Aleshire & Wynder

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Board Orientation Guide

East Kern Health Care District

East Kern HEALTH CARE DISTRICT

NEW BOARD MEMBER ORIENTATION GUIDE

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Aleshire & Wynder

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Aleshire & Wynder

Congratulations on your election to the Board of Directors of the East Kern Health Care District. It is a sign of our times that lawyers must be among the first to contact you about your new post. This letter is a brief introduction to some key laws affecting you as a board member, and some background on our role as district ("District") attorney. We will brief you on pending litigation later.

The Brown Act and the Conflicts of Interest laws are the highest profile laws applicable to Board members. The enclosed includes information on these laws. Some materials are prepared for our city clients. These are also applicable to Board members. Where it mentions City, just read it as **District**. We are anxious to answer questions you may have on these subjects and other legal topics affecting your office holding.

Our business relationship with the **District** is straightforward. We provide legal advice on all transactional matters and attend all board meetings. We serve as counsel to the **District**, not as counsel for individual Directors.

Once again, congratulations. We look forward to working with you during your tenure.

Sincerely,

Alex Lemieux

TAB 2

Aleshire & Wynder

OVERVIEW OF LEGAL ISSUES

A. BROWN ACT – THE "OPEN MEETING LAW" (Government Code 54950, *et seq.*).

1. The Brown Act requires all meetings of legislative bodies and advisory bodies to be open and public, including meetings of:

   a. Board of Directors.

   b. Commission and committee bodies.

   c. Bodies created by formal action to provide an advisory role and/or exercise authority delegated by the legislative body.

   d. **Note**: Also applies to elected officials before they actually assume office.

   e. **Note**: Does not apply to (i) bodies of less than a quorum of the legislative body intended to play an advisory role on an ad hoc basis or; (ii) meetings of individual members of a legislative body with staff or meetings of staff generally.

2. Agendas:

   a. An agenda must include all matters to be transacted or discussed, including topics to be discussed in closed session.

   b. No action may be taken if an item is not on the agenda (unless it is a qualified emergency item).

   c. Each item on the agenda must include a brief description, sufficient to inform the public of the nature of each item of business, which allows the public to determine whether to participate. Closed session item descriptions have specified formats. (See #6 below for more on closed session items.)

   d. Each agenda must be conspicuously posted 72 hours prior to the meeting in a place readily accessible to public. Special or emergency meetings agendas do not require 72 hours' notice.

   e. Each agenda must include a reasonable period of time for public comment before or during consideration of an agenda item, although there is no requirement to allow public comment on each item. Comments can also be made on items of interest to public and within the subject matter jurisdiction of the agency.

f. The legislative body may add an item to the agenda when the immediate need to act arose subsequent to the posting of the agenda and if there is a 2/3 vote of the body or a unanimous vote if less than 2/3 of the body are present.

g. No discussion may be had of any item not on agenda except: a brief response to statements or questions from members of public; asking questions for clarification; providing reference to staff or other resources for factual information; requesting staff to report at subsequent meeting on any matter; or directing staff to place a matter on a future agenda.

3. Action taken by a legislative body:

a. Includes a collective decision, or a promise to make one, by a quorum.

b. Includes an actual vote by a quorum upon a motion, proposal, resolution, ordinance, or order.

c. No preliminary or final action may be taken by secret ballot.

4. Meetings:

a. A meeting takes place if a quorum of the legislative body receives information on, discusses, or deliberates on any item on which the body may legally act.

b. Includes communication by email, phone, fax, or similar means to develop a collective concurrence as to action to be taken.

c. Serial and rotating meetings or polling are prohibited, but social gatherings are permitted if the business of the legislative body is not discussed.

d. Does not include a quorum in attendance at a conference open to public or at public meetings organized by a person or agency other than the local agency to address a topic of local concern.

e. Must generally be held within the boundaries of the agency, i.e., “retreats” not permitted.

f. A regular meeting may be adjourned to a specified new date, place and time. If the new meeting date is within 5 days, no new agenda posting is required.

g. Regular meetings with place and time must be provided by ordinance, resolution or bylaws.

h. A special meeting must be called by the presiding officer or a majority of members with 24 hour notice to all media requesting such notice, written notice to each member and notice to the public.

i. Emergency meetings may be called when a quorum determines that an emergency severely impairs public health and safety. One hour notice of the meeting must be given to media.

j. When meeting is held to adopt a new or increase a general tax or assessment, 45 days' notice must be given.

5. Remote/Teleconference Meetings

a. Legislative bodies may meet remotely/telephonically. Meeting agendas must be posted at teleconference locations. All teleconference locations must be identified in the meeting notice and agenda, and the teleconference locations must be accessible to the public.

b. However, under the state of emergency declared by Governor Newsom in the face of COVID-19, which has a sunset date of January 1, 2024, legislative bodies do not need to comply with these requirements. Once the declaration ends, legislative bodies will once again have to post their teleconference locations and make them accessible to the public.

c. Additionally, under AB 2249, a new bill enacted this year which will go into effect January 1, 2023, a member of a legislative body may attend meetings remotely without having to identify their conference location or make it accessible to the public even when not in a declared state of emergency. The member must have "just cause" or "emergency circumstances" that require them to attend remotely, including:

(1) Childcare or caregiving;

(2) A contagious illness that prevents them from attending in person;

(3) A need related to a disability not otherwise accommodated;

(4) Travel while on official business of the legislative body or another state or local agency;

(5) A physical or family medical emergency.

d. The member must notify the legislative body of their need to participate remotely as soon as possible and provide the legislative body with the general description of the circumstances relating to their need.

e. Members cannot participate remotely for a period of more than three consecutive months or 20% of regular meetings within a calendar year.

f. At least a quorum of the members of the legislative body must participate in person at a single location.

g. The legislative body must provide the public a means to observe and participate in the meeting. Notice of the meeting or agenda must include information on how to access the meeting and make public comment, whether it be through in-person or remote access.

6. Public Participation:

a. Any member of the public may attend an open meeting. The legislative body cannot require an attendee to provide his name or address or impose other conditions on attendance or public comment.

b. The agency may not prohibit public criticism of policies, procedures, programs, services, acts, or omissions of the agency.

c. The public may record the proceedings by video, film, or audiotape, unless the body finds that the recording creates noise, illumination, or an obstruction of view that constitutes a persistent disruption.

d. If a meeting is willfully interrupted or order cannot be restored by removing the disrupting individuals, the legislative body may order the room cleared and may then resume the meeting.

7. Closed Sessions:

a. Closed sessions are meetings conducted in private without the attendance of the public or press.

b. Closed sessions may only be conducted when authorized by law.

c. Most common reasons for closed session meetings:

- Pending Litigation:
  - Adjudicatory proceeding.
  - Initiation of litigation - when a case that has been filed against the agency or when the agency has decided or is deciding to initiate a lawsuit.
  - Exposure to litigation - applies only under specified circumstances.
- Real property negotiations - the agenda description must identify the property involved, the parties negotiating, and the general issues.
- Labor negotiations.

- Personnel matters.

d. The agency's available funds, funding priorities, or budget may not be discussed in closed session.

e. Requirements for closed session meetings:

- 72-hour notice should be provided.
- The agenda description must be in a specific format and the item must be announced in open session, in advance of the closed session.
- Immediately after the closed session, the legislative body must reconvene in open session and make any required disclosure.
- The legislative body may designate someone to keep minutes during a closed session meeting.

8. Penalties for failing to comply with the Brown Act:

a. It is a misdemeanor to take action on an item with the intent to deprive the public of information.

b. Injunction, mandamus and declaratory relief are available to cure Brown Act violations.

c. A decision made in violation of the Brown Act may be voided.

d. A person alleging a Brown Act violation must demand corrective action within 90 days from the date that the action was taken, or within 30 days if the action was taken in open session but in violation of agenda requirements.

e. A challenged action will be upheld if the person challenging the notice provisions had actual notice at the appropriate time.

9. **Note**: Emails or other writings containing information relating to the conduct of the public's business are public records. Other types of public records include:

a. All writings distributed to the legislative body by any person in connection with matter subject to discussion or action at a public meeting.

b. Final documents approved in closed session.

c. Any tape or film record of an open meeting made by or at the direction of the legislative body.

10. Effective January 1, 2021, Council Members (and members of other bodies subject to The Brown Act) should not communicate with other **City**

Councilmembers on social media about matters that could come before the **City** Council. Under this new law, even "liking" another council member's post on a topic within the **City** Council's subject matter jurisdiction could be deemed a violation of The Brown Act.

a. The Brown Act prohibits a majority of members of a legislative body from engaging in a "series of communications," directly or through intermediaries, to "discuss, deliberate, or take action on an item" that is within the legislative body's subject matter jurisdiction.

b. AB 992, which amends Government Code section 54952.2, explains what kind of communications a public official may have via social media and what kind of communications are prohibited.

c. A **City** Councilmember can use social media to answer questions and give or request information from the public regarding a matter within the **City** Council's subject matter jurisdiction. However, giving and requesting information can only be used if a majority of the **City** Council does not use that social media platform to discuss official business among themselves. Under AB 992, "discuss among themselves" includes making posts, commenting, or reacting to communications made by other members of the **City** Council.

d. Second, a single contact between two Councilmembers is generally not a prohibited serial meeting under The Brown Act. However, AB 992 prohibits a member of a **City** Council from responding directly to **any** communication on social media regarding a matter that is within the subject matter jurisdiction of the **City** Council that is made, posted, or shared by any other member of the **City** Council.

e. This law applies to Internet-based social media platforms that are open and accessible to the public. The law defines "open and accessible to the public" to mean that "members of the general public have the ability to access and participate, free of charge, in the social media platform without the approval by the social media platform or a person or entity other than the social media platform, including any forum and chatroom, and cannot be blocked from doing so, except when the Internet-based social media platform determines that an individual violated its protocols or rules."

B. CONFLICTS OF INTEREST UNDER POLITICAL REFORM ACT OF 1974 (Government Code 81000 *et seq.*)

1. Each agency must adopt a Conflict of Interest Code.

a. The code must list all officers who must report (those making or influencing decisions).

b. The code must include the following disclosure categories:

- Real property income, investments, and business interests.

2. Statements of economic interest must be filed pursuant to Code: file when you enter office, annually, and when leaving office.

3. Generally, the Political Reform Act prohibits a public official from participating in or attempting to use influence to affect decisions which affect financial interests.

4. A conflict of interest will exist if the official has an economic interest in the decision and all the following occur:

a. It is foreseeable that the decision will affect the Councilmember/Commissioner's economic interest.

b. The effect of the decision on the Councilmember/Commissioner's economic interest will be material.

c. The effect of the decision on the Councilmember/Commissioner's economic interest will be distinguishable from its effect on the public generally.

5. There are five basic types of economic interests:

a. A public official has an economic interest in a business entity in which he or she has a direct or indirect investment worth of $2,000 or more.

b. A public official has an economic interest in a business entity in which he or she is a director, officer, partner, trustee, employee, or holds any position of management.

c. A public official has an economic interest in real property in which he or she has a direct or indirect interest of $2,000 or more.

Note: An interest in property within 500 feet of the property which is the subject of the decision is considered to be materially affected unless there is no financial effect.

d. A public official has an economic interest in any source of income which aggregates to $500 or more within 12 months prior to the decision.

e. A public official has an economic interest in any source of gifts to him or her if the gifts aggregate to $500 or more within 12 months prior to the decision.

Note: A public official has an economic interest in his or her personal expenses, income, assets, or liability, as well as those of his or her immediate family.

6. The official may participate to extent legally required.

   a. If 3 of the 5 members have a conflict, draw lots amongst officials with a conflict to determine which conflicted member will participate.

7. The official may participate as private citizen even if conflicted.

8. Penalties for violation:

   a. Misdemeanor.

   b. Removal from office.

   c. Decision voidable.

9. If it is unclear whether a conflict exists, the FPPC will provide a letter opinion.

10. Advise the **district** attorney of potential conflict early enough to allow the district attorney to provide adequate advice.

C. CONFLICTS OF INTEREST IN THE MAKING OF A CONTRACTS (Government Code § 1090)

1. Prohibits a government officer or employee acting in his or her official capacity, from making a contract, or participating in the making of a contract, in which he or she is financially interested. Virtually any involvement in the contract-making process is considered participation in the making of a contract.

2. Financial interests would include:

   - Landlord or tenant of contract party
   - Attorney or agent of contracting party
   - Supplier of goods or services to the contracting party.
   - Landlord or tenant of a contracting party.
   - **Note**: A public official has not only his or her own financial interests in a contract but also that of a spouse where he or she stands in the shoes of the spouse for purposes of Section 1090.

3. An officer or employee shall not be a purchaser at any sale or a vendor in any purchase made in his or her official capacity.

4. No conflict of interest for "remote interests" and "non-interests". However, the officer or employee must still disclose the financial interest, abstain from

influencing the contract-making process, and note the interest in the legislative body's official records.

5. A disclosure of the conflict does not cure the conflict.

6. The contract will be void an unenforceable and the official will be subject to:

- Criminal and civil penalties
- Potential disgorgement of any consideration received or property acquired in the transaction (Example: *Thompson v. Call* (1985) 38 Cal.3d 633 **[City** able to retain title to parcel of land sold and councilmember liable to **city** for the amount of the purchase price from the sale ($258,000) plus interest.])
- Willful violation of Section 1090 may be punished as a felony.

D. INCOMPATIBLE OFFICES (Common Law Doctrine and Government Code § 1099)

1. Common law doctrine prohibits a single official from holding two public offices with potential overlap in the functions and responsibilities of the two offices.

2. Offices include elected and appointed offices as established by municipal code.

3. Under Government Code § 1099, incompatibility includes:

- Conflicting supervisory authority.
- Possibility of a significant clash of duties or loyalties between the offices.

4. Remedy: Removal from office first assumed.

TAB 3

Ethics Law Principles for Public Servants:

KEY THINGS TO KNOW

Note that the following are not statements of law, but rather principles the law is designed to achieve. The goal in providing this list is to identify the kinds of issues addressed by public service ethics laws. If an issue arises for you under these principles, public officials should consult agency counsel.

Personal Financial Gain

Generally speaking, public officials:

- Cannot request, receive or agree to receive anything of value or other advantages in exchange for a decision.
- Must disclose their financial interests to the public.
- Must disqualify themselves from participating in decisions that may affect (positively or negatively) their financial interests.
- Cannot have a financial interest in a contract made by their agency.
- Cannot be involved in agency decisions affecting a potential future employer once the official and employer each have expressed an interest in a professional relationship.
- Cannot lobby their agency for pay for a year following their departure from the agency.

Perk Issues: Including Compensation, Use of Public Resources and Gifts

Generally speaking, public officials:

- Receive limited compensation for their service to the public.
- Cannot receive compensation for speaking, writing an article or attending a conference.
- May be reimbursed for only those active and necessary expenses allowed in agency expense reimbursement policies.
- Cannot use public agency resources (money, travel expenses, staff time and agency equipment) for personal or political supplies or purposes.
- Cannot send or be featured in mass mailings at public expense.
- Cannot make gifts of public resources or funds.
- Must disclose gifts they receive from each single source that has given gifts worth $50 or more in a single calendar year.
- May not receive gifts worth a total of $500 (2019-20 amount) from a single source in a single calendar year. Note: this amount changes every two years.

- May only accept free trips and travel expenses under limited circumstances.
- May not accept free or discounted transportation from transportation companies.
- May not use campaign funds for personal benefits not directly related to a political, legislative, or governmental purpose.

Transparency

Generally speaking, public officials must:

- Disclose their economic interests when they take office, annually while they are in office and when they leave office. These economic interests can include: sources of income, property ownership, investments, certain family members' interests, business interests, loans, contracts and gifts received.
- Disclose information about who has agreed to donate significant resources ($5,000 or more) to legislative, governmental or charitable purposes at an elected official's request.
- Disclose campaign contributions and abide by applicable limits.
- Conduct the public's business in open and publicized meetings, except for the limited circumstances when the law allows closed sessions.
- Allow the public to participate in meetings, and listen to the public's views before making decisions.
- Allow public inspection of documents and records generated, owned, used, or retained by public agencies, except when non-disclosure is specifically authorized by law.
- Disclose gifts given to the public agency and how they are ultimately used.

Fair Process and Merit-Based Decision-Making

Generally speaking, public officials:

- Cannot receive loans from other staff, officials or contractors, and must disclose and comply with certain requirements for loans from others.
- Cannot engage in vote-trading.
- Have a responsibility to ensure fair and competitive agency contracting processes.
- Cannot participate in quasi-judicial proceedings in which they have a strong bias with respect to the parties or facts.
- Must conduct public hearings in accordance with fair process principles.
- Cannot participate in decisions that will benefit their immediate family (spouse/domestic partner and dependent children).
- Cannot simultaneously hold certain other public offices or engage in other outside activities that would subject them to conflicting loyalties.
- Cannot participate in entitlement proceedings—such as proceedings regarding land use permits—involving campaign contributors (does not apply to elected bodies).
- Cannot solicit campaign contributions of more than $250 from permit applicants while an application is pending and for three months after a decision (if sitting on an appointed body).
- Cannot directly solicit agency employees for political support or donations for their political causes.
- Cannot retaliate against whistle-blowers who report improper government activities.

A Public Official's Conflict of Interest Checklist

KEY CONCEPTS

- ☐ A public agency's decision should be based solely on what best serves the public's interests.
- ☐ The law is aimed at the perception, as well as the reality, that a public official's personal interests may influence a decision. Even the temptation to act in one's own interest could lead to disqualification, or worse.
- ☐ Having a conflict of interest does not imply that a public official has done anything wrong; it just means that the official has financial or other disqualifying interests.
- ☐ Violating the conflict of interest laws could lead to monetary fines and criminal penalties for public officials, and may lead to proceedings to remove the official from office. Don't take that risk.

BASIC RULE

A public official may not participate in a decision — including trying to influence a decision — if the official has financial or, in some cases, other strong personal interests in that decision. When an official has an interest in a contract, the official's agency may be prevented from even making the contract.

WHEN TO SEEK ADVICE FROM AGENCY COUNSEL

The rules are very complex. A public official should talk with agency counsel early and often and when an action by the public agency may affect (positively or negatively) any of the following:

- ☐ **Income.** Any source of income of $500 or more (including promised income) during the prior 12 months to the official or official's spouse/domestic partner.
- ☐ **Immediate Family.** The official's spouse/domestic partner and dependent children.
- ☐ **Business Management or Employment.** An entity for which the official serves as a director, officer, partner, trustee, employee or manager.
- ☐ **Real Property.** A direct or indirect interest in real property of $2,000 or more that the official or official's immediate family has, including such interests as ownership, leaseholds (but not month-to-month tenancies) and options to purchase.
- ☐ **Gift Giver.** A giver of one or more gifts worth a total of $500 (2019-20 amount) or more to the official in the prior 12 months, including promised gifts.
- ☐ **Lender/Guarantor.** A source or guarantor of a loan to the official.
- ☐ **Personal Finances.** The official or official's immediate family's personal expenses, income, assets or liabilities.
- ☐ **Contract.** A contract that the agency is considering entering into, in which the official or a member of the official's immediate family may have an interest (direct or indirect).
- ☐ **Business Investment.** An interest in a business that the official or the official's immediate family have a direct or indirect investment worth $2,000 or more.
- ☐ **Related Business Entity.** An interest in a business that is the parent, subsidiary, or is otherwise related to a business in which the official:
  - Has a direct or indirect investment worth $2,000 or more; or
  - Is a director, officer, partner, trustee, employee or manager.
- ☐ **Business Entity Owning Property.** Real property owned by a business entity or trust of the official.
- ☐ **Campaign Contributor.** A campaign contributor of the official (applies to appointed decision-making bodies only).
- ☐ **Other Personal Interests and Biases.** The official has important, but non-financial, personal interests or biases (positive or negative) about the facts or the parties that could cast doubt on the official's ability to make a fair decision.

WHAT WILL HAPPEN NEXT?

Agency counsel will advise the official whether 1) the official may participate in the decision and, 2) if a contract is involved, whether the agency can enter into the contract at all. Counsel may suggest asking either the Fair Political Practices Commission or the California Attorney General's Office regarding their opinion about the political conflict.

EVEN IF IT'S LEGAL, IS IT ETHICAL?

The law sets only minimum standards. Officials should ask themselves whether members of the public will question whether the officials are acting solely in the public's interest. If even a perceived conflict exists, officials should consider excusing themselves voluntarily from that particular decision-making process.

Beyond the Law: Ethics and Values

- Ethics is what one ought to do in a given situation. It's the kind of conduct that would make the world a better place if everyone engaged in it.
- The law provides only minimum standards for ethical conduct. Just because a course of action is legal doesn't mean it is right.
- What one ought to do is typically tied to a series of values:
  - » Trustworthiness
  - » Respect
  - » Responsibility
  - » Compassion
  - » Loyalty
  - » Fairness

ILG developed a Good Governance Checklist to help local officials identify ways they can go above and beyond legal requirements to promote public trust and confidence. To access the checklist visit: **www.ca-ilg.org/goodgovernance**.

AB 1234 Trainings

California law requires local officials to periodically receive training on public service ethics laws and principles (AB 1234). ILG offers trainings and self-test options to help local officials comply with this law. ILG offers two, one-hour self-study exercises as an option for local officials to satisfy AB 1234 requirements. The self-study materials can also be used to make up for time missed at in-person sessions if the official either arrived late or left early. Find out more at: **www.ca-ilg.org/ab1234selfstudy**.

ILG can also come to your community to train your local officials and staff. Contact ILG at **ethicsmailbox@ca-ilg.org** for more information on how to schedule an ethics workshop.

The Institute is grateful to the following firms for making this document possible in 2019:

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INSTITUTE FOR LOCAL GOVERNMENT℠

Promoting Good Government at the Local Level

The Institute for Local Government is the nonprofit training and education affiliate of the League of California Cities, the California State Association of Counties and the California Special Districts Association.

Its mission is to promote good government at the local level.

The Institute's current program areas include:

- Leadership and Governance
- Public Engagement
- Sustainable Communities
- Workforce and Civics Education

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TAB 4

ALESHIRE & WYNDER LLP
ATTORNEYS AT LAW

MEMORANDUM

Personal Liability for Acts of Officers and Employees of the City

I. INTRODUCTION

As a new member of the City Council, you may be concerned about the extent of your personal liability, as a councilmember, for acts taken by the council or by advisory committees and City employees. Therefore, we are providing you with a general overview of both state and federal law without reference to any particular set of circumstances.

II. CALIFORNIA GOVERNMENT TORT CLAIMS ACT

From the earliest days of California's legal history, public officers and employees have been held personally liable in damages for injuries suffered through malfeasance, omission, or neglect in the performance of their duties.[1] A broad exception to the rule of official liability is the doctrine of official immunity for discretionary action. In *Lipman v. Brisbane Elementary School District* (1961) 55 Cal.2d 224, the Court stated that:

> "Because of important policy considerations, the rule has become established that government officials are not personally liable for their discretionary acts within the scope of their authority even though it is alleged that their conduct was malicious."[2]

This statement is an accurate representation of California law as it existed at the time of the *Lipman* decision. The policy consideration for this immunity is said to be that:

> "The subjection of officials, the innocent as well as the guilty, to the burden of a trial and to the danger of its outcome would impair their zeal in the performance of their functions, and it is better to leave the injury unredressed than to subject honest officials to the constant dread of retaliation."[3]

To paraphrase Judge Learned Hand, it is impossible to know whether the claim is well-founded until the case has been tried. Thus, to require public officials to incur the risk of trial would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties.[4]

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[1] See, e.g., *Lick v. Maddin* (1868) 36 Cal. 208.
[2] 35 Cal.2d at 229.
[3] *Id*
[4] *Gregories v. Biddle (*2d Cir. 1949) 177 F.2d 579, 581.

Personal Liability for Acts of Officers and Employees of the City

In 1963, the California legislature enacted the California Tort Claims Act in response to the decision of *Muskopf v. Corning Hospital District* (1961) 55 Cal.2d 211, which is the companion case of the *Lipman* decision. The effect of the Tort Claims Act was to abolish all common law actions against governments and government officials and employees as they existed prior to the date of enactment and to establish an entirely statutory procedure for claims against public entities, officials and employees. Government Code Section 820 provides that, except as otherwise provided by statute, a public employee is liable for injury caused by his act or omission to the same extent as a private person. The most significant portion of this statement is the "except as otherwise provided by statute." The legislature has substantially adopted the discretionary immunity doctrine as set forth in the *Lipman* case, as well as various other grounds of immunity for governmental officials and employees.

The following is a review of the provisions of the California Tort Claims Act as they pertain to the acts of officers and employees of governmental entities.

1. Execution or Enforcement of Laws.

Government Code Section 820.4 states that a public employee is not liable for his acts or omissions when exercising due care in the execution or enforcement of any law. Nothing in this section exonerates a public employee from liability for a false arrest or false imprisonment. Note that the exclusion of false arrest or imprisonment does not preclude the application of other immunity statutes which may be applicable.

2. Acting Under Authority of Law.

Government Code Section 820.6 states that if a public employee acts in good faith, without malice, and under the apparent authority of an enactment that is found to be unconstitutional, invalid or inapplicable, he is not liable for an injury caused thereby except to the extent that he would have been liable had the enactment been constitutional, valid and applicable. Due care is not required for the application of this immunity; "good faith, without malice" is required. This immunity is somewhat broader than that previously contained in Government Code Section 1955 which applied only to actions pursuant to unconstitutional statutes.

3. Vicarious Liability.

Government Code Section 820.9 states that councilmembers are not vicariously liable for injuries caused by the act or omission of the public entity or advisory body. However, nothing in this section exonerates an official from liability for injury caused by that individual's own wrongful conduct.[5] Vicarious liability is a device a court may use to

[5] For example, although an elected or appointed official has the same right anyone else has to alert City code enforcement staff about possible code violations, if complaints from a public official can be deemed to have produced a legal action of "singling out" one business or property owner without reasonable justification, the City can be sued for selective enforcement of its laws.

impute liability upon one for the wrongful conduct of another. For example, an employer can be held vicariously liable for the action of his employees in certain circumstances. This section does not allow liability to be imputed to a councilmember for the acts or omissions of the council or other advisory bodies.

4. Adoption of or Failure to Adopt an Enactment.

Government Code Section 821 states that a public employee is not liable for an injury caused by his adoption of or failure to adopt an enactment or by his failure to enforce an enactment. This section is a continuation of a common law doctrine of immunity as set forth in *Martelli v. Pollock* (1958) 162 Cal.App.2d 655; city councilmember immune from action as councilmember.

5. Actions, re: Permits, Licenses, Etc.

Government Code Section 821.2 states that a public employee is not liable for an injury caused by his issuance, denial, suspension or revocation of or by his failure or refusal to issue, deny, suspend or revoke, any permit, license, certificate, approval, order, or similar authorization where he is authorized by enactment to determine whether or not such authorization should be issued, denied, suspended or revoked.

6. Inspections.

Government Code Section 821.4 states that a public employee is not liable for injury caused by his failure to make an inspection or by reason of making an inadequate or negligent inspection of any property other than the property of the public entity employing the public employee, for the purpose of determining whether the property complies with or violates any enactment or contains or constitutes a hazard to health or safety.

7. Malicious Prosecution.

Government Code Section 821.6 states that a public employee is not liable for injury caused by his instituting or prosecuting any judicial or administrative proceeding within the scope of his employment, even if he acts maliciously and without probable cause.

In *McClure v. City of Long Beach* (2004), a jury awarded a business owner $22.5 million as a result of selective enforcement of municipal codes which resulted in the closing of the business. In the *McClure* case, councilmembers, in response to complaints from neighbors, urged code enforcement staff to issue citations and correction notices to Ms. McClure, who was engaged in the business of operating 6-bed homes for Alzheimer's patients. When Ms. McClure went out of business she filed a lawsuit alleging her civil rights were violated due to selective enforcement.

8. Entry on Property.

Government Code Section 821.8 states that a public employee is not liable for an injury arising out of his entry upon any property where such entry is expressly or impliedly authorized by law. Nothing in this section exonerates a public employee from liability for an injury proximately caused by his own negligent or wrongful act or omission.

9. Money Stolen from Custody.

Government Code Section 822 states that a public employee is not liable for money stolen from his official custody. Nothing in this section exonerates a public employee from liability if the loss was sustained as a result of his own negligent or wrongful act or omission.

10. Misrepresentation.

Government Code Section 822.2 states that a public employee acting in the scope of his employment is not liable for an injury caused by his misrepresentation, whether or not such misrepresentation is negligent or intentional, unless he is guilty of actual fraud, corruption or actual malice.

11. Discretionary Acts.

Government Code Section 820.2 states that except as otherwise provided by statute, a public employee is not liable for an injury resulting from his act or omission where the act or omission was the result of the exercise of the discretion vested in him, whether or not such discretion is abused. This is basically a restatement of pre-existing California law, as noted above. Examples of statutes providing for liability, even though discretionary authority may be exercised, are as follows:

a. Dangerous conditions of public property. (Government Code §840.2);

b. Willful acts of disaster workers and owners of shelters or aid stations. (Civil Code §1714.5); and

c. Misrepresentation involving actual fraud or actual malice. (Government Code §822.2).

Government Code Section 820.2's grant of immunity is perhaps the most significant grant of immunity in the Tort Claims Act. The most authoritative statement on the distinction between discretionary and ministerial acts is contained in the California Supreme Court case *Johnson v. State* (1968) 69 Cal.2d 782. The *Johnson* court made clear that the distinction is controlled principally by the concept of separation of power. The basic purpose of immunity is the assurance of judicial abstention in areas where the responsibility for basic policy decisions has been committed to coordinate branches of government. The Court believed that any wider judicial review

would place the Court in the unseemly position of determining the propriety of decisions expressly entrusted to a branch of government and, moreover, the potential that such review might affect the body's decision-making process.

The mere classification of an act as discretionary will not provide immunity, however, if the injury results from the negligence of the employee in performing the act rather than from the exercise of the discretion vested in him.[6] For example, in *Johnson*, the Court held certain state employees liable for their failure to warn a foster mother of a youth's propensity for vicious and homicidal behavior when the youth was placed with the foster mother for foster care by the California Youth Authority. The Court found that the basic policy decision to parole the boy was a discretionary policy consideration entrusted by statute to the California Youth Authority and that the Youth Authority could not be held liable for this decision. The Court further held, however, that in implementing this policy, the state employees acted in such a manner as to constitute a classic case for the imposition of tort liability and that, in view of their negligent performance of the policy as established, the employees were subject to liability to the foster mother.

Concurrent with all of the above-listed immunities is the right to be defended and indemnified by the public entity for judgments, compromises, or settlements arising out of an act or omission occurring in the scope of employment as an employee of the public entity.[7] While this indemnification provision specifically excludes that part of a claim or judgment for punitive or exemplary damages, a 1985 amendment provides for some relief by authorizing a public entity to pay the punitive or exemplary damages part of a judgment if the governing body finds all of the following:

a. The judgment is based on an act or omission of an employee or former employee acting within the course and scope of his or her employment as an employee of the public entity.

b. At the time of the act giving rise to the liability, the employee or former employee acted, or failed to act, in good faith, without actual malice and in the apparent best interests of the public entity.

c. Payment of the claim or judgment would be in the best interests of the public entity.

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6 Accord, *McCorkle v. City of Los Angeles* (1969) 70 Cal.2d 252.

7 Gov. Code § 825.

III. LEGISLATIVE ACT IMMUNITY

Members of local legislative bodies have complete immunity from liability based on their legislative acts.[8] In *Kuzinich*, an adult entertainment operator sued the county and its board of supervisors claiming violations of his constitutional rights. After the adult entertainment operator's use permit had expired the county board of supervisors directed their county counsel to file an action to enjoin the operation of the adult entertainment businesses and adopted, as an emergency measure, an amendment to the zoning ordinances which made the adult business unlawful in the areas they were operating. The federal court of appeals found that immunity existed in regards to the passing of the zoning amendment, as a legislative act. The court also considered the board's direction to county counsel to initiate a lawsuit an executive act, rather than legislative, giving the board qualified, rather than absolute, immunity.[9]

The Court in *Shoultes v. Laidlaw* (6th Cir. 1989) 886 F.2d 114, 117-118 provides an explanation of the policy basis for this immunity. In *Shoultes*, a council adopted a zoning ordinance restricting the location of "adult" bookstores and entertainment. The adult bookstore operator was cited for code violations and fined for violating the ordinance. On appeal, a state court held the ordinance invalid because it had been adopted without following the applicable statutory procedures. The adult bookstore operator sued the council and mayor under 42 U.S.C. Section 1983.

