

Good Government Guide

An Overview of the Laws Governing
the Conduct of Public Officials



LAST UPDATED: SEPTEMBER 3, 2014

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Introduction

“No man should have a political office because he wants a job. A public office is not a job. It is an opportunity to do something for the public. And once in office, it remains for him to prove that the opportunity was not wasted.”

— Franklin Knight Lane,
City Attorney of San Francisco, 1899-1900

Notwithstanding the archaic gender specificity characteristic of Franklin Knight Lane’s time, the quote above by one of my more notable predecessors elegantly captures the abiding aspirations of public service, and the principles that underscore good government.

Mindful of these values, I am pleased to offer this Good Government Guide. My office wrote and updated this guide to provide employees and officials of the City and County of San Francisco with a usable, accessible overview of the major laws governing their conduct as public servants—from public meetings and public records responsibilities to conflict-of-interest and personal financial reporting requirements. This updated publication is available on my office’s website. I encourage employees and officials to read it and refer to it often.

While I hope this publication will serve as a helpful general reference for department personnel, commissioners, commission staff members, and other public servants, it cannot anticipate every situation or question that may arise. Neither can it foresee the inevitable changes that policymakers, courts, and voters make to local, state, and federal laws. So please be prudent: understand that no publication can substitute for the careful consideration of the application of laws to specific conduct. For questions regarding a particular course of action you may pursue as a public official, I encourage you to contact the Deputy City Attorney assigned to your department or commission, in advance of taking such action. You may also contact the Office of the City Attorney directly at (415) 554-4700.

Remember: a public office is a public trust. As public officials for the City and County of San Francisco, it is our highest responsibility to conduct the functions of government in a way that is honest, open, and responsive to the citizens we serve. I am proud to offer my office’s unwavering commitment to assist in that endeavor. And I hope you find this Good Government Guide helps toward that end.

Sincerely,



DENNIS J. HERRERA
City Attorney of San Francisco

Part One: Serving on a board or commission

In this part of the Good Government Guide, we provide general information about the role and duties of City boards and commissions and the interplay of those bodies with departments, the City Attorney's Office, the Board of Supervisors, and the Mayor. We also address laws governing appointments to boards and commissions, tenure in office, leaving office, and related topics. Specific provisions in the Charter relating to certain boards and commissions may differ from this general description. For more information on specific boards and commissions, see City Attorney Opinion No. 2010-01, available through the City Attorney's Office's website at <http://www.sfcityattorney.org/>. Also, the City Attorney's Office is available to answer questions regarding the rules governing boards and commissions.

I. Creation of boards and commissions

The Charter establishes most City boards and commissions. The Board of Supervisors has also created a few boards and commissions by ordinance. San Francisco voters, by initiative ordinance, have done likewise.

The Board of Supervisors has created many advisory committees, task forces, working groups, and other entities, by both ordinance and resolution. As described more fully in Parts Two and Three of this Guide, these advisory bodies are subject to open meeting laws, public records laws, and some ethics and conflict of interest laws. We primarily direct our discussion of boards and commissions in Part One toward Charter boards and commissions, and to a lesser extent boards and commissions created by ordinance. Part One provides less information about service on and the functioning of advisory bodies.

State and federal law have created entities legally separate from the City governed by a board or commission, such as the San Francisco Unified School District, San Francisco Community College District, San Francisco Health Authority, San Francisco Housing Authority, the Successor Agency to the San Francisco Redevelopment Agency, and Workforce Investment Board. These governmental entities are not part of the City and County of San Francisco (the "City"). But they operate entirely within the boundaries of San Francisco and in many cases have intrinsic ties to the City. For example, the Board of Supervisors functions as the governing board of some of these separate agencies, such as the Successor Agency and the Transportation Authority. These entities carry out various state and federal functions at the local level.

The City also participates in certain multi-county agencies created by State law or by agreement between public entities. These agencies include, for example, the Golden Gate Bridge Transit District, Transbay Joint Powers Agency, and Bay Conservation and Development Commission.

II. Becoming a commissioner

A. The appointment process

The Charter prescribes four main methods of appointment to boards and commissions, which we describe below. These are:

- Exclusively mayoral appointments to the board or commission, under Charter § 3.100(17).
- Other systems for exclusively mayoral appointments, not governed by Charter § 3.100(17).
- Mixed systems of appointments, divided between the Mayor and the Board of Supervisors.
- Other mixed systems of appointments, divided among other appointing authorities.

In some cases, the appointment process is complicated, and not all of the details are specified here. When considering the rules governing appointments to a particular board or commission, one should review the specific Charter or code provision(s) applicable, and consult the City Attorney's Office as appropriate.

Exclusively mayoral appointments under Charter § 3.100(17). Charter § 3.100(17) prescribes the most common method of appointment. The Mayor appoints all members of the board or commission. The appointments are effective upon transmittal of a Notice of Appointment to the Clerk of the Board of Supervisors. The Notice of Appointment must include the person's qualifications to serve and a statement as to how the individual represents the communities of interest, neighborhoods, and diverse populations of the City. The appointment remains in effect unless the Board of Supervisors rejects it by a two-thirds vote (eight members) within 30 days following the transmittal of the Notice of Appointment. For more information on the appointment process, see City Attorney Opinion No. 2003-05, available on the City Attorney's website.

Charter bodies to which this appointment process applies include (references are to Charter sections):

- Airport Commission (§ 4.115)
- Arts Commission (§ 5.103)
- Civil Service Commission (§ 10.100)
- Commission on Aging (§ 4.120)
- Commission on the Environment (§ 4.118)
- Commission on the Status of Women (§ 4.119)
- Fire Commission (§ 4.108)
- Health Commission (§ 4.110)

- Human Rights Commission (§ 4.107)
- Human Services Commission (§ 4.111)
- Juvenile Probation Commission (§ 7.102)
- Library Commission (§ 8.102)
- Recreation and Park Commission (§ 4.113)
- War Memorial Board of Trustees (§ 5.106)

Boards and commissions created by ordinance that wield executive power must be appointed under Charter § 3.100(17).

Exclusively mayoral appointments not governed by Charter § 3.100(17). This second type of appointment process is a variant of the first. Again, the Mayor makes all appointments to the board or commission, but different rules govern when and whether the appointments are effective. In some cases, appointments are not effective until the Board of Supervisors approves them. In other cases, appointments are not effective immediately but become effective after a specified number of days if the Board does not disapprove them. Charter bodies to which this second type of appointment process applies include:

- Historic Preservation Commission (§ 4.135)
- Municipal Transportation Agency (§ 8A.102)
- Port Commission (§ 4.114)
- Public Utilities Commission (§ 4.112)

Mixed system of appointments, divided between the Mayor and the Board of Supervisors. The Charter provides a third type of appointment process, where the Mayor makes some appointments to the board or commission, and the Board of Supervisors (or Board President or Rules Committee) makes the remaining appointments. There are variations among these bodies as to whether appointments not made by the Board of Supervisors are subject to the Board's review and/or depend on the Board's approval. Charter bodies to which some variation of this mixed system of appointments applies include:

- Board of Appeals (§ 4.106)
- Building Inspection Commission (§ 4.121)
- Entertainment Commission (§ 4.117)
- Planning Commission (§ 4.105)
- Police Commission (§ 4.109)
- Small Business Commission (§ 4.134)
- Youth Commission (§ 4.122)

Mixed system of appointments, divided among other appointing authorities. This fourth type of appointment process is a variant of the third. Multiple authorities, but not limited to the Mayor and the Board of Supervisors, exercise the appointment power. Charter bodies to which some variation of this mixed system of appointments applies include:

- Elections Commission (§ 13.103.5)
- Ethics Commission (§ 15.100)
- Health Service Board (§ 12.200)
- Retirement Board (§ 12.100)
- Retiree Health Trust Fund Board (§ 12.204)

For the Elections Commission, the Mayor, Board of Education, Board of Supervisors, City Attorney, District Attorney, Public Defender, and Treasurer each appoint one member. For the Ethics Commission, the Mayor, Assessor, Board of Supervisors, City Attorney, and District Attorney each appoint one member.

The Health Service Board is comprised of two mayoral appointees, a member of the Board of Supervisors appointed by the Board President, an appointee of the Controller, and three members elected by participants in the Health Service System. The Retirement Board has three mayoral appointees, a member of the Board of Supervisors appointed by the Board President, and three members elected by participants in the Retirement System. The Retiree Health Trust Fund Board is comprised of one appointee each of the Controller, the Treasurer, and the Executive Director of the San Francisco Employees Retirement System, and two members elected by participants in the Health Service System.

Appointments to a few Charter boards and commissions do not conform to any of the four processes described above. One example is the Fine Arts Museums Board of Trustees (§ 5.105). Incumbent trustees elect new trustees. Appointments to citizen advisory panels the Charter prescribes, and appointments to the many advisory bodies created by the Board of Supervisors, often do not conform to these processes, either.

If the appointed official is required to file a Statement of Economic Interests (see Section V.E.), the appointing authority must provide written notice to the Ethics Commission of the name of the appointee within 15 days of the appointee's assuming office. Campaign and Government Conduct Code § 3.1-105 (hereafter "C&GC Code").

B. Residency and other requirements

In general, Charter section 4.101 governs residency and other requirements for appointees to City boards and commissions. Under this provision, members of Charter-created boards and commissions must be, and remain during their tenure, "electors." Charter § 4.101(a)(2). An elector is a person registered to vote in the City. Charter Art. XVII. The voter registration requirement subsumes other requirements: that members be (1) of legal voting age, (2) residents of the City, and (3) United States citizens. In a few cases, the Charter specifies that members of a board or commission need not be electors,

e.g., the Youth Commission (§ 4.123); Asian Art Commission (§ 5.102); and Fine Arts Museums Board of Trustees (§ 5.103).

For ordinance-created boards and commissions, the appointing officer or entity may waive the residency requirement if a qualified local elector cannot be located. In addition, the ordinance may specify that members need not be residents or of legal voting age, but may not dispense with the citizenship requirement. Charter § 4.101(a)(2).

Some boards and commissions must include members who are selected from a specified profession, trade, union, or business. The Ethics Commission may grant such appointees a waiver from certain conflict of interest laws (see Part Two, Section III(B)(1)(c)). The California Political Reform Act provides limited exceptions from its conflict of interest provisions for such appointees where the legislation creating the body contains certain findings. 2 C.C.R. § 18707.4.

If a commissioner fails to meet the requirements of the office after assuming office (for example, the commissioner ceases to be an elector), the commissioner has effectively resigned by operation of law. A commissioner should notify the appointing authority immediately if any change in circumstances renders the commissioner ineligible to serve.

C. Oath of office

To exercise the powers of the office, an appointed commissioner must take the oath of office prescribed by the California Constitution. Cal. Const. Art. 20, § 3. Thus, a member of a Charter board or commission or other policy body that exercises sovereign power must be sworn in before that person may act as a member of the body. Conversely, a member of a policy body that is purely advisory does not have to take an oath of office to serve on the body. Even if an oath is not legally required in such cases, members of the body may take a ceremonial oath.

D. Term and tenure

Under the Charter and applicable ordinances, the term of office for most members of appointive boards and commissions is four years. When a new board or commission is created in the Charter, or when new members are added to an existing Charter board or commission, the members must be appointed to staggered terms. Charter § 18.114. But a new Charter provision could expressly provide otherwise.

Once a term expires, the incumbent, if not replaced, may retain the office as a holdover member until a successor takes office, unless a specific Charter provision states otherwise. But, as we explain below, the Charter severely limits this general principle. A holdover member has the same powers and duties as other members of the body.

There are two important restrictions on the ability of a person to serve as a holdover member:

- The Charter may specifically prohibit a board or commission from having any holdover members. For example, the tenure of members of the Police Commission terminates at the end of their terms. Charter § 4.109.

- The Charter may limit the holdover period to 60 days. Charter § 4.101.5(b).

The 60-day limit is especially important because it applies to a large number of Charter bodies. The general rule is that a member of an appointive board, commission, or other unit of government of the executive branch of the City or otherwise created in the Charter, may serve as a holdover member only for 60 days after the member's term ends. Still, there are many bodies to which the 60-day limit does not apply. Charter § 4.101.5(a). It does not apply to holdover members of:

- The various arts-related boards and commissions in the Charter (the Arts Commission, Asian Art Commission, Fine Arts Museums Board of Trustees, the War Memorial and Performing Arts Center Board of Trustees).
- The Retirement Board, Retiree Health Trust Fund Board, and Health Service Board.
- Citizen advisory committees created in the Charter.
- Purely advisory bodies, in the executive branch of the City or elsewhere.

The term of an office and an individual commissioner's tenure in that office are not necessarily the same. The term of an office is generally a fixed period of time measured from a fixed anniversary date. For boards and commissions whose members have four-year terms, the term is generally measured as four years from the date a quorum of the entity was first sworn into office, unless the enabling legislation mandates a specific operative date. The term runs with the office, not with the individual occupant, and continues to run whether the seat is occupied or vacant. If, for example, a seat for an office with a four-year term is left open for six months after the term expires, the term of the office is four years, but the next commissioner – if appointed six months after the earlier term expired – would hold office only for the remaining three and one-half years of that term. The commissioner does not have a right to a full four years in office from the date of appointment.

III. Compensation and benefits

A. Compensation

The Board of Supervisors sets compensation, if any, for each City board and commission, except where other Charter provisions or controlling law specifies or bars compensation. Charter § A8.400.

B. Reimbursement of expenses

The City Controller has issued a written policy that specifies both the circumstances under which City employees and commissioners may receive reimbursement for travel and other expenses incurred when carrying out City business and the procedures for seeking reimbursement. The City Controller's reimbursement policy is available through its website, at <http://sfcontroller.org/>.

C. Health benefits

Charter sections 12.202 and A8.420 establish the City’s Health Service System and provide that City officers and other officers as provided by ordinance are entitled to health care benefits. Administrative Code section 16.700 lists those entities whose members are eligible to participate in the Health Service System.

IV. Obligations of commissioners

A. Commissioners are officers of the City

Once a commissioner takes the oath of office, the commissioner becomes an officer of the City. An office is a public trust and all officers must exercise their duties in a manner consistent with this trust. Charter § 15.103. Commissioners owe a duty of loyalty to the City and must carry out their duties in a manner that serves the City’s interests. (Please see Part Two for more information on the exercise of this public trust.)

In some cases, commissioners, by law, must be selected from a certain neighborhood, community or professional group. But such commissioners owe their duty of loyalty to the entire City. They do not just represent a neighborhood, community or profession, although they may bring to their service a greater knowledge of or appreciation for the needs of that group. These commissioners, like all commissioners, must act in the City’s interests.

B. Attendance

The Charter does not generally set specific attendance requirements for commissioners. (An exception is Charter section 4.123, which sets attendance requirements for Youth Commissioners.) Nonetheless, attending meetings is a fundamental part of a commissioner’s duties. Repeated failure of for-cause commissioners to attend meetings could constitute official misconduct, which could lead to removal from the commission. Further, failing to attend meetings over a period of time could result in a finding that a commissioner has abandoned the position, causing the removal of the commissioner. San Francisco Administrative Code § 16.89-17 (the “Admin. Code”).

Boards and commissions do not have the general authority to adopt a rule about removing a member for failure to attend meetings. Ordinances or resolutions creating policy bodies sometimes contain attendance requirements and may specify that a member’s failure to satisfy those requirements shall terminate the member’s service on the body. In any event, a board or commission, whether created by Charter, ordinance, or resolution, may adopt a rule requiring that the body notify the appointing authority when a member misses a certain number of meetings over a specified period of time.

It is important that members of boards and commissions regularly attend meetings not only so that they may contribute to the work of the body but also to assure that a quorum is present so that meetings may be held. To address these concerns, the Mayor has issued

standards for commissioner attendance, and the Board of Supervisors has passed a resolution urging boards and commissions to adopt internal policies regarding members' attendance at meetings. Both of these documents are included in the Appendix to this Guide.

C. Conduct of commissioners

The Charter and the Municipal Code do not specifically set forth a “code of conduct” for commissioners. But as we explain throughout this Guide, many state and City ethics and sunshine laws govern the actions of commissions and their members. As noted above, commissioners must comport themselves in a manner consistent with the public trust. Under the Charter, wrongful behavior by a public officer in relation to the duties of office, including conduct that “falls below the standard of decency, good faith and right action impliedly required of all public officers” is official misconduct, which may result in removal from office. Charter § 15.105(e).

Some commissions choose to adopt codes of conduct for their members. So long as the code of conduct is consistent with state and local law, a commission is free to do so. Even without a code of conduct, commissioners are bound to act in a manner to uphold the public trust.

D. Roles of commissioners

When carrying out the functions the Charter and Municipal Codes assign to them, different boards and commissions may serve in different roles. Most act, either exclusively or primarily, as administrative or executive bodies. These bodies set policies for, approve actions of, and oversee departments. In setting policies to implement legislation, these bodies act in a “quasi-legislative” role, for example, by adopting regulations that flesh out the details of ordinances.

Some boards and commissions act, primarily or frequently, in a “quasi-judicial” role. When acting in a quasi-judicial capacity, the body adjudicates matters between private parties, or, more typically, between the City and private parties or employees. For example, granting or revoking a regulatory permit is a quasi-judicial decision, as is disciplining an employee. Boards and commissions that most frequently act in a quasi-judicial capacity include the Board of Supervisors when hearing appeals from certain land use decisions; Assessment Appeals Board; Board of Appeals; Civil Service Commission; Entertainment Commission; Ethics Commission; Fire Commission; Planning Commission; Police Commission; and Rent Board.

When acting in a quasi-judicial capacity, members of boards and commissions function like judges. Thus, they must take care to ensure that the parties appearing before them receive due process. Due process requires fair adjudicators. Commissioners must listen to the evidence presented before making decisions and base their decisions on the evidence in the record before them and on the governing law. Frequently, bodies that act in a quasi-judicial capacity adopt rules addressing the procedures for adjudicative hearings and the conduct of commissioners regarding evidence and witnesses.

E. Financial disclosure form

Within 30 days of assuming office, a commissioner must file a financial disclosure form with the Ethics Commission. The commissioner must then file an annual financial disclosure form on or before April 1st of each year and within 30 days of leaving office. These forms are called “Statements of Economic Interests,” and are also known as “SEIs” or “Form 700s.” The list of local appointed officials and employees who are required to file SEIs is set forth in San Francisco’s Conflict of Interest Code in Chapter 1 of Article III of the San Francisco Campaign and Governmental Conduct Code. These forms are public records available for anyone to review. (For more information on SEIs, see Part Two.)

F. Annual Sunshine, ethics, and sexual harassment training

Each commissioner must complete an annual sunshine training required by the Sunshine Ordinance. Admin. Code § 67.33. State law also requires commissioners to attend ethics and sunshine training every two years. California Government Code (hereafter “Cal. Govt. Code”) § 53235. Every commissioner must file declarations with the Ethics Commission stating that the commissioner has complied with these requirements. The Ethics Commission provides forms for this purpose at its office and on its web page. The City Attorney’s Office, in cooperation with the Ethics Commission and the Sunshine Ordinance Task Force, provides training options to satisfy these requirements. In addition, self-study materials are available on the City Attorney’s website.

The City provides sexual harassment training for its employees who are supervisors as required by state law. Cal. Govt. Code § 12950.1. Even though many commissioners and board members are not City employees, most commissions and boards do have authority over at least one employee. Therefore, the City recommends (and in some cases requires) this training for commissioners and board members. Information regarding this training is available from the City Attorney’s Office.

v. Leaving office

A. Removal

Many members of boards and commissions serve “at will,” and can be removed at the pleasure of the Mayor or other appointing authority at any time and without cause. Other commissioners may be removed only “for cause.” The Charter provision establishing each board or commission should be consulted to determine whether its members are “at will” or “for cause.”

“For cause” commissioners may only be removed through the Charter’s official misconduct process, set forth in section 15.105. That provision defines official misconduct as:

[A]ny wrongful behavior by a public officer in relation to the duties of his or her office, willful in its character, including any failure, refusal or neglect of an officer to perform any duty enjoined on him or her by law, or conduct that falls below the standard of decency, good faith and right action impliedly required of all public officers and including any violation of a specific conflict of interest or governmental ethics law. When any City law provides that a violation of the law constitutes or is deemed official misconduct, the conduct is covered by this definition and may subject the person to discipline and/or removal from office.

Charter § 15.105(e). Removal is also mandatory upon conviction of a felony involving moral turpitude. Charter § 15.105(c).

The removal process begins with the appointing authority (often but not always the Mayor) suspending the officer. Charter §§ 15.105(a), (b). The appointing authority must immediately notify the Ethics Commission and Board of Supervisors of the suspension in writing. Upon suspension of the commissioner, the appointing authority must appoint a qualified person to discharge the duties of the office during the suspension.

The appointing authority must present written charges against the officer to the Ethics Commission and Board of Supervisors at or before their next regularly scheduled meetings following the suspension. The appointing authority must also immediately furnish a copy of the charges to the officer, who has the right to appear with counsel to defend himself or herself in a hearing before the Ethics Commission.

Following the hearing, the Ethics Commission must recommend to the Board of Supervisors whether the charges should be sustained. If, after reviewing the complete record, the Board of Supervisors sustains the charges by no less than a three-fourths vote of all eleven members (i.e., nine votes), the suspended officer is removed from office. If the charges are not sustained, or not acted on by the Board of Supervisors within 30 days of receipt of the record from the Ethics Commission, the suspended officer is reinstated.

B. Recall

In a few instances, the Charter permits removal of commissioners through the recall process. The voters may recall members of the Airport Commission, Ethics Commission, Port Commission, and Public Utilities Commission. Charter §§ 4.114, 14.103(a). A voter may not initiate a recall petition until the officer has held office for six months.

C. Resignation

Any member of a City board or commission may resign by presenting a written resignation to the Mayor or other body or officer that appointed the member. Admin. Code § 16.89-15. An oral statement of resignation is not sufficient. The resignation becomes effective at the time the appointing authority receives it, unless the written resignation provides for a later effective date. Admin. Code § 16.89-16. For example, a notice of resignation could state that the resignation will become effective on a specific date or once the appointing officer designates a new appointee. An offer of resignation, while indicating the office holder's

willingness to vacate the office, does not, by itself, constitute a resignation, even if in writing.

Once a resignation is effective, neither the member nor the appointing officer may rescind it. As a general rule, the appointing officer could appoint the former commissioner to the vacancy the resignation created. But the reappointment would be subject to the normal rules governing appointments to that board or commission.

For more information on the resignation process, see City Attorney Opinion No. 2007-01, "Laws Governing Resignations of Appointed City Officers," available through the Legal Opinions section of the City Attorney's website.

D. Resignation by operation of law

As previously discussed, if a commissioner no longer meets the eligibility requirements to serve on a board or commission, the commissioner may no longer serve, regardless of whether the commissioner has formally submitted a resignation.

E. Post-separation processes

Within 15 days after a member leaves office for any reason, the appointing officer must provide written notice to the Ethics Commission of the name of the person leaving office. C&GC Code § 3.1-105.

VI. The roles of commissions, their members, and their staff

A. Powers, duties, and restrictions relating to commissions

1. Powers and duties

Charter section 4.102 sets forth the powers and duties of boards and commissions in the executive branch. Section 4.102 provides that each board or commission shall:

- 1) Formulate, evaluate and approve goals, objectives, plans and programs and set policies consistent with the overall objectives of the City, as established by the Mayor and the Board of Supervisors through the adoption of legislation;
- 2) Develop and keep current an Annual Statement of Purpose outlining its areas of jurisdiction, authorities, purpose and goals, subject to review and approval by the Mayor and the Board of Supervisors;
- 3) After public hearing, approve applicable departmental budgets or any budget modifications or fund transfers requiring the approval of the Board of Supervisors, subject to the Mayor's final authority to initiate, prepare, and

submit the annual proposed budget on behalf of the executive branch and the Board of Supervisors' authority under Charter section 9.103 (each department is responsible for providing the Mayor and Board of Supervisors with a mission-driven budget that describes each proposed activity of the department and the cost of the activity, under Charter § 9.114);

- 4) Recommend to the Mayor, for further submission to the Board of Supervisors, rates, fees and similar charges for items coming within the body's jurisdiction;
- 5) Unless the Charter provides a different procedure for appointing department heads, submit to the Mayor at least three nominees, and if rejected, make additional nominations in the same manner, for the position of department head, subject to appointment by the Mayor. (The three-nominee process is intended to give the Mayor a range of choices. If the Mayor does not object, the board or commission may submit fewer than three names. The Mayor may indicate a preferred nominee before the body submits its nominee(s), but the body does not have to honor the Mayor's preference. The Mayor may also decline to accept any of the body's nominees and ask for further nominations. See City Attorney Opinion No. 2010-01.);
- 6) Remove a department head; if the Mayor recommends removal of a department head to the board or commission, the body must act on the recommendation by removing or retaining the department head within 30 days; failure to act on the Mayor's recommendation is official misconduct (under Charter section 4.109, the Mayor, acting independently of the Police Commission, may remove the Chief of Police);
- 7) Conduct investigations into any aspect of governmental operations within its jurisdiction through the power of inquiry, and make recommendations to the Mayor or the Board of Supervisors;
- 8) Exercise such other powers and duties as prescribed by the Board of Supervisors; and
- 9) Appoint an executive secretary to manage the affairs and operations of the board or commission.

To carry out its duties, a commission may hold public hearings and take testimony. Charter § 4.102(10). In addition, relative solely to the affairs under its control, a commission may examine the department's documents, hold public hearings, subpoena witnesses, and compel production of documents. Charter § 16.114.

2. Restrictions on commissions

Along with giving powers to commissions, Charter section 4.102 also restricts how a commission may deal with the administrative affairs of its department:

Each board or commission, relative to the affairs of its own department, shall deal with administrative matters solely through the department head or his or her designees, and any dictation, suggestion or interference herein prohibited on the

part of any member of a board or commission shall constitute official misconduct; provided, however, that nothing herein contained shall restrict the board or commission's power of hearing or inquiry as provided in this Charter.

This restriction, which originated in the 1932 Charter, establishes a chain of command that governs the operation of departments under commissions. The commission sets policy and communicates that policy to the department head, who in turn is responsible for its execution. See City Attorney Opinion 90-01. There is no prohibition against a board or commission dictating administrative policy for its department, so long as it proceeds in the manner provided by the charter.

The requirement that a commission address administrative matters solely through the department head does not apply to actions taken through the commission's power of hearing or inquiry. Charter § 4.102. "The commission's power of inquiry includes the authority to call any department officer or employee before the commission to answer questions regarding the operations of the department. But if the commission wants to make changes in departmental operations as a result of those inquiries, it must still address its directives to the department's chief executive officer." City Attorney Opinion 90-01, p. 4.

B. The role of and restrictions on individual commissioners

The Charter places the power and duties of a board or commission in the body as a whole, not in individual members. Charter § 4.102. The Charter, as well as State law and the City's Sunshine Ordinance, requires boards and commissions to act at public meetings. Charter § 4.104(a)(2); Cal. Govt. Code § 54953(a); Admin. Code § 67.5. A quorum of the board or commission must be present for the body to act. Charter § 4.104(b); see also Cal. Govt. Code § 54952.6 (defining "action taken" as a collective decision or commitment made by a majority of members of the body). Thus, commissioners lack the authority, as individuals, to exercise powers of the board or commission, although the body may designate individual commissioners to perform assigned duties, such as monitoring the progress of a departmental program and reporting on the program to the body.

In addition, as noted above, Charter section 4.102 provides that "any dictation, suggestion or interference [in administrative affairs] herein prohibited on the part of any member of a board or commission shall constitute official misconduct" Thus, in addition to requiring that a board or commission deal with administrative matters solely through the department head or the department head's designees, section 4.102 prohibits individual members of boards and commissions from dictation, suggestion, or interference in administrative matters. This prohibition does not prevent individual commissioners from requesting information from the department head about the department's operations. With the department head's consent, commissioners may also seek information directly from department staff.

C. The role of commission officers

Unless the board or commission's rules or enacting legislation provide otherwise, neither the president nor vice-president of a body has any greater authority than any other member. As noted below, the Charter permits a board or commission to adopt rules and regulations consistent with the Charter and City ordinances. Charter § 4.104(a)(1). Under this authority, most Charter boards and commissions adopt rules providing for the election of a president and possibly other officers. The president presides over meetings and may call special meetings of the body. Cal. Govt. Code § 54956(a); Admin. Code § 67.6(f).

If the board or commission so chooses, it may give additional powers to the president in its rules or bylaws. Frequently, such rules authorize the president, operating often in conjunction with the department head, to set agendas for meetings. In addition, some rules authorize the body's president to create committees and/or assign members to committees, or to act as a spokesperson for the body. Even if not formalized by rule or bylaw, in some instances the longstanding custom or practice of a board or commission will include the president's exercising some of these powers, such as setting the agenda for meetings and on occasion serving as the body's spokesperson. When speaking publicly regarding the business of the body, the president must clearly state whether the president is speaking personally or for the body. If the latter, the president must have authority to do so.

Typically the vice-chair of a board or commission will preside over meetings in the chair's absence. If the vice-chair also is absent, the body should begin its meeting by voting to determine which member will serve as acting chair for that meeting.

D. The role of a department head

The Charter and Administrative Code set forth the responsibilities of department heads. The department head is responsible for the administration and management of the department. Charter § 4.126; Admin. Code § 2A.30. Among other things, department heads may:

- Appoint qualified individuals to fill positions within the department that are exempt from the civil service provisions of the Charter, and discipline or remove such employees. Charter § 4.126; Admin. Code § 2A.30.
- Act as the appointing officer under the civil service provisions of the Charter for the appointing, disciplining, and removal of employees. Admin. Code § 2A.30; Charter § A8.329.
- Issue or authorize requisitions for the purchase of materials, supplies, and equipment required by the department. Admin. Code § 2A.30.
- Adopt rules and regulations governing matters within the jurisdiction of the department, subject, if applicable, to Charter section 4.104(a)(1). Charter § 4.126.
- With the approval of the City Administrator, reorganize the department. Charter § 4.126.

Thus, the department head acts as the day-to-day manager of the department, subject to the direction of the board or commission and the Mayor. Unless the Charter or Municipal Code expressly provide otherwise, the law does not require the department head to seek the body's approval before signing contracts and making other decisions on behalf of the department. Nevertheless, the board or commission and the department head may choose as a matter of policy which matters warrant the body consideration.

Department heads under a board or commission generally serve at the pleasure of the body. Unless the Charter expressly provides otherwise, only the board or commission may remove the department head. One exception to this principle is that the Mayor acting alone, in addition to the Police Commission, may remove the Chief of Police. Charter § 4.109. And one exception to the principle that department heads serve "at will" is that, following a probationary period for the Director of Elections, the Elections Commission may remove the Director only "for cause." Charter § 13.104. Further, as previously noted, the Mayor may request that a board or commission remove its department head, and the body must act, one way or the other, on that request within 30 days. But the board or commission, not the Mayor, must make the final decision whether to remove the department head. Charter § 4.102(6).

The Charter does not specify who becomes department head when the position becomes vacant, for example, due to resignation, retirement, death, or incapacity to serve. Yet at all times someone must have the powers of the department head. The person who is serving in the next highest position in the department, i.e., the person whom the department head typically designates to run the department when the department head is absent, will function as department head until a new department head is appointed. See, for instance, Memorandum to San Francisco Police Commission re Designation of Assistant Chief Godown to fulfill the duties of Chief of Police, dated January 12, 2011, available on the Legal Opinions section of the City Attorney's Office's website.

E. The role of commission secretary

Subject to the budgetary and fiscal provisions of the Charter, each Charter board or commission may appoint a secretary to manage the affairs and operations of the body. Charter § 4.102(9). Generally, the secretary is responsible for: arranging board or commission meetings; preparing and distributing notices, agendas, minutes, and resolutions of the body; providing information to the public regarding the body's affairs; maintaining its files and records; and carrying out additional duties as directed by the body. The secretary is also responsible for notifying commissioners of mail, including e-mail, addressed to them, and for ensuring that they have an opportunity to read such mail if they so choose.

Usually, a board or commission secretary is appointed by and serves at the pleasure of the body. The secretary's duty is to the body as a whole, not to individual members. Accordingly, a commissioner does not have the right to demand from the secretary reports, favors, or special considerations beyond what the commissioner is entitled to as a member of the public. If a commissioner wants information that will require a significant amount of

staff or secretarial time, the commissioner should bring the request to the commission to determine whether the secretary (or other staff) should pursue the task.

F. The role of the City Attorney

The City Attorney is the legal counsel for the City. In that capacity, the City Attorney's Office represents the City and its officers and employees in lawsuits; drafts and approves legislation, contracts, and other documents; and provides legal advice to the City and its officers and employees. Charter § 6.102. The City Attorney's powers and duties include the broad range of functions that attorneys customarily perform for clients in both the public and the private sectors. Likewise, the attorneys in the City Attorney's Office are subject to the same rules of professional conduct that apply to all attorneys in California.

1. The City is the client of the City Attorney's Office

The City as a whole is the client of the City Attorney. While the City can act only through individual officers and employees or constituent bodies, such as boards and commissions, those City actors are not separate clients of the City Attorney's Office. Accordingly, the Office does not have a conflict of interest in advising multiple City officers and departments, who often may have differing policy views about issues giving rise to the need for legal advice. See, e.g., *Ward v. Superior Court*, 70 Cal.App.3d 23 (1977). The Office does not have a separate attorney-client relationship with individual officers or entities who act on the City's behalf.

A Deputy City Attorney assigned as counsel to a department will typically become familiar with and often expert in laws affecting that department, and may gain an understanding of its special needs and interests. But, based on subject matter expertise, the Deputy may be assigned a task, such as drafting an ordinance for a member of the Board of Supervisors, that is at odds with the department's views or preferences. In a similar vein, a Deputy City Attorney may be responsible for drafting, for different Supervisors, different ordinances on the same subject that may have policy objectives that are sharply at odds with each other.

For more information on the City as a whole being the client of the City Attorney, see the memorandum entitled "Client of the City Attorney" (December 12, 2003), available online at the City Attorney's website.

This legal principle stems from two authorities: San Francisco's Charter and the California Rules of Professional Conduct. Charter section 6.102 designates the elected City Attorney as the legal representative of the City as a whole. The purpose of creating an elected City Attorney was to ensure that the City Attorney would serve the people of San Francisco rather than any particular City official. "Made appointive by either a Mayor or Chief Administrative Officer, [the City Attorney] would be exposed to the possibility of conflicting allegiances." Francis V. Keesling, *San Francisco Charter of 1931*, at p. 41 (1933). With one City Attorney representing the City as a whole, the City speaks with one voice on legal issues and avoids the chaos, as well as taxpayer expense, that would result if each City department could hire its own counsel to represent its view of the City's interests.

The California Rules of Professional Conduct also provide that the City as a whole is the client of the City Attorney. The Rules specify that when representing any organizational client, whether a corporation or a municipality, a lawyer must treat the organization as the client, acting through the highest officer, employee, or constituent part overseeing each particular issue. Cal. Rules of Prof. Cond. 3-600(A); see also Rule 1.13, ABA Model Rules of Prof. Cond. Thus, the City Attorney generally does not have a conflict in representing multiple persons and/or bodies that are part of City government. For example, the State Bar has explained that a city attorney, asked to advise both a mayor and a city council regarding the power to adopt an ordinance where the two city actors disagreed on the legality and appropriateness of the action, does not have a conflict of interest and may advise both the mayor and the city council. Both have a role, at different times, in speaking for the city on the legislation, and neither may sue the other over the dispute. See Cal. State Bar Ethics Op. No. 2001-156.

Notwithstanding its primary role in representing the City, the City Attorney's Office may enter in other types of attorney-client relationships. First, the City Attorney, under to a contractual arrangement, sometimes represents separate legal entities that are related to but not part of the City, such as the San Francisco County Transportation Authority or the Successor Agency to the San Francisco Redevelopment Agency. In addition, as required by state law, the City Attorney sometimes represents officers and employees in their individual capacities in tort lawsuits against them for acts performed in the course and scope of their City employment.

2. Attorney-client privilege

Non-public advice that the City Attorney provides to City officials acting in their official capacities is confidential and privileged. See Cal. Evid. Code §§ 952, 954; Cal. Rule of Prof. Cond. 3-100.

Only the City, acting through the body or office to whom the City Attorney directs the attorney-client communication may waive the attorney-client privilege. See Cal. Evid. Code § 912; *People ex rel. Lockyer v. Superior Court*, 83 Cal. App. 4th 387, 398 (2000); *Ward v. Superior Court*, 70 Cal.App.3d 23, 35 (1977); Cal. Rule of Prof. Cond. 3-600. When the City Attorney provides confidential advice directly to an individual City officer or employee, only that individual recipient may waive the privilege on behalf of the City.

When the City Attorney provides confidential advice to a board or commission, only the body to whom the City Attorney directs the communication – and not its individual members – may waive the privilege and disclose the confidential information. And, because the privilege is held by the body as an institution rather than the particular individuals constituting the body at the time it received the legal advice, the body may waive the privilege at any time, including in the future when the membership of the body has changed.

Because of the sensitivity of confidential legal advice this Office provides, City officials should not waive the privilege by disclosing the advice without conferring with the City Attorney's Office first. For additional guidance concerning waiver of the attorney-client privilege, consult the City Attorney's August 20, 2009 Memorandum entitled "Disclosure of

Attorney-Client Privileged Advice from the City Attorney’s Office” available on the City Attorney’s Legal Opinions webpage.

3. Respecting confidences within City government

While the City is the client of the City Attorney, when an individual City actor requests advice and asks that the request not be shared with others, the practice of the City Attorney’s Office is to honor that request to the extent possible. This practice allows each City official to obtain the legal advice the City official needs to perform organizational functions, without concern that the discussions will be shared with someone with whom the official has a policy disagreement.

This practice is based on principles of comity and prudence. The City Attorney respects the autonomy, needs, and policy views of different entities and individuals in City government and recognizes there may be disagreements among them. Further, if the City Attorney’s Office freely disclosed within City government its legal advice given to subparts of the government, officials and employees would probably become less inclined to seek legal advice, which would be contrary to the best interests of the City.

But this practice of respecting confidences within City government does not entitle an officer or employee to have the City Attorney withhold that same advice from other persons or entities acting on behalf of the City. Because the City as a whole is the client of the City Attorney’s Office, no breach of attorney-client confidentiality arises from sharing such communications within City government. To the contrary, one of the roles of the City Attorney’s Office is to provide consistent, objective legal advice to all affected policy makers. If two City officers ask for confidential legal advice on the same question, the City Attorney will provide the same legal advice to each of them. For the same reasons, City officers and employees need to understand that they may not demand that a deputy city attorney not consult with other deputy city attorneys on a legal matter. Each deputy city attorney will consult with the appropriate colleagues to ensure the accuracy and consistency of the advice to be provided.

The City Attorney may share advice with multiple City officials in other limited circumstances. For example, if a member of the Board of Supervisors requests this Office to draft an ordinance that the Office believes raises serious legal questions, we will advise the member about the legal problems, but will also provide the same advice to the full Board of Supervisors and the Mayor if the ordinance is introduced. And in limited circumstances, where an official has a legally recognized “need to know,” the City Attorney will have to share information obtained from one part of City government with that official.

4. Due process screens

At times the City Attorney will assign one team of lawyers to a City board or commission that is adjudicating a matter, such as an appeal of a permit, tax assessment, or employment decision, and will assign a separate team of lawyers to the departmental staff appearing before the board or commission. The two teams do not share information about the pending matter. In such a circumstance, the City is still the client and the City Attorney’s Office’s provision of advice to and representation of both entities does not pose a conflict

of interest. But to protect the due process interests of persons appearing before the adjudicating board or commission, the City Attorney assigns and screens off from one another separate lawyers to advise that body and to represent the City department presenting the matter to the body.

5. The City Attorney's role in providing ethics and open government advice

The preceding discussion about the role of the City Attorney is particularly relevant to legal advice this Office provides to public officials about the ethics and open meeting laws discussed in the other parts of this Guide. When City officers and employees seek advice on ethics laws or open meeting laws, the City Attorney's Office does not provide that advice to the officer or employee in that person's individual capacity, but rather in that person's capacity as a City actor performing City duties. The individual City officer or employee does not have a separate attorney-client relationship with the City Attorney's Office.

The City Attorney's Office generally does not disseminate the information a person provides when seeking assistance in complying with these laws, nor does the Office disclose oral advice that it has provided to individual officers or employees unless the individual consents to the disclosure. But the Office may share that information or advice with other City officials who require that information to perform their functions. For example, if this Office advises a member of a commission not to participate in the commission's discussion on a contract because of a conflict of interest and a third party later asks the Office whether the commissioner has a conflict, we generally will decline to discuss the details of our advice. But if that commissioner proceeds to vote on the contract anyway, the City Attorney's Office will advise the full commission that the individual commissioner has a conflict of interest. The commission requires this information because the conflict of interest could invalidate the commission's actions on the contract.

The Office encourages City officials to contact us for advice before taking any action that could violate the ethics laws described in this Guide. The Office does not provide ethics advice to individual officials about activities that have already occurred, except in rare instances when the Office may advise about whether a potential conflict affected the validity of an official action or could compromise other official City business.

