

# CITY OF EL SEGUNDO

## MUNICIPAL LAW GUIDEBOOK FOR ELECTED AND APPOINTED CITY OFFICIALS

PRESENTED BY THE

OFFICE OF THE CITY ATTORNEY



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Mark D. Hensley, City Attorney  
Karl H. Berger, Assistant City Attorney  
David H. King, Assistant City Attorney

3650 Torrance Blvd., Suite 300  
Torrance, CA  
(818) 333-5120  
kberger@hensleylawgroup.com  
www.hensleylawgroup.com

## INTRODUCTION

The El Segundo City Attorney's office prepared this Guidebook for elected and appointed City officials (collectively "Officials") to provide an overview of some basic laws and procedures that will affect you while in public service. This Guidebook is not meant to provide an in-depth discussion regarding these laws; they are complex and the legal outcome in a particular circumstance often depends on the facts surrounding each case.

Since civil and criminal liability can arise in some situations, it is important for you to consult with the City Attorney's office before taking action that may be regulated by the laws and regulations cited in this Guidebook.

Please note that the City Attorney's office is unable to provide assistance in some circumstances because the nature of an inquiry or concern is private or creates a conflict of interest. Should that occur, we will refer you to the appropriate agency or to your private attorney.

## THE RALPH M. BROWN ACT

In 1953, the California Legislature enacted the Ralph M. Brown Act (Government Code<sup>1</sup> §§ 54950-54962), commonly referred to as the "Brown Act" or "Open Meeting Law," to ensure that deliberations and actions of local public agencies are performed at meetings open to the public and free from any veil of secrecy.<sup>2</sup> To further this overall goal, the Brown Act requires that the City's meetings be properly noticed and generally open to the public.

### ➤ *Application of the Act*

Under the Brown Act, "legislative bodies" must hold meetings that are open to the public.<sup>3</sup> The City Council and most City commissions, e.g., the Planning Commission, are legislative bodies.<sup>4</sup> Note that Officials who have not yet assumed the duties of office must still conform their conduct to Brown Act requirements and are subject to Brown Act penalties as if they had assumed office.<sup>5</sup>

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<sup>1</sup> Further references to an unspecified code are to the Government Code.

<sup>2</sup> § 54950.

<sup>3</sup> *Ibid.*

<sup>4</sup> § 54952(b).

<sup>5</sup> § 54952.1.

➤ *What is a Meeting?*

A “meeting” is generally ***any gathering*** of a majority of the members of a legislative body to hear, discuss, or deliberate regarding any issue that is within its subject matter jurisdiction.<sup>6</sup> This includes using direct communication, personal intermediaries, or technological devices to develop a collective concurrence on any matter by members of the legislative body.<sup>7</sup>

Exceptions to this general rule are limited to

- Individual conversations between an Official and any other person;
- A majority of Officials attending a gathering open to the public involving issues of general interest to the public, e.g., a conference, if the Officials do not discuss business;
- Attending an open and publicized meeting organized to address a topic of local community concern if the meeting is not sponsored by the City and Officials do not discuss business;
- Attending one of the City’s standing committee if Officials in attendance do not discuss business; or
- Attending a purely social event if the Officials do not discuss business.<sup>8</sup>

It is important to keep this rule in mind whenever a majority of Officials meet, e.g., after a regularly scheduled meeting is adjourned. While such gatherings are not impermissible, Officials must be aware that conversation topics are generally limited to matters other than business.

Remember that a *minority* of Officials may attend any event; such a gathering is not defined as a meeting under the Brown Act. As explained more fully below, however, an Official may be required to disclose his or her attendance at a particular event under some circumstances.

Also remember, however, that serial meetings are prohibited. A serial meeting occurs where less than a quorum of public officials meet in a series of different meetings, but eventually the majority of a legislative body is involved. There are two classic examples of serial meetings.

The first is where Official 1 contacts Official 2 who contacts Official 3 regarding a particular issue that is within the subject-matter jurisdiction of the legislative body. This process creates a quorum and can lead to a collective consensus with regard to action that should be taken.<sup>9</sup>

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<sup>6</sup> § 54952.2(a).

<sup>7</sup> § 54952.2(b); see also *Wolfe v. City of Fremont* (2006) 50 Cal.Rptr.3d 524.

<sup>8</sup> § 54952.2(c).

<sup>9</sup> See *Sac. Newspaper Guild v. Sac. County Bd. of Suprs.* (1968) 263 Cal.App.2d 41.

As can be seen, the advances in technology can present a problem for Officials. In particular, the ease of using the “reply” or “forward” e-mail options can quickly lead to a serial meeting (example: Official 1 sends an e-mail to Official 2 who forwards it to Official 3 along with Official 2’s comments, etc.). While a unilateral e-mail may be permissible (i.e., where there is no expectation or solicitation for a response)<sup>10</sup> an electronic “conversation” is not.<sup>11</sup>

The other type of serial meeting is a “hub and spoke” meeting. This occurs where a staff member, for example the city manager, telephones individual Officials and reveals the respective views of the other members. As stated by the Attorney General,

“problems arise when systematic communications begin to occur which involve [Officials] acquiring substantive information for an upcoming meeting or engaging in debate, discussion, lobbying or any other aspect of the deliberative process either among themselves or with staff.”<sup>12</sup>

In both of these examples, the Brown Act is violated since the public is deprived of meaningful participation and the collective concurrence of a majority is reached without a public meeting. Accordingly, it is important to exercise caution when using the convenience of communication technology and social media; while advances in technology can facilitate communication, the very convenience provided by such technology can result in inadvertent violations of the Brown Act.

