



INSTITUTE FOR LOCAL GOVERNMENT

Promoting Good Government at the Local Level

The ABCs of Open Government Laws

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

This concept of governmental transparency is so important to the public that some 83 percent of voters supported adding it to California's constitution by adopting Proposition 59 in 2004.¹

California's open government laws² require public officials to:

- A. Conduct meetings of public bodies openly, except for limited circumstances under which the law allows the public's business to be conducted privately in closed sessions.
- B. Allow the public to participate in meetings of public bodies through a public comment process.
- C. Allow inspection and copying of public records, except when non-disclosure is authorized by law.

This pamphlet summarizes these three requirements in general terms.

For Additional Information

For more information about these requirements and others relating to transparency, please see *Understanding the Basics of Public Service Ethics: Transparency Laws*, available at <http://www.ca-ilg.org/transparency>. Additional resources are also listed on the back of this pamphlet.

Local officials are also encouraged to consult with their agency attorneys for information about how these requirements apply in any given situation or more information about this area of the law.

Beyond Legal Minimums

It is important to note that the requirements discussed in this pamphlet are legal *minimums* for local government transparency in decision-making. Local agencies can provide for greater transparency.

In thinking about how an agency might provide for greater transparency, questions local agency officials might ponder include the following:

- 1) How can the agency make public information more readily available and easily understandable by the public in order to promote public trust and confidence in the agency and demonstrate the agency's commitment to transparency?
- 2) Are there kinds of information that are already publicly available in some form, but could be made available more conveniently to the public (for example, through voluntarily posting the information on the agency's website or including links on the agency's website to where information is available on other websites)?³
- 3) What kinds of information might be of interest to a cross-section of the public relating to the agency's operations and decision-making processes? Are there ways this information can be made available without individual members of the public having to ask for it?

Ongoing consideration of these kinds of questions enables a local agency's officials to engage in collective discussion and decision-making about ways in which their agency can set its sights higher than the minimum requirements of the law.

A. Conducting the Public's Business in Public

General Rules

- Elected and most appointed local-agency bodies – which include many advisory committees – must conduct their business in open and public meetings.⁴
- A “meeting” is any situation involving a majority of a public body in which agency business is transacted or discussed. In other words, a majority of the body cannot talk privately about a matter of agency business no matter how the communication occurs, whether by telephone or e-mail, or at a local coffee shop.⁵
- The public must be informed of 1) the time and place of and 2) the issues to be addressed at each meeting. In general, public officials may only discuss and act on items included on the posted agenda for a meeting. The agenda must be posted at least 72 hours in advance of a regular meeting and written in a way that informs people of what business will be discussed. Members of the public may request a copy of the agenda packet be mailed to them at the time the agenda is posted or upon distribution to the governing body. Many local agencies also post these materials on their websites and/or maintain e-mail lists to make agendas available.

Key Things to Know

- **Advisory Bodies.** Advisory bodies formally created by the governing body are subject to the open meeting laws. In some cases, committees of less than a quorum of the public body are also subject to these laws.⁶
- **Serial Meetings.** Avoid unintentionally creating a “serial” meeting—a series of communications that result in a majority of the body’s members discussing, deliberating, or taking action on a matter of agency business.

Example

If two members of a five-member public body consult outside of a public meeting (which is not in and of itself a violation) about a matter of agency business and then one of those individuals consults with a third member on the same issue, a majority of the body has consulted on that issue. Note the communication does not need to be in person and can occur through a third party. For example, sending or forwarding e-mail can be sufficient to create a serial meeting, as can a staff member’s polling the body’s members in a way that reveals the members’ positions to one another.⁷

