

# Board Meeting

## Special Meeting - March 4, 2026

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### Brown Act - BBK

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## NOTICE

### NORTHERN INYO HEALTHCARE DISTRICT BOARD OF DIRECTORS SPECIAL MEETING

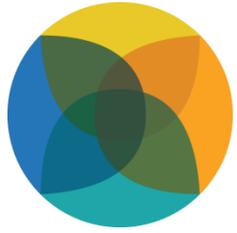
March 4, 2026, at 12:00 pm

The Board meets in person at 2957 Birch Street, Bishop, CA 93514. Members of the public will be allowed to attend in person. Public comments can be made in person.

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1. Call to Order at 12:00 pm.
2. Public Comment: At this time, members of the audience may speak only on items listed on the Notice for this meeting, and speakers will be limited to a maximum of three minutes each with a total time limit of thirty (30) minutes for all public comments unless otherwise modified by the Chair. Speaking time may not be granted and/or loaned to another individual for purposes of extending available speaking time unless arrangements have been made in advance for a large group of speakers to have a spokesperson speak on their behalf. Comments must be kept brief and non-repetitive. The Board is prohibited from generally discussing or taking action on items not included on this Notice.
3. Brown Act – Information item
4. Fiscal and Financial Training – Information Item
5. Adjournment

*In compliance with the Americans with Disabilities Act, if you require special accommodations to participate in a District Board meeting, please contact administration at (760) 873-2838 at least 24 hours prior to the meeting.*



# BBK

BEST BEST & KRIEGER LLP  
ATTORNEYS AT LAW

# The Ralph M. Brown Act Refresher

## The People's Business and the Right of Access



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# About Us



12

OFFICES

250

ATTORNEYS

130+

YEARS OF SERVICE

Best Best & Krieger serves as a trusted partner and strategist to public and private sector clients across the nation. With offices spanning from coast to coast, the firm's attorneys provide innovative legal solutions and cost-effective representation, working to protect and advance clients' interests at every turn. BB&K is recognized for decades of groundbreaking successes, loyal service, and a culture of inclusion and respect.

# Overview of Presentation



1. History of the Brown Act
2. Purpose of the Brown Act
3. Applications of the Brown Act
4. Serial Meetings
5. Rules Governing Meetings
6. Remote Attendance at Meetings
7. Closed Sessions
8. Violations
9. Meeting Tips
10. Good Governance Tips

# History of the Brown Act

# The Ralph M. Brown Act



- In 1951, S.F. Chronicle reporter Mike Harris spent six weeks looking into the way local agencies conducted meetings
  - State law long required business be done in public, but Harris discovered secret meetings or caucuses were common. He wrote a 10-part series, “Your Secret Government,” that ran in 1952.
- Out of the series came a decision to push for a new state open meeting law.
- Assemblymember Ralph M. Brown carried the legislation.
- The “Brown Act,” has evolved under a series of amendments and court decisions and been the model for other open meeting laws—such as the Bagley-Keene Act, enacted in 1967 to cover state agencies.

# Purpose of the Brown Act

# Purpose of Brown Act

- To ensure that almost all aspects of the decision-making process of local agency legislative bodies are conducted in public and open to public scrutiny.
- “The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may retain control over the instruments they have created.” (Gov. Code 54950.)



# The Right to Access



- Sunshine Laws
  - The Brown Act works in conjunction with the California Public Records Act to promote *transparency* in local government.
  - While the Public Records Act (Gov. Code §§ 6250 et seq.) ensures access to documents, the Brown Act (Gov. Code §§ 54950 et seq.) ensures that business is conducted at open and public meetings.
- To ensure that almost all aspects of the decision-making process of legislative bodies of local agencies are conducted in public and open to public scrutiny.

# Applications of the Brown Act

# Application

- Local Agency
  - Means a county, city, whether general law or chartered, city and county, town, school district, municipal corporation, **district**, political subdivision, or any board, commission or agency thereof, or other local public agency.
- Legislative Body
  - Governing body;
    - **Includes Healthcare District Board**
  - Board, commission, committee created by formal action of the governing body;
    - **Includes Committees Formed by the Healthcare District Board**
  - Meetings
  - Persons elected to legislative bodies, even prior to assuming office
  - Private organizations (in limited circumstances). i.e. nonprofits

- Meeting
  - Any gathering of a majority of the members at the same time and place to hear, discuss or deliberate upon any matter under their jurisdiction.
  - **No action needs to be taken for a meeting to occur**; conversations between and among members of a legislative body about issues confronting the agency is sufficient.
  - The Brown Act requires that these deliberations occur in public.

# Application



- Not a Meeting
  - Individual contacts (i.e. confer with constituents);
  - Conferences and seminars *open to the public*;
  - Community meetings, e.g., chamber of commerce;
  - Purely social or ceremonial occasions, e.g., ribbon cutting;
  - Meetings with other legislative bodies – a majority of the governing body may attend *as long as they do not discuss among themselves issues related to the agency.*

# Serial Meetings

# Serial Meetings



- Serial Meetings – Expressly Prohibited
  - “Use of direct communication, personal intermediaries, or technological devices employed by a *majority* of the legislative body members in order to develop a collective concurrence as to action to be taken on an item by the legislative body is prohibited.”

# Serial Meetings

- Elements of a Serial Meeting
  - Series of Communications
  - Between Less Than a Quorum
  - Taken As a Whole Involves a Majority
  - Concurrence
    - Advances or Clarifies the Understanding of an Issue;
    - Facilitates an Agreement or Compromise Among Members;
    - Advances the Ultimate Resolution of an Issue.



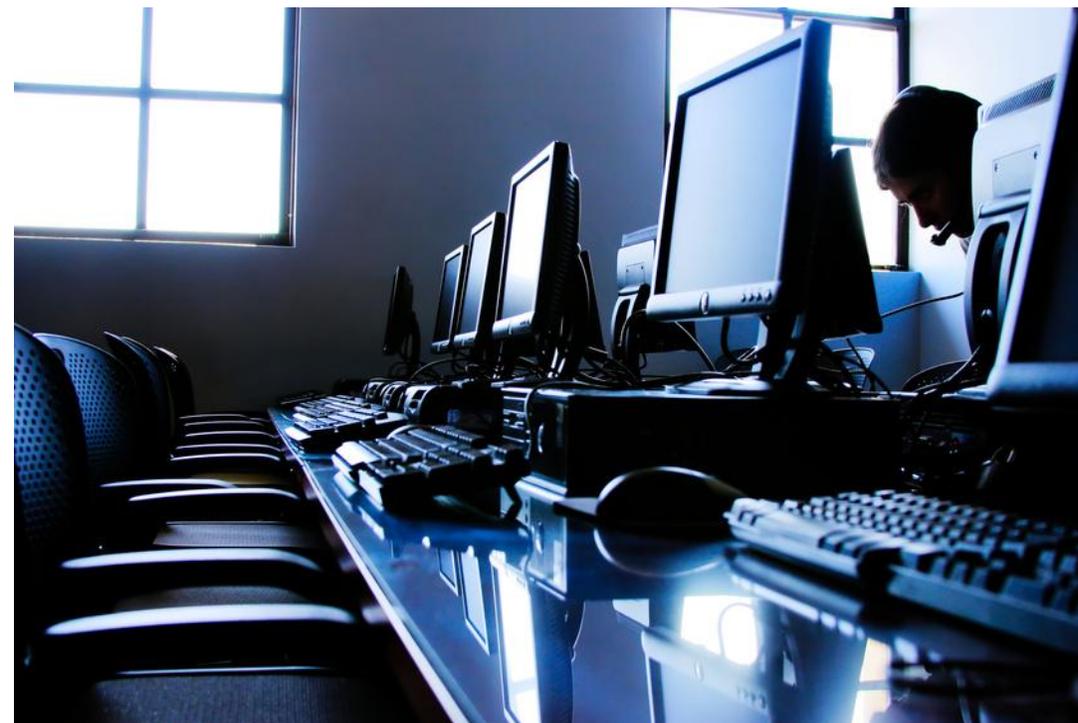
# Serial Meetings

- Two types of Serial Meetings
- Chain
  - Member A speaks to Member B who speaks with Member C about a particular matter and in the process they all form a collective concurrence on a matter.
- Hub and Spoke
  - An intermediary acts as a hub of a wheel with members relaying information back and forth to each other through the hub and in the process a majority of the legislative body develops a collective concurrence.

# Serial Meetings

## Ways Serial Meetings Can Happen

- Personal Meeting
- Telephone
- **Email**
- Written Correspondence
- Use of Intermediaries
- Social Networking Sites such as Facebook and Twitter.



# Example One

The phone call was from a lobbyist. “Say, I need your vote for that project in the south area. How about it?”

“Well, I don’t know,” replied Board Member Aletto. “That’s kind of a sticky proposition. You sure you need my vote?”

“Well, I’ve got Bradley and Cohen lined up and another vote leaning. With you, I’d be over the top.”

Moments later, the phone rings again. “Hey, I’ve been hearing some rumbles on that south area project,” said the newspaper reporter. “I’m counting noses. How are you voting on it?”

*The lobbyist and the reporter are facilitating a violation of the Brown Act. The board member may have violated the Brown Act by hearing about the positions of other board members and indeed coaxing the lobbyist to reveal the other board members’ positions by asking, “You sure you need my vote?” The prudent course is to avoid such leading conversations and to caution lobbyists, staff, and news media against revealing such positions of others.*

# Serial Meeting Exceptions



- One-on-one communications by a non-member (i.e., staff) with members of the legislative body.
  - Does NOT mean back and forth and sharing of views of different members;
  - Brown Act also allows communications to call or schedule a special meeting.

# Example Two

- The CEO meets before each board meeting with each board member to discuss the agenda. Is this an unlawful serial meeting?
  - No, this is a lawful practice. The Act expressly provides that substantive briefings of members of a legislative body by staff are permissible, as long as staff does not communicate the comments or positions of members to any other members.  
(54952.2(b)(2)).

# Example Three

The mayor sat down across from the city manager. “From now on,” he declared, “I want you to provide individual briefings on upcoming agenda items. Some of this material is very technical, and the council members don’t want to sound like idiots asking about it in public. Besides that, briefings will speed up the meeting.”

*Agency employees or officials may have separate conversations or communications outside of an open and noticed meeting “with members of a legislative body in order to answer questions or provide information regarding a matter that is within the subject matter jurisdiction of the local agency if that person does not communicate to members of the legislative body the comments or position of any other member or members of the legislative body.”<sup>18</sup> Members should always be vigilant when discussing local agency business with anyone to avoid conversations that could lead to a discussion, deliberation, or action taken among the majority of the legislative body.*

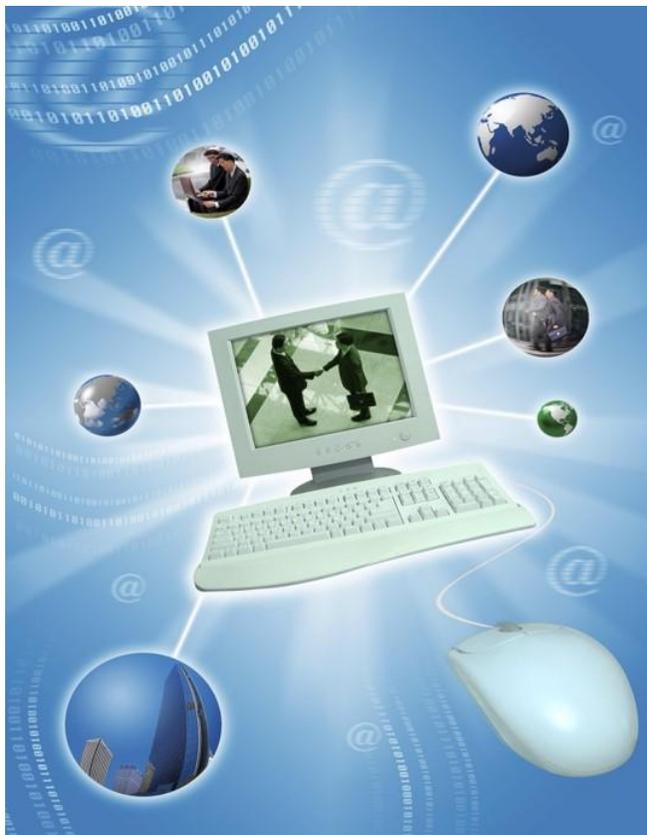
“Thanks for the information,” said Council Member Kim. “These zoning changes can be tricky, and now I think I’m better equipped to make the right decision.”

“Glad to be of assistance,” replied the planning director. “I’m sure Council Member Jones is OK with these changes. How are you leaning?”

“Well,” said Council Member Kim, “I’m leaning toward approval. I know that two of my colleagues definitely favor approval.”

*The planning director should not disclose Jones’ prospective vote, and Kim should not disclose the prospective votes of two colleagues. Under these facts, there likely has been a serial meeting in violation of the Brown Act.*

# Serial Meeting E-mail Tips



- Refrain from replying to “All” in E-mails.
- Do not take a position or make a commitment.
- E-mail board members for info only (or ask clerk or manager to send).
- Take caution.

# Social Media

- Engaging in discussion section of social media, article, etc.
- Meeting does not have to be a physical meeting.
- Series of comments to a blog or news article.



# Social Media

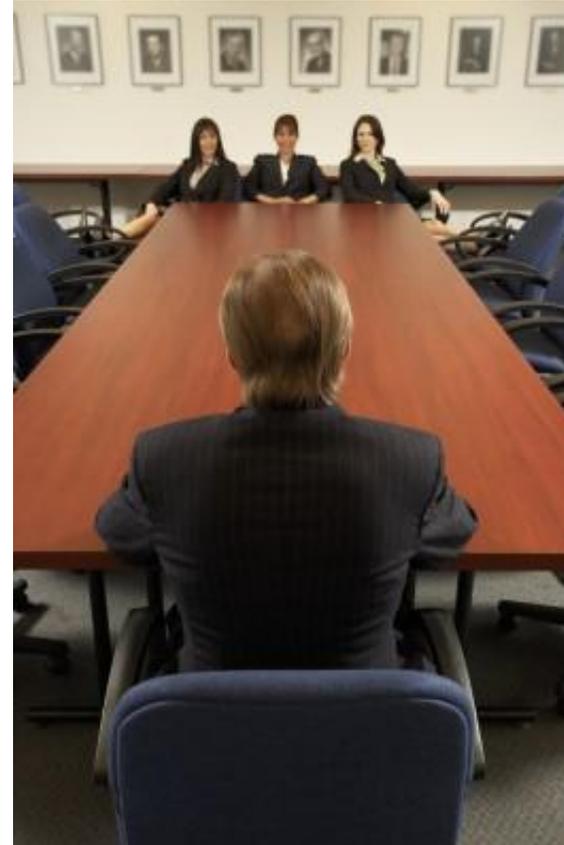
- Brown Act: District officials *may* engage in separate conversations or communicate on social media platforms to answer questions, provide information to the public, or solicit information from the public regarding District business.
- However, a District official *may not do either of the following* on a social media platform:
- Discussion by a majority: Discuss District business with a majority of members of the same legislative body. That includes communicating, posting, sharing, commenting, or using digital icons (*i.e.*, a thumbs up or an emoji); and
- Direct Responses: Respond directly to another member's communication, comment or post if the two are on the same legislative body of the District and the topic concerns District business.



# Rules Governing Meetings

# Rules Governing Meetings

- Regular meeting
- Special meeting
- Emergency meetings
- Adjourned meetings
- Public's right to comment



# Rules Governing Meetings



- REGULAR MEETINGS - Agenda Requirements:
  - Post 72 hours prior to the meeting.
  - Must include the time and location of the meeting.
  - Must contain a brief general description of each item to be discussed or addressed, including closed session items.
  - Notices available in alternative ADA formats and distributed in advance to those who request copies.

# Special Circumstances at Meetings: ADA Issues



- No public meeting shall be inaccessible to the disabled.
- All public meetings shall meet the “protections and prohibitions contained in Section 202 of the Americans with Disabilities Act of 1990.”
- Agenda for the meeting needs to include “information regarding how, to whom, and when a request for disability related modification or accommodation, including auxiliary aids or services may be made by a person with a disability who requires a modification or accommodation in order to participate in the public meeting.”

# Special Circumstances at Meetings: Non-English Speakers



- For bilingual public speakers Brown Act requires that twice as much time to present during limited public comment.
- Enough time to provide original statement in native language and translation.
- Example: instead of 3 minutes should provide 6 minutes.

# Rules Governing Meetings



- SPECIAL MEETINGS - Agenda Requirements:
  - Posted no later than 24 hours prior to the meeting.
  - Must include the time and location of the meeting.
  - Must contain a brief general description of each item to be discussed or addressed, including closed-door items.

# Rules Governing Meetings



- ADJOURNED MEETINGS - Agenda Requirements:
  - Not necessary to post a new agenda if legislative body adjourns meeting to a time and place in the order of adjournment that is less than 5 days as long as no additional business is transacted.

# Rules Governing Meetings



- EMERGENCY MEETINGS - Agenda Requirements:
  - Requires severe impairment to public health and safety.
  - Absent a “dire emergency,” at least one hour prior to the meeting, telephonic notice to media organizations.
  - If a dire emergency, notice given when members of the body are notified.
  - Generally, emergency meetings may not be held in closed session. The AG’s office encourages bodies to give the public an opportunity to comment on closed-session items prior to the body adjournment into closed session.

# Rules Governing Meetings



- Distribution of Agenda Packet to Public
  - In addition to posting an agenda, a local agency must also make the agenda packet available to the public when the materials are distributed to all or a majority of the legislative body, whichever is first
  - If sent to body, make it available

# Location of Meeting and Field Trips

General Rule – must be within the agency’s jurisdictional boundaries

No strategic planning sessions in Maui!



# Location of Meeting and Field Trips



- Exceptions to Location with Boundaries (meeting must still be open and noticed)
  - Attend a judicial or administrative proceeding
  - Inspect real or personal property located outside the jurisdiction
  - Participate in multiagency meetings so long as the meeting is in the territory of one of the agencies

# Location of Meeting and Field Trip (continued)



- To meet in a nearby facility if the agency does not have a facility within the jurisdiction
- Meet with federal or state officials to discuss regulatory or legislative issues affecting the agency
- Meet with legal counsel for pending litigation closed sessions if doing so reduces legal costs
- Flood, fire, earthquake make usual place unsafe, presiding officer can designate another meeting place

# Hypo: Location of Meeting and Field Trip



- All six Board members want to travel to Sacramento to lobby their legislators against a pending bill. Must you post an agenda?
  - Yes.
- How do you post an agenda?
  - In the usual posting place
- What should the agenda say?
  - The agenda should consist of the usual format, and indicate that the meeting will take place at a specific location and time in Sacramento, and include the specific agenda item (i.e. purpose of meeting with legislator(s)).

# Rules Governing Meetings



- Public Recording of Meetings
- The public must be allowed to audio or video tape a meeting unless the agency can make a reasonable finding that the recording would constitute a persistent disruption of the proceedings
- Recordings of public meetings by the agency are public records

# Public Comment

- The Public's Right to Comment
  - At every regular meeting, members of the public have the right to directly address the body on any item of public interest if that item is under the jurisdiction of the body.
  - For agenda items, the public must be given an opportunity to comment before or during the body's consideration of the item.
  - At special and emergency meetings, members of the public have the right to address the body about any item that is listed on the agenda.
  - **The public cannot be required to state their name when commenting**



# Responding to Public Comment



- Brief responses to statements or questions from public.
- Questions to staff for clarification of matters based upon public comments.
- Brief announcements or reports on member's or staff's own activities.
- Providing references or information to staff.
- Asking staff to report back at a future meeting on any matter.
- **No obligation to enter into back-and-forth dialogue with the public.**

# Willful Interruptions and SB 1100



- Became effective January 1, 2023
- Meant to clarify the public disruption rule
- If member of public is disruptive, governing body must warn them that the behavior is disruptive and failure to stop will result in removal
- Disruptive behavior defined: **actually disrupts**, disturbs, impedes, or renders infeasible the orderly conduct of the meeting,” including but not limited to, behavior that
  - (1) violates one of the governing body’s regulations addressing the conduct of open meetings, or
  - (2) a reasonable observer would perceive as a threat to use force by that member of the public (no warning necessary for “true threat of force”)

# Dealing With Disruptions

- Meeting Management is Key
  - Avoid fanning flames or going back and forth (often what argumentative commenters want)
  - Use recess as tool to lower temperature in the room



# Permissible Actions in Meetings



- No action or discussion allowed for any item not listed on agenda except for:
  - Adding items by majority vote for emergency situations (same standard as for emergency meeting).
  - Adding Items of Subsequent Need. Adding items by 2/3 vote because of need for immediate action that came to the attention after the agenda is posted (“Late Breaking Exception”).
  - Consideration of items continued from another meeting not more than 5 calendar days earlier.

