CHAPTER 4:
Transparency Laws

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Chapter 4: Transparency Laws

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Economic Interest Disclosure

Basic Rules

There is an adage about one's life being an open book. Nowhere is this truer than for public officials and their finances. The bottom line is when people join the ranks of public servants, the public gets to learn a great deal about their financial lives. The voters created these disclosure requirements when they approved the Political Reform Act in 1974.[1] As a result, those entering public service sacrifice a degree of privacy.

The disclosure requirements apply to nearly every local elected official and department head. Members of commissions, boards, committees and other local agency bodies with significant decision-making authority are also subject to the disclosure requirements. An agency may also require persons in staff positions to disclose their economic interests under the agency's local conflict of interest code. Such employees are known as "designated employees."[2]

This disclosure is made on a form called a "Statement of Economic Interests." It may also be referred to by the acronym "SEI" or its number "Form 700." A web-based version of the form is available from the Fair Political Practices Commission website: www.fppc.ca.gov. Local agencies may adopt electronic filing procedures with oversight from the Fair Political Practices Commission.[3] One's local agency usually provides paper copies of the form as well.

This form is filed upon assuming office, on an annual basis while in office, and upon leaving office.[4] Local rules may impose more stringent requirements.

The following kinds of economic interests must be disclosed if they meet certain minimum thresholds:

- Sources of income;
- Interests in real property;
- Investments;
- Business positions; and
- Sources of gifts.

See table on page 52.

ETHICS CODES VERSUS LOCAL CONFLICT OF INTEREST CODES

California's Political Reform Act requires local agencies to adopt local conflict of interest codes.[5] These codes supplement California law, by specifying which positions in the agency are subject to which ethics laws.

For more information, see "About Local Conflict of Interest Codes" (available at www.ca-ilg.org/local-conflict-of-interest-codes) and the Fair Political Practices Commissions materials on adopting local conflict of interest codes (see www.fppc.ca.gov/index.php?id=228).

Types of Economic Interests that Must Be Disclosed

- **Sources of Income.** $500 or more in income from one source (including any income received from a business, nonprofit organization, government agency, or individual) must be disclosed. "Sources of income" include a community property interest in a spouse or domestic partner's[6] income, but not separate property income.[7] Additionally, if someone promises an official $500 or more twelve months prior to the decision, that person or entity promising the money is a source of income.[8]
- **Personal Finances.** An official has an economic interest in the official's expenses, income, assets or liabilities and those of the official's immediate family (spouse or domestic partner[9] and dependent children).[10]
- **Real Property.** An interest in real property where the interest is worth $2,000 or more in real property must be disclosed. The interest may be held by the official, the official's spouse or domestic partner[11] (even as separate property) and children or anyone acting on their behalf. Real property interests can also be created through leaseholds, options and security or mortgage interests in property.[12]
- **Investments.** Another disclosable interest is created when the official, the official's spouse or domestic partner[13] (even as separate property), or dependent children or anyone acting on their behalf has created an investment worth $2,000 or more in a business entity, even if the official does not receive income from the business.[14]
- **Business Employment or Management.** If the official serves as a director, officer or partner, trustee, employee or otherwise serves in a management position in a company, an economic interest is created.[15] Note this does not apply to a member of the board of a nonprofit entity.
- **Related Businesses.** The official must disclose 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 $2000 or more; or
  - Is a director, officer, partner, trustee, employee, or manager.[16]
- **Business-Owned Property.** A direct or indirect ownership interest in a business entity or trust that owns real property is another disclosable interest.[17]
- **Loans.** Another kind of potentially disclosable interest is receiving a loan from someone (including someone who guarantees a loan), unless the loan is from a commercial institution issued on the same terms as available to anyone in the public.[18]
- **Gifts.** Gifts from a single source must be added up over the course of a calendar year. An official's reporting obligation is triggered when the combined value of a series of gestures from a single gift-giver reaches $50 or more.[19] For more discussion of the gift issue, please see chapter 3, pages 38-41, and www.ca-ilg.org/GiftCenter.

Penalties

Economic interest disclosure requirements are part of California's Political Reform Act. Failure to report or incomplete reporting are punishable by a variety of civil, criminal and administrative penalties depending on the severity of the violation and the degree of intent to violate the law that enforcement entities are able to demonstrate.[20]

These penalties can include any or all of the following:

- Immediate loss of office;[21]
- Prohibition from seeking elected office in the future;[22]
- Fines of up to $10,000 or more depending on the circumstances;[23] and
- Jail time of up to six months.[24]

In addition to the above penalties, failure to file a Statement of Economic Interests on time will result in late fees of $10 per day, up to a maximum of $100.[25]

FOR MORE INFORMATION

On penalties for ethics law violations, see www.ca-ilg.org/consequences.

Campaign Contribution Disclosure

Basic Rules

California has an extensive framework for transparency with respect to campaign contributions.[26] The basic theory is that the public has a right to know who gives money and other forms of support to candidates for public office; another is that the prospect of public disclosure will discourage improper influences.[27]

These transparency requirements apply not only to candidates, but also to groups which organize to participate in the election process (known as "committees" under the Political Reform Act).[28] Transparency requirements also apply to those who make large contributions to influence elections.[29] Those who participate in campaigns to pass or defeat ballot measures are also subject to these requirements.[30]

Cities and counties may have additional campaign finance disclosure laws for candidates for offices within their jurisdiction or committees focused on local jurisdiction ballot measures.[31] The Fair Political Practices Commission requires that these local ordinances be filed with the commission.[32]

In addition, certain kinds of local officials face California law restrictions on campaign contributions from people with business pending before the agency. Chapter 5 (pages 77-79) explains these restrictions.