The mayor or chairperson or a majority of Officials on a particular legislative body may schedule special meetings at any time and location within the City’s jurisdiction (with certain exceptions).<sup>13</sup> Note, however, that that a minimum of 24-hours’ notice must be given for special meetings.<sup>14</sup>

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<sup>10</sup> *Roberts v. City of Palmdale* (1993) 5 Cal. 4th 363, 376.

<sup>11</sup> *Ibid.*

<sup>12</sup> Civil Law Division, California Attorney General’s Office, The Brown Act: Open Meetings for Local Legislative Bodies 12 (Ted Prim, et al., ed. 2003).

<sup>13</sup> § 54956.

<sup>14</sup> *Ibid.*

➤ *Action Taken*

A legislative body may generally only take action on matters that are included on a properly posted agenda.<sup>15</sup> There are exceptions to this general rule: Officials may briefly respond to statements or questions made during public comment; may ask for clarification on a topic; make brief announcements; report on activities; or direct staff to place a matter on a future agenda.<sup>16</sup>

Taking action<sup>17</sup> is defined as:

1. A collective decision by a majority of the members of a legislative body;
2. A collective commitment or promise by a majority of the members to make a positive or negative decision; or
3. An actual vote by a majority of the members of the legislative body sitting as a body or entity, upon a motion, proposal, resolution, order or ordinance.

Please note that Officials who attend a meeting where action is taken in violation of the Brown Act are subject to criminal penalties.<sup>18</sup>

➤ *Public Attendance and Comments*

With certain specific exceptions, all meetings must be open to the public and attendance cannot be conditioned upon submitting personal information.<sup>19</sup> Officials may adopt reasonable regulations for public comment.<sup>20</sup>

Persons attending a meeting may record the proceedings using any reasonable method that does not interrupt the proceeding.<sup>21</sup> This right does not, however, include recording closed sessions.

The Act requires that every agenda provide an opportunity for public comment.<sup>22</sup> As already explained, Officials may respond to public remarks.

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<sup>15</sup> § 54954.2(a).

<sup>16</sup> *Ibid.*

<sup>17</sup> § 54952.6.

<sup>18</sup> § 54959

<sup>19</sup> § 54953.3.

<sup>20</sup> § 54954.3(b).

<sup>21</sup> § 54953.5.

<sup>22</sup> § 54954.3(a).

## MEETING PROCEDURES

Meetings before public bodies are often opportunities for persons to express their displeasure or support for particular matters being considered. Some may regard such meetings the quintessential opportunity to exercise their First Amendment rights.

It is important, however, to remember that meetings held by the City's council and commissions are also government proceedings that are necessary to conduct City business.<sup>23</sup> Accordingly, the City may impose limitations upon persons attending a meeting in order to help facilitate the orderly progression of such meetings.<sup>24</sup>

➤ *Regulation Permitted.*

The right to petition government and free speech are activities protected by the United States and California Constitutions.<sup>25</sup> These protections, however, are not unlimited. The United States Supreme Court recognizes that

“[e]ven protected speech is not equally permissible in all places and at all times. Nothing in the Constitution requires the Government freely to grant access to all who wish to exercise their right to free speech on every type of Government property without regard to the nature of the property or to the disruption that might be caused by the speaker's activities.”<sup>26</sup>

The City Council, and other legislative bodies in the City, may therefore regulate the activities of persons attending a City meeting to facilitate the orderly progression of the meeting.<sup>27</sup> Such regulations, however, must govern the actions of a person; they cannot generally constrain the content of that person's speech.<sup>28</sup> A commission may not, therefore, prohibit public criticism of the policies, procedures, programs, or services of the agency or the acts or omissions of the legislative body.<sup>29</sup> It may, however, prevent members of the public from commenting on matters that are not within the commission's subject matter jurisdiction.<sup>30</sup> It would be improper, therefore, for individuals to speak on matters other than such issues.

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<sup>23</sup> *White v. City of Norwalk* (9th Cir., 1990) 900 F.2d 1421, 1425.0

<sup>24</sup> *Ibid.*; § 54954.3(b).

<sup>25</sup> U.S. Const. amends. I and XIV; Cal. Const. Art. I §§ 1, 2, and 4.

<sup>26</sup> *Cornelius v. NAACP Legal Defense and Education Fund* (1985) 473 U.S. 788, 799-800.

<sup>27</sup> §§ 36813, 54954.3(b).

<sup>28</sup> § 54954.3(c); *In re Kay et al.* (1970) 1 Cal.3d 930, 942; *Acosta v. City of Costa Mesa* (9th Cir. (Cal.) 2013) 718 F.3d 800.

<sup>29</sup> § 54954.3(c).

<sup>30</sup> § 54954.3(a); 78 Op. Cal. Att'y. Gen. 224 (1995).