# Rules Governing Meetings



## Still allowed under Brown Act:

- *Brief* responses to statements or questions from public
- Questions to staff for brief clarification of matters based upon public comments
- Brief announcements or reports on member's or staff's own activities
- Providing references or information to staff
- Asking staff to report back at a future meeting on any matter
- BUT no discussion on the above items

# Remote Attendance at Meetings

# Teleconferencing



- Teleconferencing may be used for any meeting of the legislative body IF the requirements for that particular type of teleconferencing can be met by the agency and the member teleconferencing
- **All votes by roll call**

# Teleconferencing

- Applicable Teleconferencing Options :
  - Traditional Brown Act Teleconferencing
  - Reasonable Accommodation for Disability
  - Just Cause
  - Proclaimed Emergency
- *Notes:*
  - Specific rules/requirements only apply when one or more members of the legislative body teleconference
  - Staff and consultants can always teleconference; public can teleconference if agency allows for convenience OR if required because a member is teleconferencing

# Teleconferencing - Traditional

- **Traditional Brown Act Teleconferencing**
  - You/agency must:
    - Provide teleconference location on the agenda
    - Post an agenda at the teleconference site
    - Allow public access to the teleconference site
    - Quorum must participate from within agency's jurisdiction
  - You do not have to:
    - Have camera on
    - Allow public to teleconference
    - Have any specific reason for teleconferencing

# Teleconferencing – Reasonable Accommodation



- **Reasonable Accommodation Teleconferencing – New on January 1, 2026 (SB 707)**
  - Circumstances/requirements:
    - Member has physical or mental disability under applicable law; disability requires remote participation as a reasonable accommodation
    - Disclose anyone 18+ in room and relationship to person
    - Member must use audio and video (camera on) to participate, unless disability requires camera off
    - Member counts toward quorum as though in person
  - You do not have to:
    - Disclose address, etc.
    - Allow public to teleconference

# Teleconferencing – Just Cause



- **Just Cause Teleconferencing – Updated January 1, 2026 (SB 707)**
  - No need to post location if other requirements are met.
  - Requirements:
    - Physical Location. A quorum must participate from a single physical location in jurisdiction.
    - Remote Public Participation. The meeting must have either two-way video (e.g., Zoom) or telephone with live webcasting for public to participate remotely
    - Notice/Participation. Agenda describes how public virtually participates
    - Public Comments. Must allow during meeting; cannot limit to advanced comments
    - Technical Difficulties. Must stop meeting if problem is on agency's end

# Teleconferencing – Just Cause



- **Must have “just cause” for teleconferencing:**
  - Childcare or family caregiving need (limited to certain family)
  - Contagious illness
  - A physical or mental condition not otherwise accommodated
  - Travel while on official business of state or local agency
  - Physical or family medical emergency
  - Official military need >50 miles from agency boundary
  - Immunocompromised child or family (limited to certain family)

# Teleconferencing – Just Cause



- **Notification Requirements**

- Notice to Board at earliest opportunity
- Must give general description of reason, but do not have to disclose confidential medical info
- Minutes must include info on teleconferencing and reason

- **Limitations**

- Two meetings in calendar year if body meets once per month or less
- Five meetings in calendar year if body meets 2x per month
- Seven meetings in calendar year if body meets 3x+ per month

# Teleconferencing – Just Cause



- **Participation Requirements**

- Must disclose whether anyone 18 or older is present in the room
- Disclose general nature of relationship to those in room
- Must use both audio AND visual technology

# Teleconferencing – Proclaimed Emergency



- **Must be proclaimed state of emergency or local emergency and either:**
  - Meeting is, in part, to vote on if emergency is imminent risk to attendee health/safety; or
  - In past 45 days, body has already determined such
  - Physical location for public not required
  - Must use both audio AND video access
  - Disclose 18+ individuals in the room and relation
  - Member may use a two-way telephonic service without actual visual participation

# Closed Sessions

# Closed Sessions



- Must be expressly authorized.
- Must be briefly described in agenda.
- Must verbally announce items.
- If action is taken, may need to report to the public.
- Used when public is better served by closed session.
  - Think real estate negotiation or litigation strategy.

# Limited Closed Sessions



- Real Property Transactions (only price and terms of payment).
- Litigation--Existing, Anticipated and Initiation. Attorney should be present.
- Personnel Issues--Appointment, Performance, Evaluation, Discipline/Dismissal/Release.
- Labor Negotiations.
- Hospital Peer Review and Medical Staff Reports.
- Discussion of a threat to relating to critical infrastructure information relating to cybersecurity.

# Threatened Litigation

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- Under some circumstances, the Brown Act requires the nature of the claim or legal threat to be described on the agenda or verbally disclosed prior to entering closed session

# Special Healthcare Closed Sessions



- Trade Secrets
  - Per Civil Code section 3426.1 and Health & Safety Code section 32106.
  - Key: (1) information not generally known that has value; (2) necessary for **new** service, program, or facility; and (3) if prematurely discussed, would deprive district of substantial economic benefit.
  - Approval of any new service/program/facility must happen in open session.
- Certain Hearings
  - A hearing concerning staff privileges, reports of medical audit committees, or reports of quality assurance committees (per Gov. Code 37624.3 and Health & Saf. Code §§ 1461 and 32155).
  - The applicant or medical staff member whose staff privileges are the direct subject of a hearing must be able to request a public hearing.

# Closed Session



- Brown Act Agenda Safe Harbor Language.
- Requires specific wording for each specific instance.
- CLOSED SESSIONS MUST BE ON THE AGENDA AND ONLY FOR SPECIFIC REASONS LISTED IN THE BROWN ACT.
- Consult with your attorney for language requirements.

# Closed Session



- Must allow public comment *prior to closed session*.
- Must announce whether reportable action occurred.
- Only members of legislative body, legal counsel for body, staff, and necessary consultants may be present.

# The Confidentiality of Closed Session Discussions



- The Brown Act explicitly prohibits the unauthorized disclosure of confidential information acquired in a closed session by any person present, and offers various remedies to address breaches of confidentiality.
- Only the legislative body acting as a body may agree to divulge confidential closed session information; regarding attorney/client privileged communications, the entire body is the holder of the privilege and only the entire body can decide to waive the privilege.

**TOP TIP – DO NOT DISCUSS CLOSED SESSIONS WITH ANYONE OUTSIDE OF CLOSED SESSION OR OTHER PRIVILEGED COMMUNICATIONS WITH DISTRICT COUNSEL.**

# Remedies for Disclosure



- Employee
  - Disciplinary action against an employee who has willfully disclosed confidential information in violation of this section; up to dismissal.
- Member of the Legislative Body
  - Referral of the member who willfully disclosed confidential information in violation of this section to the Grand Jury.

# Violations

# Remedies for Violations of Brown Act



- Any interested person, including district attorney, may seek to invalidate an action of a legislative body on the ground that body violated *certain* provisions of the Brown Act
- Violations of Brown Act, however, cannot be invalidated if they involve actions:
  - Taken in substantial compliance with the law.
  - Involving sale or issuance of notes, bonds or other indebtedness, or any related contracts or agreements;
  - Creating a contractual obligation, including a contract awarded by competitive bid for other than compensation for professional services, upon which a party has in good faith relied to its detriment;
  - Connected with the collection of any tax; or
  - In which the complaining party had actual notice at least 72 hours prior to the regular meeting or 24 hours prior to the special meeting, as the case may be, at which the action is taken.

# Brown Act Cure & Correct, Cease & Desist



- For some types of actions, before a person may initiate an invalidation action, they must demand “cure or correction” of the alleged violation before filing suit. This allows agency to correct problem and avoid potential litigation.
- Generally, must occur within 90 days of allegedly improper action, but in some circumstances can be as short as 30 days.
- Other types of alleged violations are not subject to the invalidation / cure and correct process, but a person can demand the agency cease and desist these types of violations. Agency has option to “unconditionally commit” to cease and desist from the type of past violation that occurred to avoid potential litigation.

# Meeting Tips

# Working with the Public



- You are working in a fishbowl.
- Ensure consistency in the meetings (i.e., level of formality; don't let the moment dictate changed styles, though there is value in a little flexibility).
- Employ effective meeting techniques (Be prepared; Stick to the agenda; manage time; Hear public comment before deliberations; Listen and look like you are listening; Afford dignity to the public, staff, and each other; Avoid repetition; Make motions at the right time).
- Signs things have gone wrong (“You are OUT OF ORDER”; “We will not tolerate criticisms of staff”; “If you applaud after each speaker, we will be here all night”; “It doesn't matter what we do, the Council does what it wants”; “One more outburst like that and I will have you removed from the meeting!”).

# Parliamentary Procedure



- District follows Robert's Rules of Order for parliamentary process. Included in your handouts:
  - Roberts Rules of Order Cheat Sheet
  - CSDA Parliamentary Procedure Cheat Sheet

# Practice Tips

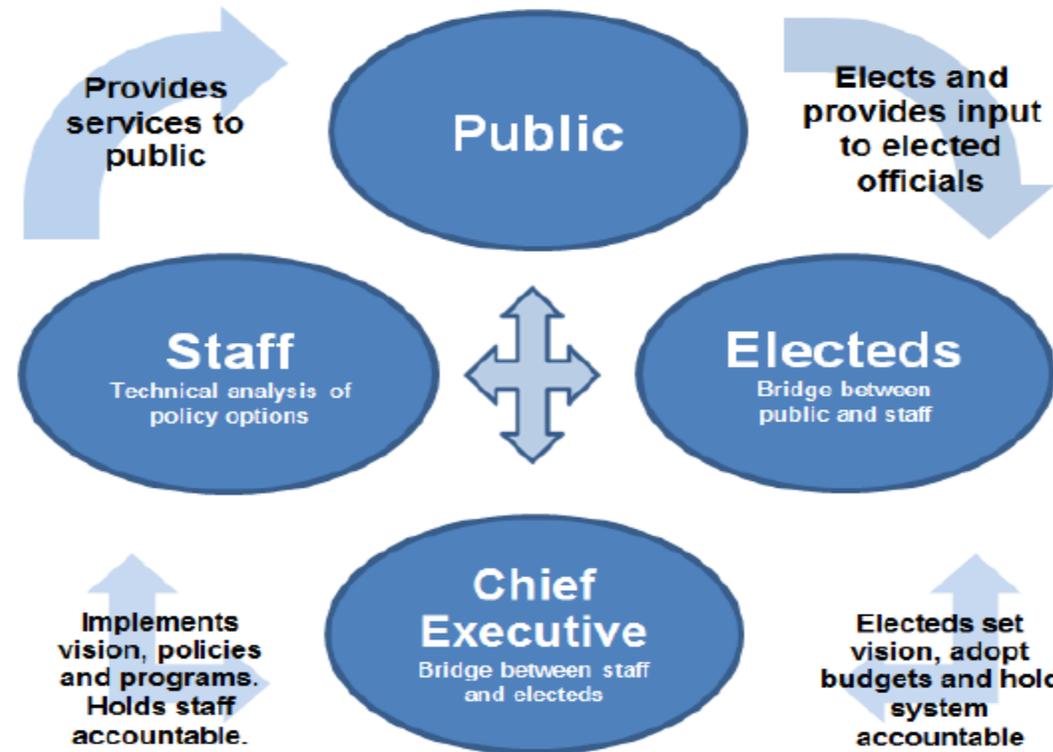
- Be thoughtful of how you advocate for policy or action.
- Do not publicly attack or criticize staff.
- Don't micromanage.
  - Respect management style and give deference to new or innovative strategies.
  - Best Practice: Hire a good CEO and give her/him room to manage.
- Don't use agency resources for individual purposes; share information with all.

# Good Governance Tips

# Good Governance Tips – Where Do I Fit?

## Bridging Function

Elected officials play a key bridging function between the community needs and staff; the chief executive officer in turn plays a bridging function between elected officials and staff.



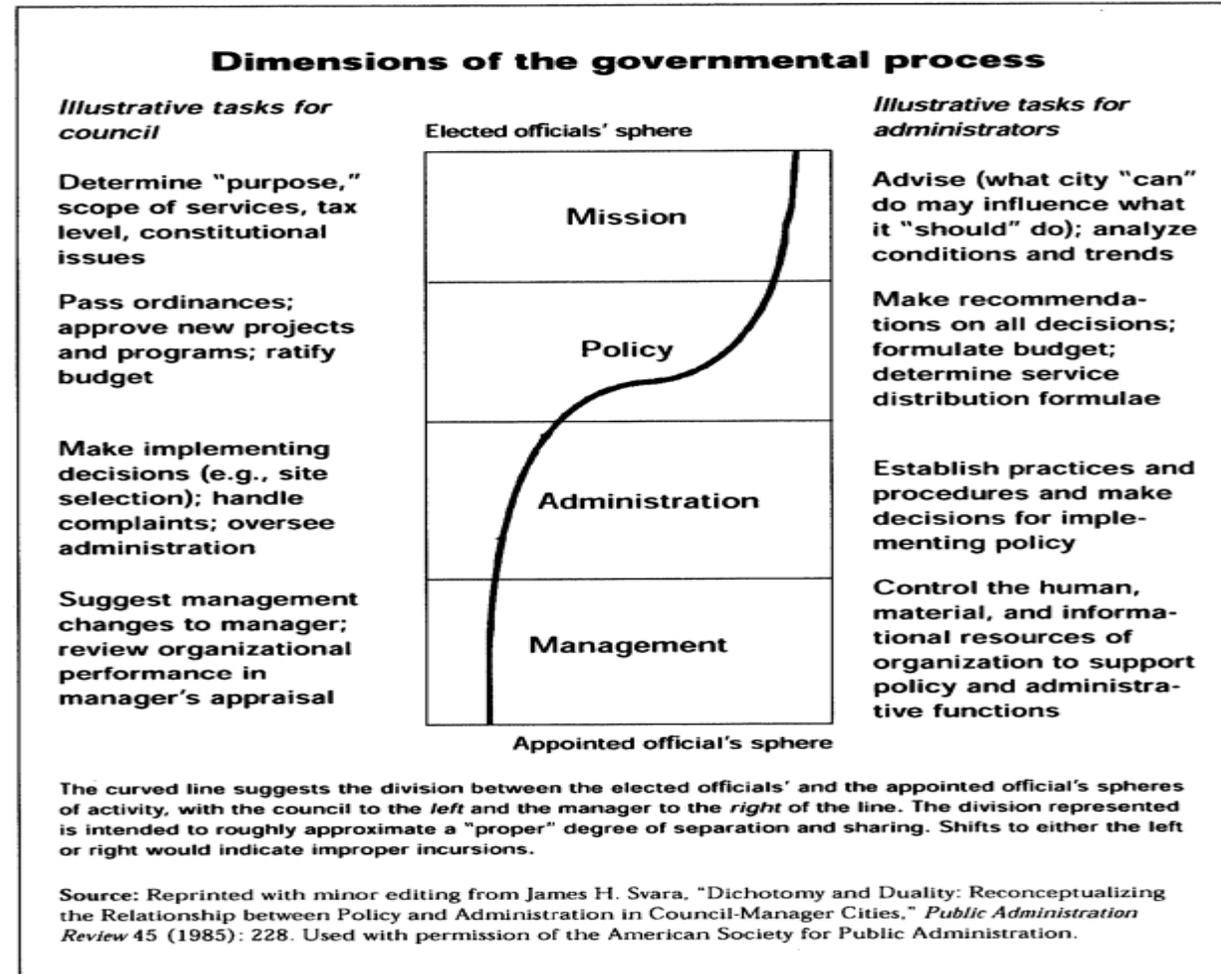
# Good Governance Tips – Where Do I Fit?



- Elected officials operate in all four dimensions of the governance process:
  - Mission
  - Policy
  - Administration
  - Management

*but to differing degrees.*

# Good Governance Tips – Where Do I Fit?



## Additional Resources

# Open & Public VI

A GUIDE TO THE RALPH M. BROWN ACT

REVISED JANUARY 2024

[https://www.calcities.org/docs/default-source/advocacy/open-public-vi-revised-2024.pdf?sfvrsn=2f412f0d\\_3](https://www.calcities.org/docs/default-source/advocacy/open-public-vi-revised-2024.pdf?sfvrsn=2f412f0d_3)

## Additional Resources Con't

BBK Key Insights Booklet

BBK Teleconferencing Matrix

Leadership & Governance Tips for Success (Institute for Local Gov't)

Great Boards: Distinguishing Governance from Management

Effective Governance: the roles and responsibilities of board members (D. Arnwine)

# Questions



# BBK

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## Thank you!!

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**California Special Districts Association**  
*Districts Stronger Together*

*This quick-glance reference covers some of the basics needed for effective meeting management, including a sample order of business and steps to handling motions. This reference is intended for informational purposes only and should not be used as a substitute for legal advice.*

Parliamentary procedure is a set of rules for conducting business at meetings in an orderly and productive fashion. Robert’s Rules of Order have been adopted by many organizations and assemblies, including the governing boards of special districts, to help them establish their procedural rules of order and manage their meetings effectively. Using parliamentary procedure enables a special district governing board to consider and act upon the greatest number of issues in the shortest amount of time, while promoting a deliberative process of full and free discussion.

### Sample Order of Business

If a quorum is present, the board president or chair begins the meeting by taking his/her position and announcing: “The meeting will come to order.” The meeting begins on the order of business, typically following the order below.

- 1. Reading and approving of the minutes:** If there is no objection, the minutes will be adopted as presented.
- 2. Reports of officers and standing committees:** Recommendations coming from these reports may result in motions from any board member in attendance. Reports are heard in the order in which the officers or standing committees are listed in the bylaws. Officers should not make motions off their own reports.
- 3. Reports of special (ad hoc) committees:** Recommendations coming from these reports may result in motions from any board member in attendance. Reports are heard in the order in which the special committees were created.
- 4. Special orders:** These are issues specifically slated for consideration at this meeting. Special orders not dealt with at the previous meeting come first. Often the bylaws dictate that certain tasks, such as elections or creation of committees, must be dealt with at a specific meeting. These tasks are typically dealt with as special orders.
- 5. Unfinished business and general orders:** These are issues left pending when the previous meeting was adjourned. Any motion that was postponed from the last meeting to the current meeting constitutes general orders. Older motions come before newer motions.
- 6. New business:** This is when any new issues are introduced.

Before adjourning the meeting, the chair should inform the board of any unfinished business that must be dealt with or be taken up at the next meeting. Any important announcements should be made at this time as well. The president cannot end a meeting without the board’s consent. However, if all business is completed and a preselected (and voted upon) hour of adjournment has arrived, a motion to adjourn is not needed.

### Origins of a Motion

Board members may present motions to formally propose an action, second motions to express support for discussion, debate motions to express their opinions and, finally, vote on motions to make their decision. Listed below are the ways motions may be introduced.

- 1. Item on an agenda:** a) Chair introduces the item briefly; b) Member moves a motion (seconded); c) Debate and vote.
- 2. Item not on an agenda:** Action or discussion of items not on a posted agenda are generally prohibited under the Brown Act except in specific situations. Refer to Brown Act for more information.
- 3. Committee is charged with returning a recommendation:** a) Committee Chair presents a report and states committee’s recommendations; b) Member moves the recommendation as a motion (no second required) or a slightly different motion (second required) or a completely different motion (second required); c) Debate and vote.
- 4. Committee is charged with returning a motion (or has the power):** Committee Chair presents a report; b) Committee Chair moves the committee’s motion (no second required); c. Debate and vote.
- 5. Chair assumes a routine motion:** a) Chair states, “If there is no objection, a motion to . . . will be adopted;” b) If there is no objection the motion has been properly adopted without a second, debate or voting; c) If there is an objection, the chair handles the motion according to Robert’s Rules’ six formal steps.

### Six Steps to Handling a Motion

The basic form of the motion is the Main Motion. These introduce topics for consideration by the assembly. They cannot be made while another motion is pending.

#### A Main Motion is brought before an assembly:

- 1. Motion is moved:** While no motion is pending, a board member seeks recognition from the chairperson. Once she is recognized she has the exclusive right to be heard at that time. Example: *“I move we allocate \$300 to repair the computers.”*
- 2. Motion is seconded:** Someone without needing to be recognized seconds the motion. The seconder is not claiming to agree with motion. The seconder is stating that the motion should be discussed and voted by the organization.
- 3. Motion is stated:** The chair states the question, *“It is moved and seconded to allocate \$300 to repair the computers.”* As the chair turns to the maker of the motion, she states, *“Are you ready for the question?”* The motion no longer belongs to the mover; it belongs to the assembly.

#### A Main Motion is considered by the assembly:

- 4. Motion is debated:** All remarks by the members are made to the chair, never to or about another member. Debate can be closed only by a two-thirds vote by the assembly.
- 5. Motion is put:** The chair says, *“The motion is to allocate \$300 to repair the computers.”*  
*All in favor of the motion indicate by saying, ‘aye’.* (Not ‘Yes’)  
*All opposed to the motion indicate by saying, ‘no’.* (Not ‘Nay’)
  - The wording of the motion when the question is put is the way it goes into effect.
  - A voice vote is the regular method when a majority vote is required for adoption.
  - A rising vote is the normal method when a two-thirds vote is required for adoption.
  - A ‘show of hands’ is intended for small assemblies or after an inconclusive voice vote.
- 6. Vote is announced:** The chair must make the following four statements.
  - *“The ‘ayes’ have it.”* Or, *“The ‘noes’ have it.”*
  - *“The motion is adopted.”* Or, *“The motion is lost.”*
  - The chair states the effect of the vote or orders its execution.
  - *“The next item of business is . . .”*

## Other types of motions:

- 1. Subsidiary Motions:** Apply to Main Motions and can change how they are handled (for example: postpone, amend, refer to committee, limit or extend debate). They are voted on before the Main Motion.
- 2. Privileged Motions:** Concern matters not related to current business, but are considered before other motions (for example: call for recess, set the time for adjournment, call for the orders of the day).
- 3. Incidental Motions:** Questions of procedure with regard to pending motions. They must be decided before business can continue (for example: point of order, appeal, division of a question, request for information).
- 4. Motions to Bring Question Again Before Assembly:** Not related to pending business but enable certain items to be reconsidered (for example: amend something previously adopted, reconsider a previous motion, discharge a committee).

## Purpose and Form for Each Motion

PURPOSE	FORM & MOTION
PROPOSE SOME ACTION	MAIN MOTION: I MOVE TO...
IMPROVE A PROPOSAL	AMEND: I MOVE TO AMEND THE MOTION BY...
CHANGE THE AMOUNT OF TIME FOR DISCUSSION	LIMIT/EXTEND DEBATE: I MOVE TO LIMIT/EXTEND DEBATE TO...
STOP DISCUSSION AND VOTE NOW	CLOSE DEBATE: I CALL THE PREVIOUS QUESTION.
DELAY A DECISION	REFER: I MOVE TO REFER THE MOTION TO... POSTPONE TO A CERTAIN TIME: I MOVE TO POSTPONE THE MOTION UNTIL... RECESS: I MOVE TO RECESS.
KILL A MOTION	POSTPONE INDEFINITELY: I MOVE TO POSTPONE THE MOTION INDEFINITELY.
DEAL WITH AN EMERGENCY	LAY ON THE TABLE: I MOVE TO LAY THE MOTION ON THE TABLE.
OBTAIN INFORMATION	PARLIAMENTARY INQUIRY: POINT OF INFORMATION, CHAIRPERSON...(FOLLOWED BY QUESTION)
CHALLENGE THE RULING OF THE CHAIR	POINT OF ORDER: POINT OF ORDER, CHAIRPERSON...(FOLLOWED BY QUESTION)
ASSURE THE ACCURACY OF THE VOICE VOTE	DIVISION: I MOVE FOR A RISING VOTE.
CLOSE THE MEETING	ADJOURN: I MOVE TO ADJOURN.

## Ranking of Selected Motions

Not all motions need a second. Not all may be amended or debated. Not all require a majority vote, or even need a vote for adoption.

Some motions have a higher ranking in power than other motions. The following chart illustrates the ranking.

Parliamentary Procedure grants certain motions a higher rank than other motions because the rank illustrates which motion is in order when other motions are pending.

The Main Motion is the lowest ranking motion because all the other ranked motion are intended to perfect the Main Motion. This ranking concept establishes a priority ranking that protects the member's right from the whim of other members.

In other words, the higher the ranking number, the higher the power to bump another motion, and also the higher the power to be protected from lower ranking motions.

