

Understanding Public Service Ethics Laws: AB1234 Training

*League of California Cities
Annual Conference & Expo*

Wednesday, Sep. 22, 2021



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Contact Kim Danko at kdanko@ca-ilg.org with questions or concerns

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- We provide practical and easy-to-use resources so local agencies can effectively implement policies on the ground



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Understanding
Public Service
Ethics Laws
and Principles
(AB 1234)

**League of California Cities
Annual Conference & Expo**

Wednesday, September 22, 2021

Presenters:

Andrew L. Jared, Senior Counsel
Aleks R. Giragosian, Senior Counsel
Colantuono, Highsmith & Whatley, PC

Los Angeles Times

A Murky Side to Water Business

BY MEGAN GARVEY
AUG. 3, 2003 12 AM PT

TIMES STAFF WRITER

There's the Irvine Ranch Water District employee accused of skimming \$2.2 million from the books. And the Santa Margarita Water District officials who treated themselves to limousine rides and four-star hotel rooms, as well as sheepskin seat covers and \$125 wax jobs for their cars.

Not to forget the San Francisco-area water district lab supervisor who was caught using an agency scale to weigh his cocaine. After arrest and conviction on drug charges, he went on to become general manager of the city of Pacifica's 13,000-customer district. Later, he was investigated and convicted on charges of misappropriating funds, including billing his employer for more than \$9,000 in meals at a local restaurant and buying a go-cart for his son.

Historical Background



Elements of Ethics Training

- Conflict of Interest Training
- Ralph M. Brown Act Training
- California Public Records Act Training

Conflict of Interest Outline

1. Government Code Section 1090
2. Political Reform Act
3. Incompatible Offices/Activities
4. Statement of Economic Interest
5. Gift Limits

- [A Notorious Conflict of Interest](#)



Government Code § 1090

Basic Rule

- Adopted in 1851, later recodified in 1943
- Public officials “shall not be financially interested in any contract made by them in their official capacity, or by any body or board of which they are members.”
- Prohibition applicable even when:
 - Contract is objectively fair and reasonable
 - Contract reflects lowest price or best value
 - Official abstains from participation in contract



What Constitutes “Making a Contract”?

- Voting to approve
- Designing specifications
- Preliminary discussions
- Negotiating
- Actual signing of contract
- For consultants: Entering into contracts on matters where previously provided design or other services

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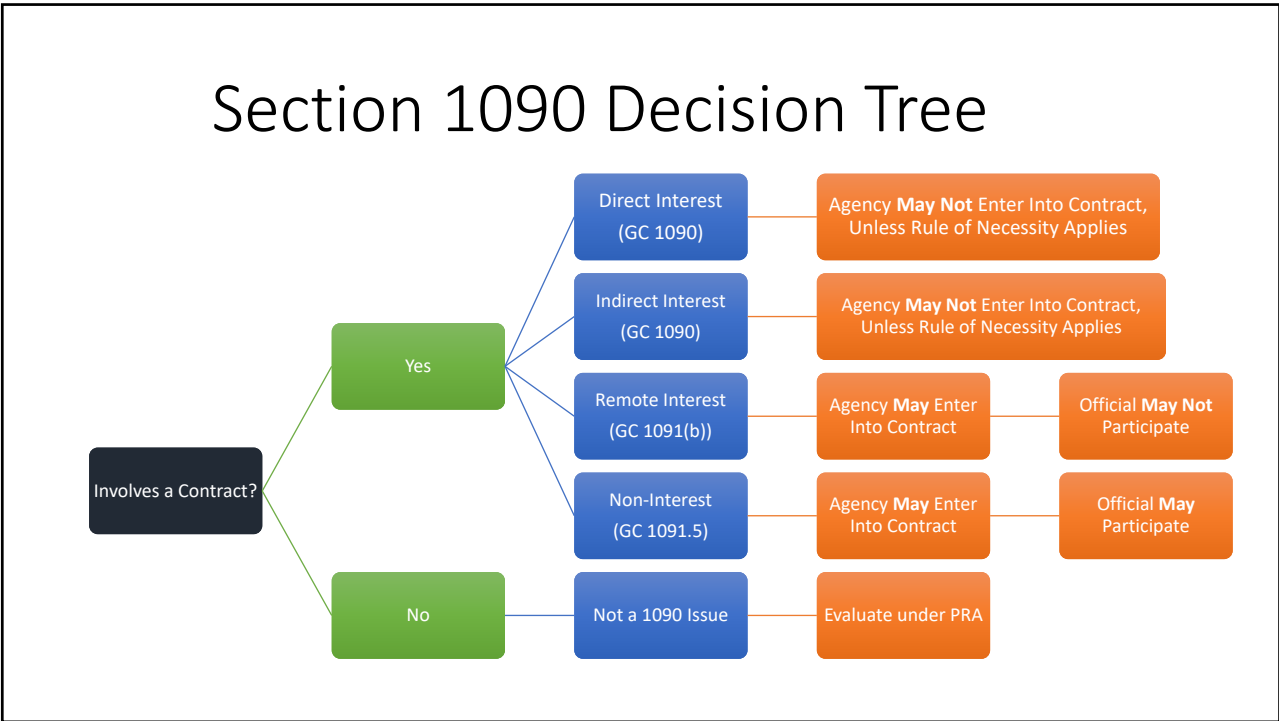
Indirect Interest