The *Shoultes* court adopted the Supreme Court's view in *Tenney v. Brandlove* (1951) 341 U.S. 367, that legislators should not be deterred from "uninhibited discharge of their legislative duty," especially at the local lawmaker level.[10] The *Shoultes* court reasoned that the threat of liability might be an even greater deterrent to service at the local level, where the rewards of pay and prestige are generally less than at the federal or state level.[11]

In sum, councilmembers are completely immune for those actions considered to be legislative acts.

IV. FEDERAL -- CIVIL RIGHTS ACT PROCEEDINGS

The Federal Civil Rights Act, 42 U.S.C. Section 1983, is a powerful legislative remedy (which provides for injunctive relief as well as compensatory and punitive damages) enacted by Congress for the protection of certain rights "secured by the Constitution and laws" against infringement by the States.

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8 *Kuzinich v. County of Santa Clara* (9th Cir. 1983) 689 F.2d 1345.
9 *Id* at 1350.
10 *Shoultes, supra,* 866 F.2d at p.117.
11 *Ibid.*

Section 1983 states:

> "Every person who, under color of any statue, ordinance, regulation, custom or usage, of any State or Territory, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

Prior to the United States Supreme Court decision in *Monell v. New York City Dept. of Soc. Serv.* (1978) 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611, municipalities were not subject to suit in a 42 U.S.C. Section 1983 Civil Rights action.[12] However, the Supreme Court in *Monell* held:

> "Local governing bodies . . . can be sued directly under Section 1983 for monetary, declaratory, or injunctive relief where [the] action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers. Moreover, although the touchstone of the Section 1983 action against a government body is an allegation that official policy is responsible for a deprivation of rights protected by the Constitution, local governments, like every other Section 1983 `person,' by the very terms of the statute, may be sued for constitutional deprivations visited pursuant to governmental `custom' even though such a custom has not received formal approval through the body's official decision-making channels."[13]

The question of immunity was addressed in *Owen v. City of Independence* (1980) 445 U.S. 622, where the United States Supreme Court held that municipalities have no immunity from damages liability resulting from constitutional violations.[14] However, at the same time, the Owen court emphasized the maintenance of a qualified good faith immunity for public officials to avoid an undue chilling effect on the exercise of their decision-making responsibilities.[15]

As more case decisions are rendered, the contours of liability and immunity under Section 1983 continue to be defined. For example, the landmark decision of *Parratt v. Taylor* (1981) 451 U.S. 527, requires consideration of the adequacy and availability of remedies under state law before deciding whether a deprivation of life, liberty or property violates due process of law. The decisions of the United States Supreme Court also underscore the significance of a considered inquiry into the

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12 *Monroe v. Pape* (1961) 365 U.S. 167.
13 *Monell,* 436 U.S. at 690, 56 L.Ed.2d at 635.
14 *Id* at 657.
15 *Id* at 653-654.

purpose and history of the Civil Rights Act, as well as present public policy considerations.[16]

The good faith immunity defense as applied to public officials and employees was qualified in *Harlow v. Fitzgerald* (1982) 457 U.S. 800. In *Harlow*, the qualified immunity under the good faith defense was judged according to an objective standard viewed in two parts:

1. Whether the applicable law that the defendant public official purportedly violated was clearly established at the time of the incident;

2. If the law was clearly established, the defendant must then prove;

a. That he was not aware of such law and therefore of the impropriety of his actions; and

b. That the average person in his situation would not have known of such law and therefore that such actions were wrong.

If a defendant public agency or employee fails to establish either of these facts, a good faith defense will fail. The import of the *Harlow* decision is that a defendant does not have to raise the good faith defense unless the court has found that the relevant law was clearly established when the incident occurred.[17]

Hundreds of cases have utilized the Harlow standard since its inception in 1982. Examples of such decisions are:

1. *Whisenant v. Yuam* (4th Cir. 1984) 739 F.2d 160 -- Good faith of police officers and prison officials was no defense to claim that they were deliberately indifferent to pretrial detainee's serious medical needs where law requiring adequate medical attention is clearly established.

2. *Alexander v. Polk* (E.D. Pa. 1983) 572 F. Supp. 605(aff'd by 750 F.2d. 250) -- City officials were protected by qualified immunity from liability in their personal capacities for denial of due process and statutory notice to recipients of benefits under a supplemental food program where issues of entitlement and notice requirements under the priority program were issues of first impression.

(See also *Mitchell v. Forsyth* (1985) 86 L.Ed.2d 411; *U.S. v. Leon* (1984) 82 L.Ed.2d 677.)

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[16] See *Smith v. Wade* (1983) 461 U.S. 30; *Briscoe v. Lattue* (1983) 460 U.S. 325; *Newport v. Fact Concerts, Inc.* (1981) 453 U.S. 247, 258; *Imbler v. Pachtman* (1976) 424 U.S. 409, 417.

[17] *Heslip v. Lobbs (*E.D. Ark. 1982) 554 F.Supp. 694.

Exhaustion of state remedies is not a prerequisite to bringing an action under Section 1983.[18] Additionally, in California, a Section 1983 action is cognizable in state court as well as federal court.[19] Notably, neither state governmental tort immunities[20] nor state claims statutes[21] apply to federal civil rights actions. State courts look to federal law to determine whether the conduct in question is actionable under Section 1983.[22]

V. FEDERAL -- SHERMAN ANTI-TRUST ACT

Anti-competitive acts of a municipality can give rise to liability under the Sherman Anti-Trust Act. In *Parker v. Brown* (1943) 317 U.S. 341, the United States Supreme Court created a "state action exception." "The basis of the State action exception is the free market principles embodied by the Sherman Anti-Trust Act must give way to the countervailing principles rooted in federalism . . . that states must be free to act upon local concerns, even if these actions have anti-competitive results."[23] This exception was later expanded to protect municipalities in *Community Communications Co. v. City of Boulder* (1982) 455 U.S. 40, 51-52. In *Boulde*r, the Supreme Court held that anti-competitive acts of a municipality that would normally give rise to liability under the Sherman Anti-Trust Act are shielded if the municipality acted pursuant to a "clearly articulated and affirmatively expressed" state policy to displace competition with regulation.

Therefore, a municipality should not take anti-competitive actions unless the California Legislature has both authorized the municipal action and intended to displace competition with regulation.

The Local Government Anti-Trust Act of 1984 (15 U.S.C. § 34) prevents federal anti-trust claimants from recovering compensatory damages, treble damages, or costs of attorneys' fees from any local government or from any local government official or employee acting in an official capacity who is found guilty of an anti-trust violation, effectively restricting municipal anti-trust liability to declaratory and injunctive relief.

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18 *Patsy v. Board of Regents* (1982(457 U.S. 496.

19 See *Martinez v. California* (1980) 444 U.S. 277, 283, fn. 7; *Kreutzer v. County of San Diego* (1984) 153 C.A.3d 62, 69; *Novick v. City of Los Angeles* (1983) 148 C.A.3d 325, 330; *Bach v. County of Butte* (1983) 147 C.A.3d 554, 560.

20 *Martinez v. California, supra,* 444 U.S. at 284, fn. 8; *Guillory v. County of Orange* (9th Cir. 1984) 731 F.2d 1379, 1382; *Fenton v. Groveland Community Servs. Dist.* (1982) 135 C.A.3d 797, 808.

21 *May v. Enomoto* (9th Cir. 1980) 633 F.2d 164, 167.

22 *Bach v. County of Butte, supra,* 147 C.A.3d at 561.

23 *Boone v. Redevelopment Agency of City of San Jose* (9th Cir. 1988) 841 F.2d 886, 890.

VI. CRIMINAL SANCTIONS

Governmental officials and employees are, of course, not immune from prosecution for criminal acts committed in the course of official duties or otherwise. The following code provisions specifically relate to actions by governmental officials or employees.

Penal Code Section 182 provides that it is the crime of criminal conspiracy to conspire to commit any act injurious to the public health, to public morals, or to pervert or obstruct justice, or the due administration of the law.

Government Code Section 3060 authorizes the prosecution of a public officer for willful or corrupt misconduct in office. The penalty on conviction is removal from office.

Government Code Section 91000 provides that it is a misdemeanor for any person to knowingly or willfully violate any provision of the Political Reform Act.[24] The Political Reform Act prohibits participation in decisions in which the decisionmaker has a financial interest and requires disclosure of a decision-maker's financial interests. A permissible penalty for each violation under this provision is a fine of up to the greater of ten thousand dollars ($10,000.00) or three times the amount the person failed to report properly or unlawfully contributed, expended, gave or received. Among the civil penalties for violation of this Act is rendering void any affected decision and a $2,000 fine.[25]

[24] Gov. Code § 81000, *et seq.*
[25] *See* Gov. Code § 91005.5.

TAB 5

INSTITUTE FOR LOCAL GOVERNMENT

Promoting Good Government at the Local Level

Financial Management for Elected Officials: Questions to Ask

Inside: Key Things to Know About

- Local Agency Financial Policies
- Budget Creation and Monitoring
- Financial Reporting
- Long-Term Financial Planning
- Cash Management and Investments
- Capital Financing & Debt Management
- Purchasing and Contracting Practices
- Finance Terminology (Glossary)

Introduction

One of an elected official's most important responsibilities is oversight of agency finances. Local agency finance can be complex. In addition, local agencies face significant financial constraints in California; this includes revenue instability due to state budget decisions and economic factors, state-mandated activities and procedural restrictions on raising new revenues.

What can elected officials do to exercise the kind of careful fiscal stewardship over taxpayer resources that the community expects?

This guide provides a series of tips and questions to assist elected officials in performing this important function. In reviewing these ideas, it is important to keep in mind that local agencies vary by size, complexity of operation, and scope of activities. As a result, some of the questions and practices described may not make sense for every local agency. For example, as a budget and accounting matter, some agencies perform one function and may therefore have one "fund." Others may have multiple funds.

This guide is a starting point for conversations between local elected officials and staff. The ultimate goal is to help make sure that everyone is playing their necessary and proper roles as informed and responsible stewards of scarce public agency resources.

Where to Find What

Local Agency Financial Policies and Practices

Financial policies can provide a solid foundation for sound public agency fiscal practices. Adopted by the governing body, such policies provide:

- A means through which the governing body can communicate its collective policy judgments and goals to staff, the public and others.

- Direction to staff and standards against which current practices can be measured, and proposals for changes in practices can be evaluated.

Ratings agencies (who assess local agencies' credit for borrowing) also look at local agencies' financial policies; well-crafted polices can mean higher rating grades which can translate into lower borrowing costs.

Questions to Ask

Financial Policies

- Does the agency have written financial policies?

- If so, what do they cover? See sidebar on next page for a checklist of possible topics.

- How often does the governing body review them?

- With respect to each policy, is it clear who is responsible for implementing that policy?

- What procedures does management use to make staff aware of such policies? What training does staff receive to allow them to competently implement such policies?

- How does the agency monitor compliance with such policies?

Financial Practices

- Are agency accounting policies and procedures documented in writing?

- What kinds of practices does the agency use (sometimes referred to as "internal controls") to make sure that the agency has systems for cross checks to minimize the risk of mistakes or maximize the likelihood that misconduct is detected?

- Does agency financial staff participate in relevant professional organizations to keep abreast of developments in the field and best practices?

- Are agency financial staff familiar with and do they adhere to the codes of ethics applicable to their professions? For example, both the California Society of Municipal Finance Officials[1] and the California Municipal Treasurers Association[2] have codes of ethics.

Financial Planning Policies.[3]

- **Budget Policy.** Such a policy commits to a balanced operating budget (and defines what that is) and requires that decision-makers be alerted when deviations are either planned or otherwise occur.

- **Long-Range Planning.** Such a policy supports financial analysis and strategies to assess the long- term implications of current and proposed capital improvement needs, cost of services, operating budgets, budget policies, cash management and investment policies, program and assumptions. For example, a capital improvement plan enables the agency details the agency's plans and relative priorities for making improvements to and replacing capital facilities (a process that normally takes years to complete).[4]

Checklist of Financial Policy Topics[5]

Local agencies have various—and various levels—of financial policies. Some policies relate to big picture, strategic topics (for example, budget policy, long-range planning and debt policy); others are very specific and practical policies (for example, credit card policies and expense reimbursement).

Having a range of policies (from big picture to practical and operational) helps an agency to chart a wise course financially and avoid operational missteps. Whether a specific policy makes sense given the nature and scope of an agency's operations will vary.

- **Asset Inventory.** Such a policy requires an up-to-date listing of all major capital assets including. The policy can also require an assessment of asset condition and a plan for replacing assets (sometimes referred to as a "capital plan"). The definition of what constitutes a "major" asset is established by local policy, as is the determination of how often the inventory is to be updated.

- **Long-Range Planning for Pension and Other Post-Employment Benefit Costs.** Such a policy analyzes how the agency will meet the future costs of agency employee pensions and other employee benefit obligations.

- **Reserve and Other Fund Balances.** Such a policy enables decision-makers to maintain a prudent level of resources to protect against a need to reduce service levels or increase revenues due to revenue shortfalls or unpredicted one-time expenses. Specific kinds of reserves can also enable an agency to set aside moneys to replace assets (for example, fleet replacement reserves).

Revenue Policies.[6] These policies help decision-makers understand and manage revenue flows.

- **Revenue Diversification.** Such a policy encourages a diversity of revenue sources to protect the agency against fluctuations in individual sources, such as sales taxes, which can rise and fall dramatically with the general economy.

- **User Fees and Charges.** Such policies establish the extent to which users of agency services are expected to cover the cost of providing the service and how those costs are determined. Note that most fees may only be used for the purposes for which they were collected and may not exceed the cost of providing the service for which the fee is charged.[7] Such policies also can provide for regular review of fee levels and calculation methods to assure that the agency meets its objectives relating to cost-recovery on an ongoing basis.

- **One-Time and Unpredictable Revenues.** A goal of such a policy is to encourage the use of one-time or unplanned revenues for one-time needs or reserve replenishment rather than for ongoing expenses.

- **Limited Purpose Revenues.** By law or policy, certain revenues must be spent for specific purposes (for example, proceeds from special taxes). This policy explains which funds are restricted and why, limits their use to those purposes, and explains how the agency tracks their use to ensure the funds are spent only on permissible expenses.

Expense Policies.[8] These policies enable decision-makers to manage and monitor how the agency incurs expenses.

- **Financial Reporting.** Financial reports compare actual expense levels (and revenue levels) to those predicted in the agency's budget. This policy specifies the content and frequency (for example, quarterly) of these reports to decision-makers and the public.

- **Debt Financing.** This kind of policy allows an agency to specify when it can use debt for either short- or long-term needs. The policy also establishes what levels of debt and debt service payments are appropriate for the agency. It can also be a tool for complying with ongoing disclosure requirements associated with the agency's debt and monitoring compliance with those requirements.

- **Expense Reimbursement.** Such policies determine the circumstances under which elected officials and staff may be reimbursed for expenses incurred in the course of their service to the agency. This includes setting limits on certain kinds of expense levels (for example, meals and hotel rates) according to community standards. Policies also specify the kind of documentation that must be provided to demonstrate that the expense was incurred in compliance with the policy before an expense will be reimbursed. Agency counsel should review the policy for compliance with AB 1234 and other state laws.[9]

- **Credit and Purchase Card Use Policies.** The practice of issuing credit cards to agency officials and staff is increasingly rare because of the potential for misuse, either accidentally or intentionally. It can however, be useful to have one or more agency credit cards to make travel arrangements and the like. Some agencies also use purchase cards. A policy specifies controls to prevent misuse of such cards.[10]

- **Petty Cash Policies.** Such a policy provides guidelines and accountability mechanisms for day-to-day cash handling by the agency and its departments.

Cash Management and Investments. State law requires agencies to adopt an investment policy specifying how the agency may invest funds not needed for the agency's immediate and short-term needs.[11] Such a policy allows the governing body to establish and keep current the agency's investment philosophy and risk tolerance. Although well-defined policies are more than a list of allowed investments,[12] such policies should be reviewed by agency counsel to make sure that the agency's investments and practices conform with state law.[13]

Purchasing/Procurement. These policies determine the processes the agency uses in determining with whom it does business (including under what circumstances contracts are competitively bid) and which staff have decision-making responsibility in that area. Such policies also typically specify how the opportunity to do business with the agency is to be announced, with the goal being to reach

Budget Creation and Monitoring

Budgets are an agency's tool for linking near-term goals with the resources available to achieve them, while keeping in mind long-term goals and resources and how the agency's annual budget fits into its capital plan. Budgeting typically involves:

1. Establishing goals and priorities for the agency;
2. Allocating resources according to those goals and priorities; and
3. Comparing actual expenses and revenues to those estimated in the current budgeted expenses, making adjustments during the course of the budget year as necessary.

As important of a function as budgeting is, decision-makers may find that their options are limited in determining how the agency's monies are actually spent. The limitations may result from legal restrictions on how funds may be used, matching funds issues (that will result in loss of revenues if the agency does not spend a certain amount), and state mandates.

Budgets play the following roles:

- **Financial Plan.** The budget document shows where agency revenues come from and how they are used. It demonstrates an agency's ability to meet recurring expenses with recurring revenues. As the fiscal year proceeds, there may need to be adjustments in the agency's financial plan—the role of elected officials is to understand why such adjustments were necessary and what steps were taken to avoid having to make these adjustments.

- **Communications Tool.** The document also is an opportunity to explain to decision-makers, the news media, staff and the public:

    - What the agency does and why;
    - How the agency is organized to deliver programs and services;
    - The kinds of programs, services and activities planned for the budget period and what kinds of costs are involved;
    - Key fiscal issues facing the agency; and
    - How the agency assesses the efficiency and effectiveness of agency efforts (see also note on performance measurement on page 11).

- **Yardstick.** Once adopted, local officials and others can use budget numbers as a reference against which to compare expenditures and revenues throughout the year. As such, the budget provides an ongoing financial management tool to make sure the agency spends within its means and balances expenses against revenues.

The budget document should be easily understood by the average member of the community. To help make this happen, financial information can be presented a variety of ways (including text, tables and charts). Including performance measures in the budget document can help the public see the relationship between costs and benefits.

Because of the public information role the budget document serves, the Government Finance Officers Association recommends that budget documents be shared via the agency's website.[14]

Questions to Ask

Role of Governing Body Members

- Do governing body members have a clear understanding of their role in the budget process?
- Do governing body members have a meaningful opportunity to shape major goals and objectives *before* the preliminary budget is prepared (for example, in budget workshops conducted sufficiently in advance of the preliminary budget's preparation)?
- Do governing body members feel like they have been given an opportunity to understand and react to key decision points within a preliminary budget (versus being subjected to a long, random presentation about numbers)?

General Questions about the Numbers in the Budget

- What are the budget's underlying assumptions (examples of key assumptions include population changes, projected case loads or service demands, state and federal funding, construction activity, utilities costs, service demands, inflation, and interest rates)? Are these assumptions realistic? What are the potential sources of uncertainty and risks regarding these assumptions?
- Does the budget explain the projections for the most significant general fund revenue sources? (These probably account for close to a large percentage of total general fund revenues.)
- For agencies providing social services, how are caseload and benefit costs forecast and managed?

Budgets Don't Tell the Whole Story

Operating budgets and financial reports do not address many important issues that decision-makers must consider. For example, they do not:

- Show postponed or avoided costs (for example, deferred maintenance on facilities or infrastructure)
- Use of one-time or expiring revenue sources.
- Indicate changes in purchasing power due to inflation or deflation.
- Measure the decline or depreciation of infrastructure (like roads, bridges and sewer lines) and public facilities (like buildings and parks).

Local officials may wish to ask staff to provide an analysis of how these variables affect the agency's ability to deliver services and facilities.

- Does the budget summarize major expenses:
  - By function or program tied to areas of public service(s) or facilities the agency provides?
  - By category? (Examples include capital expenses, debt service, and operating expenses like staffing, contract services, and supplies).
  - By fund type? (Examples include the general fund and various enterprise funds, if the agency has special funds).
- Is the budget balanced by one-time fixes or is there a sustainable long-term funding strategy (this is also an issue to be addressed in the agency's long-term financial planning documents, see page 14)?
- Does the budget clearly show the beginning and ending balances in each fund (fund balances)?
- Is the general fund budget balanced (in other words, are there enough projected revenues to fund estimated expenses)?
- Does the budget use one-time revenues only for one-time expenses (rather than ongoing expenses)?
- Does any fund have a deficit (in other words, is it projected to spend more than it brings in)? Why? Is it the deficit temporary or permanent?
- What are the most significant changes since last year's adopted budget?
- With respect to the agency's general fund, how is the fund balance projected to change?
  - How are other funds' fund balances projected to change?
  - How will any resulting changes affect the agency's compliance with its reserve policies?
- Does the budget compare actual expenses and revenues from past years so decision-makers and the public can understand how the agency's budgeted numbers compared to reality?
- Does the budget show changes in the agency's overall financial condition? What measures of financial condition does it use?

- How does the agency's budget compare with other agencies in the geographic area (both for the next fiscal year and the trend over the past five years)?
    - If there are differences, what are they and what factors account for the differences? (For example, are other agencies using different assumptions and why?)
    - Is the agency's budget dependent on any other agencies, in terms of revenues (or expenditures)?
    - Are the other agencies planning changes that should affect the agency's assumptions?
- Where is the agency in terms of constitutional limits on state and local spending? (In 1979 the California voters in 1979 approved a ballot measure[15] that limited the growth in state and local spending to a formula tied to increases in population and inflation. Finance professionals sometimes refer to this as the "Gann Limit" named after the ballot measure's sponsor. Local voters can approve an increase in the formula, for a period of up to years.[16])
- If changes to the budget prove necessary during the fiscal year, why are those adjustments necessary? What steps were taken to avoid having to make mid-year changes? What steps can be taken to avoid such changes in the future?

Local Agency Budgeting: Resources for Further Information

Government Finance Officers Association, *Recommended Budget Practices: A Framework for Improved State and Local Budgeting* (1998), available at www.gfoa.org/services/dfl/budget/RecommendedBudgetPractices.pdf

Institute for Local Government, *A Local Official's Guide to Public Engagement in Budgeting* (2010), available at www.ca-ilg.org/public-engagement-best-practices/engaging-public-budgeting.

Personnel-Related Questions

- What procedures does the agency use to forecast and manage projected personnel expenses?[17] When do labor agreements expire?
- How does the agency set its salary and benefit levels or ranges?
    - Are there salary-setting guidelines available for positions within the agency? Has the agency considered and followed them?18
    - Does the agency research and consider salaries and benefits other agencies provide for positions with similar responsibilities in the agency's geographic area?
    - How are changes in compensation determined? For unrepresented employees not subject to a memorandum of understanding, are changes based on an annual goal-setting and performance review process? What other variables does the agency consider (overall agency fiscal health, public perception, relationship to other agencies' practices, etc.)?

- Note: If the agency uses employment contracts, carefully consider the potential future fiscal impacts of automatic contract renewals, automatic increases in compensation, and provisions linking compensation increases to third-party contracts. These may hamper the agency's abilities to control its costs in the future.

- Are position vacancies monitored (including length of each vacancy), to determine if salary savings can be achieved, if position actually required, or if service levels are suffering?

- What is the status of the agency's funding for pension and other post employment benefits liabilities?

Public Information and Transparency

- What processes will the agency use to inform the public about budget issues? What mechanisms will there opportunities will be provided for public input on budget challenges and priorities?

Are the agency's budget and supporting documents made available on the agency's website?[19]

Note about Performance Measurement

"Performance measurement" (which is sometimes known by other names) enables an organization to assess its performance against organizational goals. This can occur as part of the budgeting process or as part of general management practices involving assessing the degree to which an organization's activities and priorities are aligned with pursuit of an organization's mission and strategy. Under either approach, the Government Finance Officers' Association recommends that performance measurement be linked to budget decision-making. See http://www.gfoa.org/downloads/budgetperfmanagement.pdf

More specifically, performance measurement is a management tool for systematically collecting clearly defined data regarding the effectiveness and efficiency of service delivery. The initial questions for elected officials to ask are:

1) Whether and how the agency uses performance measurement to assess its activities,
2) If the organization uses performance measurement, how is the resulting data analyzed and used in management decision-making (including decisions on allocating resources), and
3) How are those results communicated to elected officials and the community?

There are a number of good sources on performance measurement for public agencies, including the International County-City Management Association (ICMA—icma.org/en/results/center_for_performance_measurement/home and the Government Finance Officers Association (GFOA – www.gfoa.org/index.php?Itemid=250&id=479&option=com_content&task=view).

Financial Reporting and Accounting

Financial reports are an essential oversight tool. There are two basic kinds of financial reports:

- **Interim Reports.** These include monthly reports, quarterly reports and mid-year budget reviews.

- **Annual Reports.** Well-managed public agencies typically prepare a report at the end of the year explaining revenues and expenditures levels.

In addition, local agencies that receive federal or other grant moneys may be subject to specific funder financial reporting requirements.[20]

Good interim reporting identifies important trends in time for local officials to act on them before serious problems arise. Audited financial reports alert governing body members if there are irregularities in financial practices and financial reporting. Both kinds of reports require a solid financial information system to track revenues and expenditures and provide that information to decision-makers.

Questions to Ask

Interim Reporting

- What kind of reports do agency managers receive? What do they do with them?

- How often do elected officials receive interim financial reports? Does staff review the information in these reports with local officials?

- Do the reports provide meaningful information that gives local officials an accurate portrayal of the agency's current financial picture to date?

- Do the reports compare expectations with actual results? Do they discuss key variances between the two?

Some Financial Warning Signs

- Operating expenses exceeding revenues by more than five percent during the year
- Large mid-year variances in budgeted revenues and expenditures versus actual
- Inadequate or late financial reports
- Depletion of reserves to balance budget, for example if the reserves fall below ten percent of operating costs.
- Outstanding loans between funds at the end of the fiscal year
- Expenses exceeding revenues for two consecutive years, with the second year's deficit being larger than the first year's
- Debt service exceeds 10 percent of current revenues
- Increase in debt service as percentage of operating budget each year
- Qualified auditor's opinions
- Reports of internal control weaknesses from the agency's auditors with no corresponding plan to address (or repeated reports of such weaknesses from year to year)
- Large turnover in staff responsible for monitoring financial status

- Are there adverse patterns?
- Does staff have a plan to address problem areas?
- Are there inconsistencies or conflicting trends?
- Do the reports identify areas of uncertainty or risk in any forecasts contained in the reports?
- Do the reports frequently contain surprises (unexpected developments)?

Annual Reporting

- Are the annual financial reports prepared by a certified public accountant, in accordance with generally accepted accounting principles? Are these reports audited by an outside or independent auditor?
- Have all the required disclosures, for example, those required by the Governmental Accounting Standards Board (GASB—sometimes pronounced "gaz-bee") been made?
- How long has the outside or independent auditor been auditing the agency? Does the agency periodically change auditors every few years to provide a fresh view of the agency's financial practices and reports?
- What is the relationship between the auditor and both the agency staff and the governing body? Is the auditor getting the information he or she needs in a timely manner? Is communication open and encouraged?
- Are the audited annual financial reports timely—within six months after year-end?
- Should the agency have an audit committee to select and supervise the work of the outside or independent auditor?[21]
- Are the auditors' opinions "unqualified?" (An "unqualified" opinion means that the auditor concludes the agency followed all accounting rules and that its financial reports present an accurate picture of the agency's financial condition. A qualified opinion is a significant warning sign that demands attention from the governing body.)
- Does the auditor prepare a transmittal letter that clearly and concisely describes the agency's fiscal status?
- Does the auditor issue a letter to the governing body reporting on the agency' internal controls?
- Does the agency follow the "Award for Excellence in Financial Reporting" guidelines of the Government Finance Officers Association?[22] If not, why not?

Looking Ahead: Long-Term Financial Planning

- **Why Do Fiscal Forecasts?** Forecasting helps the agency think about the factors affecting the agency's fiscal health (and what can and cannot be done about them). Forecasting also helps elected officials, staff and the community understand the long- term fiscal challenges and opportunities they face, as well as possible advance warning of future uncertainties (for example, voter initiatives and state budget decisions).

- **Recognize Limitations.** Circumstances change and assumptions become outdated. Clearly stating the agency's assumptions in making a forecast encourages the review, and re-evaluation of those assumptions, when necessary.

Questions to Ask

- Does the agency periodically prepare and / or update a long-term fiscal forecast?

- If so, does the forecast take into account key variables relating to revenues and expenses? Variables include demographic factors like changes in population and case loads. They can include economic factors like inflation, new construction, property values and the overall business climate (which can affect sales taxes). Other external factors can include legislative developments and court decisions. Projected costs related to pension obligations and labor agreements are another potential variable.

- Does the forecast reach clear conclusions about what these variables mean for the agency's future revenues and expenses?

- Does the forecast also identify areas of risk and uncertainty that may limit the degree to which the agency can rely on the forecast?

- To what extent are the results of the forecast shared with decision-makers, the news media and the public?

- What level of detail do decision-makers want to receive regarding the agency's long-term financial planning? (Some governing bodies will want fairly detailed information whereas others will want bigger picture information. There is not a right level of detail – the goal is to give governing body members the level of detail that makes them comfortable.)

Cash Management and Investments

Sometimes, public agencies have funds on hand that are being held for longer-term needs. These may be invested in a variety of bonds (but not stocks), notes and other instruments allowed by state law.

The governing body's role is to be a wise steward of the public's resources. The objectives in managing public funds are, in priority order:

1. Safety (the likelihood that the agency will get all its money back)

2. Liquidity (the agency's ability to withdraw funds on short notice)

3. Yield (the interest or other return on the investment)

In light of these objectives, prudent public agency investment managers never seek to earn maximum returns on the agency's portfolio at the expense of safety or liquidity. This would expose the agency to an unacceptable level of too much risk.

Instead, they focus on seeking to earn a reasonable rate of return on the agency's investments, while preserving capital in the overall portfolio and meeting the cash flow needs of the agency.

There are funds that specialize in investing public agency funds; the Local Agency Investment Fund (LAIF) of the State Treasurer's office and CalTrust are examples.

Questions to Ask

- What oversight procedures does the agency use for its investments? Who is responsible for the day-to-day supervision of the agency's investment activities? If that authority has been delegated to the agency's treasurer, has that authority been delegated annually as required by law?[23]

- If that authority has been contracted out, who is responsible for oversight?

- What is the agency's investment policy? Is it understandable? Does the governing body review it annually as the law requires?[24]

- Do governing body members receive and review periodic investment reports?[25] Do these reports include an analysis of cash flow needs?

- Are the investment reports clear and understandable? (A lack of clarity can be a sign of problems or undue investment complexity.)

- Do the reports show numerous investments and transactions? Why? (Many public agencies do not have portfolios that justify "active" management with lots of sales, purchases and trades.)

- Are the agency's investments diverse or are the agency's assets invested in just a few places?

- Do the agency's policies allow investments in derivatives or other potentially high-risk instruments? Does that agency have any such high risk investments?

- Are any bank holdings over the FDIC insurance limit (which may vary from bank to bank) and do such depositories otherwise comply with state and federal standards to provide security for public agency deposits?[26]

Capital Financing and Debt Management

Debt financing is neither a "bad" nor a "good"—it is simply a tool for achieving community goals. However, debt does come at the price of costs of issuance and interest charges, as well as the obligation to make regular loan payments and conform to market disclosure and terms of the debt instruments on an ongoing basis.[27] Allowing these payments to become a dominant part of the agency's budget limits the agency's ability to respond to unplanned expenses.

Debt financing is usually appropriate for:

- **Temporary Short-Term Cash Flow Issues.** An agency may need to bridge cash flow gaps while waiting to receive key revenues (like property taxes in December and franchise fees in April). The agency may cover these gaps by issuing "tax" or "revenue" anticipation notes (sometimes known by the acronym "TRANs"). In this case, any amount borrowed must generally be paid back within a year.

- **Long-Term Improvements.** Debt financing is also appropriate for truly high-priority, one-time improvements – when it makes sense for current taxpayers to share the cost with those who will benefit 20 or 30 years in the future. By contrast, borrowing for ongoing operational expenses or short-term capital needs is inadvisable. The length of the debt should never exceed the useful life of the debt-financed asset.

Any agency's ability to borrow and repay debt capacity is limited. Amounts borrowed for today's project are funds that cannot be borrowed tomorrow. Amounts required for debt repayment in the future are funds that will not be available for other programs and services.