Chapter 3 explains the restrictions on how campaign funds may be spent (only for political, governmental and charitable purposes) (page 42).

FOR MORE INFORMATION

On campaign contribution disclosure, see the following resources:

- The Fair Political Practices Commission has extensive information to guide candidates and ballot measure committees on these requirements. Visit the FPPC website at www.fppc.ca.gov or call the FPPC's toll-free number: 1-866-ASK-FPPC (1-866-275-3772).
- The Political Reform Division of California Secretary of State issues identification numbers to campaigns and committees and provides technical assistance to filers, and maintains disclosure reports for public access. Visit the Secretary of State's website at www.sos.ca.gov/prd or call 916-653-6224.
- For federal elections (Presidential, U.S. Senate, House of Representatives), consult the Federal Election Commission at 1-800-424-9530 or on the web at www.fec.gov.

For specific questions, please contact the Fair Political Practices Commission.

Penalties

Campaign contribution disclosure requirements are part of the Political Reform Act. Violations of the Act are punishable by a variety of civil, criminal and administrative penalties, depending on the severity of the violation and the degree of intent to violate the law that enforcement entities are able to demonstrate.[33]

These penalties can include any or all of the following:

- Immediate loss of office;[34]
- Prohibition from seeking elected office in the future;[35]
- Fines of up to $10,000 or more depending on the circumstances;[36] and
- Jail time of up to six months.[37]

FOR MORE INFORMATION

On penalties for ethics law violations, see www.ca-ilg.org/consequences.

OTHER DISCLOSURE REQUIREMENTS

The Public Records Act is the over-arching disclosure requirement in California. In addition, there are specific disclosure requirements that are useful to note and are discussed in more detail online and in other chapters of this guide:

- General gifts to public agencies must be disclosed on a special form and posted on the agency website. More information about this disclosure is available at www.ca-ilg.org/GiftsQuestion3, and at http://www.fppc.ca.gov/index.php?id=512.
- Gifts of tickets to public agencies must be disclosed a special form and submitted to the FPPC for posting on its website. More information about this disclosure is available at www.ca-ilg.org/GiftsQuestion3, and at http://www.fppc.ca.gov/index.php?id=524.
- Campaign contributions over $250 during the previous 12 months from any party or participant in a pending permit or license application as discussed on pages 77-78 of chapter 5.

There are of course other specific disclosure/notice requirements; these are just ones that tend to relate directly to public confidence/ethics issues.

Charitable Fundraising Disclosure

Basic Rules

A sometimes overlooked disclosure obligation relates to an official or candidate's charitable or other fundraising activities. This obligation is referred to as the "behested payments" requirement. The theory is that the public has a right to know who is contributing to an elected official's favorite charities and other causes.

The disclosure requirement is triggered when:

- A person or business donates $5,000 or more (in a calendar year);
- The donation is for a legislative, governmental or charitable purpose; and
- The donation is made at the behest of the a public official. This means the official or candidate (or their employee or agent):
  - Requests or suggests the donation;
  - Controls or directs the donation; or
  - Plays a cooperating, consulting, or coordinating role with respect to the donation.[38]

The report contains the following information:

- The contributor's name and address;
- The amount or fair market value of the contribution;
- The date or dates on which the payments were made;
- The name and address of the contribution recipient;
- If goods or services were contributed, a description of those goods and services; and
- A description of the purpose or event for which the contribution was used.[39]

The official must make this report once a single donor (whether an individual or an organization) has given more than the $5,000 aggregate threshold for a calendar year. Once the $5,000 threshold has been met, all payments the donor has made for the calendar year must be disclosed within 30 days after: 1) the date the $5,000 threshold was reached, or 2) the date the payment was made, whichever occurs later.[40]

Within 30 days of the donor reaching the $5,000 threshold, the elected official must file a report with the official's agency (typically the filing officer). The Fair Political Practices Commission's "Form 803 - Behested Payments Report" should be used to make this disclosure.[41]

What is a "legislative, governmental or charitable" purpose? The law does not say, but charitable causes typically involve 501(c)(3) organizations. A "governmental" cause might include such things as fund-raising for a new county library. The reference to a "legislative" cause apparently has its roots in a 1996 Fair Political Practices Commission opinion addressing a situation in which a state senator asked a private party to pay for the airfare and expenses for a witness to come testify at a legislative hearing.[42]

Of course, when a public servant conditions one's action on a matter on a contribution to a worthy cause it is criminal extortion under state and federal law.[43] See discussion in next section.

FOR MORE INFORMATION

On charitable fundraising, see the following resources:

- "Raising Funds for Favorite Causes," available at www.ca-ilg.org/fundraising
- "Using Public Resources for Charitable Purposes," available at www.ca-ilg.org/charity
- "Commitment to Nonprofit Causes and Public Service: Some Issues to Ponder," available at www.ca-ilg.org/nonprofits
- "Understanding the 'Behested Payments' Issue," available at www.ca-ilg.org/BehestedPayments

For specific questions, please contact the Fair Political Practices Commission or agency counsel.

