



NOTICE OF ADMINISTRATION COMMITTEE MEETING

Covering Policy, Administration and Community
Relations/Communications

NOTICE IS HEREBY GIVEN that the San Lorenzo Valley Water District has called a regular meeting of the Administration Committee to be held on Tuesday, May 11, 2021, 9:00 am, via video/teleconference.

<https://global.gotomeeting.com/join/700027325>

You can also dial in using your phone.
(For supported devices, tap a one-touch number below to join instantly.)

United States (Toll Free): 1 866 899 4679
- One-touch: <tel:+18668994679,,700027325#>

United States: +1 (571) 317-3116
- One-touch: <tel:+15713173116,,700027325#>

Access Code: 700-027-325

AGENDA

1. Convene Meeting/Roll Call
2. Oral Communications
This portion of the agenda is reserved for Oral Communications by the public for items which are not on the Agenda. Please understand that California law (The Brown Act) limits what the Board can do regarding issues raised during Oral Communication. No action or discussion may occur on issues outside of those already listed on today's agenda. Any person may address the Committee at this time, on any subject that lies within the jurisdiction of the District. Normally, presentations must not exceed three (3) minutes in length, and individuals may only speak once during Oral Communications. Any Director may request that the matter be placed on a future agenda or staff may be directed to provide a brief response.
3. New Business:
Members of the public will be given the opportunity to address each scheduled item prior to Committee action. The Chairperson of the Committee may establish a time limit for members of the public to address the Committee on agenda items.
 - A. ONBOARDING PROGRAM FOR BOARD AND COMMITTEE MEMBERS
Discussion and possible action by the Administration Committee regarding an Onboarding Program for Board and Committee members.

4. Old Business: None
Members of the public will be given the opportunity to address each scheduled item prior to Committee action. The Chairperson of the Committee may establish a time limit for members of the public to address the Committee on agenda items.

5. Informational Material:
Here is a link <https://www.slvwd.com/node/286/minutes> to previous Admin Committee meeting minutes.

6. Adjournment

Agenda documents, including materials related to an item on this agenda submitted to the Committee after distribution of the agenda packet, are available for public inspection and may be reviewed at the office of the District Secretary, 13060 Highway 9, Boulder Creek, CA 95006 during normal business hours. Such documents may also be available on the District website at www.slvwd.com subject to staff's ability to post the documents before the meeting.

Certification of Posting

I hereby certify that on May 7, 2021 I posted a copy of the foregoing agenda in the outside display case at the District Office, 13060 Highway 9, Boulder Creek, California, said time being at least 72 hours in advance of the regular meeting of the Admin Committee of the San Lorenzo Valley Water District in compliance with California Government Code Section 54956.

Executed at Boulder Creek, California, on May 7, 2021.

Holly B. Hossack, District Secretary
San Lorenzo Valley Water District

MEMO

To: Administrative Committee
From: District Manager
Prepared by: District Secretary
Subject: Onboarding Program for Board and Committee Members
Date: May 11, 2021

Recommendation

It is recommended that the Administrative Committee review the following information and prepare an Onboarding Program for the District.

Background

At the January 19, 2021 meeting of the Administrative Committee the Committee prepared a multi-month calendar of action items for the committee. The calendar included an Onboarding Program for Board and Committee Members. Now that the Committee has a new Board/Committee member this seemed like a good time to review this program.

The District does not currently have a program for onboarding but after reviewing other agencies programs here is a list of documents for possible inclusion in our Onboarding Program:

- List of Items to be Included in Onboarding
 - Board Members
 - Welcome Letter
 - Forms
 - ✓ Application
 - ✓ DMV Record
 - ✓ Direct Deposit
 - ✓ Intake Form
 - ✓ CA Franchise Tax Form
 - ✓ W4
 - ✓ Form 700
 - Board Best Practices
 - Board Policy Manual
 - Orientation Materials
 - Guide to the Brown Act
 - Guide to Public Records Act
 - Training
 - Committee Members
 - Welcome Letter

- Forms
 - ✓ Application
- Board Best Practices
- Board Policy Manual
- Orientation Materials
- Guide to Brown Act
- Training

Add or delete possible items after discussion.

_____ Water District Board Best Practices

Adopted July 10, 2014

Revised June 20, 2019

1. Introduction

The Scotts Valley Water District (District) Board of Directors (Board) and the General Manager understand the importance and value of a positive and constructive culture to the overall performance of the District. This culture in large part is a product of the District's strategic vision and the goal of performing as a "Best of Class," both individually and organizationally. Whether in the capacity of a Director or as an employee, our primary responsibilities are to serve the District's customers and support the community.

The Board has adopted District mission, vision, and strategic goals to set the direction for operating activities, which are guided by policies and procedures including the Board Best Practices. In order for the Board to function in an effective manner, it is important that Directors understand their respective roles and relationship to other Directors and the General Manager. This also requires an understanding of the level of performance necessary to carry out the duties of a Director.

This document is intended to serve as an internal document to provide general guidelines and principles relating to the activities of the Board and the Directors.

2. Role of the Board

The primary role of the Board is to establish policies that guide the District to fulfill its mission. The policy decisions of the Board constitute the "action" of the Board. As such, each Director is strongly encouraged to support the actions of the collective Board even when there may be individual opinions.

The Board has three (3) major responsibilities:

- (1) Promoting the interests of the District's customers by establishing policies that support the vision and mission of the District and by ensuring the implementation of those policies. Policies include the governing principles, plans, programs, and other overarching actions of the organization. Policy-making is the process of visionary planning and should reflect the broadest possible principles and provide parameters within which staff can operate. Policy-making sets the overall direction for the District.

- (2) Overseeing the fiscal health of the District. The Board establishes policies that support fiscal stability and the effective use of District funds. In order to achieve this, each fiscal year the Board approves a budget covering the anticipated revenues and expenditures of the District. In addition, the Board establishes and monitors cash reserves and investment policies.
- (3) Hiring a General Manager to manage the day-to-day operations of the District. The Board holds the General Manager accountable for the effective operational management of the District. It also has a responsibility to properly evaluate the General Manager on a periodic basis.

General Guidelines

- The Board provides policy direction and leadership for the District.
- The Board supports decisions (from a policy perspective) which are in line with a progressive, innovative, and well-managed organization.
- The Board exercises authority only as a Board.
- The Board understands and provides leadership in regional, state, and national issues affecting the operation and management of the District. Board action is supported by the General Manager as required.
- The Board respects the role of constituents in the governance of the District, encourages their participation, and consults with key stakeholders when and where appropriate.
- Directors recognize and respect the distinctions between the policy-setting role and the day-to-day implementation of policy by staff.
- Directors represent the District in various community and water industry events.
- Directors maintain a high level of communication with the General Manager and notify the General Manager of their unavailability in a timely manner.
- Directors have equal access to information authored and received by the District.
- Directors inform the General Manager of any specific information they want to receive from outside agencies or organizations and are provided such information in a timely manner.
- Directors may request information from District staff by notifying the General Manager of such request provided such request does not cause significant disruption in staff workload. The General Manager determines if it is warranted to include the requested information on the Board or Committee meeting agenda.

3. Principles and Performance Expectations of the Board

- The Board and the General Manager function as a participatory team.
- The Board values a visionary, constructive, and high-energy work environment.
- The Board values open and honest communication with transparent agendas.

- The Board works for the common good of its customers and stakeholders and not for any private or personal interest.
- Directors are expected to review agenda packets and attend Board and Committee meetings prepared to take action as needed.
- Directors practice continued professional development.
- Directors are respectful of each other, District staff, and Board traditions.

The Board recognizes the value of diverse representation as well as shared knowledge and continuity of experience. The District is committed to providing the Directors with appropriate resources to maximize their contributions for the benefit of the District and larger water community. Board Development Guidelines (Appendix A) is a document that delineates the expectations to the Directors along with compensation parameters.

4. Board Compensation

Pursuant to the District Administrative Code, the Directors are entitled to the following:

- Directors fee for attending meetings and events related to District business. The fee amount is consistent with provisions contained in California Water Code and is established by an ordinance of the Board.
- Reimbursement of expenses incurred in connection with carrying out their official duties in accordance with District regulations.
- Group life insurance in the amount of \$10,000.
- Group dental and vision coverage for the Director and his/her dependents.
- Reimbursement of medical insurance premiums for the Director and his/her dependents in an amount not to exceed the District's employees lowest group rate determined annually. This benefit is only available to current Directors seated on the Board as of June 20, 2019 and expires at the end of the current term for each individual Director.
- Reimbursement of medical insurance premiums for the Director and his/her dependents in an amount not to exceed the District's employees lowest group rate for single party plus 50% of either the two-party or family group rate surcharge respectively if the Directors insurance covers a spouse or family.

5. Board Interaction and Communication

- Directors maintain informal and professional relationships among each other.
- Directors refrain from personal attacks against other Directors and District staff.
- Business attire is appropriate at Board meetings and attire appropriate to the event when representing the District at public events.
- Directors are representatives of the District's culture and values at all times, and lead by example in their interactions.

- Directors are knowledgeable of and adhere to the District’s policies.
- When attending meetings or conferences, Directors act as ambassadors and representatives of the District and conform to behavior that always places the District in a positive light.
- Directors will apply the rules governing communications among Directors in compliance with the Brown Act.
- Directors function as a team and are not exclusive in their communications and interactions.

6. Role of the General Manager and Legal Counsel

Role of the General Manager

The most vital relationship in the District is between the Board and the General Manager. The General Manager is the primary agent of the Board and is the individual to whom the Board delegates its authority to manage and administer the District’s daily operations in accordance with policies approved by the Board. This position is important because the District requires leadership and vision that supports the Board’s guidance in order to be successful. In this capacity, the General Manager has two roles: Chief Executive Officer, and principal advisor to the Board. As the most visible employee, the General Manager represents the District to its many constituents.

The success of the strong relationship between the Board and the General Manager depends on a shared sense of purpose, open communication, honesty, and mutual support. Both parties must also understand that the relationship itself is paradoxical with inherent tensions. The General Manager is hired to carry out Board policy directives, while at the same time looks to the Board for guidance and leadership.

One of the most important decisions a Board makes is the selection of a General Manager in whom the Board has confidence. The Board must be able to support the decisions of the General Manager and grant the authority to manage and lead the District.

It is the General Manager’s responsibility to ensure that Directors have the information needed to make Board-level decisions. The General Manager provides the same information to all Directors and will promptly alert them about problems and issues to prevent surprises. Directors expect the General Manager to provide a recommendation on items before the Board.

Board Interaction with the General Manager

- The General Manager devises and proposes periodic performance goals for approval by the Board as a part of the formal performance review process.
- The Board provides the General Manager with constructive feedback during his/her periodic performance evaluation.

- Directors are encouraged to contact the General Manager about any subject related to the operations of the District. Similarly, the General Manager may discuss any District related issue with any Director.
- The Board's questions or concerns regarding overall District operations, specific division issues, or problems with District staff are directed to the General Manager.
- The General Manager implements the Board's policy directions concerning District matters.
- The General Manager informs the Board when he/she will not be available for work-related duties.

Board Interaction with District Staff

- Directors do not direct staff to take a particular action. Requests are made through the General Manager.
- Directors may contact members of the District's executive team with questions related to pertinent District activities. When a Director makes direct contact with staff, the General Manager is advised by staff of the communication. The General Manager is responsible for ensuring that requests initiated by Directors are handled promptly and accurately.
- Critical information about District operations is provided to all Directors in verbal or written (electronic) format by an appropriate staff person with the knowledge of the General Manager.
- Directors make every effort to contact staff prior to a board meeting regarding questions related to agenda items so that staff can provide the most accurate and prepared response. The Board and staff operate by the "No Surprise Rule" regarding information sharing.

District Legal Counsel

- The District's Legal Counsel is selected by the Board and operates as an extension of and in collaboration with the Board, the General Manager, and District staff.
- The Legal Counsel's primary point of contact is the General Manager.
- The Legal Counsel regularly consults with the Board and the General Manager on items of legal concern relating to District operations.
- The District's Legal Counsel may be consulted prior to board agendas being posted publicly.
- When specialized legal expertise is needed, the District's Legal Counsel may recommend the services of an expert legal counsel and oversee the work when necessary.
- The Legal Counsel is proactive in informing and protecting the District and the Board in the performance of its duties and compliance with its legal obligations.
- The Legal Counsel meets with General Manager and Board President periodically to review the performance of the Legal Counsel, establish goals, and review its contract.

7. Selection and Role of the President and Vice President

President of the Board

- The President of the Board is selected by a majority vote of the Board at the last public Board meeting of each calendar year, unless otherwise modified. The newly elected President's term begins at the close of that Board meeting.
- The President remains as one member of the Board and has no rights or authority different from any other Director. The President votes with the Directors and votes last on a Roll Call vote.
- Each President's individual style is unique. Diversity is encouraged.
- The President chairs the meeting of the Board; calls the meeting to order, presides over the meeting, including the conduct of Directors and those in attendance, entertains and repeats all motions properly before the Board, puts motions to a vote, and announces the result.
- The President acts as the ceremonial head or representative of the District at various civic functions.
- The President is the designated spokesperson for the Board to the general public. The President may elect to appoint another Director to serve in this capacity.
- The President makes appointments to all Board Committees.
- To the extent possible, the President advises the Board of any informal communication or correspondence sent or received regarding District business.
- The President regularly communicates with the General Manager and keeps other Directors fully informed on matters of District business.
- The President provides guidance to the Board fairly and impartially.
- The President personally addresses any issues between Directors. Directors and the General Manager will inform the President on any issue or concern brought to their attention.

Vice President of the Board

- The Vice President of the Board is selected by a majority vote of the Board at the last public Board meeting of each calendar year, unless otherwise modified. The newly elected Vice President's term begins at the close of that Board meeting.
- The Vice President remains as one member of the Board and has no rights or authority different from any other Director.
- In the event the position of the President is vacated prior to the expiration of the term, the Vice President becomes the President for the remaining term, unless otherwise directed by the Board.
- In the event of an early vacancy in the position of Vice President, the Board determines, by vote, a replacement for the remaining term.

- The Vice President serves in the capacity of the President of the Board in the absence of the President.