	May Interrupt Speaker	Requires Second	May Be Debated	May Be Amended	What Vote
<b>PRIVILEGED MOTIONS</b>					
13. FIX THE TIME TO WHICH TO ADJOURN		YES		YES	MAJORITY
12. ADJOURN		YES			MAJORITY
11. TAKE A RECESS		YES		YES	MAJORITY
10. RAISE A QUESTION OF PRIVILEGE	YES				CHAIR DECIDES
9. CALL FOR THE ORDERS OF THE DAY	YES				CHAIR DECIDES*
<b>SUBSIDIARY MOTIONS</b>					
8. LAY ON THE TABLE		YES			MAJORITY
7. PREVIOUS QUESTION		YES			2/3
6. LIMIT OR EXTEND DEBATE		YES		YES	2/3
5. POSTPONE TO A CERTAIN TIME		YES	YES	YES	MAJORITY*
4. COMMIT (REFER)		YES	YES	YES	MAJORITY
3. AMEND		YES	YES, UNLESS MOTION TO BE AMENDED IS NOT DEBATABLE	YES	MAJORITY
2. POSTPONE INDEFINITELY		YES	YES		MAJORITY
<b>1. MAIN MOTION</b>		YES	YES	YES	MAJORITY
<b>INCIDENTAL MOTIONS (NO RANKING)</b>					
APPEAL	YES	YES	YES		MAJORITY
DIVISION OF ASSEMBLY	YES				*
POINT OF ORDER	YES				CHAIR DECIDES*
REQUEST FOR INFORMATION					CHAIR DECIDES
SUSPEND THE RULES (THAT PROHIBIT)		YES			2/3
<b>BRING AGAIN BEFORE ASSEMBLY</b>					
RESCIND/AMEND SOMETHING PREVIOUSLY ADOPTED		YES	YES*	YES	*
RECONSIDER THE VOTE		YES	YES		MAJORITY
DISCHARGE A COMMITTEE		YES	YES*	YES	*
TAKE FROM THE TABLE		YES			MAJORITY

\*See Robert's Rules

# Effective governance: the roles and responsibilities of board members

DON L. ARNWINE



Don L. Arnwine

**R**unning a health care organization is a team sport. It is very important that all members of the team—whether on the medical staff, in management, or on the board—understand the role of governance and what constitutes effective governance. Many misunderstandings about the roles of boards exist. Many people think that board members are paid, for example, which is not true.

My interest in the subject of governance began when I became chief executive officer (CEO) of an organization that was to establish a major health care and medical educational program in West Virginia. Five organizations merged to create the new organization; 5 boards also merged to create 1 board of 56 members. Two years after the merger, we created a governance committee to study the subject, and that's when my interest in governance began. While CEO of the Voluntary Hospitals of America, which grew from 30 to 850 hospitals during my tenure, I had the opportunity to visit with many boards. More recently, I have given 15 to 20 board retreats annually and have been an advisor to the Governance Institute. If I were allowed to focus on only one subject during the rest of my career, it would be governance.

Governance is fundamental. I have seen good boards become bad boards and bad boards become good boards. I have seen organizations fail because of problems at the governance level. Ineffective governance compromises the ability of the management to succeed. Effective governance, in contrast, greatly assists the organization. Effective governance has the following characteristics: it is efficient, allows a respectful conflict of ideas, is simple, is focused, is integrated and synergistic, has good outcomes, preserves community assets, and leads to enjoyment and personal reward for the individual board members.

In the sections that follow, I review the roles and responsibilities of boards, factors that increase board effectiveness, and the evolution of governance.

## ROLES OF BOARDS

Boards have 3 primary roles: to establish policies, to make significant and strategic decisions, and to oversee the organization's activity.

## Policy making

Effective execution of policy is necessary to fulfill the other 2 roles. Policies define focus and differentiate responsibilities among the board, the management, and the medical staff. Well-written policies lead to more efficient board functioning. Instead of having the same matter or very similar matters on the agenda repeatedly, the board can develop a policy that covers the issue and leave implementation of the policy to management. Boards have approximately 24 hours together each year, spread over regular meetings. It is essential to use that time wisely.

At the same time, board-level policies should be reviewed regularly. At Baylor Medical Center at Irving, where I chair the board of trustees, we asked a staff member to review past board minutes and extract all policies. We then refined and consolidated them. The board now reviews policies annually to see if they are still needed.

## Decision making

Decision making involves making choices about the organization's vision, mission, and strategies. Boards make decisions about issues that are strategic and significant, such as whether to enter an affiliation agreement with another organization. As decision makers, boards can also delegate nongovernance types of decisions to others—and would be wise to do so.

## Oversight

Oversight is an important function, but boards must remember that the organization is theirs to oversee, not to manage. Some boards cross the line and try to involve themselves in management. Nevertheless, in the oversight role, the board is legally responsible for everything that happens within the hospital, whether in the emergency department, a clinic, or a nursing unit. In the area of quality, for example, the board's oversight role may include setting the tone by stating that the organization is committed to quality; establishing policies related to quality, such as credentialing; ensuring that mechanisms are in place, such as committees, to establish a plan for quality; and monitoring implementation of the plan.

Board committees play an important role in the governance process. It is useful to periodically review the structure and func-

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tions of the committees and to ensure that everyone knows what to expect from them.

## RESPONSIBILITIES OF BOARDS

Boards have numerous responsibilities: they oversee management, finances, and quality; set strategic direction; build community relationships; establish ethical standards, values, and compliance; and select a CEO and monitor his or her progress. I believe that the 2 most important tasks are selecting the CEO and establishing the direction of an organization. Although the management team develops the strategic plan, it is the board's responsibility to accept or modify the strategic plan and to set the direction. The board considers elements in the environment—such as growing competition and changing patterns of care—and develops a vision, a mission, strategic thrusts, goals, and tactics that respond to the environment, all the while showing the organization's values.

Financial oversight is a familiar job that boards usually do well. Boards ensure the use of financial controls; ensure that funds are prudently invested, considering cash management, banking, and contracting parameters; and establish policies related to budgets. Their goal is to protect the community's assets. Oversight of the quality area often involves utilization and risk management in addition to continuous quality improvement.

Attention to community relationships is a responsibility unique to not-for-profit institutions. Inasmuch as board members have contact with the community, they can be sensitive to the expectations and needs of its citizens and bring that knowledge to the board room. The focus is on all those the organization serves: consumers, businesses, elected representatives, payors, and collaborators. Boards are paying more attention to the quality of life in their communities. At Baylor Medical Center at Irving, for example, the board has adopted a community action plan developed by the management team.

The ethical standards of the organization are determined by the behavior of the board. Through its ongoing actions, the board decides what behavior will and will not be tolerated. These actions supersede ethical statements—however important such statements are—in showing an organization's true values. In recent years, compliance issues have risen to board-level responsibility as well, particularly as the media have reported people being sent to jail and organizations and individuals being fined millions of dollars for breaches in government regulations. Compliance is probably the only new issue that has been added to board responsibilities over the past 10 years.

When reviewing these responsibilities, it is important to note that the board as a whole, and not any individual member, has the authority. Further, the board exists only when it is in session. The committee is an appendage of the board, and the board can delegate certain tasks to a committee or an individual, but otherwise an individual board member has no prerogative. Thus, it would be inappropriate for a board member to walk in to a manager's office and ask to review the books or demand certain changes. Such actions, in fact, can cause much disruption. The CEO is the full-time agent of the board and is the only person directly accountable to the board.

## THE "WHEEL OF GOVERNANCE": 3 INGREDIENTS FOR AN EFFECTIVE BOARD

The wheel of effective governance has 3 spokes: behavior, structure, and expectations. If one of these spokes breaks down, the board will have a flat tire, and the faulty governance process can compromise the organization's ability to move forward.

### Behavior

Appropriate board behavior can be defined as functioning in accord with the board's roles and responsibilities. Thus, board members should know the difference between governance and management, see service as a responsibility of citizenship, and find enjoyment in such service. Appropriate behavior also has key characteristics, the first of which is respect—for the organization, the management, the clinicians, the employees, and other members of the board. Respect is basic, but it doesn't always exist. I've seen many boards whose members were antagonistic towards large segments of the medical staff, for example. Such behavior is distracting and counterproductive.

Respect leads to 2 additional behavioral characteristics that are needed: openness in the board discussions and confidentiality. The two go hand in hand. Last year, when I was asked to consult with a CEO and chairman of the board to improve the climate of the board and eliminate the cliques that seemed to be forming, I discovered that the problems had arisen because of breaches in confidentiality. Some board members were speaking casually about board activities among people at their churches or at parties; others felt they couldn't be open because of this breach. The more sensitive the issue under discussion, the more important confidentiality becomes. As one board chairman used to say, "What you hear here or see here or do here, when you leave here let it stay here."

Conflicts of interest also fall in the category of behavior. Some people believe that a potential conflict of interest precludes service on the board. Based on such a view, some hospital boards do not include physicians, claiming that they could have a conflict. I disagree with this view. An attorney friend of mine told me that there's no evil in conflict of interest; the evil lies in the hiding thereof. All boards need to have a policy about conflict of interest. Usually this policy requires all members to disclose potential conflicts and to abstain from voting on such matters.

Another behavioral element is distinguishing between the important and the unimportant. The board has limited time. If it spends hours and hours on trivial matters, it won't be able to address significant and strategic matters.

Finally, the board needs to work for consensus. In not-for-profit organizations, members don't "vote their shares," with one individual being able to carry the day. Instead, boards work by reaching a common understanding of the issues, dealing with the options, choosing one, and unanimously supporting the decision even if an individual initially voted against it. Unity on the final decision is essential; if it does not exist, some people will take advantage of the discord and create problems. Team players are needed, people who join the board because they support the organization's mission and values. Board members do not participate to implement individual agendas but to help the organization effectively meet its responsibility in the community. The

**Table 1. Desired characteristics of board members**

**I. Knowledge**

- Understands and subscribes to the organization's mission and values
- Understands the economics of health care and the plan and budgets required to achieve the organization's mission
- Knows the organization's current financial position
- Understands community demographics and needs
- Knows how to build partnerships with other community groups
- Understands the complexity of the organization's challenges
- Has a grasp of medical information, technology, trends, and consequences
- Knows the difference between governance and management
- Knows how to be a "team player": when to listen and when to speak up
- Sees social/volunteer service as a responsibility of citizenship
- Understands real estate, physical facilities, and land development

**II. Skills**

- Can work to build consensus
- Can work with and be supportive of administrative and clinical staff
- Is adept at strategic and financial planning
- Has strong communication skills
- Can deal with diverse groups and ideas in a constructive way
- Can interpret financial information
- Has experience in a field or endeavor that contributes to the disciplines that affect the organization, i.e., insurance/managed care, medicine, law, finance/banking, real estate, marketing, information technology, public policy, corporate management, etc.
- Knows how to differentiate the important from the unimportant

**III. Attitudes and personal characteristics**

- Feels that collaboration is necessary for success
- Possesses openness and honesty
- Subscribes to and practices a high moral standard
- Is optimistic but realistic
- Values personal growth and learning, particularly covering matters confronting the board and the organization
- Sees self as a servant leader
- Accepts that the board has the authority and that individual board members have none (unless delegated by the board)
- Is personally challenged by what is best for the organization and the community
- Can be decisive and comfortable with large-scale decisions
- Accepts that change is our constant companion

"goodwill quotient" is exceedingly important, and these behavioral aspects will contribute significantly to that.

**Structure**

Boards may not pay much attention to structure, thinking that it is covered in the bylaws and requires no further comment. Nevertheless, problems often arise from structure rather than behavior. For example, I've encountered several boards in which the chairman had served for ≥30 years, and members were discontented and ready for someone new. Many board bylaws do not address tenure. Whether the term limit is 2 or 3 years or something different, it is helpful if everyone knows what to expect. Dissatisfied members know that they will be able to vote for someone else, and volunteers may be more willing to take on the role of chairman if they know it is for a designated period. Other

**Table 2. A sample board service commitment letter\***

I, \_\_\_\_\_, recognizing the important responsibility I am undertaking in serving as a member of the board of trustees of this organization, hereby pledge to carry out in a trustworthy and diligent manner the duties and obligations in my role as a board member.

The organization will be governed by individuals selected for their experiences and personal attributes. No individual will be selected because of his or her membership in or representation of any particular constituency. Once selected, each individual shall be required to fulfill his/her fiduciary duty with care and loyalty in the best interest of the system and the people it serves. The following characteristics will be utilized in selecting people to serve.

**My role:** I acknowledge that my primary roles as a board member are 1) to contribute to defining the organization's mission and governing the fulfillment of that mission, and 2) to carry out the functions of the office of board member as stated in the bylaws.

My role as a board member will focus on the development of policies that govern the implementation of institutional plans and purposes. This role is separate and distinct from the role of the chief executive officer, who determines the means of implementation.

**My commitment:** I will exercise the duties and responsibilities of this office with integrity, collegiality, and care.

**Pledge**

- To establish as a high priority my attendance at all meetings of the board and committees on which I serve.
- To be prepared to discuss the issues and business addressed at scheduled meetings, having read the agenda and all background material relevant to the topics at hand.
- To maintain the confidentiality of what is said or seen at board or board committee meetings.
- To work with and respect the opinions of my peers who serve on this board.
- To always act for the good of the community and the organization.
- To represent the organization in a positive and supportive manner at all times and in all places.
- To observe the parliamentary procedures and display courteous conduct in all board and committee meetings.
- To refrain from intruding on administrative issues that are the responsibility of management, except to monitor the results and prohibit methods that conflict with board policy.
- To avoid conflicts of interest between my position as a board member and my personal life. If such a conflict does arise, I will declare that conflict before the board and refrain from voting on matters in which I have conflict.
- To support in a positive manner all actions taken by the board of trustees even when I am in a minority position on such actions.
- To agree to serve on at least one committee or task force and participate in the accomplishment of its objectives.
- To participate in the annual strategic planning retreat, board self-evaluation programs, and board development workshops, seminars, and other educational events that enhance my skills as a board member.

If, for any reason, I find myself unable to carry out the above duties as best I can, I agree to resign my position as a board member.

\*Modified from Gillis J. 1995 *Board Member Manual*. Gaithersburg, Md: Aspen Publishers, 1994.

issues may concern the frequency of meetings or the size of the board.

I believe strongly in agenda creation and management. Since the board's deliberations are determined by the agenda, that one

document relates closely to the board's effectiveness. The agenda can be organized into 3 categories: items for information, items for action, and items for strategic discussion. This agenda organization helps members know what is expected of them and eliminates worry, for example, about having to vote on an item that is just for information. If executive committees and task forces are appropriately established and charged, the board can trust their efforts and avoid recreating what happened at a committee meeting. Committee suggestions and other smaller, non-controversial action items can be grouped into a "consent agenda," requiring only one motion and one vote. Background information on items in the consent agenda can be provided in the board book sent out before the meeting. Use of a consent agenda saves time and allows the board to focus on the most significant issues.

Structure also includes the nomination of new members. At Baylor Medical Center at Irving, we keep a matrix that indicates current members' skills in 8 essential areas. If attrition occurs, we look at the matrix and determine which skills are needed most. While the list of desired characteristics of board members developed by the Governance Institute is long (*Table 1*), it is understood that every board member will not have all the attributes. The average hospital board—now 12 members—is smaller than it used to be and includes physicians (both internal and external to the community).

### **Expectations**

The final spoke consists of expectations or, more specifically, board members' knowledge of what is expected of them and what they can expect from others. One of the best ways to clarify expectations is to have new members sign a letter that outlines those expectations (*Table 2*). Such a document also makes it easier to remove a board member if, for example, his or her at-

tendance has been poor. It also serves to clarify the requirements of board membership when approaching a potential volunteer.

In return for their service, board members should expect respect, a proper orientation, proper flow of communications, advanced preparation for board discussions, judicious use of their time, educational opportunities, and the opportunity to contribute. In addition, boards should be able to expect "no surprises." Boards will be comfortable with the CEO if they feel that he or she is being open with them. More than anything else, surprises damage the board's comfort level; members worry that other important matters are not being communicated. Finally, the board member can expect to participate in a board that is well led, informed, experienced in proper board function, well sized, properly motivated, consistent, a unit, and respectful of management and professionals.

### **THE EVOLUTION OF GOVERNANCE**

The focus of governance has evolved. When hospitals were being built after World War II, roles focused on stewardship, civic duty, and fundraising. Today, the focus is on management oversight, financial management, and community response. The focus of the future is on strategic performance. The board needs to ensure that it has the right expertise around the table to deal with critical issues of the time. Today, for example, boards may need expertise in information technology, just as in an earlier era they needed expertise in architecture and construction. Other critical issues to be addressed by boards today include declining reimbursements, physician relationships, consumer and community relationships, and philanthropy.

If boards understand their roles and responsibilities, have a proper structure including well-chosen members, exhibit appropriate behaviors, and know what is expected of them, they can live up to the challenges of the future and keep health care organizations on track for the good of the community.

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## Distinguishing Governance FROM Management

By Barry S. Bader

“What is the difference between governance and management?” is by far the question that not-for-profit executives and directors ask most often. Effective boards understand the difference between governing and managing; dysfunctional boards do not.

The traditional, easy answer—that the board makes policy and management carries it out—is too simplistic. It offers little practical guidance at a time when fiduciary expectations are rising. Nowadays directors serve on boards to make a difference, not just to be names on the letterhead and donors on a wall. Today’s boards *must be* informed and *want to be* engaged, both to fulfill their legal obligations and to leverage their time and talent to advise management. But — at what point does appropriate engagement cross the line into running the show?

It is tempting for directors to believe they are doing their jobs by delving into management decisions. The temptation is particularly strong for some, such as physicians who practice

### Seven *Guiding* Questions

- Is it big?
- Is it about the future?
- Is it core to the mission?
- Is a high-level policy decision needed to resolve a situation?
- Is a red flag flying?
- Is a watchdog watching?
- Does the CEO want and need the board’s support?

Health systems and hospitals are complex organizations with multiple moving parts; tinkering in one area will affect many others.

at the hospital and think they know how things should be done. It’s tempting for outside directors who may bring ideas based on what works in *their* businesses or what

they’ve heard from friends who are physicians or nurses.

*continued on page 2 →*

→ continued from page 1

Wise directors avoid the temptation to co-manage or second guess. Directors' fresh thinking and applied business knowledge are desirable, but health systems and hospitals are complex organizations with multiple moving parts. Tinkering in one area will affect many others. Complex organizations require strong, knowledgeable executive leadership to get everyone pulling in the same direction. They require tough choices about people and about what can and cannot be funded. Boards that try to manage often end up generating unintended consequences. They undermine the CEO's credibility and authority, to the detriment of the organization as a whole. They also risk driving away competent executives and directors who don't agree with a hands-on approach to governing.

## Governance Roles and Responsibilities

An understanding of the difference between governance and management rests on the cornerstone of fiduciary responsibility. Just as corporate boards are accountable to shareholders, the governing body of a not-for-profit organization has a fiduciary responsibility to see that the organization is acting in the best interests of the public, and more specifically the "stakeholders" who are served by the organization's mission. For the not-for-profit hospital, the highest-order stakeholders are the patients and the community.

## Figure 1: The Board-Management Relationship

Board's Roles	Management's Roles
Select, evaluate, and support the CEO.	<ul style="list-style-type: none"> <li>— Run the organization in line with board direction.</li> <li>— Keep the board educated and informed.</li> <li>— Seek the board's counsel.</li> </ul>
Approve high-level organizational goals and policies.	<ul style="list-style-type: none"> <li>— Recommend goals and policies, supported by background information.</li> </ul>
Make major decisions.	<ul style="list-style-type: none"> <li>— Frame decisions in the context of the mission and strategic vision, and bring the board well-documented recommendations.</li> </ul>
Oversee management and organizational performance.	<ul style="list-style-type: none"> <li>— Bring the board timely information in concise, contextual, or comparative formats.</li> <li>— Communicate with candor and transparency.</li> <li>— Be responsive to requests for additional information.</li> </ul>
Act as external advocates and diplomats in public policy, fundraising, and stakeholder/community relations.	<ul style="list-style-type: none"> <li>— Keep the board informed, bring recommendations, and mobilize directors to leverage their external connections to support the organization.</li> </ul>

Today's boards carry out five primary roles as independent fiduciaries (see Figure 1): choosing the CEO, approving major policies, making major decisions, overseeing performance, and serving as external advocates. Hospital and health system boards focus their attention on the organization's mission and strategic direction, finances and investments, quality, community benefit, and corporate compliance with laws and regulations. The role of management, led by the CEO,

is to operate the organization in line with the board's direction. Management makes operational decisions and policies, keeps the board educated and informed, and brings to the board well-documented recommendations and information to support its policy-making, decision-making and oversight responsibilities.

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## Seven Guiding Questions

Even when the mutual roles of the board and management are understood, there isn't always a bright line distinguishing governance from management. Different situations will affect the appropriate level of governance involvement. Adverse results may call for closer board oversight. For example, if the organization is in a financial downturn, is not improving subpar quality scores, faces allegations of improprieties, or is considering a merger or major transaction, the board may become more engaged and review more detailed information than it normally would. Otherwise, a governing board functions best when it focuses on higher level, future-oriented matters of strategy and policy and performs its oversight responsibilities in a rigorous but highly efficient manner.

Seven questions can help a board and management to agree on their appropriate roles for any matter of board oversight or decision making:

**1. Is it big?** The bigger the impact of a decision, the more the board ought to play a role in shaping and understanding the action and its possible consequences. One rule of thumb is that organizational decisions impacting roughly 10 percent or more of an organization's revenues or activities are strategic decisions. A decision on whether to start or greatly expand major clinical service lines such as cardiology, oncology, and orthopedics would be a strategic matter. Planning

how to implement the expansion is management's responsibility. The corollary to "Is it big?" is "Is it too small to merit the board's attention?"

**2. Is it about the future?** Boards make their impact on what the organization will look like five or more years down the road. The board's fingerprints should be on the organization's long-term vision and an integrated, three-to-five-year strategic and financial plan, as well as a master facility plan. Tomorrow's campus is the work product of today's board and management. Boards should rely on management to develop draft strategy documents for board input and approval. A board-approved strategic plan should have several major focus areas, such as quality, growth, finances, and people, with measurable goals for key indicators and initiatives in each area. Another rule of thumb: if the board-approved strategic plan has more than five or six strategic areas and more than about 20 strategic initiatives under those areas, the plan is probably management's operating plan and the board is getting involved at too low a level.