Recognizing the significance of the decision to incur long-term debt for a public agency, California's constitution requires the public voters to approve debt[28] that would be repaid from future general fund revenues.[29] While there are a number of exceptions to this requirement (including the special fund doctrine for revenue bonds[30] and an exception for financing leases), the constitutional principle is important to keep in mind. Incurring debt obligates the community into the future and reduces financial flexibility. Accordingly, the benefits of doing so should outweigh these costs.[31]

Questions to Ask

- Does the agency have a multi-year capital improvement plan? (Having such a plan enables decision-makers to consider key factors like project priorities, debt capacity and what role fees will play in financing).

    - If the agency has such a plan, is it realistic? If not, what steps are necessary to make it realistic?

- If an agency has such a plan, what does the plan *not* include? For example, does it assume that new development will bear the costs of capital improvements necessitated by that development? If so, the plan should so state.

- Does the multi-year capital improvement plan include specific information about how future maintenance costs will be paid for? It's not wise to build an asset the agency cannot afford to maintain.

- Does the agency have clear capital financing and debt management policies? Who is responsible for implementing and monitoring compliance with these policies?

  - Do these policies provide decision criteria for when incurring debt is appropriate?

  - Do these policies address what type of debt financing is appropriate (for example, a) variable versus fixed rates, and b) are interest rate swap agreements allowable and under what circumstances?)

  - Do these policies address protection of credit quality?

  - Do these policies address debt capacity?

  - Do these policies address costs/benefits of risk examinations for proposed debt?

  - Do these policies address who is on the agency's financing team and how consultants like bond counsel, financial advisors, trustees, assessment engineers and underwriters are selected? Are the selection criteria being followed?

  - Do these policies address disclosure to and relations with debt rating agencies?

  - Do these policies address who is responsible for conformance with bond covenants (obligations the agency agrees to as part of bond financing) on an ongoing basis?

- Does the agency have a debt advisory committee? If so, does the membership of the committee include representatives from the local community?

Purchasing and Contracting Practices

Procurement policies and practices enable an agency to promote maximum value and economy for the agency's constituents through fair and competitive processes. The goal underlying such policies is to select vendors and service providers using processes in ways that minimize opportunities for favoritism and that provide for competitive pricing. For service providers, the task also involves assessing whether the provider's skills best meet the agency's needs.

Purchasing presents a number of ethical and legal hazards for local officials, despite what can be a relatively small impact on overall agency spending. This is because missteps can undermine the public's overall confidence in the agency's financial practices. For more information, see www.ca-ilg.org/post/fair-procurement.

For public works projects, state law generally defines when local agencies must use competitive bidding.[32]

Questions to Ask

- What steps does the agency use to have a fair, open and competitive purchasing process?
- Does the agency's purchasing process explain the respective roles of staff and elected officials in that process?
- Have employees involved in the purchasing process received training or informational materials on the importance of both the appearance and substance of fairness in the procurement process?
- Are the purchasing rules straightforward enough so that everyone who has a part in implementing them understands the underlying goals and key rules? One element of clarity can be having separate policies depending on the nature of the purchase (for example, one for goods, one for services and another for public works projects).
- If the agency has a decentralized purchasing system (in other words, if purchase are made separately by different departments), does the agency have clear organization-wide standards and guidelines?
- Does the agency take advantage of cooperative purchasing opportunities with other public agencies?
- Does the agency have policies in place to comply with applicable prevailing wage requirements? These are especially common for vehicles and other big-ticket items.
- Would increased reliance on "just-in-time" deliveries that eliminate large inventories and warehouse systems be useful for the agency?

- Does the agency have policies in place for the proper disposal of surplus property? How has staff been made aware of such policies?

- Is the agency alert to and actively monitor contract terms for cost escalators and automatic renewals that can cause increases that can cause the agency to lose control of costs?

- Are staff responsible for purchasing decisions required to file annual disclosure statements relating to economic interests and gift receipt (known as "Form 700s")?

Limits on Agency Expenses/ Proper Uses of Public Resources

Invariably, there are more worthy uses for public funds than there are funds available. Deciding how limited public resources will be allocated is a key responsibility of elected officials, although it is important to acknowledge that decision-makers may have less discretion than one might expect in deciding how public monies are spent.

That being said, the law imposes some basic restrictions on how public resources may be used. For example, any use of public resources must serve the needs of the agency's constituents. California's Constitution expresses this principle by prohibiting "gifts" of public funds by the Legislature, general law cities, and agencies created by state statute;[33] some city charters also contain this restriction. Agency counsel can provide guidance on the issue of what constitutes an impermissible gift of public funds. An example, however, is a payment to another public agency for their purposes, with no benefit flowing back to the donor agency's constituents.[34]

Along similar lines, personal or political uses of public resources also are not allowed.[35] This prohibition applies to not only public money, but also to anything paid for with public money (for example, agency equipment, supplies and staff time). An example of how this prohibition applies is that public resources may not be used for advocacy efforts on ballot measures. (For more information, see www.ca-ilg.org/BallotMeasureLegalIssues). Elected officials should ask how staff and newly elected officials are made aware of these restrictions.

Finally, local agencies must adopt expense reimbursement policies for elected and appointed officials.[36] Agency counsel should review the policy for compliance with state law. Most agencies have adopted expense reimbursement policies for staff as a matter of sound practice.

Brief Glossary of Financial Management Terms

Note: The following glossary is designed to help non-finance experts understand some of the terminology used in public agency financial management. Public agency financial management frequently involves terms that are unfamiliar to non-experts, the definitions of which also involve other unfamiliar terms. The definitions and explanations offered below sometimes sacrifice technical accuracy in order to promote a general understanding of what a term means.

The Institute for Local Government encourages those that wish absolute technical accuracy to consult additional sources.

Accounting Standards	Generally accepted accounting principles (sometimes referred to by the acronym GAAP) published by the Governmental Accounting Standards Board (sometimes referred to by the acronym GASB) that guide local and state agencies' recording and reporting of financial information. The standards establish such guidelines as when transactions are recognized and annual financial report content.
Accrual Basis Accounting	An accounting method in which revenues (or income) are entered into the accounting system when they are payable (even though the money may not have been received yet), and expenses are recognized when the commitment to pay is made (even though no payment may have occurred yet). *Compare with Cash Basis Accounting.*
Bond	An interest-bearing promise to repay a specified sum of money borrowed (known as the principal amount) by a specified date. *See also "General Obligation Bonds."*
CalTRUST	A joint powers authority created by public agencies to provide a safe and convenient method for public agencies to pool their assets for investment purposes.
Capital Budget	A spending plan for improvements to or acquisition of land, facilities, and infrastructure. The capital budget balances revenues and expenditures, specifies the sources of revenues, and lists each project or acquisition.
Capital Improvement Program (CIP)	The section in the agency's budget for capital improvement projects, such as street or park improvements, building construction, and various kinds of major facility maintenance.

Capital Outlay	Spending that results in the acquisition of or addition to the agency's land, buildings, equipment, machinery, vehicles, and the like to provide services to the community (sometimes these are referred to as "fixed assets"). .
Cash Basis Accounting	An accounting method in which revenues are entered into the agency's accounting system when the cash is received and spending is entered into the system when the agency makes a payment. To comply with generally accepted accounting principles, local agencies must use accrual basis accounting, rather than cash basis. *Compare with "Accrual Basis of Accounting."*
Construction / Development Tax	A tax imposed on development and/or the availability or use of public agency services. *See also "Development Impact Fees."*
Contingency	In budgets, an amount that is set aside to meet unforeseen circumstances.
Debt Financing	Issuing bonds and other kinds of debt instruments to finance agency activities in service to the public.
Debt Service	Annual principal and interest payments an agency owes on money that it has borrowed.
Debt Service Funds	One or more funds in an agency accounting system established to track payments made to repay principal and interest on debt.
Development Impact Fees	Amounts charged in connection with land development to pay for facilities or services that will be needed to serve the new development that are tied to the proportionate costs of providing those facilities or services to that development.
Enterprise Fund	A separate fund used to account for services supported primarily by service charges. An example would be a solid waste fund supported by charges solid waste service receivers pay.
Entitlement Program	A benefit program in which funding is allocated according to eligibility criteria. All persons or agencies must meet the criteria specified by federal or state laws in order to receive the benefit.
Estimated Revenue	The amount of revenue the agency expects receive during a fiscal year.

Expenditure	An amount paid for goods and services associated with the provision of public services, including payments for debt retirement and capital outlays.
Fee	A charge for the cost of providing a particular service. Public agency fees may not exceed the estimated reasonable cost of providing the particular service or facility for which the fee is charged, plus overhead.
Fines, Forfeitures and Penalties	Revenues received and/or bail monies forfeited upon when an individual is convicted of a misdemeanor or municipal infraction.
Full Faith and Credit	When a local agency uses debt financing, more specifically general obligation bonds, it makes a pledge to bondholders the agency will use all available funds to meet the agency's obligation to repay bondholders.
Full-Time Equivalent (FTE)/Staff Year	The number of hours per year that a full-time employee is expected to work. If there are two workers, each of whom works half that number of hours per year, the two workers together equal one full-time equivalent or one staff year.
Fund	A self-balancing set of accounts. For agencies with more complex budgets, accounting information is organized into funds, each with separate revenues, expenditures, and fund balances.
Fund Balance	Difference between the assets (revenues and other resources) and liabilities (amounts spent or committed to) of a particular fund.
General Fund	Fund used to account for all financial resources except those accounted for in another fund (for example, enterprise or grant funds). Usually, the general fund is the largest fund in a local agency.
General Obligation (G.O.) Bonds	A form of debt in which the agency pledges its "full faith and credit" to collect enough money each year to repay the amount borrowed plus interest.
General Tax	A tax imposed for general governmental purposes, the proceeds of which are deposited into the general fund. An agency must comply with certain procedural requirements to impose, increase or extend a general tax, including securing approval of the tax by majority vote of the electorate. *See also "special tax."*

Generally Accepted Accounting Principles (GAAP)	Uniform minimum standards used by state and local agencies for financial recording and reporting which have been established by the Governmental Accounting Standards Board (sometimes referred to by the acronym GASB).
Governmental Accounting Standards Board (GASB) –	The body that sets accounting standards for governmental entities at the state and local levels.
Grant	A payment of money from one entity to another for a specified purpose, activity or facility. Generally, grants do not have to be repaid by the recipient, as long as the recipient uses the funds for the promised purposes, activities or facilities.
Intergovernmental Revenue	Revenues from other public agencies in the form of grants, entitlements, shared revenues or payments in lieu of taxes.
Investment Earnings	Revenue earned from the investment of public funds.
Licenses and Permits	These represent the agency's permission to engage in certain kinds of activities. Local agencies often charge fees designed to reimburse local agency for costs of regulating activities being licensed, such as licensing of animals, bicycles, etc.
Lien	A claim on assets, especially property, for the payment of taxes or utility service charges.
Liquidity	The ability to convert a security into cash promptly with minimum risk of principal.
Local Agency Investment Fund (LAIF)	A special investment fund in the state treasury into which local agencies may deposit money for investment.
Maintenance of Effort (MOE)	A requirement often imposed as a condition of receiving certain kinds of funding, that the agency maintains a certain level of spending. The goal of such requirement is to have the funding being provided increase the level of spending on the program (and conversely, avoid having the extra funding be used to replace existing spending).
Mandate	A state of federal requirement that local agencies perform a task in a particular way or perform a task to meet a particular standard, often without providing the revenues to do so.

One-Time Expenditures	A term used to differentiate routine, ongoing costs within a given budget from non-recurring costs that will not be repeated in future years. A capital expenditure can be a one-time expenditure (although an agency may need to evaluate whether the agency will incur maintenance or replacement costs. This category may also include single-year appropriations for special purposes.
Other Post Employment Benefits (OPEB)	A pension is a form of "post-employment benefit," that is, a benefit an employee receives after their service to the agency ends. *Other* forms of such benefits can include health insurance and other health-related benefits provided to former employees.
Performance Measures	Indicators used in the budget to show items such as 1) the amount of work accomplished, 2) the efficiency with which tasks were completed, and 3) the effectiveness of a program. Such indicators can help the public understand what public agency spending accomplishes.
Portfolio	The collection of investments held by a local agency.
Prevailing Wage	The basic hourly rate paid on public works projects to a majority of workers engaged in a particular craft, classification or type of work within the locality and in the nearest labor market area (if a majority of such workers are paid at a single rate). Prevailing wage laws require all bidders to use the same wage rates when bidding on a public works project.
Principal	The original amount of a bond or debt (sometimes also referred to as "face" or "par value"), not including accrued interest.
Program Revenues	Income generated by programs and/or dedicated to offset the program's costs.
Rating	Letters and numbers used by rating agencies to express their assessment of the likelihood of a bond or debt being repaid.
Rating Agencies	Firms that evaluate the likelihood bonds or debts will be repaid by assigning ratings to those bonds or debts. A bond rating is often the single most important factor affecting the interest cost on bonds. There are three major rating agencies for municipal bonds: Moody's Investors Service, Standard & Poor's, and Fitch Ratings.

Realignment	Actions taken by the State of California in 1991 and 2011 to restructure the state-county fiscal relationship by making certain health, social service, criminal justice, and mental health service programs county responsibilities, and providing some funding to help pay for the new responsibilities.
Rents	Revenues received through the rental of public properties to private parties such as convention space and library facilities.
Reserve	Amounts set aside to provide a funding source for extraordinary or unforeseen expenses or revenue shortfalls. Sometimes also referred to as "fund balance(s)" to reflect multiple agency funds. *See also* definition of "fund."
Revenue	Income received by the local agency. For more information on **sources** of county and city revenues, see Institute for Local Government, *Understanding the Basics of County and City Revenues* (2008), available at www.ca-ilg.org/revenueguide.
Revenue Bonds	A form of debt in which the agency pledges the income received from the operation of the facilities being financed with the debt to repay the amounts borrowed plus interest.
Salaries and Benefits	Salaries includes the compensation paid to full-time, part-time, temporary, and extra-help employees, including overtime, vacation pay, sick leave pay and any type of premium pay. Benefits include the agency's share of the costs for health, dental, life insurance, retirement, Social Security and Workers' Compensation.
Sales Tax	A tax imposed on the total retail price of merchandise sold by a retailer.
Secured Roll	A list containing all assessed property secured by land subject to local taxation
Securities	Pieces of paper (sometimes referred to as "instruments") that represent financial value. Examples include bonds and stocks.
Service Charges	Amounts charged to cover the cost of providing services to individuals or companies.

Short-Term Financing Methods	Techniques used for many purposes, such as meeting anticipated cash flow deficits, interim financing of a project, and project implementation. Using these techniques involves issuance of short-term notes.
Special Revenue Fund	Funds used to account for proceeds from specific revenue sources that are legally restricted as to how the revenues may be spent. A special revenue fund must have a separate budget adopted annually.
Tax and Revenue Anticipation Notes (TRANS)	A short term loan that local agencies use to even out cash flow during the year. The loans take the form of a debt ("note") that is secured by anticipated tax and other revenue collections.
Tax Base	The objects or transactions to which a tax is applied (for example parcels of property, retail sales, etc.). State law or local ordinances define the tax base and the objects or transactions exempted from taxation.
Tax Rate	The amount of tax applied to the tax base. The rate may flat, incremental or a percentage of the tax base, or any other reasonable method.
Total Appropriations and Total Revenues	The consolidation of all revenues and expenditures for all funds. The purpose is to report accurately the full amount of governmental revenues and expenditures for the budget period
Use Tax	A tax imposed on the use or storage of tangible personal property when sales tax is not paid. *See also "sales tax."*
User Fee	Fees charged for the use of a public service or program. An example is fees charged to participants in recreation programs. User fees for property-related services are referred to as property-related fees.
Utility Rate	A category of user fee paid by the user of utility services.
Utility Users Tax	Tax imposed on the consumer (residential and/or commercial) of any combination of electric, gas, cable television, water, and telephone services.
Vehicle License Fee (VLF)	Annual registration fee imposed on vehicles.

Williamson Act and Open Space Subvention	Officially known as the California Land Conservation Act of 1965, a law that allows local agencies to enter into contracts with private landowners to restrict specific parcels of land to agricultural or related open space use. In return, landowners receive property tax assessments which are much lower than normal because they are based upon farming and open space uses as opposed to full market value. The program contemplates local agencies receive an annual subvention of forgone property tax revenues from the state.
Yield	The total amount of revenue an agency expects to receive from a tax, determined by multiplying the tax rate by the tax base. Also, the annual rate of return on an investment, expressed as a percentage of the investment.

Endnotes

[1] The California Society of Municipal Finance Officials Code of Ethics can be found at: http://www.csmfo.org/index.cfm?fuseaction=Detail&CID=4&NavID=154 .

[2] The California Municipal Treasurers Association Code of Ethics can be found at: http://www.cmta.org/?page=4 .

[3] GFOA Recommendations: Adoption of Financial Policies, with cross references to National Advisory Council on State and Local Budgeting (NACSLB), http://www.gfoa.org/downloads/budgetAdoptionofFinancialPolicies.pdf.

[4] *See* GFOA website with long-term financial planning resources: http://www.gfoa.org/index.php?option=com_content&task=view&id=360&Itemid=186.

[5] GFOA Recommendations: Adoption of Financial Policies, with cross references to National Advisory Council on State and Local Budgeting (NACSLB), http://www.gfoa.org/downloads/budgetAdoptionofFinancialPolicies.pdf.

[6] GFOA Recommendations: Adoption of Financial Policies, with cross references to National Advisory Council on State and Local Budgeting (NACSLB), http://www.gfoa.org/downloads/budgetAdoptionofFinancialPolicies.pdf.

[7] *See, for example,* Cal. Gov't Code § 66016.

[8] GFOA Recommendations: Adoption of Financial Policies, with cross references to National Advisory Council on State and Local Budgeting (NACSLB), http://www.gfoa.org/downloads/budgetAdoptionofFinancialPolicies.pdf.

[9] *See* Cal. Gov't Code § 53232.2(b) ("If a local agency reimburses members of a legislative body for actual and necessary expenses incurred in the performance of official duties, then the governing body shall adopt a written policy, in a public meeting, specifying the types of occurrences that qualify a member of the legislative body to receive reimbursement of expenses relating to travel, meals, lodging, and other actual and necessary expenses."). *See also* http://www.leginfo.ca.gov/calaw.html for additional information on what such policies must include.

[10] *See* GFOA Best Practices: Purchasing Cards, http://www.gfoa.org/downloads/PurchasingCardFINAL.pdf for suggested practices for preventing and detecting abuse.

[11] *See* Best Practices for Treasury Management, Government Finance Review (April 2000), available at http://www.gfoa.org/downloads/CASHTreasuryapr00.pdf. The California Municipal Treasurers' Association offers sample investment policies at http://www.cmta.org/?page=39.

[12] Back to Basics: Making the Case for Investment Policies, *Government Finance Review* (August 2002) available at http://www.gfoa.org/downloads/CASHInvestPol0802.pdf.

[13] *See* Cal. Gov't Code §53600 and following (note that an agency is not required to authorize the full range of all investments allowed by state law). *See also* http://www.leginfo.ca.gov/calaw.html for specific statutory language.

[14] GFOA Recommended Best Practice: Using Websites to Improve Access to Budget Documents and Financial Reports (2003), http://www.gfoa.org/downloads/caafr-budgets-to-websites.pdf . *See also* http://www.gfoa.org/downloads/websitepresentation.pdf.

[15] *See* Cal. Const. art. XIIIB (added by Proposition 4 on the 1979 ballot and sometimes referred to as the "Gann Limit" after the ballot measure's leading proponent). *See also* Cal. Gov't Code § 7900 and following.

[16] Cal. Const. art. XIIIB, § 4.

[17] *See* GFOA Recommended Best Practice: Managing the Salary and Wage Budgeting Process (2010), http://www.gfoa.org/downloads/GFOA_ManagingtheSalaryandWageBudgetingProcessBP.pdf.

[18] *See, e.g.*, League of California Cities City Manager Compensation Guidelines, available at http://www.cacities.org/UploadedFiles/LeagueInternet/91/911307cc-e899-43cb-ba97-7d28bf20640c.pdf

[19] GFOA Recommended Best Practice: Using Websites to Improve Access to Budget Documents and Financial Reports (2003), http://www.gfoa.org/downloads/caafr-budgets-to-websites.pdf . *See also* http://www.gfoa.org/downloads/websitepresentation.pdf.

[20] *See* Single Audit Act Amendments of 1996, OMB Circular A-133, the OMB Circular Compliance Supplement and Government Auditing Standards, http://www.whitehouse.gov/omb/financial_fin_single_audit.

[21] GFOA Recommendation: Audit Committees (2008), http://www.gfoa.org/downloads/caafrAudit_Committee_revised.pdf.

[22] Available at http://www.gfoa.org/downloads/GENERALPURPOSECHECKLIST.pdf.

[23] *See* Cal. Gov't Code § 53607.

[24] *See* Cal. Gov't Code § 53646(a).

[25] *See* Cal. Gov't Code §§ 53607, 53646(b).

[26] *See* Cal. Gov't Code § 53630 and following.

[27] GFOA Recommendation: Understanding Your Continuing Disclosure Obligations for Debt (2010), http://www.gfoa.org/downloads/GFOA_understandingcontinuingdisclosureBP.pdf.

[28] Cal. Const. art. XVI, § 18(a) ("No county, city, town, township, board of education, or school district, shall incur any indebtedness or liability in any manner or for any purpose exceeding in any year the income and revenue provided for such year, without the assent of two-thirds of the voters of the public entity voting at an election to be held for that purpose, except that with respect to any such public entity which is authorized to incur indebtedness for public school purposes, any proposition for the incurrence of indebtedness in the form of general obligation bonds for the purpose of repairing, reconstructing or replacing public school buildings determined, in the manner prescribed by law, to be structurally unsafe for school use, shall be adopted upon the approval of a majority of the voters of the public entity voting on the proposition at such election; nor unless before or at the time of incurring such indebtedness provision shall be made for the collection of an annual tax sufficient to pay the interest on such indebtedness as it falls due, and to provide for a sinking fund for the payment of the principal thereof, on or before maturity, which shall not exceed forty years from the time of contracting the indebtedness.") Note that subdivision (b) goes on to provide for additional details relating to school debt.

[29] *See Rider v. City of San Diego*, 18 Cal.4th 1035, 1045 (1998).

[30] *See, for example, California Housing Finance Agency v. Elliott*, 17 Cal. 3d 575, 587 (1976).

[31] *See generally*, GFOA Recommendation: Debt Management Policy (1995 and 2003), http://www.gfoa.org/downloads/debt-management-policy.pdf .

[32] For county projects, the threshold for complying with state law relating to public work contracts and bidding procedures is based on population: counties with populations of 500,000 or more ($6,500); counties with populations of 2 million or more ($50,000); and all other counties ($4,000). *See* Cal. Pub. Cont. Code §§ 20120-20123. *See also* Cal. Pub. Cont. Code § 20390- 20409 (relating to work on county roads). For general law cities, public works projects worth more than $5,000 are subject to the state's competitive bidding requirements. Cal. Pub Cont. Code §§ 20160-20162. The state's Public Contract Code also has various competitive bidding requirements for special districts based on the kind of district. See Cal. Pub. Cont. Code §§ 20190-20381.

Note that it is a misdemeanor to split projects to avoid competitive bidding requirements. *See, e.g.*, Cal. Pub. Cont. Code §§ 20123.5, 20163.

[33] Cal. Const. art. XVI, § 6.

[34] *See, for example, Golden Gate Bridge & Highway Dist. v. Luehring*, 4 Cal. App. 3d 204 (1970).

[35] *See* Cal. Gov't Code § 8314; Cal. Penal Code § 424. *See also* Cal. Gov't Code § 54964.

[36] *See* Cal. Gov't Code § 53232.2(b) ("If a local agency reimburses members of a legislative body for actual and necessary expenses incurred in the performance of official duties, then the governing body shall adopt a written policy, in a public meeting, specifying the types of occurrences that qualify a member of the legislative body to receive reimbursement of expenses relating to travel, meals, lodging, and other actual and necessary expenses."). *See also* http://www.leginfo.ca.gov/calaw.html for additional information on what such policies must include.

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The Institute for Local Government promotes good government at the local level with practical, impartial and easy-to-use resources for California communities.

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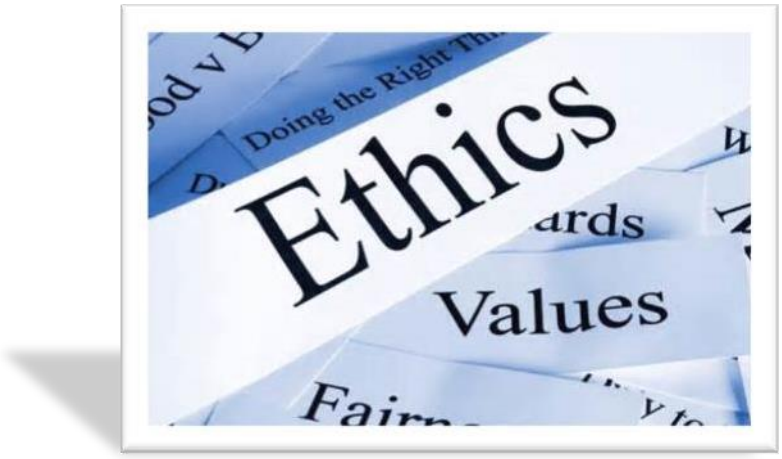
TAB 6

CONFLICTS OF INTEREST



ALESHIRE & WYNDER LLP
ATTORNEYS AT LAW

***The Political Reform Act and underlying FPPC regulations are complex, and each situation is unique and requires individualized analysis. This memorandum is meant as an overview of the regulations to help public officials identify potential financial conflicts of interests. This paper only provides a summary and is not meant to provide legal advice. Specific questions should be directed to your General Counsel or your personal attorney for a determination of the materiality of a potential conflict of interest well in advance of when a decision needs to be made.*

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CONFLICT OF INTEREST LAWS

I. INTRODUCTION

California has a number of laws that affect the role of a public official. For example, some laws require a public official to abstain from participating in certain decisions because of a financial interest that official may have in the outcome of that decision. Some laws prohibit a contract between public agencies and businesses in which a public official has an ownership interest. Also, some laws prohibit officials from holding more than one public office.

The purpose of this paper is to give you a broad overview of some of these laws to better prepare officials and future officials when they are confronted with situations that might pose such issues, which can generally be described as conflicts of interest. This paper does not attempt to provide any specific advice. If you believe that you might have a potential conflict of interest, you should immediately contact your General Counsel or private counsel to request an analysis of your specific situation. Also, the Fair Political Practices Commission ("FPPC") may give you guidance on such issues.

You should also be aware that the opinion of the General Counsel or your personal attorney that no conflict exists and that you may participate in a matter does not immunize you from action by the FPPC or your local district attorney if such agencies determine that a conflict exists.

In some instances – especially those dealing with potential conflicts of interest involving real property interests – a conflict analysis may require a factual as well as a legal analysis. The factual analysis could include an appraisal of property to determine if the proposed decision would have a material impact on your property and would thus preclude you from participating or voting on that decision. The factual analysis could also involve an investigation of the business entity in which you may have an interest and the effect of the decision on that entity.

The detailed analysis necessary in many cases cannot be provided if you disclose a potential conflict immediately before or during a meeting. In such cases you will most likely be advised not to participate until a proper analysis can be completed. The FPPC can provide written advice regarding conflicts of interest which, if followed, will provide immunity from prosecution.[1] However, this process typically takes a significant time to complete.

Therefore, it is essential that if you believe you might have a conflict and desire advice, you should advise your General Counsel or private counsel as soon as possible in advance of the time a matter will be considered so that an appropriate investigation and legal analysis can be made.

[1] The FPPC also operates a telephone advice line (1-866-ASK-FPPC or 866-275-3772). While the advice given by FPPC advisors through this service cannot immunize an official from prosecution, the general guidance provided may be useful in assessing potential conflicts of interest. The FPPC also maintains a helpful Website at www.fppc.ca.gov.

In addition, do not assume that the General Counsel's office is familiar with all of the specific facts of your personal financial situation, including all of your investments and those of your immediate family, or your relationships with individuals who may be connected with the project or matter that is being considered. You must disclose all of this information to your counsel at the earliest possible time prior to consideration of the item so that proper advice can be provided for your specific situation.

Conflicts of interest are analyzed under two distinct sets of statutory regulations. The first is contained in the Political Reform Act of 1974 (Government Code Section 87100 and following) referred to herein as the "PRA" or the "Act", which regulates all of the official actions of a public official. The second set of statutes is Government Code Sections 1090-1097, which regulates public officials whenever they negotiate or make contracts on behalf of the District.

II. THE POLITICAL REFORM ACT

The Political Reform Act addresses conflicts of interest through the disclosure of potential conflicts of interest and the prohibition of participation in the making of decisions which are actual conflicts of interest. In addition to the provisions of the PRA found in the Government Code, the FPPC has adopted detailed regulations implementing the PRA that are set forth in Title 2 of the California Code of Regulations at Sections 18700 and following (the "FPPC Regs.").[2]

The California Attorney General, the FPPC, and the local district attorneys are empowered to enforce the PRA through civil liability and civil penalties as well as criminal sanctions.[3] Although the penalties for violations of various provisions of the Act vary, civil penalties are generally based upon the amount of money or value of a gift or contribution not reported, and can be as high as $10,000 or three times the amount not reported, whichever is greater.[4] Generally, criminal violations of the Act are prosecuted as misdemeanors. If convicted, an elected official is generally barred from running for office or acting as a lobbyist for a period of four years.[5]

Because good faith may sometimes be relevant in determining criminal and civil liability, it is particularly important to seek advice whenever a potential problem appears.[6]

[2] References to FPPC Regulations will be indicated by the following: "FPPC Regs. § __"; all other references are to the Government Code unless otherwise noted.
[3] Sections 91000 and 91001.
[4] Section 91000.
[5] Sections 91000 and 91002.
[6] Section 91001(c).

A. DISQUALIFICATION

1. General Rule

The Political Reform Act provides that:

"No public official at any level of state or local government shall make, participate in making or in any way attempt to use his official position to influence a governmental decision in which he knows or has reason to know he has a financial interest."[7]

A public official has a financial interest in a decision if it is reasonably foreseeable that the decision will have a material financial effect distinguishable from its effect on the public generally on the official, a member of his or her immediate family, or on any economic interest.[8]

2. Analysis

The Act prohibits any public official from making, participating in making, or in any way attempting to use his or her official position to influence a governmental decision in which he or she knows or has reason to know he or she has a financial interest.[9] The FPPC has adopted extensive regulations to assist with determining whether a public official has a conflict of interest under the Act. Those regulations were amended in 2015 to change the previous 8-step review process to a four-part test. The four steps used now (FPPC Regs. §18700(d)) by the FPPC are:

1. Is it reasonably foreseeable that the governmental decision will have a financial effect on any of the public official's financial interests?

2. Will the reasonably foreseeable financial effect be material?

3. Can the public official demonstrate that the material financial effect on the public official's financial interest is indistinguishable from its effect on the public generally?

4. Is the public official making, participating in making, or in any way attempting to use his or her official position to influence a governmental decision?

A conflicts analysis under the regulations answers each of those questions in turn, before proceeding to the next step. For example, if it is not reasonably foreseeable the governmental decision will have a financial effect on a public official's financial interest, then there is no need to proceed to Step Two of the analysis.

Each of those steps is discussed in more detail, but the FPPC regulations provide certain definitions that are required to effectively engage in the four-step analysis. The FPPC regulations "apply only to public officials and only to governmental decisions that have a

[7] Section 87100.
[8] Section 87103.
[9] Section 87100.

financial effect."[10] "Public official" is defined broadly to include "every member, officer, employee, or consultant of a state or local government agency," (with a few exception.)[11] "Governmental decision" is defined as "any action taken by a government agency that has a financial effect on any person other than the governmental agency."[12] Finally, "financial effect" is defined as "an effect that provides a benefit of monetary value or provides, prevents, or avoids a detriment of monetary value."[13]

i. Step One: Is it reasonably foreseeable that the governmental decision will have a financial effect on any of the public official's financial interests?