Penalties

These disclosure requirements are part of the Political Reform Act. Violations of the Act are punishable by a variety of civil, criminal and administrative penalties, depending on the severity of the violation and the degree of intent to violate the law that enforcement entities are able to demonstrate.[44]

Penalties for Extortion under State and Federal Law

California Law. If an official demands that a contribution to a charitable organization be made as a condition of making a favorable decision, the demand could be prosecuted as extortion. Extortion under color of official right is a misdemeanor under California law.[45] Misdemeanors are punishable by up to six months in county jail, a fine of up to $1,000 or both.[46] Extortion can also be the basis for a grand jury to initiate removal-from-office proceedings for official misconduct.[47]

Federal Law. To be chargeable as a federal offense, the act must affect interstate commerce. The maximum penalty for extortion under federal law is 20 years in prison and a $250,000 fine.[48]

Honest Services Fraud

Under federal wire and mail fraud laws, the public has the right to the "honest services" of public officials.[49] The basic concept is that a public official owes a duty of loyalty and honesty to the public—similar to a trustee or fiduciary.[50] That duty is violated when a public official makes a decision that is not motivated by his or her constituents' interests but instead by his or her personal interests.[51]

In one instance, federal authorities prosecuted a city treasurer whose decisions to award contracts were motivated in part by whether the firm contributed to political and charitable causes favored by the treasurer.[52]

The maximum penalty for being guilty of wire and/or mail fraud includes a jail term of up to 20 years and a $250,000 fine.[53]

FOR MORE INFORMATION

On penalties for ethics law violations, see www.ca-ilg.org/consequences.

The Public's Right to Access Records

Basic Rules

There are two sets of laws and regulations that govern public records in California. One set governs the public's right to access public records[54] and another set governs which records an agency must retain and for how long.[55]

The public has the right to see materials that are created as part of the conduct of the people's business.[56] These materials include any writing that was prepared, owned, used, or retained by a public agency.[57] They include documents, computer data, e-mails, facsimiles, and photographs.[58]

A document is presumed to be a disclosable record unless a specific exception applies.[59] A few of the exceptions worth noting are:

» The "pending litigation" exception, which exempts documents that are prepared in support of ongoing litigation (otherwise opposing counsel could obtain all documents containing the agency's legal strategy just by asking for them).[60]

A safe assumption is virtually all materials involved in one's public service are public records subject to public disclosure.

» The "deliberative process" exception, which exempts preliminary drafts, notes, or other information relating to deliberative processes not ordinarily retained in the agency's course of business. The public agency also must be able to demonstrate the public's interest in nondisclosure outweighs the public's interest in disclosure.[61]

» The "personal privacy" exception, which exempts personnel files, medical records or other such files the disclosure of which would constitute an invasion of personal privacy.[62]

Despite these exceptions, the safe assumption is virtually all materials involved in one's public service—including e-mails—are records subject to disclosure.

RECORDS RETENTION

Local agencies generally must retain public records for a minimum of two years.[63] Most local agencies adopt record retention schedules as part of their records management system. These define which records must be retained. The Secretary of State provides local agencies with record management guidelines.[64]

FOR MORE INFORMATION

On Public Records, see the following resources:

- *The People's Business: A Guide to the California Public Records Act*, 2008. Available at the League of California Cities website at www.cacities.org/PRAGuide or in hardcopy form from http://www.cacities.org/publications or by calling (916) 658-8257
- *The People's Business* August 2011 Supplement, 2011. Available at the League of California Cities website at www.cacities.org or in hardcopy form from www.cacities.org/publications or by calling (916) 658-8257
- *The People's Business: A Chart of Frequently Requested Information and Records*, 2011. Available at the League of California Cities website at www.cacities.org or in hardcopy form from www.cacities.org/publications or by calling (916) 658-8257
- *Summary of the California Public Records Act*, 2004. Available on the California Attorney General's website at or go to http://ag.ca.gov/publications/summary_public_records_act.pdf

For specific questions, please contact agency counsel.

Penalties

Anyone can sue the agency to enforce his or her right to access public records subject to disclosure.[65] If the agency loses, it must pay costs and attorney's fees.[66]

FOR MORE INFORMATION

On penalties for ethics law violations, see www.ca-ilg.org/consequences.

Conducting the Public's Business in Public

Basic Rules

The underlying philosophy of California's open government laws is that public agency processes should be as transparent as possible. Such transparency Is vital in promoting public trust in government.

California's open meeting laws[67] provide legal minimums for local agency transparency in decision-making.[68] Although community college boards are subject to less detailed requirements than are other local agencies, the following are some general guidelines. Check the endnotes for specific references to community college district law.[69]

Elected and most appointed local agency decision-making bodies—which include many advisory committees—must conduct their business in an open and public meeting to assure the local decision-making process is observable by the public.[70] Note that the issue of what kinds of bodies are subject to open meeting requirements can involve careful legal analysis. For purposes of clarity, this guide uses the term "decision-making body" and "decision-makers," but the reader should be aware that this term is imprecise.