**3. Is it core to the mission?** As a fiduciary, the board is the guardian of the mission. Questions such as whether to continue a financially underperforming facility, how much to invest in community benefit activities and whether to open clinics in medically underserved communities call for the board to examine strategic and financial decisions in a mission context. Management should bring the board well-documented analyses and recommendations to help directors strike

the right balance when mission and financial realities come in conflict.

## 4. Is a high-level policy decision needed to resolve a situation?

A policy sets forth principles, guidelines, or practices to be applied in certain situations. For example, should a physician member of the board who invests in a competing facility be permitted to continue in office and practice on the medical staff? Should a manager be permitted to dismiss an employee who he says is underperforming, but who has filed a complaint alleging the hospital is violating Medicare payment rules? These situations call for consistent decision-making based on policies on physician competition and whistleblowers, respectively. Other common hospital board policies address such matters as conflict of interest, charity care and community benefit, executive compensation, CEO evaluation, and public transparency. A board's policies should be compiled into a policy manual that is available for reference at any board or committee meeting and distributed to every trustee. Of course, organizations have hundreds of operational policies governing various aspects of personnel, finance and billing, and patient care. These are not board matters. Policies requiring board approval should have a major impact on the organization, require compliance with laws or regulations, or affect the responsibilities and conduct of the board, management, and subsidiary boards.

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**5. Is a red flag flying?** Boards should routinely review dashboards and other performance reports, but when should they get into more detail discussing results and raising questions? Directors should know the red flags that signal the need for closer inquiry. Boards and especially oversight committees should focus on trends. One rule of thumb states that statistically significant over- or underperformance on a strategic, quality, or financial indicator over at least three reporting periods constitutes a trend. Of course, sentinel events, reports of unethical or illegal activity, or dramatic underperformance require prompt board or committee review before a trend develops. Red flags may also appear in reports from the external auditor, general counsel, accreditation agencies, and others. To avoid slipping from governance into management when reviewing performance problems, the board should focus on whether management recognizes the problem and has established the capability and plans needed to improve results. The board should not micromanage possible solutions; it should hold management accountable for producing better results.

**6. Is a watchdog watching?** If Congress, IRS, the state attorney general, or the news media care, the board should care. Hot button issues of the moment include community benefit, charity care, executive compensation, medical errors, and publicly available quality results. Boards should be proactive on high-profile issues, adopting

**A governing board functions best when it focuses on higher level, future-oriented matters of strategy and policy and performs its oversight responsibilities in a rigorous but highly efficient manner.**

1 Organizational decisions impacting roughly 10 percent or more of an organization's revenues or activities are strategic decisions.

2 If the board-approved strategic plan has more than five or six strategic areas and more than about 20 strategic initiatives under those areas, the board is involved at too low a level.

3 Management should bring the board well-documented analyses and recommendations to help directors strike the right balance when mission and financial realities come in conflict.

4 Directors should know the red flags that signal the need for closer inquiry. One rule of thumb states that statistically significant over- or underperformance on a strategic, quality, or financial indicator over at least three reporting periods constitutes a trend.

5 The board should not micromanage possible solutions; it should hold management accountable for producing better results.

6 If Congress, IRS, the state attorney general or the news media cares, the board should care.

7 When the CEO calls, good boards respond.

appropriate policies, overseeing performance, and ensuring the organization has a proactive public communications strategy.

**7. Does the CEO want and need**

**the board's support?** If the CEO asks for board advice or intervention, directors should respond. When CEOs are about to embark on career-limiting activities, such as fighting a labor union or terminating the contract of a noncooperative but popular physician group, the executive must know the board will stand firm. Sometimes CEOs want the board to challenge management to raise the bar for performance, which gives the CEO the board's backing to ask more from senior leadership and the medical staff. CEOs may also ask for help from directors with connections with donors, legislators, and community stakeholders. When the CEO calls, good boards respond.

Some practices and structures can help a board stay out of operations and focus on governance. The chairperson should exercise leadership and not hesitate to keep discussions focused on a higher plane. A CEO's letter to the board between meetings updates the board on recent events and obviates the need to discuss operations at meetings. A consent agenda enables a board to handle routine matters without discussion and frees up time for more important matters of policy and strategy, as well as board education. Committees for finance and investments, quality, audit and corporate compliance, and executive compensation have clear governance purposes. Conversely, in many cases, board committees on marketing, personnel/human resources, and facilities engage board members in management work and usually aren't needed.

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Most importantly, the board should elect members who understand and respect the difference between governance and management. Choose wisely, seeking as directors individuals who bring no personal agendas, understand the role of management in large, complex organizations, and have a desire to work as part of the board-management team. Then conflicts between the board and management will be rare.

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# Leadership & Governance: Tips for Success

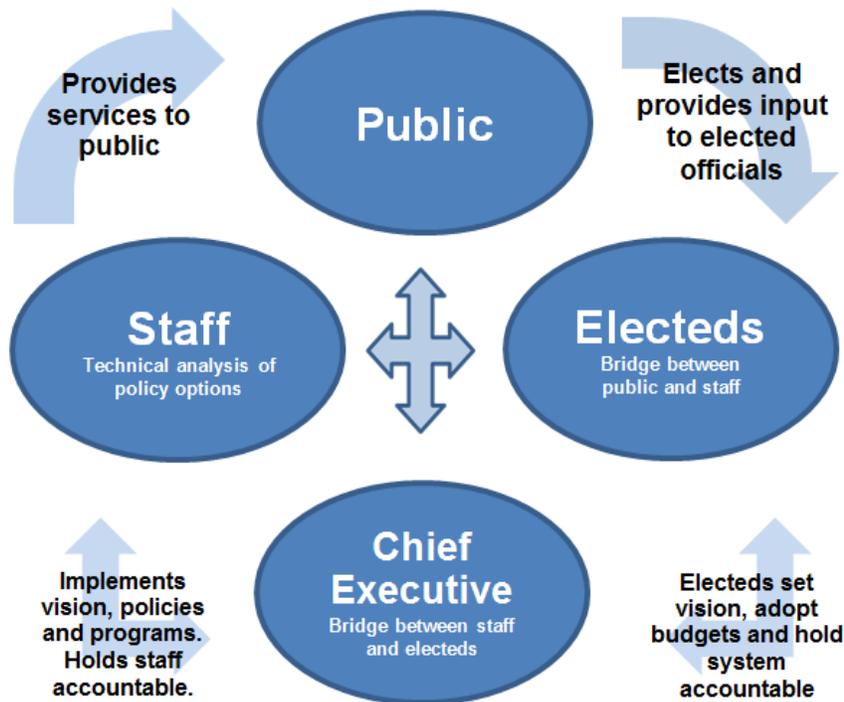
## Electeds and Staff Bring a Different & Necessary Perspective

Understanding and embracing different perspectives is part of what makes our democratic institution at the local level so great. Both perspectives are vital when making decisions in the community's interests.

- Elected officials focus on what their constituents value and need from the agency; and
- Staff has technical expertise in policy areas and what can work, given their day-to-day experiences with implementing agency policies, practices and service delivery that can help inform the decision-making process.<sup>1</sup>

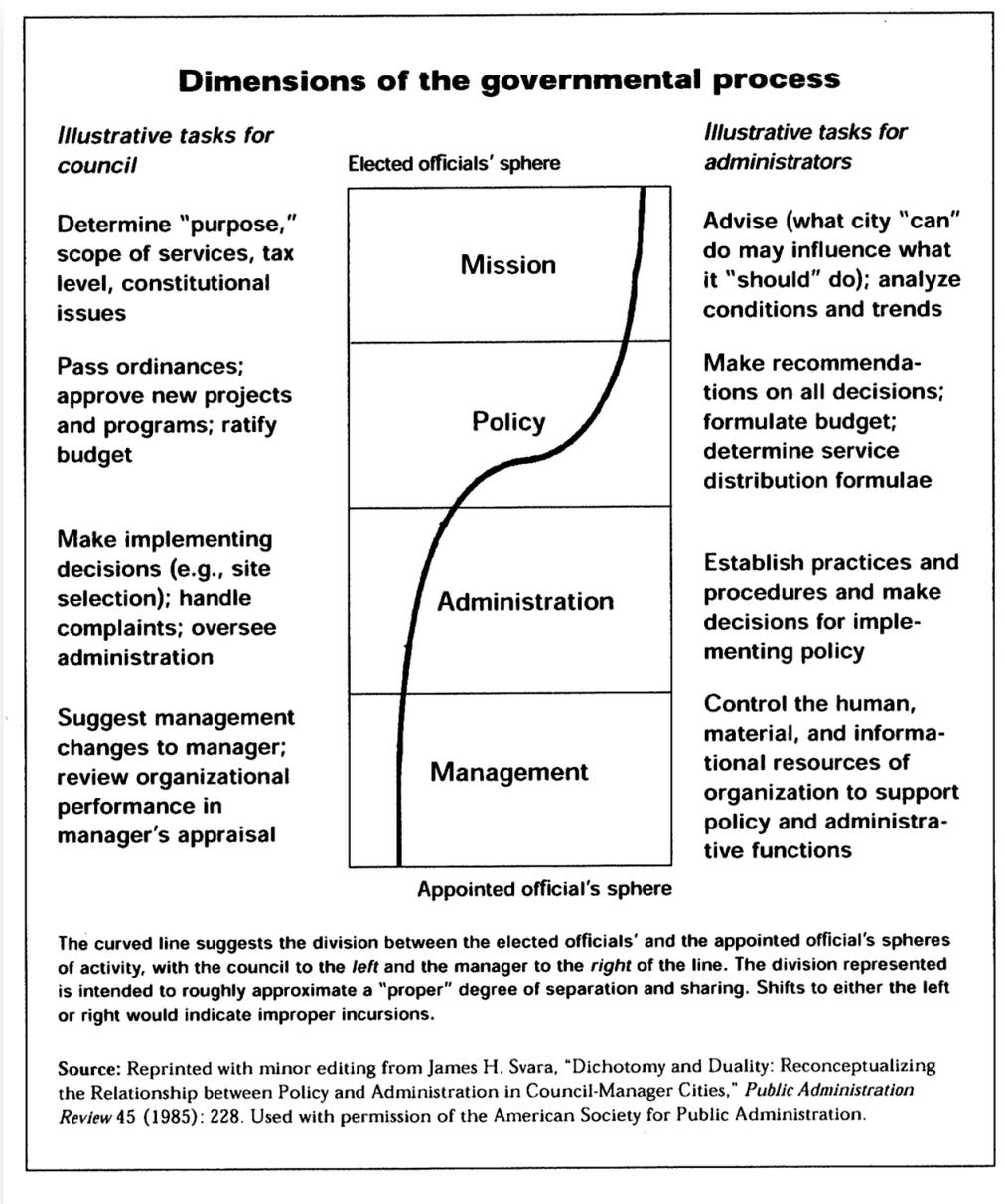
## Bridging Function

Elected officials play a key bridging function between the community needs and staff; the chief executive officer in turn plays a bridging function between elected officials and staff.



# Role Division

Current thinking is that elected and appointed officials operate in all four dimensions of the governance process: mission, policy, administration and management, although to differing degrees.<sup>2</sup> The graphic<sup>3</sup> below illustrates this phenomenon. The curved line illustrates the division of roles between governing boards and executive staff; how this line looks for each local agency varies.



## Role Clarity

A shared understanding of the chief executive's role and the governing board's expectations optimizes the working relationship. This understanding is informed by local charter and ordinance provisions that provide the overall framework for the relationship.

- The process of developing such a shared understanding begins with the hiring process and each participant in the process being forthright about their respective expectations.
- An annual evaluation process is an ongoing opportunity for such communication, particularly as governing board members change.

Staff will be most able to perform to expectations if those expectations are clear and mutually acceptable.

## Tips for Governing Board Members

**Setting Goals and Priorities.** A helpful practice is to have the governing board establish priorities and strategic goals for the organization; such goals and priorities are a tool to guide the chief executive and staff on where to focus their efforts.<sup>4</sup>

Establishing an annual time for board reflection on community priorities would also offer an opportunity to discuss decorum among members and the executive-board relationship.

**Limited Resources Means Difficult Trade-offs.** An unhappy reality is that there are likely insufficient resources to accomplish everything that the community and elected governing board members desire. This reality creates challenges for the chief executive in proposing a budget as well as well as managing the agency work force.

**Finding Common Ground.** A key skill for a governing board member is finding areas of agreement and common interests with other board members. Within the parameters of the state's open meeting laws, work with the other governing board members to find areas of agreement on what courses of action best serves the public's interests.

In the event that board members disagree, clear ground rules can quell acrimony before it becomes a public spectacle.

### When the Governing Board Changes

Staff's job is to implement the policies adopted by the governing body. This includes implementing changes in policy direction when the philosophy of the governing board changes.

New majorities on boards sometimes impute the policy preferences of the previous boards to staff. This causes them to worry that staff will not be as diligent in implementing changes to previous policies. They sometimes believe staff has to change in order for policies to change.

This is another area where frank and ongoing communication is helpful. Most professional staff understand that policy directions change and that their role is to implement that change, as long as the policy falls within the bounds of the laws and public service ethics.

Allow a certain amount of time for staff and the new majority to get to know one another and see if a productive working relationship can occur.

**Understanding that Public Policymaking Involves Value Choices.** Policy choices tend to be choices among different values, including the values of fairness, compassion, efficiency, individual rights, common good and others. The “correct” answer is likely to be an elusive goal,<sup>5</sup> particularly since members of the community as well as other members of the governing board are likely to give different values different weight.

**Chief Executive Works for the Entire Board.** All members of the body were elected by the community to participate in the agency’s decision-making processes. As a result, the chief executive’s responsibility is to strive for positive working relationships with all members of the body equally and provide information equally to all members of the body.

**Communications Needs.** Let the chief executive know what kinds of communications work for you. While the chief executive’s job is to share information with all members of the governing body equally (and typically through a combination of written communications and one-on-one meetings), governing body members will often have different communications preferences as to what combination of these two techniques work best for them.

**Transparent Decision-Making.** The governing board makes decisions (and gives staff direction) at open and well-publicized governing board meetings. These decisions occur after listening to, inquiring of and learning from interactions with all segments of the community and staff.

**The Benefits of Collaboration.** Be forthright on your objectives and goals with the chief executive, so he or she can do what is possible to help you achieve them (as opposed to “going around” him or her). A chief executive will try to be as responsive as possible to the needs of individuals on the governing board; however understand that significant tasks are likely to require governing body buy in and some tasks may conflict with priorities and policies adopted by the full governing body.

**Ground Rules.** A helpful practice is for the governing board as an entity to adopt, regularly review and update how the board will conduct its meetings and make decisions.<sup>6</sup> Such protocols typically address meeting procedures (agenda preparation, how to put issues on the agenda, debate and voting procedures (parliamentary rules) and standards of decorum (civility).<sup>7</sup>

**Managing Difficult Board Members.** Staff’s role is to provide information to enable elected officials to knowledgeably participate in the decision-making process. However, from time to time, there will be difficult and divisive board members that create a challenging and uncomfortable environment for both the board and staff. There is no one-size-fits-all solution to solve such a problem. In the end, the board must manage its own behavior—not staff.<sup>8</sup>

**Staff Preparation.** If you have questions, concerns and/or information needs (or know that members of the community do), provide staff a heads up in advance of meetings so staff can be prepared to address them.

**Unwelcome Information.** One of staff’s least favorite roles is providing information and analysis that will make one or more governing board members unhappy. Typically, providing such information is part of staff’s job to avoid surprising the board. If pursuing a given course of action could have negative outcomes (a lawsuit, unintended consequences or a chance that a given goal will not be achieved), it is

staff's job to let the board know so the board can factor such information and risks into the decision. If possible, staff will also try to identify options and alternatives for reducing the risk of negative outcomes.

**Directing Questions and Criticisms.** Question, and if appropriate, criticize ideas, policies, programs or outcomes, but not the individuals involved (whether those individuals are fellow elected officials, staff or members of the public). Remember that staff is your tool to accomplish your objectives. Public praise for things you like will motivate; public criticism and embarrassment will discourage. Criticism or information regarding staff missteps should be directed to the chief executive to address.

**Responding to Mistakes and Disappointing Outcomes.** Mistakes are likely to happen in any organization. If something bad happened, ask what measures can and will be taken to prevent such missteps in the future.<sup>9</sup>

## Tips for Chief Executive & Staff

**Clear Goals and Priorities.** A key task is for the governing body and chief executive work together to assure staff has clear direction on the agency's goals and priorities.

Goal setting workshops can be useful forums for establishing governing board and organizational priorities. This includes holding annual workshops in which goals are set, reviewed, updated and/or retained, as well as direction on how the group wants to be kept updated on progress, goals and priorities.<sup>10</sup> Follow up, of course, is critical to maximizing a goal setting session's value.<sup>11</sup>

Such clarity enables staff to know where to devote scarce/limited resources in proposing budget and work program priorities for the governing board's consideration.

Documented goals and priorities serve as a reference point when issues and potentially competing priorities come up throughout the year. Priorities may need to change of course; the key is if a new priority is added, an old one must be subtracted.<sup>12</sup>

Engaging a broad range of the community in the conversation about hard choices can help the governing body in aligning agency goals with community wishes. Such processes offer important opportunities to inform and consult the community on what can be difficult tradeoffs due to scarce resources. Such engagement can also make the resulting decisions more enduring.

**Focus on the Core Functions.** For those areas over which the agency has discretion (for example, non-state mandated efforts without maintenance of effort requirements), the conversation can focus on identifying what is most important for the agency to accomplish. This tends to be an intersection of three things: what the community is passionate about, what the organization can be best at and what resources are available.<sup>13</sup>

Identifying this intersection does not necessarily mean that tasks outside the intersecting area will not get accomplished. Some functions may be more effectively accomplished by other agencies, community-based organizations or the private sector.

**Capacity Building.** The entire community benefits from well-prepared and knowledgeable local officials. Some tools for assisting with this goal include:<sup>14</sup>

- Leadership academies that help the public, including potential future governing board candidates, understand key elements of the agency's work and processes.
- Candidate orientations that provide information about agency functions, pending policy issues, including budget issues and any regulations that apply to the campaigning process.
- Newly elected official orientations conducted as soon as possible after election results are certified. Content should include the nuts and bolts of how to accomplish objectives in their new role, as well as briefings on current issues the agency faces, the status of long-range plans and capital projects, and the budget process. Connecting newly elected officials with former electeds who are respected in the community and can offer advice and share experience is also helpful.<sup>15</sup>
- Ongoing education through local workshops, references to helpful information about local governance and policy issues and conference attendance.

**Credit for Commitment to Elective Office.** One dimension of staff's role is to help governing board members receive the recognition they deserve for their actions as public servants.<sup>16</sup> As media opportunities occur, ensure the electeds are aware so they may receive recognition for their service on community issues.

**Evenhandedness.** A positive working relationship with all governing body members regardless of personality, philosophy, positions on issues or whether the member is in the majority or minority on the body (remember majorities can change) can be another important success strategy. Communication preference may require that you spend more time with certain members. "Evenhandedness" does not necessarily mean communicating with all decision-makers in the same way.

**A Sustained Effort.** Successful relationships require ongoing effort and attention. Communication is a central element of this effort.

- Staff's role is to present information and analysis objectively, fairly and without spin.
- This includes willingness, when necessary, to deliver unwelcome information and minimize surprises for the governing board.

**When Elected Officials Disagree with Staff Recommendations and Analysis.** Professionals recognize smart, conscientious and reasonable people can disagree on the best course of action (particularly given the differing perspectives that staff and electeds contribute to the analysis of what best serves the community's interests).

- Such disagreements are not and should not be taken personally.
- All governing board decisions must be faithfully implemented, even those which differed from what staff recommended.
- Staff should never speak ill of elected officials, even to seemingly sympathetic and discreet listeners. Word of what was said inevitably seems to get back.

**Attention to Detail.** Doing the small things well helps governing board members trust staff on the big items.

**Defining Success.** Enjoying good relationships with elected officials is a worthy goal, with a few caveats.

- Be clear on the lines (legal, ethical and professional) over which you are not willing to step, before finding yourself in a difficult situation.
- As difficult as it may be, your professional reputation for competence and integrity in the long term is a more valuable career asset than keeping a particular job.

## More Resources

International City/County Management Association and National League of Cities, *Working Together: A Guide for Elected and Appointed Officials* (1999)

International City/County Management Association and National League of Cities, *Leading Your Community: A Guide for Local Elected Leaders* (2008)

This resource reflects the insights and thoughts of a number of individuals, including: Kevin C. Duggan, West Coast Director, International City/County Management Association, Pete Kutras, Retired County Executive, Santa Clara, and Principal Consultant, Municipal Resource Group, LLC, Richard A. Haffey, County Executive Officer, Nevada County, and William Chiat, Director, CSAC Institute for Excellence in County Government.

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<sup>1</sup> International City/County Management Association and National League of Cities, *Working Together: A Guide for Elected and Appointed Officials* (1999) at 22.

<sup>2</sup> *Working Together: A Guide for Elected and Appointed Officials*, at 19-20.

<sup>3</sup> Based on the work of James H. Svara in "Dichotomy and Duality: Reconceptualizing the Relationship between Policy and Administration in Council-Manager Cities," *Public Administration Review* 45 (1998): 228. This material is reproduced with permission of John Wiley & Sons, Inc.

<sup>4</sup> Kevin C. Duggan, A Key Ingredient for Success: An Effective City Council/City Manger Relationship, at 9.

<sup>5</sup> Julia Novak and John Nalbandian, Preparing Councils for Their Work, *PM Magazine*, August 2009, available at <http://webapps.icma.org/pm/9107/public/feature3.cfm?author=Julia%20Novak%20and%20John%20Nalbandian&title=Preparing%20Councils%20for%20Their%20Work&subtitle=>

<sup>6</sup> See International City/County Management Association and National League of Cities, *Working Together: A Guide for Elected and Appointed Officials* (1999), at 59. Mike Conduff, Council Relations, *PM Magazine* (June 2012), available at <http://webapps.icma.org/pm/9405/public/council.cfm?author=&title=Council%20Relations&subtitle=>

<sup>7</sup> See International City/County Management Association and National League of Cities, *Leading Your Community: A Guide for Local Elected Leaders* (2008) at 30-33.

