

California Public Records Act (PRA)

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THE BASICS

- The California Public Records Act (PRA) Government Code 6250-6270, is similar to the federal Freedom of Information Act -- the purpose of these acts is to give private citizens greater access to government information.
- With some exceptions, the PRA considers records maintained by most state agencies to be public records, but also recognizes the right to individual privacy.

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Who Is Covered

- All state and local government agencies are covered by the PRA.
- Nonprofit and for-profit entities subject to the Ralph M. Brown Act are covered as well.
- The PRA is not applicable to the Legislature, which is instead covered by the Legislative Open Records Act.
- The judicial branch is not bound by the PRA, although most court records are disclosable as a matter of public rights of access to courts.
- Federal government agencies are covered by the Federal Freedom of Information Act.

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Freedom of Information Act (FOIA)

Freedom of Information Act (FOIA), 5
U.S.C. Section 552

- Provides public access to records of the federal government.

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Records Mistakenly Sought Under FOIA

If records are mistakenly sought under FOIA, California agency should:

- explain that FOIA covers federal government records.
- explain that PRA covers California government records.
- provide records in accordance with PRA.

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Purposes

- Access permits public to monitor governmental activities.
- Agency cannot deny access to disclosable records based on requester's intended usage

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Definitions

Members of the Public:

The PRA entitles natural persons and business entities as members of the public to inspect public records in the possession of government agencies.

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Definitions

Public record defined:

Any writing that is owned, used or retained by a government agency in the conduct of its official business.

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Definitions

Writing defined:

Any means of recording information including paper, audio tape, video tape, compact disc, DVD, computer diskette, computer hard drive, etc.

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Definitions

E-mail is expressly covered. Issues:

- When is email no longer a record?
- When you place it in the trash?
- When it leaves your hard drive?
- When it is erased from the agency's back-up tape?

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EMAIL

- During discovery in litigation, agency may be required to recover email from back-up tapes.
- At present, there are no cases or opinions regarding retrieval of email trash under the PRA. PRA and litigation serve very different purposes. Based on the purposes of the PRA as discussed in *Rogers v. Superior Court* (1993) 19 Cal.App.4th 469, it seems unlikely that agencies would be asked to retrieve records from back-up tapes under the PRA.

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Making A Request

Request may be made orally or in writing.
Recommend that agency confirm oral requests in writing.

Written requests facilitate agency compliance by reducing confusion about the records requested and permitting agency to track the request

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Making A Request

- Request need not identify an exact record.
- Request may identify records by their general content

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Making A Request

- Request must still be sufficiently precise to permit the agency to locate the records.
- Request should not be unduly burdensome

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Making A Request

- Request should be specific and focused (*Rogers v. Superior Court* (1993) 19 Cal.App.4th 469.).
- Specific and focused requests facilitate prompt disclosure by government

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Making A Request

Open ended requests:

- Are burdensome
- Frustrate agency
- Are expensive for requester
- May lead to non-compliance

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Making A Request

When a request is not specific and focused, the agency has a duty to assist the public in focusing the request:

- Assist in identifying requested information
- Describe physical location of the record

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Making A Request

When a request is not specific and focused, the agency has a duty to assist the public in focusing the request

- Describe technology in which the record is housed
- Help public to overcome any practical barriers to access

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Agency Duty To Search

Agency must make reasonable efforts to locate requested records. At a minimum, such efforts should include:

- consulting record indexes
- consulting knowledgeable people
- looking in logical places

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Special rule for electronic records

Record must be provided in electronic format used by the agency if requested.

- Software developed by the government is not disclosable.
- Commercial software is not disclosable.
- Data housed in protected software may still be disclosable.

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Inspection Of Records

General Rule

Agency records may be inspected at any time during regular office hours.

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Inspection Of Records

In reality, the agency may need to:

- locate the requested records
- gather multiple records for inspection
- redact exempt information prior to inspection

Appointment to inspect records may be necessary under these circumstances

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Requesting Copies Of Records

Agency should provide records promptly.