- An indirect interest includes any investment or interest owned by:
 - The spouse or dependent child of a public servant;
 - An agent on behalf of a public servant;
 - A business entity or trust in which the public servant, the public servant’s agent, spouse, and dependent children own directly, indirectly, or beneficially a 10% interest or greater

What are the exceptions?

- **The Remote Interest Exception**
 - Disqualifies official, but board may act
- **The Non-interest Exception**
 - The financial interest “doesn’t count” and is ignored
- **The Rule of Necessity**
 - Non-statutory rule applicable only in very limited circumstances

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Obtaining FPPC Advice

Type	Method	Immunity	Precedential Value	Response Time
Informal Advice	Email or Telephone	No	No	2-3 Business Days
Formal Advice	Mail or Fax	Yes	No	21 Business Days
FPPC Opinion	Mail or Fax	Yes	Yes	Several Months

Consequences

- **Contract is void** and unenforceable
- Agency may keep benefit of the contract
- Official must disgorge any monies
- [Example of a 1090 Violation](#)



Consequences

- Violation is a **Felony** (GC §1097)
 - Fine,
 - Imprisonment,
 - Lifetime ban from public office
- Aider & Abettor Liability (GC §1090(b))
- Civil Statute of Limitations
 - 4 years after a party discovers or should have discovered the violation (GC § 1092(b))
- Criminal Statute of Limitations
 - 3 years after discovery of the violation (PC §§ 801 & 803)



Political Reform Act: History

- 1972- Watergate Scandal
- 1974- Californians adopt Proposition 9
- Championed by Secretary of State Jerry Brown, the People's Lobby, and Common Cause
- Gov. Code, § 81000 et seq.

Does the Political Reform Act Apply?

Public Official?

Governmental Decision?

Financial Interest?

Who is a “Public Official”?



87200 Filers



Designated Public Servants

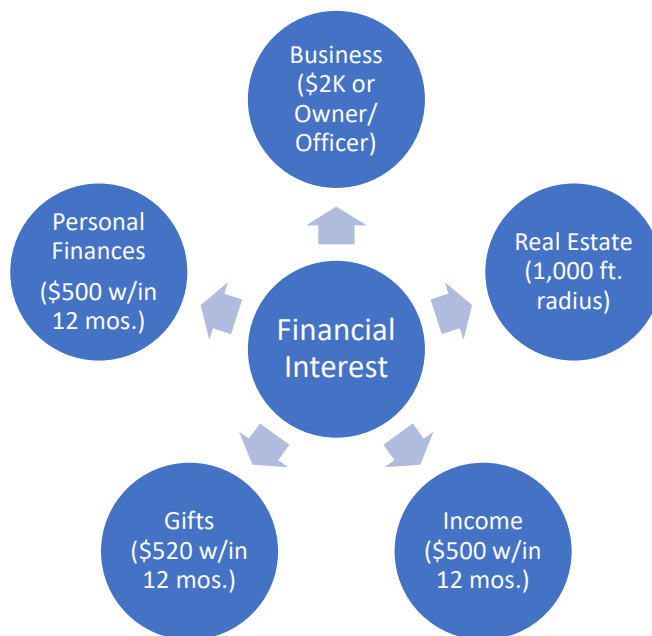


Consultants who serve in a staff capacity by contract,
or make decisions on behalf of the public agency

What is a
“Governmental
Decision”?