8. Public Interaction

- All customer concerns and inquiries are referred to the General Manager or an appropriate staff member.
- Staff provides the Board with a verbal or written report of all significant customer concerns or inquiries which cannot be handled in a routine manner, along with any response to the concern or inquiry.
- The Board is informed of significant, politically sensitive, urgent and/or repetitive communication inquiries. Staff researches the request as soon as possible and provides the General Manager with the appropriate follow-up and response. The General Manager will review the communication prior to dissemination to the Board.
- Information on an issue that may expose the District to liability is shared with District Counsel and the Board promptly at a properly-noticed closed session meeting.

9. Board Meetings

General

- All noticed meetings are conducted using Robert's Rules of Order. Robert's Rules contemplate constructive meetings and a fair, democratic process.
- The General Manager is responsible for setting the agenda. Any Director may request that an item be placed on the agenda through notification to the General Manager and the President. If a member of the public requests that a matter be placed on the agenda, the General Manager and the President will determine if the item is placed on the agenda or referred to staff or an appropriate committee.
- The General Manager meets with the President to review the agenda and prepare for the upcoming meeting.
- Oral communications are allowed for items not on the agenda, provided that a final decision of the Board on a matter is subject to the agenda requirements set forth in the Brown Act.
- Directors give due respect to all public comments; however they will not respond in a manner that suggests a decision has been made. The President will refer matters that need a decision to the General Manager for follow-up. Directors may ask clarifying questions so that staff are able to provide an appropriate and relevant response. Occasionally, a prompt response may be offered when an obvious answer or resolution is available. Directors will refrain from debating or making decisions in response to public comments.
- The President is responsible for maintaining an orderly progression of business before the Board, and to the extent possible regulates the amount and type of input from the public and from Directors and staff.

- Each Director may speak on an item prior to the vote being taken.
- The Board works diligently to achieve unanimity on all action items. At the request of a Director, and the discretion of the President, prior to a vote where unanimity may not be achieved, the item may be referred back to a committee to consider a resolution to the issue.
- Once an agenda item has been voted on, the disposition is considered as the “action” of the Board and is subsequently supported by individual Directors.
- Directors on the minority side where a less than unanimous vote is cast cannot bring back an item for consideration for one year. A majority of the Board may bring a matter back for reconsideration at any time.

Consent Agenda

- The District utilizes a Consent Agenda to approve routine business matters and previously approved budgetary items.
- If a Director has a question on a Consent Agenda item they are encouraged to contact a staff member for clarification prior to the official meeting, rather than having it pulled for separate discussion during the meeting.
- Written staff reports are prepared for all Consent Agenda items, and staff is prepared to provide a verbal report on any item when necessary.

Closed Session

- All Closed Session discussions and materials are considered legal and confidential information and as such, are not shared outside the Closed Session Conference unless specific action is taken, and then must be reported out of Closed Session. Closed Session staff reports are returned to the General Manager immediately following the meeting. Electronic copies of the reports will not be provided.
- Closed Session meetings may be held at times other than the regular meetings of the Board so long as the meeting is posted pursuant to the Brown Act.
- A Director is expected to refer a request for information regarding a Closed Session item to the General Manager who, in concert with Legal Counsel, will prepare an appropriate response.

10. Role and Responsibility of Standing and Special Committees

- Board committees are given the authority to obtain more information, investigate, and provide a report or recommendation to the Board. The committee format allows the Board to conduct its business more efficiently. Committees serve in an advisory capacity to the Board, except when the Board delegates a matter to a committee for final action.
- A standing committee may be formed, renamed, or have functions changed or terminated with approval of the Board.

- An ad-hoc committee may be formed with approval of the Board and its term expires upon completion of the project or issue for which the ad hoc committee was formed.
- A standing committee consists of two Directors. A committee chair is appointed from the members of the standing committee. Standing committee meetings are open to the public and subject to provisions of the Brown Act.
- Other Directors may attend the meetings of the standing committees; however, the Brown Act prohibits their participation in the meeting because this constitutes a quorum of the Board.
- Upon request of the committee members, the General Manager, or the President, a committee meeting may be scheduled to address an issue requiring attention.
- Staff assists members of standing committees by preparing agendas, staff reports, distributing materials, and performing other support functions as required. Committee members may request staff assistance through the General Manager.
- Copies of committee agendas are made available to the entire Board.
- The committee chair is responsible for providing a report of items discussed and/or recommendations to the entire Board at the next available Board meeting.
- If committee members are in disagreement on a recommendation, the issue is brought to the full Board for consideration.

Appendix A:

_____ Water District Board Development Guidelines

Purpose

To attract a diverse pool of individuals to serve on the Board of Directors and provide them with appropriate resources to maximize their contributions for the benefit of the District and larger water community.

Expectations to Directors

Anticipated level of commitment, engagement, effort, and energy

Required

- Participate in the New Director Orientation and District Tour in the first 3 months of assuming the office
- Attend Board Committee meetings (typically monthly) as assigned
- Attend Board President Retreat
- Attend other agency/committee meetings (such as Santa Margarita Groundwater Agency, Scotts Valley General Plan Advisory Committee, etc.) as assigned
- Attend Association of California Water Agencies (ACWA), WaterReuse and other industry events (at minimum 1 per year)
- Participate in water related education and training opportunities

Desired

- Attend ACWA Joint Powers Insurance Authority's conference as the District's representative
- Get involved in ACWA Region 5 and ACWA committees
- Attend community events on behalf of the District

Minimum anticipated annual time commitment: 12 evening meetings (2 hours each, not counting preparation), 6-12 late afternoon meetings (1 hour each), 1 day meeting (4-8 hours), 1 out-of-town conference (3-4 days), other events and training (1-2 hours each)

Attributes and Qualities of Directors

- | | |
|---------------------|---------------------|
| • Deliberate | • Dedicated |
| • Insightful | • Respectful |
| • Flexible/Adaptive | • Community minded |
| • Empathetic | • Consensus builder |
| • Analytical | |

Compensation Considerations

- In alignment with District vision and values
- Driven by the expectations to the Directors
 - Sense of responsibility/accountability
 - Prioritization of time
- Support succession planning and reduce barriers to entry
- Provide internal parity and external parity

Orientation Materials for Introducing Local Government to New Audiences

In addition to your agency's own materials (policies, calendars, staff rosters, etc.), the Institute's resources can help newly elected officials, staff and community members understand the roles and responsibilities of local government officials and local government agencies. Typical items in an orientation packet may include:

- Specific City Council or Board of Supervisor Adopted Policies
- Rules of Order (Robert's, Rosenberg's, etc.)
- Fiscal Year Budget Preparation Calendar
- Approved Board / Council Meeting Calendar
- Committee and Liaison Assignments
- Brown Act and Ethic Law Resources
- Agency's General Plan
- Agency's Adopted Budget
- Agency's Comprehensive Annual Financial Report (CAFR)
- Emergency contact Information for executive staff and colleagues

The Institute's is currently offering materials relating to these topics:

- Responsibilities and Powers
- Budgeting and Finance
- Leadership Skills
- Making Decisions
- Engaging the Public
- Public Trust & Transparency
- Working with the Media
- Working with Staff
- When Bad Things Happen

Note that, in some cases, similar information is presented in different ways. For example, the list below includes comprehensive publications Understanding the Basics of Local Agency Decision-making, The People's Business: A Guide to the Public Records Act, and Understanding the Basics of Public Service Ethics: Personal Financial Gain Laws. For those agencies that simply want pieces of this publication (or want the information with fewer graphic elements), specific pieces of those publications are also provided.

In addition to orienting elected and appointed officials to your agency via your own materials and these resources, your organization can seek out training opportunities on AB1234, AB1661, and the Brown Act to support the official's transition to public service.

- [Table of Contents \(Editable Document, Updated August 2013\)](#)
- [Responsibilities and Powers - Local Agency Powers and Limitations](#)
- [Responsibilities and Powers - Who Does What in California Local Government](#)
- [Responsibilities and Powers - Sources of Law Affecting Local Agencies](#)
- [Responsibilities and Powers - Legislative versus Adjudicative Decision Making](#)
- [Budgeting and Finance - Basics of Municipal Revenue \(Counties, Cities and Special Districts\)](#)
- [Budgeting and Finance - Financial Management for Elected Officials: Questions to Ask](#)
- [Leadership Skills - Governing Tips](#)
- [Leadership Skills - Understanding the Role of Chair](#)
- [Leadership Skills - Working Together to Achieve One's Goals: Some Strategies for Success](#)
- [Leadership Skills - Transparency in Local Government: Protecting Your Community Against Corruption](#)
- [Leadership Skills - Tips for Promoting Civility in Public Meetings](#)
- [Making Decisions - How Local Agencies Make Things Happen](#)
- [Making Decisions - How Your Agency Counsel Should Advise You When Agency Contracts Represent a Conflict of Interest](#)
- [Engaging the Public - Why Engage the Public?](#)
- [Engaging the Public - Principles of Public Engagement](#)
- [Public Trust & Transparency - The ABCs of Open Government \(Brown Act\)](#)
- [Public Trust & Transparency - Key Ethics Law Principles](#)
- [Public Trust & Transparency - The Ethics of Speaking One's Mind](#)
- [Working with Media - Tips for Newly Elected Officials](#)
- [Working with Media - Short Sound Bite Secrets](#)
- [Working with Staff - Board / Executive Staff Communications Strategies](#)
- [Working with Staff - Common Staff Positions within Agencies](#)
- [Working with Staff - Elected Official Direction to Staff](#)
- [When Bad Things Happen - Saying You're Sorry](#)
- [When Bad Things Happen - A Leader's Role When Tragedy Strikes](#)
- [Comprehensive Resource - Guide to Local Planning](#)
- [Comprehensive Resource: Understanding the Basics of Public Service Ethics Laws](#)
- [Orientation Samples & Tools from Special Districts](#)

Open & Public V

A GUIDE TO THE RALPH M. BROWN ACT

REVISED APRIL 2016



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...

CURRENT SPEAKER: Larry Block

ACKNOWLEDGEMENTS

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

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Open & Public V

A GUIDE TO THE RALPH M. BROWN ACT

REVISED APRIL 2016

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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."¹

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."²

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."³

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

PRACTICE TIP: The key to the Brown Act is a single sentence. In summary, all meetings shall be **open and public** except when the Brown Act authorizes otherwise.

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.

PRACTICE TIP: Think of the government's house as being made of glass. The curtains may be drawn only to further the public's interest. A local policy on the use of laptop computers, tablets, and smart phones during Brown Act meetings may help avoid problems.

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.

PRACTICE TIP: Transparency is a foundational value for ethical government practices. The Brown Act is a floor, not a ceiling, for conduct.

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.⁶ 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

Chapter 2

LEGISLATIVE BODIES

The Brown Act applies to the legislative bodies of local agencies. It defines “legislative body” broadly to include just about every type of decision-making body of a local agency.¹



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

A “legislative body” includes:

- **The “governing body”** of a local agency² and certain of its subsidiary bodies; “or any other local body created by state or federal statute.”² 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.³ A housing authority is a local agency under the Brown Act even though it is created by and is an agent of the state.⁴ The California Attorney General has opined that air pollution control districts and regional open space districts are also covered.⁵ Entities created pursuant to joint powers agreements are also local agencies within the meaning of the Brown Act.⁶

- **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.⁷ 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

PRACTICE TIP: The prudent presumption is that an advisory committee or task force is subject to the Brown Act. Even if one clearly is not, it may want to comply with the Brown Act. Public meetings may reduce the possibility of misunderstandings and controversy.

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.⁸

- **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.⁹ 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.¹⁰ “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.¹¹
- 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.¹² These include some nonprofit corporations created by local agencies.¹³ 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.¹⁴ 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.¹⁵

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)

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.”

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
- 5 71 Ops.Cal.Atty.Gen. 96 (1988); 73 Ops.Cal.Atty.Gen. 1 (1990)
- 6 *McKee v. Los Angeles Interagency Metropolitan Police Apprehension Crime Task Force* (2005) 134 Cal. App.4th 354, 362
- 7 California Government Code section 54952.1
- 8 *Joiner v. City of Sebastopol* (1981) 125 Cal.App.3d 799, 804-805
- 9 California Government Code section 54952(b)
- 10 79 Ops.Cal.Atty.Gen. 69 (1996)
- 11 *Frazer v. Dixon Unified School District* (1993) 18 Cal.App.4th 781, 793
- 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)
- 13 California Government Code section 54952(c)(1)(A); *International Longshoremen's and Warehousemen's Union v. Los Angeles Export Terminal, Inc.* (1999) 69 Cal.App.4th 287, 300; *Epstein v. Hollywood Entertainment Dist. II Business Improvement District* (2001) 87 Cal.App.4th 862, 876; see also 85 Ops.Cal.Atty.Gen. 55 (2002)
- 14 *International Longshoremen's and Warehousemen's Union v. Los Angeles Export Terminal* (1999) 69 Cal. App.4th 287, 300 fn. 5
- 15 "The Brown Act, Open Meetings for Local Legislative Bodies," California Attorney General's Office (2003), p. 7
- 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.
- 18 *Taxpayers for Livable Communities v. City of Malibu* (2005) 126 Cal.App.4th 1123, 1129
- 19 56 Ops.Cal.Atty.Gen. 14, 16-17 (1973)
- 20 *Wilson v. San Francisco Municipal Railway* (1973) 29 Cal.App.3d 870, 878-879
- 21 *Golightly v. Molina* (2014) 229 Cal.App.4th 1501, 1513
- 22 59 Ops.Cal.Atty.Gen. 162, 164 (1976)

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Chapter 3

MEETINGS

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Chapter 3

MEETINGS



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."¹ 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.²

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.³
- **"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.⁴
- **"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.⁵
- **"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.⁶

Six exceptions to the meeting definition

The Brown Act creates six exceptions to the meeting definition:⁷

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.⁸ 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).⁹

- 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.¹⁰ 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.¹¹



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."¹² 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.¹³ 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.”¹⁴

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.¹⁵

A unilateral written communication to the legislative body, such as an informational or advisory memorandum, does not violate the Brown Act.¹⁶ Such a memo, however, may be a public record.¹⁷

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."¹⁸ 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.

PRACTICE TIP: When briefing legislative body members, staff must exercise care not to disclose other members' views and positions.