Categories of "financial interests" (these include financial interests of any member of his or her immediate family) are: (1) a business entity with a direct or indirect investment worth at least $2,000, or a business entity in which the public official is a director, officer, partner, trustee, employee or holds any position of management; (2) real property with a direct or indirect interest of at least $2,000; (3) a source of income amounting to at least $500 within 12 months before a decision is made; (4) a source of gifts amounting to at least $470 within 12 months before a decision is made ($500 for 2019-2020); and (5) the public official's personal finances (including immediate family) including expenses, income, assets, or liabilities.[14]

The clearest way for this step to be met is if the financial interest is the subject of a governmental decision that is before the official or the official's agency.[15] In that case it is clearly reasonably foreseeable that the decision could have a financial effect on the financial interest.

Examples of a financial interest being the subject of a proceeding include the issuance, renewal, approval, denial, or revocation of any license, permit, or other entitlement to, or contract with, the financial interest, and includes any governmental decision affecting an interest in real property.[16] The analysis becomes more complicated if a financial interest is not explicitly involved in the decision.

A financial effect does not need to be likely to be considered reasonably foreseeable. Rather, it must only be a "realistic probability and more than hypothetical or theoretical."[17] The FPPC regulations include a non-exhaustive list of factors which should be considered in determining whether a financial effect is reasonably foreseeable:

(1) The extent to which the occurrence of the financial effect is contingent upon intervening events.

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[10] FPPC Regs. §18700(b).
[11] FPPC Regs. §18700(c)(1).
[12] FPPC Regs. §18700(c)(4).
[13] FPPC Regs. §18700(c)(5).
[14] Section 87100; FPPC Regs. §18700(c)(6)(A-F)
[15] FPPC Regs. §18701(a).
[16] Ibid.
[17] FPPC Regs. §18701(b)

(2) Whether the public official should anticipate a financial effect on his or her financial interest as a potential outcome under normal circumstances when using appropriate due diligence and care.

(3) Whether the public official has a financial interest that is of the type that would typically be affected by the terms of the governmental decision or whether the governmental decision is of the type that would be expected to have a financial effect on businesses and individuals similarly situated to those businesses and individuals in which the public official has a financial interest.

(4) Whether the financial effect of the governmental decision on the public official's financial interest might compromise an official's ability to act in the best interests of the public.

(5) Whether the governmental decision will provide or deny an opportunity, or create an advantage or disadvantage for one of the official's financial interests.

(6) Whether the public official has the type of financial interest that would cause a similarly-situated person to weigh the advantages and disadvantages of the governmental decision on their financial interest in formulating a position.[18]

If the answer to the Step One question is "No," then there is no disqualifying conflict of interest under the Act. If the answer is "Yes," then the analysis must proceed to Step Two.

ii. Step Two: Will the reasonably foreseeable financial effect be material?

Determining whether a reasonably foreseeable financial effect is material is the heart of a conflict of interest analysis under the PRA, and is also the most complicated step. The FPPC regulations have a different standard for determining whether a financial effect is "material" for each of the five specified types of financial interests. The five categories of financial interests are financial interests in: (1) a business entity; (2) real property; (3) a source of income; (4) a source of gifts; and (5) the public official's personal finances, or the personal finances of a member of his or her immediate family.[19] These materiality standards are detailed and complex, and this memorandum provides an overview of the various standards. If any of these financial interests are implicated in a decision, whether you believe it to be material or not, we recommend seeking advice from the General Counsel or your private counsel.

(a) *Financial Interest in a Business Entity*

A financial interest in a business entity is materially affected if the business entity is subject to proceedings by the official's agency. This includes when: (1) the business entity initiates the proceeding (by filing an application, claim, appeal, or other request for action concerning the entity with the official's agency) in which the governmental decision will be made; (2) bids on, or enters into, a contract with the agency, or is identified as a subcontractor on

[18] Ibid.

[19] FPPC Regs. §18702(a).

a bid or contract with the agency; (3) offers to sell products or services to the agency; (4) is the named or intended manufacturer or vendor of any products to be purchased by the agency with an aggregate cost of $1,000 or more in any 12-month period; (5) applies for a permit, license, grant, tax credit, exception, variance, or other entitlement from the agency; (6) is the subject of any inspection, action, or proceeding under the regulatory authority of the agency; or (7) is subject to an action taken by the agency that is directed at the entity.[20]

A financial interest in a business entity is materially affected if the governmental decision may result in an increase or decrease of the entity's annual gross revenues, or the value of the entity's assets or liabilities, in an amount equal to or more than: (1) $1,000,000; or (2) Five percent of the entity's annual gross revenues and the increase or decrease is at least $10,000.[21] A financial interest in a business entity is also materially affected if the governmental decision may cause the entity to incur or avoid additional expenses or to reduce or eliminate expenses in an amount equal to or more than: (1) $250,000; or (2) One percent of the entity's annual gross revenues and the change in expenses is at least $2,500.[22]

Concerning real property, a financial interest in a business entity is materially affected if the official knows or has reason to know that the business entity has an interest in real property and: (1) there is clear and convincing evidence the decision would have a substantial effect on the property; or (2) the property is a named party in, or the subject of, the decision under FPPC Regs. §§18701(a) and 18702.2(a)(1) through (6).[23]

(b) *Financial Interest in Real Property*

A financial interest in real property is materially affected when the relevant governmental decision: (1) involves the adoption of or amendment to a development plan or criteria affecting the property; (2) determines the real property's zoning or rezoning (other than a zoning decision applicable to all properties designated in that category), annexation or de-annexation, or inclusion or exclusion from a jurisdiction; (3) involves taxes, fees, or assessments that affect the real property; (4) authorizes the sale, purchase, or lease of the property; (5) involves the issuance, denial, or revocation of a land use entitlement; or (6) involves construction of, or improvements to, streets, water, sewer, storm drainage or similar facilities, and the parcel will receive new or improved services that provide a benefit or detriment disproportionate to other properties receiving the services.[24]

Concerning the ***location*** of real property, a financial interest in real property is materially affected when the relevant governmental decision: (1) involves property located **500 feet or less from** the property line of the parcel unless there is clear and convincing evidence that the decision will not have any measurable impact on the official's property; or (2) **involves property** located **more than 500 feet but less than 1,000 feet** from the property line of the parcel, and the decision would change the parcel's: (a) development potential; (b) income producing potential;

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[20] Ibid.; FPPC Regs. §18702.1(a).
[21] Ibid.
[22] Ibid.
[23] Ibid.
[24] FPPC Regs. §18702.2(a)

(c) highest and best use; (d) character by substantially altering traffic levels, intensity of use, parking, view, privacy, noise levels, or air quality; or (e) market value.[25]

The financial effect of a governmental decision on a parcel of real property in which an official has a financial interest involving property **1,000 feet or more** from the property line of the official's property is presumed not to be material. This presumption may be rebutted with clear and convincing evidence the governmental decision would have a substantial effect on the official's property.[26]

Concerning the ***leasing*** of real property, the reasonably foreseeable financial effects of a governmental decision on any real property in which a governmental official has a leasehold interest as the lessee of the property is material *only* if the governmental decision will: (1) change the termination date of the lease; (2) increase or decrease the potential rental value of the property; (3) change the official's actual or legally allowable use of the property; or (4) impact the official's use and enjoyment of the property.[27]

Exceptions from these regulations include: (1) a governmental decision solely concerning repairs, replacement, or maintenance of existing streets, water, sewer, storm drainage, or other improvements[28]; or (2) the adoption or amendment of a general plan that is not initiated by the public official, identifies only planning objectives or policies, and requires further implementing action by the public official's agency.[29]

(c) *Financial Interest in a Source of Income*

There are two main tests for a disqualifying financial interest in source of income, both applicable, being identifying the specific source and the "nexus test."

As for specific source[30] of income, the reasonably foreseeable financial effect of a governmental decision on an official's financial interest in a source of income is material if any of the following criteria are met: (1) the source is a **named party** in, or the subject of, the decision including a claimant, applicant, respondent, or contracting party; or (2) the source is an **individual** and: (a) The decision may affect the individual's income, investments, or other assets or liabilities (other than an interest in a business entity or real property) by $1,000 or more, or (b) The official knows or has reason to know that the individual has an interest in a business entity that will be financially affected under the materiality standards in FPPC Regs. §18702.1, or (c) The official knows or has reason to know that the individual has an interest in real property and: (i) The property is a named party in, or the subject of, the decision as defined in FPPC Regs. §§18701(a) and 18702.2(a)(1) through (6), or (ii) There is clear and convincing evidence the decision would have a substantial effect on the property; (3) the source is a **nonprofit organization** and one of the following applies: (a) The decision may result in an increase or

[25] FPPC Regs. §18702.2(a)
[26] FPPC Regs. §18702.2(b)
[27] FPPC Regs. § 18702.2(c)
[28] FPPC Regs. §18702.2(d)(1).
[29] FPPC Regs. §18702.2(d)(2).
[30] FPPC Regs. §18702.3(a)

decrease of the organization's annual gross receipts, or the value of the organization's assets or liabilities, in an amount equal to or more than: (i) $1,000,000, or (ii) Five percent of the organization's annual gross receipts and the increase or decrease is equal to or greater than $10,000, (b) The decision may cause the organization to incur or avoid additional expenses or to reduce or eliminate expenses in an amount equal to or more than: (i) $250,000, or (ii) One percent of the organization's annual gross receipts and the change in expenses is equal to or greater than $2,500, (c) The official knows or has reason to know that the organization has an interest in real property and: (i) The property is a named party in, or the subject of, the decision under FPPC Regs. §§18701(a) and 18702.2(a)(1) through (6), or (ii) There is clear and convincing evidence the decision would have a substantial effect on the property; (4) The source is a **business entity** that will be financially affected under the materiality standards in FPPC Regs. §18702.1.

The "nexus test"[31] is that any reasonably foreseeable financial effect on a source of income to a public official or the official's spouse is material if the decision will achieve, defeat, aid, or hinder a purpose or goal of the source and the official or the official's spouse receives or is promised the income for achieving the purpose or goal. There are some limited exception in FPPC Regs. §18702.3(c-d).

(d) *Financial Interest in a Source of Gift*

A public official has a financial interest in the sources of gifts he or she receives. This financial interest is materially affected when the source is a named party or otherwise identified as the subject of the governmental proceedings, is a member of the official's immediate family, is an individual that has an interest in a business entity or real property that will be affected under the regulations for those interests, is a nonprofit that will be financially affected under the materiality standards applied to a nonprofit source of income interest in FPPC Regs. §18702.3, or the source is a business entity that will be affected under the standards governing business entities.[32]

(e) *Financial Interest in a Personal Financial Effect*

A public official has a financial interest in the effects of a governmental decision on his or her personal finances, as well as the personal finances of his or her immediate family. As a general rule, this financial interest is materially affected if the decision may result in the official or the official's immediate family member receiving a financial benefit or loss of $500 or more in any 12-month period due to the decision.[33] FPPC Regs. §18702.5(b) has a few exceptions.

If the answer to Step Two is "No", and the financial effect is not material, then there is not a disqualifying conflict of interest under the Act. If the answer is "Yes," then the analysis must proceed to Step Three.

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[31] FPPC Regs. §18702.3(b)

[32] FPPC Regs. §18702.4.

[33] FPPC Regs. §18702.5.

iii. Step Three: Can the public official demonstrate that the material financial effect on the public official's financial interest is indistinguishable from its effect on the public generally?

A reasonably foreseeable material effect on a public official's financial interests does not create a conflict under the Act if the effect on the official's interest is indistinguishable from its effect on the public generally.[34] The effect is indistinguishable from the effect on the public generally if the official establishes that a significant segment of the public is affected, and the effect on his or her financial interest is not unique.[35]

"Significant segment of the public" is defined as at least 25 percent of all business or non-profit entities, real property, or individuals within the jurisdiction.[36] A unique effect on a public official's financial interest includes a disproportionate effect on: (1) the development potential or use of the official's real property or on the income producing potential of the official's real property or business entity; (2) an official's business entity or real property resulting from the proximity of a project that is the subject of a decision; (3) an official's interests in business entities or real properties resulting from the cumulative effect of the official's multiple interests in similar entities or properties that is substantially greater than the effect on a single interest; (4) an official's interest in a business entity or real property resulting from the official's substantially greater business volume or larger real property size when a decision affects all interests by the same or similar rate or percentage; (5) a person's income, investments, assets or liabilities, or real property if the person is a source of income or gifts to the official; and (6) an official's personal finances or those of his or her immediate family.[37]

There are also specific rules for certain circumstances, including public services and utilities, general use or licensing fees, limited neighborhood effects, rental properties, required representative interests, states of emergency, and governmental entities.[38]

If the answer to Step Three is "Yes," and the effect on the public official is indistinguishable from the effect on the general public, then there is no disqualifying conflict of interest under the Act. If the answer is "No," then the analysis must continue to Step Four.

iv. Step Four: Is the public official making, participating in making, or in any way attempting to use his or her official position to influence a governmental decision?

If the analysis has proceeded to this final step, and it is reasonably foreseeable that the governmental decision will have a material effect on a financial interest of the public official, then the official cannot make, participate in making, or attempt to use his or her position to influence the government decision.

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[34] FPPC Regs. §18703(a).
[35] Ibid.
[36] FPPC Regs. §18703(b).
[37] FPPC Regs. §18703(c).
[38] FPPC Regs. §18703(e).

A public official "makes" a governmental decision if the official authorizes or directs any action, votes, appoints a person, obligates or commits his or her agency to any course of action, or enters into any contractual agreement on behalf of his or her agency.[39]

A public official "participates in making" a governmental decision if the official provides information, an opinion, or a recommendation for the purpose of affecting the decision without significant intervening substantive review.[40]

An official can "influence" a governmental decision by contacting or appearing before any official in his or her own agency, or any other agency under the purview of the agency, for the purpose of affecting a governmental decision, or by purporting to make such contact or appearance on behalf of his or her own agency.[41]

There are exceptions to this step in the analysis for ministerial actions, appearances by the official as a member of the general public, actions by the official relating to his or her terms and conditions of employment, and comments made by the official to the general public or media.[42]

If the answer to Step Four is "Yes," then the public official has a disqualifying interest under the Act.

B. WHAT TO DO IF DISQUALIFICATION

1. Procedure

If a public official has a disqualifying interest, then he or she must, immediately prior to the consideration of the matter: (1) publicly identify the financial interest that gives rise to the conflict, (2) recuse himself or herself from discussing and/or voting on the matter, and (3) leave the room until after the discussion, vote, or other disposition of the matter.[43]

If an official leaves a meeting in advance of the agenda item in which the official is disqualified, the official must publicly identify the agenda item and the financial interest prior to leaving the meeting.[44]

An official first joining a meeting after the consideration of an agency item in which the official is disqualified must publicly identify the agenda item and the financial interest immediately upon joining the meeting.[45]

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[39] FPPC Regs. §18704(a).
[40] FPPC Regs. §18704(b).
[41] FPPC Regs. §18704(c).
[42] FPPC Regs. §18704(d).
[43] FPPC Regs. §18707.
[44] FPPC Regs. §18707(a)(2).
[45] Ibid.

2. Acting as Member of the General Public

The official may, however, make a public appearance before the body or board as a member of the general public, but only to represent himself or herself on matters related solely to the official's personal interests.[46]

3. "Legally Required" Exception

There is an exception to this general rule that allows a public official to participate if his or her participation is "legally required."[47] This exception is narrowly construed, and applies only if there is no alternative source of decision.[48] This exception may not be used simply to break a tie amongst non-conflicted members[49], and may not be used if a quorum of non-conflicted members may be convened.[50] The FPPC provides detailed procedures that must be followed for the "legally required" exception to apply, and we advise that you should seek counsel from your General Counsel before application of these procedures.

C. SPECIAL RULES FOR CAMPAIGN CONTRIBUTIONS

Elected officials who are appointed to other boards or commissions and all non-elected officials are prohibited from soliciting or accepting, directly or indirectly, contributions of more than $250 from any party, or his or her agent, while a proceeding involving a license, permit, or other entitlement for use is pending before the agency and for three months following the date a final decision is rendered in the proceeding if the officer knows or has reason to know that the party has a financial interest in the decision.[51]

D. DISCLOSURE STATEMENTS

1. Who Must File and When

Board members, candidates for the Board of Directors, the district manager, the general counsel, public officials who manage public investments and anyone else so required by the District's Conflict of Interest Code must file conflict of interest disclosure statements, known officially as a "Statement of Economic Interests."[52]

Elected officials and most appointed officials must file an "assuming office statement" within thirty (30) days after assuming office.[53] Thereafter, an annual Statement of Economic Interests must be filed no later than April 1 of each year. The time period covered by each annual statement is January 1 through December 31. If an office is assumed between October 1 and December 31, and an assuming office statement is filed, then the annual Statement of

[46] FPPC Regs. §18704(d)(2).
[47] FPPC Regs. §18705.
[48] FPPC Regs. §18705(a).
[49] FPPC Regs. §18705(c)(1).
[50] FPPC Regs. §18705(c)(2).
[51] Section 84308.
[52] Section 87200.
[53] Section 87202.

Economic Interests need not be filed until one year later than would otherwise be required.[54] Officials must file a final disclosure statement covering the period since the official's prior statement within 30 days after leaving office.[55]

The purpose of these filings is to alert public officials about their own economic interests and potential areas of conflict in relation to their duties. The filings also provide information to members of the public who may desire to monitor official actions for any conflicts.

2. What Must Be Disclosed

The FPPC provides all forms required for disclosing economic interests. These forms include detailed instructions on filling out the form and on the types of interests which must be disclosed. Generally the statements require two types of information:

i. Real Property and Investments

All statements must disclose direct and indirect interests in real property located in the District worth over $2,000, excepting the family residence.[56] If a property interest is worth more than $2,000, the filer must disclose the name, address and general description or nature of the investment or interest in the real property.[57]

ii. Income, Gifts and Honorarium

All sources of income aggregating at least $500 (or $50 or more of value if the income was a gift) must be disclosed on the annual and leaving office statements, regardless of whether the money was earned inside or outside the District.

All gift income exceeding $50 must be disclosed by amount and date of receipt.[58] If the gift is made from the donor through a middleman to the official, then the donor must disclose his identity to the official and the official must name both the donor and intermediary on his or her statement.[59]

Under Government Code Section 89501 and 89502, all officials subject to the disclosure requirements are prohibited from accepting any honorarium (e.g., the payment for speeches or attendance at public or private events) unless the income is for services which are customarily provided in connection with the practice of a bona fide business or profession.

NOTE: As with conflicts of interest, the rules and regulations relating to disclosure statements are governed by the Government Code and FPPC Regulations. This paper is only meant to provide basic information and the General Counsel or your personal

[54] FPPC Regs. Section 18723.
[55] Section 87204.
[56] Sections 87206 and 87103; FPPC Regs. Section 18730.
[57] Section 87206.
[58] Section 87207(4).
[59] Section 87210.

attorney should be consulted if you have any specific questions regarding such statements.

III. CONTRACTUAL CONFLICTS OF INTEREST (GOVERNMENT CODE SECTION 1090)

Government Code Section 1090 prohibits District officers and employees from having financial interests in contracts made by them or by any board or body of which they are members. The term "contract" is used very broadly, however, and applies to any agreement between the District and another party whether written or oral and whether formal or informal.[60] Although Section 1090 is otherwise much narrower than the PRA, it does cover some different interests than the PRA and, in any situation, a person must act in a manner that satisfies the requirements of both the PRA and Section 1090.

For example, if a member of an agency that authorizes a contract has a financial interest in the contract, the member may avoid a violation of the PRA by abstaining from participation in the decision, but such abstention will not avoid a violation of Section 1090 unless there is an authorized exception to the statute.

Section 1090 applies in two basic situations. First, if the financially interested District officer or District employee is a member of a board or other body that actually approves the contract (e.g., the Board of Directors), the potential conflict prohibits the District from entering into the proposed contract, regardless of whether or not the officer participates in or abstains from the actual decision. Second, if a staff member has a financial interest in a contract with the District, there is a conflict only if that staff member actually participates in the making of the contract. In either case, if such a contract is made, the District (or the other party to the contract) may void it.[61]

An exception to Section 1090, set forth in Section 1091, provides that "remote" interests in a contract do not create a conflict if the officer or employee (1) discloses his or her financial interest, (2) abstains from any participation in the making of the contract, and (3) the legislative body authorizes the contract in good faith by a sufficient vote without counting the vote of the party with a remote interest. Section 1091 is essentially a laundry list of what constitutes a "remote" interest and such list should be consulted on a case by case basis. Similarly, Section 1091.5 sets forth a number of additional situations where an officer or employee is "deemed" not to have a prohibited interest in a contract.

IV. AB 1234 TRAINING

[60] In 2002, Attorney General made a broad application of 1090. It found 1090 to apply where a staff member was negotiating a development agreement and the staff member's spouse was an independent contractor on retainer with the developer (doing community outreach) even though the spouse would not work on the particular project. See Attorney General Opinion No. 01-601 (March 6, 2002).

[61] Section 1092.

As a local elected official who will be compensated and reimbursed for your service, you are required to take two hours of training in ethics - better known as AB 1234 training (named after Assembly Bill 1234). AB 1234 training will cover general ethics principles relating to public service and ethics laws.

"Ethics laws" are defined as including:

> Laws relating to personal financial gain by public officials (including bribery and conflict of interest laws);
>
> Laws relating to office-holder perks, including gifts and travel restrictions, personal and political use of public resources and prohibitions against gifts of public funds;
>
> Governmental transparency laws, including financial disclosure requirements and open government laws (the Brown Act and Public records Act);
>
> Law relating to fair processes including fair contracting requirements, common law bias requirements and due process.
>
> AB 1234 mandates that you receive this training within one year of starting your service and then receive the training every two years after that.

Upon completion of your training, you will receive proof of participation. The Board office will keep your proof of participation on file as a public record subject to disclosure for at least five years.

V. CONCLUSION

The checklist on page three is very general in nature, but should provide a guideline for all public officials to use in determining the basic issues involved as to whether or not a disqualification is required under the Political Reform Act and/or FPPC regulations. Each item on the checklist, however, has numerous issues which need to be addressed in order to make a thorough analysis of any given fact situation.

We hope the above discussion provides a helpful guide to the general requirements of California's conflict of interest laws. It should again be stressed that this paper is not intended to answer any specific questions with regard to such laws.

Therefore, should any specific questions arise, or should you have any questions regarding any issues discussed in this paper, please do not hesitate to call your General Counsel or personal attorney.

TAB 7

The People's Business

A GUIDE TO THE CALIFORNIA PUBLIC RECORDS ACT

REVISED SEPTEMBER 2022

LEAGUE OF CALIFORNIA CITIES

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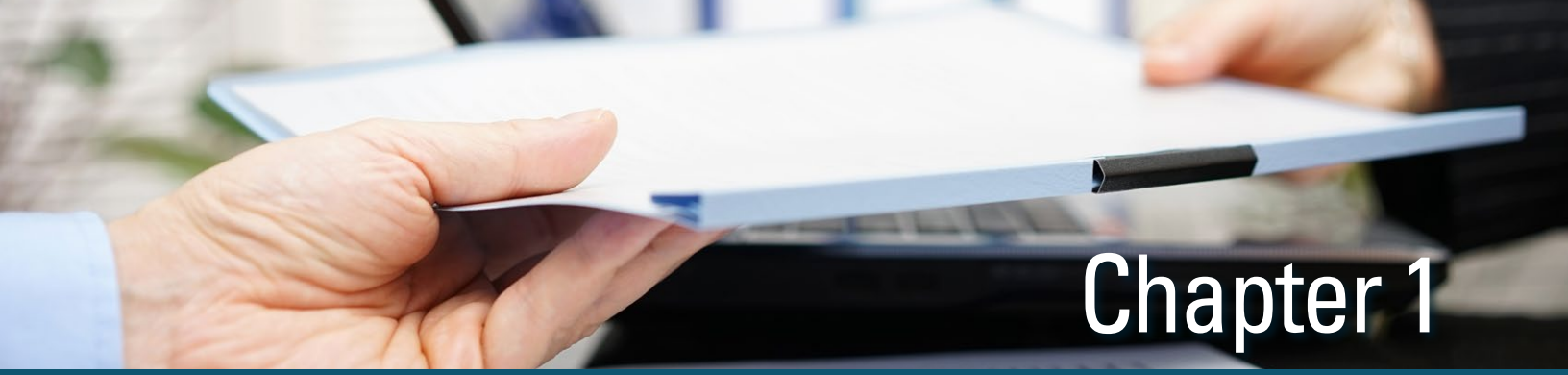

Chapter 1

Introduction and Overview

Origins of the Public Records Act

The California Public Records Act (the PRA) was enacted in 1968 to: (1) safeguard the accountability of government to the public; (2) promote maximum disclosure of the conduct of governmental operations; and (3) explicitly acknowledge the principle that secrecy is antithetical to a democratic system of "government of the people, by the people and for the people."[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.

2023 Revisions to the Public Records Act

In 2021, the legislature enacted the CPRA Recodification Act (AB 473). This Act, effective Jan. 1, 2023, renumbered and reorganized the PRA in a new Division 614 of the Government Code, beginning at section 7920.005. Nothing in AB 473 was "intended to substantially change the law relating to inspection of public records."[4] The changes were intended to be "entirely nonsubstantive in effect. Every provision of this division and every other provision of [AB 473], shall be interpreted consistent with the nonsubstantive intent of the act."[5]

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1 Gov. Code, § 7920.000 *et. seq.* (formerly 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, supra, 42 Cal.3d at p. 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, § 7920.100.

5 *Ibid.*

Case law interpreting the prior version of the PRA applies to new provisions that restate and continue the previously existing provisions.[6] AB 473 is "not intended to, and does not, reflect any assessment of any judicial decision interpreting any provision affected by [AB 473]."[7]

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."[8] The purpose is to give the public access to information that enables them to monitor the functioning of their government.[9] 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."[10]

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."[11] 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.[12]

Agency records policies and practices must satisfy both types of public records access — by permitting inspection and by providing copies of public records — 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.[13] 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.

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6 Gov. Code, § 7920.110, subd. (a).

7 Gov. Code, § 7920.110, subd. (c).

8 Gov. Code, § 7921.000 (formerly Gov. Code, § 6250).

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

10 *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.

11 Gov. Code, § 7922.525, subd. (a) (formerly Gov. Code, § 6253, subd. (a)).

12 Gov. Code, § 7922.530, subd. (a) (formerly Gov. Code, § 6253, subd. (b)).

13 *Ibid.*

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 numerous exemptions from disclosure.[14] Despite the Legislature's goal of accumulating all of the exemptions from disclosure in one place, there are also numerous laws outside the PRA that create exemptions from disclosure. The PRA lists other laws that exempt particular types of government records from disclosure.[15]

The exemptions from disclosure contained in the PRA and other laws reflect two recurring interests. Many exemptions are intended to protect privacy rights.[16] 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.[17]

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."[18] "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."[19]

Approximately half of the current exemptions from disclosure contained in the PRA appear intended primarily to protect privacy interests.[20] A significant number of the exemptions appear intended primarily to support effective

14 Gov. Code, § 7921.000 *et. seq.* (formerly Gov. Code, § 6250 *et seq.*). There are currently over 75 exemptions.

15 Gov. Code, § 7930.000 *et. seq.* (formerly Gov. Code, § 6275 *et seq.).*

16 See, e.g., "Personnel Records," p. 52.

17 See, e.g., "Attorney Client Communications and Attorney Work Product," p. 31.

18 Gov. Code, § 7920.000 (formerly Gov. Code, § 6250); Cal Const., art. I, § 3(b)(3).

19 *American Civil Liberties Union Foundation v. Deukmejian, supra,* 32 Cal.3d at p. 447.

20 See e.g., Gov. Code, §§ 7926.300 (formerly 6253.2); 7924.100-7924.110 (formerly 6253.5); 7924.005 (formerly 6253.6); 7927.700 (formerly 6254, subd. (c)); 7925.000 (formerly 6254, subd. (i)); 7927.100 (formerly 6254, subd. (j)); 7925.005 (formerly 6254, subd. (n)); 7924.505 (formerly 6254, subd. (o)), 7927.000 (formerly 6254, subd. (r)); 7923.800 (formerly 6254, subd. (u)(1)); 7923.805 (formerly 6254, subds. (u)(2)-(u)(3); 7925.010 (formerly 6254, subd. (x)); 7923.700 (formerly 6254, subd. (z)); 7926.100 (formerly 6254, subd. (ac)); 7929.400 (formerly 6254, subd. (ad)-(ad)(1)); 7929.415 (formerly 6254, subd. (ad)(4)); 7929.420 (formerly 6254, subd. (ad)(5)); 7929.425 (formerly 6254, subd. (ad)(6)); 7927.415 (formerly 6254.1, subd. (a)); 7927.405 (formerly 6254.1 (b)); 7929.600 (formerly 6254.1, subd. (c)); 7924.300-7924.335 (formerly 6254.2); 7928.300 (formerly 6254.3); 7924.000 (formerly 6254.4); 7927.005 (formerly 6254.10); 7924.500 (formerly 6254.11); 7929.610 (formerly 6254.13); 7927.605 (formerly 6254.15); 7927.410 (formerly 6254.16); 7923.755 (formerly 6254.17); 7926.400-7926.430 (formerly 6254.18); 7927.400 (formerly 6254.20); 7928.200-7928.230 (formerly 6254.21); 7922.200 (formerly 6254.29); 7927.105 (formerly 6267); 7928.005 & 7928.010 (formerly 6268).

governmental operation in the public's interest.[21] 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.[22] 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.[23]

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."[24] For the past five decades, courts have balanced those competing interests in deciding whether to order disclosure of records.[25] The courts have consistently construed exemptions from disclosure narrowly and agencies' disclosure obligations broadly.[26] 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.[27]

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.[28] 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.[29]

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21 The following exemptions contained in the PRA appear primarily intended to support effective government: Gov. Code, §§ 7927.500 (formerly 6254, subd. (a)); 7927.200 (formerly 6254, subd. (b)); 7929.000 (formerly 6254, subd. (d)); 7927.300 (formerly 6254, subd. (e)); 7929.605 (formerly 6254, subd. (g)); 7928.705 (formerly 6254, subd. (h)); 7928.000 (formerly 6254, subd. (l)); 7928.100 (formerly 6254, subd. (m)); 7928.405-7928-410 (formerly 6254, subd. (p)); 7926.220 (formerly 6254, subd. (q)); 7926.000 (formerly 6254, subd. (s)); 7926.210 (formerly 6254, subd. (t)); 7926.225, subds. (a)-(d) (formerly 6254, subds. (v)(1), (v)(1)(A), (v)(1)(B)); 7926.235 (formerly 6254, subd. (w)); 7926.230 (formerly 6254, subd. (y)); 7929.200 (formerly 6254, subd. (aa)); 7929.205 (formerly 6254, subd. (ab)); 7929.405-7929.410 (formerly 6254, subds. (ad)(2) & (ad)(3)); 7927.600 (formerly 6254.6); 7924.510 (formerly 6254.7); 7922.585 (formerly 6254.9); 7926.215 (formerly 6254.14); 7929.210 (formerly 6254.19); 7926.205 (formerly 6254.22); 7929.215 (formerly 6254.23); 7927.205 (formerly 6254.25); 7928.710 (formerly 6254.26); 7922.205 (formerly 6254.27); 7922.210 (formerly 6254.28).

22 Gov. Code, §§ 7923.600-7293.625, 7927.705 (formerly §§ 6254, subds. (f) and (k); Gov. Code, § 7922.000 (formerly Gov. Code, § 6255).

23 Gov. Code, § 7922.000 (formerly Gov. Code, § 6255); *Times Mirror Co. v. Superior Court, supra*, 53 Cal.3d at pp. 1339–1344.

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

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

26 *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 (1983)* 143 Cal.App.3d 762, 772–773.

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

28 Gov. Code, § 7921.005 (formerly Gov. Code, § 6253.3).

29 Gov. Code, § 7921.010 (formerly 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."[30] 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."[31] 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.[32]

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.[33] 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."[34] 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.[35] As amended, the Constitution also no longer requires the state to reimburse local governments for the cost of complying with

30 Cal. Const., art. I, § 3, subd. (b)(1).

31 Cal. Const., art. I, § 3, subd. (b)(2).

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

33 *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).

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

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

legislative mandates in the PRA, the Brown Act, and successor statutes and amendments.[36] 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."[37]

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.[38] Local agencies may choose to disclose public records even though they are exempt, although they cannot be required to do so.[39] 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."[40] 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 authorize a locality to enact an ordinance addressing records access that conflicts with the locality's governing charter.[41]

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.[42] 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.