- Any action taken by a government agency that has a financial effect on any person other than the governmental agency making the decision
- Prohibition on influencing a Governmental Decision through:
 - Voting
 - Discussing
 - Lobbying

What is a
Financial
Interest?



4-Step Test (GC § 87103): Is the Interest Disqualifying?

Is there a reasonably foreseeable effect on the financial interest?

Is the effect material?

Is the effect indistinguishable from the effect on the public generally?

Is there an exception that applies?

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The “Public Generally” Exception (GC § 87103)

- Effect of decision on public official’s financial interest is **not unique** compared to effect on a significant segment of the public
- “Significant segment” includes:
 - 25% of businesses or entities in the jurisdiction
 - 15% OR 25% of all real property in the jurisdiction
 - 25% of all individual’s in the jurisdiction
- And no disproportionate effect on public official’s financial interest
- Examples: Assessments, taxes, fees, rates, charges that apply equally to public official’s financial interest or entire jurisdiction

What To Do If There Is a Conflict: In-Person Meeting

When the agenda item is announced, but before discussion of the item begins:

1. State that you have a conflict of interest;
2. Publicly identify each financial interest;
3. Recuse yourself from participation in discussion; and
4. Leave the room for the duration of the discussion
5. Only return once the next agenda item is called.

NOTE: FPPC recently closed a loophole

What To Do If There Is a Conflict: Tele-conferenced Meeting

When the agenda item is announced, but before discussion of the item begins:

1. State that you have a conflict of interest;
2. Publicly identify each financial interest;
3. Recuse yourself from participation in discussion; and
4. Turn off your video and mute your mic
5. Only return once the next agenda item is called.

POLL!

Political Reform Act Violations & Fines

- Criminal
- Civil
- The Court of Public Opinion
- [Recent Example](#)



Incompatible Offices (Gov. Code, § 1099)



- Offices are incompatible when one:
 - Audits, overrules, or removes members of the other
 - Possibility of a significant clash of duties or loyalties
 - Public policy considerations make it improper
- Does not apply to an employment position
- Forfeit the first office upon acceding to the second
- Poll!

Incompatible Activities (GC § 1126)

- Rule: “[A] local agency officer or employee shall not engage in any employment, activity, or enterprise for compensation which is inconsistent, incompatible, in conflict with, or inimical to his or her duties as a local agency officer or employee or with the duties, functions, or responsibilities of his or her appointing power or the agency by which he or she is employed.”
- Agency must provide policy regarding which activities are incompatible
- Does not apply to elected officials, only employees and appointed officials

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FPPC Form 700 Statement of Economic Interest

- All local agencies must adopt conflict of interest code which designates certain employees as Form 700 filers
- Must file within 30 days of taking office and leaving office, and annually thereafter
- Check with your City Clerk to determine whether you are a Form 700 filer

The image shows a sample of California Form 700, Schedule A-2, Statement of Economic Interest. The form is titled "SCHEDULE A-2 Investments, Income, and Assets of Business Entities/Trusts (Covering Interest in 10% or Greater)". It includes sections for "BUSINESS ENTITY OR TRUST" and "BUSINESS ENTITY OR TRUST" (repeated). Each section contains fields for Name, Address, Description of Business Activity, and Financial Information.

Gift Restrictions: Is it a Gift? (GC § 82028)

- A “payment made by any person of any thing of value when the official does not provide full consideration for the value of the benefit received.”
- Includes gifts to spouse and dependent children
- Given as of the date the gift is received or promised

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Exceptions to Gift Restrictions (2 CCR § 18942)

- Informational material (electronic media ok)
- Gifts from family (includes distant relations and former family)
- Gifts from Close Friends (“long term, close, personal friendship, unrelated to the official’s position with the agency”)
- Reciprocal gifts (between friends during special occasions; not lobbyists)
- Ceremonial Role (2 tickets to entertainment event)
- Home hospitality (food, home entertainment, overnight lodging, etc.)