➤ *Willful disturbance of a meeting is unlawful.*

Penal Code § 403 states, in relevant part, that “[e]very person who . . . willfully disturbs or breaks up any . . . meeting that is not unlawful in character . . . is guilty of a misdemeanor.” This provision is interpreted as applying to persons who intentionally commit acts that violate implicit customs or explicit rules for a meeting that were actually known, or should have been known.<sup>31</sup> Shouting, yelling, and clapping have all been held to be sufficiently disruptive to permit persons to be removed from and arrested at local government meetings.<sup>32</sup>

The City Council, and other legislative bodies, may adopt rules and procedures for the orderly conduct of its meetings.<sup>33</sup> If a person disrupts a meeting, the legislative body may, in addition to having a person arrested, remove the person disturbing the meeting or clear the meeting room.<sup>34</sup>

The mayor or chairperson is generally in charge of keeping order. They, or a majority of officials on a commission, may impose rules of decorum to facilitate the orderly progression of a meeting.<sup>35</sup>

## DECISION-MAKING

Ordinarily, a public decision-making body takes either legislative or adjudicative actions regarding a matter. Legislative actions are mainly political where the public body “declare[s] a public purpose and make[s] provisions for the ways and means of its accomplishment.”<sup>36</sup> In essence, legislative action formulates rules that apply to all future cases.<sup>37</sup>

Adjudicative actions “apply law that already exists to determine specific rights based upon specific facts ascertained from evidence adduced at a hearing.”<sup>38</sup> Examples of legislative actions include plan amendments and rezones; adjudicative actions include decisions regarding conditional use permits and approving tentative maps.<sup>39</sup>

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<sup>31</sup> *In re Kay*, 1 Cal.3d at 943.

<sup>32</sup> *See Kindt v. Santa Monica Rent Control Board* (9th Cir. (Cal) 1995) 67 F.3d 266, 268-69; *Owolo v. City of Inglewood* (9th Cir., 1996) 103 F.3d 140, 1996 WL 681262, at \*\*1.

<sup>33</sup> §§ 36813, 54954.3.

<sup>34</sup> §§ 36813, 54957.9.

<sup>35</sup> *See, e.g.*, § 36813; *Nevens v. City of Chino* (1965) 233 Cal.App.2d 775, 778; 75 Op. Cal. Att’y. Gen. 89 (1992).

<sup>36</sup> *Marblehead v. City of San Clemente* (1991) 226 Cal.App.3d 1504, 1509.

<sup>37</sup> *Dominey v. Dept. of Personnel Admin.* (1988) 205 Cal.App.3d 729, 737-38.

<sup>38</sup> *Sierra Club v. Gilroy City Council* (1990) 222 Cal.App.3d 30, 38 [overruled on other grounds].

<sup>39</sup> *Horn v. Ventura County* (1979) 24 Cal.3d 605, 619; *see also San Francisco Tomorrow v. City and County of San Francisco* (2014) 228 Cal.App.4th 1239, 1254; *Taxpayers for Accountable School Bond Spending v. San Diego Unified School District* (2013) 215 Cal.App.4th 1013, 1058-1059.

➤ *Due Process*

A quasi-judicial action triggers the procedural due process rights of the United States and California Constitutions.<sup>40</sup> Under such circumstances, a party appearing before the legislative body is entitled to

1. Notice of the proposed action;
2. Reasons for the action;
3. A copy of the evidence on which the action is based; and
4. The right to respond “before a reasonably impartial, noninvolved reviewer.”<sup>41</sup>

The last requirement is one of fundamental fairness. It is a long-standing rule that quasi-judicial bodies can only make decisions based upon the evidence before them; they “cannot act on their own information.”<sup>42</sup> A legislative body acting upon its own information, without a party’s input, does not conduct a fair hearing.<sup>43</sup>

➤ *Independent Investigation*

There is nothing that prohibits an Official from conducting an independent investigation.<sup>44</sup> However, it is important that an Official disclose his or her investigation and ex parte contact if information obtained through that contact could influence the Official’s decision. Disclosure of this information provides a party with the opportunity to challenge or explain that evidence. Without such disclosure, due process would be violated.

## **CONFLICT OF INTEREST ISSUES**

Conflict of interest issues are one of the most complex areas of law that will affect you as a public Official. There are a myriad of laws and regulations that govern conflicts of interest. While the City Attorney’s office is available to discuss conflict of interest issues, the duty is on you to present any information concerning potential conflicts of interest to the City Attorney’s office.

While an Official’s conflict may render City action in a particular matter ineffective, the Official may be personally liable for criminal and civil penalties. Additionally, under most circumstances, the City Attorney’s advice on a particular situation will not safeguard the Official

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<sup>40</sup> U.S. Const. amend. V, XIV; Cal. Const. art. I, §§ 7, 15.

<sup>41</sup> *Burrell v. City of Los Angeles* (1989) 209 Cal.App.3d 568, 581.

<sup>42</sup> *English v. City of Long Beach* (1950) 35 Cal.2d 155.

<sup>43</sup> *Safeway Stores, Inc. v. City of Burlingame* (1959) 170 Cal.App.2d 637, 647-48; *La Prade v. Dept. of Water & Power* (1945) 27 Cal.2d 47, 51-52.