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

37 Gov. Code, §§ 7922.680, 7922.700-7922.725 (formerly Gov. Code, §§ 6253.10, 6270.5).

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

39 See Gov. Code, § 7921.505 (formerly Gov. Code, § 6254.5) and "Waiver," p. 28, regarding the effect of disclosing exempt records.

40 Gov. Code, § 7922.505 (formerly Gov. Code, § 6253, subd. (e)).

41 *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.").

42 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).

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.[43] 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 subject to disclosure to any and all requesters.[44] Accordingly, the PRA ensures equal access to government information by preventing local agencies form 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 award of court costs and attorneys' fees to plaintiffs who successfully seek a court ruling ordering disclosure of withheld public records.[45] The attorney's fees policy enforcing records transparency is liberally applied.[46]

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.[47] 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.

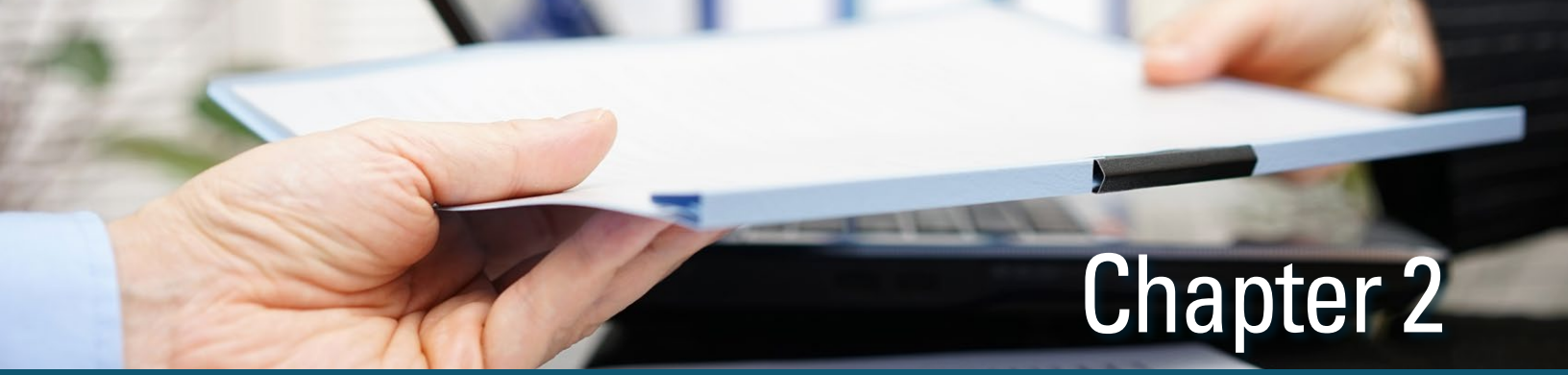
43 Gov. Code, §§ 7922.525, 7920.520, 7921.305 (formerly Gov. Code, §§ 6253, subd. (a); 6252, subd. (c); 6252.5); *Connell v. Superior Court* (1997) 56 Cal.App.4th 601, 610-612. See "Who Can Request Records," p. 17.

44 Gov. Code, § 7921.505 (formerly Gov. Code, § 6254.5). Section 7921.505 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. 28.

45 Gov. Code, § 7923.115, subds. (a)-(b) (formerly Gov. Code, § 6259, subd. (d)). See "Attorneys Fees and Costs," p. 61.

46 See "Attorneys Fees and Costs," p. 69.

47 *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).



Chapter 2

The Basics

The PRA "embodies a strong policy in favor of disclosure of public records."[48] As with any interpretation or construction of legislation, the courts will "first look at the words themselves, giving them their usual and ordinary meaning."[49] 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.[50] 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."[51] 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.[52]

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."[53]

48 *Lorig v. Medical Board of Cal.* (2000) 78 Cal.App.4th 462, 467; see "Fundamental Right of Access to Government Information," p. 6.

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

50 See "Exemptions from Disclosure — Protecting the Public's Fundamental Rights of Privacy and Need for Efficient and Effective Government," p.6.

51 Gov. Code, § 7920.530, subd. (a) (formerly Gov. Code, § 6252, subd. (e)).

52 *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.

53 Gov. Code, § 7920.545 (formerly 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."[54] The California Supreme Court relied on this definition to state that a public record has four aspects: "it is (1) a writing, (2) with content related to the conduct of the people's business, which is (3) prepared by, or (4) owned, used, or retained by any state or local agency."[55] Thus, 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. [56]

Information Relating to the Conduct of Public Business

Public records include "any writing containing information relating to the conduct of the public's business."[57] However, "[c]ommunications that are primarily personal containing no more than incidental mentions of agency business generally will not constitute public records."[58] 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.[59] 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.[60] 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.[61] Thus, where a local agency has a contractual right to control the subconsultants or their files, the records may be considered to be within their "constructive possession."[62] However, a mere contractual right to access documents held by a contractor is not sufficient to establish constructive possession when the agency does not have the authority to manage or control the documents.[63]

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54 Gov. Code, § 7920.530, subd. (a) (formerly 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.

55 *City of San Jose v. Superior Court* (2017) 2 Cal.5th 608, 617.

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

57 Gov. Code, § 7920.530, subd. (a) (formerly Gov. Code, § 6252, subd. (e)).

58 *City of San Jose v. Superior Court, supra,* 2 Cal.5th at p. 618-619.

59 Gov. Code, § 7920.530, subd. (a) (formerly 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.

60 Gov. Code, § 7920.530, subd. (a) (formerly Gov. Code, § 6252, subd. (e)).

61 *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.

62 *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.

63 See *Anderson-Barker v. Superior Court* (2019) 31 Cal.App.5th 528, 541 ("[M]ere access to privately held information is not sufficient to establish possession or control of that information.")

The PRA has also been held to apply to records possessed by *private individuals* who perform official functions for a public agency, but only to the extent that the documents are held by the individual for public functions or historically have been provided to the agency.[64]

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.[65]

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."[66] 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.[67]

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:[68]

- 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 the entire department.)[69]
- 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.[70]

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.[71]

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64 *Board of Pilot Comm'rs v. Superior Court* (2013) 218 CA4th 577, 593. But see *Regents of Univ. of Cal. v. Superior Court* (2013) 222 Cal.App.4th 383, 399 (document not prepared, owned, used, or retained by public agency is not public record even though it may contain information relating to conduct of public's business).

65 *City of San Jose v. Superior Court, supra*, 2 Cal.5th at p. 629; *Community Youth Athletic Center v. City of National City, supra,* 220 Cal.App.4th at p. 1428.

66 *City of San Jose v. Superior Court, supra*, 2 Cal.5th at p. 627.

67 *Id.* at p. 628.

68 *Id.* at pp. 627-629.

69 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.

70 See 44 U.S.C. § 2911(a).

71 See *Am. Small Bus. League v. United States SBA* (2010) 623 F.3d 1052, (analyzed under FOIA).

Regardless of Physical Form or Characteristics

A public record is subject to disclosure under the PRA "regardless of its physical form or characteristics."[72] The PRA is not limited by the traditional notion of "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,"[73] with the current definition of "writing" adopted by the legislature in 2002.[74] 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."[75] 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."[76]

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.[77] 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.[78] As a result, public agencies are not required to provide copies

72 Gov. Code, § 7920.530, subd. (a) (formerly Gov. Code, § 6252, subd. (e)).

73 Stats. 1970, c. 575, p. 1151, § 2.

74 Gov. Code, § 7920.545 (formerly Gov. Code, § 6252, subd. (g)); Stats. 2002, c. 1073.

75 Gov. Code, § 7920.545 (formerly Gov. Code, § 6252, subd. (g)).

76 *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)."

77 *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.

78 Gov. Code, § 7922.585, subds. (a), (b) (formerly Gov. Code, § 6254.9, subds. (a), (b)).

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.[79] The exception for agency-developed software does not affect the public record status of information merely because it is stored electronically.[80]

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.[81]

Specifically Identified Records

The PRA also expressly makes particular types of records subject to the PRA, 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;[82]
- 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;[83]
- Employment contracts between state and local agencies and any public official or employee;[84] and
- Itemized statements of the total expenditures and disbursements of judicial agencies provided for under the State Constitution.[85]

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."[86] 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.[87] This encompasses any committees, boards, commissions, or departments

79 Gov. Code, § 7922.585, subd. (b) (formerly Gov. Code, § 6254.9, subd. (a)).

80 Gov. Code, § 7922.585, subd. (d) (formerly Gov. Code, § 6254.9, subd. (d)).

81 *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.

82 Gov. Code, § 7928.700 (formerly Gov. Code, § 6253.31).

83 Gov. Code, § 7924.510 (formerly 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).

84 Gov. Code, § 7928.400 (formerly 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).

85 Gov. Code, § 7928.720 (formerly Gov. Code, § 6261).

86 Gov. Code, § 7920.540, subd. (a) (formerly 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.

87 Gov. Code, § 7920.510 (formerly Gov. Code, § 6252, subd. (a)).

of those entities as well. A local agency also includes "another local public agency."[88] Finally, a local agency includes a private entity, including a nonprofit entity, where that entity: (1) was created by the elected legislative body of a local agency to exercise authority that may be lawfully delegated to a private entity; (2) receives funds from a local agency, and 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; or (3) is the lessee of a hospital, as described in subdivision (d) of Government Code section 54952.[89]

The PRA does not apply to the state Legislature or the judicial branch.[90] The Legislative Open Records Act covers the Legislature.[91] 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.[92]

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.[93] "Persons" include corporations, partnerships, limited liability companies, firms, or associations.[94] Often, requesters include persons who have filed claims or lawsuits against the government, 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.[95]

Local agencies and their officials are entitled to access public records on the same basis as any other person.[96] 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.[97] 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.[98]

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88 *The Cmty. Action Agency of Butte Cty. v. Superior Court* (2022) 79 Cal. App. 5th 221, 237 (adopting a four-factor test to determine whether a nonprofit entity is "another local public agency" under the PRA; the factors are: (1) whether the entity performs a government function, (2) the extent to which the government funds the entity's activities, (3) the extent of government involvement in the entity's activities, and (4) whether the entity was created by the government).

89 Gov. Code, § 7920.510 (formerly Gov. Code, § 6252, subd. (a)) ("[L]ocal agency includes…[a]n entity that is a legislative body of a local agency pursuant to subdivision (c) or (d) of Section 54952 [of the Brown Act]."). See e.g., 85 Ops.Cal.Atty.Gen 55 (2002) (PRA covered private nonprofit corporation formed for the purpose of providing programming for a cable television channel set aside for educational use by a cable operator pursuant to its franchise agreement with a city and subsequently designated by the city to provide the programming services).

90 Gov. Code, §§ 7920.510, 7920.510 (formerly Gov. Code, § 6252, subds. (a), (b); *Michael J. Mack v. State Bar of Cal.* (2001) 92 Cal.App.4th 957, 962–963.

91 Gov. Code, § 9070 *et. seq.*

92 *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.

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

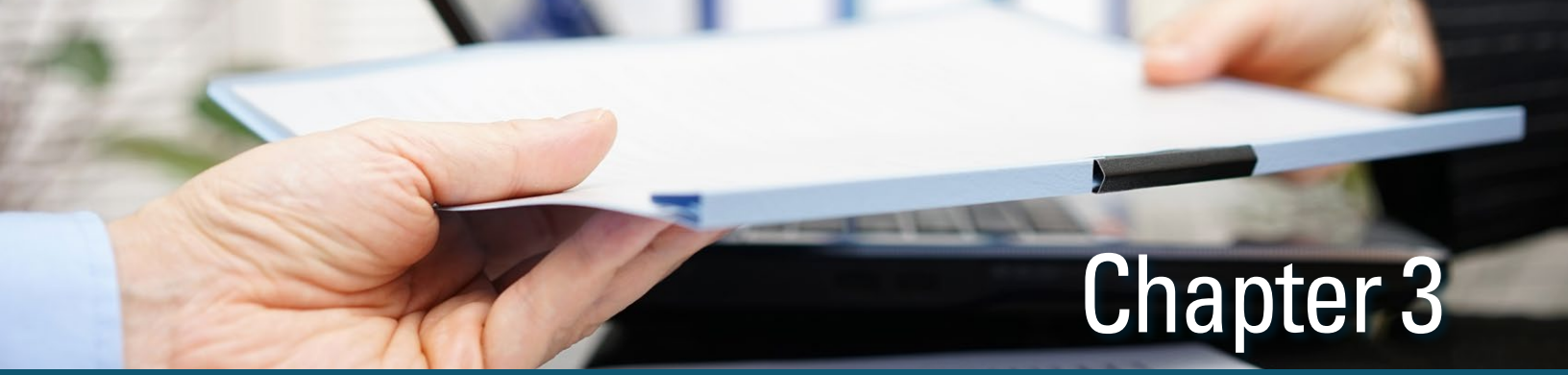
94 Gov. Code, § 7920.520 (formerly Gov. Code, § 6252, subd. (c)); *Connell v. Superior Court* (1997) 56 Cal.App.4th 601.

95 Gov. Code, § 7921.305 (formerly 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.

96 Gov. Code, § 7921.305 (formerly Gov. Code, § 6252.5).

97 *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. 40; "Requests for Journalistic or Scholarly Purposes," p. 42.

98 Gov. Code, § 7921.310 (formerly Gov. Code, § 6252.7).



Chapter 3

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.[99] 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."[100] 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.[101]

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.[102] 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.

99 Gov. Code, § 7920.000 (formerly Gov. Code § 6250).

100 Gov. Code, § 7922.500 (formerly Gov. Code, § 6253, subd. (d)).

101 Gov. Code, §§ 7922.525–7922.545 (formerly Gov. Code, § 6253).

102 Gov. Code, §§ 7922.525; 7922.530, subd. (a); 7922.545 (formerly Gov. Code, § 6253, subds. (a), (b), & (f)).

▶ 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.

▶ 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.[103] 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.[104] 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.[105]

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.[106]

▶ PRACTICE TIP:

Local agencies may want to 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 engineering plans with copyright protection.

103 Gov. Code, § 7922.525 (formerly Gov. Code, § 6253, subd. (a)).

104 *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).

105 See "Timing of The Response" p. 22.

106 Gov. Code, §§ 7922.530, subd. (a); 7922.545 (formerly Gov. Code, § 6253, subds. (b), (f)).

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.[107] 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.[108] 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.[109] 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.[110]

The PRA does not provide for a standing or continuing request for documents that may be generated in the future.[111] 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.[112] A person may also make a request to receive local agency notices, such as public work contractor plan room documents,[113] and development impact fee,[114] public hearing,[115] or California Environmental Quality Act notices.[116] 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.[117] 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.

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107 See "Fees," p. 27.

108 Gov. Code, § 7922.530, subd. (a) (formerly Gov. Code, § 6253, subd. (b)).

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

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

111 Gov. Code, §§ 7920.530; 7920.545; 7922.525 & 7922.530, subd, (b) (formerly Gov. Code, §§ 6252, subds. (e) & (g); and 6253, subds. (a) & (b)).

112 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).

113 Pub. Contract Code, § 20103.7.

114 Gov. Code, § 66016.

115 Gov. Code, § 65092.

116 Pub. Resources Code, § 21092.2.

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

▶ 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.

Content of the Request

A public records request must reasonably describe an identifiable record or records.[118] It must be focused, specific,[119] and reasonably clear, so that the local agency can decipher what record or records are being sought.[120] 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.[121]

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, 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.[122]

No magic words need to 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 does not need to state its purpose or the use to which the record will be put by the requester.[123] A requester does not have to justify or explain the reason for exercising his or her fundamental right of access.[124]

▶ 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.

118 Gov. Code, § 7922.530, subd. (a) (formerly Gov. Code, § 6253, subd. (b)).

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

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

121 See "Assisting the Requester," p. 24.

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

123 See Gov. Code, § 7921.300 (formerly Gov. Code, § 6257.5).

124 Gov. Code, § 7921.000 (formerly Gov. Code, § 6250); Cal. Const., art. I, § 3.

A PRA request applies only to records existing at the time of the request.[125] It does not require a local agency to produce records that may be created in the future. Further, a local agency is not required to provide requested information in a format that the local agency does not use.

Timing of the Response

Inspection of Public Records

Although the law precisely defines the time for responding to a public records request for copies of records, it is less precise in defining the deadline for disclosing records. Because the PRA does not state how soon a requester seeking to inspect records must be provided access to them, it is generally assumed that the standard of promptness set forth for copies of records[126] 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,"[127] which again signals the importance of promptly disclosing records to the requester.

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.[128] 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.[129] 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.[130] If the tenth day falls on a weekend or holiday, the next business day is considered the deadline for responding to the request.[131]

> **▶ 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.

125 Gov. Code, § 7922.535 (formerly Gov. Code, § 6253, subd. (c)).

126 Gov. Code, § 7922.530, subd. (a) (formerly 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).

127 Gov. Code, § 7922.500 (formerly Gov. Code, § 6253, subd. (d)).

128 Gov. Code, § 7922.500 (formerly Gov. Code, § 6253, subd. (d)). See also "Extending the Response Times for Copies of Public Records," p. 23.

129 Gov. Code, § 7922.535, subd. (a) (formerly Gov. Code, § 6253, subd. (c)).

130 Civ. Code, § 10.

131 Civ. Code, § 11.

> **▶ PRACTICE TIP:**
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> Watch for shorter statutory time periods for disclosure of particular 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.[132]

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.[133]

No other reasons justify an extension of time to respond to a request for copies of public records. For example, a local agency 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 10-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.[134] 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.

132 Gov. Code, § 81008.

133 Gov. Code, § 7922.535 (formerly Gov. Code, § 6253, subds. (c)(1)-(4)).

134 Gov. Code, § 7922.535 (formerly Gov. Code, § 6253, subd. (c)).

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 and 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 assist requesters who are having difficulty making a focused and effective request.[135] 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.[136]

Alternatively, the local agency may satisfy its duty to assist the requester by giving the requester an index of records.[137] Ordinarily, an inquiry into a requester's purpose in seeking access to a public record is inappropriate,[138] 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.[139]

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.[140] 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

135 Gov. Code, § 7922.600 (formerly Gov. Code, § 6253.1); *Community Youth Athletic Center v. City of National City* (2013) 220 Cal.App.4th 1385, 1417.

136 Gov. Code, § 7922.600, subds. (a)(1)-(3) (formerly Gov. Code, § 6253.1, subds. (a)(1)-(3)).

137 Gov. Code, § 7922.600, subd. (b) (formerly Gov. Code, § 6253.1, subd. 1(d)(3)).

138 See Gov. Code, § 7921.300 (formerly Gov. Code, § 6257.5).

139 Gov. Code, § 7922.600, subd. (a) (formerly Gov. Code, § 6253.1, subd. (a)).

140 *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; *City of San Jose v. Superior Court* (2017) 2 Cal.5th 608, 616-127, 629.

records, they must qualify as public records.[141] "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."[142]

> **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.[143] Nor is it compelled to undergo a search that will produce a "huge volume" of material in response to the request.[144] 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.[145] 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.[146]

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 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.[147]

141 See "What are Public Records?" p. 12.

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

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

144 *Ibid.* But see *Getz v. Superior Court of El Dorado County* (2021) 72 Cal.App.5th 637 (holding that a request that required a public agency to review over 40,000 emails from specified email addresses was not overly burdensome because the emails requested were easy to locate).

145 *Ibid.*

146 *American Civil Liberties Union Foundation of North California, Inc. v. Deukmejian* (1982) 32 Cal.3d 440, 452–454; *Becerra v. Superior Court* (2020) 44. Cal. App.5th 897, 929-934. See also *National Lawyers Guild v. City of Hayward* (2020) 9 Cal.5th 488, 507; 64 Ops.Cal.Atty.Gen. 317 (1981).

147 Gov. Code, § 7922.540, subds. (a)-(b) (formerly Gov. Code, §§ 6253, subd. (d), 6255, subd. (b)).

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.[148] 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,[149] unless the burden of redacting the record becomes too great.[150] 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.[151]

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.[152] 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.[153]

The PRA does not require that a local agency create a "privilege log" or list that identifies the specific records being withheld.[154] 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.

148 Gov. Code, § 7922.000 (formerly Gov. Code, § 6255, subd. (a)); Gov. Code, § 7922.540, subd. (c).

149 Gov. Code, § 7922.525 (formerly Gov. Code, § 6253, subd. (a)); *American Civil Liberties Union Foundation* of North California, Inc. *v. Deukmejian*, *supra,* 32 Cal.3d at p. 458.

150 *American Civil Liberties Union Foundation* of North California, Inc. *v. Deukmejian, supra*, 32 Cal.3d at p. 452–454; *Becerra v. Superior Court, supra*, 44. Cal. App.5th at p. 939-934.

151 *Ibid.*

152 Gov. Code, § 7920.530, subd. (a) (formerly Gov. Code, §6252, subd. (e)); *Haynie v. Superior Court* (2001) 26 Cal.4th 1061, 1075; *City of San Jose v. Superior Court, supra*, 2 Cal.5th at pp. 616–627, 629; *Sander v. Superior Court* (2018) 26 Cal.App.5th 651. See Chapter 6 concerning duties and obligations with respect to electronic records.

153 *Community Youth Athletic Center v. National City*, supra, 220 Cal.App.4th at p. 1447. See "Attorney Fees and Costs," p. 61.

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

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,[155] or it may charge a statutory fee, if applicable.[156] A local agency may require payment in advance, before providing the requested copies;[157] 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.[158] "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.[159] 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.[160] 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. 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.

155 Gov. Code, § 7922.530, subd. (a) (formerly Gov. Code, § 6253, subd. (b)).

156 Gov. Code, § 7922.430, subd. (a) (formerly Gov. Code, § 6253, subd. (b)); 85 Ops.Cal.Atty.Gen. 225 (2002); see, e.g., Gov. Code, § 81008.

157 Gov. Code, § 7922.530, subd. (a) (formerly Gov. Code, § 6253, subd. (b)).

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

159 *Ibid.*; *National Lawyers Guild v. City of Hayward* (2020) 9 Cal.5th 488, 492.

160 Gov. Code, § 7922.505 (formerly Gov. Code, § 6253, subd. (e)); *North County Parents Organization v. Dept. of Education, supra*, 23 Cal.App.4th at p. 148.

Duplication costs of electronic records are limited to the direct cost of producing the electronic copy and does not include cost of redaction.[161] For example, a city cannot charge requesters for time city employees spent searching for, reviewing, and editing videos to redact exempt, but otherwise producible, data. 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 if 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:

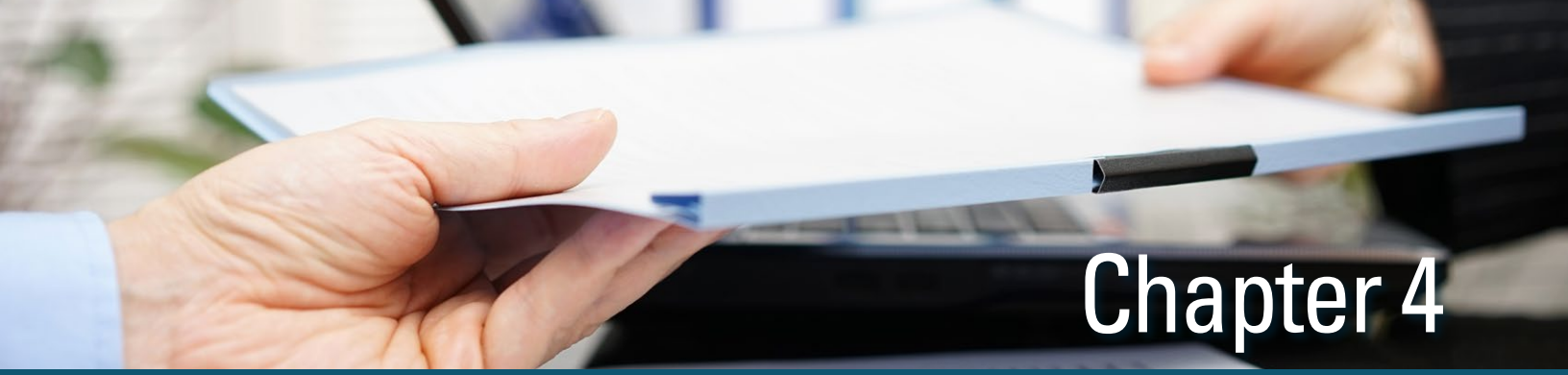
If there is a request for public records pursuant to Government Code section 7922.575 requiring "data compilation, extraction, or programming to produce the record" the local agency should ask the requester to pay the fees in advance, before the "data compilation, extraction, or programming" is actually 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 7921.505 applies to an intentional disclosure of privileged documents, and a local agency's inadvertent release of attorney-client documents does not waive such privilege.[162] 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 that agrees to treat the disclosed material as confidential.

161 *National Lawyers Guild v. City of Hayward* (2020) 9 Cal.5th 488, 492.

162 *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.



Chapter 4

Specific Document Types, Categories, and Exemptions from Disclosure

Overview of Exemptions

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

Transparent and accessible government is the foundational objective of the PRA. This recently constitutionalized right of access to the writings of local agencies and officials was declared by the Legislature in 1968 to be a "fundamental and necessary right."[163] While this right of access is not absolute, it must be construed broadly.[164] The PRA contains over 75 express exemptions, many of which are discussed below, including one for records that are otherwise exempt from disclosure by state or federal statutes,[165] 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.[166]

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.[167] Where a record contains some information that is subject to an

163 See Gov. Code, § 7921.000 (formerly Gov. Code, § 6250).

164 Cal. Const., art. I, § 3(b)(2); *City of San Jose v. Superior Court,* 2 Cal.5th 608, 617.

165 Gov. Code, § 7927.705 (formerly Gov. Code § 6254(k)); *Long Beach Police Officers Assn. v. City of Long Beach* (2014) 59 Cal.4th 59, 67.

166 Gov. Code, § 7922.000 (formerly Gov. Code, § 6255, subd. (a)); *Long Beach Police Officers Assn. v. City of Long Beach, supra,* 59 Cal.4th at p. 67. See also "Public Interest Exemption," p. 63.

167 Gov. Code, § 7922.000 (formerly Gov. Code, § 6255, subd. (a)); *Long Beach Police Officers Assn. v. City of Long Beach*, *supra*, 59 Cal.4th at p. 67.

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.[168]

> **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 ...."[169] 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;[170] (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.[171]

"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,"[172] is considered an "original work of authorship,"[173] which has automatic federal copyright protection.[174] Architectural plans may be inspected, but cannot be copied without the permission of the owner.[175]

> **PRACTICE TIP:**
>
> Some requesters will cite the "fair use of copyrighted materials" doctrine as giving them the right to copy architectural plans.[176] The fair use rule is a defense to a copyright infringement action only and not a legal entitlement to obtain copyrighted materials.[177]

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

169 Gov. Code, § 7927.705 (formerly Gov. Code, § 6254, subd. (k)).

170 17 U.S.C. § 17.

171 Health & Saf. Code, § 19851.

172 17 U.S.C. § 101.

173 17 U.S.C. § 102(A)(8).

174 17 U.S.C. §§ 102(A)(8), 106.

175 17 U.S.C. § 106.

176 17 U.S.C. § 107.

177 See *Harper and Row Publishers, Inc. v. Nation Enterprises* (1985) 471 U.S. 539, 561 (discussing "fair use" defense).

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.[178] 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.[179] After receiving this required information, the professional cannot withhold written permission to make copies of the plans.[180] 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.[181]

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.[182]

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."[183] 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.[184]

PRACTICE TIP:

Penal Code section 832.7 contains specific rules relating to the application of attorney-client privilege, and disclosure of attorney bills and retainer agreements relating to peace officer personnel records.[185]

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.[186] 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

178 Health & Saf. Code, § 19851.

179 *Ibid.*

180 *Ibid.*

181 Gov. Code, § 54957.5.

182 89 Ops.Cal.Atty.Gen. 39 (2006).

183 Gov. Code, § 7927.705 (formerly Gov. Code, § 6254, subd. (k)).

184 *Fairley v. Superior Court, supra*, 66 Cal.App.4th 1414, 1420–1422. See also "Official Information Privilege," p. 48.

185 See "Peace Officer Personnel Records," p. 53.

186 *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, 49–52.

communications to prevent such disclosure.[187] 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.[188] Unlike the exemption for pending litigation, attorney-client privileged information is still protected from disclosure even after litigation is concluded.[189] 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.[190]

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.[191]

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.[192]

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.[193] 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.[194] 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.[195]

187 *Costco Wholesale Corporation v. Superior Court, supra*, 47 Cal.4th at p. 740-741.

188 City of Petaluma v. Superior Court (2016) 248 Cal.App.4th 1023, 1032; *Clark v. Superior Court, supra*, 196 Cal.App.4th at p. 51.

189 *Roberts v. City of Palmdale* (1993) 5 Cal.4th 363, 371–373. See "Pending Litigation or Claims," p. 49.

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

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

192 Code Civ. Proc., § 2018.030, subds. (a) & (b); Gov. Code, § 7927.705 (formerly Gov. Code, § 6254, subd. (k)).

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

194 *Id.* at p. 891.

195 Compare *Citizens for Ceres v. Superior Court* (2013) 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 prepared by county's outside law firm regarding CEQA compliance with project applicant was within common interest doctrine).

Attorney Bills and Retainer Agreements

Attorney billing invoices reflecting work in active and ongoing litigation are exempt from disclosure under the attorney-client privilege or attorney-work-product doctrine.[196] Once a matter is concluded, portions of attorney invoices reflecting fee totals must be disclosed unless such totals reveal anything about the legal consultation, such as insight into litigation strategy, the substance of the legal consultation, or clues about legal strategy.[197]

Retainer agreements between a local agency and its attorneys may constitute confidential communications that fall within the attorney-client privilege.[198] A local agency's governing body may waive the privilege and elect to produce the agreements.[199]

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.

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.[200]

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.

196 *Los Angeles County Bd. of Supervisors v. Superior Court* (2016) 2 Cal.5th 282, 297; *County of Los Angeles Bd. of Supervisors v. Superior Court* (2017) 12 Cal. App.5th 1264, 1273-1274.

197 *County of Los Angeles Bd. of Supervisors v. Superior Court, supra*, 12 Cal.App.5th at pp. 1274-1275. See "Pending Litigation or Claims," p. 49.

198 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).

199 Evid. Code, § 912. See also Gov. Code, § 7921.505 (formerly Gov. Code, § 6254.5) and "Waiver," p. 28.

200 See *Golden Door Properties, LLC, et al. v. Superior Court* (2020) 53 Cal.App.5th 733.

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.[201]

> **PRACTICE TIP:**
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> 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.[202] 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.[203]

> **PRACTICE TIP:**
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> 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.

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.[204] Records of code enforcement cases being prosecuted administratively do not qualify as law enforcement records.[205] 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.[206]

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

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

202 *See* "Deliberative Process Privilege" p. 34.

203 *Citizens for Open Government v. City of Lodi* (2012) 205 Cal.App.4th 296, 307. See also, "Public Interest Exemption," p. 63.

204 Gov. Code, §§ 7923.600–7923.625 (formerly Gov. Code, § 6254, subd. (f)); *Haynie v. Superior Court* (2001) 26 Cal.4th 1061, 1068–1069; *State of California ex rel. Division of Industrial Safety v. Superior Court* (1974) 43 Cal.App.3d 778, 783–784. See "Law Enforcement Records," p. 38.

205 *Haynie v. Superior Court, supra,* 26 Cal.4th 1061; *State of California ex rel. Division of Industrial Safety v. Superior Court, supra*, 43 Cal.App.3d at pp. 783–784.

206 City of *San Jose v. Superior Court* (1999) 74 Cal.App.4th 1008. See "Official Information Privilege," p. 48, "Identity of Informants," p. 37, and "Public Interest Exemption," p. 63.

by not making the record public clearly outweighs the public interest served by disclosure of the record."[207] 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.[208]

In evaluating whether the deliberative process privilege applies, the court will still perform the balancing test prescribed by the public interest exemption.[209] In doing so, courts focus "less on the nature of the records sought and more on the effect of the records' release."[210] Therefore, the key question in every deliberative process privilege case is "whether the disclosure of materials would expose an agency's decision-making process in such a way as to discourage candid discussion within the agency and thereby undermine the agency's ability to perform its functions."[211] "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."[212] 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."[213]

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."[214] For example, the 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.[215] The Court reasoned that such disclosure could inhibit private meetings and chill the flow of information to the executive office.[216]

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."[217] 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

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207 *Times Mirror Company v. Superior Court* (1991) 53 Cal.3d 1325, 1338; Gov. Code, § 7922.000 (formerly Gov. Code, § 6255, subd. (a)); Evid. Code §1040. See also, *Labor and Workforce Development Agency v. Superior Court* (2018) 19 Cal.App.5th 12.