- **Permissible Gatherings.** Not every gathering of members of a public body outside a noticed meeting violates the law. For example, a violation would not occur if a majority of the members attend the same educational conference or attend a meeting not organized by the local agency as long as members do not discuss among themselves agency business except as part of the gathering.⁸ Nor is attendance at a social or ceremonial event in itself a violation.⁹ The basic rule to keep in mind is a majority of the members cannot gather *and* discuss agency business except at an open and properly noticed meeting.
- **Closed Sessions.** The open meeting laws include provisions for private discussions under very limited circumstances (see “typical closed session issues”).¹⁰ The reasons for holding the closed session must be noted on the agenda and different disclosure requirements apply to different types of closed sessions.¹¹
- **Posting and Following the Agenda.** In general, public officials may only discuss and act on items included on the posted agenda for a meeting.¹² However, they or staff may briefly respond to questions or statements during public comments that are unrelated to the agenda items. Officials can also request staff to look into a matter or place a matter on the agenda for a subsequent meeting. Only under unexpected circumstances can matters that are not on the agenda be discussed or acted upon.
- **Taping or Recording of Meetings Is Allowed.** Anyone attending a meeting may photograph or record it with an audio or video recorder unless the governing body makes a finding that the noise, illumination, or obstruction of view will disrupt the meeting.¹³ Any meeting tape or film made by the local agency becomes a public record that must be made available to the public for at least 30 days.¹⁴

- **Sign-In Must Be Voluntary.** Members of the public cannot be required to register their name or satisfied any other condition for attendance. If an attendance list is used, it must clearly state that signing the list is voluntary.¹⁵

Open-Government-Is-Good-Politics Note

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

TYPICAL CLOSED SESSION ISSUES

Local agency open meetings laws vary in terms of what kinds of closed sessions are allowed. Consult with agency counsel concerning 1) whether a particular type of closed session is available to your agency, 2) under what circumstances, and 3) what disclosure requirements apply before and after the closed session. The following list is illustrative of common topics that a public agency may discuss in closed session:

Personnel. To consider the appointment, employment, evaluation of performance, discipline, or dismissal of a public employee, or to hear complaints against an employee.¹⁶

Litigation. To confer with or receive advice from an agency’s legal counsel with respect to actual or potential litigation.¹⁷

Real Estate Negotiations. To provide direction to the agency’s negotiator on the price and terms of payment under which the agency will purchase, sell, exchange or lease real property.¹⁸

Labor Negotiations. To meet with the agency’s labor negotiator regarding salaries and benefits and other matters within the scope of labor negotiations.¹⁹

Student Disciplinary Issues. (For school districts and community college districts) To consider discipline of a student if a public hearing would result in disclosure of prohibited information, after notifying the student (or parents in the case of minor students) and if they do not request a public hearing.²⁰

License Applicants with Criminal Records. To allow an agency to determine whether a would-be licensee with a criminal record is sufficiently rehabilitated to obtain the license.²¹

Public Security. To confer with designated law enforcement officials regarding threats to public facilities and services or the public’s right to access those services and facilities.²²

Multi-jurisdictional Law Enforcement Agency. To discuss ongoing criminal investigations.²³

Hospital Peer Review and Trade Secrets. To discuss issues related to medical quality assurance or trade secrets.²⁴

Disclosure of Confidential Information Prohibited. The decision to disclose confidential information received in closed session is one that is generally made by the body as a whole, not individual members. Among the remedies for unlawful disclosure is referral to the grand jury, which has authority to remove officials for willful misconduct in office.

B. The Public's Right to Participate in Meetings

General Rules

- **Democracy in Action.** The public has a right to address the public body at any meeting. A public official's role is to both hear and evaluate these communications.
- **The Public's Right to be Heard.** Generally, every regular meeting agenda must provide an opportunity for the public to address the public body on any item within the body's jurisdiction.²⁵ If the issue of concern is one pending before the body, the opportunity must be provided before or during the body's consideration of that issue.²⁶

Key Things to Know

- **Anonymous Speech Must Be Permitted.** Members of the public cannot be required to give their name or address as a condition of speaking. The clerk or presiding officer may request speakers to complete a speaker card, or identify themselves "for the record," but must respect a speaker's desire for anonymity.
- **Reasonable Time Limits May Be Imposed.** Local agencies may adopt reasonable regulations to ensure everyone has an opportunity to be heard in an orderly manner.²⁷ For example, some agencies impose a uniform time limit on each person providing public comments on an issue.
- **Dealing with Dissension.** The chair cannot stop speakers from expressing their opinions or their criticism of the body.²⁸ If an individual or group willfully interrupts a meeting and order cannot be restored, the room may be cleared.²⁹ Members of the media must be allowed to remain and only matters on the agenda can be discussed.³⁰

A Note on Civility in Public Discourse

For communities to be able to work through difficult issues, it's important that people be able to express differing opinions about what best serves the public's interests in a respectful and civil manner.