<sup>44</sup> *Todd v. City of Visalia* (1967) 254 Cal.App.2d 679, 691

from personal liability; the City Attorney does not represent Officials in their personal capacity – our client is the City itself.

➤ *Common Law Doctrine*

In 1928, the California Supreme Court enunciated the common law doctrine against conflicts of interest as follows: A public officer is impliedly bound to exercise the powers conferred on the officer with disinterested skill, zeal, and diligence and primarily for the benefit of the public.<sup>45</sup>

This common law doctrine was developed through court decisions and is generally secondary to the significant regulations adopted by the Legislature and the Fair Political Practices Commission<sup>46</sup> (“FPPC”). These laws and regulations are part of the Political Reform Act (“PRA”).

➤ *Political Reform Act*

The PRA regulates conflicts of interest by requiring that Officials disclose *potential* conflicts and prohibiting their participation in decision-making where there are *actual* conflicts. The California Attorney General, the FPPC, and local district attorneys are empowered to enforce the PRA through criminal sanctions and civil penalties.<sup>47</sup> Generally, criminal violations of the Act are prosecuted as misdemeanors,<sup>48</sup> but may also be pursued as felonies.<sup>49</sup>

Although the penalties for violations of various provisions of the Act vary, civil penalties are generally based upon the amount of money or value of a gift or contribution not reported; penalties can be as high as ten thousand dollars (\$10,000) or three times the amount not reported, whichever is greater.<sup>50</sup> Because good faith may sometimes be relevant in determining criminal and civil liability,<sup>51</sup> it is particularly important to seek further advice whenever a potential problem appears.

➤ *General Rule for Disqualification*

The PRA states that “[n]o public official at any level of state or local government shall make, participate in making or in any way attempt to use his [or her] official position to influence a governmental decision in which he [or she] knows or has reason to know he [or she] has a financial interest.”<sup>52</sup>

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<sup>45</sup> *Noble v. City of Palo Alto* (1928) 89 Cal. App. 47, 51.

<sup>46</sup> 2 Cal. Code of Regs. (“FPPC Regs.”) §§ 18700, *et seq.*

<sup>47</sup> §§ 91000 and 91001.

<sup>48</sup> § 91000.

<sup>49</sup> § 91002.

<sup>50</sup> § 91000.

<sup>51</sup> § 91001(c).

<sup>52</sup> § 87100.

Under the PRA, an Official participates in making a decision when the Official influences the decision-making process in any manner including, without limitation, proffering advice or making recommendations to a legislative body regarding a matter.<sup>53</sup> With certain exceptions,<sup>54</sup> Officials must refrain from participating in the decision-making process when it is reasonably foreseeable that the decision will have a material effect on the Official's financial interest distinguishable from that of the general public.<sup>55</sup>

Regrettably, recent changes in the FPPC regulations made a complex area of the law even less understandable. Where Officials previously had some distinct guidance regarding potential conflicts of interest, the FPPC's current regulations generally lack such assistance. The best advice that we can provide when a conflict issue arises is to contact the FPPC and seek its assistance ([www.fppc.ca.gov](http://www.fppc.ca.gov) and 1-866-275-3772). Only FPPC advice can protect an Official from potential enforcement actions concerning conflicts of interest. With that caution, below is a general outline of the current requirements regarding conflicts of interest.

➤ *Determining When a Material Financial Interest Exists*

There is a complex set of FPPC regulations that determine whether an Official has a material interest in a governmental decision that would have a nontrivial and reasonably foreseeable effect on (1) the Official's financial interest in a business entity; (2) the Official's financial interest in real property; (3) the Official's financial interest in a source of income; (4) the Official's financial interest in a source of gifts; (5) the Official's personal finances; or (6) the personal finances of a member to the Official's immediate family:<sup>56</sup>

1. The effect on an Official's business is material where the business (1) initiated the proceeding pertaining to the governmental decision; (2) offers to sell a service or a product to the Official's agency; (3) bids on or enters into a contract with the agency; (4) is either the manufacturer of any product purchased by the agency or the sales provider of products which amount to \$1000 or more within a 12-month period; (5) applies for a permit or other entitlement that the agency is authorized to issue; or (6) is subject to an action under the agency's regulatory authority.<sup>57</sup> Otherwise, the effect on an Official's business is material where an informed person would find it reasonably foreseeable that the decision would contribute to a change in the price of the company's stock or affect the value of a privately-held business.<sup>58</sup> Additionally, business costs related to travel, food, and lodging, made in the course of carrying out an agency function, are not material if it is authorized by the agency and the business provides the same services to the general public, unless these costs affect the value of the company or stock.<sup>59</sup>

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<sup>53</sup> FPPC Regs. § 18704(a-c).

<sup>54</sup> FPPC Regs. § 18704(d).

<sup>55</sup> § 87103; FPPC Regs. § 18703.

<sup>56</sup> FPPC Regs. § 18702.

<sup>57</sup> FPPC Regs. § 18702.1(a).

<sup>58</sup> FPPC Regs. § 18702.1(b).

<sup>59</sup> FPPC Regs. § 18702.1(a)(8), (b).