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.¹⁹ 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.²⁰ 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

audio or video, or both.”²¹ 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:²²

- 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.²³

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:²⁴

- 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

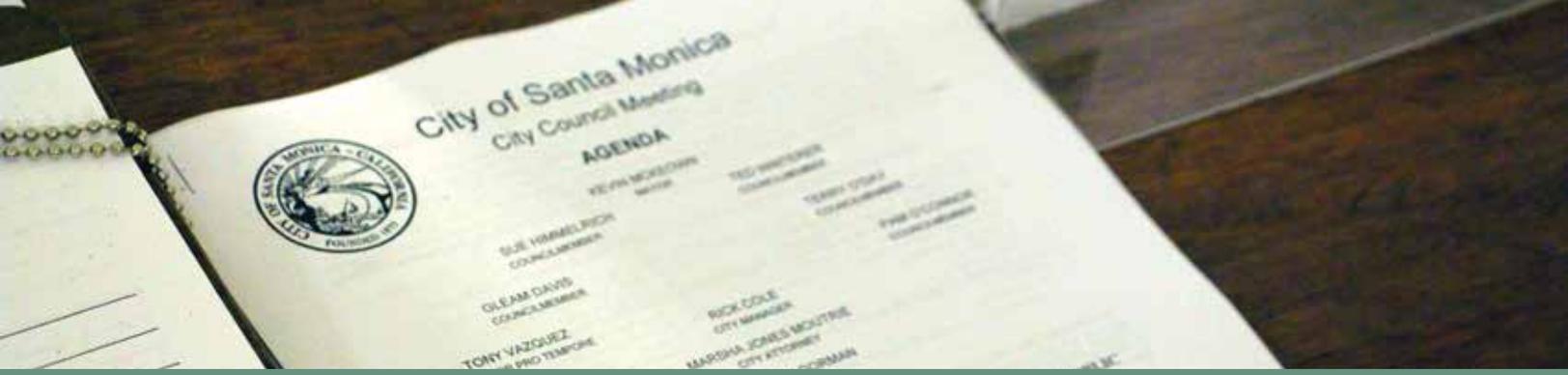
Finally, if a fire, flood, earthquake, or other emergency makes the usual meeting place unsafe, the presiding officer can designate another meeting place for the duration of the emergency. News media that have requested notice of meetings must be notified of the designation by the most rapid means of communication available.²⁸



Endnotes:

- 1 California Government Code section 54952.2(a)
- 2 *Wilson v. San Francisco Municipal Railway* (1973) 29 Cal.App.3d 870
- 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
- 11 “*The Brown Act*,” California Attorney General (2003), p. 10
- 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)
- 15 *Common Cause v. Stirling* (1983) 147 Cal.App.3d 518
- 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)
- 19 California Government Code section 54952.2; 43 Ops.Cal.Atty.Gen. 36 (1964)
- 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)
- 25 94 Ops.Cal.Atty.Gen. 15 (2011)
- 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

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Chapter 4

AGENDAS, NOTICES, AND PUBLIC PARTICIPATION



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.”¹ 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.² 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.³ 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.⁴

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.⁵ 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.⁶ 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.⁷ 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*

awareness, among other factors.⁸ The City Attorneys' Department has taken the position that obvious website technical difficulties do not require cancellation of a meeting, provided that the agency meets all other Brown Act posting requirements and the agenda is available on the website once the technical difficulties are resolved.

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.”⁹ 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.¹⁰

PRACTICE TIP: Putting together a meeting agenda requires careful thought.

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?

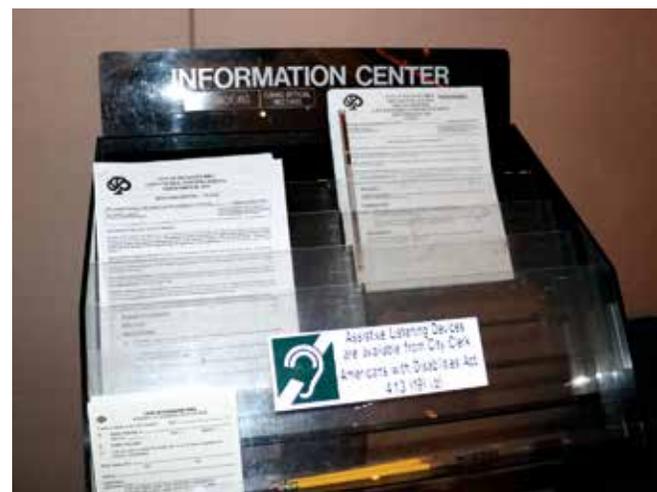
A. *Yes, so long as it does not result in extended discussion or action by the body.*

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.¹¹



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.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.¹⁸ However, they are generally consistent with the Brown Act. An item is probably void if not posted.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.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.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 XIII C or XIII D, 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.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?

PRACTICE TIP: Subject to very limited exceptions, the Brown Act prohibits any action or discussion of an item not on the posted 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.²⁴ 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.²⁵

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.²⁶ This does not mean, however, that the public is entitled to free entry to a conference attended by a majority of the legislative body.²⁷

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.²⁸

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.³² 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.³⁶ 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.³⁷

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.³⁸ The agency may impose its ordinary charge for copies that is consistent with the California Public Records Act.³⁹

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.⁴⁰

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.⁴¹

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.⁴²

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.⁴³



PRACTICE TIP: Public speakers cannot be compelled to give their name or address as a condition of speaking. The clerk or presiding officer may request speakers to complete a speaker card or identify themselves for the record, but must respect a speaker's desire for anonymity.

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.⁴⁴

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.⁴⁵

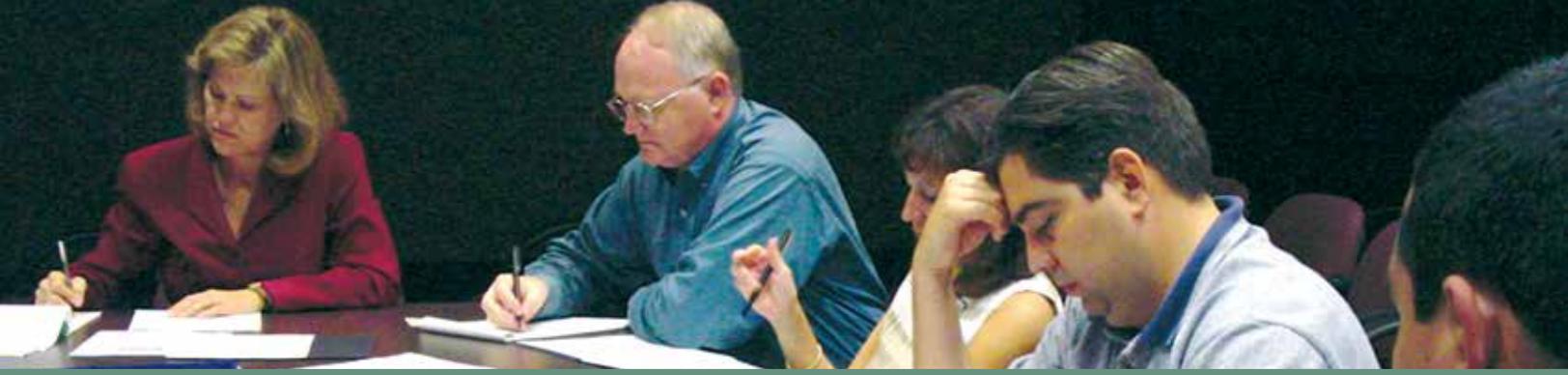
Notices and agendas for special meetings must also give members of the public the opportunity to speak before or during consideration of an item on the agenda but need not allow members of the public an opportunity to speak on other matters within the jurisdiction of the legislative body.⁴⁶

Endnotes:

- 1 California Government Code section 54954.2(a)(1)
- 2 78 Ops.Cal.Atty.Gen. 327 (1995)
- 3 88 Ops.Cal.Atty.Gen. 218 (2005)
- 4 California Government Code sections 54954.2(a)(1) and 54954.2(d)
- 5 California Government Code section 54960.1(d)(1)
- 6 ___ Ops.Cal.Atty.Gen.___, No. 14-1204 (January 19, 2016) 16 Cal. Daily Op. Serv. 937 (Cal.A.G.), 2016 WL 375262
- 7 *North Pacific LLC v. California Coastal Commission* (2008) 166 Cal.App.4th 1416, 1432
- 8 ___ Ops.Cal.Atty.Gen.___, No. 14-1204 (January 19, 2016) 16 Cal. Daily Op. Serv. 937 (Cal.A.G.), 2016 WL 375262, Slip Op. at p. 8
- 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
- 19 *Carlson v. Paradise Unified School District* (1971) 18 Cal.App.3d 196
- 20 California Education Code section 35145.5
- 21 California Government Code section 54954.6
- 22 See Cal.Const.Art.XIIIC, XIIID 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 54957.5(d)
- 40 California Government Code section 54953.5(a)
- 41 California Government Code section 54953.6
- 42 California Government Code section 54954.3(a)
- 43 California Government Code section 54954.3(c)
- 44 California Government Code section 54954.3(b); *Chaffee v. San Francisco Public Library Com.* (2005) 134 Cal.App.4th 109; 75 Ops.Cal.Atty.Gen. 89 (1992)
- 45 California Government Code section 54954.3(a)
- 46 California Government Code section 54954.3(a)

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.



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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

PRACTICE TIP: Some problems over closed sessions arise because secrecy itself breeds distrust. The Brown Act does not require closed sessions and legislative bodies may do well to resist the tendency to call a closed session simply because it may be permitted. A better practice is to go into closed session only when necessary.

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.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.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.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.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.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.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.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.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.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.¹⁶

PRACTICE TIP: Pay close attention to closed session agenda descriptions. Using the wrong label can lead to invalidation of an action taken in closed session if not substantially compliant.

The California Attorney General has opined that if the agency's attorney is not a participant, a litigation closed session cannot be held.¹⁷ 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.¹⁸

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.¹⁹

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.²⁰ 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.²¹ 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.²² 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.²³



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 concern²⁴ and the names of the parties with whom its negotiator may negotiate.²⁵

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.²⁶

“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.

PRACTICE TIP: Discussions of who to appoint to an advisory body and whether or not to censure a fellow member of the legislative body must be held in the open.

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.”²⁷ 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.²⁸ The body must possess the power to appoint, evaluate, or dismiss the employee to hold a closed session under this exception.²⁹ That authority may be delegated to a subsidiary appointed body.³⁰

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,³¹ 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.³² The employee has the right to have the specific complaints and charges discussed in a public session rather than closed session.³³ If the employee is not given the 24-hour prior notice, any disciplinary action is null and void.³⁴

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.³⁵

- 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.³⁶ 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.³⁷ 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.³⁸ However, a report on a dismissal or non-renewal of an employment contract must be deferred until administrative remedies, if any, are exhausted.³⁹

"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,⁴⁰ 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 an employee, but independent contractors who do not serve in the capacity of an officer or employee are not covered by this closed session exception.⁴¹

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.

PRACTICE TIP: The personnel exception specifically prohibits discussion or action on proposed compensation in closed session except for a disciplinary reduction in pay.

PRACTICE TIP: 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

PRACTICE TIP: Attendance by the entire legislative body before a grand jury would not constitute a closed session meeting under the Brown Act.

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

PRACTICE TIP: Meetings are either open or closed. There is nothing “in between.”⁶²

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,⁶⁷ though the Attorney General has also concluded that a local agency is preempted from adopting an ordinance criminalizing public disclosure of closed session discussions.⁶⁸ 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 a 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.⁶⁹

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.⁷⁰

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.⁷¹ 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
- 12 *Hamilton v. Town of Los Gatos* (1989) 213 Cal.App.3d 1050; 2 Cal.Code Regs. section 18707
- 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).
- 15 82 Ops.Cal.Atty.Gen. 29 (1999)
- 16 *Page v. Miracosta Community College District* (2009) 180 Cal.App.4th 471
- 17 “*The Brown Act*,” California Attorney General (2003), p. 40
- 18 California Government Code section 54956.9(g)
- 19 *Trancas Property Owners Association v. City of Malibu* (2006) 138 Cal.App.4th 172
- 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).
- 24 73 Ops.Cal.Atty.Gen. 1 (1990)
- 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)
- 28 63 Ops.Cal.Atty.Gen. 153 (1980); but see *Duvall v. Board of Trustees* (2000) 93 Cal.App.4th 902 (board may discuss personnel evaluation criteria, process and other preliminary matters in closed session but only if related to the evaluation of a particular employee).
- 29 *Gillespie v. San Francisco Public Library Commission* (1998) 67 Cal.App.4th 1165; 85 Ops.Cal.Atty.Gen. 77 (2002)
- 30 *Gillespie v. San Francisco Public Library Commission* (1998) 67 Cal.App.4th 1165; 80 Ops.Cal.Atty. Gen. 308 (1997). Interviews of candidates to fill a vacant staff position conducted by a temporary committee appointed by the governing body may be done in closed session.

- 31 California Government Code section 54957(b)(3)
- 32 88 Ops.Cal.Atty.Gen. 16 (2005)
- 33 *Morrison v. Housing Authority of the City of Los Angeles* (2003) 107 Cal.App.4th 860
- 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).
- 35 78 Ops.Cal.Atty.Gen. 218 (1995); *Bell v. Vista Unified School District* (2000) 82 Cal.App.4th 672; *Furtado v. Sierra Community College* (1998) 68 Cal.App.4th 876; *Fischer v. Los Angeles Unified School District* (1999) 70 Cal.App.4th 87
- 36 *Moreno v. City of King* (2005) 127 Cal.App.4th 17
- 37 California Government Code section 54957
- 38 *Gillespie v. San Francisco Public Library Commission* (1998) 67 Cal.App.4th 1165
- 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).
- 42 California Government Code section 54957.6; and 51 Ops.Cal.Atty.Gen. 201 (1968)
- 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
- 47 California Education Code section 48918; but see *Rim of the World Unified School District v. Superior Court* (2003) 104 Cal.App.4th 1393 (Section 48918 preempted by the Federal Family Educational Right and Privacy Act in regard to expulsion proceedings).
- 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
- 53 *McKee v. Los Angeles Interagency Metropolitan Police Apprehension Crime Task Force* (2005) 134 Cal. App.4th 354
- 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
- 62 46 Ops.Cal.Atty.Gen. 34 (1965)
- 63 82 Ops.Cal.Atty.Gen. 29 (1999)

- 64 Government Code section 54963
- 65 *Kleitman v. Superior Court* (1999) 74 Cal.App.4th 324, 327; see also California Government Code section 54963.
- 66 *Roberts v. City of Palmdale* (1993) 5 Cal.4th 363
- 67 80 Ops.Cal.Atty.Gen. 231 (1997)
- 68 76 Ops.Cal.Atty.Gen. 289 (1993)
- 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



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.¹ 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;²
- 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 agendaized items are acted on by the governing body during a meeting.³ 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,⁴ the challenger must show prejudice as a result of the alleged violation.⁵ An action to invalidate fails to state a cause of action against the agency if the body deliberated but did not take an action.⁶

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.⁷ 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.⁸ The legislative body has 30 days after receipt of the letter to provide an unconditional commitment to cease and desist from the past action.⁹ 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.¹⁰

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.¹¹ The unconditional commitment must be substantially in the form set forth in the Brown Act.¹² No legal action may thereafter be commenced regarding the past action.¹³ 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.¹⁴

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.¹⁵

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

PRACTICE TIP: Attorney's fees will likely be awarded if a violation of the Brown Act is proven.