A "meeting" is any situation involving a majority of a decision-making body discussing, hearing, deliberating or making a decision on any item that is within the agency's jurisdiction. In other words, a majority of a decision-making body cannot hear a presentation or talk privately about an issue that is before the body, no matter how the conversation occurs, whether by telephone or e-mail, on a local blog, or at a local coffee shop.[71]

The following are some key things to keep in mind:

» **Meetings.** A "meeting" is any situation involving a majority of a decision-making body in which agency business is transacted or discussed.[72]

» **Committees and Advisory Bodies.** Advisory groups or committees formally created by a governing body are subject to the open meeting laws. Standing committees are subject to the open meeting laws if they have a continuing subject-matter jurisdiction or have a meeting schedule fixed by formal action of the governing body.[73]

» **Serial Meetings.** Avoid unintentionally creating a "serial" meeting—a series of communications that result in a majority of decision-makers conferring on an issue. For example, if two members of a five-member decision-making body consult outside of a public meeting (which is not in and of itself a violation) about a matter of agency business and then one of those individuals consults with a third member on the same issue, a majority of the body has consulted on the same issue. Note the communication does not need to be in person and can occur through a third party. For example, sending or forwarding e-mail can be sufficient to create a serial meeting, as can a staff member polling decision-makers members in a way that reveals the members' positions to one another.[74]

However, separate communications with decision-makers to answer questions or provide information are generally okay, as long as those communications do not communicate information about other decision-makers' comments or position.[75] The key thing to avoid is all communications that would result in a collective concurrence among decision-makers outside a public meeting.[76]

GOOD ETHICS IS GOOD POLITICS

The media is highly vigilant in monitoring compliance with open government requirements—and quick to report on perceived violations.

» **Posting and Following the Agenda.** In general, public officials may only discuss and act on items included on the posted agenda for a meeting.[77] However, decision-makers or staff may briefly respond to questions or statements during public comments that are unrelated to the agenda items. Officials can also request staff to look into a matter or place a matter on the agenda for a subsequent meeting.[78] Only in unexpected emergency circumstances or situations when the decision-making body has determined by vote there is a need for immediate action can matters that are not on the agenda be discussed or acted upon.[79]

» **Permissible Gatherings.** Not every gathering of members of a decision-making body outside a noticed meeting violates the law. For example, an open meeting violation would not occur if a majority of a decision-making body attend the same educational conference or attend a meeting not organized by the local agency as long as certain requirements are met.[80] Nor is attendance at a social or ceremonial event in and of itself a violation.[81] The basic rule to keep in mind is a majority of members of a decision-making body cannot discuss agency business (including at conferences or social events) except at an open and properly noticed meeting.

» **Closed Sessions.** The open meeting laws include provisions for closed discussions under very limited circumstances.[82] For example, a governing body may generally meet in a closed session to receive advice from its legal counsel regarding pending or reasonably anticipated litigation.[83] However, the reasons for holding the closed session must be noted on the agenda and different disclosure requirements apply to different types of closed sessions.[84] See table on next page for a list of kinds of permissible closed sessions.

Because of the complexity of the open meeting laws, close consultation with an agency's legal advisor is necessary to ensure that requirements are observed.

FOR MORE INFORMATION

On open meeting laws, see the following resources:

» Open and *Public IV: A Guide to the Ralph M. Brown Act*, 2010. Available on the League of California Cities website at www.cacities.org/openandpublic or in hardcopy form by visiting www.cacities.org/publications or by calling (916) 658-8257.

» *The Brown Act: Open Meetings for Local Legislative Bodies*, 2003. Available on the California Attorney General's website at http://oag.ca.gov/open-meetings

» "Closed Session Leaks: Discretion is the Better Part of Valor – and Ethics," available at www.ca-ilg.org/closed-session-leaks

» The use of technology and public meetings is discussed in *Meetings and Technology: Finding the Right Balance*, 2012. Available at www.ca-ilg.org/technology-and-meetings

For specific questions, please contact agency counsel.

Typical Closed Session Issues

Local agency open meetings laws vary in terms of what kinds of closed sessions are allowed. The following list is illustrative. Consult with agency counsel concerning 1) whether a particular type of closed session is available and 2) under what circumstances.

- ✓ **Personnel.** To consider the appointment, employment, evaluation of performance, discipline, or dismissal of a public employee, or to hear complaints against an employee.[85]
- ✓ **Pending Litigation.** To confer with or receive advice from an agency's legal counsel with respect to existing, threatened or potential litigation.[86]
- ✓ **Real Estate Negotiations.** To provide direction to the agency's negotiator on the price and terms under which the agency will purchase, sell, exchange or lease real property.[87]
- ✓ **Labor Negotiations.** To meet with the agency's labor negotiator regarding salaries and benefits and other matters within the scope of labor negotiations.[88]
- ✓ **Student Disciplinary Issues (for School Districts and Community College Districts).** To consider discipline of a student if a public hearing would result in disclosure of prohibited information, after notifying the student (or parents in the case of minor students) and they do not request a public hearing.[89]
- ✓ **Grand Jury Proceedings.** To allow testimony in private before a grand jury (either individually or collectively).[90]
- ✓ **License Applicants with Criminal Records.** To allow an agency to determine whether a would-be licensee with a criminal record is sufficiently rehabilitated to obtain the license.[91]
- ✓ **Public Security.** To confer with designated law enforcement officials regarding threats to public facilities and services or the public's right to access those services and facilities.[92]
- ✓ **Multi-jurisdictional Law Enforcement Agency.** To discuss ongoing criminal investigations.[93]
- ✓ **Hospital Peer Review and Trade Secrets.** To discuss issues related to medical quality assurance or trade secrets.[94]

Just because a topic *may* be discussed in closed session does not mean that it always *must* be discussed in closed session. Sometimes there are additional legal reasons (for example privacy interests of employees) for discussing a matter during a permissible closed session. Other times such discussions are in the best interests of the public (for example, in determining negotiating positions for the agency). But other times, a majority of the decision-making body may decide that the public's interests are best served by *not* discussing a matter in closed session. A key thing to keep in mind is the decision on whether to discuss and disclose such information is a collective one, not an individual one.