Agency has up to 10 days to:

- determine if it will comply with the request, and
- notify the requester of its determination.

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Requesting Copies Of Records

Agency may extend period to make this determination for up to 14 days if there is a need to:

- communicate with outside facilities
- examine voluminous records
- communicate with others who have an interest in the records.
- construct computer reports.

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Requesting Copies Of Records

If the agency cannot provide the records in the time for making a determination, it must provide a good faith estimate of when the copies will be available.

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Fees For Duplication Of Records

Agency may charge the direct cost of duplication
– Direct cost includes:

- pro-rata cost of duplication equipment
- pro-rata cost of equipment operator (salary and benefits)
- DOJ charges \$.10/ per page

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Fees For Duplication Of Records

Agency may charge the direct cost of duplication –
Direct costs do not include:

Research
Retrieval
redaction

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Fees For Duplication Of Records

Issue:

What, if any, are the “direct costs of duplication” associated with faxing or e-mailing a record to a requester?

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Fees For Duplication Of Records

Special rules for electronic records.

Agency may recover full costs where agency is required to:

- extract or compile data.
- undertake programming to produce data.

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Fees For Duplication Of Records

Special rules for electronic records – What does it mean to extract or compile data for purposes of this section?

Full cost recovery probably not available for merely extracting or compiling information loaded in extractable fields in a data base such as an Excel spreadsheet.

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Fees For Duplication Of Records

Special rules for electronic records.

Some requesters contend that they can require agencies to create new records through extraction, compilation or programming even if the agency would otherwise have no need to create the record.

We doubt that this is the correct interpretation of the special cost provision for electronic records.

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Withholding Records

Exemptions are generally discretionary, not mandatory.

- Generally, the agency may redact exempt information; remainder of record must be disclosed.
- Where exemptions render the entire record worthless, the entire record may be withheld

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Withholding Records

Agencies should consider disclosure issues in designing records.

Exempt and disclosable information segregated from one another so that a clerk can duplicate disclosable information without need for further review by an attorney or other agency personnel

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Withholding Records

Agencies need not provide privilege or exemption log of exempt records.

Agencies should provide a sufficient explanation of the reasons for withholding records so that the public can decide whether to challenge the agency's withholding

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Withholding Records

If exempt information is disclosed, the exemption is waived.

The following disclosures are not waivers:

- Disclosures pursuant to the Information Practices Act
- Disclosures made pursuant to discovery requests

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Withholding Records

The following disclosures are not waivers:

- Disclosures pursuant to the Information Practices Act
- Disclosures made pursuant to discovery requests
- Disclosures made pursuant to court order
- Disclosures to another government agency when there is a confidentiality agreement and the head of the agency designates those employees who are permitted to examine the records

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Withholding Records

Source of Exemptions – Expressly provided in Gov. Code, § 6254 – Imported into section 6254, subd. (k) from other provisions of state or federal law – Public interest balancing test under section 6255

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Litigation and Legal Advice Exemptions Litigation and Legal

Pending litigation (Gov. Code, § 6254 (b))

- Exempts records prepared for use in litigation
- Exemption lasts only for duration of litigation

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Litigation and Legal Advice Exemptions Litigation and Legal

Pending litigation (Gov. Code, § 6254 (b))

- Settlement itself is disclosable
- Depositions are disclosable

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Litigation and Legal Advice Exemptions Litigation and Legal

Attorney-client privilege (Evid. Code, § 954 imported into PRA via Gov. Code, § 6254 (k))

- Protects confidential communications between attorney and client
- Exemption is permanent

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Litigation and Legal Advice Exemptions Litigation and Legal

Attorney-client privilege (Evid. Code, § 954 imported into PRA via Gov. Code, § 6254 (k))

- Although public disclosure generally waives the privilege, disclosure to opposing party for purpose of advancing negotiations does not constitute waiver (*STI Outdoor v. Superior Court* (2001) 91 Cal.App.4th 334, 341.)