<sup>8</sup> Julia Novak and John Nalbandian, Preparing Councils for Their Work, *PM Magazine* (August 2009), available at <http://webapps.icma.org/pm/9107/public/feature3.cfm?author=Julia%20Novak%20and%20John%20Nalbandian&title=Preparing%20Councils%20for%20Their%20Work&subtitle=>

<sup>9</sup> A Key Ingredient for Success: An Effective City Council/City Manger Relationship, at <http://webapps.icma.org/pm/9107/public/feature3.cfm?author=Julia%20Novak%20and%20John%20Nalbandian&title=Preparing%20Councils%20for%20Their%20Work&subtitle=>

<sup>10</sup> Julia Novak and John Nalbandian, Preparing Councils for Their Work, *PM Magazine* (August 2009) available at <http://webapps.icma.org/pm/9107/public/feature3.cfm?author=Julia%20Novak%20and%20John%20Nalbandian&title=Preparing%20Councils%20for%20Their%20Work&subtitle=>

<sup>11</sup> Mike Conduff, ICMA-CM, A Great Retreat!, *PM Magazine* (April 2012) available at <http://webapps.icma.org/pm/9403/public/council.cfm?author=&title=Council%20Relations&subtitle=>

<sup>12</sup> Frank Benest, Ten New Rules for Elected Officials in Times of Economic Meltdown (2011) available at <http://www.ca-ilg.org/post/leadership-strategies-times-economic-meltdown>.

<sup>13</sup> Adapted from Jim Collins, *Good to Great in the Social Sectors*, 2005 at 19 (the "hedgehog concept"). Also recommended by Frank Benest in Ten New Rules for Elected Officials in Times of Economic Meltdown (2011) available at <http://www.ca-ilg.org/post/leadership-strategies-times-economic-meltdown>.").

<sup>14</sup> From Mike Conduff, Council Relations, *PM Magazine* (June 2012), available at <http://webapps.icma.org/pm/9405/public/council.cfm?author=&title=Council%20Relations&subtitle=>

<sup>15</sup> Preparing Councils for Their Work, *PM Magazine*, available at <http://webapps.icma.org/pm/9107/public/feature3.cfm?author=Julia%20Novak%20and%20John%20Nalbandian&title=Preparing%20Councils%20for%20Their%20Work&subtitle=>

<sup>16</sup> This concept is part of the International City/County Management Association's Code of Ethics:

Tenet 6. Recognize that elected representatives of the people are entitled to the credit for the establishment of local government policies; responsibility for policy execution rests with the members.

## ROBERTS RULES CHEAT SHEET

To:	You say:	Interrupt Speaker	Second Needed	Debatable	Amendable	Vote Needed
Adjourn	"I move that we adjourn"	No	Yes	No	No	Majority
Recess	"I move that we recess until..."	No	Yes	No	Yes	Majority
Complain about noise, room temp., etc.	"Point of privilege"	Yes	No	No	No	Chair Decides
Suspend further consideration of something	"I move that we table it"	No	Yes	No	No	Majority
End debate	"I move the previous question"	No	Yes	No	No	2/3
Postpone consideration of something	"I move we postpone this matter until..."	No	Yes	Yes	Yes	Majority
Amend a motion	"I move that this motion be amended by..."	No	Yes	Yes	Yes	Majority
Introduce business (a primary motion)	"I move that..."	No	Yes	Yes	Yes	Majority

The above listed motions and points are listed in established order of precedence. When any one of them is pending, you may not introduce another that is listed below, but you may introduce another that is listed above it.

To:	You say:	Interrupt Speaker	Second Needed	Debatable	Amendable	Vote Needed
Object to procedure or personal affront	"Point of order"	Yes	No	No	No	Chair decides
Request information	"Point of information"	Yes	No	No	No	None
Ask for vote by actual count to verify voice vote	"I call for a division of the house"	Must be done before new motion	No	No	No	None unless someone objects
Object to considering some undiplomatic or improper matter	"I object to consideration of this question"	Yes	No	No	No	2/3
Take up matter previously tabled	"I move we take from the table..."	Yes	Yes	No	No	Majority
Reconsider something already disposed of	"I move we now (or later) reconsider our action relative to..."	Yes	Yes	Only if original motion was debatable	No	Majority
Consider something out of its scheduled order	"I move we suspend the rules and consider..."	No	Yes	No	No	2/3
Vote on a ruling by the Chair	"I appeal the Chair's decision"	Yes	Yes	Yes	No	Majority

The motions, points and proposals listed above have no established order of preference; any of them may be introduced at any time except when meeting is considering one of the top three matters listed from the first chart (Motion to Adjourn, Recess or Point of Privilege).

## PROCEDURE FOR HANDLING A MAIN MOTION

**NOTE:** Nothing goes to discussion without a motion being on the floor.

### Obtaining and assigning the floor

A member raises hand when no one else has the floor

- The chair recognizes the member by name

### How the Motion is Brought Before the Assembly

- The member makes the motion: *I move that (or "to") ...* and resumes his seat.
- Another member seconds the motion: *I second the motion* or *I second it* or *second*.
- The chair states the motion: *It is moved and seconded that ... Are you ready for the question?*

### Consideration of the Motion

1. Members can debate the motion.
2. Before speaking in debate, members obtain the floor.
3. The maker of the motion has first right to the floor if he claims it properly
4. Debate must be confined to the merits of the motion.
5. Debate can be closed only by order of the assembly (2/3 vote) or by the chair if no one seeks the floor for further debate.

### The chair puts the motion to a vote

1. The chair asks: *Are you ready for the question?* If no one rises to claim the floor, the chair proceeds to take the vote.
2. The chair says: *The question is on the adoption of the motion that ... As many as are in favor, say 'Aye'.* (Pause for response.) *Those opposed, say 'Nay'.* (Pause for response.) *Those abstained please say 'Aye'.*

### The chair announces the result of the vote.

1. *The ayes have it, the motion carries, and ...* (indicating the effect of the vote) or
2. *The nays have it and the motion fails*

### WHEN DEBATING YOUR MOTIONS

1. Listen to the other side
2. Focus on issues, not personalities
3. Avoid questioning motives
4. Be polite

# HOW TO ACCOMPLISH WHAT YOU WANT TO DO IN MEETINGS

## MAIN MOTION

You want to propose a new idea or action for the group.

- After recognition, make a main motion.
- Member: "Madame Chairman, I move that \_\_\_\_\_."

## AMENDING A MOTION

You want to change some of the wording that is being discussed.

- After recognition, "Madame Chairman, I move that the motion be amended by adding the following words \_\_\_\_\_."
- After recognition, "Madame Chairman, I move that the motion be amended by striking out the following words \_\_\_\_\_."
- After recognition, "Madame Chairman, I move that the motion be amended by striking out the following words, \_\_\_\_\_, and adding in their place the following words \_\_\_\_\_."

## REFER TO A COMMITTEE

You feel that an idea or proposal being discussed needs more study and investigation.

- After recognition, "Madame Chairman, I move that the question be referred to a committee made up of members Smith, Jones and Brown."

## POSTPONE DEFINITELY

You want the membership to have more time to consider the question under discussion and you want to postpone it to a definite time or day, and have it come up for further consideration.

- After recognition, "Madame Chairman, I move to postpone the question until \_\_\_\_\_."

## PREVIOUS QUESTION

You think discussion has gone on for too long and you want to stop discussion and vote.

- After recognition, "Madam President, I move the previous question."

## LIMIT DEBATE

You think discussion is getting long, but you want to give a reasonable length of time for consideration of the question.

- After recognition, "Madam President, I move to limit discussion to two minutes per speaker."

## **POSTPONE INDEFINITELY**

You want to kill a motion that is being discussed.

- After recognition, "Madam Moderator, I move to postpone the question indefinitely."

## **POSTPONE INDEFINITELY**

You are against a motion just proposed and want to learn who is for and who is against the motion.

- After recognition, "Madame President, I move to postpone the motion indefinitely."

## **RECESS**

You want to take a break for a while.

- After recognition, "Madame Moderator, I move to recess for ten minutes."

## **ADJOURNMENT**

You want the meeting to end.

- After recognition, "Madame Chairman, I move to adjourn."

## **PERMISSION TO WITHDRAW A MOTION**

You have made a motion and after discussion, are sorry you made it.

- After recognition, "Madam President, I ask permission to withdraw my motion."

## **CALL FOR ORDERS OF THE DAY**

At the beginning of the meeting, the agenda was adopted. The chairman is not following the order of the approved agenda.

- Without recognition, "Call for orders of the day."

## **SUSPENDING THE RULES**

The agenda has been approved and as the meeting progressed, it became obvious that an item you are interested in will not come up before adjournment.

- After recognition, "Madam Chairman, I move to suspend the rules and move item 5 to position 2."

## **POINT OF PERSONAL PRIVILEGE**

The noise outside the meeting has become so great that you are having trouble hearing.

- Without recognition, "Point of personal privilege."
- Chairman: "State your point."
- Member: "There is too much noise, I can't hear."

## COMMITTEE OF THE WHOLE

You are going to propose a question that is likely to be controversial and you feel that some of the members will try to kill it by various maneuvers. Also you want to keep out visitors and the press.

- After recognition, "Madame Chairman, I move that we go into a committee of the whole."

## POINT OF ORDER

It is obvious that the meeting is not following proper rules.

- Without recognition, "I rise to a point of order," or "Point of order."

## POINT OF INFORMATION

You are wondering about some of the facts under discussion, such as the balance in the treasury when expenditures are being discussed.

- Without recognition, "Point of information."

## POINT OF PARLIAMENTARY INQUIRY

You are confused about some of the parliamentary rules.

- Without recognition, "Point of parliamentary inquiry."

## APPEAL FROM THE DECISION OF THE CHAIR

Without recognition, "I appeal from the decision of the chair."

### Rule Classification and Requirements

Class of Rule	Requirements to Adopt	Requirements to Suspend
Charter	Adopted by majority vote or as proved by law or governing authority	Cannot be suspended
Bylaws	Adopted by membership	Cannot be suspended
Special Rules of Order	Previous notice & 2/3 vote, or a majority of entire membership	2/3 Vote
Standing Rules	Majority vote	Can be suspended for session by majority vote during a meeting
Modified Roberts Rules of Order	Adopted in bylaws	2/3 vote

## **Opening Reminder**

Before we begin Public Comment, I want to remind everyone that this is the public's opportunity to address the Board on matters within the Board's jurisdiction. We ask that comments be limited to matters within the Board's jurisdiction. We also request that speakers be respectful and avoid personal attacks so that we can maintain a productive and professional meeting.

## **Speaking on Matters Outside Agency Jurisdiction During Non-Agenda Public Comment**

### **Response to Someone Speaking on Matters Outside the Board's Jurisdiction [Either by President/Chair Interrupting or After Their Comments]**

Thank you for your comments. The issues you've raised are not within the jurisdiction of the Board. While we understand it may be important to you, the Board is limited to matters within its subject matter jurisdiction. We encourage you to contact the appropriate official or agency that has authority over those issues.

### **If Speaker Persists [by President/Chair Interrupting]**

As noted before, please keep your remarks to matters within the Board's jurisdiction so that we can proceed with the meeting.

## **Speaking on Other Matters During Comments on Agenda Item**

### **Step 1: First Reminder (Germaneness)**

Thank you. This agenda item concerns \_\_\_\_\_. Please limit your comments to this item. If you would like to speak on another matter, you may do so during general public comment.

### **Step 2: Second Reminder (Clear Direction)**

I need to ask you again to keep your remarks related to this agenda item. If you continue on unrelated matters, I will ask you to yield the remainder of your time.

### **Step 3: Warning Before Forfeiting Time**

You are not speaking to the posted agenda item. If you do not return to the subject, you will forfeit the remainder of your speaking time.

### **Step 4: If They Refuse to Yield / Become Disruptive**

You have been directed to limit your comments and/or yield the floor and have declined to do so. Your continued refusal is disrupting the meeting. If you do not yield the floor immediately, you may be removed pursuant to Government Code section 54957.95.

## Personal Attacks / Hate Speech

### **Response Following a Public Comment That Included Personal Attacks [After Their Comments]**

I want to remind everyone that our staff and Board members are here to serve the community. Disagreement with decisions or how District business is conducted is part of the public process, but we expect all participants to maintain professionalism and respect.

### **Response Following a Public Comment That Includes Hate Speech [After Their Comments]**

Although the law requires that we allow individuals to speak during public comment, even when we strongly disagree, I want to state clearly that this Board does not share or endorse the views expressed by the speaker. We are committed to serving all members of this community [and supporting our staff.]

**2026 Brown Act Teleconferencing Matrix**

This guide outlines common teleconference options in the Brown Act, Government Code section 54950 et seq., for local agency legislative body members, clerks/secretaries, and staff. Further options are available, like for health authorities, neighborhood councils, and community college student organizations. This is general guidance. Terms and circumstances require analysis on a case-by-case basis. If a member intends to teleconference, they should consult agency management and legal counsel to confirm compliance. Options may be further limited if the agenda deadline has passed and the agenda does not meet the minimum requirements for teleconference participation.

	<b>TRADITIONAL</b> <i>GC § 54953(b)</i>	<b>DISABILITY ACCOMMODATION</b> <i>GC § 54953(c)</i>	<b>JUST CAUSE</b> <i>GC § 54953.8.3</i>	<b>PROCLAIMED EMERGENCY</b> <i>GC § 54953.8.2</i>	<b>SUBSIDIARY BODIES</b> <i>GC § 54953.8.6</i>	<b>MULTIJURISDICTIONAL BODIES</b> <i>GC § 54953.8.7</i>
<b>Authority</b>						
<b>Necessary Circumstances</b>	No specific requirements.	Member has physical or mental disability as provided GC §§ 12926 and 12926.1, or a disability as defined in 42 USC § 12102.  Member's disability requires remote participation as a reasonable accommodation.	"Just cause" need: - Contagious illness - Physical or mental condition - Official state or local agency travel - Physical or family medical emergency - Official military need >50mi from agency boundary - Immunocompromised or caregiving need of child, parent, grandparent, grandchild, sibling, spouse, or domestic partner - Limited to: 2 mtg/yr if <1 mtg/mo; 5 mtg/yr if 2 mtg/mo, and 7 mtg/yr if ≥3 mtg/mo.	Must be: - Proclaimed state of emergency or local emergency and - Either (1) meeting is, in part, to vote on if emergency is imminent risk to attendee health/safety; or (2) in past 45 days, body has already determined such.	- Body must be an "eligible subsidiary body" meaning: (1) not main governing body,(2) only has "advisory capacity," no final action, and (3) no primary subject matter jurisdiction over elections, budgets, police oversight, privacy, access or removal of library materials, or taxes or related spending proposals. - Governing <i>and</i> subsidiary bodies adopt resolution allowing, renewed every 6 months. - Elected official serving on subsidiary body may not use.	- Body is an "eligible multijurisdictional body": (1) Members are appointed; and (2) either includes reps from 2+ local agencies, or is a JPA. - Body adopted resolution allowing such teleconferencing. - Teleconferencing members generally not eligible for stipend/per diem. - Limited to: 2 mtg/yr if <1 mtg/mo; 5 mtg/yr if 2 mtg/mo, and 7 mtg/yr if ≥3 mtg/mo.
<b>Agenda Requirements</b>	- Post agendas at all locations, including teleconference locations. - Identify each teleconference location on the agenda.	No specific requirements.	Identify means for public to view and comment via audio and video platform AND in-person options.	Identify means for public to view and comment via audio and video platform AND in-person (if in-person available).	Identify means for public to view and comment via audio and video platform AND in-person options.	- Identify means for public to view and comment via audio and video platform AND in-person options. - Identify teleconferencing members
<b>Meeting Format</b>	- Meeting and teleconference locations must be open to the public. - Quorum must be within the agency's boundaries (regardless of whether participating in-person or via teleconference). - Roll call votes required.	Remote participation treated as in-person attendance for all purposes, including any quorum requirements. - Best practice is roll call vote.	- Meeting <i>must</i> be in-person and virtual, with audio AND video access. - Quorum must be in <i>single</i> public location within agency's boundaries - Roll call votes required. - If disruption impacts meeting broadcast or remote commenting, take no action until access restored.	Physical location for public not required. Public must be able to attend remotely with audio AND video access. - Roll call votes required. - If disruption impacts meeting broadcast or remote commenting, take no action until access restored.	- Meeting <i>must</i> be in-person and virtual, with audio AND video access. - Designate physical location within agency's boundaries where members and public can attend in-person; ≥1 staff person at location. - Roll call votes required. - If disruption impacts meeting broadcast or remote commenting, take no action until access restored.	- Meeting <i>must</i> be in-person and virtual, with audio AND video access. - Quorum must be in public location within agency's boundaries. - Roll call votes required. - If disruption impacts meeting broadcast or remote commenting, take no action until access restored.
<b>Public Comments</b>	Public must be allowed to provide public comment from teleconference locations.	No specific requirements.	- Allow real-time comments. - Reasonable time to comment on each agenda item. - If specified, keep comment time open for set duration. - Cannot require advance comment submittal.	- Allow real-time comments. - Reasonable time to comment on each agenda item. - If specified, keep comment time open for set duration. - Cannot require advance comment submittal.	- Allow real-time comments. - Reasonable time to comment on each agenda item. - If specified, keep comment time open for set duration. - Cannot require advance comment submittal.	- Allow real-time comments. - Reasonable time to comment on each agenda item. - If specified, keep comment time open for set duration. - Cannot require advance comment submittal.
<b>Teleconferencing Member Must</b>	No specific rules; however, members should provide necessary information in time to be included in agenda.	- Disclose any 18+ individuals in the room and relation. - Audio <i>and</i> visual participation required, unless disability necessitates otherwise.	- Disclose any 18+ individuals in the room and relation. - Audio <i>and</i> visual participation required. - ASAP member provides notice and general description of need to participate remotely.	- Disclose any 18+ individuals in the room and relation. - May use a two-way telephonic service without visual participation.	- Disclose any 18+ individuals in the room and relation. - Audio <i>and</i> visual participation required or else announce reason for non-compliance.	- Disclose any 18+ individuals in the room and relation. - Audio <i>and</i> visual participation required. - Member must be more than 20 miles each way from any physical meeting location open to public.
<b>Minutes Requirements</b>	No specific requirements.	No specific requirements.	Identify teleconferencing member and just cause basis.	Identify teleconferencing member and teleconferencing provision.	Identify teleconferencing member and teleconferencing provision.	Identify teleconferencing member and teleconferencing provision.

# KEY INSIGHTS INTO Open Government & Ethics



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Best Best & Krieger LLP's Open Government & Ethics attorneys counsel public agencies, officials and private businesses who wish to promote public confidence in their decision-making processes by assuring that official conduct is above reproach.

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# KEY INSIGHTS INTO Open Government & Ethics



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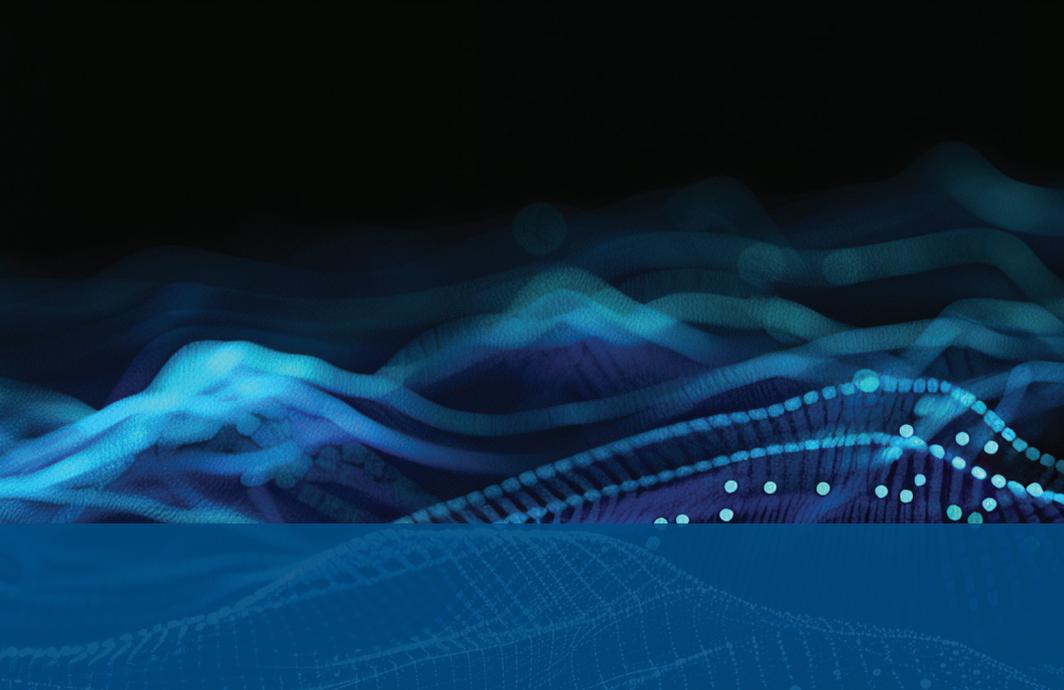
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The following information should not be construed as individual or group legal advice. Readers are cautioned to seek individualized legal assistance based on detailed analysis of particular facts and situations.



## “Gift” Rules for Public Officials and Employees

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The Political Reform Act of 1974 (PRA) regulates the receipt, prohibition, and required reporting of gifts by public officials, designated employees, and consultants. (Gov. Code sections 81000-91014.) The Fair Political Practices Commission (FPPC) defines and enforces the PRA and the gift rules. (Cal. Code Regulations, title 2, sections 18940-18961.)

**This resource summarizes the four basic aspects of the rules governing gifts to public officials and others covered by the law:**

- 1. Recognizing a gift.**
- 2. Gift limits and prohibited gifts.**
- 3. Gift reporting.**
- 4. When a gift creates a conflict of interest.**

Gift rules apply to elected and appointed public officials. This includes agency employees, consultants and volunteers who are either: (i) “statutory filers” (required to file a Statement of Economic Interests (SEI) by section 87200); or (ii) “code filers” (required to file an SEI under an agency’s conflict of interest code). (Regulations 18940, 18940.1(b).) This information is not directed to lobbyists, lobbyist firms or lobbyist employers.

**What is a “Gift?”**

A “gift” is any payment or other benefit that provides a *personal* benefit to an official, and the official does not pay for the full value of that benefit. A gift may be a good or service, forgiveness of a debt or obligation, as well as a rebate or discount in price, unless the rebate or discount is offered in the ordinary course of business without regard to the official’s status, i.e., it is available to the public. (Gov. Code section 82028; Regulation 18940.)

A gift can be almost anything if it costs money or has a market value. The FPPC’s interprets “gift” broadly to encompass essentially anything received (including products, services, loans, cash, meals – including food and beverages – tickets, travel or entertainment, etc.) for which fair market value is not paid. Gifts can also include “free advice” from consultants or professionals, tickets or passes to events or entertainment (like concerts, golf or the spa) and flowers, gift baskets or other holiday treats.