2. Generally, the effect on an Official's real property is material where it involves land use policies, improvements, zoning, or taxes applicable to the property, where it relates to the transfer of an interest in the property, where it involves consideration of a permit pertaining to the property, where it would affect the value, use, income potential, development potential, or character of the property, or would affect the value of property located within 500 feet of the Official's non-commercial property.<sup>60</sup> However, decisions which exclusively concern repair and maintenance of streets, sewers, and similar systems, and certain decisions which solely involve the adoption or amendment of a general plan, are not held to have a material financial effect on the Official.<sup>61</sup>

3. An Official will be materially affected if either the Official or the Official's spouse will receive salary, other payment for goods and services, or a gift from the person or entity that is the subject of a proceeding, or from an individual, nonprofit, or business that will be affected, or which the Official has reason to believe will be affected by the decision.<sup>62</sup> The Official will also be affected if he or she receives income as a result of the sale of real property in which he or she has an ownership interest, where the purchaser is either the subject of the proceeding or has an interest in a business or property that will be affected by the decision.<sup>63</sup> Likewise, there is a material effect where the Official is promised, or receives income so that the source of the income may achieve a goal that is likely to be affected by the decision.<sup>64</sup>

4, 5, and 6. The Official will be materially affected where the Official or his or her immediate family will "receive a measurable financial benefit or loss" as a result of a decision,<sup>65</sup> though certain exceptions apply.<sup>66</sup> As of the writing of this version of the Guidebook, the gift limitation is \$460 (this will be in effect until December 31, 2016).<sup>67</sup>

➤ *Definition of "Income"*

"Income" includes, without limitation, dividends; rents; capital gains; salary; wages; gifts; loans; and your community property interest in spousal income. Except for gifts, the only income relevant to a conflict situation is income received from a source within the City; from a source presently doing, or planning to do, business within the City; and a source having done business in the City during the last two years.<sup>68</sup>

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<sup>60</sup> FPPC Regs. § 18702.2 (a-b).

<sup>61</sup> FPPC Regs. § 18702.2(c).

<sup>62</sup> FPPC Regs. §§ 18702.3(a), 18702.4.

<sup>63</sup> FPPC Regs. § 18702.3(b).

<sup>64</sup> FPPC Regs. § 18702.3(c).

<sup>65</sup> FPPC Regs. § 18702.5(a).

<sup>66</sup> FPPC Regs. § 18702.3(b).

<sup>67</sup> FPPC Regs. § 18940.2.

<sup>68</sup> § 82030.

➤ *Effect of Decision on Official Distinguishable From Effect on Public Generally*

You may participate in a decision, even when it would have a material financial effect, if you are affected in the same manner as the general public.<sup>69</sup> This occurs when a legislative body's decision (1) will affect a significant segment of the public, defined as at least 25% of the business or nonprofit entities, real property, or individuals within the jurisdiction; and (2) the financial effect on the Official is "not unique."<sup>70</sup>

An Official does not have a conflict of interest when a legislative body's decision is indistinguishable from the effect on the public generally.<sup>71</sup> For example, changing the City's sales tax does not create a conflict because it affects all residents, even though it may significantly affect an Official's income. Likewise, where an Official's spouse owns a business located near a major street, and over half of the City's commercial properties are also located near that street, that official may participate in decisions relating to improvements made on the street, because the improvements would affect most businesses in the City and would not "uniquely" affect the Official's spouse.<sup>72</sup>

➤ *Prohibition on Participation or Influencing Decision Once an Official is Disqualified*

If you have a conflict of interest, you are disqualified from participating in the decision-making process for that matter. Accordingly, you may not have any influence over the decision before it comes before your legislative body; you must declare for the record the nature of your conflict; you must leave the room when it comes before the legislative body (unless the matter is on the consent calendar, in which case you need not leave the room<sup>73</sup>); and you may not discuss the matter with other Officials or with City staff members. An Official may, however, for certain defined personal interests make a public appearance before his or her legislative body as a member of the general public, but only in a personal capacity to comment on matters related solely to personal interests.<sup>74</sup>

As noted throughout this Guidebook, the PRA is extremely complex; this paper only provides a summary and is not meant to provide legal advice. Specific questions should be directed to the City Attorney's office for a determination well in advance of when a decision needs to be made.

➤ *Government Code § 1090*

Section 1090 prohibits Officials and City employees from having financial interests in contracts made by them or by any board or body of which they are members. This prohibition applies in two basic situations. First, if the financially interested Official or City employee is a member of a

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<sup>69</sup> FPPC Regs. § 18700(a).

<sup>70</sup> FPPC Regs. § 18703.

<sup>71</sup> FPPC Regs. § 18707(a).

<sup>72</sup> FPPC Adv. A-15-126 (2015).

<sup>73</sup> FPPC Regs. § 18704.5(d)(1).

<sup>74</sup> FPPC Regs. §§ 18702.4, 87105(d)(3), 18704(d)(2), 18707.

board or other body that executes the contract (e.g., the City Council), the potential conflict prohibits the City from entering into the proposed contract, regardless of whether or not the Official participates in or abstains from the actual decision, unless certain limited exceptions apply. Second, if a staff member has a financial interest in a contract with the City, there is a conflict only if that staff member participates in the making of the contract.<sup>75</sup> In either case, if such a contract is made, the City may void it.<sup>76</sup>

You should also understand that the term “contract” is used very broadly and applies to any agreement between the City and another party whether written or oral and whether formal or informal. Additionally, the prohibitions of Section 1090 apply equally to the councilmember who votes on a written contract, a member of an advisory board who makes a recommendation on a contract, and to an employee who advises the council on a particular contract.<sup>77</sup>

Note that a § 1090 violation may result in severe criminal penalties. While there are certain exceptions to the general prohibition, it is better to contact the City Attorney’s office with any questions you may have.