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Litigation and Legal Advice Exemptions Litigation and Legal

Evid. Code, § 1040 imported into PRA via Gov. Code, § 6254 (k)

- Protects confidential information when in public interest to do so
- Often duplicative of public interest balancing test under Gov. Code, § 6255

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Litigation and Legal Advice Exemptions Litigation and Legal

Evid. Code, § 1040 imported into PRA via Gov. Code, § 6254 (k)

- PRA exemptions in the context of discovery
- Litigants may make requests before or during litigation

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Litigation and Legal Advice Exemptions Litigation and Legal

Evid. Code, § 1040 imported into PRA via Gov. Code, § 6254 (k)

- If agency believes PRA request violates discovery order, agency should use collateral estoppel to defeat the request
- Agencies may not use PRA exemptions to defeat discovery requests; must use Evid. Code, § 1040

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Litigation and Legal Advice Exemptions Litigation and Legal

Attorney Work Product:

The attorney work product rule covers research, analysis, impressions and conclusions of an attorney. This confidentiality rule appears in section 2018 of the Code of Civil Procedure and is incorporated into the CPRA through section 6254(k). Records subject to the rule are confidential forever. The rule applies in litigation and non-litigation circumstances alike.

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Exemption For Personnel Records–Gov. Code, § 6254, Subd. C

Exemption generally does not cover information that would be exchanged at a cocktail party, such as educational background, employment background and training

Personnel records are defined by content, not by location

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Exemption For Personnel Records–Gov. Code, § 6254, Subd. C

Exemption applies to personnel, medical or similar records whose disclosure would constitute an unwarranted invasion of personal privacy.

Usually involves personal information required by employer

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Exemption For Personnel Records–Gov. Code, § 6254, Subd. C

Performance evaluations are exempt from disclosure

Case law is unsettled regarding when disclosure of personnel actions are required to be disclosed:

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**Exemption For Personnel Records—Gov.
Code, § 6254, Subd. C**

Court required disclosure if there were substantial evidence of wrongdoing irrespective of outcome; nondisclosable only if charges found to be groundless (*AFSCME v. Regents of University of California* (1978) 80 Cal.App.3d 913; and *Bakersfield City School District v. Superior Court* (2004) 118 Cal.App.4th 1041.)

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**Exemption For Personnel Records—Gov.
Code, § 6254, Subd. C**

– Where agency publicized personnel action to deter similar conduct, court found that personnel action was nondisclosable unless there were a compelling governmental justification (*Payton v. City of Santa Clara* (1982) 132 Cal.App.3d 152.)

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**Exemption For Personnel Records
Disclosure Would Constitute Unwarranted
Invasion of Privacy**

If information is intimate or personal in nature and has not been provided to a government agency as part of an attempt to acquire a benefit, disclosure of the information probably would constitute a violation of the individual's privacy.

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**Exemption For Personnel Records
Disclosure Would Constitute Unwarranted
Invasion of Privacy**

Courts have reached different conclusions regarding whether the investigation or audit of a public employee's performance is disclosable.

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Public Interest Balancing Test –Gov. Code, § 6255
Public Interest Balancing Test –Gov. Code, § 6255

Protects records where the public interest in nondisclosure clearly outweighs the public interest in disclosure.

Public interest in nondisclosure does not refer to the administrative convenience of a public agency, but to the broader interests of the public in general

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Public Interest Balancing Test –Gov. Code, § 6255
Public Interest Balancing Test –Gov. Code, § 6255

San Jose v. Superior Court (1999) 74 Cal.App.4th 1008, outlines the three-step test for the public interest balancing test:

- The public interest in disclosure
- The public interest in nondisclosure
- Less intrusive alternatives to satisfy the public interest in disclosure.

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Investigative Records and Intelligence Information

(Gov. Code, § 6254(f))

Records of complaints, preliminary inquiries to determine if a crime has been committed, and full-scale investigations, as well as closure memoranda are investigative records.