208 *Ibid.*; 5 U.S.C. § 552(b)(5). In some cases, pre-decisional communications may also be subject to the official information privilege found in Evidence Code section 1040. See "Official Information Privilege," p. 48.

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

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

211 *Id.* at p. 1342, citing *Dudman Communications v. Dept. of Air Force* (D.C.Cir.1987) 815 F.2d 1565, 1568.

212 *NLRB v. Sears, Roebuck & Co.* (1975) 421 U.S. 132, 151–152. See also *Times Mirror v. Superior Court (State of California)* (1991) 53 Cal.3d 1325, 1341.

213 *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.

214 *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.

215 *Times Mirror Company v. Superior Court, supra*, 53 Cal.3d at p. 1338.

216 *Ibid.*

217 Gov. Code, § 7927.500 (formerly Gov. Code, § 6254, subd. (a)).

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."[218] 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.[219]

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.[220] 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.[221]

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.[222] 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.

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.[223] 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.[224] 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

218 5 U.S.C. § 552, subd. (b)(5).

219 *Times Mirror Co. v. Superior Court, supra*, 53 Cal.3d 1325, 1339–1340.

220 *Id.* at p. 1342.

221 *Citizens for a Better Environment v. Department of Food and Agriculture* (1985) 171 Cal.App.3d 704, 711–712; Gov. Code, § 7927.500 (formerly Gov. Code, § 6254, subd. (a)).

222 *Citizens for a Better Environment v. Department of Food and Agriculture*, *supra,* 171 Cal.App.3d at p. 714.

223 Gov. Code, § 7924.000, subd. (a)(1) (formerly Gov. Code, § 6254.4, subd. (a)).

224 Gov. Code, § 7924.000, subd. (c) (formerly Gov. Code, § 6254.4, subd. (d)).

for election, scholarly, journalistic, or political purposes, or for governmental purposes, as determined by the Secretary of State.[225]

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.[226]

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.[227]

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.[228]

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.[229]

Initiative, Recall, and Referendum Petitions

Nomination documents and signatures filed in lieu of filing fee petitions may be inspected, but not copied or distributed.[230] 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.[231] 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.[232]

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.[233]

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.[234] 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

225 Elec. Code, § 2194.

226 Elec. Code, § 2194, subd. (b).

227 Elec. Code, § 2194, subd. (c)(1).

228 Elec. Code, § 2194, subd. (c)(2).

229 Gov. Code, § 7924.005 (formerly Gov. Code, § 6253.6).

230 Elec. Code, § 17100.

231 Elec. Code, §§ 17200, 17400.

232 Gov. Code, § 7924.110, subd. (a)(5) (formerly Gov. Code, § 6253.5, subd. (a)).

233 Gov. Code, § 7924.110, subd. (b)(2) (formerly Gov. Code, § 6253.5, subd. (a)).

234 Evid. Code, § 1041.

protecting an informant's identity outweighs the necessity for disclosure.[235] 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.[236]

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.[237]

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.[238]

Law Enforcement Records

Overview

As an exemption to the general rule of disclosure under the PRA, law enforcement records are generally exempt from disclosure to the public.[239] That is, in most instances, 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.[240] 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).[241]

The type of information that must be disclosed differs depending on 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.[242] Those portions of any file that reflect the analysis and conclusions of the investigating officers may also be withheld.[243] 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.[244]

Release practices vary by local agency. 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.[245]

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

236 *People v. Hobbs* (1994) 7 Cal.4th 948, 961–962.

237 Gov. Code, § 7929.210, subd. (a) (formerly Gov. Code, § 6254.19).

238 Gov. Code, § 7929.210, subd. (b) (formerly Gov. Code, § 6254.19). See also Gov. Code, § 7929.200 (formerly Gov. Code, § 6254, subd. (aa)).

239 Gov. Code, § 7923.600, subd. (a) (formerly Gov. Code § 6254, subd. (f)); *Williams v. Superior Court* (1993) 5 Cal.4th 337, 348.

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

241 *Long Beach Police Officers Association v. City of Long Beach* (2014) 59 Cal.4th 59, 63–68.

242 Gov. Code, § 7923.615, subd. (b) (formerly § 6254, subd. (f)(2)).

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

244 *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).

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

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.

Recent changes to the PRA have made video or audio recordings that relate to "critical incidents" available to the public within specified timeframes.[246] A video or audio recording relates to a critical incident if it depicts an incident involving (1) the discharge of a firearm at a person by a peace officer or custodial officer or (2) an incident in which the use of force by a peace officer or custodial officers against a person resulted in death or in great bodily injury. [247]

Recent changes to the Penal Code have also made records related to certain types of police incidents and police misconduct available to the public, notwithstanding the law enforcement record exemption in the PRA.[248]

PRACTICE TIP:

The term "great bodily injury" is not defined by the recent amendments to the Government Code or the Penal Code referenced above. The Penal Code does contain a definition of great bodily injury (GBI) in the context of an enhancement statute for felonies not having bodily harm as an element. Penal Code section 12022.7 defines GBI as "a significant or substantial physical injury." Case law interpreting this section may be helpful in determining what constitutes GBI, and therefore what records are subject to release, depending on the particular facts of an injury.

State law also requires police agencies to report annually to the California Department of Justice use of force incidents that caused serious bodily injury to a civilian, among other incidents. This report may be a helpful tool in determining which incidents are subject to release for purposes of the Public Records Act.

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.[249]

246 Gov. Code, § 7923.625 (formerly § 6254, subd. (f)(4)).

247 Gov. Code, § 7923.625, subd. (e) (formerly § 6254, subd. (f)(4)(C)).

248 See "Peace Officer Personnel Records," p. 53.

249 Gov. Code, § 7923.600 subd. (a) (formerly § 6254, subd. (f)); *Dixon v. Superior Court* (2009) 170 Cal.App.4th 1271, 1276 (coroner and autopsy reports).

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

The burden of proof is on the agency asserting the exemption and the exemptions should be narrowly construed.[250]

In addition to the above categories, and notwithstanding the changes to the PRA and Penal Code making additional police records available to the public, the public interest catchall exemption may still apply to police records, if on the facts of the particular case the public interest served by not disclosing the record clearly outweighs the public interest served by disclosure of the record.[251]

Information that Must be Disclosed

Under the Public Records Act, there are four 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, information relating to complaints or requests for assistance, and audio or video recordings that relate to critical incidents.

Disclosure to Victims, Authorized Representatives, and 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.[252]

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).[253]

250 *Ventura County Deputy Sheriffs' Assn. v. County of Ventura* (2021) 61 Cal.App.5th 585, 592.

251 Becerra *v. Superior Court* (2020) 44 Cal.App.5th 897, 923-929. See "Public Interest Exception," p. 63 for a discussion of this balancing test.

252 Gov. Code, § 7923.605, subd. (a) (formerly § 6254, subd. (f)).

253 Gov. Code, § 7923.605, subd. (a) (formerly § 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).

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.[254] 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.[255]

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.[256] 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.[257]

As previously stated, a PRA request applies only to records existing at the time of the request.[258] 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.

> **▶ PRACTICE TIP:**
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> Most police departments have some form of a daily desk or press log that contains all or most of this information.

254 Gov. Code, § 7923.655 subd. (a) (formerly § 6254.30).

255 Gov. Code, § 7923.655 subd. (b) (formerly § 6254.30).

256 Veh. Code, § 20012.

257 Gov. Code, § 7923.610 subd. (a)-(i) (formerly § 6254, subd. (f)(1)).

258 Gov. Code, § 7922.535 subd. (a) (formerly § 6253, subd. (c)).

Local agencies are only required to disclose arrestee information pertaining to "contemporaneous" police activity.[259] The legislature has not defined the term "contemporaneous" in the context of arrest logs, but the purpose of the disclosure requirement is "*only* to prevent secret arrests and provide basic law enforcement information to the press."[260] For example, a request for 11 or 12 month old arrest information would not serve the purpose of preventing clandestine police activity, therefore those records are exempt from disclosure.[261]

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.[262]

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;[263]
- 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;[264]
- The factual circumstances surrounding crime/incident;[265]
- A general description of injuries, property, or weapons involved;[266] and
- The names and ages of victims, except the names of victims of certain listed crimes[267] may be withheld upon request of the victim or parent of a minor victim.[268]

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.[269]

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259 Kinney *v. Superior Court* (2022) 77 Cal.App.5th 168.

260 *Id.* at pp. 180-181

261 *Id.* at p. 181

262 Pen. Code, § 841.5, subd. (a).

263 Gov. Code, § 7923.615, subd. (a)(2)(A) (formerly Gov. Code, § 6254, subd. (f)(2)).

264 Gov. Code, § 7923.615, subd. (a)(2)(B) (formerly Gov. Code, § 6254, subd. (f)(2)).

265 Gov. Code, § 7923.615, subd. (a)(2)(D) (formerly Gov. Code, § 6254, subd. (f)(2)).

266 Gov. Code, § 7923.615, subd. (a)(2)(E) (formerly Gov. Code, § 6254, subd. (f)(2)).

267 These listed crimes include various Penal Code sections which relate to topics such as sexual abuse, child abuse, hate crimes, and stalking.

268 Gov. Code, § 7923.615, subd. (a)(2)(C), (b) (formerly § 6254, subd. (f)(2)).

269 Gov. Code, § 7923.620 (formerly § 6254, subd. (f)); Pen. Code, § 841.5; *Los Angeles Police Dept. v. United Reporting Pub. Corp.* (1999) 528 U.S. 32.

Video or Audio Recordings that Relate to Critical Incidents

Beginning on July 1, 2019, video or audio that relates to critical incidents may only be withheld under certain circumstances and timeframes.[270]

A video or audio recording relates to a critical incident if it depicts any of the following incidents: (1) an incident involving the discharge of a firearm at a person by a peace officer or custodial officer; or (2) an incident in which the use of force by a peace officer or custodial officer against a person resulted in death or in great bodily injury.[271]

Disclosure of such video or audio may be delayed for up to 45 days, during an active criminal or administrative investigation into the incident, if the agency determines that disclosure would substantially interfere with the investigation.[272] After 45 days, and up to one year after the incident, disclosure may continue to be delayed if the agency can demonstrate that disclosure would substantially interfere with the investigation. After one year from the date of the incident, the agency may continue to delay disclosure only if the agency demonstrates by clear and convincing evidence that disclosure would substantially interfere with the investigation.[273]

If an agency delays disclosure pursuant to this clause, the agency shall promptly provide in writing to the requester the specific basis for the agency's determination that the interest in preventing interference with an active investigation outweighs the public interest in disclosure and provide the estimated date for the disclosure. The agency shall reassess withholding and notify the requester every 30 days. A recording withheld by the agency shall be disclosed promptly when the specific basis for withholding is resolved.[274]

Video or audio may be redacted if the agency determines that a reasonable expectation of privacy outweighs the public interest in disclosure. However, the redactions should be limited to protect those privacy interests and shall not interfere with the viewer's ability to fully, completely, and accurately comprehend the events captured in the recording and the recording shall not otherwise be edited or altered.[275] If protecting the privacy interest is not possible through redaction, and the privacy interest outweighs the public interest in disclosure, the agency may withhold the video or audio from the public.[276] However, the video or audio shall be disclosed promptly, upon request, to the subject of the recording or their representative as described in the statute.[277]

Staff time incurred in searching for, reviewing, and redacting video or audio is not chargeable to the PRA requester.[278]

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 postmortem examination or autopsy, may be disseminated except as provided by statute.[279]

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270 Gov. Code, § 7923.625 (formerly § 6254, subd. (f)(4)).

271 Gov. Code, § 7923.625, subd. (e) (formerly § 6254, subd. (f)(4)(C)).

272 Gov. Code, § 7923.625, subd. (a)(1) (formerly § 6254, subd. (f)(4)(A)(i)).

273 Gov. Code, § 7923.625, subd. (a)(2) (formerly § 6254, subd. (f)(4)(A)(ii)).

274 Gov. Code, § 7923.625, subd. (a)(2) (formerly § 6254, subd. (f)(4)(A)(ii)).

275 Gov. Code, § 7923.625, subd. (b)(1) (formerly § 6254, subd. (f)(4)(B)(i))

276 Gov. Code, § 7923.625, subd. (b)(2) (formerly § 6254, subd. (f)(4)(B)(ii)).

277 Gov. Code, § 7923.625, subd. (b)(2)(A-C) (formerly § 6254, subd. (f)(4)(B)(ii)(I-III)).

278 *National Lawyers Guild v. City of Hayward* (2020) 9 Cal. 5th 488.

279 Code Civ. Proc., § 129.

Automated License Plate Readers Data

Automated License Plate Reader (ALPR) scan data is not considered "records of investigations" because the scans are not the result of any targeted inquiry into any particular crime or crimes.[280] As such, this data is not subject to the law enforcement records exemption.

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.[281] Willful, knowing release of confidential mental health detention information can create liability for civil damages.[282]

> **▶ PRACTICE TIP:**
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> 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.[283] 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.[284] Unauthorized disclosure of suspected elder abuse or neglect information is a misdemeanor.[285]

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.[286] Juvenile court case files are subject to inspection only by specific listed persons and are governed by both statute and state court rules.[287]

280 *American Civil Liberties Union Foundation v. Superior Court* (2017) 3 Cal. 5th 1032.

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

282 Welf. & Inst. Code, § 5330.

283 Welf. & Inst. Code, § 15633.

284 Welf. & Inst. Code, § 15633.

285 Welf. & Inst. Code, §15633.

286 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.)

287 Welf. & Inst. Code, § 827.

▶ 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.[288] 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.[289]

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.[290] Unauthorized disclosure of confidential child abuse or neglect information is a misdemeanor.[291]

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.[292] 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.[293] This exemption does not extend to statistical reports of patron use or records of fines collected by the library.[294]

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.[295] Further, all registration and circulation records of any library that is (in whole or in part) supported by public funds are confidential.[296] The confidentiality of library circulation records does not extend to records of fines imposed on borrowers.[297]

288 Welf & Inst. Code, § 828, subd. (a); Cal. Rules of Court, rule 5.552(b).

289 Welf & Inst. Code, § 828, subd. (b).

290 Pen. Code, §§ 11165.6, 11165.7, 11167.5, 11169.

291 Pen. Code, § 11167.5, subd. (a).

292 Gov. Code, § 7927.105 (formerly Gov. Code, § 6267).

293 Gov. Code, § 7927.105 (formerly Gov. Code, § 6267).

294 Gov. Code, § 7927.105 (formerly Gov. Code, § 6267).

295 Gov. Code, § 7927.100, subd. (a) (formerly Gov. Code, §6254, subd. (j)).

296 Gov. Code, § 7927.105, subd. (c) (formerly Gov. Code, § 6254, subd. (j)).

297 Gov. Code, § 7927.100, subd. (b) (formerly Gov. Code, § 6254, subd. (j)).

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.[298] One frequent example of this is the submittal of sales or income information under a business license tax requirement. However, this exemption is construed narrowly and does not apply to financial information filed by an existing licensee or franchisee to justify a rate increase, because the franchisee is not merely applying for a license but is contractually assuming a city function which requires monitoring and regular review.[299]

Medical Records

California's Constitution protects a person's right to privacy in his or her medical records.[300] Therefore, the PRA exempts from disclosure "personnel, medical, or similar files, the disclosure of which would constitute an unwarranted invasion of personal privacy."[301] In addition, the PRA exempts from disclosure "[r]ecords, the disclosure of which is exempted or prohibited pursuant to federal or state law,"[302] including, but not limited to, those described in the Confidentiality of Medical Information Act,[303] physician/patient privilege,[304] the Health Data and Advisory Council Consolidation Act,[305] and the Health Insurance Portability and Accountability Act. [306]

> **▶ PRACTICE TIP:**
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> Both Gov. Code sections 7927.700 and 7927.705 probably apply to 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 7922.000.

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.[307] 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.[308]

298 Gov. Code, § 7925.005 (formerly Gov. Code, § 6254, subd. (n)).

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

300 Cal. Const., art. I, § 1; *Hill v. National Collegiate Athletic Assn.* (1994) 7 Cal.4th 1, 41.

301 Gov. Code, § 7927.700 (formerly Gov. Code, § 6254, subd. (c)).

302 Gov. Code, § 7927.705 (formerly Gov. Code, § 6254, subd. (k)).

303 Civ. Code, §§ 56 *et seq.*

304 Evid. Code, §§ 990 *et. seq.*

305 Health & Saf. Code, §§ 128675 *et seq.*

306 42 U.S.C. § 1320d.

307 Health & Saf. Code, §§ 128735, 128736, 128737.

308 Health & Saf. Code, § 128745, subd. (c)(6).

Physician/Patient Privilege

Patients may refuse to disclose, and prevent others from disclosing, confidential communications between themselves and their physicians.[309] 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.[310]

> **▶ PRACTICE TIP:**
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> 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.

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.[311] Employers must establish appropriate procedures to ensure the confidentiality and appropriate use of individually identifiable medical information.[312] 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.[313]

Health Insurance Portability and Accountability Act

Congress enacted the Health Insurance Portability and Accountability Act (HIPAA) 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.[314] The U.S. Department of Health and Human Services Secretary (HHS) has issued privacy regulations governing use and disclosure of individually identifiable health information by "covered entities" — essentially health plans, health care clearinghouses, and any health care provider who transmits health information in electronic form in connection with transactions for which the Secretary of HHS has adopted standards under HIPAA.[315] Persons[316] 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

309 Evid. Code, § 994.

310 Evid. Code, § 992.

311 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 section1797 and following, and clinics, health dispensaries, or health facilities licensed under Health and Safety Code section1200 *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.

312 Civ. Code, § 56.20.

313 Civ. Code, § 56.05, subd. (g).

314 Health Insurance Portability and Accountability Act of 1996, Pub L No. 104-191, § 261 (Aug. 24, 1996) 110 Stat 1936; 42 U.S.C. 1320d.

315 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.

316 Persons (including an employee or other individual) shall be considered to have obtained or disclosed individually identifiable health information in violation of this part if the information is maintained by a covered entity (as defined in the HIPAA privacy regulation described in section 1320d-9(b)(3)) and the individual obtained or disclosed such information without authorization. 42 U.S.C. § 1320d-6 (a).

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.[317] Federal law also permits the Health and Human Services Secretary to impose civil penalties[318]

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."[319] The PRA further prohibits the disclosure of records otherwise exempt or prohibited from disclosure pursuant to federal and state law.[320] 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.[321]

Certain information may be subject to disclosure once an application for adjudication has been filed.[322] 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.[323]

Official Information Privilege

A local agency may refuse to disclose official information.[324] "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."[325] 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.[326] Therefore, "official information" includes information that is protected by a state or federal statutory

317 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.

318 42 U.S.C. § 1320d-5.

319 Gov. Code, § 7927.700 (formerly Gov. Code, § 6254, subd. (c)).

320 Gov. Code, § 7927.705 (formerly Gov. Code, § 6254, subd. (k)).

321 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."

322 Lab. Code, §§ 5501.5, 138.7.

323 Lab Code, §138.7.

324 Evid. Code, § 1040.

325 Evid. Code, § 1040, subd. (a).

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

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.[327]

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.[328]

Where the disclosure is prohibited by state or federal statute, the privilege is absolute, unless there is an exception.[329] 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.[330] 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.[331] 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.[332] This is typically done through *in camera* judicial review.[333]

There are a number of cases interpreting this statute.[334] 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:**
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> 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.

Pending Litigation or Claims

The PRA exempts from disclosure records 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.[335] 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.[336]

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

328 Evid. Code, § 1040, subd. (b).

329 See Evid. Code § 1040, subd. (c) (notwithstanding any other law, the Employment Development Department shall disclose to law enforcement agencies, in accordance with subdivision (i) of Section 1095 of the Unemployment Insurance Code, information in its possession relating to any person if an arrest warrant has been issued for the person for commission of a felony).

330 See also exception in Evid. Code § 1040, subd. (c).

331 Gov. Code, § 7922.000 (formerly Gov. Code, § 6255).

332 *Shepherd v. Superior Court* (1976) 17 Cal.3d 107, 126.

333 The term "*in camera*" refers to a review of the document in the judge's chambers outside the presence of the requesting party.

334 *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.

335 Gov. Code, § 7927.200 (formerly Gov. Code, § 6254, subd. (b)).

336 *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.

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.[337]

Attorney billing invoices reflecting work in active and ongoing litigation are exempt from disclosure under the attorney-client privilege or attorney work product doctrine.[338] The Supreme Court reasoned that the content of such invoices is so closely related to attorney-client communications that its disclosure may reveal legal strategy or consultation. Once a matter is concluded, however, portions of attorney invoices reflecting fee totals (not billing entries or portions of invoices that describe the work performed for a client) must be disclosed unless such totals reveal anything about the legal consultation such as insight into litigation strategy, the substance of the legal consultation, or clues about legal strategy.[339] This is a factual analysis that weighs various factors.

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.[340]

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.[341] Moreover, while medical records are subject to a constitutional right of privacy, and generally exempt from production under the PRA and other statutes,[342] 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.[343]

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,[344] and documents concerning the settlement of a claim that are not shielded from disclosure by other exemptions.[345] 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.[346] 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 the public interest in nondisclosure clearly outweighs the public interest in disclosure.[347]

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

338 *Los Angeles County Bd. of Supervisors v. Superior Court* (2016) 2 Cal.5th 282, 297; *County of Los Angeles Bd. of Supervisors v. Superior Court* (2017) 12 Cal. App.5th 1264, 1273-1274.

339 *County of Los Angeles Bd. of Supervisors v. Superior Court, supra*, 12 Cal.App.5th at pp. 1274-1275. See "Attorney Bills and Retainer Agreements," p. 33.

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

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

342 See "Medical Records," p. 46.

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

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

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

346 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.

347 See Gov. Code, §7922.000 (formerly Gov. Code, § 6255).

▶ PRACTICE TIP:

In responding to a request for documents concerning settlement of a particular matter, it is critical to pay close attention to potential application of other exemptions under the PRA. Additionally, if the settlement is approved by the legislative body during a closed session, release of the settlement documents are governed by the Brown Act. It is recommended that you seek the advice of your local agency counsel.

There is considerable overlap between the pending litigation exemption and both the attorney-client privilege[348] and attorney-work-product doctrine.[349] However, the exemption for pending litigation is not limited solely to documents that fall within either the attorney-client privilege or attorney-work-product doctrine.[350] 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.[351]

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.[352] 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.[353] 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.[354] Courts have also ordered disclosure of the names and addresses of residential water customers who exceeded their water allocation under a rationing ordinance,[355] and the names of donors to a university affiliated foundation, even though those donors had requested anonymity.[356]

▶ 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.

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

349 Code Civ. Proc., § 2018.030.

350 *City of Los Angeles v. Superior Court, supra*, 41 Cal.App.4th 1083, 1087.

351 *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).

352 Gov. Code, § 7922.000 (formerly Gov. Code, § 6255, subd. (a)).

353 *City of San Jose v. Superior Court* (1999) 74 Cal.App.4th 1008, 1012.

354 Gov. Code, § 7923.800 (formerly Gov. Code, § 6254, subd. (u)(1)).

355 *New York Times Co. v. Superior Court* (1990) 218 Cal.App.3d 1579, 1581-1582.

356 *California State Univ. v. Superior Court* (2001) 90 Cal.App.4th 810, 816.

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.[357] 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.[358]

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.[359] 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.[360]

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 not to disclose his or her address or phone number.[361]

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."[362] In addition, the public interest exemption may protect certain personnel records from disclosure.[363] 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.[364]

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.[365]

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357 See Gov. Code, § 7920.500 (formerly Gov. Code, § 6254.21, subd. (f)) (containing a non-exhaustive list of individuals who qualify as "elected or appointed official[s]").

358 91 Ops.Cal.Atty.Gen. 19 (2008).

359 Gov. Code, § 7928.210 (formerly Gov. Code, § 6254.21, subd. (b)).

360 Gov. Code, § 7928.230 (formerly Gov. Code, § 6254.21, subd. (d)).

361 See Gov. Code, §§ 7928.215-7928.225 (formerly Gov. Code, § 6254.21, subd. (c)).

362 Gov. Code, § 7920.520 (formerly Gov. Code, § 6254, subd. (c)).

363 Gov. Code, § 7922.000 (formerly Gov. Code, § 6255(a)); *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.

364 *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.

365 *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.[366] In contrast, when "the charges are found true, or discipline is imposed," the public interest likely favors disclosure.[367] 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."[368] 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.[369]

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.[370] 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.[371]

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.[372]

Peace Officer Personnel Records

With certain exceptions under Penal Code section 832.7, peace officer personnel records, including internal affairs investigation reports regarding alleged misconduct, are both confidential and privileged.[373] Records outside of these certain exemptions fall within the category of records, "the disclosure of which is exempted or prohibited pursuant to federal or state law ...."[374] Records of an independent investigation into a complaint of alleged harassment by an elected county sheriff, including the complaint and the report, are not protected peace officer personnel records

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

367 *Ibid.*

368 *Ibid.*

369 *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.

370 See "Attorney-client Communications and Attorney Work Product," page 31; *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.

371 *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).

372 *Marken v. Santa Monica-Malibu Unified Sch. Dist., supra*, 202 Cal.App.4th 1250, 1264–1271. See also "Reverse PRA Litigation," p. 67.

373 Pen. Code § 832.7(a). See also *Towner v. County of Ventura* (2021) 63 Cal.App.5th 761. For definition of "Personnel Records" see Pen. Code, § 832.8.

374 Gov. Code, § 7927.705 (formerly 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.

under Section 6254(k) of the PRA, or Sections 832.7 and 832.8 of the Penal Code, or protected citizen complaint records under Section 832.5 of the Penal Code, because an elected sheriff is not an employee of the county, but rather accountable directly to the county voters.[375]

Except as discussed below, 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.[376] The appropriate procedure for obtaining information in the 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.[377]

Notwithstanding the general confidentiality of peace officer personnel records or the law enforcement records exemption under the PRA, agencies must release all records, including investigative reports, related to certain incidents or allegations.[378] These include:

- Records relating to the reports, investigations, or findings regarding an incident involving the discharge of a firearm at a person by an officer.[379]
- Records relating to the reports, investigations, or findings regarding an incident involving the use of force against a person by an officer that resulted in death or great bodily injury.[380]
- Records relating to a sustained finding that an officer used unreasonable or excessive force.[381]
- Records relating to a sustained finding that an officer failed to intervene against another officer using force that is clearly unreasonable or excessive.[382]
- Records relating to an incident in which a sustained finding was made by any law enforcement agency or oversight agency that an officer engaged in sexual assault involving a member of the public.[383]
- Records relating to a sustained finding of dishonesty by an officer related to the reporting, investigation, or prosecution of a crime, or directly related to the reporting or investigation of misconduct by another officer.[384]
- Records relating to a sustained finding that an officer engaged in conduct involving prejudice or discrimination against a person based on a protected status, as listed in the statute.[385]

375 *Essick v. County of Sonoma* (2022) 80 Cal.App.5th 562.

376 Pen. Code, § 832.7; Evid. Code, §§ 1043, 1046.

377 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.

378 Pen. Code § 832.7 subd. (b)(3).

379 Pen. Code, § 832.7, subd. (b)(1)(A)(i).

380 Pen. Code, § 832.7, subd. (b)(1)(A)(ii).

381 Pen. Code, § 832.7, subd. (b)(1)(A)(iii).

382 Pen. Code, § 832.7, subd. (b)(1)(A)(iv).

383 Pen. Code, § 832.7, subd. (b)(1)(B)(i).

384 Pen. Code, § 832.7, subd. (b)(1)(C).

385 Pen. Code, § 832.7, subd. (b)(1)(D).

- Records relating to a sustained finding that an officer made an unlawful arrest or conducted an unlawful search.[386]

For purposes of disclosure, a finding is "sustained" if there has been a final determination that the actions of the peace officer or custodial officer violated law or department policy following an investigation and opportunity for an administrative appeal pursuant to Sections 3304 and 3304.5 of the Government Code.[387]

While some of the exceptions to the general confidentiality provisions were enacted effective January 1, 2019, the statute applies retroactively, even to those incidents that occurred prior to 2019. [388]

An agency is required to disclose non-confidential police records retained by the agency, regardless of whether the agency prepared, owned, or used the records.[389]

In general, records subject to disclosure under Penal Code section 832.7 subdivision (b) shall be provided at the earliest possible time and no later than 45 days from the date of a request for their disclosure.[390] However, disclosure may be delayed based on specified circumstances, where there is an active criminal or administrative investigation. [391] Unless the agency determines that disclosure could reasonably be expected to interfere with a criminal enforcement proceeding against an officer or someone else, the time to provide the records can only be extended to 60 days.[392] If disclosure would reasonably be expected to interfere with criminal enforcement, the disclosure can be delayed up to 60 days, the agency must provide a written determination that includes the basis for its determination and the estimated date of disclosure.[393] This written determination must be renewed every 180 days.[394] Under no circumstances can disclosure be delayed for more than 18 months. [395]

In addition, there are other procedural and substantive requirements regarding records that are subject to disclosure under Penal Code section 832.7(b), as follows:

- If the incident is subject to disclosure, records relating to an incomplete investigation must be disclosed if a peace officer resigned during the investigation.[396]
- Records from separate or prior investigations shall not be released unless they are independently subject to disclosure.[397]
- For investigations or incidents that involve multiple officers, care should be given to follow the statutory requirements for portions that may be released and those that must remain confidential.[398]

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386 Pen. Code, § 832.7, subd. (b)(1)(C).

387 Pen. Code, § 832.8, subd. (b). See also *Collondrez v. City of Rio Vista* (2021) 61 Cal.App.5th 1039 (Officer had an opportunity for administrative appeal but settled and withdrew the appeal; the disciplinary decision was subject to disclosure as a final determination with a sustained finding).

388 *Ventura County Deputy Sheriffs' Assn. v. County of Ventura* (2021) 61 Cal.App.5th 585.

389 *Becerra v. Superior Court* (2020) 44 Cal.App.5th 897.

390 Pen. Code, § 832.7, subd. (b)(11).

391 Pen. Code, § 832.7, subd. (b)(8).

392 *Ibid.*

393 *Ibid.*

394 *Ibid.*

395 *Ibid.*

396 Pen. Code, § 832.7, subd. (b)(3).

397 Pen. Code, §832.7, subd. (b)(4).

398 Pen. Code, §832.7, subd. (b)(5).

- Redactions are limited to certain listed purposes only.[399] For example, the identity of whistleblowers, complainants, victims, and witnesses are required to remain confidential.[400]
- The local agency may charge only the direct cost of duplication for the production of these records and may not charge for searching or redacting records.[401]
- Attorney-client privilege will not prohibit the disclosure of factual information provided by the local agency to its attorney, or factual information discovered in any investigation conducted by, or on behalf of, the local agency's attorney. Additionally, the privilege will not cover attorney billing records unless the records relate to a legal consultation between the local agency and its attorney in active and ongoing litigation.[402]
- Prior to hiring a lateral police officer, the hiring agency must review any investigations of misconduct maintained by the officer's current or prior employer.[403]

Although the PRA is not a retention statute, Penal Code section 832.7 requires that records with no sustained finding of misconduct be retained for at least five years and records related to sustained misconduct must be retained for a minimum of 15 years.

Confidential peace officer personnel files are not protected from disclosure when the district attorney, attorney general, or grand jury are investigating the conduct of the officers.[404] 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.[405]

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.[406] The names, salary information, and employment dates and departments of peace officers have been determined to be disclosable records absent unique circumstances.[407] 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.[408] 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

399 Pen. Code, § 832.7, (b)(6)-(7).

400 Pen. Code, § 832.7, subd. (b)(6).

401 Pen. Code, § 832.7, subd. (b)(10).

402 Pen. Code, § 832.7, subd. (b)(12).

403 Pen. Code, § 832.12, subd. (b).

404 Pen. Code, § 832.7, subd. (a); but see *Towner v. County of Ventura* (2021) 63 Cal.App.5th 761 (District Attorney must maintain confidentiality of the nonpublic files absent compliance with statutorily required judicial review.)

405 Pen. Code, § 832.7, subd. (d).

406 Pen. Code, § 832.8.

407 *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.