This includes focusing on the *merits* of one's position. Even if people disagree about what's best for the community in this situation, it doesn't mean that those holding different views are bad people. Treat others with the same respect as one would like to be treated. Questioning others' motives or intelligence, being hostile, engaging in name-calling or making threats undermines one's effectiveness.

No matter how passionate one is about an issue, the goal is to conduct oneself in a way that will add to one's credibility and standing as a thoughtful member of the community.

Consequences of Non-Compliance with Open Meeting Requirements

- **Nullification of Decision.** Many decisions that are not made according to the open meeting laws are avoidable.³¹ After asking the agency to cure the violation, either the district attorney or any interested person may sue to have the action declared invalid.³²
- **Criminal Sanctions.** Additionally, members of the body who intentionally violate the open meeting laws may be guilty of a misdemeanor.³³ The penalty for a misdemeanor conviction is imprisonment in county jail for up to six months or a fine of up to \$1,000 or both.³⁴
- **Other Measures.** Either the district attorney or any interested person may sue to remedy past and prevent future violations of the open meeting laws.³⁵ Another remedy, under certain circumstances, is for a court to order that all closed sessions be tape-recorded.³⁶ Regulations of public participation beyond those allowed by applicable statutory and constitutional law can be a civil rights violation.
- **Attorneys' Fees and Costs.** Attorneys' fees and costs may be awarded to those who successfully challenge open meeting violations.³⁷

C. The Public's Right To Access Agency Documents and Records

General Rule

Public agencies must generally make their records available for inspection by the public.³⁸ Disclosure is the rule; withholding is the exception. In addition, there are a number of state laws that require affirmative disclosure of certain kinds of information (for example, by posting the information on the agency's website).³⁹

Key Things to Know

- **Agenda and Meeting Materials.** Copies of the agenda materials and other documents not exempt from disclosure distributed to the body must be available to the public.⁴⁰ Any nonexempt materials prepared by the local agency must be available for public inspection at the meeting. Materials prepared and distributed by some other person must be made available after the meeting.
- **Scope of Access.** The public has the right to see nonexempt materials that are created as part of the conduct of the people's business.⁴¹ These materials include any writing that was prepared, owned, used, or retained by a public agency.⁴² This can include documents, computer data, e-mails, facsimiles, and photographs.⁴³
- **Presumption and Exceptions.** Written materials are presumed to be a public record unless an exception applies.⁴⁴ There are a number of exceptions. For example, personnel records are typically exempt from disclosure because their release may violate an employee's privacy rights.

The public's right of access to public records is broadly construed and applies to many documents that public officials might otherwise assume are protected from disclosure.

Consequences of Violation

Anyone can sue the agency to enforce his or her right to access public records subject to disclosure.⁴⁵ If the agency loses or otherwise produces the records as the result of the lawsuit, it must pay costs and attorneys fees.⁴⁶

RESOURCES FOR FURTHER INFORMATION

California's open government laws are complex and extensive. Consult the following resources for more information on these laws.

- *Understanding the Basics of Public Service Ethics: Transparency Laws*, available at <http://www.ca-ilg.org/transparency> (includes discussions of other kinds of disclosure laws, in addition to Open Meeting Law and Public Records Act).
- *Open and Public IV: A User's Guide to the Ralph M. Brown Act, 2d Edition*, 2010. Available on the League of California Cities website at www.cacities.org or by calling 916.658.8200.
- *The People's Business: A Guide to the California Public Records Act*, 2008. Available on the League of California Cities website at www.cacities.org or by calling 916.658.8200.

Local officials should also consult their agency counsel with specific questions.

The Attorney General also offers guides on these laws; they are available from the Attorney General's website: http://ag.ca.gov/publications/2003_Intro_BrownAct.pdf (Brown Act Guide) and http://ag.ca.gov/publications/2003_Intro_BrownAct.pdf (Public Records Act).

References *[to be included in online version, not in pamphlet]*

¹ See Cal. Const. Art. I, § 3 (Proposition 59 on the 2004 ballot).

² See generally Cal. Gov't Code §§ 54950 and following (for cities, counties, special districts and school districts); Cal. Educ. Code § 72121 and following (for community college district governing boards).