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.
- 2 *Castaic Lake Water Agency v. Newhall County Water District* (2015) 238 Cal.App.4th 1196, 1198
- 3 California Government Code section 54960.1 (b) and (c)(1)
- 4 *McKee v. Orange Unified School District* (2003) 110 Cal. App.4th 1310, 1318-1319
- 5 *Cohan v. City of Thousand Oaks* (1994) 30 Cal.App.4th 547, 556, 561
- 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)



- 10 Government Code Section 54960.2(a)(4)
- 11 Government Code Section 54960.2(c)(2)
- 12 Government Code Section 54960.2(c)(1)
- 13 Government Code Section 54960.2(c)(3)
- 14 Government Code Section 54960.2(d)
- 15 Government Code Section 54960.2(e)
- 16 *California Alliance for Utility Safety and Education (CAUSE) v. City of San Diego* (1997) 56 Cal.App.4th 1024; *Common Cause v. Stirling* (1983) 147 Cal.App.3d 518, 524; *Accord Shapiro v. San Diego City Council* (2002) 96 Cal. App. 4th 904, 916 & fn.6
- 17 *Kleitman v. Superior Court* (1999) 74 Cal.App.4th 324, 334-36
- 18 *Los Angeles Times Communications, LLC v. Los Angeles County Board of Supervisors* (2003) 112 Cal. App.4th 1313, 1327-29 and cases cited therein
- 19 California Government Code section 54960.5
- 20 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.
- 21 California Government Code section 54959
- 22 California Government Code section 54952.6
- 23 61 Ops.Cal.Atty.Gen.283 (1978)
- 24 California Government Code section 54959
- 25 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.”
- 26 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.

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The People's Business

A GUIDE TO THE CALIFORNIA PUBLIC RECORDS ACT

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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.”¹ 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.² 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.³ 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.”⁴ The purpose is to give the public access to information that enables them to monitor the functioning of their government.⁵ 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.”⁶

1 Gov. Code, § 6250 *et seq.*; Stats 1968, Ch. 1473; *CBS, Inc. v. Block* (1986) 42 Cal.3d 646, 651–652; 52 Ops. Cal. Atty. Gen. 136, 143; *San Gabriel Tribune v. Superior Court* (1983) 143 Cal.App.3d 762, 771–772.

2 *San Gabriel Tribune v. Superior Court*, *supra*, 143 Cal.App.3d at p. 772; 5 U.S.C. §552 *et seq.*, 81 Stat. 54; *American Civil Liberties Union Foundation v. Deukmejian* (1982) 32 Cal.3d 440, 447; *CBS, Inc. v. Block* (1986) 42 Cal.3d 646, 651. The basic purpose of the FOIA is to expose agency action to the light of public scrutiny. *U.S. Dept. of Justice v. Reporters Com. for Freedom of Press* (1989) 489 US 749, 774.

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.

6 *San Gabriel Tribune v. Superior Court*, *supra*, 143 Cal.App.3d at p. 772, citing Shaffer et al., *A Look at the California Records Act and Its Exemptions* (1974) 4 Golden Gate L. Rev. 203, 212.

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.

► PRACTICE TIP:

There is no general exemption authorizing non-disclosure of government records on the basis the disclosure could be inconvenient or even potentially embarrassing to a local agency or its officials. Disclosure of such records is one of the primary purposes of the PRA.

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

7 Gov. Code, § 6253, subd. (a).

8 Gov. Code, § 6253, subd. (b).

9 Gov. Code, § 6253, subd. (b).

10 Gov. Code, §§ 6253.2 – 6268.

11 Gov. Code, §§ 6275 *et seq.*

12 See, e.g., “Personnel Records,” p. 46.

13 See, e.g., “Attorney Client Communications and Attorney Work Product,” p. 29.

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), (n), (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), (e), (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.

20 *Black Panther Party v. Kehoe* (1974) 42 Cal.App.3d 645, 653.

21 *Times Mirror Co. v. Superior Court*, *supra*, 53 Cal.3d at p. 1344; *Wilson v. Superior Court* (1996) 51 Cal.App.4th 1136, 1144.

22 *Rogers v. Superior Court* (1993) 19 Cal.App.4th 469, 476; *New York Times Co. v. Superior Court* (1990) 218 Cal.App.3d 1579, 1585; *San Gabriel Tribune v. Superior Court*, *supra*, 143 Cal.App.3d at pp. 772–773.

23 *Sierra Club v. Superior Court of Orange County* (2013) 57 Cal.4th 157, 175–176.

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).

28 Cal. Const. art. I, §§ 3, subds. (b)(3), (b)(4) & (b)(5).

29 *Sierra Club v. Superior Court of Orange County*, *supra*, 57 Cal.4th at pp. 175–176; *Sutter's Place, v. Superior Court* (2008) 161 Cal.App.4th 1370, 1378–1381; *Los Angeles Unified Sch. Dist. v. Superior Court* (2007) 151 Cal.App.4th 759, 765; *P.O.S.T. v. Superior Court* (2007) 42 Cal.4th 278, 305; *BRV, Inc. v. Superior Court* (2006) 143 Cal.App.4th 742, 750; 89 Ops.Cal.Atty.Gen. 204, 211 (2006); 88 Ops.Cal.Atty.Gen. 16, 23 (2005); 87 Ops.Cal.Atty.Gen. 181, 189 (2004).

30 Cal. Const., art. I, § 3, subd. (b)(7).

31 Cal. Const., art. I, § 3, subd. (b)(7).

and successor statutes and amendments.³² 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.”³³

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.³⁴ Local agencies may choose to disclose public records even though they are exempt, although they cannot be required to do so.³⁵ 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.”³⁶ 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.³⁷

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.³⁸ 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.³⁹ 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

32 Cal. Const., art. XIII B, § 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.

34 *Black Panther Party v. Kehoe, supra*, 42 Cal.App.3d at p. 656.

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.

40 Gov. Code, § 6254.5. Section 6254.5 does not apply to inadvertent disclosure of exempt documents. *Ardon v. City of Los Angeles* (2016) 62 Cal.4th 1176, 1182–1183; *Newark Unified School Dist. v. Superior Court* (2015) 245 Cal.App.4th 887, 894. See “Waiver,” p. 26.

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

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

43 *American Civil Liberties Union Foundation of Southern California v. Superior Court* (review granted July 29, 2015, S227106; superseded opinion at 236 Cal. App.4th 673); *Regents of the Univ. of Cal. v. Superior Court* (2013) 222 Cal.App.4th 383, 399; *City of San Jose v. Superior Court* (2017) 2 Cal.5th 608; Gov. Code, §§ 6253.10, 6270.5; *Marken v. Santa Monica-Malibu Unified Sch. Dist.* (2012) 202 Cal.App.4th 1250, 1265; *County of Los Angeles Board of Supervisors v. Superior Court* (review granted July 8, 2015, S226645; superseded opinion at 235 Cal.App.4th 1154).

The Basics

The PRA “embodies a strong policy in favor of disclosure of public records.”⁴⁴ As with any interpretation or construction of legislation, the courts will “first look at the words themselves, giving them their usual and ordinary meaning.”⁴⁵ 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.⁴⁶ 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.”⁴⁷ 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.⁴⁸

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.”⁴⁹

44 *Lorig v. Medical Board of Cal.* (2000) 78 Cal.App.4th 462, 467; see Chapter 1, “Fundamental Right of Access to Government Information,” *supra*, p. 5.

45 *People .v Lawrence* (2000) 24 Cal.4th 219, 230.

46 See Chapter 1, “Exemptions from Disclosure — Protecting the Public’s Fundamental Rights of Privacy and Need for Efficient and Effective Government,” *supra*, p.6.

47 Gov. Code, § 6252, subd. (e).

48 *Braun v. City of Taft* (1984) 154 Cal.App.3d 332, 340; *San Gabriel Tribune v. Superior Court* (1983) 143 Cal.App.3d 762, 774.

49 Gov. Code, § 6252, subd. (g).

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.”⁵⁰ 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.⁵¹

Information Relating to the Conduct of Public Business

Public records include “any writing containing information relating to the conduct of the public’s business.”⁵² However, “[c]ommunications that are primarily personal containing no more than incidental mentions of agency business generally will not constitute public records.”⁵³ 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.⁵⁴ 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.⁵⁵ 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.⁵⁶ 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.”⁵⁷

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.⁵⁸

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.⁵⁹

50 Gov. Code, § 6252(e); *Regents of the University of California v. Superior Court* (2013) 222 Cal.App.4th 383, 399; *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.

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:⁶⁰

- 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.)⁶¹
- 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.⁶²

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.⁶³

Regardless of Physical Form or Characteristics

A public record is subject to disclosure under the PRA "regardless of its physical form or characteristics."⁶⁴ 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," "discs," and "drums,"⁶⁵ with the latest amendments in 2002 providing the current definition of "writing."⁶⁶ 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."⁶⁷ 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."⁶⁸

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).

63 See *Am. Small Bus. League v. United States SBA* (2010) 623 F.3d 1052, (analyzed under FOIA). See "Practice Tip," p. 30 which discusses treatment of FOIA precedence.

64 Gov. Code, § 6252, subd. (e).

65 Gov. Code, § 6252, subd. (e); Stats. 1970, c. 575, p. 1151, § 2.

66 Gov. Code, § 6252, subd. (g); Stats. 2002, c. 1073

67 Gov. Code, § 6252, subd. (g).

68 *Braun v. City of Taft* (1984) 154 Cal.App.3d 332, 340, citing "Assembly Committee on Statewide Information Policy California Public Records Act of 1968. 1 Appendix to Journal of Assembly 7, Reg. Sess. (1970)."

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.⁶⁹ 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.⁷⁰ 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.⁷¹ The exception for agency-developed software does not affect the public record status of information merely because it is stored electronically.⁷²

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.⁷³

69 *Lake v. City of Phoenix*, (2009) 218 P.3d 1004, 1008; *O’Neill v. City of Shoreline* (2010) 240 P.3d 1149, 1154; *Irwin v. Onondaga County* (2010) 895 N.Y.S.2d 262, 268.

70 Gov. Code, § 6254.9, subs. (a), (b).

71 Gov. Code, § 6254.9, subd. (a).

72 Gov. Code, § 6254.9, subd. (d).

73 *Sierra Club v. Superior Court* (2013) 57 Cal.4th 157, 170. See also *County of Santa Clara v. Superior Court* (2009) 170 Cal.App.4th 1301.

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

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).

80 Gov. Code, § 6252, subd. (a), 85 Ops.Cal.Atty.Gen 55 (2002).

81 See Open & Public V, Chapter 2.

82 Gov. Code, § 6252, subds. (a) & (b); *Michael J. Mack v. State Bar of Cal.* (2001) 92 Cal.App.4th 957, 962–963.

83 Gov. Code, § 1070

84 *Overstock.com v. Goldman Sachs Group, Inc.* (2014) 231 Cal.App.4th 471, 483–486; *Pantos v. City and County of San Francisco* (1984) 151 Cal.App.3d 258, 263; *Champion v. Superior Court* (1988) 201 Cal.App.3d 777, 288; *Craemer v. Superior Court* (1968) 265 Cal.App.2d 216, 220.

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

85 *San Gabriel Tribune v. Superior Court* (1983) 143 Cal.App.3d 762.

86 Gov. Code, § 6252, subd. (c); *Connell v. Superior Court* (1997) 56 Cal.App.4th 601.

87 Gov. Code, § 6252.5; *Los Angeles Unified School Dist. v. Superior Court* (2007) 151 Cal.App.4th 759; *Dixon v. Superior Court* (2009) 170 Cal.App.4th 1271, 1279.

88 Gov. Code, § 6252.5.

89 *Marylander v. Superior Court* (2002) 81 Cal.App.4th 1119; *Los Angeles Police Dept. v. Superior Court* (1977) 65 Cal.App.3d 661; *Dixon v. Superior Court* (2009) 170 Cal.App.4th 1271. See “*Information That Must Be Disclosed*,” p. 22; “*Requests for Journalistic or Scholarly Purposes*,” p. 38.

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.⁹¹ 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."⁹² 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.⁹³

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.⁹⁴ 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, subs. (a), (b), & (f).

▶ PRACTICE TIP:

To protect the integrity of the local agency files and preserve the orderly function of the offices, agencies may establish reasonable policies for the inspection and copying of public records.

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.⁹⁵ 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.⁹⁶ 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.⁹⁷

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.⁹⁸

▶ PRACTICE TIP:

Local agencies may want limit the number of record inspectors present at one time at a records inspection. The local agency may also want to prohibit the use of cell phones to photograph records where the inspection is of architectural or engineer plans with copyright protection.

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.⁹⁹ 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.¹⁰⁰ 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.¹⁰¹ 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.¹⁰²

⁹⁵ Gov. Code, § 6253, subd. (a).

⁹⁶ *Bruce v. Gregory* (1967) 65 Cal.2d 666, 676; *Rosenthal v. Hansen* (1973) 34 Cal.App.3d 754, 761; 64 Ops.Cal.Atty.Gen. 317 (1981).

⁹⁷ See "Timing of Response" p. 20.

⁹⁸ Gov. Code, §§ 5253, subds. (b), (f).

⁹⁹ See "Fees," p. 25.

¹⁰⁰ Gov. Code, § 6253, subd. (b).

¹⁰¹ *Rosenthal v. Hansen* (1973) 34 Cal.App.3d 754, 759.

¹⁰² *Id.*, at p. 761; 64 Ops.Cal.Atty.Gen. 317 (1981).