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

officer is working undercover).[409] Video captured by a dashboard camera is not a personnel record protected from disclosure.[410]

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."[411] 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.[412] Such a qualified privilege in federal court results in a very similar weighing of the potential benefits of disclosure against potential disadvantages.[413]

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.[414] 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.[415]

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.[416] 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.[417]

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.[418] 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

409 *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).

410 *City of Eureka v. Superior Court* (2016) 1 Cal.App.5th 755, 763–765. See also "Law Enforcement Records," p. 38.

411 *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.

412 *Pasadena Peace Officers Ass'n v. Superior Court* (2015) 240 Cal.App.4th 268, 288–290. See also "Law Enforcement Records," p. 38.

413 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.

414 Gov. Code, § 7928.400 (formerly Gov. Code, § 6254.8); Gov. Code, § 53262, subd. (b).

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

416 *International Fed'n of Prof. & Tech. Eng'rs, Local 21, AFL-CIO v. Superior Court, supra*, 42 Cal.4th 3 at p. 327.

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

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

reports concerning the member, to be exempt from disclosure under the PRA.[419] 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.[420]

> **▶ 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.[421] 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.[422] 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 which the request is made prior to being provided the records.[423] Contractors are required to file certified copies of the requested records with the requesting entity within ten days after receipt of a written request.[424]

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.[425] Only the 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.[426] The name and address of the contractor or subcontractor may not be redacted.[427]

The Department of Industrial Relations Director has adopted regulations governing release of certified payroll records and applicable fees.[428] 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

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

420 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.

421 Lab. Code, § 1776.

422 Lab. Code, § 1776, subd. (b).

423 Lab. Code, § 1776, subd. (c).

424 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).

425 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.

426 Lab. Code, § 1776, subd. (e).

427 Lab. Code, § 1776, subd. (e).

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

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.[429]

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.[430] 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.[431] This limited access may be either through an in-person examination or by release of certain information to the test subject.[432] 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.[433] All such reports and information submitted to the Commission are public records subject to disclosure under the PRA.[434]

Public Contracting Documents

Contracts with local agencies are generally disclosable public records, and the public has an interest in knowing whether public resources are being spent for the benefit of the community as a whole or the benefit of only a limited few.[435] When the bids or proposals leading up to the contract become disclosable depends largely upon the type of contract.

Local agencies may award certain types of contracts (for example, contracts for the construction of public works, and for the procurement of goods and non-professional services) to the lowest responsive, responsible bidder through a competitive bidding process.[436] Local agencies usually receive bids for these contracts under seal and then publicly open the bids at a designated time and place. These bids are public records and disclosable as soon as they are opened.

Other local agency contracts (for example, for acquisition of professional services or disposition of property) may be awarded to the successful proposer who is identified through a competitive proposal process. As part of this process, local agencies solicit proposals, evaluate them, and then 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.[437] Disclosing the details of all the competing proposals can interfere with the local agency's selection process and impair its ability to secure the best possible deal on its constituents' behalf.

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429 8 C.C.R. §§ 16400, 16402.

430 Gov. Code, § 7929.605 (formerly Gov. Code, § 6254, subd. (g)).

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

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

433 Ed. Code, §§ 99153, 99154.

434 Ed. Code, § 99162.

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

436 Pub. Contract Code, § 22038.

437 Gov. Code, § 7922.000 (formerly Gov. Code, § 6255); *Michaelis, Montanari & Johnson v. Superior Court* (2006) 38 Cal.4th 1065, 1077.

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.[438] Nevertheless, documents containing the names of contractors applying for pre-qualification status are public records and must be disclosed.[439] 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.[440] 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.[441] 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.[442]

> ▶ **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 7922.000.

Recipients of Public Assistance

The PRA does not require disclosure of certain types of information related to those who are receiving public assistance. For example, disclosure of information regarding food stamp recipients is prohibited.[443] Subject to certain exceptions, disclosure of certain 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.[444]

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

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

440 Gov. Code, § 7928.705. (formerly Gov. Code, § 6254, subd. (h)).

441 Gov. Code, § 7928.705. (formerly Gov. Code, § 6254, subd. (h)).

442 Gov. Code, § 7267.2, subd. (c).

443 Welf. & Inst. Code, § 18909.

444 Welf. & Inst. Code, § 10850. See also *Jonon v. Superior Court* (1979) 93 Cal.App.3d 683, 690 (rejecting claim that all information received by a welfare agency was privileged).

Leases and lists or rosters of tenants of the Housing Authority are confidential and must not be open to inspection by the public, but must be supplied to the respective governing body on request.[445] 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.[446]

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.[447]

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.[448] 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.[449]

> **▶ 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.[450]

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.[451] 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.[452]

445 Health & Saf. Code, § 34283.

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

447 Gov. Code, § 7927.415 (formerly Gov. Code, § 6254.1).

448 Gov. Code, § 7925.000 (formerly Gov. Code, § 6254, subd. (i)); see also Rev. & Tax. Code, § 7056.

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

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

451 *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.

452 *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.

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.[453]

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.[454]

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,[455] air pollution data,[456] and corporate siting information (financial records or proprietary information provided to government agencies in connection with retaining, locating, or expanding a facility within California).[457]

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.[458]

> ▶ **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.

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.[459] 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,[460] or an officer or employee of another governmental agency when necessary for performance of official duties,[461] by court order or request of a law enforcement agency relative to an ongoing investigation,[462] when the local agency determines the

453 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.

454 *Uribe v. Howie, supra*, 19 Cal.App.3d at p. 213.

455 Gov. Code, § 7924.305 (formerly Gov. Code, § 6254.2).

456 Gov. Code, § 7924.510 (formerly Gov. Code, § 6254.7).

457 Gov. Code, § 7927.605 (formerly Gov. Code, § 6254.15).

458 Gov. Code, § 7924.305, subd. (d) (formerly Gov. Code, § 6254, subd. (e)).

459 Gov. Code, § 7927.410 (formerly Gov. Code, § 6254.16.

460 Gov. Code, § 7927.410, subd. (a) (formerly Gov. Code, § 6554.16, subd. (a)).

461 Gov. Code, § 7927.410, subd. (b) (formerly Gov. Code, § 6254.16, subd. (b)).

462 Gov. Code, § 7927.410, subd. (c) (formerly Gov. Code, § 6254.16, subd. (c)).

customer used utility services in violation of utility policies,[463] or if the local agency determines the public interest in disclosure clearly outweighs the public interest in nondisclosure.[464]

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.[465]

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.[466] Weighing the public interest in nondisclosure and the public interest in disclosure under the public interest exemption is often described as a balancing test.[467] 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.[468]

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.[469]

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 from nonexempt records when applying the balancing test under the public interest exemption.[470] 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

463 Gov. Code, § 7927.410, subd. (d) (formerly Gov. Code, § 6254.16, subd. (d)).

464 Gov. Code, § 7927.410, subd. (f) (formerly Gov. Code, § 6254.16, subd. (f)).

465 Gov. Code, § 7927.410, subd. (e) (formerly Gov. Code, § 6264.16, subd. (e)).

466 Gov. Code, § 7922.000 (formerly Gov. Code, § 6255); *Times Mirror Co. v. Superior Court* (1991) 53 Cal.3d 1325, 1337–1339.

467 *CBS Broadcasting, Inc. v. Superior Court* (2001) 91 Cal.App.4th 892, 908.

468 *Times Mirror Co. v. Superior Court, supra*, 53 Cal.3d at p. 1338.

469 *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.

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

public disclosure of competing proposals for leasing city airport property could properly await conclusion of the negotiation process.[471]

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.[472] 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.[473]

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.[474] 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.[475]

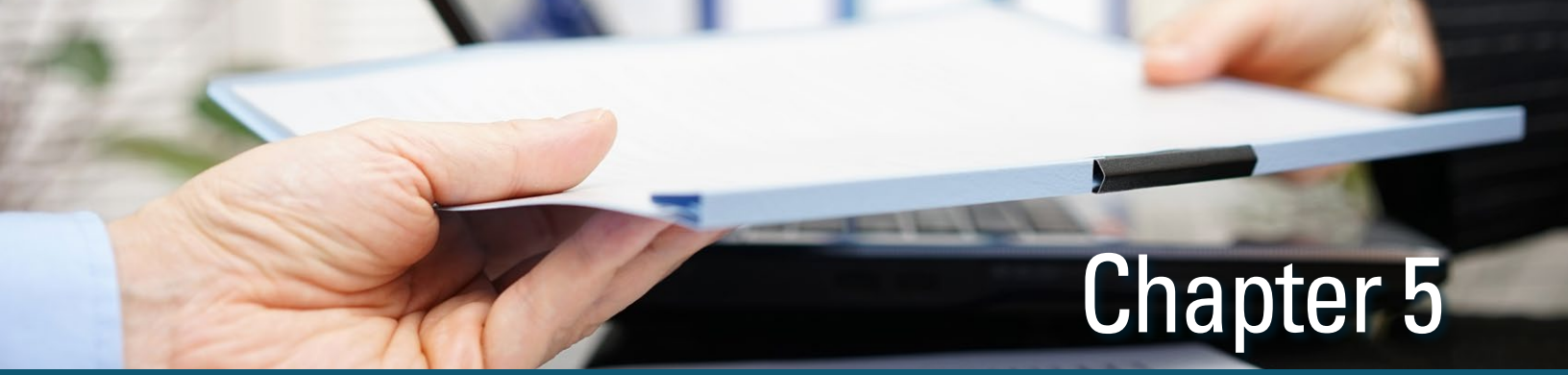
471 *Michaelis, Montanari & Johnson v. Superior Court, supra*, 38 Cal.4th 1065.

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

473 *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 "Computer Mapping (GIS) Systems," p. 74.

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

475 *Ibid.*



Chapter 5

Judicial Review and Remedies

Overview

The PRA establishes an expedited judicial process to resolve disputes over the public's right to inspect or receive copies of public records.[476] In contrast to other governmental transparency laws, such as the Brown Act,[477] the PRA establishes no criminal penalties for a local agency's noncompliance. 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.[478] 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.[479] This chapter discusses the special rules that apply to lawsuits brought to enforce the PRA.

The Trial Court Process

Under the PRA, 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.[480] Local agencies are "persons" under the PRA and may maintain an action to compel disclosure of records from another public entity.[481] 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

476 Gov. Code, §§ 7923.000, 7923.005 (formerly Gov. Code, § 6258); Gov. Code, §§ 7923.100, 7923.105, 7923.110, 7923.115, 7923.500 (formerly Gov. Code, § 6259).

477 Gov. Code, §§ 54950 *et. seq.*

478 Gov. Code, §§ 7923.000, 7923.005 (formerly Gov. Code, § 6258).

479 *Long Beach Police Officers Association v. City of Long Beach* (2014) 59 Cal.4th 59, 66 fn. 2; *County of Santa Clara v. Superior Court* (2009) 171 Cal. App. 4th 119, 128, 130 (taxpayer lawsuit may be brough to challenge legality of entity's policies or practices for responding to public records requests generally).

480 Gov. Code, § 7923.000 (formerly Gov. Code, § 6258).

481 *Los Angeles Unified Sch. Dist. v. Superior Court* (2007) 151 Cal.App.4th 759, 771.

for responding to public records requests generally.[482] As a condition to obtaining an injunction, the party seeking injunctive relief may be required to post an undertaking in an amount determined by the court.[483]

A local agency may not commence an action for declaratory relief to determine its obligation to disclose records under the PRA.[484] 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 them from requesting records.[485] 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, agencies may seek injunctive relief to preclude review and dissemination of, and to recover, inadvertently released exempt records, including attorney-client and work-product privileged records.[486]

An action under the PRA 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.[487]

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.[488]

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.[489] 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 to that which is 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.[490] However, under the California Environmental Quality Act, a litigant may not use the PRA to avoid the statutory duty to pay for preparation of the administrative record.[491]

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

483 Code Civ. Proc. §529(a). See *Stevenson v. City of Sacramento* (2020) 55 Cal.App.5th 545 (Public Records Act litigants seeking an injunction are not exempt from requirement to post undertaking and that requirement is not an unlawful prior restraint under the First Amendment).

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

485 *Id. at p. 423.*

486 *Ardon v. City of Los Angeles* (2016) 62 Cal.4th 1176; *Newark Unified Sch. Dist. v. Superior Court* (2016) 245 Cal.App.4th 887.

487 Gov. Code, § 7923.100 (formerly Gov. Code, § 6259, subd. (a)).

488 Gov. Code, § 7923.005 (formerly Gov. Code, § 6258).

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

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

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

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.[492] 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;[493] or (iii) the local agency undertook a reasonable search for records but was unable to locate the requested records.[494]

In Camera Review

The judge must decide the case based on an *in camera* review of the record or records — that is, in the judge's chambers and out of the presence and hearing of others — (if such review is permitted by the rules of evidence),[495] the papers filed by the parties, any oral argument, and additional evidence as the court may allow.[496] 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.[497]

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.[498] If the court determines the local agency representative was justified in refusing to disclose the record, the court shall return the record to the local agency representative without disclosing its content, together with an order supporting the decision refusing disclosure.[499] 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 disclosure of the remaining portions.

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.[500] A records requester may join in a reverse PRA action as a real party or an intervener.[501]

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492 *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"], disapproved on other grounds at *Natl. Lawyers Guild v. City of Hayward* (2020) 9 Cal. 5th 488, 508 fn. 9 (disapproving Fredericks to the extent it suggested an agency can recover redaction costs); *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."]

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

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

495 Evid. Code, § 915.

496 Gov. Code, § 7923.105 (formerly Gov. Code, § 6259, subd. (a)).

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

498 Gov. Code, § 7923.100 (formerly Gov. Code, § 6259, subd. (a)).

499 Gov. Code, § 7923.110 (formerly Gov. Code, § 6259, subd. (b)).

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

501 *Id.* at p. 1269.

> **▶ 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.

A party bringing a reverse PRA action to prevent disclosure may be subject to paying the requestor's attorney fees under the private attorney general statute if the requestor prevails.[502] An agency, however, is not subject to paying the requestor's attorney fees in a reverse PRA action.[503]

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.[504]

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.[505] 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.[506] This manner of providing for appellate review through an extraordinary writ procedure rather than a traditional appeal has been held to be constitutional.[507]

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.[508] 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.[509]

502 *City of Los Angeles v. Metropolitan Water Dist.* (2019) 42 Cal.App.5th 290 (awarding attorney fees to newspaper that had requested records and intervened in case); *Pasadena Police Officers Ass'n v. City of Pasadena* (2018) 22 Cal.App.5th 147, 160 (same).

503 *National Conference of Black Mayors v. Chico Community Publ'g, Inc.* (2018) 25 Cal.App.5th 570.

504 Gov. Code, § 7923.500, subd. (a) (formerly 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).

505 Cal. Rule of Court, Rule 8.487(a)(4). See generally *Omaha Indem. Co. v. Sup. Ct. (Greinke)* (1989) 209 Cal.App.3d 1266, 1271-74 (summary denial without written opinion); *Lewis v. Sup. Ct. (Green)* (1999) 19 Cal.4th 1232, 1260 (summary denial without hearing).

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

507 *Id.* at p. 115.

508 Gov. Code, § 7923.500, subd. (b) (formerly Gov. Code, § 6259, subd. (c)).

509 Gov. Code, § 7923.500, subd. (c) (formerly Gov. Code, § 6259, subd. (c)).

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.[510] 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.[511]

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.[512]

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.

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.[513] Similarly, an award of sanctions in a public records case is subject to appeal rather than a petition for an extraordinary writ.[514]

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.[515] A member of the public may be entitled to an award of attorneys' fees and costs even when he or she is not the named "plaintiff" in a lawsuit under the PRA, if the party is the functional equivalent of a plaintiff.[516] Records requesters that participate in a reverse-PRA lawsuit are not entitled to an award of attorneys' fees for successfully opposing such litigation.[517] 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.[518] Unless a plaintiff's case is "utterly devoid of merit or taken for

510 Gov. Code, § 7923.500, subd. (d) (formerly Gov. Code, § 6259, subd. (c)).

511 Gov. Code, § 7923.500, subd. (d) (formerly Gov. Code, § 6259, subd. (c)).

512 *Times Mirror Co. v. Superior Court* (1991) 53 Cal.3d 1325, 1336.

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

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

515 Gov. Code, § 7923.115, subd. (a) (formerly 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.

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

517 *Marken v. Santa Monica-Malibu Unified School Dist., supra,* 202 Cal.App.4th at p. 1268.

518 Gov. Code, § 7923.115, subd. (b) (formerly Gov. Code, §6259, subd. (d)).

improper motive," a court is unlikely to find a plaintiff's case frivolous and award attorneys' fees to an agency.[519] Only one reported case has upheld an award of attorneys' fees to a local agency based on a frivolous request.[520]

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.[521] Trial courts have discretion to deny fees when a plaintiff obtains a result so minimal or insignificant as to justify a finding that the plaintiff did not prevail, which may occur when the requester obtains only partial relief.[522]

Generally, if a local agency makes a timely, diligent effort to respond to a vague document request, a plaintiff will not be awarded attorneys' fees as the prevailing party, even in litigation resulting in issuance of a writ.[523] 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.[524]

The trial court has significant discretion when determining the appropriate amount of attorneys' fees to award.[525] Any award of costs and fees must be paid by the agency, and must not become a personal liability of the agency employees or officials who decide not to disclose requested records.[526]

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

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

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

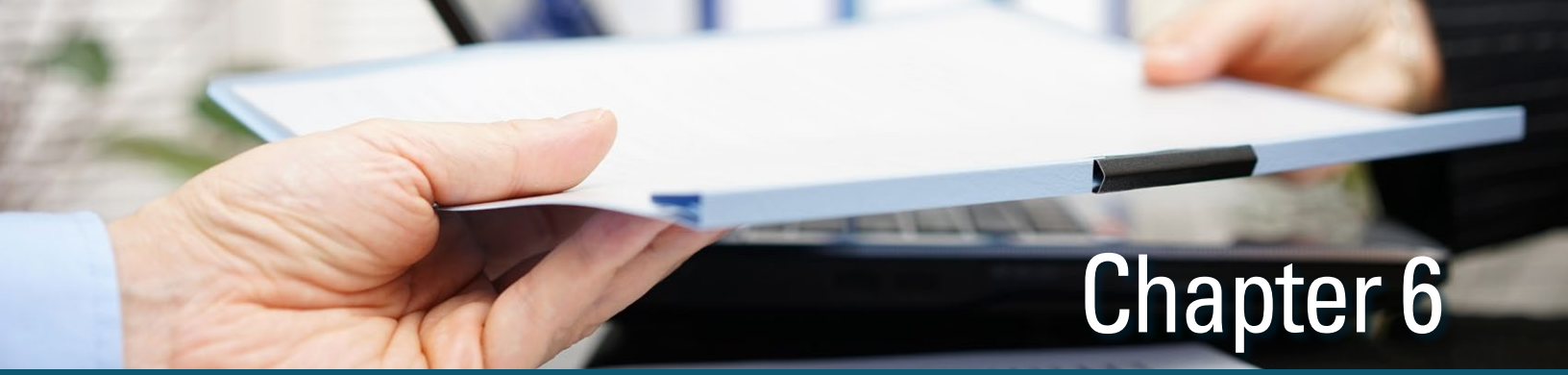
522 *Riskin v. Downtown L.A. Prop. Owners Ass'n* (2022) 76 Cal.App.5th 438, 441, 446-449.

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

524 *Community Youth Athletic Center v. City of National City, supra,* 220 Cal.App.4th at p. 1446.

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

526 Gov. Code, § 7923.115, subd. (a) (formerly Gov. Code, § 6259, subd. (d)).



Chapter 6

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,[527] any person may request a copy of a local agency meeting agenda and agenda packet by mail.[528] If a local agency has an Internet website, the legislative body or its designee must email a copy of, or a website link to, the agenda or agenda packet if a person requests delivery by email.[529] If requested, the agenda materials must be made available in appropriate alternative formats to persons with disabilities.[530] 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.[531] 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.[532] Local agency legislative bodies may establish a fee for mailing agenda materials.[533] The fee may not exceed the cost of providing the service.[534] 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.[535]

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527 Gov. Code, § 54950.5 *et. seq.* See *Open and Public: A Guide to the Ralph M. Brown Act, available at* www.calcities.org/BrownActGuide.

528 Gov. Code, § 54954.1.

529 *Ibid.*

530 *Ibid.*

531 *Ibid.; see Sierra Watch v. Placer County* (2021) 69 Cal.App.5th 1.

532 Gov. Code, § 54954.1.

533 *Ibid.*

534 *Ibid.*

535 *Ibid.*

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 exempted by the PRA, and must be made available upon request without delay.[536] 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.[537] The local agency may charge a fee for a copy of the records; however, no surcharge may be imposed on persons with disabilities.[538] 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.[539] The address of the designated location shall be listed in the meeting agenda.[540] 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.[541]

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."[542] 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.[543] 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.[544] 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.[545] Likewise, the PRA does not permit public access to records held electronically, if access is otherwise restricted by statute.[546]

536 Gov. Code, § 54957.5, subd. (a).

537 Gov. Code, § 54957.5, subd. (c).

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

539 Gov. Code, § 54957.5, subds. (b)(1), (b)(2).

540 Gov. Code, § 54957.5, subd. (b)(2).

541 Gov. Code, § 54957.5, subd. (b)(2).

542 Gov. Code, § 7920.530 (formerly Gov. Code, § 6252, subd. (e)).

543 Gov. Code, § 7922.570, subd. (b)(1) (formerly Gov. Code, § 6253.9, subd. (a)(1)).

544 Gov. Code, § 7922.570, subd. (b)(2) (formerly Gov. Code, § 6253.9, subd. (a)(2)).

545 Gov. Code, §7922.580, subd. (c) (formerly Gov. Code, § 6253.9, subd. (f)).

546 Gov. Code, § 7922.580, subd. (d) (formerly Gov. Code, § 6253.9, subd. (g)).

▶ 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.

Duplication costs of electronic records are limited to the direct cost of producing the electronic copy.[547] 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.[548] Agencies are not required to reconstruct electronic copies of records no longer available to the agency in electronic format.[549]

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.[550] 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.[551] 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

547 Gov. Code, § 7922.575, subd. (a) (formerly Gov. Code, § 6253.9, subd. (a)(2)).

548 Gov. Code. § 7922.575, subd. (b) (formerly Gov. Code, § 6253.9, subd. (b)).

549 Gov. Code, § 7922.580, subd. (a) (formerly Gov. Code, § 6253.9, subd. (c)).

550 *Lake v. City of Phoenix*, (Ariz. 2009) 218 P.3d 1004, 1008; *O'Neill 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.

551 Gov. Code, § 7922.585, subds. (a), (b) (formerly Gov. Code, § 6254.9, subds. (a), (b)).

commercial or noncommercial use.[552] The exception for agency-developed software does not affect the exempt status of records merely because it is stored electronically.[553]

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.[554]

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.[555] 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 online 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.[556] 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.

552 Gov. Code, § 7922.585, subd. (b) (formerly Gov. Code, § 6254.9, subd. (a)).

553 Gov. Code, § 7922.585, subd. (d) (formerly Gov. Code, § 6254.9, subd. (d)).

554 *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.

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

556 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.

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.[557] Its sole function is to provide access to public records.[558] Other provisions of state law govern retention of public records.[559]

Local agencies generally must retain public records for a minimum of two years.[560] 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.[561] Similarly, the retention period for "recordings of telephone and radio communications" is 100 days[562] 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."[563] The Attorney General has opined that recordings by security cameras on public buses and other transit vehicles constitute "routine video monitoring."[564] 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.

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.[565] 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.[566] Complaints and any reports or findings relating to those complaints must be retained for no less than five years for records where there was not a sustained finding of misconduct and for not less than 15 years where there was a sustained finding of misconduct.[567]

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

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

558 *Ibid.*

559 For example, an agency cannot destroy records that qualify for inclusion in an administrative record in a writ proceeding. *Golden Door Properties, LLC v. Superior Court* (2020) 53 Cal.App.5th 733.

560 Gov. Code, § 34090, subd. (d).

561 Gov. Code, § 34090.7.

562 Gov. Code, § 34090.6.

563 Gov. Code, §§ 34090.6, 34090.7.

564 85 Ops.Cal.Atty.Gen. 256, 258 (2002).

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

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

567 Pen. Code, § 832.5.

Records Covered by the Records Retention Laws

There is no definition of "public records" or "records" in the records retention provisions governing local agencies.[568] 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."[569] 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.[570]

▶ 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.

568 64 Ops.Cal.Atty.Gen. 317, 323 (1981).

569 *Id.* at p. 324.

570 Gov. Code, § 7927.500 (formerly Gov. Code, § 6254, subd. (a). See "Drafts," p. 35.

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. 71 of *"The People's Business: A Guide to the California Public Records Act," "the Guide."*
AUDIT CONTRACTS	Yes	Gov. Code, § 7928.700 (formerly 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, § 7923.600 (formerly Gov. Code, § 6254(f)); *Dixon v. Superior Court* (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 *Times Mirror Co. v. Superior Court* (1991) 53 Cal.3d. 1325 and *Rogers v. Superior Court* (1993) 19 Cal.App.4th 469 for a discussion of the deliberative process privilege. For additional information, see p. 34 of the Guide.
CLAIMS FOR DAMAGES	Yes	*Poway Unified School District v. Superior Court* (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, § 7924.100-7924.110 (formerly Gov. Code, § 6253.5); Elec. Code, §§ 17200, 17400, and 18650; Evid. Code, § 1050. For additional information, see p. 37 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, § 7920.530 (formerly Gov. Code § 6252(e)); *City of San Jose v. Superior Court* (2017) 2 Cal. 5th 608. For additional information, see pp. 12-14 of the Guide.
EMPLOYMENT AGREEMENTS/CONTRACTS	Yes	Gov. Code, § 7928.400 (formerly Gov. Code, § 6254.8). Gov. Code, § 53262(b). For additional information, see p. 57 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, § 7922.585 (formerly Gov. Code, § 6254.9); 88 Ops. Cal.Atty.Gen. 153 (2005); *see Sierra Club v. Superior Court* (2013) 57 Cal.4th 157 for data as a public record; see also *County of Santa Clara v. Superior Court* (2009) 170 Cal.App.4th 1301 for GIS basemap as public record; for additional information, see p. 16 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, § 7927.300 (formerly Gov. Code, § 6254(e)). For additional information, see p. 30 of the Guide.
JUVENILE COURT RECORDS	No	*T.N.G. v. Superior Court* (1971) 4 Cal.3d. 767; Welf. & Inst. Code, §§ 827 and 828. For additional information, see p. 44 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, § 7927.705 (formerly Gov. Code, § 6254(k)); Evid. Code, § 950, et seq.; *County of Los Angeles Board of Supervisors v. Superior Court* (2016) 2 Cal.5th 282; *Smith v. Laguna Sun Villas Community Assoc*. (2000) 79 Cal.App.4th 639; *United States v. Amlani,* 169 F.3d 1189 (9th Cir. 1999}. But see Gov. Code, § 7927.200 (formerly Gov. Code, § 6254(b)) as to the disclosure of billing amounts reflecting legal strategy in pending litigation. *County of Los Angeles v. Superior Court* (2012) 211 Cal.App.4th 57 (Pending litigation exemption does not protect legal bills reflecting the hours worked, the identity of the person performing the work, and the amount charged from disclosure; only work product or privileged descriptions of work may be redacted). For additional information, see p. 33 of the Guide.
LIBRARY PATRON USE RECORDS	No	Gov. Code, §§ 7927.100, 7927.105 (formerly Gov. Code, §§ 6254(j), 6267). For additional information, see p. 40 of the Guide.
MEDICAL RECORDS	No	Gov. Code, § 7927.700 (formerly Gov. Code, § 6254(c)). For additional information, see p. 46 of the Guide.
MENTAL HEALTH DETENTIONS (5150 REPORTS)	No	Welf. & Inst. Code, § 5328. For additional information, see p. 44 of the Guide.
MINUTES OF CLOSED SESSIONS	No	Gov. Code, § 54957.2(a). For additional information, see p. 43 of *Open and Public: A Guide to the Ralph M. Brown Act*, available at www.calcities.org/BrownActGuide.
NOTICES/ORDERS TO PROPERTY OWNER RE: HOUSING/BUILDING CODE VIOLATIONS	Yes	Gov. Code, § 7924.700 (formerly Gov. Code, § 6254.7(c)). For additional information, see p. 1 of the Guide.
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. 30 of the Guide.
PERSONAL FINANCIAL RECORDS	No	Gov. Code, §§ 7470, 7471, 7473; see also Gov. Code, § 7925.005 (formerly Gov. Code, § 6254(n)). For additional information, see p. 46 of the Guide.
PERSONNEL		For additional information, see p. 52 of the Guide.
• **Employee inspection of own personnel file**	Yes, with exceptions.	For additional information, see pp. 29-31 of the Guide. Lab. Code, § 1198.5; Gov. Code, § 36501.5. For peace officers, see Gov. Code, § 3306.5. For firefighters, see Gov. Code, § 3256.5.

INFORMATION/RECORDS REQUESTED	MUST THE INFORMATION/ RECORD GENERALLY BE DISCLOSED?	APPLICABLE AUTHORITY
• **Investigatory reports**	It depends.	*City of Petaluma v. Superior Court* (2016) 248 Cal.App.4th 1023; *Marken v. Santa Monica-Malibu Unified Sch. Dist.* (2012) 202 Cal. App.4th 1250; *Sanchez v. County of San Bernardino* (2009) 176 Cal. App.4th 516; *BRV, Inc. v. Superior Court* (2006) 143 Cal.App.4th 742.
• **Name and pension amounts of public agency retirees**	Yes. However, personal or individual records, including medical information, remain exempt from disclosure.	*Sacramento County Employees Retirement System v. Superior Court* (2011) 195 Cal.App.4th 440; *San Diego County Employees Retirement Association v. Superior Court* (2011) 196 Cal.App.4th 1228; *Sonoma County Employees Retirement Assn. v. Superior Court* (2011) 198 Cal.App.4th 986.
• **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).	*International Federation of Professional and Technical Engineers, Local 21, AFL-CIO, et al. v. Superior Court* (2007) 42 Cal.4th 319; *Commission on Peace Officers Standards and Training v. Superior Court* (2007) 42 Cal.4th 278.
• **Officer's personnel file, including internal affairs investigation reports**	No, except for specified allegations and/or findings.	With certain exceptions, peace officer personnel records, including internal affairs reports regarding alleged misconduct, are confidential. Pen. Code, §§ 832.7 and 832.8; Evid. Code, §§ 1043-1045; *International Federation of Professional & Technical Engineers, Local 21, AFL-CIO v. Superior Court* (2007) 42 Cal.4th 319; *City of Hemet v. Superior Court* (1995) 37 Cal.App.4th 1411. For additional information, see p. 53 of the Guide.
• **Test Questions, scoring keys, and other examination data.**	No	Gov. Code, § 7929.605 (formerly Gov. Code, § 6254(g)).
POLICE/LAW ENFORCEMENT		For additional information, see p. 38 of the Guide.
• **Arrest Information**	Yes	Gov. Code, § 7923.610 (formerly Gov. Code, § 6254(f)(1)); *Kinney v. Superior Court* (2022) 77 Cal.App.5th 168; *County of Los Angeles v. Superior Court (Kusar)* (1993) 18 Cal.App.4th 588.
• **Charging documents and court filings of the DA**	Yes	*Weaver v. Superior Court* (2014) 224 Cal.App.4th 746.
• **Child abuse reports**	No	Pen. Code, §11167.5.
• **Citizen complaint policy**	Yes	Pen. Code, § 832.5(a)(1).
• **Citizen complaints**	No	Pen. Code, § 832.5.
• **Citizen complaints – annual summary report to the Attorney General**	Yes	Pen. Code, § 832.5.
• **Citizen complainant information – names addresses and telephone numbers**	No	*City of San Jose v. San Jose Mercury News* (1999) 74 Cal.App.4th 1008. For additional information see p. 42 of the Guide.