³ See for example, local agency financial information made available on the State Controller's website: http://www.sco.ca.gov/ard_locrep_annual_financial.html. The State Controller is requesting information relating to local official compensation as well. See http://www.sco.ca.gov/eo_pressrel_controller_requires_salary_reporting.html.

⁴ See Cal. Gov't Code § 54952.2(a); Cal. Gov't Code § 54954.2(a).

⁵ Cal. Gov't Code § 54952.2(b); Cal. Educ. Code § 72121.

⁶ Cal. Gov't Code § 54952(b).

⁷ Cal. Gov't Code § 54952.2.

⁸ Cal. Gov't Code § 54952.2(c)(2).

⁹ Cal. Gov't Code § 54952.2(c)(5).

¹⁰ Cal. Educ. Code § 72122.

¹¹ Cal. Gov't Code § 54956.9.

¹² Cal. Gov't Code § 54954.2; Cal. Educ. Code § 72121.5.

¹³ Cal. Gov't Code § 54953.5(a).

-
- ¹⁴ Cal. Gov't Code § 54953.5(b).
- ¹⁵ Cal. Gov't Code § 54953.3.
- ¹⁶ Cal. Gov't Code § 54957(b).
- ¹⁷ Cal. Gov't Code § 54956.9.
- ¹⁸ Cal. Gov't Code § 54956.8.
- ¹⁹ Cal. Gov't Code §§ 3549.1 (school and community college districts), 54957.6 (other local agencies).
- ²⁰ Cal. Educ. Code §§ 35146, 72122.
- ²¹ Cal. Gov't Code § 54956.7.
- ²² Cal. Gov't Code § 54957.
- ²³ Cal. Gov't Code § 54957.8.
- ²⁴ Cal. Gov't Code §§ 37606, 37624.3; Cal. Health & Safety Code §§ 1461, 1462, 32106, 32155.
- ²⁵ Cal. Gov't Code § 54954.3(a); Cal. Educ Code § 72121.5.
- ²⁶ Cal. Gov't Code § 54954.3(a).
- ²⁷ Cal. Gov't Code § 54954.3(b); *White v. City of Norwalk*, 900 F.2d 1421, 1425 (9th Cir. 1990).
- ²⁸ Cal. Gov't Code §§ 54954.3(c), 54957.9; *Perry Educational Association v. Perry Local Educators' Association*, 460 U.S. 37, 46 (1983).
- ²⁹ Cal. Gov't Code § 54957.9.
- ³⁰ Cal. Gov't Code § 54957.9.
- ³¹ Cal. Gov't Code § 54960.1; ; Cal. Educ Code § 72121(b).
- ³² Cal. Gov't Code § 54960.1; Cal. Educ Code § 72121(b).
- ³³ Cal. Gov't Code § 54959.
- ³⁴ *See* Cal. Penal Code § 19.
- ³⁵ Cal. Gov't Code § 54960.
- ³⁶ Cal. Gov't Code § 54960.
- ³⁷ Cal. Gov't Code § 54960.5.
- ³⁸ *See* Cal. Gov't Code §§ 6250 and following.
- ³⁹ *See for example*, 2 Cal. Code Regs. § 18944.2(c)(3)(F) (relating to gifts to public agencies). Note the State Controller is seeking information relating to local official compensation as part of local agencies' annual financial reporting. *See generally* Cal. Gov't Code § 12463(a) (authorizing report); 53892 (describing contents of the report) ; *see also* http://www.sco.ca.gov/eo_pressrel_controller_requires_salary_reporting.html (press release relating to requirement of additional information relating to compensation).
- ⁴⁰ Cal. Gov't Code § 54957.5.
- ⁴¹ *See generally* Cal. Gov't Code §§ 6250 and following.
- ⁴² Cal. Gov't Code § 6252(d).
- ⁴³ Cal. Gov't Code § 6252(e).
- ⁴⁴ *State ex rel. Division of Industrial Safety v. Superior Court*, 43 Cal. App. 3d 778 (1974); *Cook v. Craig*, 55 Cal. App. 3d 773 (1976).

⁴⁵ Cal. Gov't Code § 6258.

⁴⁶ Cal. Gov't Code § 6259(d).

The Institute is able to make this resource available to local officials and others as a result of much appreciated financial support from:



The Institute is grateful for this firm's ongoing commitment to public service ethics and public service ethics education.

All final decisions regarding the content of this pamphlet were the Institute's.