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Exceptions to Gift Restrictions (2 CCR § 18942)

- Gambling, Prizes, Awards (must report as income; not because of official status)
- Bereavement Gifts (those typically provided)
- Gifts of Human Compassion (charity from within social circle to offset medical or living expenses when in need)
- Acts of Neighborliness (free, ordinary services polite people provide without charge)
- Dating (**unless** lobbyist or matter pending before agency)
- Gifts for Attending Wedding (reportable and valued at ½ total value)

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Gifts of Travel: Exceptions

- Government Pays for Government-Related Travel
 - Not Reportable, unlimited
- Private Entity Pays for Government-Related Travel
 - Reportable, unlimited
 - Form 801 or Form 700 Disclosure
- Private Entity Pays for Private Travel
 - Reportable and limited
 - Form 700 Disclosure

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Gift Restriction Summary



Gifts aggregating \$50 or more in the reporting period must be disclosed on a Form 700



Gifts aggregating \$520 or more in the reporting period from a single source are a conflict of interest



Return to donor within 30 days



Donate to a charity, but can't claim as a tax deduction

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Travel Payments: Cal. Const. Article XII, § 7



- A transportation company may not grant free passes or discounts to anyone holding an office in this State; acceptance of a pass or discount by a public officer, other than a Public Utilities Commissioner, shall work a forfeiture of that office.
- Punishable by forfeiture from office

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Honorariums

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- No local elected office holder, candidate for local elected office, or designated employee may accept any honorarium.
- “Honorarium” means a payment for a speech given, article published, or attendance at any public or private conference, convention, meeting, social event, meal, or like gathering.



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Questions?

Public Records Act: Historical Background



- Modeled after Federal Freedom of Information Act (FOIA)
- Signed by Governor Reagan in 1968
- Requires inspection and disclosure of public records

CA Public Records Act: Purpose

- California Constitution:
“the People have the right of access to information concerning the conduct of the people’s business”
- Government Code §6250:
“In enacting this chapter, the Legislature, mindful of the right of individuals to privacy, finds and declares that access to information concerning the conduct of the people’s business is a fundamental and necessary right of every person in this state.”

“Public Record”

Gov. Code §6252(e)

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

“Public Record”

Gov. Code §6252(e)

- Any writing
 - Includes emails and social media posts
- Containing information relating to the conduct of the public’s business
 - Not just within the subject matter jurisdiction of the agency
- Prepared, owned, used, or retained
 - Even those retained on personal devices
- By any state or local agency
 - Includes individual accounts used for public business
- Regardless of physical form or characteristics.
 - Not just printed paper documents
 - voice messages may be a public record

CA Public Records Act: Process

Public agency receives CPRA request
- request can be in any form, including orally

01

Agency has 10 days after receipt of request to notify requestor of exemptions, provide records, make them available for inspection during business hours, or request extension

02

Agency may have an additional 14 days in “unusual circumstances” to *provide* records, make available for inspection, or notify requestor of exemption (Gov. Code §6253(c)).

Exemptions from Duty to Disclose

- “Preliminary drafts, notes or memoranda ... not retained ... in the ordinary course of business, provided that the public interest in withholding those records clearly outweighs the public interest in disclosure.” (GC §6254(a))
- Pending litigation (GC §6254(b))
- Personnel, medical or similar files, the disclosure of which would constitute an unwarranted invasion of personal privacy (GC §6254(c))
- Documents of agency contractors that are not by contract owned by the agency
- Officials’ home addresses or phone numbers (GC §6254.3; 6454.21)
- Records protected by legal privilege (attorney-client or work product)(GC §6254(k))
- General balancing exception (GC §6255):
 - **Public interest served in not disclosing the record clearly outweighs the public interest served by disclosure**

Remedies



Requesters can sue to challenge denial of request



Burden is on the agency to justify withholding records



Agency has no right of appeal; review is by discretionary writ



Agency pays legal fees on loss



Agency wins fees only if suit is “clearly frivolous”

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Do's and Don'ts

Do

- Assist requester by helping narrow search by date range, sender, and subject matter
- Make documents available in electronic format
- Provide documents in native file format, upon request
- Adopt a retention schedule and delete documents pursuant to it

Don't

- Respond to a request for ANSWERS or INFORMATION, instead of a request for documents
- Charge for anything other than a nominal copying fee
- Send or save public documents to personal devices
- Create unnecessary records



Questions?