INFORMATION/RECORDS REQUESTED	MUST THE INFORMATION/ RECORD GENERALLY BE DISCLOSED?	APPLICABLE AUTHORITY
• **Concealed weapon permits and applications**	Yes, except for information that indicates when or where the applicant is vulnerable to attack and medical/psychological history	Gov. Code, § 7923.800 (formerly Gov. Code, § 6254(u)(1)); *CBS, Inc. v. Block* (1986) 42 Cal.3d 646.
• **Contact information – names, addresses and phone numbers of crime victims or witnesses**	No	Gov. Code, § 7923.615 (formerly Gov. Code, § 6254(f)(2)). For additional information, see p. 42 of the Guide.
• **Criminal history**	No	Pen. Code, § 13300 et seq.; Pen. Code, § 11106 et seq.
• **Criminal investigative reports including booking photos, audio recordings, dispatch tapes, 911 tapes and in-car video**	No	Gov. Code, §§ 7923.600-7923.625 (formerly Gov. Code, § 6254(f)); *Haynie v. Superior Court* (2001) 26 Cal.4th 1061.
• **Crime reports**	Yes	Gov. Code, §§ 7923.600-7923.625, 7922.000 (formerly 6254(f), 6255).
• **Crime reports, including witness statements**	Yes, but only to crime victims and their representatives	Gov. Code, §§ 7923.600-7923.625 (formerly Gov. Code, § 6254(f)). Gov. Code, § 13951.
Police/Law Enforcement, CONTINUED		
• **Elder abuse reports**	No	Welf. and Inst. Code, §15633
• **Gang intelligence information**	No	Gov. Code, §§ 7923.600-7923.625 (formerly 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	*T.N.G. v. Superior Court* (1971) 4 Cal.3d 767; Welf. & Inst. Code, §§ 827 and 828. For additional information, see p. 44 of the Guide.
• **List of concealed weapon permit holders**	Yes	Gov. Code, § 7923.800 (formerly Gov. Code, § 6254(u)(1)); *CBS, Inc. v. Block* (1986) 42 Cal.3d 646.
• **Mental health detention(5150) reports**	No	Welf. & Inst. Code, § 5328. For additional information, see p. 44 of the Guide.
• **Names of officers involved in critical incidents**	Yes, absent unique, individual circumstances	*Pasadena Peace Officers Ass'n v Superior Court* (2015) 240 Cal. App.4th 268*; Long Beach Police Officers Association v. City of Long Beach* (2014) 59 Cal.4th 59; *Commission on Peace Officer Standards and Training v. Superior Court* (2007) 42 Cal.4th 278; *New York Times v. Superior Court* (1997) 52 Cal.App.4th 97; 91 Ops. Cal.Atty.Gen. 11 (2008).
• **Official service photographs of peace officers**	Yes, unless disclosure would pose an unreasonable risk of harm to the officer	*Ibarra v. Superior Court* (2013) 217 Cal.App.4th 695.
• **Peace officer's name, employing agency and employment dates**	Yes, absent unique, individual circumstances	*Commission on Peace Officer Standards and Training v. Superior Court* (2007) 42 Cal.4th 278.
• **Traffic accident reports**	Yes, but only to certain parties	Veh. Code, §§ 16005, 20012 [only disclose to those needing the information, such as insurance companies, and the individuals involved].

INFORMATION/RECORDS REQUESTED	MUST THE INFORMATION/ RECORD GENERALLY BE DISCLOSED?	APPLICABLE AUTHORITY
PUBLIC CONTRACTS		
• **Bid Proposals, RFP proposals**	Yes, except competitive proposals may be withheld until negotiations are complete to avoid prejudicing the public	*Michaelis v. Superior Court* (2006) 38 Cal. 4th 1065; but see Gov. Code, § 7922.000 (formerly Gov. Code, § 6255) and Evid. Code, § 1060. For additional information, see p. 59 of the Guide.
• **Certified payroll records**	Yes, but records must be redacted to protect employee names, addresses, and social security number from disclosure	Labor Code, § 1776.
• **Financial information submitted for bids**	Yes, except some corporate financial information may be protected	Gov. Code, §§ 7927.500, 7928.705, 7927.705, 7927.605, and 7922.000 (formerly Gov. Code, §§ 6254(a), (h), and (k), 6254.15, and 6255); *Schnabel v. Superior Court of Orange County* (1993) 5 Cal.4th 704, 718. For additional information, see p. 60 of the Guide.
• **Trade secrets**	No	Evid. Code, § 1060; Civ. Code, § 3426, et seq. For additional information, see p. 61 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. 60 of the Guide.
• **Property information (such as selling assessed value, square footage, number of rooms)**	Yes	88 Ops.Cal.Atty.Gen. 153 (2005).
• **Appraisals and offers to purchase**	Yes, but only after conclusion of the property acquisition	Gov. Code, § 7928.705 (formerly 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	*Register Division of Freedom Newspapers v. County of Orange* (1984) 158 Cal.App.3d 893. For additional information, see p. 49 of the Guide.
SOCIAL SECURITY NUMBERS	No	Gov. Code § 7922.200 (formerly Gov. Code § 6254.29).
SPEAKER CARDS	Yes	Gov. Code, § 7922.000 (formerly Gov. Code, § 6255).
TAX RETURN INFORMATION	No	Gov. Code, § 7927.705 (formerly Gov. Code, § 6254(k)); Internal Revenue Code, § 6103.
TAXPAYER INFORMATION RECEIVED IN CONNECTION WITH COLLECTION OF LOCAL TAXES	No	Gov. Code, § 7925.000 (formerly Gov. Code, § 6254(i)). For additional information, see p. 61 of the Guide.
TEACHER TEST SCORES, IDENTIFIED BY NAME, SHOWING TEACHERS' EFFECT ON STUDENTS' STANDARDIZED TEST PERFORMANCE	No	Gov. Code, § 7922.000 (formerly Gov. Code, § 6255); *Los Angeles Unified School Dist. v. Superior Court* (2014) 228 Cal.App.4th 222.

INFORMATION/RECORDS REQUESTED	MUST THE INFORMATION/ RECORD GENERALLY BE DISCLOSED?	APPLICABLE AUTHORITY
TELEPHONE RECORDS OF ELECTED OFFICIALS	Yes, as to expense totals. No, as to phone numbers called.	See *Rogers v. Superior Court* (1993) 19 Cal.App.4th 469.
UTILITY USAGE DATA	No, with certain exceptions.	Gov. Code, § 7927.410 (formerly Gov. Code, § 6254.16). For additional information, see p. 62 of the Guide.
VOTER INFORMATION	No	Gov. Code, § 7924.000 (formerly Gov. Code, § 6254.4). For additional information, see p. 36 of the Guide.
VOTER INFORMATION	No	Gov. Code, § 6254.4. For additional information, see p. 36 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 August 2022

DISPOSITION OF FORMER LAW

Note. This table shows the proposed disposition of the following provisions of the California Public Records Act (Gov't Code §§ 6250- 6276.48), as that law will exist on January 1, 2020. Unless otherwise indicated, all statutory references are to the Government Code.

EXISTING PROVISION(S)	PROPOSED PROVISION(S)
6250-6276.48	7920.000-7930.215
6250	7921.000
6251	7920.000
6252(a)	7920.510
6252(b)	7920.515
6252(c)	7920.520
6252(d)	7920.525(a)
6252(e)	7920.530
6252(f)	7920.540
6252(g)	7920.545
6252.5	7921.305
6252.6	7927.420
6252.7	7921.310
6253(a)	7922.525
6253(a) 1st sent	7922.525(a)
6253(a) 2d sent	7922.525(b)
6253(b)	7922.530(a)
6253(c)	7922.535
6253(c) 1st, 4th sent	7922.535(a)
6253(c) 2d, 3d sent	7922.535(b)
6253(c) 5th sent	7922.535(c)
6253(d) 1st sent	7922.500
6253(d)(1)	7922.530(b)
6253(d)(2)	7922.530(c)
6253(d)(3)	7922.540(b)
6253(e)	7922.505
6253(f) 1st sent	7922.545(a)
6253(f) 2d sent	7922.545(b)
6253.1(a)-(c)	7922.600
6253.1(d)	7922.605
6253.2	7926.300
6253.21	7927.305
6253.3	7921.005
6253.31	7928.700
6253.4(a) 1st ¶	7922.630
6253.4(a) 2d ¶	7922.635
6253.4(b)	7922.640
6253.5	7924.100-7924.110
6253.5(a) 1st sent	7924.110(a)-(b)
6253.5(a) 2d sent	7924.110(c)
6253.5(b)	7924.110(d)
6253.5(c)	7924.100
6253.5(d)	7924.105
6253.6	7924.005
6253.8(a)-(e)	7924.900
6253.8(f)	not cont'd

EXISTING PROVISION(S)	PROPOSED PROVISION(S)
6253.9	7922.570-7922.580
6253.9 intro cl 1st part	7922.570(a)
6253.9 intro cl 2d part	7922.570(b)
6253.9(a)(1)	7922.570(b)
6253.9(a)(2) 1st sent	7922.570(b)
6253.9(a)(2) 2d sent	7922.575(a)
6253.9(b)	7922.575(b)
6253.9(c)	7922.580(a)
6253.9(d)	7922.570(c)
6253.9(e)	7922.580(b)
6253.9(f)	7922.580(c)
6253.9(g)	7922.580(d)
6253.10	7922.680
6254(a)	7927.500
6254(b)	7927.200
6254(c)	7927.700
6254(d)	7929.000
6254(e)	7927.300
6254(f)	7923.600-7923.625
6254(f) 1st sent	7923.600(a)
6254(f) 2d sent	7923.605(a)
6254(f) 3d sent	7923.605(b)
6254(f) 2d ¶	7923.600(b)
6254(f) 3d ¶	7923.610, 7923.615(a), 7923.620(a)
6254(f)(1)	7923.610
6254(f)(2)(A) 1st sent	7923.615(a)
6254(f)(2)(A) 2d, 3d sent	7923.615(b)
6254(f)(2)(B)	7923.615(c)
6254(f)(3) 1st, 2d sent	7923.620(a)
6254(f)(3) 3d sent	7923.620(b)
6254(f)(3) 4th sent	7923.620(c)
6254(f)(4)	7923.625
6254(g)	7929.605
6254(h)	7928.705
6254(i)	7925.000
6254(j)	7927.100
6254(k)	7927.705
6254 (l)	7928.000
6254(m)	7928.100
6254(n)	7925.005
6254(o)	7924.505
6254(p)(1)	7928.405
6254(p)(2)	7928.410
6254(q)(1)	7926.220(a)
6254(q)(2)	7926.220(b)
6254(q)(3)	7926.220(c)
6254(q)(4)	7926.220(d)
6254(r)	7927.000
6254(s)	7926.000
6254(t)	7926.210
6254(u)(1)	7923.800
6254(u)(2)-(3)	7923.805
6254(v)(1)	7926.225(a)

EXISTING PROVISION(S)	PROPOSED PROVISION(S)
6254(v)(2)	7926.225(b)
6254(v)(3)	7926.225(c)
6254(v)(4)	7926.225(d)
6254(w)	7926.235
6254(w)(1)	7926.235(a)
6254(w)(2)	7926.235(b)
6254(w)(3)	7926.235(c)
6254(x)	7925.010
6254(y)(1)	7926.230(a)
6254(y)(2)	7926.230(b)
6254(y)(3)	7926.230(c)
6254(y)(4)	7926.230(d)
6254(y)(5)	7926.230(e)
6254(z)	7923.700
6254(aa)	7929.200
6254(ab)	7929.205
6254(ab) 1st sent	7929.205(b)
6254(ab) 2d sent	7929.205(a)
6254(ab) 3d sent	7929.205(c)
6254(ac)	7926.100
6254(ad)	7929.400-7929.430
6254(ad)(1)	7929.400
6254(ad)(2)	7929.405
6254(ad)(3)	7929.410
6254(ad)(4)	7929.415
6254(ad)(5)	7929.420
6254(ad)(6)	7929.425
6254(ad)(7)	7929.430
6254 next-to-last ¶	7921.500
6254 last ¶ (unlabeled)	7926.200
6254.1(a)	7927.415
6254.1(b)	7927.405
6254.1(c)	7929.600
6254.2	7924.300-7924.335
6254.2(a)	7924.300
6254.2(b)	7924.305(a)
6254.2(c)	7924.305(b)
6254.2(d)	7924.305(c)
6254.2(e)	7924.305(d)
6254.2(f)	7924.305(f)
6254.2(g)	7924.335
6254.2(h)	7924.310(a)-(b)
6254.2(i)	7924.315
6254.2(j)	7924.320
6254.2(k)	7924.310(c)
6254.2(l)	7924.330
6254.2(m)	7924.305(e)
6254.2(n)	7924.325
6254.3	7928.300
6254.4	7924.000
6254.4.5	7923.750
6254.5	7921.505
6254.5 1st sent	7921.505(b)

EXISTING PROVISION(S)	PROPOSED PROVISION(S)
6254.5 2d sent	7921.505(a)
6254.5(a)-(i)	7921.505(c)
6254.6	7927.600
6254.7 (except (c))	7924.510
6254.7(a)	7924.510(a)
6254.7(b)	7924.510(b)
6254.7(c)	7924.700
6254.7(d) 1st sent	7924.510(c)
6254.7(d) 2d sent	7924.510(f)
6254.7(e)	7924.510(d)
6254.7(f)	7924.510(e)
6254.8	7928.400
6254.9	7922.585
6254.10	7927.005
6254.11	7924.500
6254.12	7929.005
6254.13	7929.610
6254.14(a)	7926.215
6254.14(a)(1)	7926.215(a)
6254.14(a)(2)	7926.215(b)
6254.14(a)(3)	7926.215(c)
6254.14(a)(4)	7926.215(d)
6254.14(a)(5)	7926.215(e)
6254.14(b)	7926.220(d), 7926.225(d), 7926.230(d)
6254.15	7927.605
6254.16	7927.410
6254.17	7923.755
6254.18	7926.400-7926.430
6254.18(a)	7926.405
6254.18(b)	7926.400
6254.18(b)(1)	7926.400(a)
6254.18(b)(2)	7926.400(b)
6254.18(b)(3)	7926.400(c)
6254.18(b)(4)	7926.400(d)
6254.18(c)	7926.410
6254.18(d)	7926.415
6254.18(d) 1st sent	7926.415(a)
6254.18(d) 2d sent	7926.415(c)
6254.18(d) 3d sent	7926.415(b)
6254.18(e)	7926.420
6254.18(f)	7926.425
6254.18(g)	7926.430
6254.19	7929.210
6254.20	7927.400
6254.21 (except (f))	7928.200-7928.230
6254.21(a)	7928.205
6254.21(b)	7928.210
6254.21(c)	7928.215-7928.225
6254.21(c)(1)	7928.215
6254.21(c)(1)(A)	7928.215(b)
6254.21(c)(1)(B)	7928.215(c)
6254.21(c)(1)(C)	7928.215(d)
6254.21(c)(1)(D)	7928.215(e)

EXISTING PROVISION(S)	PROPOSED PROVISION(S)
6254.21(c)(1)(E)	7928.215(a)
6254.21(c)(2)	7928.225
6254.21(c)(3)	7928.220
6254.21(d)	7928.230
6254.21(e)	7928.200(b)
6254.21(f)	7920.500
6254.21(g)	7928.200(a)
6254.22	7926.205
6254.22 1st sent	7926.205(a)
6254.22 2d sent	7926.205(b)
6254.22 3d & 4th sent	7926.205(c)
6254.23	7929.215
6254.24	7920.535
6254.25	7927.205
6254.26	7928.710
6254.26(a)	7928.710(b)
6254.26(b)	7928.710(c)
6254.26(c)	7928.710(a)
6254.27	7922.205
6254.28	7922.210
6254.29	7922.200
6254.30	7923.655
6254.30 1st sent	7923.655(a)
6254.30 2d sent	7923.655(b)
6254.33	7928.715
6254.35	7929.010
6255(a)	7922.000
6255(b)	7922.540(a)
6257.5	7921.300
6258 1st sent	7923.000
6258 2d sent	7923.005
6259 (except (c) 1st sent intro cl)	7923.100-7923.500
6259(a) 1st sent	7923.100
6259(a) 2d sent	7923.105
6259(b)	7923.110
6259(c) 1st sent intro cl	not cont'd
6259(c) remainder	7923.500
6259(d)	7923.115(a)-(b)
6259(e)	7923.115(c)
6260	7920.200
6261	7928.720
6262	7923.650
6263	7921.700
6264	7921.705
6265	7921.710
6267	7927.105
6268	7928.005, 7928.010
6268(a)	7928.005
6268(b)	7928.010(a)
6268(c)	7928.010(b)
6268.5	7928.015
6270	7921.010
6270.5	7922.700-7922.725

EXISTING PROVISION(S)	PROPOSED PROVISION(S)
6270.5(a) 1st sent	7922.710(a)
6270.5(a) 2d sent	7922.715(a)
6270.5(a) 3d sent	7922.715(b)
6270.5(a) 4th sent	7922.720(a), (b)
6270.5(b)	7922.725(a)
6270.5(c)(1)	7922.700(a)
6270.5(c)(2)	7922.705
6270.5(c)(3)	7922.700(b)
6270.5(d)	7922.725(b)
6270.5(e)	7922.720(c)
6270.5(f)	7922.710(b)
6270.6	7928.800
6270.7	7926.500
6275-6276.48	7930.000-7930.215
6275	7930.000
6276	7930.005
6276.01	7930.100
6276.02	7930.105
6276.04	7930.110
6276.06	7930.115
6276.08	7930.120
6276.10	7930.125
6276.12	7930.130
6276.14	7930.135
6276.16	7930.140
6276.18	7930.145
6276.22	7930.150
6276.24	7930.155
6276.26	7930.160
6276.28	7930.165
6276.30	7930.170
6276.32	7930.175
6276.34	7930.180
6276.36	7930.185
6276.38	7930.190
6276.40	7930.195
6276.42	7930.200
6276.44	7930.205
6276.46	7930.210
6276.48	7930.215

DERIVATION OF NEW LAW

Note. This table shows the derivation of each proposed provision in this recommendation. Unless otherwise indicated, all statutory references are to the Government Code.

EXISTING PROVISION(S)	PROPOSED PROVISION(S)
7920.000	6251
7920.005	new
7920.100	new
7920.105	new
7920.110	new
7920.115	new
7920.120	new
7920.200	6260
7920.500	6254.21(f)
7920.505	new
7920.510	6252(a)
7920.515	6252(b)
7920.520	6252(c)
7920.525(a)	6252(d)
7920.525(b)	new
7920.530	6252(e)
7920.535	6254.24
7920.540	6252(f)
7920.545	6252(g)
7921.000	6250
7921.005	6253.3
7921.010	6270
7921.300	6257.5
7921.305	6252.5
7921.310	6252.7
7921.500	6254 next-to-last ¶
7921.505	6254.5
7921.505(a)	6254.5 2d sent
7921.505(b)	6254.5 1st sent
7921.505(c)	6254.5(a)-(i)
7921.700	6263
7921.705	6264
7921.710	6265
7922.000	6255(a)
7922.200	6254.29
7922.205	6254.27
7922.210	6254.28
7922.500	6253(d) 1st sent
7922.505	6253(e)
7922.525	6253(a)
7922.525(a)	6253(a) 1st sent
7922.525(b)	6253(a) 2d sent
7922.530(a)	6253(b)
7922.530(b)	6253(d)(1)
7922.530(c)	6253(d)(2)
7922.535	6253(c)
7922.535(a)	6253(c) 1st, 4th sent

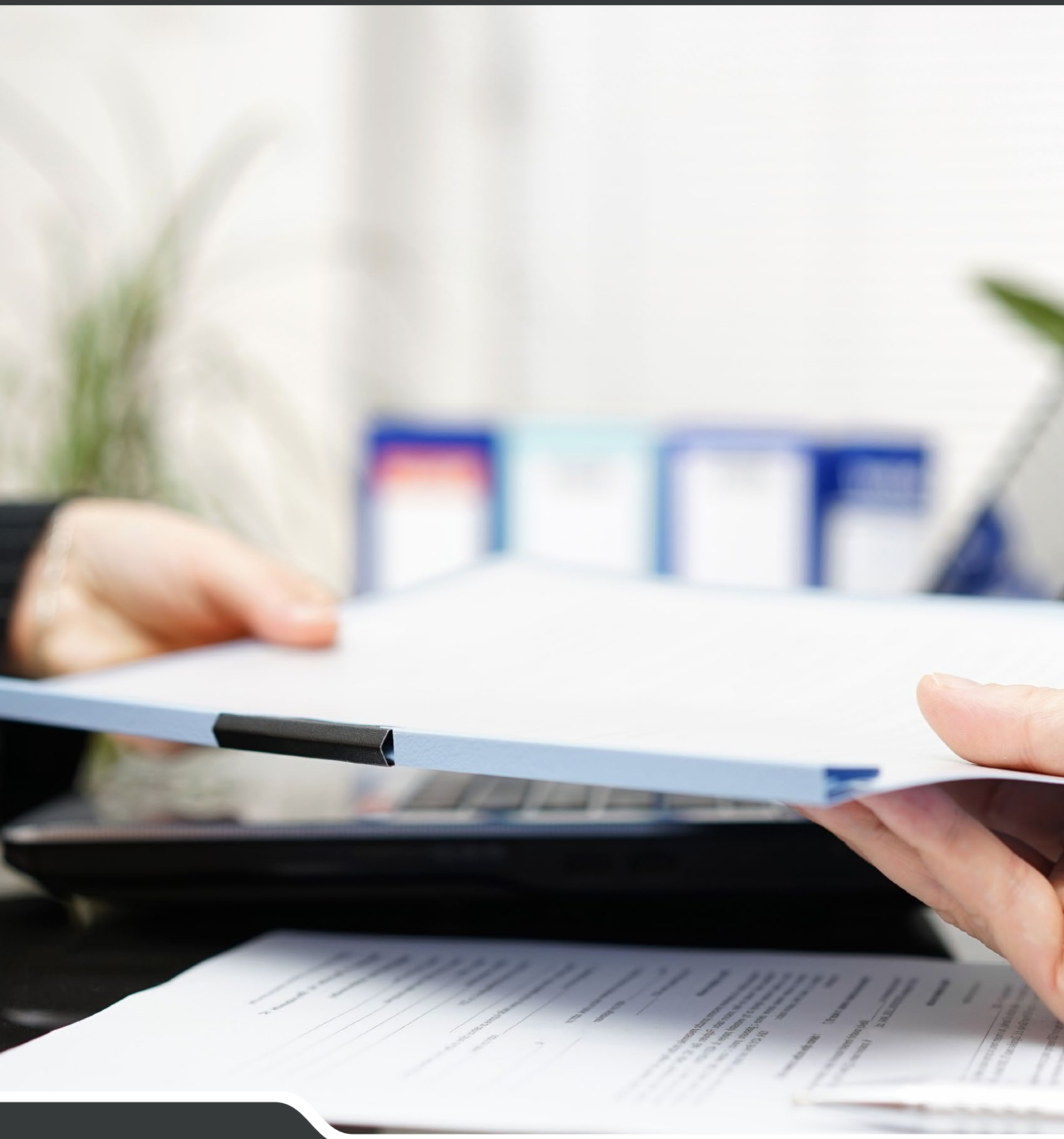
EXISTING PROVISION(S)	PROPOSED PROVISION(S)
7922.535(b)	6253(c) 2d, 3d sent
7922.535(c)	6253(c) 5th sent
7922.540(a)	6255(b)
7922.540(b)	6253(d)(3)
7922.540(c)	new
7922.545	6253(f)
7922.545(a)	6253(f) 1st sent
7922.545(b)	6253(f) 2d sent
7922.570-7922.580	6253.9
7922.570(a)	6253.9 intro cl 1st part
7922.570(b)	6253.9 intro cl 2d part, (a)(1), (a)(2) 1st sent
7922.570(c)	6253.9(d)
7922.575(a)	6253.9(a)(2) 2d sent
7922.575(b)	6253.9(b)
7922.580(a)	6253.9(c)
7922.580(b)	6253.9(e)
7922.580(c)	6253.9(f)
7922.580(d)	6253.9(g)
7922.585	6254.9
7922.600	6253.1(a)-(c)
7922.605	6253.1(d)
7922.630	6253.4(a) 1st ¶
7922.635	6253.4(a) 2d ¶
7922.640	6253.4(b)
7922.680	6253.10
7922.700-7922.725	6270.5
7922.700(a)	6270.5(c)(1)
7922.700(b)	6270.5(c)(3)
7922.705	6270.5(c)(2)
7922.710(a)	6270.5(a) 1st sent
7922.710(b)	6270.5(f)
7922.715(a)	6270.5(a) 2d sent
7922.715(b)	6270.5(a) 3d sent
7922.720(a), (b)	6270.5(a) 4th sent
7922.720(c)	6270.5(e)
7922.725(a)	6270.5(b)
7922.725(b)	6270.5(d)
7923.000	6258 1st sent
7923.005	6258 2d sent
7923.100-7923.500	6259 (except (c) 1st sent intro cl)
7923.100	6259(a) 1st sent
7923.105	6259(a) 2d sent
7923.110	6259(b)
7923.115(a)-(b)	6259(d)
7923.115(c)	6259(e)
7923.500	6259(c) (except obsolete intro cl)
7923.600-7923.625	6254(f)
7923.600(a)	6254(f) 1st sent
7923.600(b)	6254(f) 2d ¶
7923.605(a)	6254(f) 2d sent
7923.605(b)	6254(f) 3d sent
7923.610	6254(f) 3d ¶ (re 6254(f)(1)), 6254(f)(1)

EXISTING PROVISION(S)	PROPOSED PROVISION(S)
7923.615(a)	6254(f) 3d ¶ (re 6254(f)(2)), 6254(f)(2(A) 1st sent
7923.615(b)	6254(f)(2(A) 2d, 3d sent
7923.615(c)	6254(f)(2(B)
7923.620(a)	6254(f) 3d ¶ (re 6254(f)(3)), 6254(f)(3) 1st, 2d sent
7923.620(b)	6254(f)(3) 3d sent
7923.620(c)	6254(f)(3) 4th sent
7923.625	6254(f)(4)
7923.630	new
7923.650	6262
7923.655	6254.30
7923.655(a)	6254.30 1st sent
7923.655(b)	6254.30 2d sent
7923.700	6254(z)
7923.750	6254.4.5
7923.755	6254.17
7923.800-7923.805	6254(u)
7923.800	6254(u)(1)
7923.805	6254(u)(2)-(3)
7924.000	6254.4
7924.005	6253.6
7924.100	6253.5(c)
7924.105	6253.5(d)
7924.110(a)-(b)	6253.5(a) 1st sent
7924.110(c)	6253.5(a) 2d sent
7924.110(d)	6253.5(b)
7924.300-7924.335	6254.2
7924.300	6254.2(a)
7924.305(a)	6254.2(b)
7924.305(b)	6254.2(c)
7924.305(c)	6254.2(d)
7924.305(d)	6254.2(e)
7924.305(e)	6254.2(m)
7924.305(f)	6254.2(f)
7924.310(a)-(b)	6254.2(h)
7924.310(c)	6254.2(k)
7924.315	6254.2(i)
7924.320	6254.2(j)
7924.325	6254.2(n)
7924.330	6254.2(l)
7924.335	6254.2(g)
7924.500	6254.11
7924.505	6254(o)
7924.510	6254.7 (except (c))
7924.510(a)	6254.7(a)
7924.510(b)	6254.7(b)
7924.510(c)	6254.7(d) 1st sent
7924.510(d)	6254.7(e)
7924.510(e)	6254.7(f)
7924.510(f)	6254.7(d) 2d sent
7924.700	6254.7(c)
7924.900	6253.8(a)-(e)
7925.000	6254(i)
7925.005	6254(n)

EXISTING PROVISION(S)	PROPOSED PROVISION(S)
7925.010	6254(x)
7926.000	6254(s)
7926.100	6254(ac)
7926.200	6254 last ¶ (unlabeled)
7926.205	6254.22
7926.205(a)	6254.22 1st sent
7926.205(b)	6254.22 2d sent
7926.205(c)	6254.22 3d & 4th sent
7926.210	6254(t)
7926.215	6254.14(a)
7926.215(a)	6254.14(a)(1)
7926.215(b)	6254.14(a)(2)
7926.215(c)	6254.14(a)(3)
7926.215(d)	6254.14(a)(4)
7926.215(e)	6254.14(a)(5)
7926.220(a)	6254(q)(1)
7926.220(b)	6254(q)(2)
7926.220(c)	6254(q)(3)
7926.220(d)	6254(q)(4), 6254.14(b) (re 6254(q))
7926.225(a)	6254(v)(1)
7926.225(b)	6254(v)(2)
7926.225(c)	6254(v)(3)
7926.225(d)	6254(v)(4), 6254.14(b) (re 6254(v))
7926.230(a)	6254(y)(1)
7926.230(b)	6254(y)(2)
7926.230(c)	6254(y)(3)
7926.230(d)	6254(y)(4), 6254.14(b)(re 6254(y))
7926.230(e)	6254(y)(5)
7926.235	6254(w)
7926.235(a)	6254(w)(1)
7926.235(b)	6254(w)(2)
7926.235(c)	6254(w)(3)
7926.300	6253.2
7926.400-7926.430	6254.18
7926.400	6254.18(b)
7926.400(a)	6254.18(b)(1)
7926.400(b)	6254.18(b)(2)
7926.400(c)	6254.18(b)(3)
7926.400(d)	6254.18(b)(4)
7926.405	6254.18(a)
7926.410	6254.18(c)
7926.415	6254.18(d)
7926.415(a)	6254.18(d) 1st sent
7926.415(b)	6254.18(d) 3d sent
7926.415(c)	6254.18(d) 2d sent
7926.420	6254.18(e)
7926.425	6254.18(f)
7926.430	6254.18(g)
7926.500	6270.7
7927.000	6254(r)

EXISTING PROVISION(S)	PROPOSED PROVISION(S)
7927.005	6254.10
7927.100	6254(j)
7927.105	6267
7927.200	6254(b)
7927.205	6254.25
7927.300	6254(e)
7927.305	6253.21
7927.400	6254.20
7927.405	6254.1(b)
7927.410	6254.16
7927.415	6254.1(a)
7927.420	6252.6
7927.500	6254(a)
7927.600	6254.6
7927.605	6254.15
7927.700	6254(c)
7927.705	6254(k)
7928.000	6254 (l)
7928.005-7928.010	6268
7928.005	6268(a)
7928.010(a)	6268(b)
7928.010(b)	6268(c)
7928.015	6268.5
7928.100	6254(m)
7928.200-7928.230	6254.21 (except (f))
7928.200(a)	6254.21(g)
7928.200(b)	6254.21(e)
7928.205	6254.21(a)
7928.210	6254.21(b)
7928.215-7928.225	6254.21(c)
7928.215	6254.21(c)(1)
7928.215(a)	6254.21(c)(1)(E)
7928.215(b)	6254.21(c)(1)(A)
7928.215(c)	6254.21(c)(1)(B)
7928.215(d)	6254.21(c)(1)(C)
7928.215(e)	6254.21(c)(1)(D)
7928.220	6254.21(c)(3)
7928.225	6254.21(c)(2)
7928.230	6254.21(d)
7928.300	6254.3
7928.400	6254.8
7928.405	6254(p)(1)
7928.410	6254(p)(2)
7928.700	6253.31
7928.705	6254(h)
7928.710(a)	6254.26(c)
7928.710(b)	6254.26(a)
7928.710(c)	6254.26(b)
7928.715	6254.33
7928.720	6261
7928.800	6270.6
7929.000	6254(d)
7929.005	6254.12

EXISTING PROVISION(S)	PROPOSED PROVISION(S)
7929.010	6254.35
7929.200	6254(aa)
7929.205	6254(ab)
7929.205(a)	6254(ab) 2d sent
7929.205(b)	6254(ab) 1st sent
7929.205(c)	6254(ab) 3d sent
7929.210	6254.19
7929.215	6254.23
7929.400-7929.430	6254(ad)
7929.400	6254(ad)(1)
7929.405	6254(ad)(2)
7929.410	6254(ad)(3)
7929.415	6254(ad)(4)
7929.420	6254(ad)(5)
7929.425	6254(ad)(6)
7929.430	6254(ad)(7)
7929.600	6254.1(c)
7929.605	6254(g)
7929.610	6254.13
7930.000-7930.215	6275-6276.48
7930.000	6275
7930.005	6276
7930.100	6276.01
7930.105	6276.02
7930.110	6276.04
7930.115	6276.06
7930.120	6276.08
7930.125	6276.10
7930.130	6276.12
7930.135	6276.14
7930.140	6276.16
7930.145	6276.18
7930.150	6276.22
7930.155	6276.24
7930.160	6276.26
7930.165	6276.28
7930.170	6276.30
7930.175	6276.32
7930.180	6276.34
7930.185	6276.36
7930.190	6276.38
7930.195	6276.40
7930.200	6276.42
7930.205	6276.44
7930.210	6276.46
7930.215	6276.48



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