The PRA does not provide for a standing or continuing request for documents that may be generated in the future.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.¹⁰⁴ A person may also make a request to receive local agency notices, such as public work contractor plan room documents,¹⁰⁵ and development impact fee,¹⁰⁶ public hearing,¹⁰⁷ or California Environmental Quality Act notices.¹⁰⁸ The local agency may impose a reasonable fee for these requests.

► **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.

Form of the Request

A public records request may be made in writing or orally, in person or by phone.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.

► **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.

103 Gov. Code, §§ 6252, subds. (e) & (g); 6253, subds. (a) & (b).

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).

105 Pub. Contract Code, § 20103.7.

106 Gov. Code, § 66016.

107 Gov. Code, § 65092.

108 Pub. Resources Code, § 21092.2

109 *Los Angeles Times v. Alameda Corridor Transportation Authority* (2001) 88 Cal.App.4th 1381, 1392.

Content of the Request

A public records request must reasonably describe an identifiable record or records.¹¹⁰ It must be focused, specific,¹¹¹ and reasonably clear, so that the local agency can decipher what record or records are being sought.¹¹² 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.¹¹³

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.¹¹⁴

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.¹¹⁵ A requester does not have to justify or explain the reason for exercising his or her fundamental right of access.¹¹⁶

► 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.¹¹⁷ 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 records¹¹⁸ applies to inspection. This assumption is bolstered by the provision in the PRA that states, "[n]othing in this chapter shall be construed to permit an agency to delay or obstruct the inspection or copying of public records,"¹¹⁹ which again signals the importance of promptly disclosing records to the requester.

110 Gov. Code, § 6253, subd. (b).

111 *Rogers v. Superior Court* (1993) 19 Cal.App.4th 469, 481.

112 *Cal. First Amend. Coalition v. Superior Court* (1998) 67 Cal.App.4th 159, 165.

113 See "Assisting the Requester," p. 22.

114 *Cal. First Amend. Coalition v. Superior Court*, *supra*, 67 Cal.App.4th at p. 166.

115 See Gov. Code, § 6257.5.

116 Gov. Code, § 6250; Cal. Const., art I, § 3.

117 Gov. Code § 6254, subd. (c).

118 Gov. 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

¹²⁰ Gov. Code, § 6253, subd. (d). See also “Extending the Response Times for Copies of Public Records,” p. 21.

¹²¹ Gov. Code, § 6253(c).

¹²² Civ. Code, § 10.

¹²³ Civ. Code, § 11.

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.¹²⁶ 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.¹²⁷ 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.¹²⁸

¹²⁶ Gov. Code, § 6253, subd. (c).

¹²⁷ Gov. Code, § 6253.1; *Community Youth Athletic Center v. City of National City* (2013) 220 Cal.App.4th 1385, 1417.

¹²⁸ Gov. Code, § 6253.1, subds. (a)(1)-(3).

Alternatively, the local agency may satisfy its duty to assist the requester by giving the requester an index of records.¹²⁹ Ordinarily an inquiry into a requester’s purpose in seeking access to a public record is inappropriate,¹³⁰ 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.¹³¹

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.¹³² 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.¹³³ “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.”¹³⁴

▶ 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.¹³⁵ Nor is it compelled to undergo a search that will produce a “huge volume” of material in response to the request.¹³⁶ 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.¹³⁷ 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.¹³⁸

129 Gov. Code, §6253., subd. 1(d)(3).

130 See Gov. Code, § 6257.5.

131 Gov. Code, § 6253.1, subd. (a).

132 *Community Youth Athletic Center v. City of National City*, *supra*, 220 Cal.App.4th at pp. 1417–1418; *Cal. First Amend. Coalition v. Superior Court* (1998) 67 Cal.App.4th 159, 166.

133 See “What Are Public Records” p. 11.

134 *Regents of the University of California v. Superior Court* (2013) 222 Cal.App.4th 383, 399.

135 *Cal. First Amend. Coalition v. Superior Court* (1998) 67 Cal.App.4th 159, 166.

136 *Ibid.*

137 *Ibid.*

138 *American Civil Liberties Union Foundation v. Deukmejian* (1982) 32 Cal.3d 440, 452–454; *see also* 64 Ops.Cal.Atty.Gen. 317 (1981).

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.

145 *Community Youth Athletic Center v. National City* (2013) 220 Cal.App.4th 1385, 1447. See “Attorney Fees and Costs,” p. 61.

146 *Haynie v Superior Court*, *supra*, 26 Cal.4th, at p. 1075.

147 Gov. Code, § 6253, subd. (b).

148 Gov. Code, § 6253, subd. (b); 85 Ops.Cal.Atty.Gen. 225 (2002); see, e.g., Gov. Code, § 81008.

149 Gov. Code, § 6253, subd. (b).

150 *North County Parents Organization v. Dept. of Education* (1994) 23 Cal.App.4th 144, 148.

151 Gov. Code, § 6253, subd. (e); *North County Parents Organization v. Dept. of Education*, *supra*, 23 Cal.App.4th at p. 148.

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.

¹⁵² *Ardon v. City of Los Angeles* (2016) 62 Cal.4th 1176, 1183; *Newark School District v. Superior Court* (2015) 245 Cal.App.4th 887, 897.

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

153 Cal. Const., art I, § 3(b)(2); *Humane Society of U.S. v. Superior Court* (2013) 214 Cal.App.4th 1233, 1254.

154 *State of California ex rel Division of Industrial Safety v. Superior Court* (1974) 43 Cal.App.3d 778, 785; *Fairley v. Superior Court* (1998) 66 Cal.App.4th 1414, 1422, fn. 5.

155 Gov. Code, § 6255; *Long Beach Police Officers Assn. v. City of Long Beach* (2014) 59 Cal.4th 59, 66–67; see also “Public Interest Exemption,” p. 54.

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

157 *International Federation of Professional & Technical Engineers, Local 21, AFL-CIO v. Superior Court* (2007) 42 Cal.4th 319, 329.

► PRACTICE TIP:

When evaluating a record to determine whether it falls within an exemption in the PRA, do not overlook exemptions and even prohibitions to disclosure that are contained in other state and federal statutes, including, for example, evidentiary privileges, medical privacy laws, police officer personnel record privileges, official information, information technology or infrastructure security systems, etc. Many of these other statutory exemptions or prohibitions are also discussed below.

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

158 Gov. Code, § 6254, subd. (k).

159 17 U.S.C. § 17.

160 17 U.S.C. §§ 101, 102(A)(8).

161 17 U.S.C. §§ 102(A)(8), 106.

162 17 U.S.C. § 107.

163 Health & Saf. Code, § 19851.

164 *Ibid.*

written permission to make copies of the plans.¹⁶⁵ 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.¹⁶⁶

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.¹⁶⁷

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.”¹⁶⁸ 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.¹⁶⁹

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.¹⁷⁰ 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.¹⁷¹ 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.¹⁷² Unlike the exemption for pending litigation, attorney-client privileged information is still protected from disclosure even after litigation is concluded.¹⁷³ 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.¹⁷⁴

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.¹⁷⁵

165 *Ibid.*

166 Gov. Code, § 54957.5.

167 89 Ops.Cal.Atty.Gen. 39 (2006).

168 Gov. Code, § 6254, subd. (k).

169 *Fairley v. Superior Court*, *supra*, 66 Cal.App.4th 1414, 1420–1422; see also “Official Information Privilege,” p. 43.

170 *Costco Wholesale Corporation v. Superior Court* (2009) 47 Cal.4th 725, 733; *Fireman’s Fund Insurance Company v. Superior Court* (2011) 196 Cal.App.4th 1263, 1272–1275; *Clark v. Superior Court* (2011) 196 Cal.App.4th 37, 49–54.

171 *Costco Wholesale Corporation v. Superior Court*, *supra*, 47 Cal.4th at p. 747.

172 *Clark v. Superior Court*, *supra*, 196 Cal.App.4th at p. 51.

173 *Roberts v. City of Palmdale* (1993) 5 Cal.4th 363, 371–373; see “Pending Litigation or Claims,” p. 28.

174 *Holmes v. Petrovich Development Co. LLC* (2011) 191 Cal.App.4th 1047, 1071–1072.

175 *Chubb & Son v. Superior Court* (2014) 228 Cal.App.4th 1094, 1106–1109.

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

► 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.

176 Code Civ. Proc., § 2018.030, subds. (a) & (b); Gov. Code, § 6254, subd. (k).

177 *OXY Resources LLC v. Superior Court* (2004) 115 Cal.App.4th 874, 889.

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* (2016) 2 Cal.5th 282, 288.

180 *County of Los Angeles v. Superior Court* (2012) 211 Cal.App.4th 57; *Smith v. Laguna Sur Villas Community Assn.* (2000) 79 Cal.App.4th 639; *U.S. v. Amlani* (9th Cir. 1999) 169 F.3d 1189; *Clarke v. American Commerce Nat. Bank* (9th Cir. 1992) 974 F.2d 127.

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).

182 Evid. Code, § 912. See also Gov. Code, § 6254.5 and "Waiver," p. 26.

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.

183 *Consolidated Irrigation District v. Superior Court* (2012) 205 Cal.App.4th 697, 710–712.

184 See *Deliberative Process Privilege* p. 32.

185 *Citizens for Open Government v. City of Lodi* (2012) 205 Cal.App.4th 296, 307. See also, "Public Interest Exemption," p. 54.

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

186 Gov. Code, § 6254, subd. (f); *State of California ex rel. Division of Industrial Safety v. Superior Court* (1974) 43 Cal.App.3d 778, 783–784; *Haynie v Superior Court* (2001) 26 Cal4th 1061, 1068–1069; see “Law Enforcement Records,” p. 35.

187 *State of California ex rel. Division of Industrial Safety v Superior Court, supra*, 43 Cal.App.3d at pp. 783–784. See, e.g., 6254, subd. (a); 5 U.S.C. 1325783788788; *Haynie v. Superior Court* (2001) 26 Cal.4th 1061.

188 *San Jose v. Superior Court* (1999) 74 Cal.App.4th 1008; see “Official Information Privilege,” p. 43, “Identity of Informant Privilege,” p. 45, and “Public Interest Exemption,” p. 54.

189 *Times Mirror Company v. Superior Court* (1991) 53 Cal.3d 1325, 1338.

190 *Ibid.*; 5 USC § 552(b)(5).

191 *California First Amendment Coalition v. Superior Court* (1998) 67 Cal.App.4th 159, 172.

192 *Times Mirror Company v. Superior Court, supra*, 53 Cal.3d at pp. 1338, 1342.

193 *Times Mirror Company v. Superior Court, supra*, 53 Cal.3d at p. 1342, citing *Dudman Communications v. Dept. of Air Force* (D.C.Cir.1987) 815 F.2d 1565, 1568.

194 *NLRB v. Sears, Roebuck & Co.* (1975) 421 U.S. 132, 151–152.

195 *Times Mirror Company v. Superior Court, supra*, 53 Cal.3d at p.1341, citing *Cox, Executive Privilege* (1974) 122 U Pa L Rev 1383, 1410.

196 *Jordan v. United States Dept. of Justice* (D.C.Cir.1978) 591 F.2d 753, 774; *Ryan v. Department of Justice* (D.C.Cir.1980) 617 F.2d 781, 790; *Soucie v. David* (D.C.Cir.1971) 448 F.2d 1067, 1078.

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.¹⁹⁷ The Court reasoned that such disclosure could inhibit private meetings and chill the flow of information to the executive office.¹⁹⁸

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.”¹⁹⁹ 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.”²⁰⁰ 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.²⁰¹

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.²⁰² 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.²⁰³

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.²⁰⁴ 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.

203 *Citizens for a Better Environment v. Department of Food and Agriculture* (1985) 171 Cal.App.3d 704, 711–712.

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.²⁰⁵ 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.²⁰⁶ 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.²⁰⁷

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.²⁰⁸

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.²⁰⁹

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.²¹⁰

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.²¹¹

Initiative, Recall, and Referendum Petitions

Nomination documents and signatures filed in lieu of filing fee petitions may be inspected, but not copied or distributed.²¹²

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.²¹³ 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.²¹⁴

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.²¹⁵

205 Gov. Code, § 6254.4, subd. (a).

206 Gov. Code, § 6254.4.

207 Elec. Code, § 2194.

208 Elec. Code, § 2194.

209 Elec. Code, § 2194, subd. (c).

210 Elec. Code, § 2194, subd. (c)(2).

211 Gov. Code, § 6253.6.

212 Elec. Code, § 17100

213 Elec. Code, §§ 17200, 17400

214 Gov. Code, § 6253.5.

215 Gov. Code, § 6253.5.

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.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.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.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.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.²²⁰

Law Enforcement Records

Overview

Law enforcement records are generally exempt from disclosure.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.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).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.²²⁴ Those portions of any file that reflect the analysis and conclusions of the investigating officers may also be withheld.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.²²⁶

216 Evid. Code, § 1041

217 Evid. Code, § 1041; *People v. Navarro* (2006) 138 Cal.App.4th 146, 164.

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).

222 *Haynie v. Superior Court* (2001) 26 Cal.4th 1061, 1068; 65 Ops.Cal.Atty.Gen. 563 (1982).

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).

225 *Rackauckas v. Superior Court* (2002) 104 Cal.App.4th 169, 174.

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

²²⁷ *Haynie v. Superior Court*, *supra*, 26 Cal.4th 1061 (911 tapes); 86 Ops.Cal.Atty.Gen. 132 (2003) (booking photos).

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

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).

²³¹ Gov. Code, § 6254.30.

²³² Gov. Code, § 6254.30.

²³³ Veh. Code, § 20012.

²³⁴ Gov. Code, § 6254, subd. (f)(1).

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

²³⁶ Pen. Code, § 841.5, subd. (a).

²³⁷ Gov. Code, § 6254, subd. (f)(2).

²³⁸ Gov. Code, § 6254, subd. (f); Pen. Code, § 841.5; *Los Angeles Police Dept. v. United Reporting Pub. Corp.* (1999) 528 U.S. 32.

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.²⁴⁰ Willful, knowing release of confidential mental health detention information can create liability for civil damages.²⁴¹

► 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.²⁴² 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.²⁴³ Unauthorized disclosure of suspected elder abuse or neglect information is a misdemeanor.²⁴⁴

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.²⁴⁵ Juvenile court case files are subject to inspection only by specific listed persons and are governed by both statute and state court rules.²⁴⁶

► 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.²⁴⁷ 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.²⁴⁸

240 Welf. & Inst. Code, §§ 5150, 5328.

241 Welf. & Ins. Code, § 5330.

242 Welf. & Inst. Code, § 15633.

243 Welf. & Inst. Code, § 15633.

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.)