Primarily covers investigations by law enforcement.

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Deliberations, Correspondence, and Drafts

Deliberative process privilege.

- Protects records involved in the decision-making process
- Implemented through public interest balancing test in Gov. Code, § 6255
- Permits candid debate and airing of potential solutions.

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Deliberations, Correspondence, and Drafts

Deliberative process privilege

- Advisors may be from inside or outside the government
- Deliberative process privilege may be overcome by a narrow request with high public interest

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Deliberations, Correspondence, and Drafts

Correspondence Exemptions

- Only the Governor and the Legislature have correspondence exemptions
- Correspondence means letters from persons outside the government

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Deliberations, Correspondence, and Drafts

Correspondence Exemptions

- Governor's action requests and budget change proposals would be protected by the deliberative process privilege not the correspondence exemption
- Some agencies use the balancing test to protect the names and addresses of persons who write the agency.

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Deliberations, Correspondence, and Drafts

Drafts, notes and memoranda (Gov. Code, § 6254 (a))

- Protects preliminary drafts, notes and memoranda that are not retained in the ordinary course of business where the public interest in nondisclosure outweighs the public interest in disclosure.

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Deliberations, Correspondence, and Drafts

Drafts, notes and memoranda (Gov. Code, § 6254 (a))

- Difficult test to understand and apply (*Citizens for a Better Environment v. California Department of Food and Agriculture* (1985) 171 Cal.App.3d 704.)
- Deliberative process privilege exemption is easier to understand and apply

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Copyright and Trade Secrets

Copyright

- Federal agencies excluded from federal copyright protection, but
- States are not expressly excluded
- Copyright protection presumably imported into PRA via Gov. Code, § 6254 (k)

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Copyright and Trade Secrets

Trade Secrets

- Trade secrets not expressly exempt
- However, the confidentiality of trade secrets is protected by Evid. Code, § 1060, and is imported into the PRA via Gov. Code, § 6254(k)

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Copyright and Trade Secrets

Trade Secrets

- Section 3426.1 of the Civil Code states that "trade secret," for purposes of the PRA, is defined by the definition that was in use in 1984.
- One must look to case law and the Restatement of Torts to determine the definition.

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Copyright and Trade Secrets

Trade Secrets

- Agency must determine whether records submitted to it are protected by trade secret
- If not protected, agency must disclose
- Agency may wish to withhold for limited period in order for holder of right to seek protection in court

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Other expressed exemptions

Include records relating to:

- securities and financial institutions;
- utility, market and crop reports;
- testing information; appraisals and feasibility reports;
- gubernatorial correspondence;
- legislative counsel records;
- personal financial data used to establish a license applicant's personal qualifications;
- home addresses; and election petitions.

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Enforcement

Mandate, injunctive relief, declaratory relief

- If plaintiff prevails, plaintiff receives court costs and attorney's fees.
- Plaintiff prevails if suit motivates disclosure

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Enforcement

Once suit is filed, any voluntary disclosure by agency means plaintiff has prevailed.

- Plaintiff need not prevail on all issues; one issue is probably sufficient.
- Agency receives fees only if suit is adjudged totally frivolous.

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Thank You

Questions?

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Palomar Pomarado Health
Board Education

The Ralph M. Brown Act (Open Meeting Law)

Janine Sarti, Esq. September 20, 2007

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Legislative Intent

"The people of this State do not yield their sovereignty to the agencies which serve them. 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 control over the instruments they have created."

-Gov't Code Section 54950

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Brown Act Purpose

- Facilitate public participation
- Curb misuse of democratic process

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Agenda for Tonight

- Public bodies subject to the Brown Act
- Meeting defined
- Notice and agenda requirements
- Rights of the public
- Permissible closed sessions
- Penalties for violation

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Public Bodies Subject to the Brown Act

- Governing body of a local agency
- Standing Committee
 - Created by formal action and has continuing subject matter
- Doesn't include special (ad hoc) committees
 - Single, limited purpose
 - Finite period of time

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Meeting Defined

“Any congregation of a majority of a Board at the same time and place to hear, discuss, or deliberate upon any matter which is under the jurisdiction of the board.”