Penalties

Nullification of Decision

Many decisions that are not made according to the open meeting laws are voidable.[95] After asking the agency to cure the violation, either the district attorney or any interested person may sue to have the action declared invalid.[96]

Criminal Sanctions

Additionally, members of the governing body who intentionally violate the open meeting laws may be guilty of a misdemeanor.[97] The penalty for a misdemeanor conviction is imprisonment in county jail for up to six months or a fine of up to $1,000 or both.[98]

Other Consequences

Either the district attorney or any interested person may sue to remedy past, and prevent future, violations of the open meeting laws.[99] Another remedy, under certain circumstances, is for a court to order all closed sessions be tape-recorded.[100] Costs and attorney's fees may be awarded to those who successfully challenge open meeting law violations.[101]

FOR MORE INFORMATION

On penalties for ethics law violations, see www.ca-ilg.org/consequences.

A NOTE ABOUT BLOGGING AND SOCIAL NETWORKING SITES

Decision-makers who are covered by open meeting laws must avoid situations in which the majority of a decision-making body uses the Internet to communicate with each other about a matter of agency business. For this reason, decision-makers must take care when responding to each other's blogs, posts on social networking sites (such as Facebook) or e-mails.

The so-called "Web 2.0" creates opportunities for people to present information on websites in the form of a journal. These sites also allow visitors to make comments or ask questions (called "posts" or "postings") in response to the others' comments.

For many decision-makers, blogging offers an effective way to share information with and communicate with constituents. For example, rather than having to field 10 e-mails asking the same question, an official can post a response on his or her blog and refer folks to the answer. Blogging can also a good way to keep the public informed, especially as fewer people turn to traditional media for information.

The open meeting laws do not stop one-way communications from members of legislative bodies to others. An example would be a "frequently asked questions" piece on an official's website that does not involve two-way communications among legislative body members.

However, a majority of decision-makers participating in a blog or other web-based conversation could constitute a "meeting" within the meaning of the open meeting laws. This means that the meeting must be held in accordance with all open meeting requirements, in an appropriate (disability accessible) location, with prior notice and an agenda.

What is the theory underlying these restrictions? One is that the general public has a right to know that discussions and decision-making on a particular issue may occur. There is also an underlying concept of decision-makers facing their constituents as they deliberate on issues, as well as the obligation to hear the thoughts of the full range of constituents (not just those on the Internet) should constituents choose to offer them.

For more information, see "Legal Issues Associated with Social Media" (available at www.ca-ilg.org/SocialMediaLegalIssues) and "Taking the Bite Out of Blogs: Ethics in Cyberspace" (available at www.ca-ilg.org/blogs).

The Public's Right to Participate in Meetings

Basic Rules

Another element of open meeting laws is the public's right to address the governing body at any open meeting. An elected official's role is to both hear and evaluate these communications. There are a number of basic rules that govern this right. Again, check the endnotes for specific references to requirements for community college boards.[102]

Posting and Following the Agenda

The open meeting laws require the public be informed of the time of and the issues to be addressed at each meeting.[103] The agenda must be posted at least 72 hours in advance of a meeting and written in a way that informs people of what business will be discussed.[104]

Members of the public may request a copy of the agenda packet be mailed to them at the time the agenda is posted or upon distribution to the governing body.[105] Most local agencies must post these materials on their website, if the agency has one.[106]

There are a few exceptions to the 72-hour requirement that relate to unexpected circumstances.[107] These exceptions may allow an agency to take action or discuss items not on the agenda.[108] The agency may also hold special meetings on 24-hour notice[109] or on less than 24-hours notice if a true emergency exists.[110]

The Public's Right to Material Not Included in the Agenda Packet

Any documents or other materials relating to an agenda item for an open session of a regular meeting of a governing body distributed less than 72 hours before the meeting must be made available to the public. This must occur when the materials are distributed to the members of the governing body at a public office or location that the agency designates for this purpose. Local agencies must list the address of this office or location on the agendas for all meetings of their governing body. Materials distributed after the agenda packet is prepared may be posted on an agency website.[111]

Any documents distributed during a public meeting must also be made available to the public. This must occur at the meeting if the document is prepared by the agency, or after the meeting of the document is prepared by others, like members of the public.[112]

Special Issues

Taping or Recording of Meetings Is Allowed

Anyone attending a meeting may photograph or record it with an audio or video recorder unless the governing body makes a finding the noise, illumination, or obstruction of view will disrupt the meeting.[113] Any meeting tape or film made by the local agency becomes a public record that must be made available to the public for at least 30 days.[114]

Sign-In Must Be Voluntary

Members of the public cannot be required to register their name or fulfill any other condition for attendance at a meeting. If an attendance list is used, it must clearly state signing the list is voluntary.[115]

The Public's Right to be Heard

Generally, every agenda must provide an opportunity for the public to address the governing body on any item of interest to the public within the body's jurisdiction.[116] If the issue of concern is one pending before the governing body, the opportunity must be provided before or during the body's consideration of that issue.[117]

Reasonable Time Limits May Be Imposed

Local agencies may adopt reasonable regulations to ensure everyone has an opportunity to be heard in an orderly manner.[118] When many people wish to comment on an issue, for example, an agency may give each speaker a time limit to ensure that everyone has a chance to speak and the agency can complete its business. However, every effort should be made to avoid artificially short time limits; this gives the public a reasonable chance to share their views and demonstrates the agency's commitment to considering the public's perspectives.