246 Welf. & Inst. Code, § 827.

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.²⁴⁹ Unauthorized disclosure of confidential child abuse or neglect information is a misdemeanor.²⁵⁰

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.²⁵¹ 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.²⁵² This exemption does not extend to statistical reports of patron use or records of fines collected by the library.²⁵³

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.²⁵⁴ Further, all registration and circulation records of any library that is (in whole or in part) supported by public funds are confidential.²⁵⁵ The confidentiality of library circulation records does not extend to records of fines imposed on borrowers.²⁵⁶

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.²⁵⁷ 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.²⁵⁸

Medical Records

California’s Constitution protects a person’s right to privacy in his or her medical records.²⁵⁹ Therefore, the PRA exempts from disclosure “personnel, medical, or similar files, the disclosure of which would constitute an unwarranted invasion of personal privacy.”²⁶⁰ In addition, the PRA exempts from disclosure “[r]ecords, the disclosure of which is exempted or prohibited pursuant

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. (j).

257 Gov. Code, § 6254, subd. (n).

258 *San Gabriel Tribune v. Superior Court* (1983) 143 Cal.App.3d 762, 779–780.

259 Cal. Const., Art. I, § 1.

260 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.

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.²⁷⁰ Employers must establish appropriate procedures to ensure the confidentiality and appropriate use of individually identifiable medical information.²⁷¹ 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.²⁷²

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.²⁷³ The U.S. Department of Health and Human Services Secretary has issued privacy regulations governing use and disclosure of individually identifiable health information.²⁷⁴ 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.²⁷⁵ Federal law also permits the Health and Human Services Secretary to impose civil penalties.²⁷⁶

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."²⁷⁷ The PRA further prohibits the disclosure of records otherwise exempt or prohibited from disclosure pursuant to federal and state law.²⁷⁸ 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.²⁷⁹

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).

273 Health Insurance Portability and Accountability Act of 1996, Pub L No. 104-192, § 261 (Aug. 24, 1996) 110 Stat 1936; 42 U.S.C. 1320d.

274 42 U.S.C. § 1320d-1–d-3, Health and Human Services Summary of the Privacy Rule, May, 2003. The final privacy regulations were issued in December, 2000 and amended in August, 2002. The definitions of "health information" and "individually identifiable health information" in the privacy regulations are in 45 C.F.R. 160.103. The general rules governing use and disclosure of protected health information are in 45 C.F.R. 164.502.

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.

276 42 U.S.C. § 1320d-5.

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.²⁸⁰ 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.²⁸¹

Official Information Privilege

A local agency may refuse to disclose official information.²⁸² "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."²⁸³ 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.²⁸⁴ 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.²⁸⁵

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.²⁸⁶ 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.²⁸⁷ 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.²⁸⁸ This is typically done through *in camera* judicial review.²⁸⁹

There are a number of cases interpreting this statute.²⁹⁰ 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.

280 Lab. Code, §§ 5501.5, 138.7.

281 Lab Code, §138.7.

282 Evid. Code, § 1040.

283 Evid. Code, § 1040, subd. (a).

284 *Department of Motor Vehicles v. Superior Court* (2002) 100 Cal.App.4th 363, 373–374.

285 *White v. Superior Court* (2002) 102 Cal.App.4th.Supp. 1, 6.

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.

290 *Department of Motor Vehicles v. Superior Court*, *supra*, 100 Cal.App.4th 363; *California State University, Fresno Assn., Inc. v. Superior Court* (2001) 90 Cal. App.4th 810; *County of Orange v. Superior Court* (2000) 79 Cal.App.4th 759.

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).

292 *Fairley v. Superior Court* (1998) 66 Cal.App.4th 1414, 1420–1421; *City of Hemet v. Superior Court* (1995) 37 Cal.App.4th 1411, 1420.

293 *Fairley v. Superior Court* (1998) 66 Cal.App.4th 1414, 1420; *City of Hemet v. Superior Court* (1995) 37 Cal.App.4th 1411, 1419.

294 *County of Los Angeles v. Superior Court* (2012) 211 Cal.App.4th 57, 67. See also the Attorney-Client Privilege, p. 29.

295 *Wilder v. Superior Court* (1998) 66 Cal.App.4th 77.

296 *Poway Unified Sch Dist. v. Superior Court* (1998) 62 Cal.App.4th 1496, 1502–1505.

297 See Medical Privacy Laws, p. 40.

298 *Poway Unified Sch Dist. v. Superior Court* (1998) 62 Cal.App.4th 1496, 1505.

299 *City of Los Angeles v. Superior Court* (1996) 41 Cal.App.4th 1083, 1089.

300 *Register Div. of Freedom Newspapers, Inc. v. County of Orange* (1984) 158 Cal.App.3d 893, 901.

301 See, e.g., *D.I. Chadbourne, Inc. v. Superior Court* (1964) 60 Cal.2d 723; *City of Hemet v. Superior Court* (1995) 37 Cal.App.4th 1411.

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 privilege³⁰³ and attorney-work-product doctrine.³⁰⁴ However, the exemption for pending litigation is not limited solely to documents that fall within either the attorney-client privilege or work product protection.³⁰⁵ 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.³⁰⁶

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.³⁰⁷ 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.³⁰⁸ 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.³⁰⁹ Courts have also ordered disclosure of the names and addresses of residential water customers who exceeded their water allocation under a rationing ordinance,³¹⁰ and the names of donors to a university affiliated foundation, even though those donors had requested anonymity.³¹¹

► **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.

303 Evid. Code, § 950 *et seq*; *Costco Wholesale Corp. v. Superior Court* (2009) 47 Cal.4th 725.

304 Code Civ. Proc. § 2018.030.

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).

308 *City of San Jose v. Superior Court* (1999) 74 Cal.App.4th 1008.

309 Gov. Code, § 6254, subd. (u)(1).

310 *New York Times Co. v. Superior Court* (1990) 218 Cal.App.3d 1579.

311 *California State Univ., Fresno Ass'n, Inc., v. Superior Court* (2001) 90 Cal.App.4th 810.

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.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.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.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.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.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."³¹⁷ In addition, the public interest exemption may protect certain personnel records from disclosure.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.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.³²⁰

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

313 91 Ops.Cal.Atty.Gen. 19 (2008).

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).

318 Gov. Code, § 6255; *BRV, Inc. v. Superior Court* (2006) 143 Cal.App.4th 742, 755; see also, *Copley Press, Inc. v. Superior Court* (2006) 39 Cal.4th 1272.

319 *International Fed'n of Prof. & Tech. Eng'rs, Local 21, AFL-CIO v. Superior Court* (2007) 42 Cal.4th 319, 335; *Commission on Peace Officer Standards & Training v. Superior Court* (2007) 42 Cal.4th 278, 300; *Caldecott v. Superior Court* (2015) 243 Cal.App.4th 212, 231; *BRV, Inc. v. Superior Court*, *supra*, 143 Cal.App.4th 742, 755; *American Fed'n of State, County & Mun. Employees (AFSCME), Local 1650 v. Regents of Univ. of Cal.* (1978) 80 Cal.App.3d 913 914–916.

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.³²¹ In contrast, when “the charges are found true, or discipline is imposed,” the public interest likely favors disclosure.³²² 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.”³²³ 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.³²⁴

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.³²⁵ 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.³²⁶

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.³²⁷

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”³²⁸

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.³²⁹ The appropriate procedure for obtaining information in the

321 *AFSCME, Local 1650 v. Regents of Univ. of Cal.* (1978) 80 Cal.App.3d 913, 918.

322 *Ibid.*

323 *Ibid.*

324 *Caldecott v. Superior Court* (2015) 243 Cal.App.4th 212, 223–224; *Marken v. Santa Monica-Malibu Unified Sch. Dist.* (2012) 202 Cal.App.4th 1250, 1275–1276; *BRV, Inc. v. Superior Court* (2006) 143 Cal.App.4th 742, 759; *Bakersfield City Sch. Dist. v. Superior Court* (2004) 118 Cal.App.4th 1041, 1045–1047; *AFSCME, Local 1650 v. Regents of University of California* (1978) 80 Cal.App.3d 913, 918.

325 See “Attorney-client Communications and Attorney Work Product,” page 29; *City of Petaluma v. Superior Court* (2016) 248 Cal.App.4th 1023, 1035–1036. But see *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.

326 *BRV, Inc. v. Superior Court*, *supra*, 143 Cal.App.4th 742, 759 (permitting redaction of names, home addresses, phone numbers, and job titles “of all persons mentioned in the report other than [the subject of the report] or elected members” of the school board); *Marken v. Santa Monica-Malibu Unified Sch. Dist.*, *supra*, 202 Cal.App.4th 1250, 1276 (permitting redaction of the identity of the complainant and other witnesses, as well as other personal information in the investigation report).

327 *Marken v. Santa Monica-Malibu Unified Sch. Dist.*, *supra*, 202 Cal.App.4th 1250, 1264–1271. See also “Reverse PRA Litigation,” p. 59.

328 Gov. Code, § 6254, subd. (k); Pen. Code, §§ 832.7–832.8; *International Fed’n of Prof. & Tech. Eng’rs, Local 21, AFL-CIO v. Superior Court* (2007) 42 Cal.4th 319, 341; *City of Hemet v. Superior Court* (1995) 37 Cal.App.4th 1411, 1431.

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

330 See, e.g., *People v. Mooc* (2001) 26 Cal.4th 1216; *People v. Thompson* (2006) 141 Cal.App.4th 1312; *City of San Jose v. Superior Court* (1998) 67 Cal.App.4th 1135.

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

332 Pen. Code, § 832.7, subd. (d).

333 Pen. Code, § 832.8.

334 *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* (2007) 42 Cal.4th 278, 289–293.

335 *Ibarra v. Superior Court* (2013) 217 Cal.App.4th 695, 700–705.

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).

337 *City of Eureka v. Superior Court* (2016) 1 Cal.App.5th 755, 763–765. See also “Law Enforcement Records,” p. 35.

338 *Sanchez v. City of Santa Ana* (9th Cir. 1990) 936 F.2d 1027, 1033–1034, cert denied (1991) 502 U.S. 957; *Miller v. Pancucci* (C.D.Cal. 1992) 141 F.R.D. 292, 299–300.

339 *Pasadena Peace Officers Ass’n v. Superior Court* (2015) 240 Cal.App.4th 268, 288–290. See also “Law Enforcement Records,” p. 35.

340 Evid. Code, § 1043 *et seq.*; *Guerra v. Bd. of Trustees* (9th Cir. 1977) 567 F.2d 352; *Kerr v. United States Dist. Court for Northern Dist.* (9th Cir. 1975) 511 F.2d 192, *aff’d*, (1976) 426 U.S. 394; *Garrett v. City and County of San Francisco* (9th Cir. 1987) 818 F.2d 1515.

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

341 Gov. Code, § 6254.8; Gov. Code, § 53262, subd. (b).

342 *Braun v. City of Taft* (1984) 154 Cal.App.3d 332.

343 *International Fed'n of Prof. & Tech. Eng'rs, Local 21, AFL-CIO v. Superior Court*, *supra*, 42 Cal.4th 319, 327.

344 *Commission on Peace Officer Standards & Training v. Superior Court*, *supra*, 42 Cal.4th 278, 299, 303.

345 *Sacramento County Employees' Retirement System v. Superior Court* (2011) 195 Cal.App.4th 440, 472.

346 *Sonoma County Employees' Retirement Ass'n v. Superior Court* (2011) 198 Cal.App.4th 986, 1004.

347 Gov. Code, § 20230; See also *SDCERS v. Superior Court* (2011) 196 Cal.App.4th 1228, 1238–1239, citing with approval 25 Ops. Cal. Atty. Gen. 90 (1955), which exempts from disclosure employee election of benefits. For peace officer election of benefits see Pen. Code, §§ 832.7 - 832.8 and *International Fed'n of Prof. & Tech. Eng'rs, Local 21, AFL-CIO v. Superior Court* (2007) 42 Cal.4th 319, 343.

348 Lab. Code, § 1776.

349 Lab. Code, § 1776, subd. (b).

which the request is made prior to being provided the records.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.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.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 1978.³⁵³ The name and address of the contractor or subcontractor may not be redacted.³⁵⁴

The Department of Industrial Relations Director has adopted regulations governing release of certified payroll records and applicable fees.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.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.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.³⁵⁸ This limited access may be either through an in-person examination or by release of certain information to the test subject.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.³⁶⁰ All such reports and information submitted to the Commission are public records subject to disclosure under the PRA.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.³⁶² When the bids or proposals leading up to the contract become disclosable depends largely upon the type of contract.

350 Lab. Code, § 1776, subd. (c).

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).

352 Lab. Code, § 1776, subd. (e); *Trustees of Southern Cal. IBEW-NECA Pension Plan v. Los Angeles Unified School District* (2010) 187 Cal.App.4th 621.

353 Lab. Code, § 1776, subd. (e).

354 Lab. Code, § 1776, subd. (e).

355 Lab. Code, § 1776, subd. (i); see Lab. Code, § 16400 *et seq.*

356 8 C.C.R. §§ 16400, 16402.

357 Gov. Code, § 6254, subd. (g).

358 Ed. Code, § 99157, subd. (a) *Brutsch v. City of Los Angeles* (1982) 3 Cal.App.4th 354.

359 Ed. Code, §§ 99157, subds. (a) & (b).

360 Ed. Code, §§ 99153, 99154.

361 Ed. Code, § 99162.

362 *Cal. State Univ., Fresno Ass'n, Inc. v. Superior Court* (2001) 90 Cal.App.4th 810, 833.

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.

363 Pub. Contract Code, § 22038.

364 Gov. Code, § 6255; *Michaelis, Montanari & Johnson v. Superior Court* (2006) 38 Cal.4th 1065, 1077.

365 Pub. Contract Code, §§ 10165, 10506.6, 10763, 20101, 20111.5, 20209.7, 20209.26, 20651.5.

366 Pub. Contract Code, § 20101, subd. (a).

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

370 Welf. & Inst. Code, § 18909.

371 Welf. & Inst. Code, § 10850.

372 *Jonon v. Superior Court* (1979) 93 Cal.App.3d 683, 690.