➤ *No Free Passes*

A somewhat dated provision of the California Constitution prohibits any public officeholder from accepting a pass or discount from a transportation company. Specifically, Article XII, § 7, of the Constitution states that

“[a] transportation company may not grant free passes or discounts to anyone holding an office of the State; and the acceptance of a pass or discount by a public officer, other than public utilities commissioner, shall work a forfeiture of that office ...”

Actions by the Southern Pacific Railroad leading to political corruption caused this provision to be added to the Constitution in 1879, but it has rarely been used. The California Attorney General, however, has opined that an official may forfeit their office because of this prohibition even though (1) the official was completely unaware of the provision; (2) the official had no regulatory power or other official influence over the activities of the transportation company or any other transportation company; (3) the transportation company’s activities were not restricted to intrastate business, but included interstate and international operations as well; (4) the official, upon learning of the prohibition, immediately reimbursed the carrier for the transportation received; and (5) the official’s travel was personal travel rather than official business.<sup>78</sup>

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<sup>75</sup> *Fraser-Yamor Agency v. County of Del Norte* (1977) 68 Cal.App.3d 201.

<sup>76</sup> § 1092.

<sup>77</sup> *Stigal v. City of Taft* (1962) 58 Cal. 2d 565; *City Council v. McKinley* (1978) 80 Cal. App. 3d 204; and *Schaefer v. Berinstein* (1956) 140 Cal. App. 2d 278.

<sup>78</sup> 76 Op. Cal. Att’y. Gen. 1 (1993).

It is unlikely that this provision would apply to special rates given to the public generally. Moreover, the Attorney General's Office has opined that it does not apply to the use of Frequent Flyer miles or to tickets obtained by a public official when the eligibility is based on the fact that the official's spouse is an airline employee.<sup>79</sup> Finally, this provision does not apply if the ticket is provided by a non-"transportation company," i.e., provided by your employer, as a gift from a friend, or to enable you to make an out-of-town speech or attend an out-of-town event. Note, however, that such gifts would need to be disclosed under the PRA.

➤ *AB 1234 Ethics Training*

AB 1234<sup>80</sup> allows the City to reimburse elected and appointed officials for actual and necessary expenses incurred in the performance of official duties in accordance with a written policy adopted by the City Council. Such a policy<sup>81</sup> identifies the types of expenses for which the City can reimburse a public official relating to travel, meals, lodging, and other actual and necessary expenses. Among other things, AB 1234 requires the person attending activities and receiving reimbursements to give a brief report to the City Council at its next regular meeting regarding those official duties.

Public officials must also receive at least two hours of training in ethics every two years;<sup>82</sup> newly elected public officials must obtain such training within one year after being elected.<sup>83</sup> A local agency or an association of local agencies may offer one or more training courses, or sets of self-study materials with tests, to meet the requirements. The courses may be taken at home, in-person, or online.

If you are interested in the online training, go to [locaethics.fppc.ca.gov/login.aspx](http://locaethics.fppc.ca.gov/login.aspx).

➤ *Mass Mailings*

The PRA also regulates "mass mailings" (Government Code §§ 81000-91014). In relevant part, the PRA states: "No newsletter or mass mailing shall be sent at public expense."<sup>84</sup> The term "mass mailing" means "over two hundred substantially similar pieces of mail, but does not include a form letter or other mail which is sent in response to an unsolicited request, letter or other inquiry."<sup>85</sup>

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<sup>79</sup> 80 Op. Cal. Att'y. Gen. 146 (1997); 85 Ops. Cal. Atty. Gen. 40 (2002).

<sup>80</sup> §§ 53232, *et seq.*

<sup>81</sup> *Id.*

<sup>82</sup> § 53235(b).

<sup>83</sup> § 53235.1(b).

<sup>84</sup> § 89001.

<sup>85</sup> § 82041.5.

The PRA prohibits *any* public money from being spent to *distribute* a mass mailing.<sup>86</sup> Moreover, the law prohibits more than \$50 of public money from being spent to design, produce, or print an otherwise prohibited mass mailing.<sup>87</sup>

Mass mailings are prohibited when they “feature” an elected officer as follows:<sup>88</sup>

“(A) Features an elected officer affiliated with the agency which produces or sends the mailing; or

(B) Includes the name, office, photograph, or other reference to an elected officer affiliated with the agency which produces or sends the mailing, and is prepared or sent in cooperation, consultation, coordination, or concert with the elected officer.”