Ralph M. Brown Act: Historical Background

- Prior to 1952, multiple public meeting laws written to govern specific types of agencies. Difficult for public to track.
- In 1952, reporter Michael Harris (left) publishes a 10-part series in the San Francisco Chronicle titled "Your Secret Government"
- The League of California Cities lobbied Assembly Member Ralph M. Brown (right) to adopt one set of reforms to apply to all local public agencies



Heart of the Brown Act

“All meetings of the legislative body of a local agency shall be open and public, and all persons shall be permitted to attend any meeting of the legislative body of a local agency, except as provided in this chapter.”



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What is a “Legislative Body”?

- **Governing body of a local agency** (e.g., City Council/Board of Supervisors)
- **A local agency created by state or federal statute** (e.g., commissions)
- **Any sub-committee, board, or commission created by the local agency**

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Legislative Body: Exception

- Ad Hoc Committee:
 - Advisory to legislative body
 - **Temporary**
 - Limited Purpose
 - Composed of less than quorum legislative body's members
- Special advisory groups
 - Created by staff or a single member of the legislative body
 - Advisory to staff or the single member
- Public employees

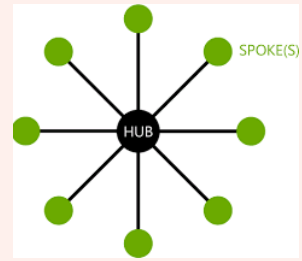
What is a "Meeting"?

"...any congregation of a **majority of the members** of a legislative body at the same time and location, including teleconference..., to **hear, discuss, deliberate or take action** on any item that is within the subject matter jurisdiction of the legislative body." (GC §54952.2(a))

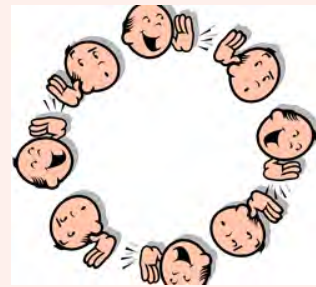
"...use of a **series of communications** of any kind, directly or through intermediaries, to discuss, deliberate, or take action on any item of business that is within the subject matter jurisdiction of the legislative body." (GC §54952.2(b))

Serial Meetings

(GC §54952.2(b))



- Hub and Spoke
- Daisy Chain



Examples of Serial Meetings + Polls



Serial Briefings



Email



Social Media

Can I post about City business on social media?

Yes,

- but members of a board cannot use social media to discuss among themselves “business of a specific nature that is within the subject matter jurisdiction of the legislative body.”
- CAN use social media to communicate with constituents
- CANNOT have one member post on discussions by other members
- CANNOT weigh in with “likes” or emoji’s; This counts as discussion.

(GC §54952.2(b)(3))

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Exceptions to the Definition of Meeting



Individual
Contacts



Conferences



Community
Meetings



Meetings of
another
Legislative Body



Social or
Ceremonial
Occasions

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Meeting Location

(GC §54954(b))

Must occur within boundaries of the agency, except to:

- comply with a court order or attend a judicial proceeding
- inspect real or personal property
- attend a meeting with another legislative body
- meet with a state or federal representative to discuss legislative or regulatory issues
- meet in a facility outside of, but owned by, the local agency if the topic relates to the facility
- visit independent legal counsel's office for a closed session

Teleconferencing

(GC §54953(b))

- Audio or video or both connecting locations
 - All votes are by roll call
 - All locations comply with the Brown Act, including allowing public participation
 - A quorum participates from within the jurisdiction*
 - The notice and agenda identify the remote location*
 - Both locations posted and accessible to the public*
- *Excused through 9-30-2021 by Exec. Order N-29-20 and N-08-21

Different Meetings and Requirements

Meeting Type	Publishing Agenda	Setting Meeting Date, Time, and Place	Public Comment for Items Not on Agenda
Regular (GC §54954)	72 Hours Before Meeting	Set by resolution or ordinance of the majority during a meeting	Yes
Special (GC §54956)	24 Hours Before Meeting	Set by presiding officer or majority vote during or outside of a meeting	No
Emergency (GC §54956.5)	As soon as possible; notice to media outlets 1 hour prior	Set by majority vote during or outside of a meeting	No
Adjourned (GC §54955)	No reposting if meeting is adjourned for less than 5 days	Set by an order of adjournment adopted by any members present at a prior regular or special meeting	Depends on whether it is a regular or special meeting