373 Health & Saf. Code, § 34283.

374 Health & Saf. Code, § 34332, subd. (c).

375 Gov. Code, § 6254.1.

376 Gov. Code, § 6254, subd. (i); see also Rev. & Tax. Code, § 7056.

377 Rev. & Tax. Code, §§ 7056, 7056.5.

378 See, e.g., *San Gabriel Tribune v. Superior Court* (1983) 143 Cal.App.3d 762.

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.³⁷⁹ 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.³⁸⁰

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.³⁸¹

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.³⁸²

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,³⁸³ air pollution data,³⁸⁴ and corporate siting information (financial records or proprietary information provided to government agencies in connection with retaining, locating, or expanding a facility within California).³⁸⁵

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.³⁸⁶

► **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.

379 *Cal. State Univ., Fresno Ass’n, Inc. v. Superior Court* (2001) 90 Cal.App.4th 810, 834; *Braun v. City of Taft* (1984) 154 Cal.App.3d 332, 347; *San Gabriel Tribune v. Superior Court, supra*, 143 Cal.App.3d 762, 781.

380 *Cal. State Univ., Fresno Ass’n, Inc. v. Superior Court, supra*, 90 Cal.App.4th 810; *San Gabriel Tribune v. Superior Court, supra*, 143 Cal.App.3d 762.

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.

382 *Uribe v. Howie, supra*, 19 Cal.App.3d 194, 213.

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.³⁸⁷ 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,³⁸⁸ or an officer or employee of another governmental agency when necessary for performance of official duties,³⁸⁹ by court order or request of a law enforcement agency relative to an ongoing investigation,³⁹⁰ when the local agency determines the customer used utility services in violation of utility policies,³⁹¹ or if the local agency determines the public interest in disclosure clearly outweighs the public interest in nondisclosure.³⁹²

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.³⁹³

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.³⁹⁴ Weighing the public interest in nondisclosure and the public interest in disclosure under the public interest exemption is often described as a balancing test.³⁹⁵ 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.³⁹⁶

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.³⁹⁷

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

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; *Times Mirror Co. v. Superior Court* (1991) 53 Cal.3d 1325, 1337–1339.

395 *CBS Broadcasting, Inc. v. Superior Court* 91 Cal.App.4th 892, 908.

396 *Times Mirror Co. v. Superior Court, supra*, 53 Cal.3d 1325, 1338.

397 *City of San Jose v. Superior Court* (1999) 74 Cal.App.4th 1008; *Michaelis, Montanari & Johnson v. Superior Court* (2006) 38 Cal.4th 1065; *Coronado Police Officers Assn. v. Carroll* (2003) 106 Cal.App.4th 1001; *Los Angeles Unified School District v. Superior Court* (2014) 228 Cal.App.4th 222.

from nonexempt records when applying the balancing test under the public interest exemption.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.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.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.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.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.⁴⁰³

398 *American Civil Liberties Union Foundation v. Deukmejian* (1982) 32 Cal.3d 440.

399 *Michaelis, Montanari & Johnson v. Superior Court, supra*, 38 Cal.4th 1065.

400 *Black Panther Party v. Kehoe* (1974) 42 Cal.App.3d 645, 657.

401 *CBS Broadcasting Inc., v. Superior Court* (2001) 91 Cal.App.4th 892; *Connell v. Superior Court* (1997) 56 Cal.App.4th 601; *Copley Press, Inc., v. Superior Court* (1998) 63 Cal.App.4th 367; *CBS, Inc. v. Block* (1986) 42 Cal.App.3d 646; *Braun v. City of Taft* (1984) 154 Cal.App.3d 332; *California State University, Fresno Assn. v. Superior Court* (2001) 90 Cal.App.4th 810; *Sierra Club v. Superior Court* (2013) 57 Cal.4th 157; *County of Santa Clara v. Superior Court* (2009) 170 Cal.App.4th 1301. See also, the discussion of GIS information in Chapter 6 at page 51.

402 *Coronado Police Officers Assn. v. Carroll* (2003) 106 Cal.App.4th 1001, 1015–1016.

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.⁴⁰⁴ In contrast to other governmental transparency laws such as the Brown Act,⁴⁰⁵ 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.⁴⁰⁶ 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.⁴⁰⁷ 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.⁴⁰⁸ 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.⁴⁰⁹

Conversely, a local agency may not commence an action for declaratory relief to determine its obligation to disclose records under the PRA.⁴¹⁰ 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

404 Gov. Code, §§ 6258, 6259.

405 Gov. Code, § 54950 *et seq.*

406 Gov. Code, § 6258.

407 *Long Beach Police Officers Association v. City of Long Beach* (2014) 59 Cal.4th 59, 66 fn.2.

408 Gov. Code, § 6258.

409 *County of Santa Clara v. Superior Court* (2009) 171 Cal.App.4th 119, 130.

410 *Filarsky v. Superior Court* (2002) 28 Cal.4th 419, 426.

them from requesting records.⁴¹¹ 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.⁴¹²

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.⁴¹³

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.⁴¹⁴

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.⁴¹⁵ 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.⁴¹⁶ 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.⁴¹⁷

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.⁴¹⁸ 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,⁴¹⁹ or (iii) the local agency undertook a reasonable search for records but was unable to locate the requested records.⁴²⁰

411 *Id.* at p. 423.

412 *Los Angeles Unified School Dist. v. Superior Court* (2007) 151 Cal.App.4th 759, 779.

413 Gov. Code, § 6259, subd. (a).

414 Gov. Code, § 6258.

415 *City of Los Angeles v. Superior Court* (2017) 9 Cal.App.5th 272.

416 *Bertoli v. City of Sebastopol* (2015) 233 Cal. App. 4th 353, 370-371.

417 *St. Vincent’s v. City of San Rafael* (2008) 161 Cal.App.4th 989, 1019, fn.9.

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.”]

419 See, e.g., *Los Angeles Unified School Dist. v. Superior Court*, *supra*, 151 Cal.App.4th at p. 767.

420 *Community Youth Athletic Center v. City of National City* (2013) 220 Cal.App.4th 1385, 1420.

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).

424 *Costco Wholesale Corp. v. Superior Court* (2009) 47 Cal.4th 725, 737.

425 Gov. Code, § 6259, subd. (a).

426 Gov. Code, § 6259, subd. (b).

427 *Marken v. Santa Monica-Malibu Unified School Dist.* (2012) 202 Cal.App.4th 1250, 1264, 1267.

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).

431 *Powers v. City of Richmond* (1995) 10 Cal.4th 85, 113–114.

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

438 *Los Angeles Times v. Alameda Corridor Transportation Authority* (2001) 88 Cal.App.4th 1381, 1388.

439 *Butt v. City of Richmond* (1996) 44 Cal.App.4th 925, 929.

440 Gov. Code, § 6259, subd. (d); *Garcia v. Governing Board of Bellflower Unified School District* (2013) 220 Cal.App.4th 1058, 1065; *Los Angeles Times v. Alameda Corridor Transportation Authority*, *supra*, 88 Cal.App.4th at p. 1385.

441 *Fontana Police Dep't. v. Villegas-Banuelos* (1999) 74 Cal.App.4th 1249, 1253.

442 *Marken v. Santa Monica-Malibu Unified School Dist.* (2012) 202 Cal.App.4th 1250, 1268.

443 Gov. Code, § 6259, subd. (d).

444 *Crews v. Willows Unified School Dist. et al.* (2013) 217 Cal.App.4th 1368.

445 *Butt v. City of Richmond*, *supra*, 44 Cal.App.4th at p. 932.

446 *Rogers v. Superior Court* (1993) 19 Cal.App.4th 469, 482–483; *Belth v. Garamendi* (1991) 232 Cal.App.3d 896, 901–902.

447 *Motorola Comm'n & Elecs., Inc. v. Dep't of Gen. Servs.* (1997) 55 Cal. App. 4th 1340, 1350–51.

448 *Community Youth Athletic Center v. City of National City* (2013) 220 Cal.App.4th 1385, 1446.

449 *Bernardi v. County of Monterey* (2008) 167 Cal.App.4th 1379, 1394.

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

451 Gov. Code, § 54950.5.

452 Gov. Code, § 54954.1. See *Open and Public V: A User's Guide to the Ralph M. Brown Act, 2d Edition*, 2016 (Contact the League of California Cities, 1400 K Street, Sacramento, CA 95814; phone (916) 658-8200; website <http://www.cacities.org/Resources/Open-Government>).

453 Gov. Code, § 54954.1.

454 *Ibid.*

455 *Ibid.*

456 *Ibid.*

457 *Ibid.*

458 *Ibid.*

exempted by the PRA, and must be made available upon request without delay.⁴⁵⁹ 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.⁴⁶⁰ The local agency may charge a fee for a copy of the records; however, no surcharge may be imposed on persons with disabilities.⁴⁶¹ 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.⁴⁶² The address of the designated location shall be listed in the meeting agenda.⁴⁶³ 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.⁴⁶⁴

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.”⁴⁶⁵ 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.⁴⁶⁶ 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.⁴⁶⁷ 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.⁴⁶⁸ Likewise, the PRA does not permit public access to records held electronically, if access is otherwise restricted by statute.⁴⁶⁹

► 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.

459 Gov. Code, § 54957.5, subd. (a).

460 Gov. Code, § 54957.5, subd. (c).

461 Gov. Code, § 54957.5, subd. (d). *See* Chapter 3.

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, § 6253.9, subd. (a)(1).

467 Gov. Code, § 6253.9, subd. (a)(2).

468 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.⁴⁷⁰ 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.⁴⁷¹ Agencies are not required to reconstruct electronic copies of records no longer available to the agency in electronic format.⁴⁷²

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.⁴⁷³ 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.⁴⁷⁴ 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.⁴⁷⁵ The exception for agency-developed software does not affect the exempt status of records merely because it is stored electronically.⁴⁷⁶

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.⁴⁷⁷

470 Gov. Code, § 6253.9, subd. (a)(2).

471 Gov. Code, § 6253.9, subd. (b).

472 Gov. Code, § 6253.9, subd. (c).

473 *Lake v. City of Phoenix*, (Ariz. 2009) 218 P.3d 1004, 1008; *O’Neil v. City of Shoreline* (Wash. 2010) 240 P.3d 1149, 1152–1154; *Irwin v. Onondaga County* (N.Y. 2010) 895 N.Y.S.2d 262, 265.

474 Gov. Code, § 6254.9, subs. (a), (b).

475 Gov. Code, § 6254.9, subd. (a).

476 Gov. Code, § 6254.9, subd. (d).

477 *Sierra Club v. Superior Court* (2013) 57 Cal.4th 157, 170; see also *County of Santa Clara v Superior Court*, (2009) 170 Cal.App.4th 1301, 1323–1336.

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.⁴⁷⁸ 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.⁴⁷⁹ 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.⁴⁸⁰ Its sole function is to provide access to public records.⁴⁸¹ Other provisions of state law govern retention of public records.

Local agencies generally must retain public records for a minimum of two years.⁴⁸² 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.⁴⁸³ Similarly, the retention period for "recordings of telephone and radio communications" is 100 days⁴⁸⁴ 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."⁴⁸⁵ The Attorney General has opined that recordings by security cameras on public buses and other transit vehicles constitute "routine video monitoring."⁴⁸⁶ 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.

478 Pub. Contract Code, §§ 10111.2, 20103.7.

479 Fed. Rules Civ. Proc., rule 26, 28 U.S.C.; Cal. Rules of Court, rule 3.724(8); Code Civ. Proc. §§ 2016.020, 2031.020–2031.320.

480 *Los Angeles Police Dept. v. Superior Court* (1977) 65 Cal.App.3d 661, 668.

481 *Ibid.*

482 Gov. Code, § 34090, subd. (d).

483 Gov. Code, § 34090.7.

484 Gov. Code, § 34090.6.

485 Gov. Code, §§ 34090.6, 34090.7.

486 85 Ops.Cal.Atty.Gen. 256, 258 (2002).

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.⁴⁸⁷ 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.⁴⁸⁸

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.⁴⁸⁹ 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."⁴⁹⁰ 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.⁴⁹¹

► **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.

487 Gov. Code, § 34090, subds. (a), (b), (c) & (e).

488 Lab. Code, § 1198.5, subd. (c)(1).

489 64 Ops.Cal.Atty.Gen. 317, 323 (1981).

490 *Id.* at p. 324 .

491 Gov. Code, § 6254, subd. (a). See "Drafts," p. 33.

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.

INFORMATION/RECORDS REQUESTED	MUST THE INFORMATION/RECORD GENERALLY BE DISCLOSED?	APPLICABLE AUTHORITY
AGENDA MATERIALS DISTRIBUTED TO A LEGISLATIVE BODY RELATING TO AN OPEN SESSION ITEM	Yes	Gov. Code, § 54957.5. For additional information, see p. 63 of <i>“The People’s Business: A Guide to the California Public Records Act,” “the Guide.”</i>
AUDIT CONTRACTS	Yes	Gov. Code, § 6253.31.
AUDITOR RECORDS	Yes, with certain exceptions	Gov. Code, § 36525(b).
AUTOMATED TRAFFIC ENFORCEMENT SYSTEM (RED LIGHT CAMERA) RECORDS	No	Veh. Code, § 21455.5(f)(1).
AUTOPSY REPORTS	No	Gov. Code, § 6254(f); <i>Dixon v. Superior Court</i> (2009) 170 Cal. App.4th 1271.
CALENDARS OF ELECTED OFFICIALS	Perhaps not, but note that there is no published appellate court decision on this issue post- Prop. 59. ¹	See <i>Times Mirror Co. v. Superior Court</i> (1991) 53 Cal.3d. 1325 and <i>Rogers v. Superior Court</i> (1993) 19 Cal.App.4th 469 for a discussion of the deliberative process privilege. For additional information, see p. 32 of the Guide.
CLAIMS FOR DAMAGES	Yes	<i>Poway Unified School District v. Superior Court</i> (1998) 62 Cal.App.4th 1496.
CORONER PHOTOS OR VIDEOS	No	Civ. Proc. Code, § 129.
DOG LICENSE INFORMATION	Unclear	See conflict between Health & 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.
ELECTION PETITIONS (INITIATIVE, REFERENDUM AND RECALL PETITIONS)	No, except to proponents if petition found to be insufficient	Gov. Code, § 6253.5; Elec. Code, §§ 17200, 17400, and 18650; Evid. Code, § 1050. For additional information, see p. 34 of the Guide.
EMAILS AND TEXT MESSAGES OF LOCAL AGENCY STAFF AND/OR OFFICIALS	Yes	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); <i>City of San Jose v. Superior Court</i> (2017) 2 Cal. 5th 608. For additional information, see p. 12 of the Guide.
EMPLOYMENT AGREEMENTS/CONTRACTS	Yes	Gov. Code, §§ 6254.8 and 53262(b). For additional information, see p. 49 of the Guide.
EXPENSE REIMBURSEMENT REPORT FORMS	Yes	Gov. Code, § 53232.3(e).
FORM 700 (STATEMENT OF ECONOMIC INTERESTS) AND CAMPAIGN STATEMENTS	Yes ²	Gov. Code, § 81008.