Finally, the Sunshine Ordinance states that the City Attorney shall not act as counsel to a City employee or custodian of a public record for purposes of denying access to the public. Admin. Code § 67.21(i). This provision does not prohibit the City Attorney from performing the Charter-mandated function of advising departments on all legal matters, including public records issues. Where the law permits or requires a department to deny a public records request, the City Attorney is duty bound under the Charter and Rules of Professional Conduct to so advise the department upon request. But this provision serves as a reminder that in performing that advisory function, the City Attorney must remain faithful to state and local open government laws and decline to defend denial of access to a public record where no plausible legal basis supports denial.

G. City contracting laws

City law requires competitive bidding on most contracts to protect against fraud, corruption, and favoritism as well as to ensure that honest bidders participate in the contracting process. See, e.g., Admin. Code § 21.1. City officers and employees must follow these processes when awarding any City contracts. While public City Attorney opinions and other City resources explain these laws in greater detail, we mention them here to stress the importance of ensuring fair processes in government contracting decisions.

VII. Operations of boards and commissions

A. Governing law

The Charter sets forth the general powers and duties of City boards and commissions in sections 4.102-4.104. The Charter often provides more specific powers and duties for each Charter body. Also, the Municipal Code establishes additional duties for some boards and commissions.

In addition to the local laws that govern boards and commissions, some state laws affect their operations. For example, as described in Part Three, state open meeting and public records laws, along with their local counterparts, apply to the operations of City bodies.

This section summarizes some of the principles pertaining to the operation of boards and commissions. Certain aspects of this subject are also discussed in Part Three,.

B. Rules and regulations

In addition to the laws described above, a board or commission may adopt rules and regulations consistent with state and local law. Charter § 4.104(a)(1). These bodies often adopt regulations that specify the manner in which they will implement the duties given them in the Charter or in an ordinance, or clarify ambiguities in laws they are charged with enforcing.

A board or commission seeking to adopt, amend or repeal a rule or regulation must give at least ten days' notice of a hearing regarding such a proposal. Charter § 4.104(a)(1). The board or commission should post notice of the hearing in the same manner as other meeting notices – at the Main Public Library, and on the board or commission's website. It may be a stand-alone notice, but it is also permissible to include the notice on the agenda for a meeting of the board or commission, if it is displayed prominently on the agenda and readily visible to the reader. Whatever the form of the notice, it must comply with the ten-days requirement.

A copy of the rules and regulations, once adopted, must be filed with the Clerk of the Board of Supervisors and be available at the central office of the board or commission and at the Main Public Library. Charter § 4.104(a)(1); Admin. Code §§ 8.15, 8.16.

A board or commission's rules of order or bylaws address matters relating to the operation of the body that are not addressed by the Charter, Municipal Code, or other state or local laws. Such rules may address matters such as the election, terms, and duties of officers; the establishment of the body's regular meeting time and place; the procedure for setting agendas; the procedure for consent calendars (if any); and procedures relating to the establishment and appointment of committees of the board or commission. The bylaws of many bodies provide that Roberts' Rules of Order govern the commissions' operations where the bylaws do not address a matter. But, just as a commission may not adopt any rule that conflicts with state or local law, it may not rely on a provision of Roberts' Rules that is inconsistent with those laws. Subject to state and local law, boards and commissions are ultimately responsible for construing their bylaws.

C. Quorum

Generally, under the Charter, a majority of the voting members of a board or commission constitutes a quorum for the transaction of business. The majority must consist of a majority of the number of members designated by law, rather than the number of seats actually filled. Charter § 4.104(b). See also Cal. Govt. Code § 54952.2(a) (defining "meeting" by reference to majority of members); Admin. Code § 67.3(b) (same).

Many boards and commissions have seats designated for persons with certain backgrounds, characteristics or expertise. For example, seats may be divided among two or more appointing authorities; may be designated for members with ties to a neighborhood, the community, a profession, or possessing some other credential or experience; or may be reserved for particular types of individuals, such as the disabled. As a general rule, unless the law creating the body with the restricted seat expresses a contrary intent, such a body may conduct business where a restricted seat is vacant so long as the body has and retains a numerical quorum.

When a quorum of a board or commission fails to attend a scheduled meeting or the body loses a quorum because of the departure of some of its members, the only official actions that the body may take are to: (1) fix the time to which to adjourn; (2) adjourn the meeting; (3) recess the meeting; or (4) take measures to secure a quorum. See generally Cal. Govt. Code §§ 54955, 54955.1. Any other action taken by the body is void.

Once a meeting ceases, members of the board or commission may remain to discuss any matter they choose among themselves or with the members of the public who have attended. If documents are collected, notes taken, or a recording made, they may be presented at the next meeting of the board or commission so that they may become part of its record.

If there is a lack of a quorum at a meeting of a board or commission that has committees, the parent body may not reconstitute itself as a committee of the whole or as one of its committees, even if a quorum of that committee happens to be present. Such a committee meeting would require a separate notice and posting of an agenda for a meeting of that particular committee.

D. Voting

Boards or commissions may not vote by secret ballot. They must conduct all votes, other than those permitted in a closed session, publicly. Further, an absent member may not vote by proxy. See generally Charter §§ 2.104, 2.108, 4.104(a)(3), 4.104(b); Cal. Govt. Code § 54953(c); Admin. Code §§ 1.29, 67.16.

Also, once it has taken an action, the policy body must disclose the action and announce the vote of each member of the body. Cal. Govt. Code § 54953(c)(2). Similar but more specialized rules govern disclosing of actions taken and votes in closed session. With certain exceptions, members of boards or commissions must vote on every matter before them. First, as we note elsewhere in this Guide, a member may not vote on a matter where the member's vote would violate a conflict of interest law. Second, by a majority vote of members present, a board or commission may excuse a member from voting on a matter for any reason. Charter §§ 2.104(b), 4.104(b); Admin. Code § 1.29. Also, as we discuss elsewhere in this Guide, as a general rule, if the body is hearing an adjudicative matter, such as deciding whether to grant a permit application, participation of a member who has not been present during part of the hearing and has not reviewed the evidence that was submitted during the member's absence would violate due process rights of the party before the body.

The Charter requires that the number of votes necessary to approve an action (i.e., majority, 2/3, 3/4, etc.) be based on the total number of seats, rather than the number of seats currently filled, the number of members present, or the number of members qualified to vote on the item. Charter § 4.104(b). But a board or commission may adopt a rule or bylaw that authorizes the body to decide procedural matters based on a majority vote of the members present, provided a quorum is present. Charter § 4.104(b).

E. Election of officers

As we describe above, boards or commissions generally adopt rules establishing officers and terms for the officers. Some of these bodies establish in their bylaws or rules a particular method for electing officers. Voting for officers, like all votes, must occur publicly and only after there has been an opportunity for public comment.

Where a board or commission has not adopted a specific process for electing officers, it may look to Roberts' Rules of Order for guidance. Roberts' Rules of Order provide several methods for electing officers. City bodies frequently use the following process. First, the presiding officer takes public comment on the agenda item. Then the presiding officer requests nominations for the office from the members of the body. No second is required under Roberts' Rules of Order. When no additional nominations are offered, the presiding officer closes the nominations. The commission then votes on the nominations in the order they were received. The first candidate to receive a majority of the votes is elected to the office.

F. Vacancies on boards and commissions

By the end of each calendar year, the Board of Supervisors and the Mayor must prepare a list of all boards, commissions, and committees for which they have the power to make appointments, showing current appointees and date of appointment and qualifications for office, and the expiration dates for each term,. The appointing authority must give public notice as specified by law of any unscheduled vacancy to enable citizens to pursue the opportunity to participate in and contribute to the operations of local government. Cal. Govt. Code §§ 54970-74.

VIII. Role of the Board of Supervisors: Charter section 2.114, the prohibition against interference in administration

The Charter establishes the Board of Supervisors (“Board”) as the City’s law-making body. In support of that function, the Charter confers upon the Board the “power of inquiry and review” regarding all matters affecting the conduct of any City department or office. Charter § 16.114. The Charter also gives the Board broad powers regarding the budget. Further, except for individual personnel and specific contract matters, the Charter generally allows the Board to adopt legislation setting policies governing the operations of individual departments. Charter § 2.114.

At the same time, the Charter is based on a strict principle of separation of powers between the Board, as the legislative branch, and the executive branch under the Mayor, City Administrator and the various City boards, commissions, and executive officers. Therefore while the Board may adopt legislation setting policies for the executive branch, such legislation may not authorize the Board to exercise, administer or oversee the administration of those policies.

The Charter’s noninterference provision establishes two central rules:

- Members of the Board must generally communicate with departments through the department heads unless the Board is formally exercising its power of inquiry under Charter section 16.114 or a Board member is testifying regarding administrative matters, other than specific contract and personnel matters, at a public meeting of a City board or commission.
- Neither the Board, its committees, nor any of its members may “dictate, suggest, or interfere with” administrative actions of the City Administrator, or of department heads under the City Administrator or department heads under the City Administrator, or under the boards and commissions of the executive branch. But with some exceptions, the Board may adopt ordinances regarding administrative matters, again, other than specific contract and individual personnel decisions. And the Board may adopt nonbinding resolutions exhorting a particular department to change the way it operates.

Under the Charter, violation of section 2.114 constitutes official misconduct. See Section V(A) above for a description of official misconduct proceedings.

A. Communications between the board of supervisors and a department

1. General rule

Section 2.114 provides that members of the Board must communicate with City departments only through the City Administrator for departments under the City Administrator, or through the department head or responsible board or commission for other City departments. Board members may also contact other department employees whom the department head has designated, and may contact the deputy in charge of the department in the department head's absence.

This directive broadly covers all communications addressing administrative "or other functions" for which departments are responsible.

2. Exception: exercising the power of inquiry

As we describe above, it is generally improper for a Board member to contact department employees without the consent of the department head. But in the context of an official Board inquiry into a department's operations, the Board or a member authorized by the Board may contact directly any City employee having potentially relevant knowledge. Charter § 16.114.

As a legislative body, the Board of Supervisors has a broad right to seek information about the governance of the City. Charter § 16.114. Courts have interpreted broadly the scope of inquiry related to the legislative process:

"The Legislature's right to obtain accurate and up-to-date information on matters of public concern cannot be disputed. "The power of inquiry has been employed by Congress throughout our history, over the whole range of the national interests concerning which Congress might legislate or decide upon due investigation not to legislate; it has similarly been utilized in determining what to appropriate from the national purse, or whether to appropriate. The scope of the power of inquiry, in short, is as penetrating and far-reaching as the potential power to enact and appropriate under the Constitution." *Connerly v. State Personnel Board*, 92 Cal.App.4th 16, 62 (2001) (quoting *Barenblatt v. United States*, 360 U.S. 109, 111 (1959)).

B. Non-interference with administrative matters

1. General rule

The second paragraph of section 2.114 sets forth the core prohibition on interference with administrative matters:

Neither the Board of Supervisors, its committees, nor any of its members, shall have any power or authority, nor shall they dictate, suggest or interfere with respect to any appointment, promotion, compensation, disciplinary action, contract or requisition for purchase or other administrative actions or recommendations of the City Administrator or of department heads under the City Administrator or under the respective boards and commissions. The Board of Supervisors shall deal with administrative matters only in the manner provided by this Charter, and any dictation, suggestion or interference herein prohibited on the part of any Supervisor shall constitute official misconduct; provided, however, that nothing herein contained shall restrict the power of hearing and inquiry as provided in this Charter.

This restriction prohibits interference with a range of departmental activities: employment matters, contracting and purchasing decisions, and other administrative decisions including how to allocate resources between departmental functions, to whom to assign given functions, prioritization of functions, internal accounting, monitoring, training, and resolution of questions or disputes with individual citizens. By prohibiting interference in administrative matters, section 2.114 attempts to limit Board involvement in areas that historically have presented the greatest risks of favoritism and corruption.

The ban on interference applies not only to the Board as a body, but also to its committees and individual members. And the restriction can apply to words as well as actions. A threat that the Board, its committees, or members make to a department head to engage in any of the prohibited activities may violate section 2.114 even if they do not actually take any further steps to carry out the threat.

2. Exceptions

a. Resolutions

Section 2.114 does not prohibit the Board, as opposed to individual members, from offering suggestions about departmental matters. See *Eller Outdoor Advertising v. Board of Supervisors*, 89 Cal.App.3d 76, 81-82 (1979). Rather, section 2.114 prohibits the Board from “dictating” or “commanding” departments on administrative matters, in the sense of actual intervention or interference. *Id.* The full Board, but not individual members, may adopt resolutions expressing the Board’s views on City departmental operations. In those resolutions, the Board may urge, but not require, departments to take certain actions. This exception regarding nonbinding resolutions does not limit the express authority of the Board under Charter section 2.114 to adopt policy ordinances that bind departments in how they operate.

Section 2.114 prohibits the Board and its individual members from directing departments with regard to either specific contracts or specific personnel decisions. Charter section 9.118, which requires Board approval of contracts above dollar or term thresholds specified in that section, does give the Board limited authority over particular contracts. The Board may not amend a contract that it receives for approval under section 9.118. Nevertheless, it may inform the department of the reasons it will not approve the contract in its current form and make suggestions as to the changes required to make the contract acceptable.

Therefore, at the conclusion of a legislative inquiry in which the Board uncovers mismanagement within a department or a bad contracting decision, neither the Board nor an individual Board member may suggest or direct any action with regard to either the contract or the responsible employees.

b. Adopting the City's budget

Section 2.114 does not prohibit the Board or its members from allocating City resources through the budgetary process. See Charter §§ 9.101, 9.103, 9.105, and 9.113. Adoption of a budget is a core legislative function. *Hicks v. Board of Supervisors*, 69 Cal.App.3d 228, 235 (1977). When the Board as a whole or an individual Board member explains or advocates a position as part of the budgetary process or in contemplation of the Board's role in that process, that speech falls within the legislative prerogative of the Board, even if that speech comments on the performance of executive branch employees or the administration of executive branch departments. Such commentary would not ordinarily violate the Charter's ban against interference with administrative affairs.

c. Testifying at public meetings

Section 2.114 also allows individual Board members to testify regarding administrative matters at public meetings of City boards and commissions. This exception recognizes that the delivery of remarks at open, publicly noticed meetings subject to response and rebuttal by the full body of commissioners and by members of the public counterbalances the dangers of Board members engaging in improper intimidation or influence peddling. Therefore, an individual supervisor does not violate section 2.114 by testifying at a public meeting of a commission regarding a department's administration of City affairs under that department's jurisdiction.

But section 2.114 still forbids individual Board even when testifying at City commission meeting to make suggestions or recommendations relating to individual personnel or specific contract decisions.

d. Adopting legislation

The Board may adopt binding, department-specific ordinances that affect administrative matters, without violating the noninterference rule. The Board can adopt laws of general application setting uniform, City-wide policies regarding matters that, if decided individually, would be considered administrative matters.

There are limits to this authority to adopt legislation. First, the Board cannot bind a department that has Charter-derived exclusive authority over its affairs or assets if the Board's legislation is directed only at that department. Second, legislation that applies to all departments must not impair the capacity of an exclusive jurisdiction department to discharge one of its core functions.

Third, under Section 2.114 (and the Charter's fundamental separation of powers), the Board may only adopt ordinances that constitute legislative enactments. For example, the Board may not adopt an ordinance directing the Department of Public Works to issue a permit to a particular individual because the issuance of a permit is not a legislative act.

Likewise, while the Board may adopt legislation setting the standards and procedures for issuing a class of permits, it may not itself execute those standards through the determination of whether an applicant has met those standards. And since the Board may not exercise executive powers except as authorized by the Charter, the Board also may not adopt legislation that would overrule the department's action on a specific application.

Part two: Conflicts of interest, financial disclosure & governmental ethics laws

City officers and employees are subject to strict conflict of interest laws. State laws, particularly the Political Reform Act (Cal. Govt. Code section 87100, *et seq.*), impose broad conflict of interest rules, gift limits, and financial disclosure requirements. The City and County of San Francisco enforces additional conflict of interest rules and gift limits.

In this part of the guide we describe generally the State and local conflict laws that govern the conduct of public officials. .

I. ‘Public office is a public trust’

Charter section 15.103 provides that “[p]ublic office is a public trust and all officers and employees of the City and County shall exercise their public duties in a manner consistent with this trust.” This provision expresses one of the underlying purposes of conflict of interest laws. Section 15.103 authorizes the City to enact laws to implement this fundamental obligation of public service by providing:

The City may adopt conflict of interest and governmental ethics laws to implement this provision and to prescribe penalties in addition to discipline and removal authorized in [the] Charter. All officers and employees of the City and County shall be subject to such conflict of interest and governmental ethics laws and the penalties prescribed by such laws.

The City’s ethics provisions, which the City adopted under this Charter section, are primarily found in the Campaign and Governmental Conduct Code, sections 3.200 through 3.244. The findings and purpose section, section 3.200, states that to ensure that the governmental processes promote fairness and equity for all residents and to maintain public trust in governmental institutions, the people of San Francisco have a compelling interest in regulating conflicts of interest and the outside activities of City officers and employees. Section 3.202 provides that the City’s ethics laws are to be liberally construed to effectuate their purposes.

A. The San Francisco Ethics Commission

San Francisco’s Ethics Commission is responsible for implementing and administering local laws relating to political campaigns, lobbying, conflicts of interest, and governmental ethics. Charter § C3.699-10. The Commission provides advice and assistance to City officers, candidates for City office, and City employees regarding compliance with local governmental ethics laws. Charter §§ C3.699-11, C3.699-12.

The Ethics Commission also investigates complaints regarding the conduct of City officers and employees. Charter § C3.699-13. The Ethics Commission's investigations are confidential to the extent permitted by State law. Charter § C3.699-13(a). In addition, local law protects individuals who file complaints with the Ethics Commission - often known as "whistleblowers" - from retaliation for filing complaints. C&GC Code § 4.115.

The Ethics Commission office is located at 25 Van Ness Street, Suite 220, San Francisco, CA 94102. Copies of San Francisco's ethics laws, Ethics Commission implementing regulations, and advice letters, as well as information about the complaint process, are available on the Commission's website: <http://www.sfethics.org/>.

II. Conflicts of interest and financial disclosure

Several State and local laws prohibit City officials from participating in decisions in which they have a financial interest. In most cases, officials do not violate these laws if they disclose their financial interest and abstain from participating in or seeking to influence a decision in which the officials have an interest. But sometimes, an official with a conflict must choose between maintaining the financial interest and continuing to serve as a public official.

In this section we address laws on conflicts of interest and financial disclosure. In subsection A we discuss the California Political Reform Act's prohibition on conflicts of interest, which is the principal State law governing conflicts of interest. In subsection B we address the Political Reform Act's financial disclosure requirements, which are designed to prevent conflicts of interest. In subsection C we address the Act's prohibition on conflicts of interest arising from the solicitation or receipt of campaign contributions by certain appointed members of boards and commissions. In subsections D through G we address other State and local conflict of interest provisions.

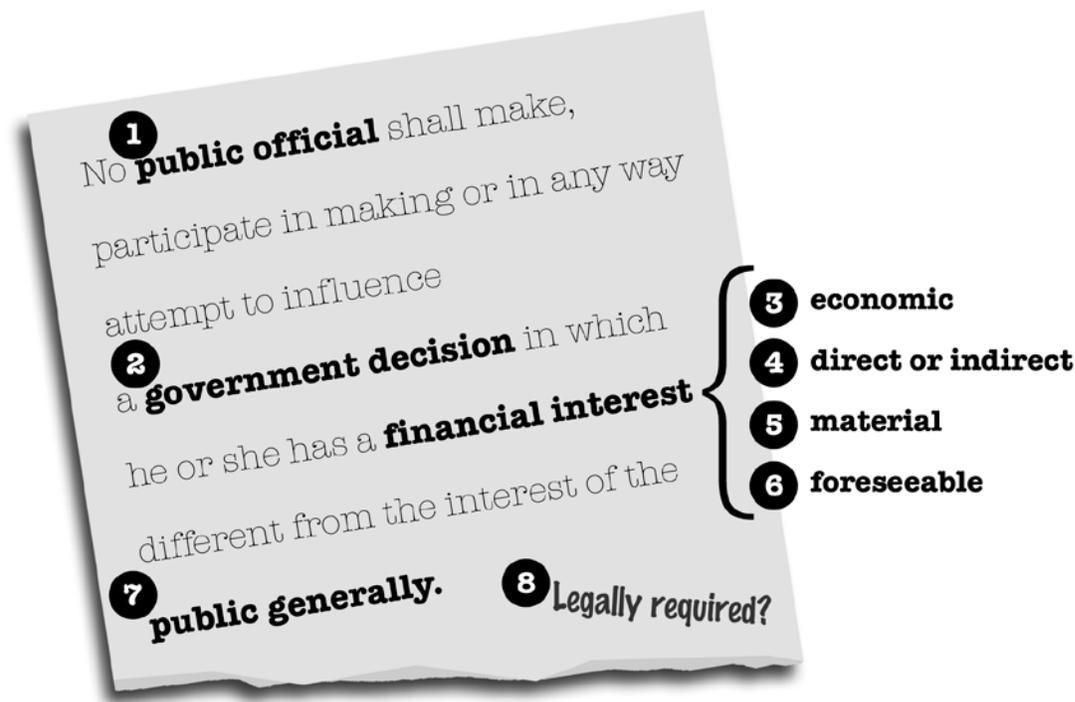
A. Conflicts of interest: the Political Reform Act

California's Political Reform Act (the "Political Reform Act") prohibits public officials from making, participating in making, or seeking to influence governmental decisions in which they have a financial interest. Cal. Govt. Code § 87100. Under the Political Reform Act, an official has a financial interest in a decision if it is reasonably foreseeable that the decision will have a material financial effect, different from the effect on the public generally, on the public official's economic interests. Cal. Govt. Code § 87103.

When a public official has a conflict of interest under the Political Reform Act, the official must abstain from participating in the decision-making process, including any discussions or meetings leading up to the final decision. The official is not counted for purposes of establishing a quorum for that particular matter. In addition, a public official cannot attend a closed session or obtain or review a recording or any non-public information regarding the governmental decision in which the official has a prohibited conflict of interest.

Some public officials are subject to additional requirements when they have a conflict of interest and are required to abstain from the decision-making process at issue. When members of the Board of Supervisors, members of the Planning Commission, members of the Retirement Board, the Mayor, the City Attorney, the District Attorney, the City Treasurer and all City officials who manage public investments have a conflict of interest under the Political Reform Act, they must announce their financial interest on the public record and leave the room while the matter is being discussed and decided. Cal. Govt. Code § 87105; 2 C.C.R. § 18702.5. Even though not specifically addressed in the Political Reform Act, members of other boards and commissions required to abstain from a decision-making process due to a conflict of interest should make a similar public disclosure.

The California Fair Political Practices Commission (“FPPC”), which administers and enforces the Political Reform Act, has developed an eight-question framework for assessing whether an officer or employee has a conflict of interest under the Act. In analyzing any conflict-of-interest question under the Political Reform Act, the official should proceed through the following eight-step analysis. 2 C.C.R. § 18700.



1. Is the individual a public official?

The Political Reform Act defines the term public official as a “member, officer, employee, or consultant” of a local government agency. The term “member” includes any member of a board or commission with decision making authority and in limited circumstances could include a member of a nonprofit corporation. Whether a “consultant” qualifies as a public official depends upon the nature and extent of the consultant’s work. Cal. Govt. Code §§ 82048, 82019; 2 C.C.R. § 18701; June 13, 2006 City Attorney Memorandum “Statements of

Economic Interest Filing Requirements For Consultants” available on the City Attorney’s legal opinions webpage.

If the individual is not a public official, then the Political Reform Act does not apply.

2. Is a government decision involved?

The Political Reform Act prohibits a public official from making, participating in making, or seeking to influence a government decision in which the official has a financial interest. The Political Reform Act specifically defines these activities as follows:

Making a decision. A public official makes a decision when the official:

- votes;
- appoints a person to a position;
- obligates the agency to a course of action; or
- enters into a contract for the agency.

Deciding not to act, unless based on disqualification under the Political Reform Act, also constitutes making a decision. 2 C.C.R. § 18702.1.

Participating in making a decision. Participating in making a decision includes negotiating, providing advice by way of research, investigation, or preparation of reports or analyses for the decision-maker, if these functions are performed without significant intervening substantive review.

Participating in making a decision does not include: taking ministerial or clerical actions; appearing before an agency to represent the official’s personal interests; or participating in actions regarding the public official’s own compensation for services or the terms or conditions of the official’s employment or contract. 2 C.C.R. § 18702.2.

Influencing a decision. Influencing a decision includes: contacting, appearing before, or otherwise attempting to influence any member, officer, employee or consultant of the official’s agency, or an agency appointed by or subject to the budgetary control of the official’s agency. Even where a public official appears before another agency that is not subject to the control of the official’s agency, the official still would be considered to be influencing a decision if the official is acting on behalf of, or as a representative of, the public official’s agency in contacts with the other agency; only where the official is acting solely in a personal capacity in such a situation could the official avoid being deemed to be influencing a decision. Acting as a representative of the official’s agency includes, for example, delivering correspondence using official stationery. 2 C.C.R. § 18702.3.

If no government decision is involved, the Political Reform Act does not apply.

3. Is an economic interest involved?

The Political Reform Act prohibits public officials from participating in a government decision only if the decision involves one of the following economic interests identified in the Act:

Investments. A direct or indirect investment worth \$2,000 or more in any business entity doing business in the jurisdiction. An indirect investment means an investment owned by the spouse, dependent child, or agent of the public official, or by a business entity or trust in which the official (or the official's spouse, registered domestic partner recognized by State law, dependent child, or agent) owns a 10% or greater interest. Cal. Govt. Code § 82034; 2 C.C.R. § 18703.1(a)

What is “doing business in the jurisdiction?” Under the Political Reform Act, an entity does business in the jurisdiction if it has contacts on a regular or substantial basis with a person who maintains a physical presence in the City and County of San Francisco. Contacts include manufacturing, distributing, selling, purchasing or providing goods or services. If a public official wishes to claim that a business is not doing business in the jurisdiction, the official bears the burden of demonstrating this fact. 2 C.C.R. § 18230.

Real Property. A direct or indirect interest worth \$2,000 or more in any real property in the jurisdiction. An indirect investment means an investment owned by the spouse, dependent child, or agent of the public official, or by a business entity or trust in which the official (or the official's spouse, registered domestic partner recognized by State law, dependent child, or agent) owns a 10% or greater interest. 2 C.C.R. § 18703.2.

Source of income or gifts. Any source of income (other than loans by a commercial lending institution in the regular course of business on terms available to the public without regard to official status) aggregating \$500 or more in value, or any source of gifts with a cumulative value of \$440 or more, provided to, received by, or promised to the public official within 12 months before the date the decision is made. Cal. Govt. Code § 82030; 2 C.C.R. §§ 18703.3, 18703.4.

Business positions. Any business entity doing business in the jurisdiction in which the public official is a director, officer, partner, trustee, or employee or holds any position of management. 2 C.C.R. § 18703.1(b).

Income, assets, or expenses. The income, assets, and expenses of the public official or the public official's immediate family. 2 C.C.R. § 18703.5. “Immediate family” means spouse, registered domestic partner recognized by State law, or dependent children. Cal. Govt. Code § 82029; 2 C.C.R. § 18229.

If none of these enumerated economic interests are involved, the Political Reform Act does not apply.

4. Does the decision directly or indirectly involve the public official's economic interest?

Direct involvement. A decision directly involves a public official's economic interest if the economic interest is the subject of the decision. For example, if a company in which an official has an interest of \$2,000 or more is seeking a contract with the official's department, the official's is directly involved in decisions about the contract. 2 C.C.R. §§ 18704.1; 18704.2 and 18704.5.

Indirect involvement. Any time an official's economic interest is affected by a decision, but that economic interest is not the subject of the decision, the interest is said to be

“indirectly” involved in the decision. For example, a vote on general legislation that affects the official’s economic interest as well as the interests of many other City residents or businesses is a type of government decision that would indirectly affect a official’s economic interests.

5. What materiality standard applies?

Under the Political Reform Act, a conflict of interest exists only if the effect of a decision on the official’s economic interests would be “material.” Determining materiality usually requires estimating the dollar value of the effect of a decision on the official’s economic interest. FPPC regulations set forth specific standards for determining when a decision’s effect on a particular type of economic interest is material. Application of those standards turns in part on whether the official’s economic interest is directly or indirectly involved in the decision.

a. Decisions involving an economic interest in a business entity

i. Directly involved

The effect of a decision on a business entity that is directly involved in a governmental decision is presumed to be material. This presumption may be rebutted by proof that it is not reasonably foreseeable that a governmental decision will have any financial effect on the business entity.

SPECIAL RULE FOR COMPANIES THAT ARE LISTED IN THE FORTUNE 500, GENERATE REVENUES SIMILAR TO A FORTUNE 500 COMPANY, ARE LISTED ON THE NEW YORK STOCK EXCHANGE (“NYSE”), OR HAVE NET INCOME OF \$2.5 MILLION OR MORE. Even if it is directly involved in a governmental decision, an investment interest is treated as indirectly involved if the interest is a relatively small investment in a large company. To determine whether the company is sufficiently large to fall within this rule, the FPPC refers to the Fortune 500 and the NYSE. For companies included in the Fortune 500, or if not listed in the Fortune 500, had revenues no less than the revenues than those generated by the company that ranked 500th on the Fortune 500 list, if the public official has an investment of \$25,000 or less, the standards for “indirectly involved” business entities apply. For companies listed on the NYSE, or if not listed on the NYSE, had net income in the previous fiscal year of \$2,500,000 or more, if the public official has an investment of \$25,000 or less, the standards for “indirectly involved” business entities apply. Those standards are set forth in the next subsection.

ii. Indirectly involved

The effect of a decision is material for any business entity in which an official has an economic interest if the following standards (which vary with the size of the business) are met:

Fortune 500. For a Fortune 500 business entity, or an entity not listed in the Fortune 500 that had revenues no less than the revenues generated by the company that ranked 500th on the Fortune 500 list, the decision would result in:

- an increase or decrease in gross revenues for a fiscal year of \$10,000,000 or more;
- incurring or avoiding expenses for a fiscal year of \$2,500,000 or more; or
- an increase or decrease in the value of assets or liabilities of \$10,000,000 or more. 2 C.C.R. § 18705.1(c)(1).

New York Stock Exchange. For a business entity listed on the NYSE or an entity not listed on the NYSE that had a net income in the previous fiscal year of \$2,500,000 or more, the decision would result in:

- an increase or decrease in gross revenues for a fiscal year of \$500,000 or more;
- incurring or avoiding expenses for a fiscal year of \$200,000 or more; or
- an increase or decrease in the value of assets or liabilities of \$500,000 or more. 2 C.C.R. § 18705.1(c)(2).

NASDAQ/American Stock Exchange. For a business entity listed on the NASDAQ or American Stock Exchange, or an entity not listed that had a net income of \$750,000 or more, the decision would result in:

- an increase or decrease in gross revenues for a fiscal year of \$300,000 or more;
- incurring or avoiding expenses for a fiscal year of \$100,000 or more; or
- an increase or decrease in the value of assets or liabilities of \$300,000 or more. 2 C.C.R. § 18705.1(c)(3).

All Others. For any business entity that does not meet any of the above standards, it is reasonably foreseeable that the decision would result in:

- an increase or decrease in gross revenues for a fiscal year of \$20,000 or more;
- incurring or avoiding expenses for a fiscal year of \$5,000 or more; or
- an increase or decrease in the value of assets or liabilities of \$20,000 or more. 2 C.C.R. § 18705.1(c)(4).

b. Decisions involving an economic interest in real property

i. Real property interests other than leasehold interests

A governmental decision made with respect to a real property interest is material whenever the decision:

- involves the adoption of or amendment to a general or specific plan, and the real property is located within the proposed boundaries of the plan (except as provided in the exception described below);

- determines the real property's zoning (other than a zoning decision applicable to all properties designated in that category), annexation or de-annexation, or inclusion in or exclusion from any city, county, district, or other local government subdivision (other than elective district boundaries);
- would impose, repeal, or modify any taxes, fees, or assessments that apply to the real property;
- authorizes the sale, purchase, or lease of the real property;
- involves the issuance, denial or revocation of a license, permit or other land use entitlement authorizing a specific use of or improvement to the real property or any variance that changes the permitted use of, or restrictions placed on, that real property;
- involves construction of, or improvements to, streets, water, sewer, storm drainage or similar facilities, and the parcel in which the official has an interest will receive new or improved services that are distinguishable from improvements and services that are provided to other similarly situated properties in the official's jurisdiction;
- would change the development potential of the real property;
- would change the income producing potential of the parcel of real property;
- would change the highest and best use of the real property;
- would change the character of the real property by substantially altering traffic levels or intensity of use, including parking, of property surrounding the real property, the view, privacy, noise levels, or air quality, including odors, or any other factors that would affect the real property's market value;
- would consider any decision affecting real property value located within 500 feet of the property line of the official's real property; or
- would cause a reasonable person to believe that the governmental decision would likely influence the market value of the official's property. 2 C.C.R. § 18705.2(a).

ii. Leasehold interests

A governmental decision on any real property in which an official has a leasehold interest is material whenever the decision would:

- change the termination date of the lease;
- increase or decrease the potential rental value of the property;
- increase or decrease the rental value of the property, and the official has a right to sublease the property;
- change the official's actual or legally allowable use of the property; or
- impact the official's use and enjoyment of the property. 2 C.C.R. § 18705.2(b).

iii. Exceptions

For all real property interests, including leasehold interests, the following types of decisions are not material:

- the decision solely concerns repairs, replacement or maintenance of existing streets, water, sewer, storm drainage or similar facilities; or
- the decision solely concerns the adoption or amendment of a general plan and all of the following apply:
 - the decision only identifies planning objectives or is otherwise exclusively one of policy;
 - the decision requires a further decision or decisions by the public official's agency before implementing the planning or policy objectives, such as permitting, licensing, rezoning, or the approval of or change to a zoning variance, land use ordinance, or specific plan;
 - the decision does not concern an identifiable parcel or parcels or development project; and
 - the decision does not concern the agency's prior, concurrent, or subsequent approval of, or change to, a permit, license, zoning designation, zoning variance, land use ordinance, or specific plan. 2 C.C.R. § 18705.2(c).

c. Decisions involving those who are sources of income or gifts

i. Directly involved

Any reasonably foreseeable financial effect on a person who is the source of income or gifts to a public official and who is directly involved in a decision before the official's agency is material. 2 C.C.R. § 18705.3(a).

ii. Indirectly involved

For determining whether a decision has a material effect on a person who is a source of income and is indirectly involved in a decision, the following standards apply:

Business entity. If the source of income or gifts is a business entity, the materiality standards described above for indirectly involved business entities apply. 2 C.C.R. § 18705.3(b)(1).

Nonprofit entity. If the source of income or gifts is a nonprofit entity, including a governmental entity, the following standards apply:

For an entity with gross annual receipts of \$400,000,000 or more, the decision will:

- affect gross revenues for a fiscal year by \$1,000,000 or more;
- affect expenses for a fiscal year by \$250,000 or more; or
- affect assets or liabilities by \$1,000,000 or more.

For an entity with gross annual receipts of between \$100,000,000 and \$400,000,000, the decision will:

- affect gross revenues for a fiscal year by \$400,000 or more;
- affect expenses for a fiscal year by \$100,000 or more; or
- affect assets or liabilities by \$400,000 or more.

For an entity with gross annual receipts of more than \$10,000,000 but less than or equal to \$100,000,000, the decision will:

- affect gross revenues for a fiscal year by \$200,000 or more;
- affect expenses for a fiscal year by \$50,000 or more; or
- affect assets or liabilities by \$200,000 or more.

For an entity with gross annual receipts of more than \$1,000,000 but less than or equal to \$10,000,000, the decision will:

- affect gross revenues for a fiscal year by \$100,000 or more;
- affect expenses for a fiscal year by \$25,000 or more; or
- affect assets or liabilities by \$100,000 or more.

For an entity with gross annual receipts of more than \$100,000 but less than or equal to \$1,000,000, the decision will:

- affect gross revenues for a fiscal year by \$50,000 or more;
- affect expenses for a fiscal year by \$12,500 or more; or
- affect assets or liabilities by \$50,000 or more.

For an entity with gross annual receipts of \$100,000 or less, the decision will:

- affect gross revenues for a fiscal year by \$10,000 or more; or
- affect expenses for a fiscal year by \$2,500 or more; or
- affect assets or liabilities by \$10,000 or more. 2 C.C.R. § 18705.3(b)(2).

Individuals. The effect of a decision is material as to individuals who are sources of income or gifts and indirectly involved in the decision if any of the following applies:

- the decision will affect the individual's income, investments or other tangible or intangible assets or liabilities (other than real property) by \$1,000 or more; or
- the decision will affect the individual's real property interest in a manner that is considered material under the materiality standards applicable to real property indirectly involved in a decision. 2 C.C.R. § 18705.3(b)(3).

Nexus. Any reasonably foreseeable financial effect on a person who is a source of income to a public official is material if the public official receives or is promised the income to achieve a goal or purpose that would be achieved, defeated, aided, or hindered by the decision. 2 C.C.R. § 18705.3(c).

d. Decisions involving personal financial effect

A reasonably foreseeable personal financial effect of at least \$250 in any 12-month period is material. Neither a financial effect on the value of real property nor a financial effect on a business entity should be considered when determining whether a decision will have a personal financial effect on a public official or employee. 2 C.C.R. § 18705.5.

If the effect of a decision does not meet the materiality standards, the public official does not have a conflict under the Act.

6. Is it reasonably foreseeable that the decision will have a material financial effect?

After identifying the appropriate materiality test, the public official must inquire whether such an effect is reasonably foreseeable. If the official's economic interest is explicitly involved in the decision at hand, it is presumed that the effect of the decision is reasonably foreseeable. 2 C.C.R. §18706(a).

If the economic interest is not explicitly involved in the decision, there is no such presumption. To be reasonably foreseeable, the financial effect need not be likely. But if the financial effect is a realistic possibility and more than hypothetical or theoretical, it is reasonably foreseeable. In assessing whether a financial effect is reasonably foreseeable, the official should consider the following non-exclusive list of the factors:

- the extent to which the occurrence of the financial effect is contingent upon intervening events, not including future governmental decisions by the official's agency, or any other agency appointed by or subject to the budgetary control of the official's agency;
- whether the official should anticipate a financial effect on his or her economic interest as a potential outcome under normal circumstances;
- whether the official has a economic interest that is of the type that would typically be affected by the terms of the governmental decision, or whether the governmental decision is of the type that would be expected to have a financial effect on similarly situated businesses and individuals in which the public official has a financial interest;
- whether a reasonable inference can be made that the financial effects of the governmental decision on the public official's economic interest could compromise the public official's ability to act in the best interests of the public;
- whether the governmental decision would provide or deny an opportunity, or create an advantage or disadvantage for one of the official's economic interests, including whether the economic interest may be entitled to compete or be eligible for a benefit resulting from the decision; and
- whether the official has the type of economic interest that would cause a similarly situated person to weigh the advantages and disadvantages of the governmental decision in formulating a position. 2 C.C.R. § 18706(b).

If it is not reasonably foreseeable that the decision will have a material financial effect under the applicable standard, then the public official does not have a conflict under the Political Reform Act.

7. Is the effect of the decision on the official's economic interest distinguishable from the effect on the public generally?

Even if the reasonably foreseeable financial effect of a decision is material, disqualification is required only if the effect is distinguishable from the effect on the public generally. The regulations interpreting the Political Reform Act contain specific rules for determining when a decision affects a significant segment of the public in substantially the same manner as the public official. 2 C.C.R. § 18707.

If the public official's economic interest would be affected in the same manner as the public generally, as defined in the Political Reform Act, then the public official may participate in the decision.

8. Is the public official's participation legally required?

In limited circumstances, even where an official has a conflict of interest, the official may still participate if the official's participation is legally required. This exception is very narrow. Participation is legally required only if there is no alternative officer or entity that may make the decision consistent with the purposes and terms of the statute authorizing the decision. This exception does not permit an official who is otherwise disqualified to break a tie or vote if a quorum of members of the agency who are not disqualified could be obtained. 2 C.C.R. § 18708. Before invoking this exception, officials should consult the City Attorney's Office to determine whether their participation is legally required in a given circumstance.

B. Financial disclosure under the Political Reform Act

In addition to prohibiting participation in government decisions that affect a public official's financial interests, the Political Reform Act requires public officials with significant decision making authority to publicly disclose their financial interests. This financial disclosure informs the public about a public official's economic interests and potential conflicts of interest.

1. Who is required to file Statements of Economic Interests?

All public officials (including elected officials, candidates for elective office, appointed officials, and employees) who make, or participate in making, governmental decisions that could affect their personal financial interests are required to file financial disclosure forms. Cal. Govt. Code §§ 87200, 87302. These forms are called "statements of economic interests," and are also known as "SEIs" or "Form 700s."

The list of officials and employees who are required to file SEIs is set forth in San Francisco's Conflict of Interest Code, in Chapter 1 of Article III of the San Francisco Campaign and Governmental Conduct Code. Individuals who hold positions listed in these sections are called "designated employees."

Appointing authorities of officers who file SEIs with the Ethics Commission must notify the Ethics Commission within 15 days that a person has been appointed to, or left office, to enable the Ethics Commission to monitor compliance with the SEI filing requirements. C&GC Code § 3.1-105.