The identity of the donor is irrelevant. Anyone, whether an individual or a company, can give a gift that may be reportable or prohibited. The only exceptions are gifts from family members, long-time friends, or gifts from a public agency employer (discussed below). The gift becomes reportable if the gift’s source must be identified on an SEI.

Finally, a gift to an official's immediate family may be considered a gift. The PRA considers such gifts reportable if the donor has no established working, social, or similar relationship with the official's family member, or circumstances suggest the donor intended to influence the official. (Regulation 18943) This includes gifts to spouses, dependent minor children, and possibly dependent adult children up until 23.

### What is not a "Gift?"

The following include some of the most common examples of items not considered reportable gifts. This list is not exhaustive; there are certain conditions, as discussed in FPPC Regulation 18942, where there is an exception to the general rule.

- Informational materials, such as books, pamphlets, calendars and periodicals used to convey information to assist in the performance of official duties.
- Gifts from the following family members, unless the donor is acting as an agent or intermediary for any person not among this list:
  - Spouse or former spouse.
  - Children, stepchildren or grandchildren.
  - Parent or grandparent.
  - Sibling.
  - Current or former parent-in-law, brother-in-law or sister-in-law.
  - Nephew, niece, aunt or uncle, including grandnephew, grandniece, great aunt or great uncle.
  - First cousin, including a first cousin once removed or the spouse, or former spouse, of any such person other than a former in-law.
- A campaign contribution required to be reported under the law.
- Any devise or inheritance.
- A personalized plaque or trophy valued at less than \$250.
- The cost of home hospitality provided to an official by an individual in the individual's home when the individual is present.
- Gifts that are:
  - Unused and then returned or donated to a 501(c)(3) nonprofit within 30 days of receipt.
  - Exchanged between an official and an individual (but not a lobbyist) on a holiday, birthday or other occasions where

gifts are commonly exchanged, and to the extent that the value of the gifts exchanged are substantially the same value, including food, entertainment and nominal benefits provided to guests at an event.

- Reciprocal exchanges in a social relationship between the official and another individual (not a lobbyist), with whom the official participates in repeated social events or activities, such as lunches, dinners, rounds of golf, attendance at entertainment or sporting events, where the parties typically rotate payments on a continuing basis so that, over time, each party pays for approximately his or her share of the costs of the continuing activities, so long as the total value of payments received by the official within the calendar year is not substantially disproportionate to the amount paid by the official.
- From an individual with whom the official has a long-term, close, personal relationship, unrelated to the official's position.
- Admission (where paid admission is required) to an event, food, and nominal items provided as part of the paid admission, to the official where he or she makes a speech, so long as the admission is provided by the person who organizes the event.
- A ticket provided to the official and one guest for admission to a facility, event, show or performance for an entertainment, amusement, recreational or similar purpose at which the official performs a ceremonial role on behalf of his or her agency.
- Gifts received: (i) at a wedding or civil union, (ii) as bereavement-related gifts, (iii) that constitute an "act of neighborliness" or "human compassion," or (iv) in a bona fide dating relationship.
- Costs for travel, lodging and passes received from and through a public agency are normally not considered gifts to the official, though the rules are complex. Generally, transportation, lodging and meals paid for by the public agency when the official is conducting official agency business are considered neither gifts nor income and are thus not reportable on the SEI. Travel and lodging paid by third parties, however, might be considered either gifts or income depending on the circumstances, but are generally not subject to the \$630 limitation. If an individual or an entity gives tickets or passes to the public agency for distribution by the agency (usually by the manager, superintendent or other executive) and they are used for public purposes, the value of such gifts are not reportable by the official on his or her SEI. Instead, the public agency must complete and file either a Form 801 or a Form 802 and follow certain reporting requirements.

## What Does It Mean to “Receive” a Gift?

A gift is considered “received” and “accepted” when an official, or their family member: (i) knowingly takes actual possession of the gift, (ii) is provided the gift’s benefit, *or* (iii) takes any action exercising direction or control over the gift. (Gov. Code 89503.5.) “Re-gifting” to another person or entity constitutes receipt of a gift. A gift is not “accepted” if, within 30 days, the official: (i) returns the *unused* gift to the donor; (ii) donates the gift either to a 501(c)(3) nonprofit unrelated to the official or to a local, state, or federal government agency, without claiming the donation as a tax deduction; or (iii) pays for the full value of the gift.

## Is It Legal to Accept a “Gift?”

Most gifts are legal so long as the official complies with the reporting requirements and stays below the gift limits. Of course, just because a gift can be accepted does not mean it should be. Whether to accept a gift is a personal decision each public official must make in light of his or her own circumstances, in compliance with special local policies and the expectations of his or her constituents.

It is illegal, however, to **condition a vote or official governmental action on receiving a gift**. This includes offering to vote for or against an agenda item, or to take or refrain from any governmental action (including influencing staff and other elected officials) in exchange for a gift. **This is bribery.** (Penal Code sections 70 (misdemeanor), 85 (felony); see also Education Code section 35230 (misdemeanor).) Any gift considered a bribe, regardless of the amount, creates a disqualifying financial interest under the PRA and Government Code section 1090, preventing the agency from entering into any contract with the donor.

## If I Accept a “Gift,” What Do I Need to Know?

There are three general considerations when deciding to accept a gift: (i) prohibited gifts, (ii) gifts that must be reported, and (iii) gifts that create a disqualifying conflict of interest under the PRA.

## What “Gifts” Are Prohibited?

- Any gift(s) received from a single reportable source with a value greater than \$630 within the calendar year. (Gov. Code section 89503, Regulations 18940.2, 18945.1.)
- Honoraria, such as payment for making a speech, publishing an article or attending any public or private conference, convention, meeting, social event, meal or similar gathering.

## What “Gifts” Must be Reported?

Any gift(s) received from a single reportable source with a value of \$50 or more during the calendar year must be reported on an SEI. (Gov. Code section 87210, Regulation 18940(c).) Public officials should be careful if multiple gifts are received from the same reportable source over the course of a calendar year that total \$50 or more (e.g., two \$25 gift baskets); receipt of the second gift will trigger the reporting requirement. An official may also partially reimburse the donor, thus reducing the gift’s value for reporting purposes.

## What “Gift” Creates a Disqualifying Conflict of Interest?

Any gift or combination of gifts from a single donor valued at \$630 or more which were received in the 12 months preceding a governmental decision affecting that donor creates a disqualifying conflict of interest under the PRA. (Gov. Code section 87103(e); Regulation 18700(c)(6)(E)) (**Note:** this is different than a calendar year for reporting purposes. For example, an official who receives a \$400 gift from a donor in December and another \$400 gift the following January will have a disqualifying conflict of interest, but will be below the \$630 maximum for the calendar year.)

## How Do I Determine a “Gift’s” Value?

Gifts are valued at “fair market value” on the day they are received. (Regulation 18940(c).) The donor or retail source may be contacted to provide the gift’s value and make a determination.



# California Public Records Act<sup>1</sup>

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The California Public Records Act (“CPRA”) (California Government Code section 7922<sup>2</sup>, *et seq.*) was passed by the California Legislature in 1968 for government agencies and allows the public to inspect and obtain copies of records from state and local public agencies. The main goal of the CPRA is to provide the public with access to information that allows them to examine government operations. Public agencies are required to disclose records relating to the conduct of the public’s business upon request unless there is a legal basis not to do so.

Best Best & Krieger LLP's ("BBK") Advanced Records Center ("ARC"), assists public agencies by providing expert guidance and support on a variety of records-related matters. ARC's team of Certified E-Discovery Specialists leverages cutting-edge technology to provide comprehensive, cost-effective assistance with CPRA processing, policy drafting, training, and document retention.

## Who Handles CPRA Requests?

Elected and appointed officials, as well as public agency employees and consultants, along with individuals contracting with public agencies, are directly responsible for preparing, using, transmitting, and storing public records.

## What Is a "Public Record?"

A public record is a document or record related to the public's business that a public agency creates or receives. Under the CPRA, a "public record" is any "writing," regardless of its physical form or characteristics, that contains information related to the conduct of the public's business and is prepared, owned, used, or retained by a public agency. The CPRA's definition of "writing" includes handwriting, typewriting, printing, photographs, photocopies, emails, faxes "and every other means of recording upon any tangible thing, any form of communication or representation... and any record thereby created, regardless of the manner in which the record has been stored." (Section 7920.545<sup>3</sup>)

### Examples of disclosable public records include:

- Emails regarding a public agency's business
- Claims filed against a public agency
- Employment agreements
- Names and salaries of public employees

<sup>1</sup> As of January 1, 2023, the CPRA has been reorganized and recodified without any substantive change. This resource will show the new numbering with footnote references to the previous numbers. Additionally, unless stated otherwise, all statutory references cite to the California Government Code.

<sup>2</sup> Formerly Government Code section 6250 *et seq.*

<sup>3</sup> Formerly Government Code section 6252(g)

- Names and pension amounts of retired public employees
- Proposals (after negotiations are complete)
- Expense reimbursements for public officials and public employees
- Settlement agreements
- Contracts between public agencies and third parties
- Geographic Information System (GIS) data (but not the software)
- Permits and licenses issued by public agencies
- Agenda reports, ordinances, resolutions, and public meeting minutes

**Best practice:** Consider emails, text messages, and photographs regarding the public agency’s business as disclosable public records. Keep all communications professional so casual remarks and banter stay off the public record.

## Emails and Public Records

Email messages that contain information regarding an agency’s official business are public records subject to the CPRA and applicable records-retention laws. However, email messages not pertaining to public business are typically not considered public records, including:

- Personal messages
- SPAM emails, advertisements, or other “junk” messages
- Birthday greetings, invitations to lunch, etc.
- Newsletters or general information from other agencies or vendors

Public officials and staff should refrain from using personal email accounts to discuss official business. If it’s unavoidable, the message should be forwarded or “cc’d” to the email address provided by the agency. Emails related to official agency business must be accessible and retained by the agency in accordance with the agency’s document retention policy.

## Rights to Privacy

Personal privacy is a constitutionally protected right recognized by the CPRA. The legislature acknowledged the importance of individual privacy by creating several exemptions in the CPRA. For instance, the CPRA permits the withholding of personnel, medical, or similar information if releasing the information would infringe upon an

individual's personal privacy, and if the balance of interests favors non-disclosure (Section 7927.700). Similarly, a government employee's personal information is kept confidential, such as home addresses, personal telephone numbers, and birth dates (Section 7928.300).

In some cases, agencies must use a general balancing test to determine whether the right to privacy in a particular instance outweighs the public's interest in accessing the information. In such situations, if personal or intimate information is obtained from a person (e.g., a government employee or appointee, or an applicant for government employment/appointment) as a precondition for the employment or appointment, a privacy interest in such information is likely to be recognized. However, if information is provided voluntarily in a public setting (e.g., a public meeting) or in order to receive a benefit, a privacy right is less likely to be recognized. At times, the decision to disclose depends on whether the invasion of an individual's privacy is significant enough to outweigh the public interest in disclosure.

## What Are Public Agencies Required to Do Under the CPRA?

### 1. Provide Assistance

Public agencies must help requesters make “focused and effective” records requests that reasonably describe identifiable records. This involves assisting in identifying records that are responsive to a request, describing the format in which the records exist (whether electronic or paper-based), outlining the physical location of the records (e.g., offsite storage or the agency's website), and providing suggestions to avoid having the agency deny the request (e.g., warn of any legal privileges that apply to the requested records).

**Best practice:** Ask the requester for clarification if you're unsure about the type of records being sought. Provide examples or descriptions of the types of records the agency uses to help identify documents or documents that may contain the information sought.

### 2. Provide Records

Public agencies must make copies of disclosable public records “promptly available” whenever possible and allow inspection of disclosable public records “at all times” during regular business hours. Access is always free. Fees for “inspection” or “processing”

are prohibited<sup>4</sup>. However, the CPRA allows public agencies to review and redact records, when necessary, to delete any portions that are exempt from disclosure before inspection. The CPRA also allows public agencies up to 10 days to determine if it has the records. In specific situations, a public agency may extend the 10 days up to an additional 14 days to make its determination. Those particular situations are when a public agency needs to 1) search for and collect records from offsite facilities, 2) search for, collect, and examine large volumes of records, 3) consult with another agency about the request, or 4) compile data, write a computer program or construct a computer report to extract data.

**Best practice:** When other staff members ask for documents for a CPRA request, provide the documents quickly to comply with the CPRA's legal deadlines.

### 3. Provide a Written Explanation When Records Are Withheld

When a public agency denies a request for records, the denial must be provided in writing and include the specific exemption in the CPRA or other statute. If no specific exemption applies, the denial must give a detailed explanation of why the public interest in withholding the records clearly outweighs the public interest served by disclosure. Moreover, the written denial must also include the names and titles/positions of each person responsible for denying the request.

The CPRA allows certain records to be kept confidential, but this doesn't mean they're completely off-limits to the public. While an agency can withhold these records, it can also choose to provide greater access. However, the law prohibits selective or favored access, and once the information is disclosed to one requester, it becomes public for everyone (Section 7921.505(b)).<sup>5</sup>

<sup>4</sup> Government Code section 7922.503 (Formerly Government Code section 6253(b))

<sup>5</sup> Formerly Government Code section 6254.5

**Best practice:** Forward all records requests to the agency’s designated person to process and respond to the requests. If a records request is being denied, provide as much information as possible so a thorough explanation for the denial can be prepared.

## What Are Public Agencies **Not Required** to Do Under the CPRA?

- The CPRA does not require creation or preparation of a record or document that does not exist at the time of the request to satisfy a records request (*Sander v. Superior Court* (2018) 26 Cal. App.5th 651, 669.)
- Requests for records generated in the future are not allowed
- Conduct research, complete checklists or answer questions
- Create a “privilege” log of withheld documents (*Elgin Haynie v. Superior Court* (2001) 26 Cal. 4th 1061.)

## What Public Agencies **Cannot** Do Under the CPRA:

- Require a records request be submitted in writing – verbal records requests are valid (*Los Angeles Times v. Alameda Corridor Transportation Authority* (2001) 88 Cal. App. 4th 1381, 1392.)
- Charge for staff time to gather, review or redact documents (*North County Parents Organization, et al. v. Dept. of Education* (1994) 23 Cal. App. 4th 144, 148.)
- Limit access to records based on the purpose of the request (Section 7921.300<sup>6</sup>)
- Ask requesters to provide identification before disclosing records (Section 7921<sup>7</sup>; Cal. Const. Art. I, section 3(b)(1); *Connell v. Superior Court* (1997) 56 Cal. App. 4th 601, 611-612 [disclosable records must be made available to any person].)

## Which Records Are Exempt From Disclosure?

### The “**Laundry List**”

Many types of records are listed as exempt from disclosure in the CPRA. In the Government Code, there is a “laundry list” of records that are not required to be disclosed. The exempt records include:

<sup>6</sup> Formerly Government Code section 6257.5

<sup>7</sup> Formerly Government Code section 6250

- Preliminary drafts, notes and other “temporary” documents that are not kept by an agency in the ordinary course of business, as long as the public interest in withholding these “draft” documents clearly outweighs the public interest in disclosure (Section 7927.500<sup>8</sup>)
- Records pertaining to pending litigation to which the agency is a party (Section 7927.200<sup>9</sup>)
- Personnel, medical or similar files, the disclosure of which would constitute an unwarranted invasion of personal privacy (Section 7927.700<sup>10</sup>)
- Investigatory Records (Section 7923.600-7923.625<sup>11</sup>)
- Voter Information (Section 7924.000<sup>12</sup>)
- Tax Payer Information (Section 7925.000<sup>13</sup>)
- Real estate appraisals made for or by a public agency, related to a property acquisition (Section 7928.705<sup>14</sup>)
- Attorney-client privilege (Section 7927.705<sup>15</sup>).

### Other Exemptions - The “Catch-All” Exemption

Other CPRA sections protect various records or information from disclosure, including utility customer information, personal addresses in DMV records and archaeological site information. Sections 7930.105<sup>16</sup> through 7930.215<sup>17</sup> contain an alphabetical listing of records and information that are protected from disclosure in other California statutes (from “Acquired Immune Deficiency Syndrome, blood test results” to “Youth Authority” records).

<sup>8</sup> Formerly Government Code section 6254(a)

<sup>9</sup> Formerly Government Code section 6254(b)

<sup>10</sup> Formerly Government Code section 6254(c)

<sup>11</sup> Formerly Government Code section 6254(f)

<sup>12</sup> Formerly Government Code section 6254(f)

<sup>13</sup> Formerly Government Code section 6254(i)

<sup>14</sup> Formerly Government Code section 6254(h)

<sup>15</sup> Formerly Government Code section 6254(k)

<sup>16</sup> Formerly Government Code section 6276.02

<sup>17</sup> Formerly Government Code section 6276.48

Section 7922.000<sup>18</sup> is known as the “catch-all” exemption. It includes a general balancing test for withholding public records. To withhold documents under the “catch-all” exemption, an agency must demonstrate that the public interest served by withholding the documents “clearly outweighs” the public interest served by disclosure.

**Best practice:** Legal counsel can help determine if a document should be withheld under the “catch-all” exemption and evaluate if the reasons for withholding the document will meet the balancing test in Section 7922.000<sup>19</sup>.

## Police Records

There were recent changes in the law regarding the disclosure of certain police records. Starting from January 1, 2019, a new law significantly changed the accessibility of police personnel records that were once confidential and not disclosable to the public, including the press. Senate Bill 1421 amended Penal Code Section 832.7, allowing for the release of records related to officer use-of-force incidents, sexual assault, and acts of dishonesty. Previously, access to such records required a Pitchess motion and a private review by a judge or arbitrator during a legal proceeding.

### Senate Bill 1421 made police officer personnel records relating to the following incidents subject to disclosure:

- Discharge of a firearm at a person by a peace or custodial officer
- Use of force by a peace or custodial officer against a person that results in death or great bodily injury
- A law enforcement or oversight agency’s sustained finding that a peace or custodial officer engaged in sexual assault involving a member of the public
- A sustained finding of dishonesty by a peace or custodial officer directly relating to the reporting, investigation or prosecution of a crime, or directly relating to the reporting of, or investigation of misconduct by, another peace or custodial officer

<sup>18</sup> Formerly Government Code section 6255(a)

<sup>19</sup> Formerly Government Code section 6255(a)

The California Senate passed Senate Bill 16 (“SB 16”) on September 2, 2021, and it was signed into law on September 20, 2021. SB 16 is part of ongoing efforts to enhance transparency in law enforcement. In 2018, Governor Brown signed SB 1421 into law, which made significant changes to the confidentiality of certain categories of peace officer personnel records. SB 16 builds upon this by expanding the types of peace officer personnel records that can be disclosed to the public and used as evidence in court. It also mandates that law enforcement agencies review the personnel file of a lateral peace officer before employing them.

**SB 16 extends the categories of peace officer personnel records that can be disclosed under a CPRA request to include:**

- Sustained findings related to unreasonable or excessive force
- Sustained findings where an officer failed to intervene during another officer’s clearly excessive or unreasonable use of force
- Sustained findings related to an officer’s conduct involving prejudice or discrimination based on a specified protected class (including verbal, written, online, recorded, or gestural behavior)
- Sustained findings related to unlawful arrest or search conducted by an officer

**Finally, as of July 1, 2019, Assembly Bill 748 (“SB 748”) requires video and audio recordings of “critical incidents” be disclosed. These include incidents include:**

- Discharge of a firearm at a person by a peace or custodial officer
- Use of force by a peace or custodial officer against a person that resulted in death or great bodily injury

**Proceed With Caution**

**Agencies relying on an exemption to withhold a public record must be aware that:**

- Exemptions must be “narrowly construed” – the meaning of an exemption cannot be stretched to fit a document.
  - EXAMPLE: The exemption for “preliminary drafts” protects only actual “working draft” documents. If an agency keeps draft versions of a document along with the final version, those drafts are not exempt from disclosure, even if they are stamped “draft.”

- EXAMPLE: The “pending litigation” exemption applies only to documents specifically prepared for litigation. An existing record may suddenly become important in a lawsuit. However, if the record was disclosable before the litigation, it remains disclosable during and after the litigation.
- Exempt information must be redacted from otherwise disclosable public records and the redacted versions must be disclosed (Section 7922.525(b)<sup>20</sup>).
- Exemptions are generally discretionary, not mandatory. An agency may waive an exemption and disclose an exempt document. However, once the exemption is waived, that same document must be disclosed to anyone else who requests it (Section 7924.000<sup>21</sup>).

## Some Records Are NOT Public

- Finally, the CPRA identifies certain documents and information that are “...not deemed to be public records.” Such records and information are confidential and must not be disclosed to the public. These documents include initiative/referendum/recall petitions, the identities of persons requesting bilingual ballots, voter registration information, trade secrets (as defined in Section 7924.510<sup>22</sup>), Social Security numbers, public library patrons’ records, family welfare records, birth records, adoption information, and personal information on various public employees.

**Best practice:** Avoid accidentally releasing exempt records or information for a CPRA request. Always check documents for attorney-client communications, Social Security numbers, home addresses, etc.

## Can We Charge for Providing Documents?

- **Inspection of Records:** Public agencies cannot charge requesters to inspect documents, even if documents must first be copied and redacted before inspection.
- **Copies of Paper Records:** For requests for paper copies of public records, public agencies may charge the “direct costs of duplication,” which includes only the cost of making the copy. Such cost cannot include staff time for retrieving, handling, reviewing,

<sup>20</sup> Formerly Government Code section 6253(a)

<sup>21</sup> Formerly Government Code section 6254.4

<sup>22</sup> Formerly Government Code section 6254.7(d)

or redacting documents. Public agencies usually charge a “per page” copying fee for paper copies that typically ranges from 10 to 25 cents per page, depending on each agency’s actual cost for producing a paper copy. However, copy charges for certain documents are set by statute, including documents under the Political Reform Act (e.g., 10 cents per page for Form 700, campaign statements, etc.) and certified payroll records under the Labor Code (\$1 for the first page, 25 cents for each additional page).

- **Copies of Electronic Records:** In certain situations, the CPRA allows public agencies to charge the cost of staff time to construct electronic records and for necessary programming and computer services. Typically, this cost is the hourly fee of the staff member who will provide these services. Public agencies may also charge for the cost of any materials used to provide electronic records (CDs, DVDs, flash drives, etc.). However, public agencies cannot charge a fee for simply attaching an existing electronic record to an email and sending it to a requester or uploading an electronic record to a file-sharing site (e.g., Dropbox).
- **Redactions for Body-Worn Camera Footage:** Local agencies cannot charge a requester for redacting a video or audio file. In *National Lawyers Guild, San Francisco Bay Area Chapter v. City of Hayward* (2020) 9 Cal. 5th 488, the court reaffirmed that local agencies may only charge the costs of duplication and not for other ancillary costs, such as retrieval, inspection, and handling of files.