The phrase “features an elected officer” means that “the item mailed includes the elected officer’s photograph or signature, or singles out the elected officer by the manner of display of his or her name or office in the layout of the document, such as by headlines, captions, type size, typeface or type color.”<sup>89</sup> Note, however, that simply referencing an elected official’s name may be impermissible if the mailing is prepared or sent in “cooperation, consultation, coordination, or concert with the elected officer.”<sup>90</sup>

An item is “sent” if delivered to residences, businesses, or post office boxes by any means (not simply the mail).<sup>91</sup> Items that are publicly available for distribution at meetings, or can be actively obtained by the public from public facilities (e.g., City Hall) are not “sent” for purposes of the PRA. Moreover, the regulation of mass mailings does not apply to solicitations for information; only to unsolicited requests.<sup>92</sup>

The mass mailing regulations affect are written documents, records, videotapes and buttons.<sup>93</sup> However, these regulations do not affect webpages.<sup>94</sup> Further, the PRA’s 200 item limitation applies on a calendar basis, i.e., up to 200 similar items may be sent each calendar month.<sup>95</sup>

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<sup>86</sup> FPPC Regs. § 18901 (a)(3)(A).

<sup>87</sup> FPPC Regs. § 18901(a)(3)(B).

<sup>88</sup> FPPC Regs. § 18901(a)(2).

<sup>89</sup> FPPC Regs. § 18901(c)(2).

<sup>90</sup> FPPC Regs. § 18901(a)(2)(B).

<sup>91</sup> FPPC Regs. § 18901(a)(1).

<sup>92</sup> §§ 82041.5, 89001; FPPC Regs. § 18901(a)(4).

<sup>93</sup> FPPC Regs. § 18901(a)(1).

<sup>94</sup> *In re Peltzer*, FPPC Priv. Adv. Ltr. A-97-106 (Mar. 25, 1997); see also *In re Foote*, CA FPPC Adv. A-98-114 (1998) website links not restricted by the Act’s prohibition on publicly funded mass mailings; *In re Ratto*, CA FPPC Adv. A-07-085 (2007) [candidate information may be placed on agency website].

<sup>95</sup> FPPC Regs. § 18901(a)(4).

## PUBLIC RECORDS

The Public Records Act (“Records Act”) defines a public record as

“any writing containing information relating to the conduct of the public’s business prepared, owned, used, or retained by any ...local agency regardless of physical form or characteristics.”<sup>96</sup>

A “writing” includes

“handwriting, typewriting, printing, photostating, photographing, and every other means of recording upon any form of communication or representation, including letters, words, pictures, sounds, or symbols, or combination thereof, and all papers, maps, magnetic or paper tapes, photographic films and prints, magnetic or punched cards, discs, drums, and other documents....”<sup>97</sup>

Generally, all public records must be “open to inspection at all times during the office hours of the...local agency and every person has a right to inspect any public record....”<sup>98</sup> Based on these statutory definitions, virtually every piece of information created, received, or stored in the course of performing City business constitutes a public record and may be inspected by the public upon request.

➤ *Time for responding to a PRA request.*

As stated above, public records must generally be available for public inspection during the City’s business hours. If public records are stored on medium other than paper, e.g., CD-ROMs or microfiche, equipment for viewing these records must be made available for the public.<sup>99</sup>

Persons may also request that the City provided them with copies of public records. Ordinarily, public agencies must respond to requests for copies of public records within ten (10) days. In “unusual” circumstances, the City may extend the time for responding by an additional fourteen (14) days if the city manager, or designee, explains the reasons for the delay to the requestor within the initial 10-day time period.<sup>100</sup>

The definition of “unusual circumstances” includes (1) “[t]he need to search for and collect the requested records from field facilities or other establishments that are separate from the office processing the request; (2) “[t]he need to search for, collect, and appropriately examine a voluminous amount of separate and distinct records that are demanded in a single request; (3) “[t]he need for consultation, which shall be conducted with all practicable speed, with another

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<sup>96</sup> § 6252(d).

<sup>97</sup> § 6252(e).

<sup>98</sup> § 6253(a).

<sup>99</sup> 64 Ops. Cal. Atty. Gen. 317 (1981); 57 Op. Cal. Att’y. Gen. 307, 311 (1974); see §§ 6253.1, 6253.9.

<sup>100</sup> § 6253(c).

agency having substantial interest in the determination of the request or among two or more components of the agency having substantial subject matter interest therein”; and (4) “[t]he need to compile data, to write programming language or a computer program, or to construct a computer report to extract data.”<sup>101</sup>

➤ *When may public records be withheld?*

As stated above, virtually everything drafted, received, or kept by the City constitutes a public record. However, although the PRA favors disclosure of public records, cities are generally not required to *create* documents in response to a public record request.<sup>102</sup> Nor must the City comply with requests for documents that are unduly burdensome.<sup>103</sup>

Moreover, there are specific types of documents that may be withheld by public agencies for other reasons. A partial list of exempt City records includes:

- Preliminary drafts, notes, or interagency or intra-agency memoranda that are not retained by the City in the ordinary course of business, provided that the public interest in withholding those records clearly outweighs the public interest in disclosure.
- Records pertaining to pending litigation to which the City is a party until the pending litigation or claim is finally adjudicated or settled.
- Personnel, medical, or similar files, the disclosure of which would constitute an unwarranted invasion of personal privacy.
- Geological and geophysical data, plant production data, and similar information relating to utility systems development, or market or crop reports, which are obtained in confidence from any person.
- Other than as specifically required by the Government Code, records of complaints, investigations, intelligence information, or security procedures of the police and fire departments (code enforcement).
- Test questions, scoring keys, and other examination data used to administer a licensing examination, examination for employment, or academic examination.
- The contents of real estate appraisals or engineering or feasibility estimates and evaluations made for or by the City relative to the acquisition of property, or to prospective public supply and construction contracts, until all of the property has been acquired or all of the contract agreement obtained.