2. What must be disclosed on Statements of Economic Interests?

Depending upon the scope of their decision-making responsibility and the positions they hold, public officials who are required to file SEIs must disclose some or all of their interests in real property located in San Francisco, investments, business positions, and income (including gifts and loans) received during the preceding year. See Cal. Govt. Code § 87302; 2 C.C.R. § 18730; C&GC Code § 3.1-100, et seq. In general, public officials must disclose the types of economic interests that could potentially lead to a conflict of interest under the Political Reform Act. For this reason, public officials must also report their spouse's, registered domestic partner's, or dependent children's economic interests in addition to their own interests.

The amount of financial disclosure required depends upon the nature of the position held by a particular public official. State law requires some public officials, such as elected City officials and members of the Planning Commission, to file SEIs. San Francisco's Conflict of Interest Code requires most other public officials to file SEIs. The Board of Supervisors adopts the Conflict of Interest Code after receiving input from each department. The City updates the Conflict of Interest Code every other year.

The Conflict of Interest Code identifies the individuals in each department who must file SEIs and specifies the filing requirements for those individuals. The Conflict of Interest Code is set forth in San Francisco Campaign and Governmental Conduct Code sections 3.1-100 – 3.1-500. Each public official should review these provisions to determine his or her disclosure obligations.

3. When must Statements of Economic Interests be filed?

Public officials who are required to file statements must file an initial "assuming office statement" within 30 days of taking office and a "leaving office statement" within 30 days of leaving office. While in office, a public official must file an "annual statement" on or before April 1 of each year. Cal. Govt. Code § 87302; 2 C.C.R. § 18730. See also 2 C.C.R. § 18732 (filing dates if assuming office between October 1 and December 31); § 18735 (filing dates for designated employees who change positions).

4. Where are Statements of Economic Interests filed?

Members of Boards and Commissions and Department Heads must file their SEIs with the Ethics Commission. Agency heads of the San Francisco Unified School District, the Community College District, the San Francisco Housing Authority, the Successor Agency to the Redevelopment Agency of the City and County of San Francisco, the Office of Citizen Complaints, and the Law Library also file with the Ethics Commission. Members of the Civil Grand Jury must file their SEIs with the Executive Officer of the Superior Court. Employees must file their forms with their department heads, the executive director of their agency, or their designees. See C&GC Code § 3.1-103.

Financial disclosure forms may be obtained from the San Francisco Ethics Commission or downloaded from the FPPC's website at <http://www.fppc.ca.gov>. The Ethics Commission and the FPPC provide assistance in completing the forms. The Ethics Commission's telephone number is (415) 252-3100 and the FPPC's telephone number is (866) 275-3772. In addition, the City Attorney's Office will assist with questions regarding completion of the forms. The telephone number for the City Attorney's Office is (415) 554-4700.

5. What are the consequences of not filing the Statement of Economic Interests or not disclosing required information?

Failure to comply with these reporting requirements may result in fines, discipline, and civil or criminal proceedings. In addition, there is a \$10 a day fine (up to a maximum of \$100) for late filings. Local law also provides that an officer or employee may be subject to discipline or removal from office for failure to file. See Cal. Govt. Code § 91000, et seq.; C&GC Code § 3.1-102.5.

6. May officials amend their Statements of Economic Interests?

If an official discovers an error after filing a SEI, the official must amend that filing. SEI amendment forms are available on the FPPC's website at <http://www.fppc.ca.gov>.

7. Who has access to Statements of Economic Interests?

SEIs are public records. Any member of the public may review and copy a public official's SEI. Cal. Govt. Code § 81008.

8. Sunshine affidavit required for officials who file SEIs with the Ethics Commission

Each official who files an SEI with the Ethics Commission must also file an annual affidavit with the Ethics Commission stating that the official has completed Sunshine training required by the Sunshine Ordinance and ethics training required by state law. The Ethics Commission provides forms for this purpose at their office and on their web page. For

further information about this requirement, see the section of this guide addressing the Sunshine Ordinance. See Admin. Code § 67.33; San Francisco Ethics Commission Regulation (“EC Reg.”) 67.33-1.

C. Conflicts of interest under the Political Reform Act based on solicitation and receipt of campaign contributions by department heads and members of appointed boards and commissions

California Government Code section 84308 prohibits department heads and members of appointed boards and commissions from soliciting contributions in excess of \$250 from persons who are parties to, or participants in, proceedings pending before them, and from making decisions affecting a source of campaign contributions of more than \$250.

1. Who is covered?

Section 84308 applies to department heads and appointed boards and commissions. Although the section does not apply to elected bodies such as the Board of Supervisors, when members of an elected body are sitting as members of an appointed body, they are subject to section 84308. But if the *entire* body is made up of elected officials, as for example, where the Board of Supervisors is designated to sit as the Transportation Authority, section 84308 does not apply. 2 C.C.R. § 18438.1.

2. What does section 84308 prohibit?

Section 84308 prohibits two types of activities: soliciting contributions above \$250 from participants in proceedings before the official, and participating in decisions involving certain contributors.

a. Ban on soliciting contributions greater than \$250

Section 84308 prohibits an appointed officer from soliciting, accepting or directing campaign contributions of more than \$250 from any party, participant or agent of a party or participant:

- while a proceeding is pending before the officer’s agency; and
- for three months following the date of the decision.

This prohibition applies even where the contribution is directed to a person other than the officer. Similarly, a party, participant or an agent cannot make a campaign contribution of more than \$250 to an officer during the course of the proceedings and for three months following the decision.

An officer “solicits” a contribution only if the officer knows or has reason to know that the person being solicited is a party or participant (or the agent of either) and personally requests the contribution or knowingly allows an agent to do so. A prohibited solicitation

under section 84308 does not include a request made in a mass mailing to the public, at a public gathering, or in a newspaper or other mass media.

b. Disqualification

Section 84308 prohibits an officer from participating in a decision when before making the decision, the officer learns that a party or participant in a proceeding has made a campaign contribution of more than \$250 to the officer within the previous 12 months. If the officer returns the contribution (or the portion of the contribution over \$250) within 30 days of the time that he or she learns of the contribution and the proceeding, then disqualification is not required.

Unlike the prohibition on soliciting contributions, the disqualification requirement applies only if the contribution was made to the officer. Disqualification is not required if the officer solicited contributions for other people.

An officer who has received a campaign contribution of \$250 or more within the previous 12 months from a party or participant in a proceeding (or their agents) must disclose that fact on the record of the proceeding. The party who made a contribution to an officer in the 12 months before the decision also has a duty to disclose the contribution.

3. What is a proceeding?

A proceeding is an action to grant, deny, revoke, restrict, or modify any license, permit, or other entitlement for use. A proceeding includes action on all business, profession, trade and land use licenses and permits. It also includes agency decisions regarding contracts (other than competitively bid, labor, or personal employment contracts) and all franchises. The exception for “competitively bid” contracts applies only when the bidders submit fixed amounts in their bids and the agency is required to select the lowest qualified bidder. FPPC Adv. Ltr. No. I-93-220.

A proceeding does not include action on rules of general application, such as adoption of a general plan or real estate development standards. 2 C.C.R. § 18438.2(a).

4. When is a proceeding pending before an agency?

A proceeding is pending before an agency when:

- the proceeding has commenced;
- officers of the agency will make a decision in the matter; and
- the officers’ decision will not be purely ministerial. 2 C.C.R. § 18438.2.

A proceeding commences when an application is filed, an agency begins to prepare a request for proposals for a contract, or an issue is otherwise submitted to the jurisdiction of an agency for a decision. 2 C.C.R. § 18438.2; FPPC Adv. Ltr. No. A-96-083.

Section 84308 applies only when an officer knows or has reason to know that a proceeding is pending. 2 C.C.R. § 18438.7; FPPC Adv. Ltr. No. A-96-083. For instance, if agency staff is working on a proceeding, the proceeding is pending but the agency commissioners are not

aware of the proceeding, the prohibitions of section 84308 do not apply until the officers receive notice, such as an agenda listing the proceeding. See *id.*

5. Who is a party, participant or agent?

A party is a person who files an application for, or is the subject of a proceeding, involving a license, permit, or other entitlement for use. A party also includes a party to a contract (other than a competitively bid, labor or personal employment contract) that requires the agency's approval. A participant is any person who is not an actual party to the proceeding but who actively supports or opposes a particular decision by lobbying the agency, testifying, or otherwise seeking to influence the agency and who has a financial interest in the outcome of the decision. An agent is an individual or firm who represents a party or participant in the proceeding. 2 C.C.R. §§ 18438.3; 18438.4.

D. Conflicts of interest under Government Code section 1090

California Government Code Section 1090 prohibits public officials, employees and consultants from participating in the making of a contract that could implicate their personal financial interests. The prohibition extends to contracts approved by individual public officials and employees, or by the boards or commissions of which they are members. Employees, consultants, and members of purely advisory bodies who are financially interested in a contract must abstain from participating in the making of the contract. For public officials, such as members of City boards and commissions, abstaining from a decision may not adequately address a conflict of interest under Government Code Section 1090. A conflict of interest under Government Code Section 1090 may require that a public official choose between maintaining a private interest and remaining in public office. Contracts violating Section 1090 are void and violation of this section may subject a public official to severe sanctions, including possible criminal liability.

As we further describe below, there are narrow exceptions to Section 1090 . Officials should consult in advance with the City Attorney's Office to confirm whether one of these exceptions applies and if not, what steps they should take to address the potential conflict.

1. Who is subject to Government Code section 1090?

Section 1090 applies primarily to City employees and officials. But section 1090 may also apply to consultants and contractors that work for City agencies and departments. If a City contractor performs a "public function" or exercises judgment on behalf of a City agency, then that contractor may also be subject to section 1090's prohibitions. See *California Housing Finance Agency v. Hanover/California Management and Accounting Center, Inc.*, 148 Cal. App. 4th 682, 690 (2007); 70 Ops. Cal. Atty. Gen. 271 (1987).

2. What is a financial interest?

Section 1090 does not define the term “financial interest.” The courts have made clear that they will not construe the term “in a restrictive and technical manner.” *People v. Honig*, 48 Cal. App. 4th 289 (1996). Section 1090 is “concerned with any interest, other than perhaps a remote or minimal interest, which would prevent the officials involved from exercising absolute loyalty and undivided allegiance to the best interests of the [City].” *Id.* at 315.

3. What constitutes making a contract?

Section 1090 also does not define making a contract. Again, the courts have construed this term broadly to serve the statute’s purposes. Courts have held that the term extends to the planning, preliminary discussion, compromising, drawing of plans and specifications, and solicitations of bids that lead to the formal making of a contract. *Stigall v. City of Taft*, 58 Cal.2d 565, 569 (1962). The California Attorney General has stated that participation in the initial stages of making a contract can preclude a public official from seeking the same contract after leaving office. 81 Ops. Cal. Atty. Gen. 317 (1998).

4. Remote interests

Government Code section 1091 identifies several “remote interests,” or exceptions to Government Code section 1090. Remote interests are financial interests that the Legislature has deemed sufficiently remote that an official with such an interest may abstain from voting on a matter in which the official has an interest rather than resigning from the board or commission.

Remote interest exceptions may apply if the official is a landlord or tenant of the contracting party or an officer of a nonprofit corporation receiving a grant. When a public official has a “remote interest,” the official may remain on the board or commission that votes on the contract, but the member with the remote interest must announce the interest on the record and abstain from all discussions about and votes regarding the matter involving the remote interest.

5. Noninterests

Government Code Sections 1091.5 identifies “noninterests.” Noninterests involve situations that the Legislature has determined do not present a conflict of interest. If a member of a board or commission has a noninterest, section 1090 does not prohibit the official from voting on the matter involving the noninterest.

Even where Government Code Section 1090 does not preclude an official’s participation in a decision, the public official must still ensure that the Political Reform Act does not bar participation in the decision.

E. Conflicts of interest under the common law

Before the Legislature enacted California statutes on conflicts of interest, the State courts developed a common law conflict of interest doctrine. Although it is unclear whether this doctrine applies in areas governed by statute, public officials should also consider this doctrine in assessing a proposed course of conduct. Generally, the doctrine provides that a public official owes an undivided duty of loyalty to the public. Where a governmental decision involves a conflict between a public official's duty of loyalty to the public and duty of loyalty to a private interest, the public official should avoid participating in the decision. See *Noble v. City of Palo Alto*, 89 Cal. App. 47, 51 (1928).

F. Conflicts of interest under the Campaign and Governmental Conduct Code

1. Appointments and nominations

Campaign and Governmental Conduct Code section 3.208 provides that no person may give or promise and no officer or employee of the City may solicit or accept, any money or anything of value in consideration for the person's, or any other person's, nomination or appointment to any City office, employment, promotion, or for other favorable employment action.

2. Prohibition on voting on own character or conduct

Campaign and Governmental Conduct Code section 3.210 prohibits a member of a board or commission from knowingly voting on or in any way attempting to influence the outcome of governmental action involving the member's own character or conduct, own rights as a member, or own appointment to any office, position, or employment. This section does not prohibit any officer or employee from:

- responding to allegations;
- applying for an office, position, or employment;
- responding to inquiries; or
- participating in the decision of the member's board, commission, or committee to choose the member as chair, vice chair, or other officer of the board, commission, or committee.

3. Decisions involving family members

In addition to the general prohibitions on making decisions in which a public official has a financial interest, section 3.212 of the Campaign and Governmental Conduct Code prohibits officers and employees of the City from making, participating in making, or seeking to influence a City decision about an employment action involving a relative.

Nothing in this section prohibits an officer or employee from acting as a personal reference or providing a letter of reference for a relative who is seeking appointment to a position in any City department, board, commission, or agency other than the officer or employee's department, board, commission, or agency under the control of any such department, board, commission, or agency.

When this section prohibits a department head from participating in an employment action involving a relative, the department head must delegate in writing to an employee in the department the authority to make any decisions regarding such employment action.

For purposes of this prohibition, the term "employment action" means hiring, promotion, or discipline. C&GC Code § 3.212(c). The section does not apply to an appointment or other decisions related to holding a City office or position that is nonsalaried. See EC Reg. 3.212-1. The term "relative" means a spouse, registered domestic partner, parent, grandparent, child, sibling, parent-in-law, aunt, uncle, niece, nephew, or first cousin and includes any similar step relationship or relationship created by adoption. C&GC Code § 3.212(c).

4. Disclosure of personal, professional and business relationships

Section 3.214 of the Campaign and Governmental Conduct Code requires City officers and employees to disclose on the public record any personal, professional, or business relationship with any individual who is the subject of, or has an ownership or financial interest in, the subject of a governmental decision being made by the officer or employee. This disclosure requirement applies only if, as a result of the relationship, the public could reasonably question the ability of the officer or employee to act for the benefit of the public. Disclosure on the public record means inclusion in the minutes of a public meeting, or if the decision is not made at a public meeting, recorded in a memorandum kept on file at the offices of the City officer or employee's department, board, or commission.

The Ethics Commission has adopted regulations detailing the types of personal, professional, and business relationships that this section requires to be disclosed. See EC Regs. 3.214-1 to 3.214-6. The regulations define personal, professional, or business relationships as follows:

- **Personal relationship.** A personal relationship is a relationship involving a family member or a personal friend, but does not include a mere acquaintance.
- **Professional relationship.** A professional relationship is a relationship with a person based on regular contact in a professional capacity, including regular contact in conducting volunteer and charitable activities.
- **Business relationship.** An officer has a business relationship with a person if, within the two years before the decision, the person was a client, business partner, colleague, or did business with the officer or employee's business. A business relationship does not include a person with whom the officer or employee does business in a personal capacity, such as a grocery store owner. EC Reg. 3.214-5.

EC Reg. 3.214-5. A court may void any governmental decision made by a City officer or employee who fails to make the disclosure required by this section if the failure to disclose was willing and the City officer or employee failed to make the decision (1) with disinterested skill, zeal and diligence, and (2) primarily for the benefit of the City. Other than discipline by an appointing authority, no penalty may be imposed for a violation of this section.

5. Receipt of benefits for referrals

Section 3.226(a) of the Campaign and Governmental Conduct Code prohibits an officer or employee from receiving any money, gift, or other thing of economic value from a person or entity other than the City for referring a member of the public to a person or entity for any advice, service, or product related to the City's processes.

6. Restrictions on contracting

Campaign and Governmental Conduct Code section 3.226(b) prohibits an officer or employee from requiring a member of the public to hire, employ, or contract with any specific person or entity in exchange for any governmental action. For example, this provision would prohibit a department from requiring a contractor to hire a particular person or subcontractor as a condition of a contract award. Departments that wish to hire a particular person or subcontractor due to that person's or subcontractor's expertise or familiarity with the work to be conducted, should consult in advance with the City Attorney's Office. Section 3.226(b) does not prohibit a City department, board, commission, or agency from requiring a prime contractor to use subcontractors listed in the prime contractor's proposal or bid. See EC Reg. 3.226-1.

Section 3.226(b) also provides that the Ethics Commission may waive this restriction if the Commission determines that hiring or contracting with a particular person or entity is necessary for the proper administration of a governmental program or action. See EC Reg. 3.226-1.

III. Other prohibitions

Public officials are subject to a number of other state and local laws governing official conduct that restrict conflicts between outside activities and public duties. The following is a brief description of the provisions of these laws that most frequently apply.

A. Prohibition on representing private parties before other city officers and employees: compensated advocacy

Section 3.224 of the Campaign and Governmental Conduct Code prohibits any officer of the City from directly or indirectly receiving any compensation to communicate orally, in

writing, or in any other manner on behalf of any other person with any other officer or employee of the City with the intent to influence a government decision.

This section does not apply to any communication by:

- an officer of the City on the City's behalf;
- an officer of the City on behalf of a business, union, or organization of which the officer is a member or full-time employee;
- an associate, partner, or employee of an officer of the City unless it is clear from the totality of the circumstances that the associate, partner or employee is merely acting as an agent of the City officer; or
- a City officer acting in a capacity as a licensed attorney engaged in the practice of law.

Intent to influence means any communication made for the purpose of supporting, promoting, influencing, modifying, opposing, delaying, or advancing a governmental decision, but does not include communications that:

- involve only routine requests for information, such as a request for publicly available documents;
- are made as a panelist or speaker at a conference or similar public event for educational purposes or to disseminate research and the subject matter does not pertain to a specific action or proceeding;
- are made while attending a general informational meeting, seminar, or similar event;
- are made to the press; or
- involve an action that is solely ministerial, secretarial, manual or clerical. EC Reg. 3.224-1.

The Ethics Commission may waive the prohibitions in this section for any member of a City board or commission who by law must be appointed to represent any profession, trade, business, union, or association.

B. Restrictions on future employment

As described below, several City laws limit the employment activities of officers or employees after they leave City service:

- All City officers and employees are permanently barred from switching sides on a particular matter that they were personally and substantially involved in while in City service.
- For one year after leaving City service, officers and employees may not seek to influence their former department or other government unit.
- City officers and employees may not accept employment with certain City contractors for one year.

- The Mayor and members of the Board of Supervisors are subject to broader post-employment restrictions than those that apply to other City officers and employees.

Individuals subject to these rules may request waivers from the Ethics Commission under some circumstances.

1. All officers and employees

All City officers and employees are subject to a permanent ban on certain types of post-employment activities, and a one-year ban on activities related to lobbying their former department.

a. Permanent ban

The permanent ban on certain post-employment activities is similar to the State law that applies to State officers and employees. Under section 3.234(a)(1)(A) of the Campaign and Governmental Conduct Code, City officers and employees may never act as an agent, attorney, or otherwise represent any person, other than the City, before any court or before any state, federal or local agency (or any officer or employee of such a court or agency) by making any formal or informal appearance or by making any oral, written or other communication in connection with a particular matter if:

- 1) the City is a party or has a direct and substantial interest in the matter;
- 2) the former officer or employee participated personally and substantially as a City officer or employee in the matter; and
- 3) the matter involved a specific party or parties at the time of the officer or employee's participation.

Section 3.234(a)(1)(B) imposes a permanent ban on aiding, advising, counseling, consulting, or assisting another person (other than the City) in any proceeding in which the officer or employee would be precluded from participating personally.

The permanent ban does not apply to offering witness testimony in court or other legal proceedings, provided that the officer or employee is not testifying as an expert witness and receives no compensation other than fees regularly provided for by law or regulation to witnesses. C&GC Code § 3.234(a)(1)(C).

b. One-year ban

In addition to the permanent ban, no current or former City officers and employees may, for one year after terminating their City service or employment with a City department, board, or commission, communicate with an intent to influence a government decision, orally, in writing, or in any other manner, on behalf of any other person (except the City), with any officer or employee of the department, board, or commission that the officer or employee served. C&GC Code § 3.234(a)(1)(D). This prohibition does not apply to a current or former City officer acting in a capacity as a licensed attorney engaged in the practice of law.

For former Mayors, former members of the Board of Supervisors, and their senior staff members, the one-year ban prohibits communications on behalf of others with any City agency and department. C&GC Code § 3.234(b)(1). The prohibition extends to communications with City officers, employees and representatives as well as City boards, departments, commissions and agencies.

c. Waiver

The Ethics Commission may waive the application of a post-employment restriction to a current or former employee or officer if the Commission determines that granting a waiver would not create the potential for undue influence or unfair advantage. The Ethics Commission may also waive any of these restrictions for members of City boards and commissions who, by law, must be appointed to represent any profession, trade, business, union, or association. C&GC Code § 3.234(c).

Ethics Commission regulations implement this waiver provision and explain the waiver process. See EC Reg. 3.234-4.

d. Future employment

There are two additional limits on future employment that apply to City officers and employees:

- a one-year ban on employment with certain City contractors; and
- a prohibition on making decisions affecting a person or entity with whom the officer or employee is discussing or negotiating future employment.

i. One year ban on employment with certain City contractors

Under Campaign and Governmental Conduct Code section 3.234(a)(3), City officers and employees may not work for or otherwise receive compensation from a person or entity that entered into a contract with the City within the previous 12 months if the officer or employee personally and substantially participated in the contract award.

The Ethics Commission may waive this prohibition if the Commission determines that imposing the restriction would cause extreme hardship for the former City officer or employee. Ethics Commission regulations implement this provision and explain the waiver process. See EC Reg. 3.234-4.

ii. Making decisions affecting a person with whom a City employee or official is negotiating future employment

Under both the Political Reform Act (Cal. Govt. Code § 87407) and Campaign and Governmental Conduct Code (section 3.206(c)), City employees may not make, participate in making, or seek to influence a government decision affecting a person or entity with whom the employee is discussing or negotiating future employment.

2. Future city employment for former Mayors and members of the Board of Supervisors

Neither the Mayor nor a member of the Board of Supervisors may, for a period of one year after the last day of service as Mayor or member of the Board of Supervisors, be appointed to any full-time, compensated employment with the City. C&GC Code § 3.234(b)(2).

This restriction on appointment to “employment” does not apply to the appointment of a former Mayor or Supervisor to a vacancy in an elective office of the City and County, or to a seat on a board or commission in the executive branch.

C. Prohibition on incompatible activities

1. Statements of incompatible activities

Government Code section 1126 prohibits City officials from engaging in compensated activities that are incompatible with their official duties. Campaign and Governmental Conduct Code section 3.218 implements this provision. Under this local law, City officers and employees may not engage in any employment, activity or enterprise that their department, board, commission or agency (“department”) has identified as incompatible. Each department has listed its incompatible activities in its statement of incompatible activities (“SIA”).

The SIAs are specific to the duties and responsibilities of each department’s officers and employees. Although all SIAs include several of the same rules, no SIA is exactly like another, and City employees and officials should consult their own department’s SIA. All SIAs are on the Ethics Commission’s website.

The SIAs supersede pre-existing Civil Service Commission rules and regulations relating to outside activities. C&GC Code § 3.218(f).

2. Common provisions of SIAs

Each department’s SIA must list those activities that are inconsistent, incompatible, or in conflict with the particular duties of the officers and employees of the department. The incompatible activities vary from department to department, but all SIAs prohibit the following:

- using the time, facilities, equipment and supplies of the City or the badge, uniform, prestige or influence of the City officer or employee’s position for private gain or advantage;
- receiving or accepting anything of value from anyone other than the City for the performance of an act that the officer or employee would be required or expected to render in the regular course of service or employment with the City;
- performing an act in a capacity other than as an officer or employee of the City that may be subject directly or indirectly to the control, inspection, review, audit, or

enforcement of the officer or employee's department, board, commission or agency; and

- participating in an activity with time demands that would render the performance of the City officer and employee's duties less efficient.

3. Notice to officers and employees

By April 1 of each year, every department must provide its employees and officers with a copy of its SIA. EC Reg. 3.218-2. Each department must provide a copy of its SIA by taking all of the following steps:

- posting the SIA on the department's web page;
- posting the SIA within the department's offices in the same place that other legal notices are posted; and
- either distributing a paper copy of the SIA to each officer or employee, or distributing an electronic copy of the SIA to each officer or employee by either (a) sending an email that contains the SIA to each officer or employee, or (b) if the department does not have the officer or employee's email address, by providing a handout to the officer or employee that references the SIA, provides the address of the SIA on the website of the department or the Ethics Commission, and directs the officer or employee to review the SIA in its entirety. EC Reg. 3.218-2.

4. Advance written determinations

An employee or officer may request a determination that the otherwise incompatible activity that the employee or officer wishes to perform should not be prohibited in a particular circumstance. An advance written determination confers the employee or officer seeking the determination with immunity from any subsequent enforcement action based on an alleged violation of the SIA.

The employee or officer seeking an advance written determination (the "requester") must submit the request in writing. Departments may develop or use their own forms for advance written determination requests. The Ethics Commission has also developed a standard request form, which is available on its website.

Each department's SIA identifies the decision-maker for advance written determinations. The decision-maker is the person or group of people who decide whether the proposed activity is incompatible with official duties and responsibilities. EC Reg. 3.218-4(b). The identity of the appropriate decision-maker can vary depending on who is seeking the advance written determination. The decision-maker must, on the basis of the facts and information provided by the requester, determine whether the activity that the requester wishes to perform is incompatible with the requester's duties. EC Reg. 3.218-4(c).

If an employee requests an advance written determination and the decision-maker does not make a decision within 20 days, the advance written determination is automatically approved. EC Reg. 3.218-4(d). This 20-day deadline does not apply to requests by officers.

If the circumstances described in the requester's application for an advance written determination are either inaccurate or change over time, the decision-maker may revoke any prior approval of an advance written determination. EC Reg. 3.218-4(d).

All requests for advance written determinations, and the advance written determinations themselves, are public records.

5. Amendment of statements of incompatible activities

A department may submit proposed amendments to its SIA to the Ethics Commission. EC Reg. 3.218-1. No such amendments will be effective until the Ethics Commission has approved them. The Ethics Commission may also, at any time and on its own initiative, amend any department's SIA.

D. Holding more than one office

1. Dual office-holding for compensation

Under Campaign and Governmental Conduct Code section 3.220, City officers with an annual salary of more than \$2,500 may not hold any other local, state or federal office with an equal or greater salary. The term salary does not include a stipend, per diem, or other payment for attendance at meetings; health, dental, or vision insurance; or other non-cash benefits. A person who violates this provision is deemed to have vacated the City office.

2. Incompatible offices

Under Government Code section 1099, public officials may not hold incompatible offices. In the absence of statutes indicating otherwise, offices are incompatible if the duties of the two offices will result in a significant clash of loyalties, if the dual office holding would be improper for reasons of public policy, or if either office exercises a supervisory, auditory, or removal power over the other. *People ex rel. Chapman v. Rapsey*, 16 Cal.2d 636 (1940). Upon assuming an incompatible office, a person is deemed to have vacated the first office.

E. Prohibition on contracting with the city

Section 3.222 of the San Francisco Campaign and Governmental Conduct Code prohibits City officers from contracting with the City, the School District, the Redevelopment Agency, the Housing Authority or the Community College District. This provision applies to any contract or subcontract of \$10,000 or more per year.

This prohibition does not apply to:

- contracts or subcontracts with nonprofit organizations, or to contracts or subcontracts entered into before a member of a board or commission began service;
- agreements to provide goods or services at substantially below fair market value; or

- contracts or subcontracts with business entities affiliated with a member of a board or commission unless the official exercises management and control over the business.

The Ethics Commission may waive the prohibition for any officer who, by law, must be appointed to represent any profession, trade, business, union or association.

F. Prohibition on disclosing or using confidential information

Campaign and Governmental Conduct Code section 3.228 prohibits City officers and employees from disclosing any confidential or privileged information unless authorized or required by law to do so.

Officers and employees are also prohibited from using any privileged information obtained by virtue of their office or employment to advance the financial or other private interests of themselves or others.

Under this section, confidential information means information that at the time of use or disclosure was not subject to disclosure under the Sunshine Ordinance or California Public Records Act.

G. Restrictions on use of city resources and political activity

1. Use of city resources

State law prohibits officers and employees from using public resources for campaign activity, personal purposes, or other purposes not authorized by law. Cal. Penal Code § 424; Cal. Govt. Code § 8314; *Vargas v. City of Salinas*, 46 Cal.4th 1 (2009); *Stanson v. Mott*, 17 Cal.3d 206 (1970). Misuse of public resources may be punishable by two to four years imprisonment in State prison and disqualification from holding any public office in the State, as well as civil penalties. Incidental and minimal use of public resources is not subject to criminal prosecution. Cal. Govt. Code § 8314(e); Cal. Penal Code § 424(c).

Local law specifically prohibits use of public funds to design, produce, create, mail, send, or deliver any printed greeting card that celebrates or recognizes a holiday. C&GC Code § 3.232. Also, each City department's statement of incompatible activities includes language prohibiting the use of time, facilities, equipment and supplies for personal or political activities.

2. Restrictions on political activity

In addition to the general restriction on use of public resources for campaign activity, State and local law impose specific restrictions on political activity. California Government Code section 54964 prohibits local agencies from expending public funds to support or oppose a candidate or ballot measure.

State and local law prohibit local officers and employees from directly or indirectly soliciting funds from other officers or employees of the City or from persons on the City's employment lists, unless the solicitation is part of a solicitation made to a significant segment of the public that may include officers or employees of the City. Cal. Govt. Code § 3205; C&GC Code § 3.230(a).

Officers and employees may not engage in political activity during working hours or on City premises. C&GC Code § 3.230(c). For purposes of this prohibition, the term "City premises" does not include property that is made available to the public and can be used for political purposes.

Officers and employees may not participate in political activities of any kind while in uniform. Cal. Govt. Code § 3206; C&GC Code § 3.230(b); see also EC Reg. 3.230-1(a) (defining "in uniform").

For more information about this topic, consult the City Attorney's most recent memorandum on "Political Activity by City Officers and Employees." The current version of the memorandum may be found on the City Attorney's legal opinions webpage.

H. Contractor contribution ban

1. Ban on contributions from contractors to elected officials or candidates

Under San Francisco's Campaign and Governmental Conduct Code, a person who contracts with the City, the San Francisco Unified School District, the Community College District, or a state agency with members appointed by the Mayor or the Board of Supervisors may not make a campaign contribution to any officer whose office, board or appointees would have to approve any such contract. C&GC Code § 1.126.

The law also prohibits contributions to political committees controlled by the officer or to a candidate for the officer's position. C&GC Code § 1.126(b)(1). The law only prohibits such contributions if the contract has a value of \$50,000 or more, or a combination of contracts in one fiscal year has a value of \$50,000 or more. C&GC Code § 1.126(b)(2). The prohibition applies not only to any party and prospective party to such a contract, but also to members of the party's board of directors; its chairperson, chief financial officer and chief operating officer; any person with an ownership interest of more than 20 percent in the party; any subcontractor listed in a bid or contract; and any committee sponsored or controlled by the party. C&GC Code § 1.126(c).

The ban on contributions applies only during the period starting with "commencement of negotiations" and ending six months after the approval of the contract or upon the "termination" of contract negotiations. C&GC Code § 1.126(b)(3).

Negotiations are "commenced" when a prospective contractor "first communicates" with the City office "about the possibility of obtaining a specific contract." EC Reg. 1.126-1(a). This initial communication may occur in person, by telephone, or in writing, and may be initiated by the prospective contractor or the City officer or employee. *Id.*

Examples of communications between prospective contractors and City officers and employees that commence negotiations include, but are not limited to, the following:

- A prospective contractor contacts a City officer or employee to promote itself for a specific contract; and
- A City officer or employee contacts a prospective contractor to propose that the contractor apply for a specific contract; and a prospective contractor submits a bid, proposal, or response to a Request for Qualifications to compete for a specific City contract.

Examples of communications between prospective contractors and City officers and employees that do not “commence” negotiations include, but are not limited to, the following:

- Inquiries regarding a particular contract, and requests for information or documents relating to a Request for Proposal or Request for Qualifications, provided that the inquiry or request does not involve promotion of the prospective contractor’s interest in a specific contract;
- Requests for Requests for Proposals and Requests for Qualifications;
- Attendance at an interested persons meeting that is open to the public; and
- Requests to be placed on a mailing list. EC Reg. 1.126-1(b).

Negotiations are “terminated” when the City or the prospective contractor end the negotiation process before a final City decision is made to award the contract. EC Reg. 1.126-1(i). For example, if a prospective contractor formally withdraws or is disqualified from consideration for a specific contract, the negotiations have terminated.

2. Ban on solicitation and receipt of contributions from contractors

San Francisco’s Campaign and Governmental Conduct Code also prohibits local elected officials from soliciting or accepting campaign contributions from certain City contractors. No City elected official, or political committee controlled by an elected official:

- May solicit or accept any contribution from a City contractor;
- From the submission of a contract involving the contractor to that elected official until either:
 - 1) the termination of negotiations; or
 - 2) six months have elapsed from the date the contract was approved.

C&GC Code § 1.126(c). Any candidate or candidate-controlled committee that receives a prohibited contribution must forfeit the contribution to the City. C&GC Code § 1.126(d).

Like the prohibition on making contributions from contractors to elected officials, the contracts that trigger the ban on soliciting or accepting contributions must have a value of \$50,000 or more in a fiscal year. C&GC Code § 1.126(c).

IV. Restrictions on gifts, honoraria, travel & loans

City officers and employees are subject to a number of laws and rules restricting the receipt of gifts and requiring the reporting of gifts. In this section we describe the principal gift requirements, which are contained in the Political Reform Act. This section also describes local gift rules.

A. Gifts to individuals

1. General

The Political Reform Act imposes gift restrictions on local elected officers and officials identified in Government Code section 87200, candidates for local elected offices, and designated employees. Designated employees are all employees who are listed in the City's Conflict of Interest Code and required to file a statement of economic interests. The City's Conflict of Interest Code can be found in Article III, Chapter 1 of the Campaign and Governmental Conduct Code. The Conflict of Interest Code designates employees and officials in each City agency and specifies the financial disclosure rules that apply to the designated employees and officials.

a. Gift limits under the California Political Reform Act

Elected officials, candidates, and officials listed in Section 87200. Local elected officers, public officials listed in Government Code section 87200 and candidates for local elective office may not accept gifts of more than \$440 from a single source in calendar year. These individuals must report gifts of \$50 or more on their statements of economic interests. The public officials listed in Government Code section 87200 include members of planning commissions, members of the Board of Supervisors, the District Attorney, the Treasurer, the City Administrator, the Mayor, the City Attorney, public officials who manage public investments, and candidates for any of these offices.

Designated employees. Employees listed in the City's Conflict of Interest Code may not accept gifts of more than \$440 in a calendar year from any source if they would be required to report income from that source on their statement of economic interests. If an employee required to report income from only specific categories of sources, gifts from other sources are not subject to the gift limit and need not be reported. Gifts of \$50 or more from a reportable source must be disclosed on the employee's statement of economic interests.

Gift limits are cumulative. The total amount of gifts that an employee or official receives from a single source in a calendar year may not exceed \$440. And if the total value of gifts received from a single source exceeds \$50, the employee or official must report all of the gifts received.

<p>Example. An executive director of a City department is designated in the City's Conflict of Interest Code and must disclose all sources of income and gifts. A professional acquaintance takes the executive director out to lunch three times during the year, but each</p>
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lunch costs only \$25. Because the total for all the lunches exceeds \$50, the executive director must report all three lunches on his statement of economic interests.

b. What is a gift?

A gift is *any* payment or benefit that a public official receives or accepts for which the official does not provide goods or services of equal or greater value. A gift includes a rebate or discount in the price of anything of value unless the rebate or discount is made in the regular course of business to all members of the general public. Cal. Govt. Code § 82028(a). Unless such a payment, benefit or discount falls into one of the exceptions described below, it should be considered a gift subject to limits and reporting requirements.

An official has “received” or “accepted” a gift when the official has actual possession of the gift or when the official exercises discretion or control over the gift, including discarding the gift or giving it to someone else.

If an official receives a gift and take one of the following steps within 30 days of receiving the gift, the official does not need to report the gift or account for any potential gift limits:

- Return the gift unused;
- Donate the gift, unused, to a 501(c)(3) nonprofit organization with which the official, or a member of the official’s immediate family, holds no position, or to a government agency and do not take a tax deduction for the donation; or
- Pay fair market value for the gift. 2 C.C.R. § 18941(c).

c. Exceptions

The Political Reform Act contains a number of exceptions to the broad definition of gift. 2 C.C.R. § 18942. The following are not considered gifts under the Act:

- Informational material. Informational material provided to assist an official in the performance official duties, including books, reports, pamphlets, calendars, periodicals, photographs, audio and video recordings, or free or discounted admission to conferences or seminars. Transportation provided to or in connection with an on-site demonstration, tour, or inspection also qualifies as informational material if the transportation is integral to the information conveyed, the site is otherwise legally inaccessible, or there is no publicly-available commercial transportation to or from the site. 2 C.C.R. § 18942.1.
- Gifts from family members. Gifts from an official’s spouse or former spouse, including an official’s registered domestic partner, child or step-child, parent, grandparent, grandchild, brother, sister, current or former parent-in-law, brother-in-law, sister-in-law, aunt, uncle, niece, nephew, grand-aunt, grand-uncle, grand-niece, grand-nephew, first cousin, first cousin once removed or the spouse or former spouse of any such person (other than a former in-law), provided that they are not acting as an intermediary for someone else.
- Campaign contributions. Campaign contributions are not gifts under the Act, but are subject to other state and local reporting and regulatory requirements.

- Bequest or inheritance. A bequest or inheritance is not a gift, but if an official receive tangible items as part of a bequest, such as property or stock, an official may have to report these items as investments.
- Personalized plaques and trophies worth less than \$250.
- Gifts of home hospitality. Gifts of home hospitality provided in the host's home when the host is present, including food, drink, or occasional lodging, from a person with whom the official has a relationship, connection, or association unrelated to the official's position, unless:
 - any part of the cost of the hospitality is paid directly or reimbursed by another person;
 - the host or any other person deducts any part of the cost of the hospitality as a business expense on a tax return; or
 - there is an arrangement between the host and a third party under which the host will use compensation received from the third party to pay for the hospitality.
- Gifts exchanged on birthdays and holidays. Gifts of approximately equal value exchanged between an official and another individual on holidays, birthdays, or similar occasions when gifts are typically exchanged. Similarly, if a group of City employees participate in a gift exchange – such as during the holiday season – any items received are not gifts as long as they are not substantially disproportionate in value.
- Reciprocal exchanges. Exchanges made in a social relationship between an official and another individual, with whom the official participates in repeated social events or activities such as lunches, dinners, rounds of golf, and attendance at entertainment or sporting events, where the participants typically rotate payments of less than \$440 on a regular basis so that, over time, each participant pays for approximately that person's share of the costs. But, even in the context of such a social relationship, if the official has received a disproportionate amount relative to what the official has paid, that excess amount constitutes a gift.
- Donation of leave credits from colleagues. Leave credits, including vacation, sick leave, or compensatory time off, donated to an official in accordance with the City's catastrophic illness program.
- Payments received in connection with making a presentation. Admission fees, food, and nominal items provided as part of paid admission to an event, when the official is making a speech at the event and receives these payments as a result of that appearance.
- Tickets to events to perform a ceremonial role. Tickets provided to an official and one guest of the official to a facility, even, show, or performance where the official performs a ceremonial role on behalf of the City. A ceremonial role is an act performed at an event at the request of the holder of the even where, for a period of time, the focus of the event is on an act performed by the official, such as throwing

out the first pitch at a baseball game, cutting a ribbon at an opening, or making a presentation of a proclamation or award. 2 C.C.R. § 18942.3. Mere attendance does not qualify as performing a ceremonial role.