**Best practice:** Only charge “direct cost” for paper copies and any materials needed to provide electronic records.

## How Is the CPRA Enforced?

A person can file a lawsuit against a public agency to enforce the right to inspect or receive a copy of a public record (Sections 7923.000 & 7923.005<sup>23</sup>). If the court finds that the public agency’s decision to withhold records was not justified, the public agency will be ordered to disclose the records. Also, the court has the discretion to award court costs and reasonable attorneys’ fees to the prevailing plaintiff, to be paid by the public agency. (*Riskin v. Downtown Los Angeles Property Owners Association* (2022) 291 Cal.Rptr.3d. 534.)

<sup>22</sup> Formerly Government Code section 6254.7(d)

<sup>23</sup> Formerly Government Code section 6258

Alternatively, if the court finds that the plaintiff's case was "clearly frivolous," it will award court costs and reasonable attorney fees to the public agency, to be paid by the plaintiff (Section 7923.115(a)-(b))<sup>24</sup>.

To prevent an agency from disclosing a record, a person can file a "reverse-CPRA" action. As described by the Second District Court of Appeal in *Marken v. Santa Monica-Malibu Unified School District*, the action generally involves a third-party seeking a court order stopping disclosure on grounds it would infringe that party's rights and/or is unauthorized by law.

**Best practice:** Legal counsel can assist in navigating the complexities of the CPRA. If uncertain about what is disclosable under the CPRA, it's always a good idea to consult with legal counsel.

<sup>24</sup> Formerly Government Code section 6259(d)



## Avoiding **Financial Conflicts of Interest** — Should I Participate in this Decision?

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The Political Reform Act of 1974 (Gov. Code Sections 81000–91014) forms the foundation for California’s financial conflict of interest laws for public officials. The purpose is to cover both actual and apparent conflict of interest situations between a public official’s private interest and their public duties.

The basic rule is that no public official shall make, participate in making, or in any way attempt to use their official position to influence a governmental decision if they know, or have reason to know, that they have a financial interest in the decision.

## Who Should Avoid Financial Conflicts of Interest?

All decision-making public officials for local government agencies which includes every member, officer, and employee of a local government agency, as well as consultants to a local agency who meet certain criteria. Public officials may also include members of public agency boards, councils, commissions, and committees with decision-making authority.

If you are a public official who may make, participate in making, or in any way influence a public agency decision, this resource will help determine whether you have a potential financial conflict of interest that has to be addressed.

## Do I Have a Financial Conflict of Interest Under the Political Reform Act?

Before making a decision or discussing a future decision of your public agency, try to answer the following questions:

### 1. Will you be “participating in a decision?”

You are “participating in a decision” of your public agency by doing any of the following:

- **Making an actual decision** — Voting, making an appointment, or taking an action that obligates or commits your public agency.
- **Contributing to the decision-making process** — Making a recommendation or participating in negotiations about the public agency decision.
- **Influencing the decision** — Making your position known, discussing the decision with other agency officials, providing reports, or influencing others (such as staff or consultants) who are involved in the decision-making process.

### 2. Does the decision affect one or more of your “financial interests?”

A financial conflict of interest can exist if the public agency decision you are participating in affects (positively or negatively) any of your “financial interests” as described in the Act and listed here:

- **Business Interest:** Any for-profit business entity in which you or your immediate family (spouse and dependent children) have a direct or indirect investment worth \$2,000 or more. You also have a financial interest in any business in which you are an employee, manager, officer, director, owner, partner or trustee, regardless of whether you have an investment or receive income from the entity.
- **Source of Gross Income:** A public official has a financial interest in any source of income that is either received by or promised to the official and totals \$500 or more in the 12 months before the decision. Income is very broadly defined as “a payment received” with few exceptions. Examples of income include salary, wage, advance, dividend, interest, rent, proceeds from any sale, gift, loan, forgiveness or payment of debt, or community property interest in income of a spouse. The FPPC regulations make it clear that a conflict of interest results whenever either the amount or the source of an official’s income is materially affected by a decision. Also, a decision that foreseeably will materially affect an official’s employer would generally necessitate a disclosure and disqualification, even if the amount of income received by the official was not affected. Common exclusions from income include loans from commercial lending institutions in the ordinary course of business made on terms available to the general public, campaign contributions, government salaries and benefits, monetary inheritances, and alimony or child support payments.
- **Gift Interest:** Any gift(s) — cash, goods or services — promised or given to you in the past 12 months by a person, business, or other entity totaling \$630 or more in value. The dollar limit is adjusted biennially in odd-numbered years based on the Consumer Price Index (CPI).
- **Real Property Interest:** Any real property interest, including ownership, mortgage, lease, easement or license, or option to acquire such interest in real property, located in the public agency’s jurisdiction owned directly or indirectly by you or your immediate family if the fair market value of the real property interest is \$2,000 or more. Month-to-month tenancies are not considered an interest in real property. Interest in real property also includes a pro rata share of a business entity’s real property or trust in which the public official or immediate family owns, directly or indirectly, a 10 percent interest or greater.

- **Personal Financial Interest:** Any personal expense, income, asset, or liability of you or your immediate family (spouse and dependent children).

### 3. Will the public agency decision have a reasonably foreseeable “material financial effect” on any of your financial interests?

Participation in a decision that affects your financial interest creates a conflict of interest only if it is reasonably foreseeable (a realistic possibility) and the effect is “material.”

In general, if the financial effect can be recognized as a realistic possibility and more than hypothetical or theoretical, it is reasonably foreseeable. If the financial result can be expected only in extraordinary circumstances not subject to the public official’s control, it is not reasonably foreseeable. In determining whether a governmental decision will have a reasonably foreseeable financial effect on a financial interest other than an interest explicitly involved, described above, the following factors should be considered:

- a. The extent to which the occurrence of the financial effect is contingent upon intervening events.
- b. Whether you should anticipate a financial effect on your financial interest as a potential outcome under normal circumstances when using appropriate due diligence and care.
- c. Whether you have a financial interest that is of the type that would typically be affected by the terms of the governmental decision.
- d. Whether the governmental decision will provide or deny an opportunity, or create an advantage or disadvantage for one of your financial interests, including whether the financial interest may be entitled to compete or be eligible for a benefit resulting from the decision.

This is not an exclusive list of all the relevant facts that may be considered in determining whether a financial effect is reasonably foreseeable.

“Material” means important or significant, and often depends upon whether or not the interest is explicitly involved. For each financial interest you identified as potentially affected by the decision, review the corresponding analysis below to determine whether the effect is material.

- **Business, Source of Income, and Gift Financial Interests — Explicitly Involved:** If your financial interest is explicitly involved (i.e., the subject of or a named party in the decision), the financial effect of the decision on your financial interest is presumed to be material unless you can demonstrate that the decision will not have a financial effect on your financial interest.
- **Business, Source of Income, and Gift Financial Interests — Not Explicitly Involved:** A reasonably foreseeable financial effect on a business entity is material if it results in 1) a change in gross revenues or in the value of assets or liabilities by at least \$1 million or 5 percent of annual gross revenues, or 2) a change in business expenses of \$250,000 or more or of 1 percent of annual gross revenues and the change is at least \$2,500; or if the business entity owns property that is the subject of the decision or would be substantially effected by the decision.
- **Real Property Interest — Explicitly Involved:** When your real property interest is explicitly involved in a public agency decision, the reasonably foreseeable financial effect is presumed material. A real property interest is explicitly involved when the decision includes matters such as the property's zoning, annexation, sale, lease, licensed or permitted use, taxes, fees, or improved services to the property.
- **Real Property Interest — Not Explicitly Involved:** When the real property is not explicitly involved, a decision's reasonably foreseeable financial effect is presumed material if, among other things, any part of the property in which you have a financial interest is within a 500-foot radius of the real property involved in the decision, unless it is clear the decision will not have a measurable impact on your property. If your property is located more than 500 feet, but less than 1,000 feet, from the property line of the property involved in the decision, the financial effect is material if the decision would have certain specified impacts, such as changing the parcel's view, noise or traffic level, development or income-producing potential, best use, character, or market value.

If the real property in which you have a financial interest is 1,000 feet or more from the property involved in the decision, the financial effect of the decision on your real property interest is presumed not to be material unless the specific circumstance of the decision and the nature of your property interest make it reasonably foreseeable that the decision will have a significant financial effect on your real property interest. Factors include the development potential of the property, use of the property, and character of the neighborhood.

- **Real Property Interest** — Leasehold Interest: If you have a leasehold interest in real property as opposed to an ownership interest, your leasehold interest in the property is material if the decision changes the termination date of the lease, affects the potential rental value of the property, changes your actual or legally allowable use of the property, or impacts your use and enjoyment of the property
  - **Personal Financial Interest:** The financial effect of a decision on your personal financial interest is material if the decision may result in you or your immediate family member receiving a financial benefit or loss of \$500 or more in any 12-month period due to the decision.
- 5. Does the decision affect your financial interests differently from the “public generally?”**

Even if you answered “yes” to the first three questions, you have a financial conflict of interest only if the decision affects you differently from the public in general. The financial effect of a decision is indistinguishable from its effect on the public generally if you establish that a significant segment of the public is affected and the effect on your financial interest is not unique compared to the effect on the significant segment.

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

- **Business Interest** — All businesses or nonprofit entities within your jurisdiction.
- **Real Property Interest** — All real property, commercial real property, or residential real property within your jurisdiction.
- **Individuals** — All individuals within your jurisdiction.

If you are elected to represent a specific district/area in the public agency, your “jurisdiction” is that district/area; otherwise, your jurisdiction is the agency’s jurisdiction.

A significant segment of the public is at least 15 percent of residential property within your agency’s jurisdiction if the only interest you have in the decision is your primary residence.

Specific rules exist for special circumstances involving public service and utility charges, general use or licensing fees, decisions with limited neighborhood effects, rental properties, required representative interests as part of a board or commission membership, states of emergency, and governmental interests.

## What Should I Do if a Financial Conflict Exists?

### 1. Do not participate in the decision.

If you answered “Yes” to all four questions above, you most likely have a financial conflict of interest and you are prohibited from participating in the decision-making process. Do not participate in the discussion or render any opinion or advice, and do not act in any way that might influence the decision.

### 2. Disclosure and recusal are required.

State law requires you to publicly disclose your financial conflict of interest on the record and excuse yourself from the meeting while the matter is being considered in open session. You generally do not have to excuse yourself on consent calendar items unless the item is pulled, but must publicly disclose the type of your financial interest (i.e., business entity, real property, etc.) that gives rise to the conflict of interest.

### 3. Do not commit violations of the Political Reform Act (PRA)

Violation of the PRA can result in administrative fines, civil penalties, and criminal sanctions.

## Other Conflict of Interest Laws

Two other key financial conflict of interest laws apply to public officials that you may encounter as either a board or council member, public employee, or consultant in the decision-making process:

### 1. Self-Interested Contracts (Government Code Section 1090)

This key law prohibits you, as a local official or employee, from voting on, discussing, or negotiating a proposed contract or sale with your public agency if you could receive some financial gain or loss from the contract or sale. Even if you abstain as a board or council member, the entire board or council is prohibited from entering into the contract unless an exception applies. Any contract signed by a public agency board or council in violation of Section 1090 is void. The rule is different if you are a decision-making employee not on the board or council. A public agency employee may disclose their financial interest in the public agency contract and be disqualified from any involvement, allowing the board or council to enter the contract legally. Violation of this law will void the contract or sale and may result in permanent forfeiture of office for elected officials. There are limited exceptions to this law that are beyond the scope of this resource.

## 2. Campaign Contributions (Government Code Section 84308)

If you are a directly elected or appointed public official, this law (known as the Levine Act) prohibits you from participating in proceedings involving licenses, permits, or other entitlements for use that affect a person, business, or other entity from which you have received a campaign contribution of more than \$500 within the preceding 12 months, and requires you to disclose on the record the receipt of any such contribution. In addition, this law prohibits you from accepting campaign contributions of more than \$500 from a party or participant in the proceeding for 12 months after a final decision is rendered in a proceeding.



## Conflict in Government Contracts — Government Code **Section 1090**

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Generally, government officials or employees with personal financial interests in a government contract cannot participate in or influence the creation of that contract. California Government Code section 1090 (“Section 1090”) prohibits members of the Legislature, state, county, district, judicial district, and city officers or employees (and certain consultants) from having a financial interest in any contract made by them in their official capacity or by any governmental body or board of which they are members.

A contract made in violation of Section 1090 carries with it serious consequences. With certain exceptions for independent contractors, a willful violation is punishable as a felony and the offending person may be banned from office for life. Prosecutors and the Fair Political Practices Commission (FPPC) can sue for civil penalties or impose administrative fines. Contracts made in violation of Section 1090 are void, even when the contract is to the advantage of the government agency. All benefits flowing from the contract obtained by the non-government entity may be restored to the agency (disgorged) without any offset to the other contracting party for goods or services provided.

Members of state or local governing bodies and state or local employees are generally subject to Section 1090. Consultants and independent contractors of an agency may be subject to Section 1090 if they have responsibilities for contracting decisions, act in a “staff capacity” such that they are “transacting on behalf of the government,” or are otherwise involved in the making of a government contract, unless they fall under the exceptions outlined in Section 1097.6. If you believe that Section 1090 may apply to your situation, you should engage qualified legal counsel to help you navigate these issues.

## Do I Have a Disqualifying Conflict of Interest Under Section 1090?

The FPPC is the state body responsible for ensuring that California state and local governments operate ethically under the requirements of the Political Reform Act. The FPPC applies a six-step analysis to determine whether an official or employee has a disqualifying conflict of interest under Section 1090.

### 1. Is the official or employee subject to the provisions of Section 1090?

All state, county, district, judicial district and city officers and employees are subject to the law. Independent contractors may be subject to Section 1090 as well unless they fall under the exceptions outlined in Section 1097.6, which went into effect on January 1, 2024. Now, independent contractors who enter into a contract with a public agency to perform one phase of a project and seek then to enter into a subsequent contract for a later phase of the same project are not “officers” under Section 1090 if their duties

and services related to the initial contract did not include assisting the public agency with any portion of a request for proposals, request for qualifications, or any other subsequent or additional contract with the agency. However, even if independent contractors assist the public agency with contracting matters, they may enter into a subsequent contract with the public agency for a later phase of the same project so long as: (1) their prior participation during an initial stage of a project was limited to conceptual, preliminary, or initial plans or specifications; and (2) all bidders or proposers for the subsequent contract have access to the same information, including all conceptual, preliminary, or initial plans or specifications.

## **2. Does the decision or action at issue involve a contract?**

One looks to general principles of contract law to determine whether a contract is involved in a process or decision. Sections 1090 and 1097 require that all transactions be viewed in a broad manner and avoid narrow and technical definitions of “contract.” Under this law, “a contract” includes a request for proposal, MOU, construction contract, lease or other real property agreements, purchase orders and agreements, any exchange of goods or services for consideration whether in writing or not and grants of money or property or other things of value. Generally, a contract exists when two or more parties agree to exchange goods or services with the expectation that each will receive something of value in return.

## **3. Is the official or employee participating in the making of a contract?**

“Making a contract” is broadly construed and includes any participation in the making of the contract including, but not limited to involvement in preliminary discussions, negotiations, compromises, reasoning, planning, drawing of plans and specifications, solicitation for bids and other actions. The understanding of “participation” is very broad and requires careful analysis. Also, in relation to a public body, such as a city council or district board, when members of a public board, commission or similar body have the power to execute contracts, each member is presumed to be involved in the making of all contracts by his or her board regardless of whether the member actually participates in the making of the contract. The presence of one person with a financial conflict of interest in a contract prevents the entire body from acting on that contract. Thus, when council or board members are involved, it is irrelevant whether or not they recuse themselves

from the decision because the law usually presumes that the official was involved in entering the contract.

#### 4. Does the official or employee have a “financial interest” in the contract?

A person has a financial interest in a contract if he or she might profit or suffer a loss from the contract in any way. Said another way, any kind of financial impact – good or bad – causes a conflicting financial interest. The impact need not even be certain. Although Section 1090 does not specifically define “financial interest,” the term is liberally and broadly construed to include indirect, as well as direct interests. An indirect interest often arises when an official or employee has a business or financial relationship with a person or entity who is contracting with the government entity. A person is conflicted under Section 1090 when their financial interest might in any way prevent the person from exercising absolute loyalty and undivided allegiance to the best interests of the public agency. Any separate, personal interest of an officer or employee in a government-made contract may constitute an indirect interest. An official has a conflict of interest when that official’s spouse has a financial interest in the making of the contract. This is because the law presumes that an official is financially interested in his or her spouse’s income or financial interest.

#### 5. Does either a “remote interest” or “non-interest” apply?

By law, there are various statutory exceptions to Section 1090’s prohibition against an entire board or agency making a contract. Where the financial interest involved is deemed a “remote interest,” as defined in Section 1091, the contract may be made if: 1) the officer in question discloses his or her financial interest in the contract to the public agency, 2) such interest is noted in the entity’s official records and 3) the officer abstains from any participation in the making of the contract.

Section 1091 provides a list of 17 “remote interests.” These provisions are complex and one should not rely on the application of these exceptions without first consulting with counsel or seeking the advice of the FPPC.

Non-interests apply to all persons covered by Section 1090: Non-interests are set forth in Section 1091.5. There are 14 of these statutory non-interests. In essence, these constitute a legislative recognition that certain financial interests are so remote or speculative as to not require disqualification from participating

in the making of a contract, or which are designed to serve or accommodate some other public policy, such as one's interest in one's own salary from a government entity or the receipt of public services. A non-interest means a person is not disqualified from participating in the making of a contract. Some non-interests do still require the official to disclose the interest in the official records. Again, as with "remote interests," these non-interest exceptions are complex and one should seek the advice of legal counsel or the FPPC before relying on one of these statutory exceptions.

## **6. Does the Rule of Necessity apply?**

The Rule of Necessity applies only to government entities, not individuals. In very limited circumstances, a Rule of Necessity has been applied to allow the making of a contract that Section 1090 would otherwise prohibit. Under the Rule of Necessity, a government agency may acquire an essential good or service in an emergency when to delay the contract would be to the public detriment, or when no source other than that which triggers the conflict is available. When the Rule of Necessity applies, due to a conflict with an official on a multi-member board or body, the interested official must abstain from any participation in the decision.

## **What Are the Consequences if Section 1090 is Violated?**

- With certain exceptions for independent contractors, a willful violation or aiding and abetting a willful violation of Section 1090 is punishable as a felony and carries a sentence of up to three years in state prison and a lifetime ban from holding office.
- A prosecutor or the FPPC can bring a civil action to collect civil fines of up to \$10,000 or three times the amount of the benefit received under the contract.
- The FPPC can impose administrative fines of up to \$5,000 per violation.
- The contract is void and suit may be brought to have the contract declared void.
- All proceeds, payments and profits received or obtained as a result of the contract must be returned to the government entity.
- Because most Section 1090 violations also violate the Political Reform Act's prohibition against having a financial interest in a governmental decision, the full array of penalties available under that Act also apply, including misdemeanor criminal liability, civil penalties, administrative fines and injunctive relief.



# Completing a Statement of Economic Interests (Form 700)

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The Political Reform Act (Gov. Code section 81000 et seq.) prohibits a public official from making, participating in making or using 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. (Gov. Code section 87100.) To help identify potential conflicts of interest, the PRA requires officials to file forms called Statements of Economic Interests, or SEIs, also known as Form 700s, disclosing personal assets and income that may be affected by participating in decisions of their position.

Public officials required to file SEIs are identified in Gov. Code section 87200 and in an agency's conflict of interest code. The PRA requires every public agency to adopt a code that provides disclosure and disqualification rules, identifies positions that make or participate in the agency's decision-making processes, and establishes categories of financial interests that are assigned to the designated positions based on their official duties.

### Who Should File Form 700?

All public officials listed in section 87200, and public officials, employees and consultants identified in an agency's conflict of interest code or others in newly created positions, boards and commissions not yet covered under an agency's conflict of interest code.

### General Process

The Fair Political Practices Commission (FPPC) is the state agency responsible for interpreting and administering the Act. Form 700 was developed by the FPPC for public officials to disclose personal financial interests, as required by law. Form 700 is used for both individuals filing under section 87200 and individuals filing under an agency's conflict of interest code. Form 700 and other documents are distributed by agency filing officers and filing officials to various filers. Filing an SEI is not a one-time event, but is done annually while the official retains the filing relationship with the agency, and is retrospective for reporting, disclosing activity for time periods prior to the filing date. All SEIs must have an original "wet" signature or be duly authorized by the filing officer to file electronically under section 87500.2.

There are three types of SEIs filed by public officials – Assuming Office Statement filed when first beginning duties with your agency or being sworn in, Annual Statement filed annually and Leaving Office Statement when an official's relationship with the agency has terminated. Form 700 is also used by candidates for filing a disclosure statement.

It is important to keep in mind that SEIs are signed under penalty of perjury (see Penal Code section 118) and are public records once filed.

**WHERE TO FILE - 87200 FILERS**

STATE OFFICES	Your Agency
COUNTY OFFICES	Your County Filing Official
CITY OFFICES	Your City Clerk
MULTI-COUNTY OFFICES	Your Agency

- **Code Filers** — Officials, Employees, and Consultants Designated in a Conflict of Interest Code: File with your agency, board or commission unless otherwise specified in the agency’s conflict of interest code (e.g., Legislative staff files directly with FPPC). In most cases, the agency, board or commission will retain the SEIs.
- **Employees in Newly Created Positions of Existing Agencies:** File with the agency or its code reviewing body, if directed to do so.
- **Members of Boards and Commissions of Newly Created Agencies:** File with the newly created agency or its code reviewing body, if required.

**Filing Deadlines and Reporting Periods**

- **Assuming Office Statement -** Due within 30 days after the date of assuming office;
  - Disclose reportable investments and interests in real property held on the date of assuming office and reportable income, including gifts, loans and travel payments, received during the 12 months prior to the date of assuming office.
- **Exception:** If a filer assumed office between Oct. 1 and Dec. 31 and filed an assuming office statement, the first annual SEI would not be due until one year following the date specified in the agency’s Code if the date is April 1 or earlier. (Regulation 18732.)
- **Note:** These deadlines are for filers to file or mail their SEIs to the agency officer/official, as required. The postmark date is the date of filing. The filing official has 5 days after the filing deadline or date of receipt for SEIs received after the deadline to process and forward SEIs filed by 87200 filers to the FPPC or other filing officer. (Regulation 18115.)