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<sup>101</sup> § 6253(c)(1-4).

<sup>102</sup> *Rosenthal v. Hansen* (1973) 34 Cal.App.3d 754.

<sup>103</sup> *State Bd. of Equalization v. Super. Ct.* (1992) 10 Cal.App.4th 1177.

- Information required from any taxpayer in connection with the collection of local taxes that is received in confidence and the disclosure of the information to other persons would result in unfair competitive disadvantage to the person supplying the information.
- Records the disclosure of which is exempted or prohibited pursuant to federal or state law.
- Information contained in applications for licenses to carry firearms that indicates when or where the applicant is vulnerable to attack or that concerns the applicant's medical or psychological history or that of members of his or her family.<sup>104</sup>

➤ *Assistance with identifying public records.*

The City is required to assist persons seeking public records by helping them “make a focused and effective request that reasonably describes an identifiable record...”<sup>105</sup> To fulfill this obligation (with certain exceptions<sup>106</sup>), the City must take the following steps “to the extent reasonable under the circumstances”<sup>107</sup>:

- Help the requestor identify those documents that meet the request “or to the purpose of the request”;
- “Describe the information technology and physical location in which the records exist”; and
- “Provide suggestions for overcoming any practical basis for denying access to the records or information sought.”<sup>108</sup>

The City cannot recoup its costs for such assistance from the requestor. Before June 4, 2014, the City could seek reimbursement for its costs. Article XIII B, § 6, of the California Constitution generally provides that, when the state mandates a program or higher level of service on a local government, it *must* provide funds to the local government to reimburse costs related to the state mandate.

On June 3, 2014, however, voters approved Proposition 42, the California Compliance of Local Agencies with Public Act, which amended Article XIII B section 6(a) to provide that “the Legislature may, but need not, provide a subversion of funds for... (4) Legislative mandates contained in statutes within the scope of paragraph (7) of subdivision (b) of Section 3 of Article

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<sup>104</sup> § 6254.

<sup>105</sup> § 6253.1(a).

<sup>106</sup> § 6253.1(d).

<sup>107</sup> § 6253.1(a).

<sup>108</sup> § 6253.1(a)(1-3).

I.” Proposition 42 also added Article I, section 3(b)(7), which provides that, “in order to ensure public access to the meetings of public bodies and the writings of public officials and agencies,” local agencies must comply with the PRA and the Brown Act. Collectively, these amendments provided that the state legislature was not required to reimburse local agencies for funds expended in connection with the CPRA.

Where there has been a change in the law, the Department of Finance may file a request with the Commission to adopt a new test claim decision upon a showing that the state's liability under Article XIII B section 6 has been modified.<sup>109</sup> On January 21, 2015, the Department of Finance filed a request for redetermination of prior test claims concerning the CPRA, and the Commission found that Proposition 42 eliminated the state's liability for reimbursement, beginning on June 4, 2014.<sup>110</sup> The decision was adopted July 24, 2015, and served August 4, 2015.

➤ *Records Provided to a Majority of the City Council*

The Government Code<sup>111</sup> provides that

**“[A]gendas of public meetings and any other writings, *when distributed to all, or a majority of all, of the members of a legislative body of a local agency by any person in connection with a matter subject to discussion or consideration at an open meeting of the body, are disclosable public records . . . and shall be made available upon request without delay.*”**

As seen by the emphasized language, virtually *any writing*, that was distributed to a majority of the City Council (or other legislative body) is a public record and must be available for public inspection. As noted above, such writings include electronic mail correspondence with City Councilmembers. Consequently, if it is obvious (or reasonably certain) that a majority of Councilmembers received a writing, it is important that a copy be provided to the City Clerk for filing and inspection. This is true even if an appointed public official, such as the City Manager, did not receive a copy of the correspondence. Accordingly, please ensure that the City Clerk receives a copy of all writings you may receive where it is apparent that the same writing was provided to a majority of the City Council (or other legislative body).

## CONCLUSION

As noted earlier, this Guidebook is only a superficial overview of laws and regulations that will affect you while in public service. Questions or concerns regarding specific facts should be directed to the City Attorney’s office.

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<sup>109</sup> § 17570(c).

<sup>110</sup> Cal. Com. State Mandates (2015) Decision No. 14-MR-02.

<sup>111</sup> § 54957.5(a) (emphasis added).

If you are interested in reviewing any of the legal sources cited in this Guidebook, or would like to contact one of the State Agencies, the following information may be helpful:

For case law - <http://www.findlaw.com/cacases/>

For California Statutes - <http://leginfo.legislature.ca.gov/>

For California Regulations - <http://ccr.oal.ca.gov>

For Attorney General Opinions (since 1986) - <https://oag.ca.gov/opinions>

For the FPPC - <http://www.fppc.ca.gov/> and 1-866-275-3772

For an overview of ethics - <http://www.ca-ilg.org/document/understanding-basics-public-service-ethics-laws>

Please let us know if you have any questions.