INFORMATION/RECORDS REQUESTED	MUST THE INFORMATION/RECORD GENERALLY BE DISCLOSED?	APPLICABLE AUTHORITY
GEOGRAPHIC INFORMATION SYSTEM (GIS) MAPPING SOFTWARE AND DATA	No as to proprietary software. Yes as to GIS base map information.	Gov. Code, § 6254.9; 88 Ops.Cal.Atty.Gen. 153 (2005); see <i>Sierra Club v. Superior Court</i> (2013) 57 Cal.4th 157 for data as a public record; see also <i>County of Santa Clara v. Superior Court</i> (2009) 170 Cal.App.4th 1301 for GIS basemap as public record; <i>Sierra Club v. Superior Court</i> (2011) 195 Cal.App.4th 1537; for additional information, see p. 14 of the Guide.
GRADING DOCUMENTS INCLUDING GEOLOGY REPORTS, COMPACTION REPORTS, AND SOILS REPORTS SUBMITTED IN CONJUNCTION WITH AN APPLICATION FOR A BUILDING PERMIT	Yes	89 Ops.Cal.Atty.Gen. 39 (2006); but see Gov. Code, § 6254(e). For additional information, see p. 29 of the Guide.
JUVENILE COURT RECORDS	No	<i>T.N.G. v. Superior Court</i> (1971) 4 Cal.3d. 767; Welf. & Inst. Code, §§ 827 and 828. For additional information, see p. 39 of the Guide.
LEGAL BILLING STATEMENTS	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.	Gov. Code, § 6254(k); Evid. Code, § 950, et seq.; <i>County of Los Angeles Board of Supervisors v. Superior Court</i> (2016) 2 Cal.5th 282; <i>Smith v. Laguna Sun Villas Community Assoc.</i> (2000) 79 Cal.App.4th 639; <i>United States v. Amlani</i> , 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. <i>County of Los Angeles v. Superior Court</i> (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.
LIBRARY PATRON USE RECORDS	No	Gov. Code, §§ 6254(j) and 6267. For additional information, see p. 40 of the Guide.
MEDICAL RECORDS	No	Gov. Code, § 6254(c). For additional information, see p. 40 of the Guide.
MENTAL HEALTH DETENTIONS (5150 REPORTS)	No	Welf. & Inst. Code, § 5328. For additional information, see p. 39 of the Guide.
MINUTES OF CLOSED SESSIONS	No	Gov. Code, § 54957.2(a). For additional information, see p. 43 of <i>Open and Public V: A User's Guide to the Ralph M. Brown Act, 2d Edition</i> , 2016 (Contact the League of California Cities, 1400 K Street, Sacramento, CA 95814; phone (916) 658-8200; website http://www.cacities.org/Resources/Open-Government).
NOTICES/ORDERS TO PROPERTY OWNER RE: HOUSING/BUILDING CODE VIOLATIONS	Yes	Gov. Code, § 6254.7(c). For additional information, see p. 1 of the Guide.

INFORMATION/RECORDS REQUESTED	MUST THE INFORMATION/RECORD GENERALLY BE DISCLOSED?	APPLICABLE AUTHORITY
OFFICIAL BUILDING PLANS (ARCHITECTURAL DRAWINGS AND PLANS)	Inspection only. Copies provided under certain circumstances.	Health & Saf. Code, § 19851; see also 17 U.S.C. §§ 101 and 102. For additional information, see p. 28 of the Guide.
PERSONAL FINANCIAL RECORDS	No	Gov. Code, §§ 7470, 7471, 7473; see also Gov. Code, § 6254(n). For additional information, see p. 40 of the Guide.
PERSONNEL		For additional information, see p. 46 of the Guide.
<ul style="list-style-type: none"> • Employee inspection of own personnel file 	Yes, with exceptions	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.
<ul style="list-style-type: none"> • Investigatory reports 	It depends	<i>City of Petaluma v. Superior Court</i> (2016) 248 Cal.App.4th 1023; <i>Marken v. Santa Monica-Malibu Unified Sch. Dist.</i> (2012) 202 Cal.App.4th 1250; <i>Sanchez v. County of San Bernardino</i> (2009) 176 Cal.App.4th 516; <i>BRV, Inc. v. Superior Court</i> (2006) 143 Cal.App.4th 742.
<ul style="list-style-type: none"> • Name and pension amounts of public agency retirees 	Yes. However, personal or individual records, including medical information, remain exempt from disclosure.	<i>Sacramento County Employees Retirement System v. Superior Court</i> (2011) 195 Cal.App.4th 440; <i>San Diego County Employees Retirement Association v. Superior Court</i> (2011) 196 Cal.App.4th 1228; <i>Sonoma County Employees Retirement Assn. v. Superior Court</i> (2011) 198 Cal.App.4th 196.
<ul style="list-style-type: none"> • Names and salaries (including performance bonuses and overtime) of public employees, including peace officers 	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).	<i>International Federation of Professional and Technical Engineers, Local 21, AFL-CIO, et al. v. Superior Court</i> (2007) 42 Cal.4th 319; <i>Commission on Peace Officers Standards and Training v. Superior Court</i> (2007) 42 Cal.4th 278.
<ul style="list-style-type: none"> • Officer's personnel file, including internal affairs investigation reports 	No	This information can only be disclosed through a <i>Pitchess</i> motion. Pen. Code, §§ 832.7 and 832.8; Evid. Code, §§ 1043-1045; <i>International Federation of Professional & Technical Engineers, Local 21, AFL-CIO v. Superior Court</i> (2007) 42 Cal.4th 319; <i>People v. Superior Court</i> (2014) 228 Cal.App.4th 1046; <i>City of Hemet v. Superior Court</i> (1995) 37 Cal.App.4th 1411.
<ul style="list-style-type: none"> • Test Questions, scoring keys, and other examination data. 	No	Gov. Code, § 6254(g).
POLICE/LAW ENFORCEMENT		For additional information, see p. 35 of the Guide.
<ul style="list-style-type: none"> • Arrest Information 	Yes	Gov. Code, § 6254(f)(1); <i>County of Los Angeles v. Superior Court (Kusar)</i> (1993) 18 Cal.App.4th 588.
<ul style="list-style-type: none"> • Charging documents and court filings of the DA 	Yes	<i>Weaver v. Superior Court</i> (2014) 224 Cal.App.4th 746.
<ul style="list-style-type: none"> • Child abuse reports 	No	Pen. Code, §11167.5.

INFORMATION/RECORDS REQUESTED	MUST THE INFORMATION/RECORD GENERALLY BE DISCLOSED?	APPLICABLE AUTHORITY
POLICE/LAW ENFORCEMENT, Continued		
• Citizen complaint policy	Yes	Pen. Code, § 832.5(a)(1).
• Citizen complaints	No	Pen. Code, § 832.7.
• Citizen complaints – annual summary report to the Attorney General	Yes	Pen. Code, § 832.5.
• Citizen complainant information – names addresses and telephone numbers	No	<i>City of San Jose v. San Jose Mercury News</i> (1999) 74 Cal. App.4th 1008. For additional information see p.38 of the Guide.
• Concealed weapon permits and applications	Yes, except for home/business address and medical/psychological history	Gov. Code, § 6254(u)(1); <i>CBS, Inc. v. Block</i> (1986) 42 Cal.3d 646.
• Contact information – names, addresses and phone numbers of crime victims or witnesses	No	Gov. Code § 6254(f)(2). For additional information, see p. 38 of the Guide.
• Criminal history	No	Pen. Code, § 13300 et seq.; Pen. Code, § 11105 et seq.
• Criminal investigative reports including booking photos, audio recordings, dispatch tapes, 911 tapes and in-car video	No	Gov. Code, § 6254(f); <i>Haynie v. Superior Court</i> (2001) 26 Cal.4th 1061.
• Crime reports	Yes	Gov. Code, §§ 6254(f), 6255.
• Crime reports, including witness statements	Yes, but only to crime victims and their representatives	Gov. Code, §§ 6254(f), 13951.
• Elder abuse reports	No	Welf. and Inst. Code, §15633
• Gang intelligence information	No	Gov. Code, § 6254(f); 79 Ops.Cal.Atty Gen. 206 (1996).
• In custody death reports to AG	Yes	Gov. Code, § 12525
• Juvenile court records	No	<i>T.N.G. v. Superior Court</i> (1971) 4 Cal.3d 767; Welf. & Inst. Code, §§ 827 and 828. For additional information, see p. 39 of the Guide.
• List of concealed weapon permit holders	Yes	Gov. Code, § 6254(u)(1); <i>CBS, Inc. v. Block</i> (1986) 42 Cal.3d 646.
• Mental health detention(5150) reports	No	Welf. & Inst. Code, § 5328. For additional information, see p. 39 of the Guide.
• Names of officers involved in critical incidents	Yes, absent unique, individual circumstances	<i>Pasadena Peace Officers Ass’n v Superior Court</i> (2015) 240 Cal.App.4th 268; <i>Long Beach Police Officers Association v. City of Long Beach</i> (2014) 59 Cal.4th 59; <i>Commission on Peace Officer Standards and Training v. Superior Court</i> (2007) 42 Cal.4th 278; <i>New York Times v. Superior Court</i> (1997) 52 Cal.App.4th 97; 91 Ops. Cal.Atty.Gen. 11 (2008).

INFORMATION/RECORDS REQUESTED	MUST THE INFORMATION/RECORD GENERALLY BE DISCLOSED?	APPLICABLE AUTHORITY
POLICE/LAW ENFORCEMENT, Continued		
<ul style="list-style-type: none"> • Official service photographs of peace officers 	Yes, unless disclosure would pose an unreasonable risk of harm to the officer	<i>Ibarra v. Superior Court</i> (2013) 217 Cal.App.4th 695.
<ul style="list-style-type: none"> • Peace officer's name, employing agency and employment dates 	Yes, absent unique, individual circumstances	<i>Commission on Peace Officer Standards and Training v. Superior Court</i> (2007) 42 Cal.4th 278.
<ul style="list-style-type: none"> • Traffic accident reports 	Yes, in their entirety, but only to certain parties	Veh. Code, §§ 16005, 20012 [only disclose to those needing the information, such as insurance companies, and the individuals involved].
PUBLIC CONTRACTS		
<ul style="list-style-type: none"> • Bid Proposals, RFP proposals 	Yes, except competitive proposals may be withheld until negotiations are complete to avoid prejudicing the public	<i>Michaelis v. Superior Court</i> (2006) 38 Cal. 4th 1065; but see Gov. Code, § 6255 and Evid. Code, § 1060. For additional information, see p. 50 of the Guide.
<ul style="list-style-type: none"> • Certified payroll records 	Yes, but records must be redacted to protect employee names, addresses, and social security number from disclosure	Labor Code, § 1776.
<ul style="list-style-type: none"> • Financial information submitted for bids 	Yes, except some corporate financial information may be protected	Gov. Code, §§ 6254(a),(h), and (k), 6254.15; and 6255; <i>Schnabel v. Superior Court of Orange County</i> (1993) 5 Cal. App.4th 704, 718. For additional information, see p. 51 of the Guide.
<ul style="list-style-type: none"> • Trade secrets 	No	Evid. Code, § 1060; Civ. Code, § 3426, et seq. For additional information, see p. 52 of the Guide.
PURCHASE PRICE OF REAL PROPERTY	Yes, after the agency acquires the property	Gov. Code, § 7275.
REAL ESTATE		For additional information, see p. 51 of the Guide.
<ul style="list-style-type: none"> • Property information (such as selling assessed value, square footage, number of rooms) 	Yes	88 Ops.Cal.Atty.Gen. 153 (2005).
<ul style="list-style-type: none"> • Appraisals and offers to purchase 	Yes, but only after conclusion of the property acquisition	Gov. Code, § 6254(h). Note that Gov. Code, § 7267.2 requires release of more information to the property owner while the acquisition is pending.
REPORT OF ARREST NOT RESULTING IN CONVICTION	No, except as to peace officers or peace officer applicants	Lab. Code, § 432.7.
SETTLEMENT AGREEMENTS	Yes	<i>Register Division of Freedom Newspapers v. County of Orange</i> (1984) 158 Cal.App.3d 893. For additional information, see p. 44 of the Guide.
SOCIAL SECURITY NUMBERS	No	Gov. Code § 6254.29.

INFORMATION/RECORDS REQUESTED	MUST THE INFORMATION/RECORD GENERALLY BE DISCLOSED?	APPLICABLE AUTHORITY
SPEAKER CARDS	Yes	Gov. Code, § 6255.
TAX RETURN INFORMATION	No	Gov. Code, § 6254(k); Internal Revenue Code, § 6103.
TAXPAYER INFORMATION RECEIVED IN CONNECTION WITH COLLECTION OF LOCAL TAXES	No	Gov. Code, § 6254(i). For additional information, see p. 52 of the Guide.
TEACHER TEST SCORES, IDENTIFIED BY NAME, SHOWING TEACHERS' EFFECT ON STUDENTS' STANDARDIZED TEST PERFORMANCE	No	Gov. Code, § 6255; <i>Los Angeles Unified School Dist. v. Superior Court</i> (2014) 228 Cal.App.4th 222.
TELEPHONE RECORDS OF ELECTED OFFICIALS	Yes, as to expense totals. No, as to phone numbers called.	See <i>Rogers v. Superior Court</i> (1993) 19 Cal.App.4th 469.
UTILITY USAGE DATA	No, with certain exceptions.	Gov. Code, § 6254.16. For additional information, see p. 54 of the Guide.
VOTER INFORMATION	No	Gov. Code, § 6254.4. For additional information, see p. 34 of the Guide.

- 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