- Prize or award. A prize or award received in a bona fide competition unrelated to one's official status is not a gift. But the official must report it as income if the value of the prize or award is \$500 or more.
- Wedding attendance. Benefits such as food and refreshments received as a wedding guest are not gifts so long as they are substantially the same as the benefits received by other guests.
- Bereavement offerings. Bereavement offerings typically provided in memory of and concurrent with the passing of a spouse, parent, child, sibling, or other relative of an official, such as flowers at a funeral.
- Acts of neighborliness. Acts of kindness that would be performed by a neighbor or good Samaritan, such as loaning a household item, providing a needed car ride, or assisting with a home repair. This exception does not extend to air transportation.
- Gifts given directly to members of an official's family. Gifts given directly to members of an official's family are presumed not to be gifts to the official, except when there is no established working, social, or similar relationship between the source of the gift and the official's family member, or there is evidence suggesting that the source of the gift intended to influence the official through the official's family member. 2 C.C.R. § 18943.
- Tickets to fundraisers for 501(c)(3) nonprofit organizations. If the nonprofit organization directly provides the ticket to the official, and the official uses the ticket. The official may accept up to two tickets for each event, for the official's own use and a guest. 2 C.C.R. § 18946.4(b).
- Tickets to fundraisers for political campaigns, if the candidate or committee supported by the fundraiser directly provides the ticket to the official and the official uses the ticket. The official may accept up to two tickets for each event, for the official's own use and a guest. 2 C.C.R. § 18946.4(c).
- The following exceptions may also apply so long as the individual providing the benefit or payment does not have, reasonably foreseeably have, or have within the next 12 months following the payment, any matters before the official's agency in which the official would participate. Such matters include a contract, license, permit, other entitlement for use, or an enforcement proceeding.
 - Benefits or payments made on a date or in a dating relationship.
 - Acts of human compassion. Payments provided to an official, or an official's family members, made to offset family medical or living expenses that the official can no longer meet because of an accident or illness, or to assist with expenses associated with humanitarian efforts such as the adoption of a child. Such payments do not constitute gifts so long as the source is an

individual who has a prior social relationship with the official, or if the payments are made without regard to official status.

- "Best friends forever." Payments provided to an official by an individual with whom the official has a long-term, close personal friendship unrelated to the official's status.

d. Gifts that are reportable but not subject to the gift limit

The following gifts must be reported on an official's statement of economic interests, but are not subject to the gift limit.

- Wedding gifts. The law attributes one half of the gift to the public official. 2 C.C.R. § 18946.3.
- Certain gifts of travel, as discussed in Section IV(A)(4).

An official is disqualified from making a decision affecting a source of gifts of \$440 or more in the 12 months before the decision, even if the gift is not subject to the gift limit.

e. Disqualification

Regardless of whether an official files a Statement of Economic Interests, City employees and officers may not make, participate in making, or seek to influence any governmental decision affecting any person or entity that was a source of \$440 or more in gifts in the 12 months preceding the date of the decision. See Part Two, Section II(A).

2. Local gift restrictions

In addition to the Political Reform Act's requirements, the City has gift rules, found in sections 3.216 and 2.115 of the Campaign and Governmental Conduct Code. Departments may also impose additional gift restrictions on their officers or employees. Some of these department-specific gift rules may be found in each department's Statement of Incompatible Activities. See Section III(C).

a. Prohibition of bribery

Section 3.216(a) of the Campaign and Governmental Conduct Code prohibits any person from offering or making, and any officer or employee from accepting, any gift with the intent to influence the City officer or employee in the performance of any official act. See also Cal. Penal Code § 68.

b. Limits on gifts from a restricted source

Section 3.216(b) of the Campaign and Governmental Conduct Code provides that City officers and employees may not solicit or accept gifts from a person who the officer or employee knows or has reason to know is a restricted source.

A restricted source is:

- a person doing business with (*i.e.*, entering into a contract or performing under a contract) or seeking to do business with the department of the officer or employee; or
- any person who during the previous 12 months knowingly attempted to influence the officer or employee in any legislative or administrative action.

Ethics Commission regulations allow officers and employees to receive nominal gifts from restricted sources. Under these regulations, an officer or employee may accept non-cash gifts worth \$25 or less on up to four occasions per year from any restricted source. EC Reg. 3.216(b)-5(a). The regulations also allow officers and employees to accept from restricted sources gifts of food and drink to be shared with coworkers. EC Reg. 3.216(b)-5(b).

c. Gifts from subordinates

Under Section 3.216(c) of the Campaign and Governmental Conduct Code, officers and employees may not solicit or accept anything of value from any subordinate, or employee or from any candidate or applicant for a position as an employee or subordinate under them.

Ethics Commission regulations implement this section. These regulations exclude certain voluntary gifts given or received for special occasions or under other circumstances in which gifts are traditionally given or exchanged. See EC Reg. 3.216-1. For example, gifts, other than cash, with an aggregate value of \$25 or less per occasion, given on occasions on which gifts are traditionally given, are not considered gifts for purposes of this section. Gifts, such as food and drink, without regard to value, to be shared in the office among employees, and personal hospitality provided at a residence that is of a type and value customarily provided by the employee to personal friends, are also not prohibited under this section.

d. Gifts from lobbyists

Lobbyists may not provide gifts that have a fair market value of more than \$25 to City officers. C&GC Code § 2.115(a).

e. Gifts for referrals

City officers and employees may not accept anything of value for referring a member of the public to a person or entity for any advice, service, or product related to the City's processes. C&GC Code § 3.226.

3. Honoraria

a. Generally prohibited

Honoraria are payments for giving a speech, publishing an article, or attending a conference or other gathering. Local elected officials, officials listed in Government Code section 87200, and candidates for local elective office may not accept honoraria. Designated employees may not accept honoraria from any source they would be required to report on their statement of economic interests. Cal. Govt. Code § 89502.

b. Steps to take to avoid receipt

If an official receives an honorarium and takes one of the following steps within 30 days of receipt, the payment will not be treated as an honorarium and will not be subject to reporting:

- return the payment;
- deliver the payment to the City and do not claim a tax deduction; or
- have the payment made directly to a bona fide charitable, educational, civic, religious or similar tax exempt nonprofit organization, and comply with all four of the following requirements;
 - do not make the donation a condition of the speech, article or attendance;
 - do not claim a tax deduction;
 - do not be identified to the recipient; and
 - ensure that the donation has no reasonably foreseeable financial effect on the official or the official's immediate family. 2 C.C.R. §§ 18932-18933.

c. Exceptions

The Political Reform Act provides two exceptions to the ban on honoraria:

- Payment for dramatic, comedic, musical or other artistic performance and payment for publication of books, plays or screen plays.
- Income for personal services provided in connection with a bona fide business, trade or profession, such as teaching, practicing law, medicine, insurance, real estate, banking or building contracting, where the services are customarily provided in connection with the business. This exception does not apply where the predominant activity of the business, trade, or profession is making speeches.

4. Travel

a. The Political Reform Act

The Political Reform Act treats payments for travel as gifts. A payment, advance, or reimbursement for transportation and related lodging and food will be subject to the \$440 gift limit, unless one of the exceptions described below applies.

i. Travel payments made directly to City officials and employees

When offered to and accepted by a City official or employee, the following are not considered gifts and need not be reported on a statement of economic interests:

- Travel paid for by a state, local, or federal government agency for education, training, or other inter-agency programs. Such payments received from a government agency are limited to actual travel costs and related per diem expenses. 2 C.C.R. § 18950(c)(2).

- Reimbursement for travel by either a government agency or a 501(c)(3) nonprofit organization for which the official has provided equal or greater consideration. Cal. Govt. Code § 82030(b)(2).

The following types of travel are not subject to the gift limit but must be reported on an official's or employee's statement of economic interests. Unlike payments for travel that need not be reported, these payments may disqualify the public official from participating in a future decision affecting the source of the travel.

- Travel in connection with a speech given in the United States. Under this exception, employees and officials may accept transportation, necessary lodging and food (the day before, day of and day after the speech or panel), free admission, refreshments, and similar non-cash nominal benefits provided directly in connection with an event at which the employee or official gives a speech or, participates in a panel or seminar. Cal. Govt. Code § 89506(a).
- Travel provided by governments or nonprofits. Travel provided by a government agency, a foreign government, an educational institution, a 501(c)(3) nonprofit organization, or a foreign organization that substantially satisfies the requirements for 501(c)(3) tax-exempt status, as long as the travel is reasonably related to a legislative, governmental, or public policy purpose. Cal. Govt. Code § 89506(a).

The foregoing gift of travel exceptions do not apply if a third-party made a contribution to an organization directly paying for or reimbursing an official's travel with the intent of providing a gift of travel to that official. Under such circumstances, a contribution made to a third-party to fund the official's travel is treated as a gift from the contributor because the third-party is merely an intermediary or "pass-through" for the contribution. See 2 C.C.R. § 18945; Modha Adv. Ltr., No. A-13-116A, 2013 WL 5934113 at *4-5 (Oct. 25, 2013). The third-party would be considered an intermediary for such a travel payment if any of the following applies:

- the contributor identifies the official as the intended recipient of the gift of travel;
- the third-party receives a contribution after the official or the official's agent solicited the contribution; or
- the third-party receives a contribution after soliciting the contribution with the understanding that the funds would be used for the sole or primary purpose of supporting an official's trip.

See 2 C.C.R. § 18945. Note that under this last scenario, the third-party would not need to specify which individual officials would receive the gift of travel. If the third-party generally identifies the recipients of a contribution as a group of governmental officials, the contributor's funding would constitute gifts of travel to those officials. See Calof Adv. Ltr., No. I-10-107, 2010 WL 3066079 at *4-5 (Jul. 29, 2010).

ii. **Travel payments made in conjunction with official agency business**

Travel payments made in conjunction with official agency business and through a City department are not gifts to the official or employee using those funds. Such travel

payments are thus not subject to any gift limits or reporting requirements. To qualify under the “official agency business” exception, an official must meet the following requirements.

- The payment is made directly to, or coordinated with, a City department.
- The payment is used for official agency business in one of the following ways:
 - the payment is made under to a contract that requires the contracting party to pay for any required government travel resulting from the City’s participation in the contract;
 - the payment is made for the purpose of performing a regulatory inspection or auditing function that the City is required to perform;
 - the payment is provided by an organization providing a training to its members, and an employee or official is attending to provide the training;
 - the payment is made in connection with an educational conference and the employee or official is a named presenter at the conference;
 - the payment is made for an employee or official to receive a training directly related to the employee or official’s job duties, and the donor commonly provides such trainings;
 - the payment is made for food to all attendees of a working group meeting in which the employee or official participates as a City representative;
 - the payment is made to view an operation, structure, facility or available product where the viewing would substantially enhance the employee or official’s knowledge and understanding of whether to enter into a contract regarding a similar operation, structure, facility or product.
- The City selects the employee or official who will use the travel payment. But if the travel payment is for a presentation or training, the source of the payment may request the employee or official who is most qualified on the relevant subject matter.
- The travel is made under the same requirements applicable to travel made using City funds, and the employee or official is representing the City in the course and scope of the employee or official’s duties. The travel expenses cannot exceed what would be reasonably paid at the City’s expense.
- The travel payment must be disclosed on the FPPC Form 801, available at: <http://www.fppc.ca.gov/forms/801.pdf>. The form must be maintained as a public record. Within 30 days after the end of each quarter in which travel payments totaled \$2,500 or more, the Form 801 must be submitted to the FPPC and posted on the official’s department’s website in a prominent fashion. The Form 801 requires disclosure of the following information:
 - the dates of travel, and an itemized breakdown of the transportation, lodging and food costs;
 - the name of the transportation provider, the type of transportation provided, and the name of the business at which lodging was provided;
 - the location of the travel;
 - the name and address of the entity paying for the travel; and

- the purpose of the travel, department and title of the employee or official who used the payment and the name of any elected or appointed official who used the payment.

To qualify under the “official agency business” exception, elected officials, the City Administrator, members of the Planning Commission, and public officials who manage public investments may only accept gifts of travel in narrow circumstances. In addition to the requirements listed above, three other requirements apply to travel payments provided to these officials: they must directly relate to the official’s public duties; must be made for a purpose that would otherwise be paid for with the agency’s funds; and must be authorized in the same manner as travel payments made using the City’s own funds. 2 C.C.R. § 18950.1.

b. Constitutional prohibition on travel discounts for officers

Article XII, section 7 of the California Constitution prohibits public officers, but not employees, from accepting free passes or discounts from transportation companies. This prohibition does not apply to a public officer’s receipt of generally available “frequent-flyer” miles earned without regard to official status.

c. Reporting out-of-state travel by an elected official

Whenever a City elected official accepts a gift of transportation, lodging or food for any out-of-state trip paid for in part by someone other than the City, another government entity or an educational institution, the official must disclose the gift with the Ethics Commission on Form SFEC-3.216(d), available on the Ethics Commission’s website. The official must file the report with the Ethics Commission as soon as the official has accepted the gift of travel. As a practical matter, the official must file the report before leaving for the out-of-state trip. The Ethics Commission’s form requires the official to report who is paying for the trip, how much the travel costs, which City employees and lobbyists are traveling with the official, and other details. C&GC Code § 3.216(d).

5. Loans

Personal loans that elected and appointed officials receive are subject to restrictions and, in some circumstances, a personal loan that the official does not repay or repays below certain amounts, may become a gift to that official.

a. Limits on loans from agency officials, consultants and contractors

Elected officials and officials specified in Section 87200 may not receive a personal loan that exceeds \$250 from an officer, employee, member, or consultant of their government agency or an agency over which their agency exercises direction and control. In addition, such officials may not receive a personal loan that exceeds \$250 at any time from any individual or entity that has a contract with their government agency or an agency over which their agency exercises direction and control. Cal. Govt. Code §§ 87460-87462.

b. Restriction on loan terms

Elected officials may not receive a personal loan of \$500 or more unless the loan is made in writing and clearly states the terms of the loan. The loan document must include: the names of the parties to the loan agreement; the date; the principal amount of the loan; the interest rate; term of the loan; the amount of the payments; and the date or dates when payments are due. Cal. Govt. Code § 87461.

i. Exceptions

The following loans are not subject to these limits and documentation requirements:

- loans from banks or other financial institutions made in the normal course of business on terms available to members of the public without regard to official status;
- loans received by an elected officer's or candidate's campaign committee;
- loans received from a spouse, child, parent, grandparent, grandchild, brother, sister, parent-in-law, brother-in-law, sister-in-law, nephew, niece, aunt, uncle, or first cousin, or the spouse of any such person, unless the official is acting as an agent or intermediary for another person not covered by this exemption; and
- loans made or offered in writing before January 1, 1998.

c. Loans as gifts

A personal loan received by any public official, including any designated employee, may become a gift subject to gift reporting and gift limitations under the following conditions:

i. Loan with defined repayment date

If the loan has a defined date or dates for repayment and the official does not make the repayment, then the loan will become a gift when the statute of limitations for filing an action for default has expired. For a loan provided pursuant to a written agreement, the statute of limitations is four years. *See* Cal. Civ. Proc. Code § 337.

ii. Loan without a defined repayment date

If the loan does not define a date or dates for repayment, then the loan will become a gift if it remains unpaid when one year has elapsed from the later of:

- the date the loan was made;
- the date the last payment of \$100 or more was made on the loan; or
- the date upon which the official last made payments on the loan aggregating to less than \$250 during the previous 12 months.

iii. Exceptions

The following loans will not become gifts to an official:

- a loan to an elected officer's or candidate's campaign committee;

- a loan described above on which the creditor has taken reasonable action to collect the balance due;
- a loan described above on which the creditor, based on reasonable business considerations, has not undertaken a collection action. But, except in a criminal action, the creditor has the burden of proving that it based the decision not to take a collection action on reasonable business considerations;
- a loan made to an official who has filed for bankruptcy and the loan is ultimately discharged in bankruptcy;
- a loan that would not be considered a gift, such as a loan from a family member. Cal. Govt. Code § 87462.

B. Gifts to the city

City departments, instead of individual City employee or officers, may also receive gifts. The City imposes a number of requirements on departments' acceptance of gifts. Also, departments should follow state law guidelines on acceptance of gifts to ensure that gifts to the City are not attributed to individual public officials, who are subject to gift limits.

1. Departments may accept gifts of up to \$10,000

Generally departments may accept gifts up to \$10,000 in value. Admin. Code § 10.100-305(a). Departments must promptly report all such gifts to the Controller. The Board of Supervisors must generally accept any gift valued in excess of \$10,000. Admin. Code § 10.100-305(b) Departments must report annually to the Board of Supervisors, during the first two weeks of July, regarding the receipt and disposition of any gifts received by the department in the previous fiscal year, regardless of amount. In some instance, the City has authorized a department's acceptance of a gift worth more than \$10,000 through a special fund established by the Administrative Code or specific Charter provisions.

2. Departments must report gifts over \$100

The Sunshine Ordinance requires departments to report gifts exceeding \$100 in value to carry out any City function by posting the information on the department's Web page and disclosing it in response to a public records request. Admin. Code § 67.29-6. The report must include the donor's name, address, and telephone number, the value of the gift, and any financial interest the donor has involving the City. Id.

Under Section 67.29-6, and unless otherwise provided in the Charter, departments must report gifts on their websites even if Board of Supervisors has accepted the gifts at a public meeting. Even though the Board's process of accepting most gifts over \$10,000 offers an opportunity for public review and input on those gifts, the Board's acceptance of a gift does not change or supersede the posting requirement in the Sunshine Ordinance.

Where the Charter vests in a department with special gift acceptance authority—as is the case with the City’s three charitable trust departments—that Charter authority supersedes any conflicting San Francisco Administrative Code requirement regarding gift acceptance, approval, and disclosure, including those described here.

While the Sunshine Ordinance requires departments to report gifts that they receive on behalf of the City, as explained above, the Sunshine Ordinance does not require departments to report personal gifts that City employees or officers receive. The Sunshine Ordinance’s reporting requirement applies only to gifts that the City accepts or uses—that is, gifts that a City officer, employee or agent accepts in an official capacity on behalf of the City. As discussed above, many officers, employees and consultants must separately report gifts they receive personally, as opposed to gifts received by the City. The Sunshine Ordinance does not require a department to report on its website personal gifts that individual officers or employees report on their Statement of Economic Interests (Form 700) or on an elected official’s Gifts of Travel Form (SFEC-3.216(d)). Gifts to the City that Benefit Particular Employees or Officers

In narrow circumstances, a City department may accept a gift that would benefit a City official or a group of officials within the department, without violating any gift limits or rules that would otherwise apply. When a City agency or department receives a gift of goods or services that will benefit particular employees or officers rather than the department as a whole, state law imposes additional restrictions and reporting requirements. Such a gift may be considered a gift *to the City* and not to individual employees or officers, only if the following criteria are met. These requirements do not apply to gifts of travel or tickets received by a City department. Those gifts are addressed by separate regulations.

- The department uses the gift for official department business.
- The department head determines and controls the use of the gift and independently decides which officers or employees will use it. The department head may not select himself or herself as a recipient, unless the gift is a good or service that may be generally used by other department employees, such as a network printer connected to several office computers.

When a payment that benefits one or more individual employees or officers meets these criteria, the City must report the gift on the FPPC Form 801. The form requires that the department report the following information:

- a description of the gift, the date received, the intended purpose and the value of the gift;
- the name and address of the donor, and, if the donor is not an individual, a description of the business activity or nature and interests of the entity;
- if the donor has raised money from any other persons to pay for the gift, the names and amounts given by these persons; and
- the department’s use of the gift and the name and title of the person using the gift.

The FPPC Form 801 is available at: <http://www.fppc.ca.gov/forms/801.pdf>. The department must complete the Form 801 for each gift it accepts and maintain the form as a

public record. The department must also file the form with the department's filing officer (the person who accepts Statements of Economic Interests from department employees) within 30 days after the end of each fiscal quarter. The department must also post the Form 801 on the department's website, in a prominent fashion, within 30 days after the close of any fiscal quarter in which the department receives gifts that have a total value of \$2,500 or more. 2 C.C.R. § 18944.

If the gift does not qualify as a gift to the City under the criteria described above, then the employee or officer must abide by the limits, prohibitions, and reporting requirements that normally apply to an individual's acceptance of gifts; which we discuss at Section IV.A above.

3. "Behested payment" rule

Under state law, City elected officials who solicit donations for legislative, governmental, or charitable purposes—including donations to the City from private sources—are required to report these "behested" payments. Such a donation is made at the "behest" of an elected official if it is requested, solicited, or suggested by that official, or otherwise made to a person in cooperation, consultation, coordination with, or at the consent of, the elected official. The elected official asking for these donations must file a report with the official's department once a single source has made a behested payment of \$5,000 or more during the calendar year, and subsequent payments of any amount from that source must be reported as well. The required report, FPPC Form 803, is available on the FPPC's and the Ethics Commission's websites. The official must submit the report to the department within 30 days of the date on which the donation is made, and the department must then submit the form to the Ethics Commission within 30 days. Cal. Govt. Code § 82015(b)(2)(B)(iii); 2 C.C.R. § 18225.7.

c. Gifts distributed by the city

1. Gifts of tickets and event passes

Free or discounted tickets and passes to an event, show or performance may be a gift to a City employee or official, even if provided by the City. Such tickets and passes are not considered gifts to the employee or official who actually uses them, only if one of the following circumstances apply.

a. Tickets or passes treated as income

If the City provides the tickets to the official, and the official treats the tickets as income, the tickets do not constitute gifts. 2 C.C.R. § 18944.1(a)(1). For these purposes, the official must report the tickets as income under state and federal income tax laws. The City must also report the tickets as income to the official on FPPC Form 802.

b. Distribution of tickets or passes for a public purpose

If the City provides the tickets to public officials for a public purpose, those tickets may not constitute gifts. To fall under the public purpose exception, the tickets must have been:

- received by the City under the terms of a contract for the use of public property;
- received by the City because the City controls the event; or
- purchased by the City at fair market value.

Also, all of the following additional conditions must apply:

- the original source of the tickets or passes has not identified which agency officials will use them;
- the agency determines in its own discretion which officials will use the tickets or passes;
- the agency distributes the tickets to its officials in accordance with a written, publicly available policy adopted by the agency, and the distribution serves a public purpose identified in that policy;
- the official using the tickets only for the official and the official's immediate family members; and
- the agency reports the distribution of the tickets on its website on FPPC Form 802. The completed forms must be emailed to the FPPC at form802@fppc.ca.gov, within forty-five days of the tickets' distribution. 2 C.C.R. § 18944.1(b)-(d).

Alternatively, the public official or employee may either pay fair market value for any tickets or passes that they receive, donate them to a 501(c)(3) non-profit organization, or return them before the event takes place. For more detailed guidance on the rules that apply gifts of tickets and passes distributed by the City, please consult the City Attorney's Memorandum on Gift Rules Regarding the City's Distribution of Tickets and Passes, dated June 22, 2012, available on the City Attorney's Legal Opinions webpage.

2. Raffles

When the City, or one of the City's departments, holds a raffle for its employees, and the prizes awarded in the raffle were donated by a third party, the prizes are gifts subject to reporting requirements and applicable limits. In such instances, the department that organized the raffle should notify prize-winners of the source of the gift. The value of the prize is its fair market value less any payment made by the employee to participate in the raffle. 2 C.C.R. § 18944.2.

v. Obligations of city officers and employees

In addition to their responsibilities to comply with State and local ethics laws, local law charges City officers and employees with several obligations regarding enforcement of local ethics laws.

A. Cooperating and assisting in enforcement investigations

Under section 3.240 of the Campaign and Governmental Conduct Code, in connection with an investigation by the Ethics Commission, the District Attorney, or the City Attorney of an alleged violation of local ethics laws, City officers and employees:

- must cooperate with and assist those agencies;
- may not provide false or fraudulent evidence, documents, or information to those agencies; and
- may not conceal from those agencies information that is material to an investigation.

B. Prohibition on filing false charges

Section 3.238 of the Campaign and Governmental Conduct Code prohibits all persons, including City officers and employees, from knowingly and intentionally filing with the Ethics Commission, the District Attorney, or the City Attorney any false charge alleging a violation of local ethics laws.

C. Prohibition on aiding and abetting

Section 3.236 of the Campaign and Governmental Conduct Code prohibits any person, including City officers and employees, from knowingly and intentionally providing assistance or otherwise aiding and abetting any other person in violating local ethics laws.

VI. Protection of whistleblowers

A. All persons may file a complaint

Any person may file a complaint with the City alleging that a City officer or employee has engaged in improper government activities; misused City resources; created a danger to public health or safety by failing to perform duties required by the officer or employee's City position; or abused a City position to advance a private interest. C&GC Code § 4.105(a). Such a person is often referred to as a "whistleblower."

Individuals may access additional information about the City's Whistleblower Program and file complaints online by visiting the Controller's website at: <http://www.sfcontroller.org/index.aspx?page=31>.

Also, whistleblower complainants may contact any of the following:

- the Controller (415/554-7500);
- the District Attorney (415/533-1752); or

- the City Attorney (415/554-4700).

Whistleblowers are entitled to confidentiality protections. C&GC Code § 4.120.

B. City officers and employees protected against retaliation

The City's Whistleblower Ordinance, Campaign and Governmental Conduct Code section 4.100, *et seq.*, provides protection against any adverse employment action to City officers and employees who, in good faith, file a complaint, oral or written with the Ethics Commission, the Controller, the District Attorney or the City Attorney, or a complaint with the complainant's department, alleging that a City officer or employee engaged in improper government activity by: violating local campaign finance, lobbying, conflicts of interest or governmental ethics laws, regulations or rules; violating the California Penal Code by misusing City resources; creating a specified and substantial danger to public health or safety by failing to perform duties required by the officer or employee's City position; abusing a City position to advance a private interest, or cooperating with an investigation of such complaint.

VII. Mass mailings at public expense

Under Government Code section 89001, public officials may not send newsletters or other mass mailings at public expense. A mass mailing is more than 200 substantially similar pieces of mail. Cal. Govt. Code § 82041.5. Taken literally, the statute would preclude any large mailing at public expense, including many mailings essential to the operation of government, such as tax notices, sample ballots, and meeting agendas. To avoid this result, FPPC regulations clarify which mass mailings are permissible and which are impermissible.

A. What mass mailings are prohibited?

Under the FPPC's regulations, see 2 C.C.R. section 18901(a), a mass mailing is prohibited only if all of the following four requirements are met:

1. Transmission

The item is sent or delivered by any means to the recipient at the recipient's residence, place of employment or business, or post office box. The FPPC has interpreted the rule broadly applying it to a range of modes of transmission, including fax and personal delivery as well as postal delivery. But the rule applies only to the transmission of materials to the locations specified in the rule – to a person's home, office, or post office box.

2. Reference to elected officer

The item sent either:

- features an elected officer affiliated with the agency which produces or sends the mailing; or
- includes the name, officer, 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.

3. Paid for with public funds

A mass mailing is sent at public expense if:

- public money pays for any of the cost of distribution; or
- public money pays for costs of design, production, or printing exceeding \$50, and the officials designing, producing, or printing intend to send the item other than as permitted by this regulation.

4. More than 200 pieces sent

The mass mailing rule applies only to mailings of more than 200 substantially similar items in a single calendar month. Copies that are exempt are not counted towards the 200 limit. The following materials are exempt:

- **Letterhead.** Any item in which the elected official's name appears only in the letterhead or logotype of the stationery, forms (including "compliments of" cards), or envelopes. Such an item may not include the elected official's picture, signature, or any other reference to the elected official, except as permitted by another exception. 2 C.C.R. § 18901(b)(1).
- **Press releases.** A press release sent to members of the media. 2 C.C.R. § 18901(b)(2).
- **Inter-office communications.** Materials sent in the normal course of business to other governmental entities or officers. 2 C.C.R. § 18901(b)(3).
- **Intra-office communications.** Materials sent in the normal course of business to staff. 2 C.C.R. § 18901(b)(4).
- **Collection or payment of funds.** Any item sent in connection with the payment or collection of funds if use of the elected official's name, office, title, or signature "is necessary to the payment or collection." 2 C.C.R. § 18901(b)(5).
- **Essential to administration of program.** Any item that an agency responsible for administering a government program sends to persons subject to that program, where the mailing is essential to the functioning of the program the item does not include the elected official's photograph, and the elected official's name, office, title, or signature is necessary to the functioning of the program. 2 C.C.R. § 18901(b)(6).
- **Required by law.** Any legal notice or item sent as required by law, court order, or order adopted by an administrative agency under the Administrative Procedure Act, and in which use of the elected officer's name, office, title, or signature is necessary.

Inclusion of an elected officer's name on a ballot as a candidate for elective office, and inclusion of an elected officer's name on a ballot argument, shall be considered necessary to such a notice or other item. 2 C.C.R. § 18901(b)(7).

- **Directories.** A telephone directory, organization chart, or similar listing or roster which includes the names of elected officers as well as other individuals in the agency sending the mailing, where all names are the same type size, type face, and type color and no photographs are included. 2 C.C.R. § 18901(b)(8).
- **Announcements.** An announcement of a meeting if:
 - it is sent to the elected officer's constituents and concerns a public meeting that is directly related to the elected officer's incumbent governmental duties, which is to be held by the elected officer, and which the elected officer intends to attend, or
 - it announces an official agency event or events for which the agency is providing use of its facilities or staff or other financial support.

The announcement may not include the officer's photograph or signature and may include only a single mention of the officer's name, except as permitted elsewhere in the regulations. 2 C.C.R. § 18901(b)(9).

- **Agendas.** An agenda required to be made available to the public. 2 C.C.R. § 18901(b)(10).
- **Business Card.** A business card that does not contain the elected officer's photograph or more than one mention of the elected officer's name. 2 C.C.R. § 18901(b)(11).
- **Materials sent in response to unsolicited requests.** A request is unsolicited if it is not requested or induced by the elected officeholder or a third party acting at the behest of the officeholder. 2 C.C.R. § 18901(c)(4).

VIII. Penalties for violations of ethics laws

A. The Political Reform Act

Any person who knowingly or willfully violates the Political Reform Act is guilty of a misdemeanor, which is punishable by a fine of up to \$10,000. Cal. Govt. Code § 91000.

A violation of the Political Reform Act may also result in civil penalties of up to \$5,000 and subject the individual to discipline by the official's agency. Cal. Govt. Code §§ 83116, 91005.5, 91003.5. Injunctive relief is also available.

If a court determines that a violation of the Political Reform Act occurred, a court may set aside any official action if it might not otherwise have been taken or approved. Cal. Govt. Code § 91003.

For violations of the gift and honoraria provisions, the Fair Political Practices Commission may bring an action to recover three times the amount of the unlawful gift or honoraria. Cal. Govt. Code § 89521.

B. Government Code section 1090

A violation of Government Code section 1090 may subject a person to a fine of not more than \$1,000 or imprisonment.

Also, a person found to have violated section 1090 is forever disqualified from holding office in the State. Cal. Govt. Code § 1097.

A contract violating section 1090 is void and unenforceable. Cal. Govt. Code § 1092.

C. San Francisco ethics laws

Knowing and willful violations of the ethics provisions of local ethics laws may subject a person to criminal penalties of up to \$10,000 per violation, a year in jail, or both. A violation also may subject a person to civil or administrative penalties in the amount of \$5,000 for each violation. C&GC Code § 3.242. Injunctive relief is also available.

In addition to these penalties, City officers are subject to suspension and removal from office for official misconduct. Charter § 15.105. Section 15.105 defines official misconduct and describes the process for suspension and removal. Any person removed from office because of official misconduct is ineligible for election or appointment to City office or employment for a period of five years after removal. Charter § 15.105(d).

Part three: Public records & meetings laws

“The very word ‘secrecy’ is repugnant in a free and open society; and we are as a people inherently and historically opposed to secret societies, to secret oaths and to secret proceedings. We decided long ago that the dangers of excessive and unwarranted concealment of pertinent facts far outweighed the dangers which are cited to justify it. Even today, there is little value in opposing the threat of a closed society by imitating its arbitrary restrictions. Even today, there is little value in insuring the survival of our nation if our traditions do not survive with it.”

— President John F. Kennedy
Address before the American Newspaper
Publishers Association, April 27, 1961

I. Introduction

Good government in our democracy is premised on informed and engaged citizenship, and our ability to govern can never be better or more effective than laws intended to assure the broadest possible public access to government proceedings and records. The policy objective underlying public records and open meeting laws is that citizens share a fundamental right to access information concerning the conduct of their government, and that governmental entities should make their policy decisions openly and with the full benefit of public participation.

As strongly as we in the City Attorney’s Office encourage City officials and employees to be thoroughly familiar with laws governing public records and open meetings, we urge, too, that they and we embrace these laws in the aspirational spirit of openness, transparency, and accountability that animate them. Public service means being ever mindful of the public’s right to be informed about and to participate in our democracy. Citizens who petition public officials and employees—whether to share ideas, to criticize, to seek information, or to request public records—deserve respect and appreciation for fulfilling a civic duty no less important to San Francisco’s government than our own duty as public servants.

As with almost every area of law, there are few absolutes; exceptions exist in open government laws to accommodate occasionally competing protected rights of privacy and

confidentiality. But these exceptions are generally narrow. Violations of open government laws are more likely to occur from ignorance or confusion than from deliberate intent. But it is important to understand that even unwitting violations may be legitimately viewed with suspicion. They invite criticism and undermine the credibility of City departments and policy bodies. Also, there can be substantial costs and penalties for violating these laws.

We encourage all policy body members and department personnel to thoroughly familiarize themselves with public records and open meeting laws by carefully reading this part of the Good Government Guide, and by taking part in the trainings that the City Attorney's Office offers. We also encourage City officials and employees to contact the City Attorney's Office in advance whenever they have questions regarding public records or meetings.

II. Legal overview

This part of the Good Government Guide should familiarize department heads, City personnel, members of City boards, commissions, and other bodies, and the public, with State and local laws governing the public's right of access to City records and meetings conducted by certain City bodies.

A. Open government laws

We address these four major laws that promote open government in San Francisco:

- The California Public Records Act (Cal. Govt. Code §§ 6250 et seq.) is the State law governing public access to the records of State and local agencies.
- The Ralph M. Brown Act (Cal. Govt. Code §§ 54950 et seq.) is the State law governing meetings of local governmental boards, commissions, and other multi-member bodies that the Brown Act refers to as "legislative bodies."
- The San Francisco Charter imposes additional requirements on the conduct of City boards, commissions, departments, and officials.
- The San Francisco Sunshine Ordinance (Admin. Code Chapter 67) imposes additional requirements on City government affecting both the public's access to records and the conduct of meetings of boards, commissions, and other bodies. The Sunshine Ordinance refers to City boards, commissions and most other multi-member policymaking and advisory bodies as "policy bodies." The Board of Supervisors enacted the Sunshine Ordinance in 1993 and the voters substantially amended it in 1999.

In addition to these four main laws, we address other provisions of State and City law that pertain to open government in San Francisco, including a California constitutional provision embracing open government principles.

For the convenience of the reader, this part of the Guide provides citations to a number of provisions of law. These citations are not intended to suggest that they are the only sources of legal authority regarding public records and open meeting issues. Court cases, opinions of the California Attorney General and the City Attorney, and other sources of federal, state, and local law may be relevant to a particular situation.

B. State-local overlap of open government laws

There is considerable overlap between State open government laws and City laws, including the Sunshine Ordinance. Where helpful, this Guide draws distinctions between State and City law requirements. But often the Guide does not draw such distinctions. Where State and City laws differ, the general rule is that the City must follow the more rigorous standard promoting greater access to public records and meetings of policy bodies. Admin. Code §§ 67.5, 67.21(k). We thus often focus only on that legal standard.

Some public agencies that have some connection to the City or are physically located within the City are nonetheless legally distinct from City government and are not subject to the Sunshine Ordinance. Among these agencies are the San Francisco Unified School District, San Francisco Community College District, the Successor Agency to the San Francisco Redevelopment Agency, San Francisco County Transportation Authority, San Francisco Health Authority, San Francisco Housing Authority, San Francisco Parking Authority, San Francisco In-Home Supportive Services Public Authority, and San Francisco Local Agency Formation Commission. . These agencies are subject only to the Public Records Act, the Brown Act, and, in some cases, other State laws governing public meetings and public records specific to the agency. But, although the Sunshine Ordinance does not of its own force apply to them, these agencies may choose to follow some or all of its requirements, and some of them have.

C. Proposition 59

In 2004, California voters adopted Proposition 59, an amendment to Article I, section 3 of the California Constitution. Proposition 59 creates a general constitutional right of access to public records and meetings. But it also states that it does not repeal or nullify existing statutory or constitutional restrictions on access to public records and meetings and does not supersede or modify the right of privacy recognized in the California Constitution.

It is therefore not completely clear what impact Proposition 59 has on access to public records and meetings, particularly in San Francisco, where the Sunshine Ordinance already provides for greater openness in government than State law requires. Courts and the Attorney General have generally found that Proposition 59 does not create new rights of public access to records and meetings but instead constitutionalizes existing rights under State law.

The underlying policy of the public records laws is that access to information concerning the conduct of the government's business is a fundamental right of each citizen. Cal. Govt. Code § 6250; Admin. Code § 67.1. The parallel purpose of the open meeting laws is to ensure that policy bodies make decisions openly and with the public's participation. Cal.

Govt. Code § 54950; Admin. Code § 67.1. Proposition 59 thus highlights what both State and City law have long recognized: Conscientious adherence to open government laws is essential to democratic self-governance. But by constitutionalizing the principle of open government, Proposition 59 has elevated that principle in the public consciousness and has arguably encouraged courts in close cases to come down on the side of open access to public records and meetings of policy bodies. Among other things, Proposition 59 requires courts to broadly construe provisions that further the people’s right of access and narrowly construe provisions that limit the right of access.

III. PUBLIC RECORDS LAWS

A. Definition of a public record

The Public Records Act defines a “public record” very broadly. The definition has three elements:

- Any writing, regardless of physical form or characteristics.
- Containing information relating to the conduct of the public’s business.
- Prepared, owned, used, or retained by a state or local agency.

Cal. Govt. Code § 6252(e). The first element defines a “record.” The second and third elements define what makes the record “public.” The Sunshine Ordinance adopts this definition of “public record.” Admin. Code § 67.20(b).

The first element of the definition of public record—that it is a “writing”—is immensely expansive. It encompasses any handwriting, typewriting, printing, photostating, photographing, photocopying, transmission by e-mail or fax, and every other means of recording on any tangible thing any form of communication or representation, including letters, words, pictures, sounds, or symbols. Cal. Govt. Code § 6252(g). This concept of a writing goes beyond the traditional written form. It may consist of communications in any medium that contains encoded information, such as a computer tape, video recording, cassette recording, voicemail, text message, photograph, or movie. E-mails including attachments are writings within the meaning of the Public Records Act. Yet, while it is clear that electronic records are “writings” under the Act, many principles developed under the Act preceded the current era of electronic communications, and those principles and others are in some respects still evolving to catch up with this sweeping technological change.

The second element of the definition of public record—that it contain information “relating to the conduct of the public’s business”—is also expansive, though it has limits. For example, an employee’s grocery shopping list, kept in an office desk drawer, is not a public record because it does not contain information about the workings of City government. As another example, a single document that contains notes of an office meeting and notes about the writer’s personal plans for the weekend is part public record (the notes of the meeting, which relate to the conduct of public business) but part not (the notes concerning the writer’s personal plans, which do not relate to the conduct of public business).

The third element of the definition—that a public record is “prepared, owned, used, or retained by a state or local agency”—is expansive, too. In particular, there may be instances where the City does not own a record that is nonetheless considered a public record. For example, while courts have not definitively resolved the issue, City officials and employees, in an abundance of caution, should assume that work they perform for the City on personal computers or other personal communications devices may be subject to disclosure under the public records laws. Such a record meets the first two elements of the definition of public record; the remaining question is whether, under the circumstances, the law would consider the record prepared or used by the City.

There are express exceptions to the definition of public record. For example, computer software that the City develops is not a public record. Cal. Govt. Code §6254.9(a); Admin. Code § 67.20(b). But these exceptions are few and far between. The large majority of records in the City’s possession are public records.

Legal issues concerning disclosure typically center not on whether the record is a public record, but on whether a specific law authorizes or requires the City to withhold or redact the record. Thus, in ordinary discourse, when someone asks “Is this a public record?” the real question usually being asked is not whether it is a public record, but whether the agency must disclose it to the public.

B. The public records request

City personnel may have difficulty recognizing that they have received a public records request or an effort by a member of the public to make a request. The discussion below clarifies when a request triggers the City’s obligation to respond.

1. Form of request

A person may make an oral public records request in person or by phone, or submit it in writing by fax, postal delivery, personal delivery, or e-mail. Admin. Code § 67.21(b). Departments must honor oral requests. They may ask but not insist that a request be in writing, to clearly record the timing and content of the request. A sample request form, modeled on the form used by the Clerk of the Board of Supervisors, is found at the end of the Guide.

2. Records/category of records sought must be “identifiable”

A public records request must specify an identifiable record or category of records sought. Cal. Govt. Code § 6253(b). The law does not require exactitude in requests, or limit requests to specific records the requester identifies by date, author, and/or recipient. But a request must be sufficiently clear and defined that the department can understand what records are the subject of the request.

The law does not generally allow a requester to look indiscriminately through a department’s files where such files are not otherwise made available to members of the

public. Accordingly, public records requests may not require access to “all of your records.” But public servants should make a conscientious effort to assist requesters in identifying the information or records they seek.

3. No “standing” records requests

Neither the Public Records Act nor the Sunshine Ordinance gives a member of the public the right to file a standing request for records that departments may or will create or receive in the future. For example, asking a department to provide a copy of all records to be created in the future pertaining to a particular subject – even if that subject is defined clearly and narrowly – is not a valid public records request. The Brown Act provides a limited right to file a standing request for future meeting agendas and agenda packets of a policy body. Cal. Govt. Code § 54954.1. Otherwise, a department may choose to honor a standing request for a particular recurring record, or for a record it expects to create in the future, but the law does not compel it to do so.

4. Questions are not records requests

A request that a department create a response to a request for information or answer a series of questions is not a public records request, and neither the Public Records Act nor the Sunshine Ordinance requires a department to reply to a series of written interrogatories. Nevertheless, department personnel should make a reasonable effort to assist questioners when public records may exist that would assist in answering written questions. Where a department knows that it has an existing record that is not privileged and that directly answers a written question a member of the public has posed, it is often a good practice for the department to forward that record to the person who submitted the question.