Handling Disruptions

If an individual or group willfully interrupts a meeting and order cannot be restored, the room may be cleared.[119] Members of the media must be allowed to remain and only matters on the agenda can be discussed.[120]

The chair can encourage everyone to be civil and mutually respectful during the meeting and remove individuals that are disruptive.[121] However, the chair cannot stop or remove speakers for expressing their opinions or their criticism of the governing body.[122]

Finally, note that other California laws may provide additional, subject-specific notice requirements.

FOR MORE INFORMATION

On public participation in meetings, see the following resources:

- *The Brown Act: Open Meetings for Local Legislative Bodies, 2003*. Available on the California Attorney General's website at http://oag.ca.gov/open-meetings
- Institute resources on civility, see www.ca-ilg.org/civility
- Resources on open meetings listed at page 60

For specific questions, please contact agency counsel.

GOOD ETHICS IS GOOD POLITICS

Community relations—and the public's views of an official's responsiveness—are seriously undermined when it appears an official is not listening to the input being provided by the public. Even more damage occurs to the public's perception if an official expresses disagreement with a position being advocated in a hostile or disrespectful way.

Even if one disagrees with the views being offered, the statesperson-like approach is to treat all speakers with the same respect one would like to be treated with if the roles were reversed. This is an application of the value of respect.

Penalties

Nullification of Decision

As a general matter, decisions that are not made according to the open meeting laws are voidable.[123] After asking the agency to cure the violation, either the district attorney or any interested person may sue to have the action declared invalid.[124]

Criminal Sanctions

Additionally, members of the governing body who intentionally violate the open meeting laws may be guilty of a misdemeanor.[125] The penalty for a misdemeanor conviction is imprisonment in county jail for up to six months or a fine of up to $1,000 or both.[126]

Other Measures

Either the district attorney or any interested person may sue to remedy past and prevent future violations of the open meeting laws.[127] Another remedy, under certain circumstances, is for a court to order that all closed sessions be tape-recorded.[128] Costs and attorney's fees may be awarded to those who successfully challenge open meeting law violations.[129]

Potential Civil Rights Violations

Regulations of public participation beyond those allowed by applicable statutory and constitutional law can give rise to liability under the civil rights laws,[130] including liability for attorney's fees.[131]

FOR MORE INFORMATION

On penalties for ethics law violations, see www.ca-ilg.org/consequences.

VOTERS SUPPORT OPEN GOVERNMENT

In 2004, California voters made the concept of public agency transparency a state constitutional requirement as well as a statutory one. In so doing, the voters observed that "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."[132]

Endnotes and Additional Information

Note: *Sections in the California Code are accessible at* http://leginfo.legislature.ca.gov/. *Fair Political Practices Commission regulations are accessible at* www.fppc.ca.gov/index.php?id=52. *A source for case law information is* www.findlaw.com/cacases/ *(requires registration).*

1 This is a requirement of the Political Reform Act. *See generally* Cal. Gov't Code §§ 87200-10.

2 Cal. Gov't Code § 82019.

3 *See* Cal. Gov't Code § 87500.2.

4 Cal. Gov't Code §§ 87202-04, 87302. *See* 2 Cal. Code Regs. § 18722.

5 Cal. Gov't Code § 87300.

6 2 Cal. Code Regs. § 18229.

7 Cal. Gov't Code §§ 82030, 87103(c); 2 Cal. Code Regs. § 18703.3.

8 Cal. Gov't Code § 87103(c). *See Larsen Advice Letter,* No. A-82-192 (1982).

9 2 Cal. Code Regs. § 18229.

10 2 Cal. Code Regs. § 18703.5 (referring to Cal. Gov't. Code § 82029, defining "immediate family").

11 2 Cal. Code Regs. § 18229.

12 *See* Cal. Gov't Code §§ 82033, 87103(b).

13 2 Cal. Code Regs. § 18229.

14 Cal. Gov't Code §§ 82034, 87103(a); 2 Cal. Code Regs. § 18703.1.

15 Cal. Gov't Code § 87103(d); 2 Cal. Code Regs. § 18703.1(b).

16 2 Cal. Code Regs. § 18703.1(c).

17 Cal. Gov't Code § 82033 (pro rata interest, if own 10 percent interest or greater).

18 Cal. Gov't Code § 82030(b)(8), (10).

19 Cal. Gov't Code § 87207(a)(1).

20 *See generally* Cal. Gov't Code §§ 91000-14.

21 *See* Cal. Gov't Code § 1770(h) (providing a vacancy occurs upon conviction of a felony or of any offense involving a violation of official duties).