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Meeting Exception

- Conferences and retreats open to the public
- Social or ceremonial event
- Open meeting of another government body

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Serial Meeting

- Use of direct communication, personal intermediaries, or technological devices that is employed by a majority of the board to develop a collective concurrence as to action.

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Serial Meetings

- Purpose – develops collective concurrence as to action
 - Series of communications
 - Each involving less than a quorum
 - Taken as a whole involves board majority

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Notice and Agenda

- Regular Meeting - time & location generally set
 - Post agenda at least 72 hours before
- Special Meeting – called at any time
 - 24 hour notice to board and media
 - Called by Board Chair or majority of the board
 - Only discuss special agenda item
- Emergency Meeting – extraordinarily rare
 - 1 hour notice to media
 - Show that prompt action is necessary to prevent the disruption of public facilities.

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Agenda Requirements

- Brief description of item of business
 - Not to exceed 20 words, can't be misleading
- Posting – location accessible 24 hours a day for the 72 hours prior to the meeting
 - Location freely accessible to the public
- Closed session must be on agenda
 - Generally describe the topic
- Include date, time, and location.

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Non Agenda Items

- General Rules – no action or discussion for items no on agenda, except
 - Board determines emergency
 - Board determines need for immediate action
 - Continuation of prior agenda item

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Exception to agenda requirements

- Brief responses to public testimony
- Requests for clarifications to staff
- Reports on personal activities
- Emergency – need for immediate action

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Meeting Location

- Held within geographic jurisdiction
- Except
 - Necessary to comply with court order
 - Inspect real or personal property
 - Meet with state or federal officials
 - At closest meeting facility available
 - To visit legal counsel to discuss litigation

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Teleconferencing Meeting

- Agendas posted at all teleconference locations
- Each location identified in agenda
- Each location accessible to the public
- Conference call number must be on agenda
- Quorum of board must be within district

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Records Distributed

- Records distributed at meeting are public records
- Public is entitled to a copy at time of meeting

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Public Comment

- Regular Meeting
 - May comment on any item, even in not on agenda
 - Board may impose reasonable time limits
- Special Meeting
 - Board must allow comments on agenda items
 - Board must allow criticisms and complaints

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Other Public Rights

- Right to record meeting
- Can't require registration to attend meeting
- Right to review documents distributed to the board

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Closed Sessions

- Brief description of topic on the agenda
- Orally announce items to be discussed prior to meeting
- Report votes/actions taken at conclusion of closed session
- Can't have "semi-closed" meeting

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Reason for closed session

- Purchase, sale, exchange, or lease of real property
 - Must hold prior open session to identify property and grant authority to negotiator
- Discuss pending litigation
 - Litigation formally initiated, or
 - Significant exposure to litigation
- Meetings with law enforcement
 - Threat to security, or to services
- Discuss appointment, employment, or evaluation of public employee
- Discuss position for collective bargaining negotiations including salary and fringe benefits
- Trade secrets – any concept where entity derives economic value
 - Necessary to develop a new program, and
 - Disclosure deprives District of economic benefit

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After a Closed session

- Must publicly report any action taken
 - Real estate negotiations
 - Employment status of public employee
 - Approval of labor contract
- Not required to maintain minutes of closed session

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Penalties and Remedies for violation

- Criminal penalties
 - Intent to deprive public of information where board knows the public is entitled to receive
 - Guilty of a misdemeanor
 - No criminal violations ever imposed in history of the Act

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Civil Remedies

- Any interested person may compel compliance with Brown Act
- Court order to record closed sessions
- Injunctive relief
- Suit filed to void action taken at meeting
- Liable for costs and attorney fees

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Quote:

“A popular government, without popular information, or the means of acquiring it, is but a prologue to a farce or tragedy.”

- James Madison

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Questions

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