Departments may choose to answer some or all of the written questions they receive, and may even research questions for members of the public. These may be good practices in some instances, but the extent to which to respond to written questions is a matter of policy for each department.

While it is well settled that in responding to a public records request a department need not create a record that does not exist, the principle is not so clear-cut in the case of electronic records. As we discuss later, departments have certain obligations to compile information that already exists in electronic databases.

5. No special terminology required

A public records request need not use special terminology like “this is a public records request” or “this is a request under the Sunshine Ordinance” to be valid. And the use of incorrect terminology, like “this is a Freedom of Information Act request,” does not render the request invalid. The request merely needs to make reasonably clear that the requester is seeking identifiable records from the City. And even if the request does not mention the Public Records Act or Sunshine Ordinance, the City must adhere to the requirements of those laws in responding, unless the requester clearly instructs otherwise.

6. No justification required

A public records request need not state the reason for the request, and the City may not demand an explanation from the requester as a condition of responding to or complying with the request. Cal. Govt. Code § 6257.5; Admin. Code § 67.25(c). Making a records request is a right, not a privilege whose exercise is dependent on the good graces of government, Nevertheless, the City may ask the requester questions about the request to assist the City in responding, by helping the requester clarify the scope or nature of a request or narrow an unduly broad request.

7. Anonymous requests permitted

As a general rule, the City must respond to anonymous public records requests, or requests made under pseudonyms, provided that the request includes information sufficient to allow the City to transmit a response to the requester.

8. Types of access to records

A requester may seek to inspect records, or obtain copies of records, or both. Cal. Govt. Code §§ 6253(a), (b); Admin. Code §§ 67.21(a), (b). Typically the request itself, or the surrounding circumstances, will make clear the type of access the requester is seeking. If not, the department may seek clarification from the requester.

C. Responding to a public records request

1. Providing assistance to requesters

The Public Records Act requires departments to assist members of the public to identify records and information that are responsive to the request or purpose of the request, if stated; describe the physical location and information technology in which the requested records exist; and provide suggestions for overcoming any practical basis for denying access to the records or information sought. The department will have satisfied these requirements even if it is unable to identify the requested information after making a reasonable effort to elicit additional clarifying information from the requester. Cal. Govt. Code §§ 6253.1(a), (b).

If a requester has addressed a request to the wrong department, or if the department that received the request knows that another department may have responsive records, the department that received the request typically should inform the requester of the other department(s) that may have responsive records. Admin. Code § 67.21(c). A department should follow this procedure even if it does not have responsive records.

Further, if most of the information in a requested record is exempt from disclosure, the department must inform the requester of other records, if any, that may contain some of the information the requester seeks. Admin. Code § 67.27(d); see also Admin. Code § 67.25(c).

As mentioned above (see section (B)(6)), the City's general duty to assist requesters does not entitle departments to require the requester to give a reason for the request or explain how the requester will use the records. Departments may not limit access to a public record otherwise subject to disclosure based on the purpose for which the record is being requested. Cal. Govt. Code § 6257.5. Accordingly, departments should not routinely make such inquiries. But sometimes, particularly where the request is overly broad or unclear, it may be appropriate to ask about the requester's objectives where the inquiry would help the department identify the records and satisfy the request. Admin. Code § 67.25(c). When a department receives an extremely broad request and reasonably suspects that the requester actually is seeking a more limited number of records, the department may check with the requester to see if a narrower request would yield the records actually being sought.

2. Providing a description of records

The Sunshine Ordinance allows a person to ask a department for information regarding the existence, quantity, form, and nature of records relating to a particular subject. When requested to do so, the department must respond in writing within seven days. Admin. Code § 67.21(c). The Ordinance does not provide for any time extension to comply with such a request.

This procedure enables a person to get enough information relating to a subject to make or refine a public records request. It does not require a department to provide an inventory detailing each record that may pertain to a subject or to create a privilege log detailing records the department has withheld from disclosure in response to a request. Nor does it require a department to respond with exactitude. For example, a department may use approximations when describing the quantity of records relating to a subject. As another example, when describing the nature of records, a department may specify different categories without having to detail every specific type of record within each category.

3. Timely response

The City must respond to a public records request promptly. Cal. Govt. Code § 6253(b); Admin. Code § 67.21(b). There are two types of requests – standard requests, and immediate disclosure requests – with different response deadlines.

a. Standard requests: 10 calendar days

Unless the requester makes an immediate disclosure request, departments must respond to a request to inspect or copy records within 10 calendar days. But in “unusual circumstances,” departments may have up to 14 additional calendar days to respond. To invoke such an extension, the department must inform the requester in writing of the extension within the initial 10-day period, setting forth the reasons for the extension and the date on which a response will be made. Cal. Govt. Code § 6253(c). The department need not obtain the requester's consent to invoke an extension of time for one of the specified reasons.

“Unusual circumstances” permitting the extension are limited to the need for the department to do one or more of the following:

- Search for and collect the requested records from facilities separate from the office processing the request.
- Search for, collect, and appropriately examine a voluminous amount of separate and distinct records included in a single request.
- Consult with another department or agency that has a substantial interest in the response to the request.
- As to electronic information, compile data, write programming language or a computer program, or construct a computer report to extract data.

Cal. Govt. Code §§ 6253(c). Although departments have 10 days to respond to a standard request, and may be able to invoke an extension of up to 14 days, in either instance they should respond as promptly as possible and without unreasonable delay. Admin. Code §§ 67.21(a), (b).

b. Immediate disclosure requests: next business day

The Sunshine Ordinance requires a faster response for “immediate disclosure requests.” The faster response is required only if the request is in writing. Admin. Code § 67.25(a). Also, the words “Immediate Disclosure Request” must appear across the top of the request and on the envelope, subject line, or cover sheet transmitting the request. Admin. Code § 67.25(a). These rules for designation of an immediate disclosure request are more than a formality. They are designed to alert departments that an expedited time frame for processing the records request applies. A request that does not comply with these rules is not an immediate disclosure request. But if a department perceives that the requester intended but failed to make an immediate disclosure request, it may in its discretion choose to treat the request as if it were an immediate disclosure request.

The purpose of the immediate disclosure request is to expedite the City’s response to a “simple, routine, or otherwise readily answerable request.” Admin. Code 67.25(a). The Sunshine Ordinance specifies that for more extensive or demanding requests, the maximum deadlines for responding to a request apply. Admin. Code § 67.25(a).

Thus, the requester’s designation of a request as an immediate disclosure request does not automatically make it so. Rather, a department may adhere to the time deadlines governing standard requests – an initial 10-day period for response, plus a possible extension of up to 14 additional days – if the extensive or demanding nature of the request would impose an undue burden on the department to respond immediately.

Immediate disclosure requests must be satisfied no later than the close of business the next business day. Admin. Code § 67.25(a). The department should respond to the requester within that time period by fax or email, if the requester has provided that contact information. If the requester has provided a postal address only, mailing the response within the time period satisfies the deadline. Admin. Code § 67.25(a).

Departments may invoke an extension of no more than 14 calendar days to respond to immediate disclosure requests. Admin. Code § 67.25(b). While the Sunshine Ordinance mentions a 10-day extension period, that provision incorporates an expired provision of the Public Records Act framed in terms of 10 “business days,” which is typically equivalent to 14 calendar days. Further, when the voters amended the Ordinance and created the immediate disclosure request process, the provision of the Political Reform Act then in effect used 14 calendar days as the maximum time frame for extensions. That provision remains in effect. Cal. Govt. Code § 6253(c). Therefore, we read the Sunshine Ordinance and Public Records Act to allow an extension of up to 14 calendar days to respond to an immediate disclosure request.

If a department invokes the 14-day extension, it must notify the requester by the close of business on the business day following the request. Admin. Code § 67.25(b). A department may invoke the extension on one of the following grounds: (1) the voluminous nature of the records requested, (2) location of the records in a remote storage facility, and (3) the need to consult with another interested department. Admin. Code § 67.25(b). The Public Records Act further permits an extension to compile electronic data, write programming language or a computer program, or construct a computer report to extract data. Cal. Govt. Code § 6253(c)(4). In creating the immediate disclosure request process, the Sunshine Ordinance evinces an intent to follow state law regarding extensions of time to respond to records requests. Accordingly, the Sunshine Ordinance imports into the immediate disclosure request process this fourth ground for an extension of time.

c. Description requests: 7 calendar days

As noted earlier, the Sunshine Ordinance allows a member of the public to obtain a description of the existence, quantity, form, and nature of a department’s records on a subject. Such a request is technically not a public records request, though it may easily be confused with one, especially when the description request accompanies a public records request. Departments must respond to description requests within 7 days. The Ordinance does not authorize time extensions for responding to such requests. Admin. Code § 67.21(c).

d. Calculating time

If a department receives a public records request after regular business hours (for example, an email request received at 7:00 p.m.) or on a weekend or holiday, it may consider the next business day as the date of receipt. Cal. Civ. Code § 10. If a deadline for a response falls on a weekend or holiday, the department may consider the next business day as the deadline for response. Cal. Civ. Code § 11.

e. Duty to produce records incrementally

Departments must produce records as soon as reasonably possible on an incremental or “rolling” basis, when so requested. Therefore, even when a department has additional time to respond and is collecting a large quantity of records, if requested, it must produce records as it locates and reviews them – providing the review is in all respects complete – rather than waiting until it has located and reviewed all potentially responsive records.

Admin. Code § 67.25(d). In some cases, because of the relationship between two records or sets of records, review of the first will not necessarily be complete until the department has completed review of the second. If the department must redact a responsive record, review of the record is not complete until the department has made the redaction.

f. The rule of reason

In very rare circumstances a public records request or series of requests may become so burdensome, persistent, or sweeping that the demands placed on the department to respond to it within the required time frame would unreasonably impinge on the department's ability to perform its public duties. In these unusual instances, the department may be able to invoke a "rule of reason" (a common law doctrine occasionally cited in case law) to allocate the amount of time and resources a department devotes to responding. Departments believing that circumstances may warrant invoking this rule are urged to consult with the City Attorney's Office before doing so.

In general, the timing of a department's response to a request to inspect records must be reasonable in light of all the circumstances, including: the volume of records to be inspected; whether the records are readily available; the need, if any, to review the records to make appropriate redactions; the need, if any, to assign staff to oversee the inspection; whether the department is actively using the records; and the number of other public records requests to which the department is also responding. Without denying or unreasonably delaying the requested inspection, a department may consider the degree of disruption of its operations that inspection will cause in determining the timing and logistics of the inspection. In response to a request to inspect a large number of records, the department may afford the requester access to records for a specified amount of time each day if under the circumstances that procedure is reasonable. Departments may not unnecessarily place roadblocks in the way of requesters seeking to inspect records, but in this era of limited public resources departments must balance the duty to respond to public records requests with their obligation to maintain a high level of service to the general public.

When a department responds to a request for copies of excessively voluminous records, the rule of reason likewise may govern the timing of the department's response. Where compliance with a request may pose serious or insurmountable staffing burdens, the department may allocate a limited number of hours per day or week to work on responding to the request, to minimize disruption of its other public duties. In such circumstances, department personnel should endeavor to work cooperatively with the requester to determine if the request can be narrowed to minimize barriers to a prompt response, or to at least prioritize records the requester would like to receive first. If the same person makes multiple requests of a department or of the City as a whole, circumstances may warrant allocating a limited number of hours per day or week to the individual's requests.

Because open government laws place such paramount importance on responding promptly to public records requests, a department should neither lightly nor routinely invoke the rule of reason as a basis for elongating the time for fully responding. Indeed, we strongly

advise City personnel against invoking the rule of reason unless they have first consulted with the City Attorney's Office about their particular circumstances.

4. Proper response

a. The duty to respond

Departments may not refuse to respond to a public records request. In some circumstances, failure to respond could subject an employee to discipline. Also, such failure it could lead to a legal action in which the requester could recover attorneys' fees against the City.

Yet sometimes for good faith reasons departments miss deadlines for responding to public records requests. Once a department realizes it has missed or will miss a deadline, it should expeditiously contact the requester and process the request as quickly as possible.

b. The duty to search for records

The duty to respond to a public records request necessarily encompasses a duty to search for responsive records. The City must make a good faith, reasonable search effort. What constitutes a reasonable search depends on the circumstances. In some cases, a knowledgeable department employee will definitively know whether responsive records exist and, if so, where they may be located. But often the department will need to circulate the request among those employees most likely to have or know of responsive records. In a similar vein, the department often will need to consult those files where responsive records most likely would be found. Files that are in storage must be retrieved and searched if they are likely to contain responsive records.

But the duty to search for records does not require a department to find a needle in a haystack. Further, as noted above, the more burdensome the search required, the more likely will be the need to invoke an extension of time to respond to the request or, in more extreme cases, to invoke the rule of reason warranting a more drawn-out search. It is possible there may be a circumstance so extreme that it is appropriate for a department to decline to conduct a comprehensive search, but before taking such an approach a department should consult with the City Attorney's Office.

c. Types of responses

Following a reasonable search for responsive records, the department must do one of the following: disclose all responsive records; inform the requester in writing that it has no responsive records; or inform the requester in writing that responsive records exist, but that they are exempt from disclosure, stating the legal basis for the exemption. Cal. Govt. Code §§ 6253(c), 6255(b); Admin. Code §§ 67.21(b), 67.27. Often the group of responsive records will include both exempt and nonexempt records, in which instance the department must disclose the nonexempt records. In a similar vein, an individual record may be partially exempt from disclosure, in which case the department will redact the relevant portion of the record and must inform the requester in writing of the legal basis for the redaction. Admin. Code § 67.26.

d. No privilege log required

The law does not require a responding department withholding records to create a privilege log identifying the withheld records. It is common to prepare a privilege log in a litigation context, but not when responding to a public records request.

e. Information in electronic form

As a general rule, if a department has no records responsive to a request, the law does not require it to create or re-create one. But the Sunshine Ordinance requires the City to make information stored in electronic form available to a member of the public in any form requested so long as the information is available to or easily generated by the department in that form, including disk, tape, print-out, or on a computer monitor, even if the department does not use the information in the format that the requester seeks. Admin. Code § 67.21(l). Members of the public do not have a right to inspect public information on a computer monitor where the information visible on the monitor is inextricably intertwined with information that is properly exempt from disclosure. Admin. Code § 67.21(l). But departments must produce in an appropriate form the publicly disclosable information. With limited exceptions, the Sunshine Ordinance does not require a department to program or reprogram a computer to produce an electronic record. Admin. Code § 67.21(l).

The Legislature has amended the Public Records Act to impose additional requirements about information that is in an electronic format. Cal. Govt. Code § 6253.9. A department must make the information available in any electronic format in which it holds the information. Cal. Govt. Code § 6253.9(a)(1). And it must make a copy of an electronic record available in the format requested if it has used that format to create copies for its own use or for other agencies. Cal. Govt. Code § 6253.9(a)(2). These provisions do not require a department to reconstruct a record in an electronic format if the record is no longer available electronically. Cal. Govt. Code § 6253.9(c).

i. Portable Document Format, or PDF

To facilitate accessibility and ease of use, many City departments provide their electronic records to the public as PDF files. PDF, which stands for “Portable Document Format,” is a file format created by Adobe Systems in the early 1990s to facilitate the exchange of electronic documents across multiple operating systems, and without requiring the purchase of specific software or hardware. PDF is now an open standard, meaning it is available without charge, is non-proprietary, and can be accommodated by different software. The advantages of providing records in this format are that:

- PDF is a free, open format.
- PDF records are viewable and printable on any computer platform.
- PDF records typically look like the original records and thus preserve the integrity of the original information.
- PDF records can enable full-text searches to locate words and terms features in PDF documents that are saved in electronic format.

- PDF records work with assistive technologies to make the information available to persons with disabilities.

ii. Metadata

Sometimes a requester seeks a record in its original electronic format, which likely involves proprietary software, such as Microsoft Word or Excel. In such instances, it is usually the case that the electronic document will contain embedded, hidden information known as “metadata.” Metadata may include information about the document’s authors and editors; comments shared among co-authors and editors; and tracked changes in versions of the document before its completion. This metadata may not be readily apparent in the final document, but it may nonetheless be fully available to the recipient were the document provided in its native file format. Depending on the nature of the record requested, some or all of the metadata it contains may be properly exempt from disclosure. In still other instances—including comments that may contain legal advice, medical, personnel or otherwise private information—the disclosure of metadata may be restricted or actually prohibited by law.

While current case law offers little guidance on legal questions relating to public disclosure of metadata, and while technologies continue to evolve quickly, there is no evidence that the California Legislature intended to require public entities to search and redact metadata in electronic records. Neither is there an apparent legislative intent to require government agencies to produce records in their electronic formats if their release would jeopardize or compromise the security or integrity of the original records, or of any proprietary software in which it is maintained. Cal. Govt. Code § 6253.9(f).

At the same time, department personnel should consider the usability of public information provided to requesters in responding to public records requests. In asking for a public record in a native file format like Microsoft Excel, for example, a requester may simply be seeking a format that will enable searching, querying and summarizing public information in a manner that is far easier than if the record were provided in a scanned PDF or on a printed page. In some instances, the very same technology innovations that can present difficult public records questions may help resolve these issues through conversion to file formats that both meet the requester’s needs and avoid problems with unauthorized disclosure of metadata. Departments seeking further advice on these issues should consult with their department’s information technology staff and with the City Attorney’s Office.

The San Francisco Board of Supervisors has adopted a policy directing its clerk to provide responsive records in the original format when the requester so requests. Other departments may wish to consider their own policy options in light of the risks of unintended or impermissible disclosure of metadata in documents specific to their own department’s function. Again, departmental personnel seeking further advice on the topic of providing electronic records to members of the public should consult with their information technology staff and the City Attorney’s Office.

iii. Fee for duplicating electronic records

The fee for duplicating electronic records is limited to the direct cost of producing copies in an electronic format. Cal. Govt. Code § 6253.9(a)(2). The Public Records Act imposes

additional duties on local governments relating to electronic records., Under the Public Records Act, local governments may require requesters to pay the additional cost of producing a copy of the record, including the cost of constructing the record and of programming and computer services necessary to produce a copy, if (1) the record is ordinarily produced only at otherwise regularly scheduled intervals, or (2) the request would require data compilation, extraction, or programming to produce the record. Cal. Govt. Code § 6253.9(b). But, under the Sunshine Ordinance, if an electronic record is easily generated, the department may not charge a fee. Admin. Code § 67.21(l).

iv. Back-up files

As a general rule, departments need not search their back-up electronic files in response to a public records request. Back-up files serve the limited purpose of providing a means of recovery in cases of disaster, departmental system failure, or unauthorized deletion. They are not available for departmental use except in these limited situations. Electronic records such as e-mails that an employee has properly deleted under the department's records retention and destruction policy but that remain in back-up files are analogous to paper records that the department has lawfully discarded in the trash but may be found in a City-owned dumpster. Neither the Public Records Act nor the Sunshine Ordinance requires the City to search the trash for such records, whether paper or electronic.

v. Information on personal communications devices

Neither the Public Records Act nor the Sunshine Ordinance directly addresses whether communications relating to the public entity's business that a public official sends or receives on personal electronic devices such as cell phones and personal computers are subject to disclosure as public records. Courts have not definitively resolved this issue. But there is a strong argument that the key criteria for determining whether such a communication is a public record are the content and context of the record; whether it concerns City business and whether a City official or employee has received or created it in the performance of work duties. Even if the Public Records Act covers records on personal communications devices, this does not mean that officers and employees must retain such communications. Personal electronic devices may have limited storage capacity, and communications on them, if deemed to be public records, would be subject to the department's records retention policy. See Section IV below. These policies do not require retention of all public records, but only certain types of records as specified in State and local law. Examples of public records that the law does not require the City to retain include, but are not limited to, routine messages or e-mails, miscellaneous correspondence not requiring follow-up, notes, and preliminary drafts of memoranda that have been superseded (though under the Sunshine Ordinance, special rules govern retention of drafts of contracts)!. For a more thorough understanding of records retention requirements, City officers and employees should consult their department's record retention policy and this Guide's discussion of records retention issues.

5. Fees

a. No fees for records search

Departments may not charge a fee for the costs incurred in searching for, locating, or collecting records to respond to a public records request. Cal. Govt. Code § 6253(b); Admin. Code § 67.26.

b. No fees for redacting exempt information

Departments may not charge a fee for the costs incurred in redacting exempt information from a record to be disclosed in response to a public records request. Cal. Govt. Code § 6253(b); Admin. Code § 67.26.

c. No fees for inspecting records

Departments may not charge a fee for a requester to inspect records. Admin. Code § 67.28(a). In some circumstances, a department may deploy staff to sit with requesters while they inspect records, to ensure the security of the records. The department may not charge a fee for this use of staff time. If the department has to make a new copy of a record for the requester to inspect because redactions have been made in the original, the department may not charge a fee for that inspection copy.

d. Fees for copies

Departments may charge a fee for the duplication and mailing of copies of records. Cal. Govt. Code § 6253(b). Departments may require payment before providing the copies. Subject to the important limitations below, the decision to charge a fee, the amount of the fee, and the process for payment, are within each department's discretion, provided the discretion is not exercised unreasonably and is free of favoritism or discrimination.

For records routinely produced in multiple copies for distribution, such as copies of an agenda reproduced for a meeting, a department may charge 1¢ per page, plus postage. Admin. Code §§ 67.9(e), 67.28(b). For records assembled and copied to the order of the requester, a department may charge no more than 10¢ per page, plus postage. Admin. Code § 67.28(c). A record that a department originally reproduced in multiple copies, but now must again reproduce in response to a public records request, such as the agenda for a past meeting of a policy body, is subject to the higher charge. If the meeting has not yet occurred, though, the law is unclear on the fee that may be charged for copies of agendas and agenda materials that must be reproduced in response to a public record request. In this circumstance, we advise departments to charge only 1 cent per page for agendas and agenda materials.

A department may establish higher copying fees only if it prepares and posts an itemized cost analysis establishing that the per page direct cost of reproduction exceeds the above amounts. Admin. Code § 67.28(d).

Where the requester seeks a copy of a record on a medium other than paper, the City may charge for the cost of the medium on which the information is duplicated. Admin. Code § 67.21(l). A department may charge up to \$10 for video copies of video recorded

meetings. Admin. Code § 67.28(e). There is no specific dollar limit on the charge for audio copies of audio recorded meetings, but, as with video copies or any other non-paper medium, the charge may not exceed the cost of the medium on which the information is duplicated.

e. Special fees for copies and other services

Although the Sunshine Ordinance generally limits the fee for photocopies of records to 10¢ per page, state or City law may specially authorize certain departments or officials (such as the County Clerk, Assessor-Recorder, and Registrar of Voters) to charge higher fees for photocopies and services such as providing certified copies of documents, or providing copies of certain types of records. These special fees are presumptively valid, but we advise departments and officials to consult first with the City Attorney's Office if they have questions regarding such fees.

D. Exemptions from disclosure

The Public Records Act exempts certain classes of records from disclosure. As we discuss later, the Sunshine Ordinance limits the City's ability to claim some of these exemptions. Interpreting these exemptions may present complex legal and factual questions that require consultation with the City Attorney's Office.

Both the Public Records Act and the Sunshine Ordinance create a general right of public access to public records. Therefore, the law always imposes the burden on the City to justify its refusal to disclose a record by specifying the legal basis. Cal. Govt. Code § 6255(b); Admin. Code §§ 67.27(a)-(c).

Some records contain both exempt and non-exempt information. A department may not withhold an entire record unless all the information in it is exempt. Admin. Code § 67.26. Instead, the department must redact the exempted material and annotate the redacted text by referring to the provision or provisions of law authorizing the refusal to disclose. Admin. Code § 67.26. As previously noted, the department may not charge the requester a fee for redacting the information. Admin. Code § 67.26.

Some grounds for nondisclosure commonly arise. Below we discuss some of these. We do not discuss all the exemptions available under State and federal law; many apply only to specialized types of records and some rarely apply.

The exempt status of a record often means that a department may but need not decline to disclose it. But in other instances, such as where State or federal constitutional privacy interests of individuals or a statutory ban is involved, the department must not disclose a record even if it wishes to do so. Departments that have questions about whether they must invoke an exemption, or may choose not to, should consult the City Attorney's Office in advance.

If a department voluntarily discloses a record that it may withhold, then it waives its privilege to withhold the record in the future. Cal. Govt. Code § 6254.5. Departments may not disclose a record to one member of the public and withhold that record from another member of the public. But certain types of disclosures – for example, to another

governmental entity, or if otherwise required by law – do not necessarily require disclosure of that same record to a member of the public. Cal. Govt. Code §§ 6254.5(b), (e). And if the department has inadvertently compromised a third party’s rights by disclosing a record it should have withheld, it may not compound the error by making the same wrongful disclosure to another member of the public. For example, if a department has violated a person’s privacy by not redacting a home address or home phone number in a record given to a requester, the department may not repeat the error when giving the same record to a second requester.

Individual employees generally lack the authority to waive a privilege to withhold a record. Depending on the circumstances, only the policy body that oversees the department, the department head, or other authorized personnel may make such a decision. Unauthorized disclosure of a privileged record is official misconduct and may subject the person who made the disclosure to disciplinary action or criminal prosecution, or both. Campaign & Govt. Conduct Code §§ 3.228, 3.242.

1. Exemption under state or federal law

The United States Constitution, the California Constitution, and federal or State statutes and regulations exempt from disclosure, or prohibit disclosure of, certain records. The Public Records Act incorporates these laws in an exemption. Cal. Govt. Code § 6254(k). This exemption specifically references the California Evidence Code but is not limited to the various privileges and other provisions there that limit a party’s access to information. Rather, under this exemption, where disclosure would violate any federal or State law, the City may not release the record. Where federal or State law does not prohibit disclosure of a record but authorizes nondisclosure, the City may decide whether to disclose.

The Public Records Act catalogues alphabetically many exemptions derived from other State statutes. Cal. Govt. Code §§ 6276.02-6276.48 These are examples of laws that are incorporated into the Act through the exemption referenced above. The list is extensive. For example, it begins with 18 separate listings of information related to AIDS that is confidential under state law, including provisions in the California Penal Code, Health and Safety Code, Insurance Code, and Welfare and Institutions Code. Cal. Govt. Code § 6276.02. But this alphabetical listing is not exhaustive, even as to state statutes, and it does not purport to include references to federal law or to state administrative regulations or state constitutional provisions. Cal. Govt. Code §§ 6275, 6276.

2. Privacy

The California Constitution includes an individual right to privacy. Both state and local law recognize as a general principle that the right to personal privacy sometimes precludes disclosure of public records or information contained in those records. Cal. Govt. Code §§ 6250, 6254(c); Cal. Const., Art. I, §1; Admin. Code §67.1(g); Admin. Code Chapter 12M. These authorities may protect private information or records from disclosure even absent a statutory or constitutional provision addressing the specific information or type of record in question.

Some laws ban disclosure of information based on the privacy interests of individuals. For example, California Welfare and Institutions Code § 10850 makes confidential records that concern individuals who receive certain public social services. In such circumstances, the bar on disclosure is absolute unless the law provides specific exceptions where disclosure is mandated or permitted.

In other circumstances, the privacy bar to disclosure, while not absolute, is still high. In these instances, departments must determine whether disclosure serves a sufficiently significant public purpose to warrant release of the record and the attendant compromise of an individual's privacy. The level of the bar will depend on the nature and strength of the privacy interest. Privacy has many dimensions and cannot neatly be reduced to scientific measurement. Where the privacy interest is relatively weak, a weaker justification for disclosure in the public interest may suffice. But if the justification for public disclosure is itself weak, a relatively weak privacy concern may be sufficient to justify not disclosing the record.

a. Privacy interests of city employees and officials

Departments must not disclose “personnel, medical, or similar files, the disclosure of which would constitute an unwarranted invasion of personal privacy.” Cal. Govt. Code § 6254(c). But all personnel records are not automatically exempt. As a general rule:

- Members of the public are entitled to see records that contain a City employee's name, current or past job classification, current or past job assignment, and actual wages earned including overtime. Admin. Code §§ 67.24(c)(3), (4). There may be narrow exceptions to this general rule; for example, in limited circumstances some of this information for certain peace officers possibly may be withheld for safety or security reasons.
- The City must disclose the amount, basis, and recipient of any performance-based increase in compensation or benefits or any other bonus that it awards to any employee. Admin. Code § 67.24(c)(6).
- The City must disclose the job pool characteristics and employment and education histories of all job applicants who accepted employment with the City. Admin. Code §§ 67.24(c)(1), (2).

But, because of the right to privacy, as a general rule the City may not disclose personal information about employees such as home address, telephone numbers, personal e-mail address, age, date of birth, race or ethnicity, sex, and marital status. Disclosure of an employee's social security number is strictly prohibited. Cal. Govt. Code § 6254.29. Further, certain types of personnel records generally may not be disclosed. For example:

- The law generally considers a supervisor's performance evaluation of an employee a private matter that is not subject to disclosure. Even if the evaluation is favorable, it is not generally for public consumption.
- Generally the City must not disclose records containing medical or disability information about employees. Federal and state statutes provide broad protection for such information.

- Peace officer personnel records receive special protection under State law. Cal. Pen. Code §§ 832.7, 832.8. But not all information pertaining to a peace officer qualifies as a “peace officer personnel record.” For example, an officer’s name and salary is generally not exempt from disclosure. And a department’s official incident report in which an officer’s name is mentioned is not a peace officer personnel record.

Records concerning discipline of specific City employees, or circumstances that might warrant their discipline, often pose difficult issues. To the extent permitted by law, the Sunshine Ordinance requires the City to disclose records of an employee’s confirmed misconduct involving personal dishonesty, misappropriation of public funds, resources, or benefits, unlawful discrimination, abuse of authority, or violence. Admin. Code § 67.24(c)(7). Whether the employee’s misconduct is confirmed, and whether it is the type of misconduct addressed by the Ordinance, is sometimes unclear.

The Ordinance does not directly address other issues relating to actual or alleged employee misconduct, such as the treatment of: Unresolved or uninvestigated complaints against employees; complaints that have been investigated and resolved in the employee’s favor; and records of ongoing personnel investigations. We recommend that departments faced with requests for such records consult the City Attorney’s Office. The privacy issues pertaining to these types of personnel records can be complex, and other considerations in addition to privacy, such as the need to maintain effective investigations and the need to maintain public confidence in City employees and processes, may be relevant.

The law protects the privacy of City officials as well as City employees. For example, the City should not, without a commissioner’s consent, disclose to the public that commissioner’s personal e-mail address, even if the commissioner has disclosed it to commission staff. But departments should make available a City e-mail address at which members of the public may contact City officials, including commissioners. As another example, the Public Records Act strictly prohibits posting on the internet the home address or phone number of any elected or appointed official, defined broadly to include not merely the Mayor and members of the Board of Supervisors but many others, including active and retired peace officers. Cal. Govt. Code §§ 6254.21, 6254.24. Given the volume of material that many departments now post on their websites, it is important to take care to avoid inadvertently disclosing this type of information.

b. Privacy interests of members of the public

The statutory and constitutional protections for privacy also apply to information in City records about members of the public. For example, social security numbers may not be disclosed to the public. Cal. Govt. Code § 6254.29. To take another obvious example, a patient in a City hospital or health clinic has medical privacy rights that the public records laws cannot override. Similarly, departments may not disclose medical information pertaining to a disability that an individual submits to the City in connection with a request for access to a City building or modification of a City program, unless the individual consents to the disclosure.

Concerns about identity theft warrant redaction not merely of social security numbers, but also of driver’s license numbers, credit card numbers, bank account numbers, and similar information in records of transactions between the City and members of the public. This

type of information pertaining to City employees and officials likewise warrants privacy protection. In some circumstances, the law affords greater privacy protection for financial information about private individuals in City records than for comparable information about City employees; but the general rule is that records of distribution of City funds to private persons, like salary payments to City employees, are subject to disclosure.

Although the comparison is not always exact, usually the types of personal information about employees and officials that the City may not disclose will parallel the personal information about members of the public that the City may not disclose. For example, the general rule is that departments should not disclose home addresses, personal phone numbers, or personal e-mail addresses of members of the public. Such personal contact information typically sheds no light on the operations of City government, and thus disclosure does not fulfill the central purpose of public records laws. Further, many individuals would not want their privacy and in some instances their safety threatened by unwelcome intrusions derived from public disclosure of their personal contact information. Often the proper balance is to disclose the name of an individual who has communicated with a department, or signed an attendance sheet at a public meeting, while not disclosing contact information for that individual.

But there may be some circumstances in which knowing the location of a person's home is relevant to the public's ability to monitor the operations of government, for example, because of the proximity of the home to a site that is the subject of a City decision. And there may be circumstances where people do not have a reasonable expectation of privacy in contact information they have provided to the City, for example, based on notices on a department's forms or website to the effect that information submitted will be a matter of public record. If a department is inclined to disclose contact information for private individuals or other information about members of the public of a personal nature, we recommend that the department consult the City Attorney's Office.

In some circumstances, especially when disclosure of a personnel record is a close question, it may be advisable as an administrative practice for the City to first notify the affected individuals about the planned disclosure. In rare cases, this process may allow the person to provide information to the department that would cause it to change its decision to disclose. Further, this process allows the affected individuals to attempt to protect their privacy interest by filing suit to prevent disclosure of ostensibly private information.

3. Pending litigation

A department may decline to disclose records relating to and developed during pending litigation to which the City is a party, until the litigation is finally adjudicated or otherwise settled. Cal. Govt. Code § 6254(b). But the City must disclose claims filed against it. Admin. Code § 67.24(b)(1)(i).

As a general rule, for the pending litigation exemption to apply, it is not enough that a record relate to the litigation. Rather, it must have been prepared for or in the course of litigation. Departments receiving requests for records relating to pending litigation should immediately contact the Deputy City Attorney handling the litigation.

4. Attorney-client communication

A department may decline to disclose any privileged communication between the department and its attorneys. State law makes communications that are made in confidence as part of the attorney-client relationship between the City Attorney's Office and City officials and employees privileged and confidential. Cal. Govt. Code §§ 6254(k), 6276.04; Cal. Evid. Code §§ 950 et seq.

The attorney-client privilege belongs to the client, not the attorney. Thus, records in the City Attorney's possession covered by the privilege must remain confidential unless the client – the City – consents to their disclosure. Cal. Bus. & Prof. Code § 6068(e). By the same token, with the City's authorization a department may disclose records in its possession covered by the privilege. We recommend that departments consult with the City Attorney's Office before releasing records of privileged attorney-client communications.

5. Attorney work product

Records that contain the work product of an attorney representing the City are protected from disclosure. Cal. Govt. Code §§ 6254(k), 6276.04; Cal. Code Civ. Proc. §2018.030. The attorney work product doctrine functions as a privilege, protecting from disclosure “[a] writing that reflects an attorney's impressions, conclusions, opinions, or legal research or theories.” Cal. Code Civ. Proc. § 2018.030(a). This privilege may also extend to other records relating to the legal work of attorneys representing the City, including documents prepared at the request of the City Attorney's Office, such as reports by investigators, consultants, and other experts.

The attorney work product privilege is distinct from the attorney-client privilege and can cover records that the attorney-client privilege does not. And, unlike the pending litigation exception, the attorney work product privilege extends beyond records prepared for litigation purposes. Where the privilege applies to litigation records, it does not lose its force at the conclusion of litigation.

6. Informants, complainants, and whistleblowers

In some circumstances, departments may shield from disclosure the identity of persons complaining to the City about violations of law. Cal. Evidence Code § 1041. Privacy or other grounds may also authorize or require nondisclosure, even where the complaint does not allege a violation of law. Cal. Govt. Code § 6254(c). Substantial public interests often warrant withholding the identity of complainants. When, for example, a tenant complains about a landlord, a neighbor complains about a neighbor, an employee complains about an employer, or a citizen complains about a person making a public disturbance, disclosure of the identity of the complainant, the complaint, and/or the investigation could lead to retaliation against or harassment of the complainant and could also compromise the investigation. Under those circumstances the City may be able to withhold or redact the complaint and record of the investigation. See generally Cal. Evidence Code § 1040.

Also, the City may protect from disclosure the identity of whistleblowers complaining about City officers' and employees' wasteful, inefficient, or improper use of City funds or other improper activities, as well as the content and investigation of those complaints. Charter §§ C3.699-13(a), F1.107(c); C&GC Code §§ 4.120, 4.123. Central to the effectiveness of the City's whistleblower program is the public's understanding that the City will treat whistleblower complaints in a confidential manner to the extent permitted by law.

Finally, the constitutional right to petition the government for a redress of grievances, or to engage in anonymous protest speech, may in some circumstances protect the identity of complainants.

7. Trade secrets

Under certain circumstances, the law protects trade secrets from disclosure. Cal. Govt. Code § 6276.44; Cal. Civil Code §§ 3426, 3426.7(c); Cal. Evid. Code § 1060. Different types of information, including proprietary financial data, may constitute a trade secret. Several provisions in the Public Records Act address narrow categories of trade secrets or other proprietary information. See, e.g., Cal. Govt. Code §§ 6254.2 (pesticide safety and efficacy information), 6254.7 (certain air pollution data), 6254.15 (corporate financial information regarding location, expansion, and retention of corporate facilities in California).

But trade secret issues more likely will arise in a variety of business, contractual, and land use contexts not specifically addressed in the Public Records Act. A request for records that a company deems to be trade secrets can pose difficulties for the City, which must evaluate rather than take at face value the company's claim that the records are bona fide trade secrets. In some cases it will be clear that a record is a trade secret; but in many cases it will be unclear. Further, even if a record qualifies as a trade secret, its disclosure is not necessarily barred in response to a public records request, because the public interest in disclosure of the trade secret must also be considered.

Where the City intends to disclose records that a company claims are trade secrets, it is often appropriate for the City to give the company a brief period within which to seek a judicial order preventing disclosure. A department facing a records request that may contain trade secrets should consult the City Attorney's Office in advance.

8. Investigative and security records

The Public Records Act exempts from disclosure records of complaints to, investigations conducted by, intelligence information or security procedures of, and investigatory or security files compiled by, local police agencies. Cal. Govt. Code § 6254(f). The City must disclose certain information in files covered by this exemption, but not the files themselves. This exemption is potentially broad in scope, covering a wide range of records, including, for example, police investigative files, security tapes of City buildings, customer lists provided to the police by an alarm or security company, and police protocols for responding to terrorist attacks. Because this is a discretionary exemption, the police agency may, as a matter of practice or policy, choose to disclose records covered by the exemption. But certain related information, such as criminal history information, may not

be publicly disclosed. Cal. Penal Code §§ 13300 *et seq.*, 11105 *et seq.* Peace officer personnel records do not fall within this exemption and, as previously noted, may not be publicly disclosed. Cal. Penal Code § 832.7.

Unlike the vast majority of exemptions, disclosure obligations under this exemption may turn on the identity or purpose of the requester. For example, certain types of information must be disclosed to victims of certain crimes, their authorized representatives, and insurance carriers against which a claim has been or might be made. Other types of information must be disclosed to persons who swear under penalty of perjury that the request is made for scholarly, journalistic, political, or governmental purposes, or for investigation purposes by a private investigator. We do not address all the details of this exemption here, but encourage affected departments to consult the City Attorney's Office as issues arise.

The Sunshine Ordinance has cut back on this exemption. Under the Public Records Act, a record that falls within this exemption remains exempt even after the case is closed. But the Sunshine Ordinance provides, as to records pertaining to criminal investigations, arrests, or other law enforcement activity, that the record becomes available to the public once the District Attorney or a court determines that a prosecution will not be sought or the statute of limitations for filing charges has expired. Admin. Code § 67.24(d). Even so, the Ordinance protects from disclosure certain types of sensitive private information including names of juvenile witnesses and certain information whose disclosure would jeopardize law enforcement, for example, by disclosing a confidential source or secret investigative techniques or procedures, or in other unspecified ways. Admin. Code § 67.24(d)(1)-(7). Further, a state law enforcement officer such as the District Attorney is not bound by this provision.

This exemption also covers investigatory or security files compiled by non-police agencies for correctional, law enforcement, or licensing purposes. The "law enforcement" feature of this exemption generally precludes its application to records of administrative investigations conducted to determine compliance with ordinances. But the exemption for investigatory files that the City compiles for licensing purposes has broad reach given the range of permitting decisions that departments and policy bodies make. A separate exemption covers personal financial data that an applicant submits to qualify for a permit or license. Cal. Govt. Code § 6254(n).

For more information on security matters generally, as a starting point see the memorandum entitled, "Guidelines for Redacting Information from Plans Created by the City to Anticipate and Respond to Emergencies Created by Terrorist or Other Criminal Activity" (September 15, 2006) on the City Attorney's website.

9. Other exemptions

The Public Records Act creates many other exemptions for specific types of records, including, as previously noted, certain types of trade secrets. Among other exemptions the Act creates are records containing testing information pertaining to applications for public employment, Cal. Govt. Code § 6254(g); real estate appraisals and engineering evaluations, Cal. Govt. Code § 6254(h); library circulation records, Cal. Govt. Code § 6254(i); records

containing certain voter registration information, Cal. Govt. Code § 6254.4; records containing utility customer data, Cal. Govt. Code § 6254.16; and records of “alternative investments” in which public investment funds invest, Cal. Govt. Code § 6254.26. There are many more, often narrow in scope and obscure. These exemptions often have multiple components that must be analyzed closely to determine whether the exemption applies to a particular record, whether the discretion is mandatory or discretionary, and whether there are factors that must be balanced before making the decision to disclose or withhold the record.