There is no provision for an extension of time for filing an SEI unless the filer is serving in active military duty. Statements of 30 pages or less may be faxed by the deadline as long as the originally signed paper version is sent by first class mail to the filing officer/official within 24 hours.

- **Late Filing** — The filing officer who retains originally signed or electronically filed SEIs may impose a fine for any SEI that is filed late. The fine is \$10 per day up to a maximum of \$100. Late filing penalties may be reduced or waived under certain circumstances.

Persons who fail to timely file their SEIs may be referred to the FPPC's Enforcement Division (and, in some cases, to the Attorney General or district attorney) for investigation and possible prosecution. In addition to the late filing penalties, a fine of up to \$5,000 per violation may be imposed.

- **Amending SEIs** — If an error has been made on an SEI, an amendment must be filed as soon as possible. SEIs may be amended at any time. Only the schedule that needs to be revised must be amended. It is not necessary to amend the entire filed form. Amendment schedules can be obtained from the filing officer or at [www.fppc.ca.gov](http://www.fppc.ca.gov). An amendment can be filed in the same manner as the originally filed SEI; however, each page being amended must be signed.

### What to Disclose:

Not everything is deemed reportable. Economic interests filers need to consider are reportable investments in businesses and business positions held, interests in real property, and sources of income, including gifts, loans and travel payments from third parties.

For code filers, reportable economic interests are determined by the agency's jurisdiction and the disclosure categories assigned to the filer's position. For 87200 filers, except for gifts, reportable economic interests are only limited by the agency's jurisdiction, and there is no jurisdiction limit applied for reporting sources of gifts. However, there are many reporting exceptions to be found under the gift regulations starting at Regulation 18940.

In addition to economic interests held and received by the filer, reportable economic interests include business investments and interests in real property held by the filer's spouse and dependent children, and income received by the spouse, if the interests and sources of income qualify under the reporting requirements as described above.

The term spouse includes registered domestic partners.

"Investments," including independent consulting or contracting businesses, are reportable if they are either located in, doing business

in, planning to do business in, or have done business during the previous 2 years in the agency's jurisdiction.

## Disclosure Requirements:

### 87200 filers must disclose:

- All investments in any business entity in which the filer, the filer's spouse or dependent children had a direct, indirect or beneficial interest totaling \$2,000 or more.
- All interests in real property located in whole or in part within, or not more than two miles outside, the jurisdiction of the agency, in which the filer, the filer's spouse or dependent children had a direct, indirect or beneficial interest totaling \$2,000 or more.
- All sources of income of \$500 or more received by the filer or \$1,000 received by the filer's spouse.
- All business positions held with each reportable business, even if no income was received.
- All gifts aggregating \$50 or more from a single reportable source

## Designated Positions Must Disclose:

It is the assignment of Disclosure Categories that tells the code filer what is reportable.

Categories must be assigned to code filers based on the duties and responsibilities of the position. Categories should be designed and assigned in an effort to prevent requiring over-disclosure or the disclosure of the types of assets that the position could not affect. In other words, if the position does not participate in decisions that could affect interests in real property, the person in that position should not be required to disclose interests in real property.

Code filers must disclose interests as listed above for 87200 filers, but are limited to categories assigned under their agency's conflict of interest code. If assigned, the filer must disclose all interests in real property located in, or not more than two miles outside, the jurisdiction of the agency, and all described investments and business positions in business entities, and sources of income, including gifts, loans and travel payments. As noted above, such investments are reportable if they are located in, doing business in, planning to do business in, or have done business during the previous 2 years in the agency's jurisdiction.

Reminder: Even if a code filer's assigned disclosure category does not specify the disclosure of gifts, the definition of income includes gifts. This means any source of a gift that would be reportable as a source of income would likewise be made reportable as a source of any gifts aggregating \$50 or more during the reporting period.

The chart on the following page lists some common reportable and non-reportable economic interests. Refer to the Form 700 instructions and its Reference Pamphlet for more.

### Public Access:

SEIs are public documents and must be made available by the agency for viewing and copying during regular business hours no later than the second business day after they are received by the filing officer. Access to the Form 700 is not subject to the Public Records Act procedures. SEIs may never be altered or redacted, although posted copies may have signatures and certain addresses blocked. No one may ask for the identity or completion of a form as a condition of access to SEIs. Reproduction fees of no more than 10 cents per page may be charged.

### Things to Know:

- Know and understand your disclosure requirements.
- Know your agency's jurisdiction.
- You only need to disclose reportable investments and interests.
- Income from public agencies is not reportable.
- You are not required to report the same interest on duplicate schedules, e.g. income on Schedule A-2 and Schedule C.
- You only need to disclose gifts from reportable sources.

Common Reportable Interests	Common Non-Reportable Interests
<b>SCHEDULE A-1</b> Investments less than 10%	
Stocks, including those held in IRAs and 401Ks, bonds, managed funds. Each stock must be listed.	Gov. bonds, insurance policies, mutual funds registered with the SEC, funds similar to mutual funds, like ETFs.
<b>SCHEDULE A-2</b> Investments of 10% or more	
Business entities, Partnerships, sole ownership, LLCs, investments held by business or living trust. (e.g., Form 1099 filers).	Bank accounts, money market, CDs, annuities.
<b>SCHEDULE B</b> Real Property	
Rental property, ownership interest, leasehold interest in filer's jurisdiction, or within two miles of the boundaries of the jurisdiction.	Personal residence including vacation home used exclusively as a personal residence.
<b>SCHEDULE C</b> Income, Loans & Business	
Non-Governmental Salary/wages, per diem, reimbursements, spouse's income (50%), proceeds from any sale (i.e. home, car, boat), prizes, awards, personal loans. Note: that filers are required to report only half their spouse's or partner's salary.	Governmental salary, income from government entity, stock dividends, income from PERS.
<b>SCHEDULE D</b> Gifts \$50+ from single source	
Tickets/Passes to events - sports/entertainment, amusement parks, parking, food, wedding gifts, rebates, discounts.	Gifts from family, home hospitality, gifts of even exchange.
<b>SCHEDULE E</b> Travel Payments	
Payments, advances and reimbursements from third parties for travel and related expenses including lodging and meals.	Travel paid by official's agency, payments from non-reportable sources.



# The Brown Act

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The Ralph M. Brown Act (California Government Code Section 54950 through 54962), often referred to as “the open meeting law,” guarantees the public’s right to attend and participate in meetings of local legislative bodies. The act includes requirements that affect the taking of minutes, including what must be in different situations. This resource provides a summary of the Brown Act’s requirements for the minutes in various circumstances, including teleconferenced meetings, non-agenda items, and closed sessions.

In adopting the Brown Act in 1953, the California Legislature’s intent was clear: “In enacting this chapter, the Legislature finds and declares that the public commissions, boards and councils and the other public agencies in this State exist to aid in the conduct of the people’s business. It is the intent of the law that their actions be taken openly and that their deliberations be conducted openly.”

By preparing accurate and complete minutes of discussions and actions undertaken by local government bodies, local agencies ensure the public receives an accounting of the important work carried out by their representatives.

## What to Include in the Minutes?

### Open Sessions

- All actions taken by the legislative body in open session
- Any votes cast by members If a writing is a public record related to an agenda item for an open session of a regular meeting of a legislative body and is distributed to all, or a majority of all, of the members of a legislative less than 72 hours before that meeting, the writing shall be made available for public inspection (Section 54957.5(b))

### Teleconferencing (Section 54953)

- Record that an agenda including relevant teleconference information notice was posted, that a quorum participated from locations within the jurisdiction or a single primary location (depending on the type of teleconferencing used), and other teleconference requirements were followed (Section 54953).
- If meeting remotely during a proclaimed emergency, document findings that either the emergency directly affects meeting safely in person or that state or local officials continue to impose or recommend measures to promote social distancing (Section 54953(e)).
- If a member participates remotely for “just cause” or under emergency circumstances, record the circumstances of their remote attendance, that at least a quorum participated in person from a single physical location, and that the remote member(s) disclosed whether there was anyone 18 years of age or older in the remote location and their relationship to that person (Section 54953(f)).

### Meeting Outside Jurisdiction

- Record reason for the meeting to be held outside jurisdiction (Section 54954)

### Action on Non-Agenda Items

- Emergency — Record that a majority vote was to invoke an emergency and a description of the emergency (Section 54954.2).
- Immediate Need — Note that a 2/3 vote of the legislative body present at the meeting or, if less than 2/3 of the members were present, a unanimous vote of those members present, was taken and the grounds were articulated by the body for invoking the rule (Section 54954.2).
- Adjourned Meetings (Section 54955)
- Special Meetings — A waiver of notice was agreed to by legislative body members (Section 54956).
- Emergency Meetings — Record special requirements for posting and what to include in the minutes (Section 54956.5).

### Pre-Closed Sessions — Announcements

- Record that an open session announcement was made (Section 54957.7).
- Content — It may include a reference to the item as listed on the agenda and may be made at the location of the closed session as long as the public is allowed to be present at that location.
- Real Property — Record that a special announcement was made (Section 54956.8).
  - Special Announcement: Identify negotiators, the real property concerned, and the party whom negotiations are with.
- Pending Litigation — State on the agenda or announce the paragraph of Section 54956.9(d) that authorized the closed session.

### Post-Closed Session Announcements

- A disclosure report may be made orally or in writing and may be made at the location of the closed session as long as the public is allowed to be present at that location.

## Real Estate Negotiations

- Note whether a body finalizes a signed agreement (i.e., the other party signed before the agency signed) in closed session. (Section 54957.1(a)(1)(A).)
  - Disclosure must be made in open session during the same meeting.
  - The report must include (1) the acceptance action, (2) the voting tally, and (3) the substance of the agreement.
- However, if the other party or court must finalize the agreement (i.e., the other party signs after the agency signed), disclosure must be made as soon as the agency is informed of approval by the other party. (Section 54957.1(a)(1)(B))
  - No disclosure is required in open session, but disclosure must be made to any person who asks.
  - The report must include (1) the fact of the approval action, (2) the voting tally, and (3) the substance of the agreement.

## Personnel Actions

- Record whether a body takes action to appoint, employ, dismiss, accept the resignation of, or otherwise affect the employment status of a public employee in closed session. (Section 54957.1(a)(5))
  - Disclosure must be made in open session during the same meeting.
  - The report must include (1) the reportable action, (2) the voting tally, and (3) the title of the position involved.
- However, if the body takes action to dismiss an employee or not renew an employment contract, and the dismissal or nonrenewal is subject to further administrative remedies, disclosure must be made in open session at the first public meeting after exhaustion of the administrative remedies.
- If a body considers an action to dismiss an employee or not renew an employment contract, but ultimately retains the employee, no disclosure report is required (Attorney General Opinion - 89 Ops. Cal.Atty.Gen. 110 (2006)).

## Labor Negotiations

- If a body approves an agreement that concludes labor negotiations with represented employees:

- Disclosure must be made after the agreement is final and has been accepted or ratified by the other party. The Brown Act does not specify whether this disclosure must be during open session or may instead be made only when asked.
- The report must include (1) the approval action, (2) the voting tally, and (3) the other party to the agreement.

### Approval of Initiating or Intervening in Litigation

- If the body approves initiation of, or intervention in, litigation:
  - Disclosure must be made in open session during the same meeting.
  - The report must explain (1) that the body gave direction to initiate or intervene in litigation and (2) that additional particulars will, upon inquiry, be disclosed after the litigation formally commenced.
- If the litigation authorized by the body has formally commenced and disclosure would not jeopardize the agency's ability to effect service on parties or conclude existing settlement negotiations to the agency's advantage:
  - No disclosure is required in open session, but a report must be provided to any person who asks after the lawsuit is filed.
  - The report must include (1) the approval action, (2) the voting tally, (3) the defendants, and (4) particulars about the substance of the litigation.
- If the litigation authorized by the body has formally commenced and disclosure would jeopardize the agency's ability to effect service on parties or conclude existing settlement negotiations to the agency's advantage:
  - No disclosure is required in open session, but a report must be provided to any person who asks after process has been served on unserved parties, if that was the concern, or the settlement negotiations have concluded, if that was the concern.
  - The disclosure report must include (1) the approval action, (2) the voting tally, (3) the defendants, and (4) particulars about the substance of the litigation.

### Approval of Certain Litigation Actions

- If a body approves a litigation defense, filing an appeal or filing an amicus curiae brief, then:

- Disclosure must be made in open session during the same meeting.
- The report must include (1) the approval action, (2) the voting tally, (3) the adverse parties (if known), and (4) the substance of the litigation at issue (Section 54957.1(a)(2)).

### Approval of Settlement Agreements

- If a body gives approval to legal counsel to settle pending litigation and accepts a settlement offer signed by the opposing party in closed session:
  - Disclosure must be made in open session during the same meeting.
  - The report must include (1) the acceptance action, (2) the voting tally, and (3) the substance of the agreement.
- However, if the other party or court must finalize the agreement (i.e., the other party signs after the agency signed), when the settlement is final:
  - No disclosure is required in open session, but must be provided to any person who asks.
  - The report must include (1) the fact of the approval action, (2) the voting tally, and (3) the substance of the agreement.

### Disposition of Claims

- If a body makes a decision pertaining to claims for the payment of tort liability, losses, public liability losses, or workers' compensation liability incurred by a joint powers agency or a local agency member of the joint powers agency:
  - Disclosure must be made after the agreement as soon as disposition is reached. The statute does not specify whether this disclosure must be during open session or may instead be made only when asked.
  - The report must include (1) the name of the claimant, (2) the name of the agency claimed against, (3) the substance of the claim, (4) the voting tally, and (5) any monetary amount approved for payment and agreed upon by the claimant.

## Pension Funds

- If a body makes a pension fund investment transaction decision:
  - Disclosure must be made at the first open meeting held after the earlier of (1) the close of the investment transaction or (2) the transfer of pension fund assets for the investment transaction.
  - A roll call vote must be entered into the minutes of the closed session.
  - The report must include (1) the approval action and (2) the voting tally.

## Common Safe Harbor Listings for Closed Sessions

### Conference with Real Property Negotiations (Section 54956.8)

- Property: Specify street address or, if no street address, the parcel number or other unique reference, of the real property.
- Agency Negotiation: Report the names of negotiators attending the closed session; if the specified negotiator cannot attend, announce who will attend at the open session before the closed session.
- Negotiating Parties: Specify the name of the party (not the agent).
- Under Negotiation: Specify whether the instruction to the negotiator will concern price, terms of payment, or both.

### Conference with Legal Counsel — Existing Litigation (Section 54956.9(d)(1))

- Name of Case: Specify by reference to claimant's name, names of parties, case, or claim numbers.
- Case Name Unspecified: Specify whether disclosure would jeopardize service of process or existing settlement negotiations.

### Conference with Legal Counsel — Anticipated Litigation

- Significant exposure to litigation under Section 54956.9(d)(2) or Section 54956.9(d)(3): Specify number of potential cases.
- The agency may also have to provide additional information on the agenda or in an oral statement before the closed session (Section 54956.9(e)(2)-(5)).
- Initiation of litigation under Section 54956.9(d)(4): Specify the number of potential cases.

### **Liability Claims for Insurance Pool JPAs or a Member Agency (Section 54956.95)**

- Claimant: Specify the name unless unspecified under Section 54961.
- Agency Claimed Against: Specify the name of the agency.

### **Threat to Public Services or Facilities (Section 54957(a))**

- Consultation with: Specify the name of the law enforcement agency and title of officer or name and title of the applicable agency representative.

### **Public Employee Appointment (Section 54957(b)(1))**

- Title: Specify the description of the position to be filled.

### **Public Employment (Section 54957(b)(1))**

- Title: Specify the description of the position to be filled.

### **Public Employee Performance Evaluation (Section 54957(b)(1))**

- Title: Specify the position and title of the employee being reviewed.

### **Public Employee Discipline/Dismissal/Release (Section 54957(b))**

- No additional information is required.

### **Conference with Labor Negotiators (Section 54957.6)**

- Agency Designated Representatives: Specify the names of designated representatives attending the closed session; if the designated representative(s) cannot attend, announce who will attend at the open session before the closed session.
- Employee Organization: Specify the name of the organization representing the employee or employees in question.

**-or-**

- Unrepresented Employee: Specify the position and title of the unrepresented employee who is the subject of the negotiations.



## The Levine Act

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The Political Reform Act of 1974 (Gov. Code § 81000 et seq.) prohibits agency officers from accepting, soliciting or directing a contribution of more than \$500 from a party or participant (or their agents) while a proceeding involving a license, permit, or other entitlement for use, including a contract, is pending before the agency, and for 12 months after a decision, if the officer knows or has reason to know the party or participant has a financial interest in the decision. (Gov. Code § 84308.) This provision is commonly known as the “Levine Act.”

The Levine Act also requires agency officers who received a contribution of more than \$500 within the preceding 12 months from a party or participant to disclose that fact on the record, and to recuse themselves from making, participating in making, or using their official position to influence a decision in the proceeding if the officer **willfully or knowingly** received a contribution exceeding the limit in the previous 12 months from a party, a participant or their agent.

Willfully or knowingly includes, among other things: actual knowledge of the contribution; a party or participant has made two or more contributions of more than \$500 in the past; the officer personally solicited the contribution. A contribution being reported under campaign finance laws is not enough to prove actual knowledge.

Officers of public agencies as it relates to the Levine Act are considered anyone who is:

- a.** In an elected position;
- b.** A member of a board or commission (elected or appointed);
- c.** The chief executive of a state or local agency of any kind, including cities, districts, or joint powers agencies; or
- d.** In any position with decision-making authority with respect to certain proceedings and also a candidate for elected office or was a candidate for elected office in the 12 months before a proceeding.

Please note that the Levine Act also contains restrictions applicable to “parties,” “participants,” and “agents” to proceedings. Each of these types of individuals or entities are discussed below, but this resource is generally intended to inform Officers about their duties under the Levine Act.

If you believe the Levine Act may apply to your situation, you should engage qualified legal counsel to help you navigate these issues.

## What Restrictions and Responsibilities Apply to Officers?

In an “entitlement to use proceeding,” Officers are prohibited from accepting, soliciting, or directing a contribution of more than \$500 from any party or a party’s agent, or from any participant or a participant’s agent if the Officer knows or has reason to know that the participant has a financial interest in the proceeding.

This prohibition applies while the proceeding is pending and for 12 months following the date of the final decision in the proceeding.

If an Officer willfully or knowingly received a contribution of more than \$500 within 12 months before a proceeding from a party or party's agent, or a participant or participant's agent where the Officer knows or has reason to know that the participant has a financial interest in the proceeding, the Officer is prohibited from making, participating in making, or in any way attempting to influence the decision in the proceeding.

If the Officer has received a contribution of more than \$500 from a party, participant, or agent within the 12 months before the proceeding, the Officer is required to disclose the contribution orally or in writing in the manner required by the Levine Act and implementing regulations.

### What Proceedings Are Covered by the Levine Act?

A "proceeding" is broadly defined and includes decisions to grant, deny, revoke, restrict, agree to, amend, or modify any business, professional, trade, or land use licenses and permits, franchises, and *most* types of contracts.

Examples include decisions on professional license revocations, conditional use permits, rezoning of real estate parcels, zoning variances, tentative subdivision and parcel maps, consulting contracts, service agreements, purchase orders, cable television franchises, garbage service franchises, building and development permits, public street abandonments, and private development plans.

However, a "proceeding" does not include competitively bid contracts, contracts under \$50,000, labor contracts (such as MOUs with labor groups or project labor agreements), personal employment contracts (such as employment agreements with the local agency's executive or in-house legal counsel), contracts between government agencies, contracts where no party receives financial compensation, or periodic review or renewal of development agreements or competitively bid contracts with no material changes.

### When Does a Proceeding Become "Pending?"

For Officers, a proceeding becomes "pending" when:

1. the decision is before the Officer or Officer's legislative body for consideration, such as when an item is placed on a legislative body's agenda for discussion or decision at a public meeting; or

2. the Officer knows or has reason to know the proceeding is before the Officer's agency for an action or decision, and it is reasonably foreseeable the decision will come before the Officer in their decision-making capacity.

(Please note that a proceeding becomes "pending" at a different point for parties, participants, and their agents. For these persons, it is "pending" when the matter is before the agency for action, such as when an application or proposal for a contract has been submitted.)

## Who Is a Party, Participant, or Agent in a Proceeding?

A "party" means any person who files an application for, or is the subject of, a proceeding.

A "participant" is much broader and generally means a person who is not a party but who actively supports or opposes a particular decision in a proceeding *and* who has a financial interest in the decision.

For example, a person will generally be considered a participant if the person has a financial interest in a proceeding and communicates with an Officer or his or her agency for the purpose of influencing a decision in the proceeding. This includes when a person lobbies in person, testifies in person (such as during public comment), or otherwise acts to influence a proceeding by communicating with an Officer or the agency to influence the proceeding, whether in person or by other means.

A participant is considered to have a "financial interest" under the Levine Act in the same way that people or entities can have a financial interest for conflicts of interest under the Political Reform Act. For example, a participant may have a financial interest in a proceeding based on their interests in business entities, real property, sources of income, sources of gifts, or personal finances, and it has to be reasonably foreseeable that the proceeding would have a material financial effect on one or more of their financial interests.

An "agent" of a party or participant in a proceeding is a person who: (1) represents a party or participant for compensation; and who (2) appears before or otherwise communicates with the agency for the purpose of influencing the pending proceeding.

## Can an Official Return a Contribution of \$500+ to Participate in a Proceeding?

Yes, but there is a limited time to do so. Once the Officer knows or should have known about a contribution and a proceeding, the Officer may return the contribution within 30 days and participate in the proceeding.

For example, if a contribution was received from a party before the Officer knew or had reason to know a proceeding involving the party had become pending, the Officer could return the contribution within 30 days of becoming aware of the contribution or proceeding.

For a contribution received from a participant before the Officer knew or had reason to know the participant had a financial interest in the proceeding, the Officer has 30 days from knowing about the contribution or the financial interest in the proceeding, whichever is later.

For Officers who serve on a legislative body and would otherwise be disqualified under the Levine Act from participating in a proceeding, the Officer may still participate before returning the contribution if all the following criteria are met:

1. The decision is made at a public meeting of the legislative body,
2. the Officer knew or should have known about the contribution and proceeding for less than 30 days,
3. after learning of the contribution or proceeding and prior to taking part in any further discussion or decision, the Officer discloses the fact of the disqualifying contribution on the record of the proceeding as required under the Levine Act and states that they will return the contribution within 30 days from the date the Officer knew or should have known about the contribution and proceeding, and
4. the contribution is in fact returned within that timeframe.







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