Content of Agenda

- Call to Order
- Roll Call
- Approval of Agenda
- Approval of Minutes
- Public Comment on Items Not on the Agenda
- Consent Items
- Discussion Items with brief description of each item
- Future Agenda Items

Content of Agenda

- Must contain
 - Public Comment for all items on agenda
 - Brief general description of each item (need not exceed 20 words)
 - Time and location of meeting
 - How to request disability-related modification or accommodation (GC §54954.2)
- Must be posted on City website

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Public Comment

“Every agenda for regular meetings shall provide an opportunity for members of the public to directly address the legislative body on any item of interest to the public, before or during the legislative body’s consideration of the item, that is within the subject matter jurisdiction of the legislative body, provided that no action shall be taken on any item not appearing on the agenda unless the action is otherwise authorized by subdivision (b) of Section 54954.2.”

(GC 54954.3)

Public Comment

- **Two types:**
 - Items on the agenda (Specific Item)
 - Items not on the agenda (General Public Comment)
- **May Not Take Action On Items Brought During General Public Comment**
 - Can set for future agenda or briefly respond to statement made
 - **Cannot discuss**
 - **Exceptions**
 - Emergency situation
 - floods, fires, strikes (GC 54954.2(b)(1))
 - Subsequent need: 2/3 vote (GC 54954.2(b)(2))
 - Can add to agenda: **came up after posting** of agenda **AND requires immediate action**

General Public Comment



- Four appropriate responses:
 - Ask clarifying question of commenter
 - Briefly respond to comment
 - Refer matter to staff
 - Ask to agendaize for subsequent discussion

Right to Public Comment

- City may establish “reasonable regulations” to ensure intent if carried out
 - Can adopt reasonable regulation limiting time for speakers (GC §54953.3(b)(1))
 - Number minutes per speaker per topic can be adjusted
 - Must provide at least twice allotted time persons using translator (GC §54953.3(b)(2))
 - May require speaker cards; Must not REQUIRE



Right to Public Comment

- “Reasonable regulations”
 - 3- minute time limit for speaker upheld where unlimited time for board member
 - 2-minute time limit unreasonable to for evidentiary presentation
 - May depart from limitations as reasonable discretion
 - Complexity of item
 - Total number of speakers
 - May require speaker cards
 - CANNOT require public to provide names or other information



Right to Public Comment

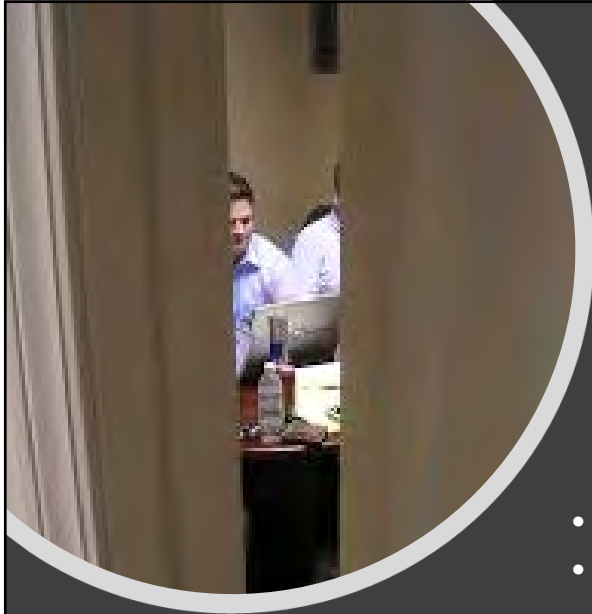
- Speaker should **not** be interrupted, unless speech is not protected by First Amendment (e.g., threats, incitement of violence, extreme obscenity)
- When should we cut this individual off?
 - When they get loud?
 - When the Vice Mayor feels insulted?
 - When they give silent nazi salute?
 - When they say a “swear word”?
 - When their 3 minutes are up?
 - When they cause a disruption of the meeting?