Sometimes departments have legitimate programmatic or policy concerns with disclosing a record, but are not aware of an applicable exemption. In these circumstances, consultation with the City Attorney’s Office is appropriate. Given the emphasis on disclosure in our public records laws, there may be no applicable exemption. But in some cases there may be an exemption that is available to address the department’s concerns.

E. Contracts and related records

The Sunshine Ordinance sets forth detailed rules governing disclosure of contracts and related materials. The City must disclose such records at least to the extent required by the Public Records Act. But in certain respects the Ordinance affords the public greater access to these records than does State law.

We summarize below the general disclosure rules applicable to contracts and related materials, and then discuss special rules that apply to sole source service contracts, certain leases and permits, and franchise agreements. Given the variety and in many cases the complexity of City contracts, questions may arise that we do not answer below. For those, we recommend that departments consult the City Attorney’s Office.

1. General rules

a. Mandatory post-award disclosure

Except as noted below, contracts, contractors’ bids, responses to requests for proposals (“RFPs”), and all other records of communications between departments and persons or firms seeking contracts must be available for public inspection immediately after the City awards the contract. Admin. Code § 67.24(e)(1). When a department receives proposals in response to an RFP, but does not award a contract, it is not required to make the proposals public. But if a board or commission is sitting as the review panel, and for that purpose receives copies of one or more proposals submitted in response to an RFP, then the proposals must be made available to the public at the same time they are made available to the commissioners. Cal. Govt. Code § 54957.5; Admin. Code § 67.9.

Though not specifically mentioned in the Sunshine Ordinance, responses to requests for information (“RFIs”) and requests for qualifications (“RFQs”) are subject to the same general rules for disclosure. Because responses to RFIs and RFQs typically precede the issuance of an RFP, those responses typically will be considered communications between the City and persons or firms seeking contracts, and may be withheld from disclosure prior to contract award. But where the end result of an RFQ is the establishment of a list of

qualified contractors to perform specialized services for a department on an ad hoc basis, the establishment of the list should be analogized to the award of a contract,

As the prior discussion suggests, questions may arise concerning the timing of disclosure of those responses and other records relating to the responses. Where such questions arise, we recommend that departments consult the City Attorney's Office.

b. Notice of disclosure requirements

The Sunshine Ordinance requires departments to inform bidders, proposers, and contractors that contract-related information they provide to the City will be subject to public disclosure on request, including, as discussed below, financial information the successful bidder or proposer submitted. Admin. Code § 67.24(e)(1).

c. Financial data

Departments may refuse to disclose proprietary financial information in records regarding an unsuccessful bidder or proposer including information on net worth. Admin. Code § 67.24(e)(1). Departments may withhold proprietary financial data about the winning bidder or proposer until the final approval authority in the City awards the contract. Admin. Code § 67.24(e)(1). Departments must make such information public upon award of the contract, unless other State or federal law prohibits such disclosure. Admin. Code § 67.24(e)(1). In some instances (for example, under the federal Transportation Regulations for Disadvantaged Business Enterprises), State or federal law may forbid the City from disclosing the personal net worth and related records of successful bidders or proposers.

d. Records relating to negotiation strategy

As a general rule, departments may withhold from disclosure preliminary drafts, memoranda, notes, and other records containing recommendations relating to the City's negotiating strategy, that the City has not provided to a prospective contractor or other third party. See generally Admin. Code §§ 67.24(a)(1), 67.24(e)(1), 67.24(e)(3). Disclosure of such records to the public would mean that the party or parties with whom the City is negotiating may also obtain copies. The Sunshine Ordinance does not mandate such disclosures.

e. Score sheets and other evaluation materials for proposals

The Sunshine Ordinance mandates disclosure of certain records relating to RFPs. After completion of any review, evaluation, or rating of responses to an RFP, the City must make available for public inspection the names of scorers and evaluators, with their individual ratings, comments, and score sheets, and other materials used in the evaluation process. Admin. Code § 67.24(e)(1). The proposals that the panelists evaluate are not considered "other materials used in the evaluation process" and thus need not be disclosed at this stage in the contracting process. Proceedings of RFP selection panels are closed to the public.

f. Draft contracts

Except for certain types of agreements as discussed below (see section (E)(2)), departments may refuse to disclose draft versions of contracts during the negotiating process. But they must preserve these drafts and make them available for public inspection 10 days before presentation of the agreement to the policy body responsible for approving the agreement. Admin. Code § 67.24(a)(2). The 10-day rule does not apply where the policy body finds and articulates how the public interest would be unavoidably and substantially harmed by compliance with that rule. Admin. Code § 67.24(a)(2). Further, in the case of negotiations for a contract, lease, or other business agreement in which a City agency is offering to provide facilities or services in direct competition with other public or private entities that are not required to or do not make their competing proposals public, the policy body may postpone public access to the final draft agreement until the City agency presents the draft to it for approval. Admin. Code § 67.24(a)(2).

g. Other exemptions

Departments are not required to disclose contract-related records that federal or State law protect from disclosure or that fall within specific exemptions under the Public Records Act and Sunshine Ordinance. For example, privileged attorney-client communications, even if contract-related, are not subject to disclosure. As another example, an internal draft of an RFP that has not been finalized may be withheld from disclosure as a "recommendation of the author" where its premature disclosure would impair the integrity of the contracting process. Cal. Govt. Code § 6254(a); Admin. Code § 67.24(a)(1).

2. Sole source service contracts, certain leases and permits, and franchise agreements

Special rules govern disclosure of records exchanged between the City and another party during negotiation of the following types of contracts:

- Contracts for personal, professional, or other contractual services – if not subject to a competitive process, or where such process has arrived at a stage where there is only one qualified responsive bidder.
- Leases or permits – having total anticipated revenue or expense to the City of \$500,000 or more, or for a term of 10 years or more.
- Franchise agreements.

For these types of contracts (informally referred to as the “Big 3”), departments must make available to the public upon request documents exchanged during negotiations relating to the positions of the parties, including drafts or portions of drafts of agreements, even if the request is made while negotiations are ongoing. In other words, the general rule discussed above, that departments may refuse to disclose draft versions of contracts during the negotiating process, does not apply to these types of contracts. If the City does not prepare a record of the negotiations, or the record does not provide a meaningful representation of the positions of the parties, then the Deputy City Attorney or other City representative familiar with the negotiations, upon written request from a member of the public, must

prepare a written summary of the respective positions of the parties in the negotiations. The summary must be prepared within five business days of the final day of negotiations for the week. Admin. Code § 67.24(e)(3).

F. Enhanced access to public records under the Sunshine Ordinance

The Sunshine Ordinance limits the ability of City departments to invoke certain exemptions available under the Public Records Act and requires disclosure of certain types of records. We discuss below major features of the Ordinance that provide enhanced access to public records and that are not discussed elsewhere in this Guide.

1. General balancing

In addition to enumerating specific exemptions, the Public Records Act includes a general “public interest” balancing exemption. This exemption allows the government agency to refuse to disclose records where, on the facts of the particular case, the public interest in nondisclosure clearly outweighs the public interest in disclosure. Cal. Govt. Code § 6255(a). The Sunshine Ordinance prohibits the City from withholding or redacting records under this balancing exemption. Admin. Code § 67.24(g).

Some exemptions have a balancing component, whether explicit or implicit. For example, the privacy exemption in the Public Records Act covers only “unwarranted” invasions of personal privacy. Cal. Govt. Code § 6254(c). Thus, this exemption necessarily entails drawing lines between warranted and unwarranted invasions of privacy, which forces consideration of the public interest that would be served by disclosure of information that has a privacy dimension. That is a form of balancing, but the Sunshine Ordinance does not prohibit it.

2. Deliberative process privilege

Under the general public interest balancing exemption of the Public Records Act, an agency may decline to disclose records based on the “deliberative process privilege.” This privilege applies where the agency can demonstrate that disclosure of records would discourage candid discussion in the agency, undermining its decision making process and its ability to perform its functions. The Sunshine Ordinance prohibits the City from withholding or redacting records based on this privilege. Admin. Code § 67.24(h).

3. Investigative records exemption

As noted earlier, the Sunshine Ordinance limits the “investigative records” exemption of the Public Records Act, Section 6254(f), as it pertains to criminal investigation records. With certain qualifications, those records lose their exempt status once it has been authoritatively determined that a prosecution will not be sought or once the statute of limitations has expired. Admin. Code § 67.24(d). Budget and financial records

The Sunshine Ordinance requires the City to disclose budgets, whether tentative, proposed, or adopted, for the City or any department, program, project, or other category. Admin. Code § 67.24(f). The City must disclose all bills, claims, invoices, vouchers, or other records of payment obligations, and records of actual disbursements, showing amount paid, payee, and purpose of payment. But records of payments for social or other services that are confidential by law are exempt from disclosure. Admin. Code § 67.24(f).

4. Confidential litigation settlement provisions

The Sunshine Ordinance prohibits the City from entering into confidential settlements of litigation. Admin Code § 67.12(b)(3).

G. Additional public information requirements

The Sunshine Ordinance and other provisions of City law enhance transparency in government by requiring departments to follow certain practices that facilitate the public's access to information. We highlight below the major provisions relating to operational transparency that this Guide does not discuss elsewhere.

1. Oral public information

Each department head must designate a knowledgeable person or persons who can answer questions regarding departmental operations, plans, policies, and positions. Admin. Code § 67.22(a). The department head may but is not required to serve in this capacity. Admin. Code § 67.22(a). The designated person must respond to inquiries, provided that no more than 15 minutes is required to obtain the information responsive to the inquiry. Admin. Code § 67.22(c). Whether by designating an alternate or multiple employees for this task, the department head should assure that someone is always available to provide oral information to the public.

Both the U.S. and California Constitutions provide for the right of the people to petition their government for redress of grievances, and practitioners of good government should make every effort to be accountable and responsive to the citizens they serve. But neither these constitutional guarantees nor the Sunshine Ordinance gives members of the public the right to interview, debate, or engage in lengthy discussions employees or officials of their choosing. At the same time, none of these laws curtails informal informational discussions between employees and members of the public, if such contacts are acceptable to the employee and the department, not disruptive of departmental operations, and do not violate other laws, such as those governing public meetings. Admin. Code § 67.22(b).

2. Public review file

The Clerk of the Board of Supervisors and the clerk or secretary of each board and commission enumerated in the Charter must maintain a public review file open for public inspection during normal business hours. Admin. Code § 67.23(a). This requirement does not apply to other policy bodies. The public review file must contain copies of

communications that the clerk or secretary has distributed to or received from a quorum of the body concerning any matter on its meeting agendas within the previous 30 days or likely to be on a meeting agenda of the body within the next 30 days. Admin. Code § 67.23(a). This requirement does not apply to exempt materials, commercial solicitations, or periodical publications. Admin. Code § 67.23(a).

The clerk or secretary must maintain the public review file in chronological order for communications sent or received in the immediately preceding three business days. Admin. Code § 67.23(b). After a document has been on file for two days, it may be removed and placed in the monthly chronological file. Admin. Code § 67.23(b). The clerk or secretary need not put lengthy, multi-page reports attached to these communications in the chronological file if the file contains a letter or memorandum of transmittal referencing the report. Admin. Code § 67.23(c).

3. Annual reports

City boards, commissions, and departments must prepare an annual report. Charter § 4.103; Admin. Code § 2A.30. The annual report should contain a summary of the services and programs of the board, commission, or department, presented in terms and format accessible to the average citizen, and may include highlights and achievements of the prior year. Admin. Code § 1.56(a).

Boards, commissions, and departments that produce an annual report must post it on the City's website and transmit the Uniform Resources Locator (URL) to the Public Library within 10 days of final approval of the report. Admin. Code § 1.56(b); see also Admin. Code § 8.16. Where the law does not set the date for submitting the report, the board, commission, or department must notify the clerk of the Board of Supervisors in writing of the date by which the report will be posted. Admin. Code § 1.56(c).

City departments may not use City funds to print the annual report, absent prior approval by the Board of Supervisors. Admin. Code § 1.56(d). City officials or employees may print the report from the website or maintain hard copies of the report pursuant to a records retention policy. Admin. Code § 1.56(d). At the request of a member of the public, the board, commission, or department, or the Library, must promptly print or assist in arranging the printing of the report from the website. Admin. Code § 1.56(d).

4. Annual lists of sole source contracts

At the end of each fiscal year, departments must provide to the Board of Supervisors a list of all sole source contracts that they entered into during that fiscal year. Admin. Code § 67.24(e)(3). The list is a public record available for inspection and copying.

5. Department head calendars

The Mayor, City Attorney, and department heads must keep and maintain a daily calendar. Admin. Code § 67.29-5. The calendar must record the time and place of each meeting or event the official attended, excluding purely personal or social events at which no City business is discussed that did not take place at City offices or the offices or residences of

people who do substantial business with the City or are substantially financially affected by City actions. For meetings not otherwise publicly recorded, the calendar must include a general statement of the issues discussed. The Sunshine Ordinance does not require the official to include on the calendar the names of individuals attending the meeting.

Calendars must be available to any requester three business days after the “calendar entry date.” Admin. Code § 67.29-5. The calendar entry date is not when the meeting or event was physically entered into the calendar, but rather is the date that the meeting or event actually took place. The official need not disclose calendars in advance of the calendar entry date.

6. Maintaining a website

Departments must maintain a publicly accessible website. Admin. Code § 67.29-2. Each department must post on its website the following information for all of its policy bodies (including but not limited to all boards and commissions, whether or not Charter-created, committees of policy bodies, and advisory bodies):

- Notices and agendas for meetings of policy bodies, posted no later than the time at which this information is otherwise distributed to the public, allowing reasonable time for posting.
- Minutes of meetings within 48 hours after they have been approved. This requirement does not impose a duty to keep minutes on policy bodies that are not required to keep minutes.
- All notices, agendas, and minutes of meetings of policy bodies. This requirement does not impose a duty to keep minutes on policy bodies that are not required to keep minutes.
- Information that the policy body or department is required to make publicly available.

Each department must make reasonable efforts to review its website regularly and update it at least weekly. Admin. Code § 67.29-2. The Sunshine Ordinance encourages departments to make available on their respective websites as much information and as many documents as possible concerning their activities. Admin. Code § 67.29-2.

In addition, the City must post on the City’s website (or comparable accessible location on the internet) a current copy of the Charter and all City codes. Admin. Code § 67.29-2.

iv. Records retention and destruction laws

Various local, state, and federal laws govern the retention and destruction of records. We summarize the most important requirements below. Department heads should familiarize themselves with the records retention requirements in Chapter 8 of the San Francisco Administrative Code and in the Sunshine Ordinance, as well as with rules relating to particular departmental records.

The purpose of the records classification and retention laws is twofold. First, to preserve important records for an appropriate period of time in an orderly fashion. Retention ensures both that the public has access to important City records and that the City is able to protect its legal and financial rights by accessing records that establish or define those rights. Second, a carefully considered retention policy obviates the need of a department to retain unnecessary records and incur unnecessary storage costs. Accordingly, each department must develop a written policy specifically outlining which records it must maintain, and for how long.

A. Definition of ‘records’ that must be retained

For the purpose of records retention law, the term “records” is defined much more narrowly than in the Public Records Act. In the retention context, “records” means any paper, book, photograph, film, sound recording, map, drawing, or other document, or any copy, made or received by the department in connection with the transaction of public business and retained by the department (1) as evidence of the department’s activities, (2) for the information contained in it, or (3) to protect the legal or financial rights of the City or of persons directly affected by the activities of the City. Admin. Code § 8.1.

E-mail and other electronic records are subject to the records retention laws. As with paper records, some electronic records fit the definition of “records” in the retention context. But most do not.

The vast majority of public records in the City’s possession do not fall under the definition of “records” within the meaning of records retention law. Therefore, the City may destroy these records at any time. For example, as a general rule, employees may immediately dispose of phone message slips, notes of meetings, research notes prepared for the personal use of the employee creating them, and the large majority of e-mail communications.

In addition, departments may destroy at any time periodicals or publications they receive that are not of historical significance. They likewise may destroy duplicate copies even of documents the original copy of which the responsible City department must retain under records retention law. Cal. Govt. Code § 34090.7. With the exception of certain draft agreements, departments generally need not retain drafts of documents that later drafts or a final version supersede.

B. Classification of records that must be retained

All records that are subject to records retention requirements fall into three classifications – Current, Storage, and Permanent – as described below.

- **Current Records:** Records that the department retains in its office space and equipment for convenience, ready reference, or other reason.
- **Storage Records:** Records that the department need not retain in its office space and equipment but that the department must, or should, prudently preserve for a time or permanently in the facilities of a records center.

- Permanent Records: Records that the department must permanently retain.

Admin. Code § 8.4. The department head is responsible for determining which types of departmental records properly fall under each of these classifications. Admin. Code § 8.3.

Departments must also designate certain records as “Essential Records” – essential to the continuity of government and the protection of rights and interests of individuals in case of possible destruction by a major disaster, such as fire, earthquake, flood, enemy attack, or other cause. Admin. Code § 8.9.

C. The records retention schedule

State law sets a floor for records retention. The general rule is that departments must maintain all records subject to records retention requirements for at least two years. Cal. Govt. Code § 34090. Again we note that this requirement applies only to the minority of records in the possession of most City departments that are subject to any retention requirements. There are certain exceptions to the two-year State law standard, requiring records to be maintained for a longer period or permitting their destruction in a shorter period.

Consistent with State law, City law sets the following schedule for how long records must be retained.

Current records and storage records—from two to five years old. Departments may destroy or otherwise dispose of these records if (1) their destruction will not be detrimental to the City or defeat any public purpose, and (2) a records retention schedule includes a definitive description of such records and sets forth the retention period applicable to them. The department head must prepare the schedule. The Mayor or Mayor’s designee, or the board or commission that oversees the department, must approve the schedule. Further, the City Attorney must approve the schedule as to records of legal significance, the Controller must approve it as to financial records, and the Retirement Board must approve it as to time rolls, time cards, payroll checks, and related matters. Admin. Code § 8.3.

Current records and storage records—over five years old. Departments may destroy these records if they have served their purpose and are no longer required for any public business or other public purpose. But departments may destroy financial records only after the Controller’s approval; legally significant records only after the City Attorney’s approval; and payroll checks, time cards, and related documents only after the Retirement Board’s approval. Departments must deliver payroll checks, time cards, and related documents to the Retirement Board upon its request instead of destroying them. Admin. Code § 8.3.

Permanent records and essential records. Departments may not destroy or otherwise dispose of these records, except as stated here. Admin. Code § 8.3. Unless otherwise required by law or regulation, the City must store permanent records by microfilming the paper records or placing them on an optical imaging storage system, placing the original film or tape in a State-approved storage vault, and maintaining a copy with the department. Admin. Code § 8.4. The department, at its discretion, may then destroy the paper records.

D. Other principles pertaining to retention of records

In addition to specific retention requirements imposed by state and local law, as discussed above – including the Sunshine Ordinance, discussed more fully below – general legal principles require retention of records in some circumstances.

1. Retention following a public records request

Even if a document does not meet the definition of “record” for retention purposes, if the department receives a public records request for the document, it may not destroy it or otherwise dispose of it. For example, if a third party submits a document to a department that later receives a records request for it, the department may not return the document to the third party and then tell the requester it does not possess the document. The legal obligation to respond to public records requests and provide responsive records unless there is a legal basis for withholding them precludes the department from destroying or disposing of a document after receiving a public records request for which the document is a responsive record.

The same principles apply if a document meets the definition of “record” for retention purposes but due to the passage of time could have been destroyed under the applicable records retention schedule. If the document is in the department’s possession at the time of the public records request, then the legal obligation to respond to the request trumps the discretion the department otherwise would have to destroy the document.

2. Retention in light of litigation risk

If a matter is likely to be the subject of litigation or is covered by pending litigation, then departments and officials with records relevant to the litigation must retain the records. This retention, called a “litigation hold,” applies to both paper and electronic records. The same principle applies if litigation has commenced.

3. Method of retaining electronic records

If a department elects to or must retain a particular e-mail, it must create and retain a hard copy in the appropriate file. In the alternative, a department with a reliable computer data storage and retrieval system may elect to store the document on that system. Departments may not rely on e-mail back up tapes to comply with City and State record retention laws.

E. Sunshine Ordinance provisions

The Sunshine Ordinance addresses certain records retention issues, as discussed below.

1. The general duty to maintain and preserve records

The Mayor and all department heads must maintain and preserve all documents and correspondence in a professional and businesslike manner. Admin. Code § 67.29-7(a).

This does not mean that a department must retain all its records. Rather, institution of and compliance with the department's records retention policy satisfies this provision.

2. Designation of certain officials' records as city property that remains with the city

Documents that the Mayor's Office, elected officials, or department heads prepare, receive, or maintain are the City's property. The City must maintain the originals of such records consistent with record retention policies, even after the official leaves the office. Admin. Code § 67.29-1.

3. Duty to cooperate with City Administrator in compiling city index

The Sunshine Ordinance requires the City Administrator to compile an index that identifies the types of information and documents the City's departments, agencies, boards, commissions, and elected officials maintain. The index is for the use of City officials, staff, and the public. It should be organized to permit a general understanding of the types of information the City maintains, by which officials and departments, for which purposes, for what periods of retention, and under what manner of organization for accessing.

The City Administrator must continuously and accurately maintain the index. Each department, commission, and public official must cooperate with the City Administrator to identify the types of records it maintains, including those documents created by the entity, those documents it receives in the ordinary course of business, and the types of requests that it regularly receives. Each department, agency, commission, or public official shall report any changes in practices or procedures affecting the accuracy of the index. Admin. Code § 67.29.

4. Specific retention requirements

The Sunshine Ordinance requires retention of certain records. For example:

- Departments must retain for public review, before approval by a policy body, drafts of agreements City representatives are negotiating with another party that have been exchanged with that party. Admin. Code § 67.24(a)(2).
- Policy bodies must permanently retain tapes of their meetings, regardless of whether the body was required to tape the meeting. Admin. Code §§ 67.14(b), 67.8-1(a).
- The Department of Elections must preserve all records and invoices relating to the design and printing of ballots and other election materials, as well as records documenting who had custody of ballots from the time ballots are cast until they are received and certified by the department. Admin. Code § 67.29-7(b).
- Charter boards and commissions must retain for at least 30 days written materials that must be included in the public review file. Admin. Code § 67.23.

Some of these retention requirements are discussed in greater detail elsewhere in this Guide.

v. Public meeting laws

A. Entities subject to public meeting laws

1. Legislative or policy bodies

The Brown Act applies to “legislative bodies.” Generally, the Act defines a legislative body as any local government board, commission, committee, or other body, whether permanent or temporary, decision-making or advisory, created by charter, ordinance, resolution, or formal action of a legislative body. Cal. Govt. Code § 54952(b). The governing body of a local agency or local body created by state or federal statute also is a legislative body. Cal. Govt. Code § 54952(a).

The Sunshine Ordinance applies to “policy bodies.” Its definition of “policy body” is similar to but broader than the Brown Act definition of “legislative body.” In our discussion of open meeting laws, we use the term “policy body” to encompass all of these entities under the Sunshine Ordinance and all legislative bodies under the Brown Act.

Policy bodies include the City’s boards and commissions, any advisory body created by the Charter or the Board of Supervisors or by the initiative of a board, commission, or other policy body, any committee of a policy body, and any advisory board, commission, committee, or council created by federal, state, or local grant whose members are appointed by City officials, employees, or their agents. Admin. Code § 67.3(d). Bodies created by the Mayor or a department head are not policy bodies but in some circumstances may be “passive meeting bodies,” discussed at subsection (I) below.

Committees consisting solely of City employees or officials that are created by Charter, ordinance, resolution, or formal action of a policy body are policy bodies. Admin. Code § 67.3(d)(6). Other committees not so created consisting solely of City employees are not policy bodies, but in limited circumstances may be passive meeting bodies.

Policy bodies often create other policy bodies through formal action. For example, if a commission’s bylaws create a committee, or the commission adopts a motion doing so, the committee is itself a policy body. It matters not whether the body is an ad hoc committee or a permanent committee.

Policy bodies may also create other policy bodies through less formal means. For example, if, acting on behalf of the commission, the chair forms an ad hoc committee, the committee may be a policy body even though the commission did not formally create it. As another example, if a commission agrees by consensus at a meeting that two commissioners should look into an issue and report back at a later meeting, the commission may, depending on the circumstances, have created a two-member policy body, without knowingly doing so.

The name of an entity does not determine whether it is a policy body. Even if labeled a “task force,” “working group,” or similar title connoting informality in operations, the entity is a policy body if it meets the legal definition. So too is a personnel or budget committee of a commission, even if it only makes recommendations, or only investigates certain issues. Indeed, a “policy” body need not make or even advise on policy. For example, a body that primarily performs managerial tasks, or mainly adjudicates cases, is a policy body if it meets the legal definition.

Different types of policy bodies are subject to most of the same meeting law requirements. But there are important variations in requirements for different types of policy bodies. For example, in some circumstances special, more stringent open meeting requirements govern the Board of Supervisors and boards and commissions created in the Charter but do not apply to non-Charter bodies. And policy bodies such as the Board of Appeals conducting adjudicatory proceedings must also provide procedural due process that does not emanate from open government laws. In this Guide, we note several differences in open meeting requirements that hinge on the type of policy body involved, but does not detail all such differences.

2. Passive meeting bodies

The Sunshine Ordinance imposes limited public access requirements on “passive meeting bodies” that do not qualify as policy bodies. See subsection (I) below.

3. Private entities

In certain circumstances, City law requires private entities that perform the City’s business or contract with or receive funds from the City to provide public access to certain of their meetings. See Section VII below.

4. Individuals

Because a policy or passive meeting “body” must consist of two or more members, an individual can be neither a policy body nor a passive meeting body. Thus, generally, neither the Brown Act nor the open meeting provisions of the Sunshine Ordinance apply to meetings or hearings conducted by individuals, such as:

- An executive official, including a department head who serves under a board or commission.
- An individual hearing officer, even if the hearing officer is performing a function for a board or commission.
- An individual member of a policy body, even if the member is performing an assigned function for the body.

For example, if a policy body assigns one member to research an issue and report back to the body, the member need not conduct the research through meetings that conform to the open meeting requirements applicable to the policy body. But to avoid an unlawful *seriatim* meeting, discussed at Section IV(B)(4)(a) below, the member must take care to

avoid interactions outside of noticed meetings that involve a majority of the policy body or one of its committees.

While an individual is not subject to open meeting requirements that apply to a “body,” other laws may require individual officials to conduct public meetings or hearings. For example, certain provisions of law, such as Charter section 16.112, discussed at Section VI(A) below, and Charter section 4.104(a)(1), discussed in Part One, Section VII(B), may require department heads to hold public hearings when considering particular actions, but such hearings are not subject to the rules that govern the meetings of policy bodies. In addition, in limited circumstances, the passive meeting body rules may apply to meetings that executive officials attend.

5. Officials who have not assumed office

A person who has been elected to serve as a member of a policy body but has not yet assumed office must follow the Brown Act. Cal. Govt. Code § 54952.1. An appointed official who has not yet assumed office is not subject to this rule, but may voluntarily choose to adhere to it. ‘Meeting’ defined

The Brown Act and Sunshine Ordinance apply to all “meetings” of policy bodies. When members of a policy body are not engaged in a “meeting,” they generally are not subject to open meeting requirements.

6. The concept of a ‘meeting’

With limited exceptions, under the expansive language of the Sunshine Ordinance, a meeting occurs whenever a majority of the members of a policy body come together at the same time and place. Admin. Code § 67.3(b)(1). The majority is calculated with reference to all seats on the body, including vacant seats. But if a policy body has seats for nonvoting members, those seats are not considered in calculating the majority.

A meeting occurs even if the policy body takes no action but only gathers information collectively or discusses an issue.

A meeting may also occur under certain circumstances even if a majority of the members are not physically together at the same time and place. The most prominent example is the unlawful “seriatim” meeting. See Section IV(B)(4)(a) below.

7. Examples of meetings

Formal meetings of policy bodies are easily recognized as meetings. Less obvious examples, discussed below, illustrate the breadth of the “meeting” concept under the Brown Act and Sunshine Ordinance.

a. Retreats

Policy bodies may hold retreats. While there may be departures from some meeting norms at retreats, there may be no abandonment of legal requirements. For example, a commission cannot hold a retreat closed to the public in the hope that the private setting

will enable members to develop closer personal relationships that may lead to better working relationships. A retreat is a meeting of the body, and therefore must be conducted publicly. There must be proper notice, an agenda, and an opportunity for the public to comment, and all other requirements applicable to meetings must be followed. For example, where a policy body holds a retreat at a location other than its regular meeting place, it must give 15 days' advance notice. Admin. Code § 67.6(f). And, except in very limited circumstances, policy bodies must hold retreats, like meetings generally, in San Francisco. Cal. Govt. Code § 54954(b); Admin. Code § 67.6(b).

b. Site visits

Policy bodies may undertake site visits, such as inspection of a City facility under the body's jurisdiction. But a site visit is a meeting of the body and thus must be conducted with proper notice, an agenda, and an opportunity for the public to attend and comment, and must comply with other requirements for meetings. Further, a site visit typically is a special meeting held at a location other than the body's regular meeting place, so 15 days' advance notice is required. Admin. Code § 67.6(f). The logistical difficulties that open meeting requirements can pose for site visits may persuade the policy body to forego site visits and instead have a staff member make the visit, perhaps even videotaping it, and then report to the body on the visit at the next meeting of the body.

c. Meal gatherings

The Sunshine Ordinance provides that a "meal gathering" of a policy body before, during, or after a meeting is considered part of that meeting. Admin. Code § 67.3(b)(4)(C). Such a gathering is subject to the applicable notice and agenda provisions of the Ordinance. For example, if, after a policy body's meeting ends, the members go to a nearby restaurant to unwind over dinner or drinks, their meal gathering is unlawful unless it has been publicly noticed in accordance with the Sunshine Ordinance. Further, the public must be permitted to hear and observe the discussion of the members of the body at a meal gathering. And the body may not conduct a meal gathering in restaurants or other venues that require a payment to gain access.

For purposes of this Sunshine Ordinance provision, a meal gathering encompasses not only provision of a full meal, but also service of beverages or snacks only.

Where a meal attended by a majority of a policy body is not close in time to a formal meeting of the body, the facts will dictate the applicability, if any, of open meeting requirements. As explained below, depending on the facts, such a meal may constitute a meeting of the body, or a non-meeting, or a passive meeting.

8. Non-meetings

The Sunshine Ordinance's expansive definition of a meeting should not be construed so literally as to yield absurd results. For example, during a recess of a meeting of a three-member committee, there is no unlawful "meeting" if two of the committee members find themselves in the same elevator, provided they do not then discuss committee business.

As previously discussed, a “meeting” of a policy body is defined by reference to a majority of its members. When a minority get together or otherwise communicate among themselves regarding matters within the jurisdiction of the body, there is no “meeting.” For example, no meeting occurs if two members of a five-member policy body get together to strategize about items on the agenda for an upcoming meeting of the body. Nor is there a meeting if the chair of a five-member body reviews agenda items with the newest member but neither the chair nor the new member reviews those items with other members.

In addition, the law recognizes certain circumstances, discussed below, that do not constitute a meeting of the policy body even though a majority of the members gather together or engage in communications on the same subject.

a. Individual contacts between ‘another person’ and a majority of members

Individual communications between a person who is not a member of a policy body and a member are not a meeting of the body, even if the person cumulatively has contacts or conversations with a majority of the members on the same subject. Cal. Govt. Code § 54952.2(c)(1); Admin. Code § 67.3(b)(4)(A). This principle recognizes that members of the public have a constitutional right to communicate with all members of policy bodies. In addition, allowing individual communications with a majority of the body gives persons who are not members of either the body or the public, such as staff and other public officials, flexibility one-on-one to answer questions from or provide information to members of the body.

But to avoid the pitfalls associated with unlawful seriatim meetings, discussed at Section IV(B)(4)(a) below, these individual communications must be carefully conducted. The discussions must not involve the views or positions of other members of the policy body on the same subject. The member of the policy body should not solicit or encourage the other person to restate the views of other members, and should curb any such discussion initiated by the other person; and staff communicating with a member of a policy body should likewise avoid stating the views of other members. Cal. Govt. Code § 54952.2(b)(2); Admin. Code § 67.3(b)(4)(A). More fundamentally, those having the individual contacts must not serve as intermediaries to facilitate communications among a majority of the members of the body outside of a meeting.

Special limitations apply to adjudicative matters, such as a specific permitting or personnel decision that affects an individual’s rights. Depending on the circumstances, principles of due process and procedural and evidentiary rules governing such matters may make decisions of the body vulnerable to legal challenge where members have had individual conversations with anyone regarding the matter outside of the hearing. Although the Brown Act and Sunshine Ordinance generally allow individual communications with a majority of a policy body, those laws do not address the principles and rules that specifically apply in adjudicative settings.

b. Attendance at social, ceremonial, or recreational gatherings

Attendance of a majority of members of a policy body at a social, ceremonial, or recreational gathering is not a meeting if (1) the gathering is not sponsored or organized by or for the policy body and (2) a majority of the members refrain from using the occasion to discuss business within the subject matter jurisdiction of the body. Cal. Govt. Code § 54952.2(c)(5); Admin. Code § 67.3(b)(4)(C). For example, attendance of a majority of a policy body at a wedding, swearing-in ceremony, or banquet honoring a community leader would typically not be a meeting of the body.

But if a social, ceremonial, or recreational gathering is sponsored or organized by or for the policy body and a majority of members are invited to attend, the event is a gathering of a passive meeting body. See Section IV(I) below. And if a majority of the members discuss the business of the policy body at a social, ceremonial, or recreational gathering, that discussion transforms the gathering into a meeting of the body – an unlawful meeting, because not held in compliance with open meeting requirements.

c. Attendance at conferences

Attendance of a majority of members of a policy body at a regional, statewide, or national conference, such as an educational conference, is not a meeting of the body, provided that a majority do not use the occasion to collectively discuss the topic of the gathering or other business. Cal. Govt. Code § 54952.2(c)(2); Admin. Code § 67.3(b)(4)(B). The conference must be open to the public, but members of the public have no right to attend for free if other participants or registrants must pay fees or other charges to attend. Cal. Govt. Code § 54952.2(c)(2).

d. Attendance at local community meetings

Attendance of a majority of members of a policy body at a meeting organized to address a topic of local community concern, such as a neighborhood project, an officer-involved shooting, or a controversial legislative proposal, is not a meeting of the body, provided that the meeting is open to the public and a majority of the members do not use the occasion to collectively discuss the topic of the gathering or other business. Cal. Govt. Code § 54952.2(c)(3); Admin. Code § 67.3(b)(4)(B). The meeting must be organized by a person or organization that is not part of City government. Cal. Govt. Code § 54952.2(c)(3). Thus, if a City department sponsors a local community meeting it may be unlawful for a majority of the commission that oversees that department to attend without having properly noticed it as a commission meeting. Consulting the City Attorney's Office in advance of such a meeting is advisable in these situations.

e. Attendance at meetings of a standing committee of the policy body

Attendance of a majority of members of a policy body at an open and noticed meeting of a standing committee of the body is not a meeting of the body, so long as members of the body who are not committee members attend as observers. Cal. Govt. Code § 54952.2(c)(6); Admin. Code § 67.3(b)(4)(C-1). But under these circumstances the

role of an observer may be unclear and the committee meeting may present logistical and other complications.. Consulting the City Attorney's Office in advance of such a meeting , and before noticing the meeting, is advisable in these situations.

f. Attendance at meetings of another policy body

The Brown Act states that attendance of a majority of a policy body at an open and noticed meeting of a second policy body is not a meeting of the first body, provided that a majority of the first body do not discuss among themselves, other than as part of the scheduled meeting, business within the jurisdiction of the first body. Cal. Govt. Code § 54952.2(c)(4). The Sunshine Ordinance does not have a parallel provision, but states that every member of a policy body retains the full constitutional rights of a citizen to comment publicly on the wisdom or propriety of government actions. Admin. Code § 67.17. The City Attorney's Office should be consulted regarding any scenario in which a majority of the members of a policy body might attend a meeting of another policy body.

9. Unlawful meetings

A meeting of a policy body may be unlawful for a variety of reasons; for example, because it has not been timely or properly noticed (see Section); is held outside the City without satisfying one of the narrow exceptions permitting such a meeting (see Section); or is held as a closed session without legal justification (see Section). We highlight below other types of unlawful meetings.

a. Seriatim meetings

Even if a majority of the members of a policy body are not present in one place at one time, an unlawful meeting can still occur. Cal. Govt. Code § 54952.2(b); Admin. Code §§ 67.3(b)(2), (3). The law considers communications among a majority of the members outside of a noticed public meeting a "seriatim" (or "serial") meeting. Such communications, if substantive in nature, are generally unlawful.

The vice of seriatim meetings is that the public is unable to observe the policy body's receipt of information and the discussions among the members of the body, and has no opportunity to offer public comment, at what is essentially a private meeting. That the members do not reach a consensus or make a decision makes no difference. The unlawful seriatim meeting occurs because of the receipt of information and discussion among the members. And a seriatim meeting that goes further, with the members reaching a consensus or agreeing to take an action, is likewise unlawful.

Seriatim meetings can occur by use of technology, such as fax, e-mail, text message, or telephone, or through an intermediary. For example, an unlawful meeting may occur when one member, or at a member's request the clerk of the policy body, phones a majority of the members to discuss a substantive matter. Whether effected through a series of phone calls or a single conference call, such a meeting is unlawful because it involves a majority of the members.

A letter, fax, e-mail, text message, or other written communication from a member of a policy body to a majority of the members regarding matters within the body's jurisdiction

is not in itself unlawful. But there is a substantial risk that the initial one-way lawful communication could result in a seriatim meeting if a majority of the body ends up responding and effectively deliberating on or discussing a substantive matter. Communicating by e-mail or text message is of particular concern because the sender cannot control the actions of others in forwarding and responding to messages, which can easily lead to a substantive discussion among a majority of the body.

To avoid policy body members inadvertently triggering a seriatim meeting, we recommend that a member of the policy body who wishes to provide written materials to a majority of the body submit the materials to the clerk of the body to give to the members. The clerk may then include the materials in the policy body's agenda packet for the next meeting and in the public review file, if the body is required to maintain one. Admin. Code § 67.23(a). Other members who receive these materials should refrain from responding until the meeting.

The seriatim meeting prohibition generally does not preclude members of a policy body from discussing outside of a formal meeting procedural matters, such as scheduling a special meeting or determining whether a quorum will be present at an upcoming meeting. Members of the body and its clerk must take care to ensure that such communications do not veer from procedure to substance and thereby become an unlawful seriatim meeting.

b. 'Pre-meetings' and 'post-meetings'

If a majority of the members of a policy body get together before a scheduled meeting to review items on the agenda or otherwise to discuss the business of the body or matters within its jurisdiction, they are conducting a meeting. Similarly, if, after the body has adjourned its meeting, a majority of the members discuss what happened, for example, by rehashing an agenda item or discussing a matter that the body continued to a subsequent meeting, they are conducting a meeting. Such "pre-meetings" and "post-meetings" are unlawful because the body has not properly noticed them and has not formally afforded the public the opportunity to attend and comment.

We do not suggest that casual or fleeting comments among a majority of a policy body's members immediately before or after a meeting are unlawful per se. Nevertheless, we caution against substantive conversations at those times among a majority of the body pertaining to the business of the body.

B. Time, place, and notice requirements for meetings

1. Types of meetings

There are three possible types of meetings of policy bodies: Regular, special, and emergency. This Guide does not discuss emergency meetings in detail because the prerequisites for emergency meetings are so stringent that such meetings hardly ever occur. Such meetings may proceed only in the face of an "emergency" (a work stoppage, crippling activity, or other activity that severely impairs public health or safety) or a "dire emergency" (a crippling disaster, mass destruction, terrorist act, or threatened terrorist activity so immediate and significant that providing one-hour notice of the meeting may

endanger public health or safety). The Brown Act details the abbreviated notice requirements and other procedures applicable to emergency meetings. Cal. Govt. Code § 54956.5.

There are only a few differences in the legal rules governing regular and special meetings. The Sunshine Ordinance has eliminated the most important difference under state law, a longer notice period for posting agendas of regular meetings. The remaining differences are that, unlike at a regular meeting, there is no right of general public comment at a special meeting. But the policy body may allow it. In addition, there is no mechanism at a special meeting for addressing issues not on the agenda. Finally, a special meeting may not consider the salaries, salary schedules, or fringe benefits of a local agency executive, such as a department head, though it may be called to discuss the departmental budget. Cal. Govt. Code § 54956(b).

a. Regular meetings

All policy bodies, except advisory bodies, must establish by ordinance, resolution, motion, or in their bylaws, the time and place for holding regular meetings. Cal. Govt. Code § 54954(a); Admin. Code § 67.6(a). Customarily, a policy body's regular meetings are held at the same time and place, for example, the first and third Monday of the month at 6:30 p.m. in City Hall. But a body may schedule regular meetings at dates or times that are not uniform if there is some degree of advance notice to the schedule. For example, the body may adopt a resolution in November setting the schedule for regular meetings for the coming year, with the meetings to be held on different weekdays in different months.