22 *See* Cal. Gov't Code § 91002 (providing no person convicted of a misdemeanor under the Political Reform Act shall be a candidate for any elective office or act as a lobbyist for a period of four years following the date of the conviction).

23 Cal. Gov't Code § 91000(b).

24 *See* Cal. Penal Code § 19 (providing misdemeanors are punishable by imprisonment in county jail up to six months, a fine not exceeding $1,000, or both).

25 Cal. Gov't Code §91013.

26 *See generally* Cal. Gov't Code §§ 84100-511.

27 *See* Cal. Gov't Code § 81002(a).

28 *See, e.g.*, Cal. Gov't Code §§ 82013, 84101.

29 *See* Cal. Gov't Code § 82013(c).

30 *See* Cal. Gov't Code § 84202.3.

31 *See* Cal. Gov't Code §§ 81013, 81009.5.

32 Cal. Gov't Code § 81009.5(a). Local disclosure requirements can be found on the Fair Political Practices Commission's website, available at http://fppc.ca.gov/index.php?id=9.

33 *See generally* Cal. Gov't Code §§ 91000-14.

34 *See* Cal. Gov't Code § 1770(h) (providing a vacancy occurs upon conviction of a felony or of any offense involving a violation of official duties).

35 *See* Cal. Gov't Code § 91002 (providing no person convicted of a misdemeanor under the Political Reform Act shall be a candidate for any elective office or act as a lobbyist for a period of four years following the date of the conviction).

36 Cal. Gov't Code § 91000(b).

37 *See* Cal. Penal Code § 19 (providing misdemeanors are punishable by imprisonment in county jail up to six months, a fine not exceeding $1,000, or both).

38 *See* Cal. Gov't Code § 82015(b)(2)(B)(iii); 2 Cal. Code Regs. § 18215.3(a). *See also* Cal. Fair Political Practices Commission, *Limitations and Restrictions on Gifts, Honoraria, Travel and Loans,* at 6 (2012), available at http://www.fppc.ca.gov/factsheets/LocalGiftFactSheet2013.pdf.

39 *See* Cal. Gov't Code § 82015(b)(2)(B)(iii). *See also* Fair Political Practices Commission, California Form 803 – Behested Payments Report Instructions, available at http://fppc.ca.gov/forms/803/Form803.pdf.

40 *Id.*

41 Fair Political Practices Commission, California Form 803 - Behested Payments Report, available at http://www.fppc.ca.gov/forms/803/Form803.pdf

42 *See Schmidt Advice Letter,* No. A-96-098 (March 26, 1996); S. Rules. Comm., S.B. 124 S. Floor Analysis, 1997-1998 Sess., (Cal. Sept. 2, 1997).

43 Cal. Penal Code § 518; *In re Shepard*, 161 Cal. 171 (1911). *See also* 18 U.S.C. § 666(a)(1) (B) (referring to "corruptly solicits or demands for the benefit of any person, intending to be influenced . . .").

44 *See generally* Cal. Gov't Code §§ 91000-14.

45 Cal. Penal Code § 521.

46 Cal. Penal Code § 19.

47 Cal. Gov't Code §§ 3060-3074.

48 18 U.S.C. § 1951(a). *See generally* 18 U.S.C. § 3571(b).

49 18 U.S.C. §§ 1341 (mail fraud), 1343 (wire fraud), 1346 (honest services).

50 *U.S. v. Sawyer,* 239 F.3d 31, 39 (1st Cir. 2001) (finding sufficient evidence of guilt apart from proof of violation of state law).

51 *U.S. v. Lopez-Lukis,* 102 F.3d 1164, 1169 (11th Cir. 1997) (noting that effort to improperly control composition of decision-making body constituted an effort to deprive public of honest services); *McNally v. U.S.,* 483 U.S. 350 at 362-63 (Justice Stevens, dissenting).

52 *U.S. v. Kemp,* 379 F.Supp. 2d 690, 697-98 (E.D. Penn. 2005). In *Skilling v. U.S.,* 130 S.Ct. 2896, 2931 (2010), the U.S. Supreme Court held that in order to avoid unconstitutional vagueness 18 USC §1346 (honest services fraud) only criminalizes bribes and kick-back schemes.

53 18 U.S.C. §1341 (". . . shall be fined under this title or imprisoned not more than 20 years, or both.").

54 *See* Cal. Gov't Code §§ 6250-70.

55 *See* Cal. Gov't Code §§ 34090-34090.8.

56 *See generally* Cal. Gov't Code §§ 6250-70. *See also* Cal. Const. art. I, § 3(b)(1).

57 *See* Cal. Gov't Code §§ 6252-53.

58 Cal. Gov't Code § 6252(g) "'Writing' means 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."

59 *State ex rel. Division of Industrial Safety v. Superior Court,* 43 Cal. App. 3d 778, 117 Cal. Rptr. 726 (1974); Cook v. Craig, 55 Cal. App. 3d 773, 127 Cal. Rptr. 712 (1976).

60 Cal. Gov't Code § 6254(b).

61 *See* Cal. Gov't Code § 6254(a). *See also California First Amendment Coalition v. Superior Court,* 67 Cal. App. 4th 159, 78 Cal. Rptr. 2d 847 (1998).

62 Cal. Gov't Code § 6254(c).

63 Cal. Gov't Code § 34090(d). Note that in California, the Public Records Act is not a records retention statute. *See Los Angeles Police Dept. v. Superior Court,* 65 Cal. App. 3d 661 (1977).