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Public Rights

- Public has right to photograph and record meetings (GC §5495.5)
 - Unless board makes reasonable finding that recording cannot continue because of noise, illumination or disruption of fire causes persistent disruption of meeting)
 - Broadcasting permitted unless disruptive (GC §54953.6; 6091)
- Cannot limit public access
- Reasonable time, place, and manner restrictions permitted



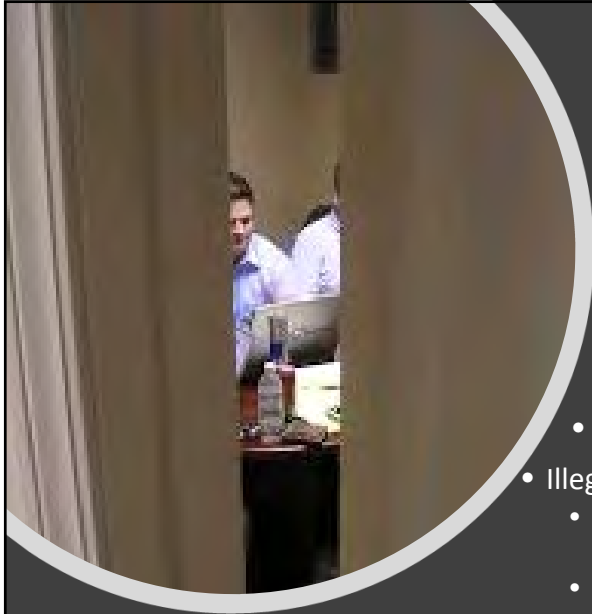
Closed Sessions

- Narrow exception to open meeting requirement allowing meeting without the public or the press
- **Limited to topics identified in State law**
- Limited to board and necessary staff
- Specified agenda format and “reporting out” requirements
- Don’t go into closed session w/o legal assistance
- **All discussions in Closed Session are CONFIDENTIAL and may not be discussed outside of Closed Session**



Closed Sessions

- **Real estate negotiations** (GC §54953.5, 54956.8)
- **Pending Litigation** (GC §54956.9(d)(1)-(d)(4))
 - Existing Litigation
 - Anticipated/Threatened Litigation
- **Liability Claims** (GC §54956.95)
- **Personnel Matters** (GC §54957)
 - Appointment/Evaluation/Dismissal/Release
 - Only those employees directly reportable to board
- **Labor Negotiations** (GC §54957.6)
- **Threats to public services** (GC §54957(a))



Closed Sessions

- Narrow exception to open meeting requirement allowing meeting without the public or the press
- **Limited to topics identified in State law**
- Limited to board and necessary staff
- Specified agenda format and “reporting out” requirements
- Don’t go into closed session w/o legal assistance
- Illegal to disclose closed session confidences
 - Cannot state in open session or to anyone else
 - Confidentiality can be waived by vote of the board
 - Local agency may enforce by disciplinary action against employee, or seek injunctive relief
 - Council may refer councilmember disclosing confidential information to the grand jury (GC §54963(c))

Other Issues

- **Sign-In Sheet**
 - CANNOT *require* public to provide names or other information as condition of attending (GC §54953.3)
 - CAN have sign-in sheet if CLEARLY indicated that signing is **voluntary**
- **Access to Documents**
 - Agendas and other documents distributed to a majority of council must be made available to public (GC §54953.5)
 - Materials **by staff distributed prior to or during** meeting must be made available to public during meeting
 - Materials **by others during meeting** must be made available to public after the meeting (GC §54953.5(c))
- **Voting**
 - no action by secret ballot, whether preliminary or final (GC §54953(c)(1))
 - Agency shall publicly report all votes, including abstentions, of all members present for the action (GC §54953(c)(2))
- **Salaries for local agency executive**
 - Action only at regular meeting
 - Orally report summary of salary, schedules, or compensation paid in fringe benefits prior to vote

Violation of the Brown Act

- **What happens when the board or individual violates the Brown Act?**
 - Criminal prosecution possible (GC §54959)
 - Civil Action: District Attorney or Interested Person (GC §54960(a))
 - To prevent violations, determine applicability of Brown Act, or action of body discouraging/penalizing expression of members
 - Must send Cease and Desist Letter: send a letter within 9 months
 - City must respond within 30 days to cure alleged violation:
 - Unconditional Commitment to Cease and Desist
 - Lawsuit must be filed within 15 days after the 30 days expires
 - Mandamus Action (GC §54960.1)
 - To declare action taken by council is null and void
 - Must make written demand to cure and correct w/i 90 days of action (30 days if in open session)

Violation of the Brown Act

- **What happens when a court determines a Brown Act violation occurred?**
 - Violative action is nullified
 - City pays plaintiff's attorneys' fees
 - Civil penalties
 - Criminal penalties



Questions