If a regular meeting would otherwise fall on a holiday, the policy body may hold the meeting on the next business day, unless it otherwise reschedules or cancels the meeting in advance. Admin. Code § 67.6(c).

b. Special meetings

The presiding officer or a majority of the members of a policy body may call a special meeting to occur at a time or place other than the time or place for regular meetings. Cal. Govt. Code § 54956; Admin. Code § 67.6(f). Typically a special meeting addresses one subject, rather than a range of subjects as is typical for regular meetings. But it is permissible to hold a special meeting on more than one subject.

If a policy body reschedules a regular meeting to a time other than the regular meeting time, it conducts the meeting as a regular rather than a special meeting. For example, there would be a period for general public comment, which is not required for special meetings. See Section V(C)(4)(c) below.

c. Meetings held within city limits

With limited exceptions, policy bodies must hold all their meetings in the City. Cal. Govt. Code § 54954(b); Admin. Code § 67.6(b). One exception is where the body inspects real property located outside the City. This Guide does not detail the other exceptions because only very rarely do they come into play. A policy body that wishes to hold a meeting outside of the City should consult the City Attorney's Office.

2. Notice of meetings: posting agendas

a. Regular meetings

All policy bodies must post regular meeting agendas in a location that is freely accessible to the public at least 72 hours before the meeting. Cal. Govt. Code § 54954.2(a); Admin. Code § 67.7(a), (c). Weekends are counted in calculating the 72 hours. It is advisable, though not legally required, to give more than 72 hours' notice of a meeting when weekend or holiday hours comprise part of the notice period. Further, as an administrative rather than legal matter, policy bodies may choose to regularly give more than 72 hours' notice of meetings, allowing for "extra time" to ensure that they meet that deadline.

The law requires two specific postings for regular meetings and we strongly recommend, where feasible, two additional postings:

- The public library. Policy bodies must send two copies of the agenda to the Government Information Center at the San Francisco Public Library, which must receive the copies at least 72 hours before the meeting. Admin. Code § 8.16.
- The departmental website. Policy bodies must post the agenda on their website at least 72 hours before the meeting. Cal. Govt. Code § 54954.2(a)(1), (d); Admin. Code § 67.7(a).
- The meeting room. To maximize notice to the public, we recommend posting the agenda on a bulletin board adjacent to the entrance to the meeting room where feasible.
- The departmental office. To maximize notice to the public, we recommend, where feasible, posting the agenda on a bulletin board or similar location in the departmental office that is easily accessible to the public.

b. Special meetings

The Sunshine Ordinance requires policy bodies to give notice of special meetings at least 72 hours in advance to each member of the body and any members of the media who have requested notice in writing. Notice should be delivered as reasonably requested and may be by personal delivery, U.S. mail, e-mail, or fax. Admin. Code § 67.6(f). We have interpreted the Sunshine Ordinance to impose the same public notice requirements for special meetings as for regular meetings. The policy body must post the notice at the San Francisco Public Library Government Information Center and on the body's website at least 72 hours in advance of the meeting. See generally Cal. Govt. Code § 54956(a), (c); Admin. Code §§ 8.16, 67.6(f), 67.29-2. In addition, we strongly recommend where feasible posting the notice at the meeting location and the departmental office.

If a policy body holds a special meeting in a building other than its regular meeting place, it must give public notice of the meeting at least 15 days in advance. Admin. Code § 67.6(f). The 15-day notice requirement does not apply if the special meeting is held in the same building as the body's regular meeting place, but a different room. The 15-day notice need not include a formal agenda but should specify the time and place of the meeting and

generally identify the nature and purpose of the meeting. The body must post a formal agenda 72 hours in advance of the meeting, as with all special meetings.

c. Meetings of policy bodies that do not have a regular meeting schedule

The 72-hour notice and locational posting requirements apply to the inaugural meeting of a new policy body. But we recommend giving more notice of inaugural meetings if possible. In some cases the governing law creating the policy body may specify a longer notice period for the inaugural meeting of the body.

The 72-hour notice and locational posting requirements also apply to the meetings of advisory bodies that do not have regular meeting times.

3. Mailing agendas to interested persons

Policy bodies must send copies of agendas and agenda packets for regular and special meetings to any member of the public who has on file a valid written request for such materials. Cal. Govt. Code § 54954.1. These materials must be mailed at the time the agenda is posted or upon distribution to a majority of the policy body, whichever occurs first. A request is valid for the calendar year in which it is filed and to continue in effect must be renewed following January 1 of each year. We suggest that policy bodies notify members of the public who have made a standing request for such materials of the need to renew the request annually. The body's secretary or staff should update the mailing list annually to remove persons who no longer wish to receive the materials or are no longer at the listed address. Admin. Code § 8.17.

Policy bodies may charge a fee of one cent per page, plus any postage costs, for providing agendas and agenda packets in response to such standing requests, unless the body has set a special fee. Admin. Code §§ 67.9(e), 67.28(b), 67.28(d).

4. Alternative format of agenda for disabled persons

If requested, policy bodies must make available the agenda and documents constituting the agenda packet, without surcharge, in appropriate alternative formats to persons with disabilities. Cal. Govt. Code § 54954.1; Admin. Code § 67.7(f).

5. Cancellation of meetings

The City must provide notice of the cancellation of a meeting to the public as soon as reasonably possible. Admin. Code § 67.6(g). To the extent time permits, the policy body should post the cancellation notice on its website and at the San Francisco Main Library Government Information Center. Admin. Code § 67.6(g). It is desirable also to post the cancellation notice at the meeting site and at the departmental office. If time permits, the policy body should mail notice of the cancellation to those members of the public who have requested in writing to receive meeting agendas. Admin. Code § 67.6(g). Though not legally required, we recommend that bodies give notice of the cancellation to parties with a matter on the agenda and to persons who normally receive agendas by e-mail.

C. Meeting agendas

1. Description of agenda items

a. The "meaningful description" standard

Meeting agendas must contain a meaningful description of each item of business that the policy body will discuss or on which it may take action. The description must be sufficiently clear and specific to alert people of average intelligence and education whose interests are affected that they may have reason to attend the meeting or seek more information on the item. The description should be brief, concise, and written in plain English. Cal. Govt. Code § 54954.2(a); Admin. Code §§ 67.7(a), (b). Even consent agenda items must meet the "meaningful description" standard. Where an agenda includes an item to be heard in closed session, special description requirements may apply. See Section IV(H)(1)(a) below.

For special meetings, the agenda must "specify ... the business to be transacted or discussed." Cal. Govt. Code § 54956(a); Admin. Code § 67.6(f). Though phrased slightly differently than the agenda description requirement for regular meetings, there is no substantive difference between the two requirements. Description of agenda items is important because, with very limited exceptions, policy bodies may not consider matters that are outside the scope of an agenda item. In particular instances, it may be unclear whether the description of an agenda item satisfies the "meaningful description" standard. And on occasion there can be tension between a description that is meaningful and one that is brief and concise. In such cases, it often is better to err on the side of a longer, more informative description. Where description of an agenda item presents close or difficult issues, we advise that staff responsible for preparing the agenda consult the City Attorney's Office before posting the agenda.

No precise formula dictates whether a description of an agenda item is legally adequate. That determination must be made case-by-case. Sometimes an agenda item may inadvertently be framed so narrowly or with so much specificity that it may unintentionally confine the policy body's range of discussion or action. Advance consultation with the City Attorney's Office can minimize such problems. Sometimes it is best for an agenda description of an item to highlight specific components of an issue that are expected to be the main focus of discussion and action at the meeting, but also to include more open-ended language that would clearly permit discussion or action concerning other components of the issue.

A policy body may amend and then adopt proposed legislation, rules, and other policy proposals at the same meeting, so long as the amendments of the original proposals are within the reasonably foreseeable scope of changes that debate could produce in light of the description of the item on the agenda. But if the basic nature of the proposal would change, going beyond the scope of the notice on the agenda, the body must calendar the proposed change for consideration at a later meeting.

In some cases it will matter whether a change in proposed legislation, rules, or policies is a contraction or expansion of the original proposal described on the agenda. For example, if

the description references a tract of land, a proposal affecting only a portion of the tract would likely be within the description, but a proposal broadening the land affected likely would not be. Similarly, if the description references the City's prospective purchase of property for a specified amount, a proposal that the City pay less would likely be within the description, but a proposal that the City pay more likely would not be. On the other hand, if the description references the City's prospective sale of property for a specified amount, a proposal that the amount of the sale be larger would likely be within the description, but a proposal that the sale price be smaller likely would not be.

We emphasize that such issues must be assessed case-by-case and generalizations in this area are not determinative. If a policy body has questions about whether another meeting is necessary to take action, it should consult the City Attorney's Office if possible in advance of making that decision.

b. Discrete actions

In some circumstances the law requires a policy body to take discrete actions before rendering a decision. For example, in some circumstances the California Environmental Quality Act ("CEQA") requires the policy body to make environmental findings before a proposal can be adopted. Where one action by the policy body is a formal prerequisite to another action by the policy body, it is advisable and in some cases such as CEQA determinations may be legally required to include both actions in the agenda description.

c. Erroneous agenda items

Occasionally, the description of an agenda item contains an error. If the error is material, the general rule is that the policy body must continue the item without taking any action. Whether an error is material depends on the facts and circumstances. It may be material if it substantially misstates the substance of the agenda item so that potentially interested members of the public might have attended the meeting or sought further information about the item had it not contained the error.

d. Amended agenda items

Sometimes after having posted the agenda, the policy body wishes to amend it; for example, by adding or changing the description of an agenda item. There is no legal barrier to doing so if the amended agenda is posted in advance of the 72-hour deadline for posting agendas. But once that deadline has passed, the agenda may be amended only under limited circumstances. A new item may not be added to the agenda unless at the meeting the policy body confirms that the new item meets one of the limited exceptions to the agenda requirement, discussed at Section IV(D)(3) below.

Nevertheless, during the 72-hour notice period, an agenda item may be modified to more clearly state its scope; for example, providing greater detail or explanation than the original description. Improving a legally adequate agenda description during this period is permissible, so long as the modification is reasonably within the scope of the original description.

When amending an agenda, it is advisable, though not legally required, that the agenda be labeled "Amended Agenda" and that the portion that has been amended be clearly identified to the public."Discussion" and "action" items

Each agenda item must state whether the policy body will take action on the item and describe the proposed action, or will merely conduct a discussion. Admin. Code § 67.7(a). Where an agenda describes an item as a discussion item, the policy body may not take action on it. Sometimes the drafter of the agenda may not know whether the policy body will only discuss the item or will also wish to take action on it. In such instances, the agenda may describe the item as "discussion and possible action."

2. Materials accompanying agenda items

The agenda must refer to explanatory documents, such as correspondence or reports that the policy body has received in connection with an agenda item. The clerk of the body must post these documents adjacent to the agenda if they are one page in length. If they are longer, they need not be posted with the agenda, but the agenda must indicate where the documents are available for public inspection and copying. Admin. Code § 67.7(b).

The law does not require that agenda items have accompanying materials. Nor does it limit policy bodies to considering at meetings only documents that existed when the agenda was posted. Often policy bodies consider documents that members of the public, staff, and others present to the body after the posting of the agenda, including at the meeting. The Brown Act and Sunshine Ordinance require that the body give members of the public access to these materials at roughly the same time members of the policy body get them. See Section IV(F)(4) below.

3. Discussing or acting on items not on the agenda

Generally, policy bodies may discuss or take action on only items listed on the agenda. Policy bodies may act on an item not listed on the agenda only in three limited situations, described below. Cal. Govt. Code § 54954.2(b); Admin. Code § 67.7(e).

- Upon a determination that an accident, natural disaster, or work force disruption poses a threat to public health and safety. The policy body makes this determination by majority vote of the body.
- Upon a good faith and reasonable determination that the need to take immediate action on the item is so imperative as to threaten serious injury to the public interest if action is deferred to a subsequent special or regular meeting, or the action relates to a purely commendatory action, and the need for such action came to the attention of the policy body subsequent to the posting of the agenda. The body makes this determination by a two-thirds vote of the body, or if fewer than two-thirds of the members are present, by unanimous vote of those present.
- The item appeared on a regular meeting agenda for a meeting occurring no more than five calendar days earlier at which the policy body continued the item to the meeting at which the body is acting on it.

These three limited powers to act on matters not listed on the agenda apply only to regular meetings of policy bodies. For special meetings, the body may consider only matters stated on the agenda; there are no exceptions. Cal. Govt. Code § 54956(a); Admin. Code § 67.6(f).

During general public comment, discussed at Section IV(F)(3) below, members of the public raise topics not on the agenda. Members of the policy body may not engage in a discussion of such matters because the topics have not been agendized. But they may ask questions or make simple announcements for clarification, ask staff for information or to report back to the body on the matter at a subsequent meeting, or ask that the matter be calendared for a subsequent meeting. Cal. Govt. Code § 54954.2(a)(2); Admin. Code § 67.7(d). These limited steps do not constitute “discussion” or “action” under the open meeting laws and thus may take place during a meeting even though not on the agenda.

The same principles apply to matters absent from the agenda and not mentioned during the general public comment period, for example, the department head’s brief report on developments breaking after the posting of the agenda. Members of the policy body may take the same limited steps regarding such matters during the meeting. Members also may make a brief announcement or briefly report on their activities. Cal. Govt. Code § 54954.2(a)(2).

4. Mandatory notices and information on agendas

Every agenda must contain certain information. Sometimes the law requires precise language. Below we discuss categories of information to include on agendas. As explained below, some of these requirements apply to agendas for all meetings of all policy bodies; others have more limited applicability.

- Date/time of meeting
- Place of meeting
- Opportunity for general public comment
- Opportunity for public comment on agenda items
- Sunshine rights
- Ringing and use of cell phones
- Sensitivity to chemical-based products
- Disability accommodation
- Location of materials accompanying agenda items
- Location of agenda materials distributed less than 72 hours before meeting
- Lobbying activity
- Other information pertaining to the meeting or policy body

a. Date/time of meeting

Agendas must state the date and time of the meeting. Cal. Govt. Code §§ 54954.2(a)(1), 54956(a); Admin. Code §§ 67.6(f), 67.7(c).

b. Place of meeting

Agendas must state the location of the meeting. Cal. Govt. Code §§ 54954.2(a)(1), 54956(a); Admin. Code §§ 67.6(f), 67.7(c).

c. Opportunity for general public comment

Agendas for regular meetings, but not special meetings, must provide an opportunity for general public comment. Cal. Govt. Code § 54954.3(a); Admin. Code § 67.15(a). See Section IV(F)(3) below.

d. Opportunity for public comment on agenda items

Agendas must provide an opportunity for public comment on specific agenda items. Cal. Govt. Code § 54954.3(a); Admin. Code § 67.15(a). See Section IV(F)(3) below. It is permissible to list “public comment” under each agenda item, but such listings are unnecessary if the agenda contains a notice to the effect that there will be an opportunity for public comment on each agenda item, or otherwise expressly provides that opportunity.

e. Sunshine rights

Agendas must inform members of the public of their rights under the Sunshine Ordinance, and that they may contact the Sunshine Ordinance Task Force to learn more about their rights or complain of a violation. Admin. Code §§ 67.7(g), (h). The following notice should appear on agendas:

KNOW YOUR RIGHTS UNDER THE SUNSHINE ORDINANCE
(Chapter 67 of the San Francisco Administrative Code)
Government’s duty is to serve the public, reaching its decisions in full view of the public. Commissions, boards, councils and other agencies of the City and County exist to conduct the people’s business. This ordinance assures that deliberations are conducted before the people and that City operations are open to the people’s review.
FOR MORE INFORMATION ON YOUR RIGHTS UNDER THE SUNSHINE ORDINANCE OR TO REPORT A VIOLATION OF THE ORDINANCE, CONTACT THE SUNSHINE ORDINANCE TASK FORCE.
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Copies of the Sunshine Ordinance can be obtained from the Clerk of the Sunshine Ordinance Task Force, at the San Francisco Public Library, and on the City’s website at <http://www.sfgov.org>.]

f. Ringing and use of cell phones

Agendas must state that the ringing and use of cell phones, pagers, and other sound-producing electronic devices are prohibited during the meeting. Admin. Code § 67A.1 The following language should appear on agendas and be stated at the beginning of each meeting:

The ringing and use of cell phones, pagers, and similar sound-producing electronic devices are prohibited at this meeting. The Chair may order the removal from the meeting room of any person responsible for the ringing or use of a cell phone, pager, or other similar sound-producing electronic device.

g. Sensitivity to chemical-based products

Agendas for boards and commissions enumerated in the Charter must include a notice concerning sensitivity to chemical-based products such as perfume. Admin. Code § 67.13(d). The following language should appear on agendas for meetings of such policy bodies:

In order to assist the City's efforts to accommodate persons with severe allergies, environmental illnesses, multiple chemical sensitivity, or related disabilities, attendees at public meetings are reminded that other attendees may be sensitive to various chemical-based products. Please help the City accommodate these individuals.

h. Disability accommodation

Agendas must include information regarding how, to whom, and when a person with a disability may request a modification or accommodation, including auxiliary aids or services, to participate in the meeting. Cal. Govt. Code § 54954.2(a); Admin. Code § 67.13(b). The following language should appear on agendas:

To obtain a disability-related modification or accommodation, including auxiliary aids or services, to participate in the meeting, please contact [name of person and contact information] at least 48 hours before the meeting, except for Monday meetings, for which the deadline is 4:00 p.m. the previous Friday.

i. Location of materials accompanying agenda items

As previously noted, agendas must state the location where materials accompanying agenda items are available for inspection and copying during regular office hours. Admin. Code § 67.7(b).

j. Location of agenda materials distributed less than 72 hours before meeting

Agendas must also include information regarding the location where members of the public may inspect agenda materials distributed to the policy body fewer than 72 hours before a meeting. Cal. Govt. Code § 54957.5(b)(2). Agendas should contain the following language:

Any materials distributed to the members of [name of policy body] within 72 hours of the meeting or after the agenda packet has been delivered to the members are available for inspection at [name and address of office of policy body] during regular office hours.

k. Lobbying activity

The Ethics Commission has requested that each policy body place the following language on all agendas. Though not legally required, all agendas should state:

Individuals who influence or attempt to influence local policy or administrative action may be required by the San Francisco Lobbyist Ordinance (San Francisco Campaign and Governmental Conduct Code sections 2.100 – 2.160) to register and report lobbying activity. For more information about the Lobbyist Ordinance, please contact the Ethics Commission at 25 Van Ness Avenue, Suite 220, San Francisco, CA 94102, telephone (415) 252-3100, fax (415) 252-3112 and website: <http://www.sfgov.org/ethics/>.

l. Other information pertaining to the meeting or policy body

Agendas may include information related to the meeting that the law does not require but that is useful to the public. For example, agendas may include the policy body's rules for conducting meetings, such as its process for receiving public comment. As another example, agendas may identify the mass transit routes that would be convenient to take to and from meetings.

Agendas may also include notices and announcements pertaining to the work of the policy body and matters over which it has jurisdiction. For example, a policy body may include on agendas notices of upcoming meetings of Board of Supervisors committees or other bodies that will address matters within the policy body's jurisdiction. As another example, agendas may include a prominent notice of an upcoming hearing to adopt a regulation, in accordance with the Charter's 10-day notice requirement for such a hearing. Charter § 4.104(a)(1).

D. Conduct of meetings

Policy bodies have wide discretion to adopt rules or follow practices regarding the conduct of meetings, provided the rule or practice does not violate the Brown Act, Sunshine Ordinance, or other law. Not every detail concerning the conduct of meetings presents a legal issue. Parliamentary questions typically do not present legal issues.

Some policy bodies adopt rules for the conduct of meetings, typically through bylaws or resolutions. Generally, policy bodies are not required to have bylaws, but many do, especially boards and commissions enumerated in the Charter. Some purely advisory bodies have bylaws and others do not. In some cases the governing law creating the policy body may require that it adopt bylaws.

This Guide does not address internal rules of policy bodies for the conduct of meetings. Rather, the discussion below addresses legal issues regarding the conduct of meetings.

1. Timing and sequencing issues

Policy bodies may not start meetings before the time stated on the agenda. But they may start meetings late if necessary; for example, to obtain a quorum or extend a courtesy to a member caught in traffic, or because another meeting in the same meeting room has not ended.

Policy bodies are not required to consider agenda items in the order they appear on the agenda. But the presiding officer must announce sequencing changes at the start of the meeting, or as soon as they are known. Admin. Code § 67.15(e). If the agenda specially indicates that an item will be heard at a certain time, it may not be heard before then.

Policy bodies may begin consideration of an agenda item and then continue consideration of the item to a later point in the meeting. If that occurs, the presiding officer should make clear that the body has not yet completed its consideration of the item, and take care to assure that continuing the item does not compromise the public's right to comment on it.

Policy bodies occasionally consider rescinding an action taken earlier in the meeting. As a technical procedural matter, a policy body may reopen a completed agenda item before the meeting has concluded. But if it is not necessary to immediately rescind the prior action, it may be preferable in some circumstances to continue the item to a later meeting at which the body would consider rescinding the action and acting anew on the agenda item. This approach may minimize confusion that may arise from the body's rescinding an action taken earlier in the meeting, and reduce the risk that the right of public comment may be inadvertently compromised in the process.

2. Quorum requirements

A majority of the members of a policy body constitutes a quorum for the transaction of business. Charter § 4.104(b); see generally Cal. Govt. Code § 54952.2(a); Admin. Code § 67.3(b) (defining "meeting" by reference to majority of members). For quorum purposes, "transaction of business" is an all-encompassing term that includes not only taking action on agenda items but also discussing them, receiving public comment, receiving staff reports, and conducting hearings, among other things. For quorum purposes, "majority" is measured by the number of members of the policy body designated by law, not the number of seats actually filled.

Many boards and commissions have seats that are in some manner restricted. For example, seats may be divided among two or more appointing authorities; may be designated for members drawn from a neighborhood, a particular community, an industry, or a profession; may be restricted to persons with specific credentials or experience; or may be reserved for particular types of individuals, such as disabled persons. As a general rule, unless the law creating the body with the restricted seat expresses a contrary intent, such a body may conduct business where a restricted seat is vacant so long as the body has and retains a numerical quorum.

When a quorum fails to attend a meeting or the policy body loses a quorum at a meeting because of the departure of a member, the only official actions that the body may take are to (1) fix the time to which to adjourn, (2) adjourn the meeting, (3) recess the meeting, or (4) take measures to secure a quorum. See generally Cal. Govt. Code §§ 54955, 54955.1. Other actions that a body may take while it does not have a quorum are void.

If a meeting ends because of the loss of a quorum, or never began because of the absence of a quorum, members of the policy body who are there may remain to discuss any matter with members of the public. There is no unlawful “meeting” because a majority of the members of the body are not present. The members who remain to confer with the public should make clear that their discussions do not constitute a meeting and that the body may take no action. If documents are collected, notes taken, or a recording made, those may be presented at the next meeting of the policy body or one of its committees to become part of the policy body’s record.

If there is a lack of a quorum at a meeting of a policy body that has committees, the parent body may not reconstitute itself as a committee of the whole or as one of its committees, even if a quorum of that committee is present. Such a committee meeting would require a separate notice and posting of an agenda for a meeting of that committee.

3. Voting requirements

Secret or anonymous ballots are prohibited Cal. Govt. Code § 54953(c); see generally Charter §§ 2.108, 4.104(a)(3); Admin. Code §§ 1.29, 67.16. Even if members of the policy body think that a public vote on an item would be awkward or unpleasant, as sometimes happens when the body is electing officers, the body must conduct a public vote. Only votes during closed sessions may occur in secret – and, even then, the body must disclose many of those votes at the end of the closed session. See Section IV(H)(1)(f) below.

An absent member of a policy body may not vote by proxy. See generally Charter §§ 2.104(b), 4.104(b); Admin. Code §§ 1.29, 67.16. The Brown Act and Sunshine Ordinance presuppose that members of policy bodies will render decisions at meetings. To permit an absent member to cast a vote without being at the meeting, by communicating the vote to another member or the clerk of the body, is inconsistent with these laws. Further, proxy voting is at odds with the City’s requirement that members of appointive boards, commissions, and other units of government, and members of bodies created by legislation, be “present” at meetings. See Section IV(E)(4) below.

Once an action has been taken, the policy body must disclose the action and announce the vote of each member of the body. Cal. Govt. Code § 54953(c)(2). Similar but more specialized rules govern disclosure of actions taken and votes of policy body members in closed session.

Members of appointive boards, commissions, and other units of government, and members of bodies created by legislation, must vote on every matter before them, with two exceptions. As noted elsewhere in this Guide, a member must not vote on a matter where the member’s vote would violate a conflict of interest law. In addition, the body by a motion adopted by a majority of members present may excuse a member from voting for any reason. Charter §§ 2.104(b), 4.104(b); Admin. Code § 1.29.

For appointive boards, commissions, and other units of government, when determining whether action on an agenda item is approved, the policy body must count the vote based on the total number of seats comprising the body rather than the number of seats currently filled or number of members present. Charter § 4.104(b). The policy body's rules may provide for votes on procedural matters to be determined by a majority of the members present, so long as a quorum is present. Charter § 4.104(b). The Charter does not define a "procedural" matter for this purpose, and context may be critical to the definition. If there is a question whether a particular vote is on a procedural matter, it is advisable to consult with the City Attorney's Office, preferably in advance of the meeting if the presiding officer or others anticipate that the question may arise.

4. Meetings by teleconference

"Teleconference" means a meeting of a policy body, the members of which are in more than one location, connected by electronic means, through either audio or video, or both. Cal. Govt. Code § 54953(b)(4). Under the Brown Act, policy bodies may elect to meet by teleconference, if certain requirements are satisfied. Cal. Govt. Code §§ 54953(b)(1), (2). But the Charter requires the physical presence at one meeting site of the members of appointive boards, commissions, or other units of government, and the Administrative Code contains a similar "presence" requirement for policy bodies created by legislation. Charter § 4.104(b); Admin. Code § 1.29. Therefore, these bodies may not meet by teleconference.

Policy bodies not covered by the proscription against teleconferencing may elect to meet by teleconference if the Brown Act's requirements are satisfied: Each teleconference location must be identified on the agenda; the agenda must be posted at each location; each location must be accessible to the general public and to disabled persons; members of the public must have an opportunity to address the rest of the body directly from each teleconference location; and during the teleconference at least a quorum of the body must participate from within the geographic boundaries of the City. Cal. Govt. Code §§ 54953(b)(3), 54961. As a practical matter, these requirements may be difficult to satisfy.

There is one exception to the Charter's proscription of teleconferencing. If authorized by ordinance, teleconferencing is permitted when a member of a policy body is physically unable to attend a meeting in person, as certified by a health care provider, due to the member's pregnancy, childbirth, or related condition, and also when a member is absent to care for his or her child after birth of the child, or after placement of the child with the member or the member's immediate family for adoption or foster care. Charter §§ 4.104(b), 4.104(c). But the Board of Supervisors has not enacted an implementing ordinance. See also Charter §§ 2.104(a), (c) (parallel provisions applicable to the Board of Supervisors).

Rules regarding teleconferencing apply only to members of policy bodies. Thus, for example, a policy body has discretion to schedule a presentation on an agenda item to be made from another part of the country via teleconference. But in some adjudicative contexts, receiving testimony from witnesses not present at the meeting may present due process or other procedural problems.

5. Text messaging during meetings

Neither the Brown Act nor Sunshine Ordinance addresses text messaging during meetings, and there is no definitive case law on the subject. The City Attorney's Office strongly discourages the practice.

Text messaging or use of other personal electronic communications devices during meetings is especially problematic when the policy body is holding an adjudicative hearing, such as a hearing to grant or suspend a permit, that will affect individual private interests. Text messaging during such a hearing could enable a member to surreptitiously communicate with one of the parties, or receive evidence or direction as to how to vote, from an outside party, that other members of the body and the parties do not see. These circumstances may undermine the integrity of the proceeding and raise due process concerns.

Even outside the adjudicative context, text messaging or use of other personal electronic communications devices during any meeting of a policy body presents serious problems. The Brown Act and Sunshine Ordinance presume that public input during a meeting will be "on the record" and visible to those who attend or view a tape of the meeting. But members of the public will not observe the text messages that members of the policy body receive during the meeting. Hence the public will not be able to raise all reasonable questions regarding the basis for the policy body's actions. And text messaging among members of the policy body concerning an agenda item or other business of the body could lead to an unlawful seriatim meeting in the midst of a formal meeting.

Text messages that policy body members send or receive during a meeting may in fact have nothing to do with the body's business. But a member of the public observing the meeting, not knowing the contents of the text messages, may assume otherwise. To avoid the problems associated with text messaging or similar electronic communications during meetings, we recommend that policy bodies adopt a rule prohibiting or regulating the practice.

It is an open question whether text messages, or similar communications over a personal electronic device, that a member of a policy body sends or receives either during or outside a meeting, that relate to the conduct of the body's business, are public records. There is a strong argument that they are, and out of an abundance of caution, members of policy bodies should assume that communications on personal electronic devices may be subject to disclosure if the communication would otherwise be a public record subject to disclosure.

6. Disruption of meetings

Generally, two sorts of disruptions can occur at meetings of a policy body. Individuals may disrupt the meeting by making noise, speaking out of turn, or otherwise refusing to comply with the body's rules or the presiding officer's lawful direction of the meeting. The presiding officer may order the removal of individuals engaging in disruptive behavior. Depending on the circumstances, before taking this step, the presiding officer should warn the offending individual and afford an opportunity to correct the behavior. In other cases,

there may be a general disruption such that removal of the willful disrupters will not restore order. In these situations, the policy body may order the room cleared and then continue with the meeting. In such an event, representatives of news media not involved in the disruption have a right to remain in the meeting. A policy body may adopt a procedure to readmit individuals not responsible for the disruption. As an alternative to ordering the room cleared, the body may choose to continue the meeting to another date, or may take a short recess. Cal. Govt. Code § 54957.9.

Passive, silent protest during a meeting of a policy body is likely constitutionally protected, no matter when it occurs and regardless of the body's formal rules. Such protest may be offensive to members of the body but not likely to actually disrupt the meeting.

7. Adjourning or continuing meetings

The terms "adjourn" and "continue," as used in the Brown Act, refer to a policy body's action to postpone or finish at a later time a noticed meeting or consideration of a specific item or items on the agenda. In this discussion, we use the term "continue" for both types of actions. A policy body may need to continue a meeting when the hour gets late, the body lacks or loses a quorum, the body seeks additional information about an agenda item, or for other reasons.

If no member of the policy body is present for a regular meeting, the secretary or clerk may continue the meeting to a future time and place. Upon doing so, the secretary or clerk must give the members written notice in the same manner required for special meetings, which the members may waive. Cal. Govt. Code §§ 54955, 54955.1, 54956(a)(1). But the clerk or secretary may not continue a special meeting; a special meeting would have to be renoticed.

For regular and special meetings, when less than a quorum of a policy body is in attendance, the member or members present may continue the meeting to a future time and place. Cal. Govt. Code §§ 54955, 54955.1. As previously discussed, there are only a limited number of actions that less than a quorum of a policy body may take. See Section IV(E)(2) above.

The secretary or clerk must post a notice of the time and place for the continued meeting in a conspicuous manner on or near the door of the place of the original meeting. If the continued meeting is scheduled to be held within 24 hours, the notice must be posted immediately. If the continued meeting is scheduled to be held more than 24 hours later, the notice must be posted no later than 24 hours after the continuance. Cal. Govt. Code §§ 54955, 54955.1.

The Sunshine Ordinance enhances these notice requirements by providing that if a meeting must be continued for any reason, notice of the change shall be given to the public as soon as is reasonably possible. Admin. Code § 67.6(g). Further, if time permits, the notice should be posted on the policy body's website and at the Government Information Center of the Main Public Library, and mailed to members of the public who have requested, in writing, to receive meeting agendas. Admin. Code § 67.6(g).

If the continued meeting is held within five days and proper notice of the continuance was given, items on the agenda for the original meeting may be considered at the subsequent meeting without issuing a new agenda. If the continued meeting is held more than five days later, the policy body must comply with all of the notice and agenda requirements for either a special or regular meeting, as appropriate.

E. Rights of the public at meetings

1. The right to attend meetings

Members of the public have a right to attend meetings of policy bodies. Cal. Govt. Code § 54953(a); Admin. Code § 67.5. Accordingly, policy bodies may not impose discriminatory admission requirements for meetings, or hold meetings in a facility that prohibits admission on the basis of race, color, religion, national origin, ethnic group identification, ancestry, sex, sexual orientation, age, disability, or other actual or presumed class identity or characteristics. Cal. Govt. Code §§ 11135, 54961(a); Admin. Code § 67.13(a). Nor may they hold meetings in a facility or room that is inaccessible to disabled persons or where members of the public must make a payment or purchase as a condition of being there. Cal. Govt. Code § 54961(a); Admin. Code § 67.13(a).

Further, a policy body may not require a member of the public to register the person's name, complete a questionnaire, provide other information, or fulfill any other precondition to attend a meeting. If an attendance list, register, questionnaire, or similar document is posted at or near the entrance to the meeting room or circulated to those attending the meeting, it must clearly state that signing or completing the document is voluntary and that any person may attend the meeting without signing or completing the document. Cal. Govt. Code § 54953.3. It is advisable, though not required, that the document also state that persons may address the body during the meeting without signing or completing it. These provisions help ensure that people will feel free to attend meetings of policy bodies in relative anonymity and without being subject to inquiries or conditions that could discourage them from attending.

Where meetings of policy bodies are held in buildings that require entrants to sign in, the sign-in requirement is lawful. Even so, in some circumstances, such as an evening meeting of a policy body in a building that is otherwise vacated, members of the public may have concerns regarding the right to attend the meeting anonymously and without preconditions. In such a case, the policy body may wish to consult the City Attorney's Office in advance to address such concerns.

Occasionally the room where a policy body is holding a meeting does not have the seating capacity to accommodate the large number of people who wish to attend. Where the Board of Supervisors, a board or commission enumerated in the Charter, or a committee thereof, anticipates that the crowd in attendance will exceed the legal capacity of the meeting room, the policy body must, as a general rule, use an "overflow" room equipped with an adequate broadcasting system that allows persons to hear the meeting. Admin. Code § 67.13(a). Persons in the overflow room must be allowed in the meeting room to exercise their right of public comment.

The right to attend meetings of policy bodies, though critical to open government, is not absolute. It does not extend to the closed session portion of a meeting. See Section IV(H) below. Nor, as discussed previously, does the right preclude policy bodies from excluding some or all members of the public from the meeting, where disruption of the meeting warrants their exclusion. There may be other rare circumstances where the law permits or requires the exclusion of a member of the public from a meeting of a policy body. In these unusual situations, we advise that the policy body consult in advance with the City Attorney's Office.

2. The right to record, film, photograph, and broadcast meetings

Members of the public have a right, using their own resources, to tape record, film, photograph, or broadcast meetings of policy bodies. A policy body may not curtail this right to avoid publicizing a meeting or to discourage public participation. It may curtail this right only to the extent it reasonably finds that because of noise, illumination, or obstruction of view, the activity would persistently disrupt the meeting. Cal. Govt. Code §§ 54953.5(a), 54953.6; Admin. Code § 67.14(a). This "persistent disruption" standard is difficult to meet and could probably be met, if at all, only rarely and in unusual circumstances.

3. The right of public comment at meetings

Members of the public have an important but limited right to participate in meetings of policy bodies. They have the right to speak ("comment") at meetings.

a. Types of public comment

There are two types of public comment – comment on agenda items, and comment on matters not on the agenda but within the subject matter jurisdiction of the policy body. This latter category is often called "general public comment." At regular meetings, policy bodies must afford an opportunity for both types of public comment. By contrast, at special meetings, policy bodies must provide an opportunity for comment on agenda items, but need not provide an opportunity for general public comment. Cal. Govt. Code §§ 54954.3(a), 54956(a); Admin. Code §§ 67.15(a), (b).

Some laws, such as CEQA (the California Environmental Quality Act), require an opportunity for public participation at certain hearings. Such public participation rights are independent of the right of public comment under the Brown Act and Sunshine Ordinance.

b. Timing of public comment

For comment on agenda items, the public has a right to speak before the policy body takes action on the item. With agenda items that are for discussion only, the public must be allowed to speak before or during the body's consideration of the item. Cal. Govt. Code § 54954.3(a); Admin. Code § 67.15(a).

Within these parameters there is flexibility in the timing of public comment on agenda items. For example, the presiding officer may ask for public comment immediately after the item is called, or may ask for public comment only after the members of the body have discussed the item, so long as it is still under consideration. A body may also ask for public comment on all agenda items at the beginning of the meeting, but only if the procedure allows adequate time for public comment on those items.

There are no restrictions on the timing of the general public comment period. Often policy bodies have this period at the beginning or the end of the meeting. But policy bodies may provide the opportunity for general public comment at any point in the meeting. The body may even divide the general public comment period; for example, allowing thirty minutes of general public comment at an early stage in the meeting, and if that period does not accommodate all speakers, allowing more time for general public comment at a later stage of the meeting.

c. Time limits for speakers

Policy bodies must allow each member of the public to speak once on each agenda item for up to three minutes. Admin. Code § 67.15(c). The policy body may reasonably limit public comment on an item to less than three minutes per speaker based on such factors as the nature of the item, the number of anticipated speakers for the item, and the anticipated duration of other agenda items. Where many people are offering public comment on the same agenda item, the presiding officer may encourage speakers to avoid repeating the comments of others.

Sometimes members of the policy body ask questions of a speaker who is giving public comment. The body must not count the time for the question and answer against the speaker's time. Similarly, following the period for public comment on an agenda item, if a member of the body questions a person who has offered public comment on the item, the speaker may respond, even if the speaker's time for public comment has been exhausted.

Policy bodies must apply time limits uniformly to members of the public. Admin. Code § 67.15(c). For example, individual speakers favoring one side of an issue may not be given more time than individual speakers on the opposite side. Similarly, public speakers who comment first on an agenda item may not be given more time than those who comment later. But the equal time requirement does not apply to speakers who are not considered members of the public for this purpose. Such speakers include, for example, public officials or employees appearing before the policy body in an official capacity; parties to a proceeding before the body; and persons whom the body has scheduled to make a presentation on an agenda item.

The right of public comment is personal to each member of the public who attends the meeting. Persons in attendance may not "donate" their speaking time to another speaker, thereby giving that speaker more time for public comment than others. When an organization has no official role regarding an agenda item, one organizational representative has a right to comment on the item only for the same amount of time as an individual member of the public.

If a member of the public has a disability that impairs the ability to speak, then the policy body must extend that person's public comment time as necessary to reasonably accommodate the person. The body also may grant additional time to accommodate members of the public who require use of a translator. Special rules govern the use of translators for this purpose at meetings of the Board of Supervisors and its committees. Admin. Code § 67.13(e).

d. Public comment on consent agenda items

Sometimes policy bodies group routine action items that are not expected to generate discussion under a single agenda designation – the "consent agenda." The public must be given an opportunity to comment on any or all items on the consent agenda. Typically the consent agenda is treated as a single item for the purpose of public comment. But if an item is severed from the consent agenda, it should be treated as a separate item for purposes of public comment requirements.

The law does not discretely address the issue of consent agenda items, much less establish a clear standard for inclusion or exclusion of items on a consent agenda. As a rule of thumb, matters that are simple or routine may be consent agenda items. If matters that do not meet that standard are included, there is a risk of undermining, and possibly violating, the right of public comment regarding those matters.

e. Content of public comment

A meeting is a limited public forum and a policy body must give broad rein to a speaker's right of self-expression so long as the comments relate to the specific agenda item or under general public comment to items under the jurisdiction of the body. Members of the public have the right to criticize the policy body's programs, practices, policies, and services, as well as its members and staff. Cal. Govt. Code § 54954.3(c). Criticism may be harsh, unfair, insolent, discourteous, or otherwise obnoxious. Sometimes it is appropriate to request that a speaker phrase criticism more respectfully, but to require that public comment be respectful would, in almost all circumstances, be unlawful except in the limited circumstances described below.

The presiding officer may reasonably confine a speaker's comments to the agenda item under consideration or, for general public comment, to the subject matter jurisdiction of the body. For example, a public comment about an employee's personal life would likely not be germane to any matter under the body's jurisdiction unless it clearly related to work performance. Further, the presiding officer may inform a speaker that neither the Brown Act nor the Sunshine Ordinance protects members of the public from liability for defamatory statements made during public comment. Cal. Govt. Code § 54954.3(c).

In extreme and unusual circumstances, public comment may arguably constitute discriminatory or harassing speech that may pose a risk of liability for the City under state or federal civil rights laws. To address this issue, the Mayor's Office has issued a "Policy on Discriminatory or Harassing Remarks Made at Public Meetings of City Boards and Commissions," a copy of which is reprinted at the end of the Guide.