64 The Secretary of State's Local Government Records Management Guidelines may be viewed at http://www.sos.ca.gov/archives/local-gov-program/pdf/records-management-8.pdf

65 Cal. Gov't Code § 6258.

66 Cal. Gov't Code § 6259(d).

67 *See generally* Cal. Gov't Code §§ 54950-63 (for cities, counties, special districts and school districts).

68 *See* Cal. Gov't Code § 54953.7.

69 Cal. Educ. Code §§ 72121-29 (for community college district governing boards).

70 *See* Cal. Gov't Code § 54952.2(a).

71 Cal. Gov't Code § 54952.2(b); Cal. Educ. Code § 72121.

72 Cal. Gov't Code § 54952.2(a).

73 Cal. Gov't Code § 54952(b).

74 Cal. Gov't Code § 54952.2.

75 Cal. Gov't Code § 54952.2(b)(2).

76 *Wolfe v. City of Fremont,* 144 Cal. App. 4th 533, 50 Cal. Rptr. 3d 524 (2006); *see also* S.B. 1732, 2007-2008 Leg., Reg. Sess. (Cal. 2008) (clarifying Cal. Gov't Code § 54952.2 to include both communications that result in a collective concurrence and those that are part of the process of developing collective concurrence).

77 Cal. Gov't Code § 54954.2; Cal. Educ. Code § 72121.5.

78 Cal. Gov't Code § 54954.2(a)(2), *See* Cal. Educ. Code § 72121.5.

79 Cal. Gov't Code § 54954.2(b).

80 Cal. Gov't Code § 54952.2(c)(2).

81 Cal. Gov't Code § 54952.2(c)(5).

82 *See, e.g.,* Cal. Gov't. Code §§ 54956.5-54957, 54957.6, 54957.10, 54962; Cal. Educ. Code § 72122.

83 Cal. Gov't Code § 54956.9.

84 Cal. Gov't Code § 54954.5.

85 Cal. Gov't Code § 54957(b).

86 Cal. Gov't Code § 54956.9.

87 Cal. Gov't Code § 54956.8.

88 Cal. Gov't Code §§ 3549.1 (school and community college districts), 54957.6 (other local agencies).

89 Cal. Educ. Code §§ 35146, 72122.

90 Cal. Gov't Code § 54953.1.

91 Cal. Gov't Code § 54956.7.

92 Cal. Gov't Code § 54957(a).

93 Cal. Gov't Code § 54957.8.

94 Cal. Gov't Code §§ 37606, 37624.3; Cal. Health & Safety Code §§ 1461, 1462, 32106, 32155.

95 Cal. Gov't Code § 54960.1; Cal. Educ. Code § 72121(b).

96 *Id.*

97 Cal. Gov't Code § 54959.

98 *See* Cal. Penal Code § 19.

99 Cal. Gov't Code §§ 54960-.2.

100 *Id.*

101 Cal. Gov't Code § 54960.5.

102 Cal. Educ. Code §§ 72121-29 (for community college district governing boards).

103 Cal. Gov't Code § 54954.2(a); Cal. Educ. Code § 72121.

104 *Id.*

105 Cal. Gov't Code § 54954.1.

106 *See* Cal. Gov't Code § 54954.2. This requirement only applies to:

- The governing body of a local agency or any other local body created by state or federal statute; or
- A commission, committee, board, or other body of a local agency, created by charter, ordinance, resolution, or formal action of a legislative body, if the members are compensated for their appearance, and at least one member is also the member of a governing body created by state or federal statute.

107 Cal. Gov't Code § 54954.2(b).

108 Cal. Gov't Code § 54954.2(b)(2).

109 Cal. Gov't Code § 54956.

110 Cal. Gov't Code § 54956.5.

111 Cal. Gov't Code § 54957.5.

112 Cal. Gov't Code § 54957.5(c).

113 Cal. Gov't Code § 54953.5(a).

114 Cal. Gov't Code § 54953.5(b).

115 Cal. Gov't Code § 54953.3.

116 Cal. Gov't Code § 54954.3(a); Cal. Educ. Code § 72121.5.

117 Cal. Gov't Code § 54954.3(a).

118 Cal. Gov't Code § 54954.3(b); *White v. City of Norwalk,* 900 F.2d 1421, 1425 (9th Cir. 1990).

119 Cal. Gov't Code § 54957.9.

120 *Id.*

121 *Norse v. City of Santa Cruz,* 629 F.3d 966, 976 (9th Cir. 2010).

122 Cal. Gov't Code §§ 54954.3(c), 54957.9; *Perry Educational Association v. Perry Local Educators' Association,* 460 U.S. 37, 46 (1983); *Acosta v. City of Costa Mesa,* --- F.3d ----, 2013 WL 1847026 (9th Cir. 2013).

123 Cal. Gov't Code § 54960.1; Cal. Educ. Code § 72121(b).

124 *Id.*

125 Cal. Gov't Code § 54959.

126 *See* Cal. Penal Code § 19.

127 Cal. Gov't Code § 54960.

128 *Id.*

129 Cal. Gov't Code § 54960.5.

130 *See* 42 U.S.C. § 1983.

131 *See* 42 U.S.C. § 1988.

132 Cal. Const. art. I, § 3(b)(1).

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