As a general rule, the policy body may not restrict the form of communication used by a speaker during public comment. Occasionally a speaker wishes to incorporate in the speaker's public comment a video or audio recording. Incorporating such media into public comment is permissible so long as the speaker adheres to the general rules governing public comment, such as germaneness and time limits. The policy body has no obligation to provide video or audio equipment to facilitate this type of public comment, but if the speaker provides such equipment, the body must reasonably accommodate the speaker's chosen mode of expression.

f. Procedures relating to public comment

A policy body may adopt reasonable rules and regulations relating to public comment. Cal. Govt. Code § 54954.3(b); Admin. Code § 67.15(c). Even absent formal rules, staff or the presiding officer, with the tacit or express approval of the policy body, may implement procedures for public comment. For example, some policy bodies ask members of the public who wish to comment on an agenda item to submit a speaker card in advance. A speaker card system may aid the presiding officer in conducting the meeting in an orderly fashion and may aid staff in preparing meeting minutes. The details of a speaker card system, or other systems for administering public comment, are largely within the discretion of the policy body or its presiding officer. But, as discussed below, any public comment procedures must accommodate the right of individuals to address the body anonymously.

A policy body may anticipate that a particular item will elicit a great deal of public comment. It may consider scheduling the meeting in two sessions – one for staff presentation, public comment, and in some cases the taking of evidence; the other for the body's deliberation and possible action. Even absent advance planning for a meeting on an item to be held in two sessions, a policy body may conduct a hearing with public comment but find that it does not have time to complete its deliberation and take action, and may then close public comment after all members of the public wishing to do so have spoken, and recess the meeting to a later date for the body to deliberate and possibly take action. In these situations, depending on the circumstances, type of proceeding, and other factors that may vary depending on the policy body, the body may be able to conduct the second session of the meeting or hearing without public comment. To ensure that the right of public comment is not compromised in these situations, it is critical that the policy body give the public notice of when there will be an opportunity for public comment, and when there will not. We recommend that the body consult the City Attorney's Office in these situations.

g. The right to comment anonymously

A member of the public has a right to comment anonymously. The presiding officer may request that each speaker fill out a speaker card or state the speaker's name for the record, but may not insist that the speaker disclose his or her identity. See generally Govt. Code § 54953.3; Admin. Code § 67.16. Though not legally required, a policy body may note on its speaker cards that the speaker's name is optional, and may note on its meeting agendas that speakers offering public comment do not have to identify themselves.

h. Responding to public comment

The right to public comment does not include a right to obtain a response from members of the policy body. A speaker may ask questions of the policy body or individual members, but there is no obligation to answer or engage in dialogue with the speaker. Whether it is appropriate for the presiding officer or other members to respond to speakers on an agenda item may vary with the circumstances, and does not present a legal issue. But during general public comment members of the policy body must take care to avoid a substantial dialogue with speakers if it might reasonably be seen as their discussing an issue that has not been agendaized.

Further, a policy body may adopt a rule or practice prohibiting members of the public from directly interrogating individual members of the body during public comment, though it may not prohibit criticism of individual members or rhetorical questions seemingly directed at a member.

i. Public comment and committees

The right of public comment extends to meetings of all policy bodies, including committees of parent bodies. If the parent body limits a committee's authority to hear only those items that the parent body refers to it, then the committee may limit public comment to the items on its agenda. Under these circumstances, the committee is not required to take general public comment on items not listed on the agenda. Persons desiring to speak on non-agenda items within the subject matter jurisdiction of the parent body may address those items at meetings of the parent body. Cal. Govt. Code § 54954.3(a).

With one exception, policy bodies must allow public comment on agenda items that were heard at a meeting of a committee of the body. The Board of Supervisors alone is not required to provide for public comment on items before the full Board where those items were previously considered at a committee meeting or a meeting of the full Board sitting as a committee of the whole, at which public comment was allowed. Cal. Govt. Code § 54954.3; Admin. Code § 67.15(a).

j. Public comment by members of a policy body

Generally, members of a policy body may offer public comment at the meeting of another policy body. Members retain their right to comment publicly on government actions, including those of the policy body on which they sit. Admin. Code § 67.17. Special provisions govern comment by members of the Board of Supervisors at the meeting of another policy body. Charter § 2.114. Concerns about having a meeting that has not been properly noticed may arise if a majority of members of one policy body offer public comment at a meeting of another policy body. Where this possibility is foreseeable, it is advisable to consult the City Attorney's Office in advance.

Members of policy bodies who perform quasi-judicial functions, such as granting or revoking permits, need to exercise care in their public comments, whether before their own body, another body, or in other settings, on specific adjudicative matters. Quasi-judicial bodies must afford a fair hearing to the parties before them. Central to a fair hearing is the principle that decision makers come to the hearing with an open mind,

prepared to hear both sides and to decide the case on the merits of the evidence presented and the governing law. A member of a policy body who makes public statements or advocates supporting or opposing a party regarding a matter that the body later hears in a quasi-judicial proceeding could be vulnerable to a charge that the member is biased on the matter and thus jeopardize the decisionmaking process. Members of such bodies should confer in advance with the City Attorney's Office when these issues arise.

4. The right to obtain materials distributed to the policy body at or before the meeting

As a general rule, meeting agendas and other documents distributed to a majority of the members of a policy body in connection with a matter to be considered at a meeting must be made available to the public. Cal. Govt. Code § 54957.5(a). Further, even if a document has not been distributed to a majority, it must be made available to the public if it is intended to be distributed to a majority in connection with a matter anticipated for discussion or consideration at a meeting, and is on file with the clerk of the policy body. Admin. Code § 67.9(a).

As previously discussed, if documents are distributed to the members of a policy body after they have received the agenda packet, for example, a day or two before the meeting, the documents must be made available at the same time to the public at the departmental office or other designated location, and meeting agendas must contain a notice that states the location where such documents will be publicly available. Cal. Govt. Code § 54957.5(b).

But if a document is otherwise exempt from public disclosure, it typically remains exempt even if distributed to a majority of a policy body. Cal. Govt. Code § 54957.5(a); Admin. Code § 67.9(a). For example, a privileged attorney-client memorandum distributed by the City Attorney's Office to all members of a policy body does not lose its confidential status by virtue of the distribution. Similarly, a memorandum distributed to the body concerning a confidential personnel matter does not become public as a result of the distribution. If questions arise concerning possible disclosure of agenda materials that may be privileged, we recommend consulting the City Attorney's Office before disclosing the materials in question.

The Brown Act provides that records subject to disclosure that are distributed during a meeting of a policy body must be made available for public inspection at the meeting if prepared by City staff or a member of the policy body. Cal. Govt. Code § 54957.5(c). If prepared by some other person, such as a member of the public, they must be made available for public inspection after the meeting. Cal. Govt. Code § 54957.5(c). The Sunshine Ordinance refines these requirements. It provides that records subject to disclosure that are distributed during a meeting but prior to commencement of their discussion must be made available for public inspection prior to commencement of, and during, their discussion. Admin. Code § 67.9(c). Records distributed during their discussion must be made available for public inspection immediately or as soon thereafter as practicable. Admin. Code § 67.9(d).

5. The right of disabled persons to reasonable accommodation

The meetings of all policy bodies must comply with the Americans With Disabilities Act and state disability law. Cal. Govt. Code § 54953.2. This mandate covers all aspects of meetings. In addition, the Brown Act and Sunshine Ordinance contain more specific provisions for the accommodation of disabled persons:

- All policy bodies must, upon request, make available, in appropriate alternative formats, agendas, agenda materials, and writings distributed at meetings. Cal. Govt. Code §§ 54954.1, 54954.2(a)(1), 54957.5(c). Boards and commissions enumerated in the Charter must ensure that agendas are made available to sight-impaired persons through Braille or enlarged type. Admin. Code § 67.7(f).
- Boards and commissions enumerated in the Charter must provide sign language interpreters or note-takers at each regular meeting if the body has received a request for such services at least 48 hours before the meeting. Where the body meets on a Monday, the request for such services must be made by 4:00 p.m. on the last business day of the preceding week. Admin. Code § 67.13(b).
- Boards and commissions enumerated in the Charter must ensure that accessible seating for persons with disabilities, including those using wheelchairs, is made available for each regular and special meeting. Admin. Code § 67.13(c).
- As previously noted, all policy bodies must hold their meetings in facilities that are accessible to disabled persons. Cal. Govt. Code § 54961(a); Admin. Code § 67.13(a).

These provisions should not be construed to limit the duty of all policy bodies to adhere fully to the requirements of federal and state disability law. Disability law questions may arise in many different factual settings. Where questions arise, we recommend that departments consult with the City Attorney's Office in advance to ensure that meetings of bodies will be noticed and conducted in a manner that fully complies with disability law.

F. Records of meetings

1. Audio recordings

Each board or commission listed in the Charter must audio record regular and special meetings. Admin. Code § 67.14(b). Other policy bodies are not required to audio record their meetings, except for closed session portions of meetings. Admin. Code § 67.8-1(a).

When a policy body tapes a meeting, even if taping is not required, the tape becomes a public record and may not be erased or destroyed. Cal. Govt. Code § 54953.5(b); Admin. Code § 67.14(b). Tapes of closed sessions must be retained for at least 10 years, or permanently if possible. Admin. Code § 67.8-1(a).

A policy body may not charge a member of the public to listen to a tape recording or watch a video recording of a meeting. Inspection of recordings shall be provided without charge on equipment made available by the City. Cal. Govt. Code § 54953.5(b); Admin.

Code § 67.14(b). As with any public record, policy bodies may charge for copies of a tape recording or video recording.

2. Minutes

The Brown Act imposes no requirements on policy bodies regarding minutes of meetings. Only local law imposes requirements, which vary greatly depending on the type of policy body.

a. Appointive boards, commissions, and other units of government in the executive branch

The Charter requires each appointive board, commission, or other unit of government in the executive branch to keep a “record” of the proceedings of each regular or special meeting. The record must include how each member voted on each question. Charter § 4.104(a)(3). The Charter does not otherwise require specific information to be in the record.

b. Charter boards and commissions

The Sunshine Ordinance imposes detailed requirements for meeting minutes of boards and commissions listed in the Charter. These requirements do not apply to other policy bodies. The clerk or secretary for Charter boards and commissions must record the minutes of each meeting and include certain information in the minutes:

- The beginning time of the meeting.
- The ending time of the meeting.
- The names of the members in attendance.
- The roll call vote on each matter considered.
- A list of those members of the public who spoke on each matter who identified themselves, whether the speaker supported or opposed the matter, and a brief summary of the speaker’s public comment.

Admin. Code § 67.16. As discussed earlier in this Guide, when a City officer or employee has disclosed on the record a personal, professional, or business relationship as required by Section 3.214 of the Campaign and Governmental Conduct Code, that disclosure must be recorded in the minutes.

If the Charter body held a closed session, the minutes must also include:

- The beginning time of the closed session.
- The ending time of the closed session.
- The members of the policy body and others, identified by name and title, in attendance at the closed session.

Admin. Code § 67.16. But the name of a person whose presence in the closed session may be kept confidential, such as a candidate for appointment interviewed in a closed session,

need not be disclosed. In such a case, the minutes should note the person's presence in the closed session, without identifying the person.

The Sunshine Ordinance allows any person who spoke during a public comment period at a meeting of a Charter board or commission to supply a brief written summary of the comments to be included in the minutes if it is 150 words or less. Admin. Code § 67.16. The summary is not part of the body's official minutes, nor does the body vouch for its accuracy; and the minutes may expressly so state. The policy body may reject the summary if it exceeds the prescribed word limit or is not an accurate summary of the speaker's public comment.

The speaker's summary of public comment may be placed in the text of the minutes for the agenda item (or for general public comment, if that is when the comment occurred), or at the end of the minutes, whether or not designated as an attachment. If the summary is placed at the end of the minutes, we recommend as a sound practice though not a legal requirement that the text of the minutes for the agenda item (or for general public comment) cross-reference the attachment, to direct the reader to the summary.

Draft minutes of each meeting of a Charter board or commission must be available for public inspection and copying no later than 10 business days after the meeting. The officially adopted minutes must be available for inspection and copying no later than 10 business days after the meeting at which the minutes are adopted. If requested to do so, the body must produce the minutes in Braille or enlarged type. Admin. Code § 67.16.

c. Other policy bodies

Policy bodies that do not fit into one of the above two categories, such as purely advisory bodies and committees of parent bodies, are not required to keep meeting minutes or maintain a record of meetings. But we strongly advise that such bodies maintain brief minutes of meetings to record attendance by members, actions taken, and votes on those actions. Otherwise, questions may arise as to the accuracy of informal or unofficial reports regarding the meetings of such bodies and actions taken at such meetings.

d. Other issues pertaining to minutes

Except as has been noted above, there are no other legal requirements for the content of minutes. There are variations among policy bodies in the style, length, and detail of the minutes of their respective meetings.

While not all policy bodies are required to keep minutes, certain rules apply to any policy body that does. Each policy body must send two copies of its minutes to the Government Information Center at the San Francisco Public Library. Admin. Code § 8.16. Minutes must also be posted on the body's website within 48 hours after approval, and thus typically will then be available for inspection and copying. Admin. Code § 67.29-2.

It is customary, but not legally required, that minutes of a meeting be considered and adopted at the next meeting of the policy body. Sometimes policy bodies adopt the minutes at a later meeting.

A member of a policy body may vote on approval of minutes of a meeting even though the member did not attend that meeting. A policy body may but is not required to excuse a member from voting to approve minutes for a meeting that the member did not attend.

G. Closed sessions

The Brown Act and Sunshine Ordinance recognize that under limited circumstances a policy body may best consider certain matters in nonpublic sessions, commonly called closed sessions. Closed sessions are the exception to the general rule requiring public meetings. These exceptions are strictly limited. While members of a policy body may find it awkward or even counterproductive to consider certain matters in public, the body must do so unless the law allows a closed session. For example, while there are good arguments that a policy body should be able to hold a closed session to instruct its negotiator regarding a prospective contract for goods and services, there can be no closed session for this purpose because the Brown Act does not authorize such a closed session.

Holding a closed session is usually a choice of the policy body. No member of the public has the right to demand a closed session. And even where the policy body may meet in closed session, the law usually does not require it to do so. But in limited instances State or federal law requires policy bodies to keep certain matters confidential, in which case the body must meet in a closed session to discuss such matters. For example, federal laws on medical privacy, as well as the state constitutional right of privacy, may effectively require a policy body to hold a closed session to the extent the body must discuss an individual's medical condition in connection with an agenda item.

We first address general principles pertaining to closed sessions, then discuss the most common types of closed sessions.

1. General principles

a. Notice and agenda requirements

A meeting of a policy body in closed session is subject to most of the requirements of the Brown Act and Sunshine Ordinance, including public notice and agendas. These laws require policy bodies to include certain information on the agenda for closed session items. See generally Cal. Govt. Code § 54954.5; Admin. Code §§ 67.8, 67.8-1(b). The special notice provisions pertaining to the most common types of closed sessions are:

- Personnel matters – Cal. Govt. Code § 54954.5(e); Admin. Code § 67.8(a)(4).
- Pending litigation – Cal. Govt. Code § 54954.5(c); Admin. Code §§ 67.8(a)(3), 67.8-1(b).
- Real estate negotiations – Cal. Govt. Code § 54954.5(b); Admin. Code § 67.8(a)(2).
- Labor negotiations – Cal. Govt. Code § 54954.5(f); Admin. Code § 67.8(a)(5).
- Security matters – Cal. Govt. Code § 54954.5(e); Admin. Code § 67.8(a)(4).

Where it is unclear in advance of the meeting whether a closed session will be warranted, or whether the body will wish to have a closed session, we recommend that the agenda give

notice of a potential closed session to preserve that option. In such a circumstance it is helpful although not legally required for the notice to explain that the policy body may but not necessarily will go into closed session.

Because of the specialized nature of closed session agenda requirements, except in routine circumstances we recommend consulting the City Attorney's Office when drafting agendas for closed sessions. In many cases closed session agenda descriptions may pose difficult challenges for which legal advice would be helpful.

Before going into a closed session, the policy body must first meet in open session to publicly announce its intent to hold a closed session and state the grounds for the closed session. Admin. Code § 67.11. Reading the agenda notice for the closed session will suffice as the announcement.

In the closed session, the policy body may consider only those matters listed on the agenda. Admin. Code § 67.11. Policy bodies must guard against consideration in the closed session of matters that are related to the subject of the closed session, but are beyond what the law allows the body to discuss in the closed session.

b. Public comment requirements

Before holding a closed session, the policy body must meet in open session to take public comment. Cal. Govt. Code § 54954.3. This opportunity for public comment should extend to all items on the closed session agenda including the question whether the body should go into closed session.

c. Deciding to go into closed session

For closed sessions on pending litigation, policy bodies must vote on whether to go into closed session. Admin. Code § 67.10(d). For other types of closed sessions, the law does not require a vote to go into closed session, although a body may adopt a rule requiring such a vote or adhere to a custom of having a vote.

d. Attendance at closed sessions

If the policy body meets in closed session, it may not permit any members of the public to attend. The presence of unauthorized members of the public in the closed session waives the privilege to preserve the confidentiality of the session and could render the closed session unlawful.

But the policy body may admit persons whose assistance it needs to conduct the business prompting the closed session. For example:

- In a closed session to evaluate the performance of an employee, the policy body may invite the employee and the employee's representative to participate in the proceeding.
- In a closed session to consider hiring a department head, the policy body may interview candidates for the position and their references.

- In a closed session on pending litigation, the policy body may include an expert witness to evaluate evidence bearing on the legal issues under discussion with the body's counsel.
- In a closed session for real estate negotiations, the policy body may include an appraiser whose analysis of the economic value of the parcel in question will assist the body in instructing its negotiator on the price range that would be acceptable for the sale or lease of the property.
- In a closed session for labor negotiations, the policy body may include legal counsel to advise on the permissible scope of collective bargaining.

e. Confidentiality of closed sessions

Individual members of a policy body may not, without authorization from the body, disclose information obtained during the closed session or the substance of the discussion that occurred in closed session. Only the policy body acting as an entity, and subject to state and federal law requiring confidentiality of specific information or records, may determine whether to disclose information obtained in the closed session or the substance of the discussion. Unauthorized disclosure by a member of the policy body or staff person violates the law and may potentially lead to disciplinary action such as removal from office. Cal. Govt. Code § 54963.

A member of the policy body who was absent from a closed session may listen to the tape of the closed session or discuss the closed session with someone who was present, but is subject to the same confidentiality obligations as those who were present. If a conflict of interest or other legal bar precludes a member from participating in the body's consideration of the item that is the subject of the closed session, the member should not attend the closed session, listen to the tape recording, or otherwise gain knowledge of information the body obtained in closed session or the discussion that took place.

The policy body, as an entity, has the right to make public the content of the closed session. Therefore, a change in the membership of the policy body does not affect the right to order disclosure of the content of the closed session. Indeed, policy body members should recognize that a change in membership could itself trigger a decision by the body to disclose.

Because dominion over the closed session rests with the policy body rather than the individual members who participated in the closed session, a person who becomes a member of the body after the closed session took place may listen to the tape or discuss the closed session with someone who was present, subject to the same confidentiality restrictions that apply to members who were present.

f. Reporting on closed sessions

After a closed session, policy bodies must return to open session. If the body took certain actions in closed session, it must publicly report the action taken and the vote of each member. Cal. Govt. Code § 54957.1; Admin. Code § 67.12(b). This disclosure requirement applies only to those actions specified in the above provisions of State and local law. In certain circumstances, as discussed below, policy bodies may defer disclosing the action taken.

By the close of business on the next business day following the meeting, the policy body must post, where it posts its agendas, a written summary of actions the body must disclose or documents embodying that information. Admin. Code § 67.12(d). On that same business day, it must make available to the public any contracts, settlement agreements, or other documents that the body finally approved or adopted in the closed session, except if substantial amendments necessitate retyping that is not completed by then. Cal. Govt. Code § 54957.1(c).

In addition, the policy body must provide contracts, settlement agreements, or other documents finally approved in the closed session to any person who is present when the closed session ends and who requests the document, if the person made an advance request or a standing request for such documents. Cal. Govt. Code § 54957.1(b); Admin. Code § 67.12(c). If the body substantially amends these documents so that retyping is required, it need not release them until the retyping is done, but the presiding officer or a designee must orally summarize the substance of the amendments for the requester or any other person present and requesting the information. Cal. Govt. Code §§ 54957.1(b).

g. Voting on disclosure of closed session discussion

After a closed session, every policy body must, by motion and vote in open session, decide whether to disclose any or all of its discussion, provided that disclosure would not violate federal, state, or local law. Admin. Code § 67.12(a). The body may elect to disclose no information. The presiding officer or a designee of the presiding officer who attended the closed session must make any such disclosure. Admin. Code § 67.12(a). The body may choose to disclose the general nature of the closed session without disclosing specifics, so long as the disclosure is otherwise lawful.

h. Recordings of closed sessions

As previously noted, all policy bodies must audio record closed sessions and retain the recordings for at least 10 years, or permanently where technologically and economically feasible. Admin. Code § 67.8-1(a). Policy bodies must make these recordings available whenever all rationales for closing the session are no longer applicable. Admin. Code § 67.8-1(a). But one or more rationales for a closed session often may extend well into the future. Given the importance the law places on the confidentiality of closed sessions, and because the body rather than departmental staff has ultimate responsibility for the confidentiality of the closed session, we recommend that staff consult the City Attorney's Office before disclosing a closed session recording.

In cases of closed sessions to consider anticipated litigation, the public has the right of access to the recording (1) two years after the meeting if no litigation is filed, (2) upon expiration of the statute of limitations if the anticipated litigation has not been filed, or (3) as soon as the controversy leading to the anticipated litigation is settled or concluded. Admin. Code § 67.8-1(a). We ask that a policy body contact the City Attorney's Office before disclosing any recordings of closed sessions involving anticipated litigation, to make sure that one of these grounds applies. We likewise request that this Office be contacted whenever there is a request to disclose a recording of any closed session involving actual litigation.

i. Minutes of closed sessions

Policy bodies may but are not required to keep minutes of what transpired in closed sessions. Cal. Govt. Code § 54957.2(a). Such minutes are confidential. Cal. Govt. Code § 54957.2(a). But, as previously noted, the Sunshine Ordinance requires Charter boards and commissions to record in their public minutes certain basic information regarding closed sessions. Admin. Code § 67.16.

j. Holding multiple closed sessions in one meeting

Sometimes a policy body will have closed sessions on more than one agenda item during the same meeting. If these closed sessions are held consecutively, the body need not physically go into and come out of each of the closed sessions, although it has that option. It may physically go into closed session once, address each of the agenda items, and then come out of closed session when the last of those agenda items is concluded.

If this approach is taken, the closed session on each agenda item must be properly conducted on its own terms. As a general rule, the agenda items should not be intermixed in closed session; the policy body should conclude its consideration of the first closed session item before beginning its consideration of the second. The confidentiality rules must be applied distinctively to each of the agenda items. For example, if the first item concerns a personnel evaluation and the second a real estate negotiation, it would not be lawful for the real estate negotiator to attend the closed session on the first item, or for the employee subject to the personnel evaluation to attend the closed session on the second item.

To maintain the distinctiveness of each of the agenda items, we recommend that, upon coming out of closed session, the policy body have separate motions and votes, for each of the agenda items, regarding disclosure of closed session discussion. In some cases it may also be advisable that separate tape recordings be made of each of the closed session items. These recommendations are not legal requirements but are desirable approaches to make clear to the public that the policy body is following the law in its conduct of closed sessions.

2. Common types of closed sessions

City policy bodies most often use closed sessions for personnel matters, pending litigation, real estate negotiations, labor negotiations, and security matters. We discuss below these exceptions to the principle of open meetings.

a. The personnel exception

Policy bodies may meet in closed session to discuss or act on the appointment, employment, promotion, discipline, dismissal, or evaluation of any officer or employee, if the body has the power to appoint, employ, dismiss, or discipline that person. Cal. Govt. Code § 54957(b); Admin. Code § 67.10(b). Appointment or employment of an employee may include more than initial hire; it may include evaluation of an employee's fitness for duty following a leave, or following dismissal. Evaluation of an employee may include more than a formal or regular process such as an annual performance evaluation; it may include

evaluation of the employee's performance regarding an incident involving that employee, or a specific matter within the employee's responsibilities.

The power to meet in closed session for these varied purposes also extends to bodies that have a role in making these decisions. For example, a committee of a policy body may meet in closed session to review and recommend candidates for appointment as department head, even though the committee's role is advisory.

Policy bodies typically have the authority to make personnel decisions regarding only the department head and the commission secretary. Hence most policy bodies may not meet in closed session to discuss the work performance of most departmental employees. But there are exceptions to this principle. For example, the Charter gives police officers and firefighters the right to a trial before their commissions regarding certain disciplinary actions. Charter § A8.343. Accordingly, those commissions typically meet in closed session to consider discipline of police officers and firefighters. Unless a police officer consents to an open hearing on disciplinary charges, state-mandated confidentiality of peace officer personnel records effectively requires a closed session. Cal. Penal Code §§ 832.7, 832.8.

The purpose of the personnel exception is to enable policy bodies to protect the privacy of individuals subject to specific types of personnel decisions, and to foster candid deliberations concerning such individuals. Therefore, policy bodies may not meet in closed session to discuss a department's general personnel operations or policies. Also, as a general rule, a policy body may not hold a closed session to discuss the process or criteria for the selection of a department head, or the general criteria for evaluating a department head. These issues typically do not focus on a particular individual. But to the extent criteria for evaluation of the department head turn on that person's distinctive traits rather than on general factors that would apply to any head of that department, the body may discuss and develop criteria in closed session.

A policy body must conduct discussion of salary, even if keyed to a specific person, in public, except for consideration of a reduction in compensation resulting from imposition of discipline. Cal. Govt. Code §54957(b)(4). But under the labor negotiations exception, discussed at Section IV(H)(2)(d) below, a body may meet in closed session to instruct its negotiator regarding compensation for unrepresented as well as represented employees. In such a case, the agenda must identify the item as involving labor negotiations rather than a personnel matter. The person whose salary is being negotiated may not attend the closed session. As noted earlier, discussion of a department head's salary, even if in closed session, may not occur as part of a special meeting. Cal. Govt. Code § 54956(b).

When a policy body calendars a closed session to discuss specific charges or complaints against an employee, it must notify the employee at least 24 hours before the meeting. The body's failure to give the notice will invalidate any discipline it imposes. Cal. Govt. Code § 54957(b)(2). Evaluation of an employee's work performance, even if it includes criticisms, does not generally constitute a discussion of specific charges or complaints against the employee. But a body's discussion of serious misconduct may constitute discussion of a specific charge or complaint, triggering the 24-hour notice requirement. An employee has the right to demand a public hearing on specific charges or complaints that the body has calendared for a closed session, but may not demand that the body conduct

its deliberations in public. An employee does not have the right to demand that the policy body meet in closed session if the body has determined it is appropriate to conduct the meeting in public. Cal. Govt. Code § 54957(b); Admin. Code § 67.10(b).

Because independent contractors are not employees, policy bodies may not meet in closed session to discuss the employment or termination of an independent contractor. Similarly, because the personnel exception does not cover members of policy bodies, a body may not meet in closed session to elect officers, or consider the composition of a committee of the body, or consider complaints regarding a member of the body. Cal. Govt. Code § 54957(b)(4); Admin. Code § 67.10(b).

Both the Brown Act and Sunshine Ordinance include closed session agenda formats for personnel matters. Cal. Govt. Code § 54954.5(e); Admin. Code § 67.8(a)(4). Among other things, the agenda must identify the type or types of personnel actions the policy body may consider in the closed session, and the body is bound to that agenda description. For example, a notice of a closed session for performance evaluation of an official or employee will not enable the body to consider discipline or dismissal, except to determine whether to schedule a second closed session for the purpose of considering those actions.

After the closed session, the policy body must return to open session and report (1) any action taken to appoint, employ, dismiss, transfer, or accept the resignation of a public employee, (2) the roll call vote, (3) the name of the employee, (4) the position affected, and (5) the reason for dismissals for a violation of law or City policy. Cal. Govt. Code § 54957.1(a)(5); Admin. Code § 67.12(b)(4). As previously noted, the body must comply with requirements for the posting and notice of such actions. Cal. Govt. Code §§ 54957.1(b), (c); Admin. Code §§ 67.12(c), (d). In limited circumstances, privacy considerations may preclude naming an employee who has been dismissed. Before considering such a departure from the prescribed disclosures, the policy body should consult the City Attorney's Office.

The law does not require disclosure of the closed session evaluation of an employee or discipline short of dismissal imposed during the closed session. Given privacy considerations, we recommend that policy bodies not disclose such actions after a closed session without first consulting the City Attorney's Office.

The Charter requires the Mayor to appoint many department heads from candidates the policy body has nominated. Charter §§ 3.100(18), 4.102(5). Given its role in the appointment process, the policy body may meet in closed session to nominate candidates. But it need not publicly report its nominations until the first meeting after the Mayor announces the new department head, when the body must report the closed session's roll call vote for the Mayor's appointee and post written notice of that action by the next business day. The policy body is not required to disclose the identity of unsuccessful nominees.

b. The pending litigation exception

Policy bodies may meet in closed session with their attorneys regarding "pending litigation" when discussion in open session would prejudice the City's position in the litigation. Cal. Govt. Code § 54956.9(a); Admin. Code § 67.10(d). This exception does not

permit a policy body to meet in closed session merely to get advice from its attorney on a non-litigation matter. Cal. Govt. Code § 54956.9(b). Nor does it permit the body to meet in closed session to consider the qualifications or engagement of an independent contract attorney or law firm, for litigation services or otherwise. Admin. Code § 67.10(d)(3).

Counsel for the policy body must be present in a closed session held under the pending litigation exception. Neither an adverse party nor that party's attorney may attend. Further, the closed session may not be used to negotiate with an opposing party.

For purposes of this exception, "litigation" does not only mean court proceedings. It includes any adjudicatory proceeding before a court, administrative body exercising its adjudicatory authority, hearing officer, or arbitrator. Cal. Govt. Code § 54956.9(c). Further, litigation is considered "pending" in any of the following three circumstances:

- Actual litigation where the City is a party; that is, an adjudicatory proceeding in which the City is a party has been initiated formally. Cal. Govt. Code § 54956.9(d)(1).
- Potential litigation with the City as defendant; that is, a point has been reached where, in the policy body's opinion on the advice of its legal counsel, based on existing facts and circumstances, there is a significant exposure to litigation; or the policy body is deciding whether a closed session is authorized under this rationale. Cal. Govt. Code §§ 54956.9(d)(2), (3). A remote possibility of litigation against the City does not generally warrant a closed session. But the law does not require a near certainty of litigation against the City to hold a closed session. Though incapable of precise definition, "significant" exposure to litigation is the key.
- Potential litigation with the City as plaintiff; that is, the policy body has decided or is deciding whether to initiate litigation based on existing facts and circumstances. Cal. Govt. Code 54956.9(d)(4).

Considering whether the City should intervene in a case or participate as an *amicus curiae* is included in potential litigation involving the City as a party, and thus may be considered in closed session. See Cal. Govt. Code § 54957.1(a)(2); Admin. Code § 67.12(b)(2).

"Existing facts and circumstances" for the purpose of determining if the City has a significant exposure to litigation are limited to the following situations. As noted below, requirements for disclosing those facts and circumstances vary :

- Facts and circumstances that might result in litigation against the City but that the City believes are not yet known to a potential plaintiff or plaintiffs, which facts and circumstances need not be disclosed. Cal. Govt. Code § 54956.9(e)(1).
- Facts and circumstances, including, but not limited to, an accident, disaster, incident, or transactional occurrence that might result in litigation against the City and that are known to a potential plaintiff or plaintiffs, which facts or circumstances shall be publicly stated on the agenda or announced. Cal. Govt. Code § 54956.9(e)(2).
- The receipt of a claim under the Tort Claims Act or some other written communication from a potential plaintiff threatening litigation, which claim or

communication shall be available for public inspection. Cal. Govt. Code § 54956.9(e)(3).

- A statement made in an open and public meeting threatening litigation on a specific matter within the responsibility of the policy body. Cal. Govt. Code § 54956.9(e)(4).
- A statement threatening litigation, made outside an open and public meeting, on a specific matter within the responsibility of the policy body, so long as the City official or employee aware of the threat makes a record of the statement before the meeting, which record shall be available for public inspection. Cal. Govt. Code § 54956.9(e)(5).

Before holding a closed session under the pending litigation exception, the policy body must vote, in open session, to invoke the attorney-client privilege to hold the closed session. Admin. Code § 67.10(d).

The policy body must disclose on the agenda the legal basis for the closed session. If the agenda indicates that the closed session will address formally initiated litigation to which the City is a party, the agenda must state the case name, court, case number, and the date the case was filed, except if the agenda states that to do so would jeopardize the City's ability to (1) effectuate service of process on one or more unserved parties or (2) conclude existing settlement negotiations to the City's advantage. Both the Brown Act and Sunshine Ordinance detail the requirements for noticing a closed session on pending litigation. Cal. Govt. Code § 54954.5(c); Admin. Code §§ 67.8(a)(3); 67.8-1(b). Where a policy body with final decision-making power is holding a closed session to discuss a potential settlement of litigation, the agenda must include the names of the parties, the case number, the court, and the material terms of the settlement. Admin. Code § 67.12(b)(3).

In addition, where a settlement would commit the City or a department to adopting, modifying, or discontinuing an existing policy, practice, or program, or to paying an amount of money equal to or more than \$50,000, the policy body must disclose any written settlement agreement and any documents attached to or referenced in the settlement agreement at least 10 days before the closed session. Where the disclosure of documents in a litigation matter that has been settled could be detrimental to the City's interest in pending litigation arising from the same facts or incident and involving a party not a party to or otherwise aware of a settlement, the City may withhold disclosure until the other case is settled or otherwise finally concluded. Admin. Code § 67.12(b)(3).

After holding the closed session, the policy body must return to open session and report any approval given to legal counsel to prosecute, defend, seek or refrain from seeking appellate review or relief, or enter as a party, intervenor, or *amicus curiae* in any form of litigation. The report shall identify the adverse party or parties, any co-parties with the City, any existing claim or order to be defended against, or any factual circumstances or contractual dispute giving rise to the City's complaint, petition, or other litigation initiative. Cal. Govt. Code §§ 54957.1(a)(2), (3); Admin. Code § 67.12(b)(2). As previously noted, there are additional requirements for the posting and notice of such actions by the close of the next business day. Cal. Govt. Code §§ 54957.1(b), (c); Admin. Code §§ 67.12(c), (d).

The policy body may defer giving its report if immediate disclosure of the City's intentions would be contrary to the public interest. In those instances, the body may wait to report until the first meeting after the adverse party or parties have been served in the matter. Cal. Govt. Code § 54957.1; Admin. Code § 67.12(b)(2). See also Cal. Govt. Code § 54957.1(b)(2).

c. The real estate negotiations exception

A policy body may hold closed sessions with its real estate negotiator before the City's purchase, sale, exchange, or lease (including a lease renewal or renegotiation) of real property, to grant authority to the negotiator regarding the price and terms of payment for the purchase, sale, exchange, or lease. Cal. Govt. Code § 54956.8; Admin. Code §§ 67.8(a)(2), 67.12(b)(1). The permissible scope of closed session discussion will depend on the facts and circumstances that relate to price and terms of payment for each prospective real estate transaction. Because this standard is imprecise, the line between permissible and impermissible closed session discussion under this exception may in some cases be unclear. We recommend that the policy body consult the City Attorney's Office when questions arise concerning the permissible scope of closed session discussion. This exception does not limit the authority of policy bodies to hold a closed session regarding an eminent domain proceeding under the pending litigation exception. Cal. Govt. Code § 54956.8.

Before holding a closed session under the real estate negotiations exception, the policy body must hold an open session in which the body identifies its negotiator(s), the real property or properties involved, and the person(s) with whom the City may negotiate. Cal. Govt. Code § 54956.8. The negotiator may but need not be a member of the policy body. Cal. Govt. Code § 54956.8. An agent or designee of the negotiator may appear for the negotiator, so long as the body publicly announces the name of the person before going into closed session. Cal. Govt. Code § 54954.5(b).

Both the Brown Act and Sunshine Ordinance include formats for agendaizing a closed session for real estate negotiations. Cal. Govt. Code § 54954.5(b); Admin. Code § 67.8(a)(2). The agenda must disclose the street address, if one exists, for the property. If the property does not have a street address, the agenda must include the parcel number or other unique description. But if there is a manner of identifying such a property in addition to parcel number that will convey its location in a more meaningful way, that description should also be included on the agenda.

After the closed session and once the agreement is final, the policy body must publicly report any approval given to the negotiator. If the body's own approval renders the agreement final, the body shall immediately report that approval, the substance of the agreement, and the vote taken. If final approval rests with the other party, the body shall make the disclosure on its website and at the next meeting, once the other party has informed the body of its approval. Notwithstanding the final approval, if there are conditions precedent to the final consummation of the transaction, or there are multiple continuous or closely located properties that are being considered for acquisition, the City need not disclose the agreement until the conditions are satisfied or the City has reached agreement for all of the properties, or both. Cal. Govt. Code § 54957.1(a)(1); Admin.

Code § 67.12(b)(1). As previously noted, there are additional requirements for the posting and notice of actions taken in closed session by the close of the next business day following the meeting at which such actions must be disclosed. Cal. Govt. Code §§ 54957.1(b), (c); Admin. Code §§ 67.12(c), (d).

d. The labor negotiations exception

A policy body may meet in closed session with the City's designated representatives to give negotiating instructions regarding collective bargaining or meeting and conferring with public employee organizations or with unrepresented employees so long as the body has authority over such matters. Cal. Govt. Code § 54957.6; Admin. Code § 67.10(e).

Both the Brown Act and Sunshine Ordinance include formats for agendizing a closed session for labor negotiations. Cal. Govt. Code § 54954.5(f); Admin. Code § 67.8(a)(5). Among other things, the notice must identify the City's labor negotiator(s). The negotiator may but need not be a member of the policy body. An agent or designee of the negotiator may appear for the negotiator so long as the body publicly announces the name of the person before the body goes into closed session. Cal. Govt. Code § 54954.5(f).

The City must make any collectively bargained agreement available to the public at least 15 calendar days before the meeting of the policy body to which the agreement is to be reported. Admin. Code § 67.12(b)(5).

e. The security exception

Policy bodies may meet in closed session on matters posing a threat to the security of or the public's access to public buildings, services, or facilities. Cal. Govt. Code § 54957(a); Admin. Code § 67.10(a). The threat need not be imminent for the body to go into closed session. Nor must the body have reason to believe there is a specific plot against the building or facility in question. For example, if a building's design features render it vulnerable to attack, and a public discussion of those design features would alert a would-be terrorist to the building's vulnerabilities, that discussion may occur in closed session under this exception. Consideration of a threat to the safety of a public official may occur in closed session under the security exception, because typically such a threat will at least indirectly endanger the public's access to public buildings, services, or facilities.

The Brown Act describes the scope of security matters that a policy body may address in a closed session with greater specificity than the Sunshine Ordinance, by mentioning a threat to the security of essential public services, including water, drinking water, wastewater treatment, natural gas service, and electric service. Cal. Govt. Code § 54957(a). But these types of threats are encompassed within the more general language of the Sunshine Ordinance.

The Sunshine Ordinance states that a closed session under the security exception must include the Attorney General, District Attorney, Sheriff, or Chief of Police, or their respective deputies. Admin. Code § 67.10(a). The Brown Act also authorizes such closed sessions with agency counsel, a security consultant, or a security operations manager. Cal. Govt. Code § 54957(a). Because the Ordinance does not mention those persons, the policy body should not meet with them alone, but should also include in the closed session at least

one of the persons mentioned in the Ordinance. The agenda description for the closed session must identify by name, title, and agency the law enforcement officer(s) attending the closed session. Cal. Govt. Code § 54954.5(e); Admin. Code § 67.8(a)(4)

In contrast to most types of closed sessions, the law does not require reporting any action that the policy body takes in closed session under the security exception.

f. Miscellaneous exceptions

Policy bodies may also meet in closed session in other limited circumstances, for example, (1) to consider license applications by persons with criminal records (Cal. Govt. Code § 54956.7); (2) to consider the purchase or sale of specific pension fund investments (Cal. Govt. Code § 54956.81); and (3) for other special, limited circumstances, such as when a commission must consider a matter that is confidential under state or federal law. If there are questions about whether one of these or other exceptions might apply in a particular situation, we recommend that the policy body consult in advance with the City Attorney's Office.

H. Passive meeting bodies

The Sunshine Ordinance imposes open government requirements on “passive meeting bodies” that the Brown Act does not regulate and that are not policy bodies. We first discuss the types of entities that are passive meeting bodies, then the rules that apply to gatherings of such bodies.

1. Types of passive meeting bodies

Gatherings of the following types of groups are subject to the passive meeting body rules:

- Advisory committees or other multimember bodies created in writing, or by the initiative of, a member of a policy body, the Mayor, the City Administrator, a department head, or any elective officer. Admin. Code §§ 67.3(c)(1); 67.4(a)(5).
- A social, recreational, or ceremonial occasion sponsored or organized by or for a policy body to which a majority of the body has been invited. Admin. Code §§ 67.3(c)(3), 67.4(a)(5). Spectators at such gatherings are not entitled to refreshments or food. Admin. Code § 67.4(a)(4).
- Committees created by the initiative of a member of a policy body, the Mayor, or a department head, consisting solely of City employees, that are reviewing, developing, modifying, or creating City policies or procedures relating to public health, safety, or welfare, or to services for the homeless. Admin. Code § 67.3(c)(5).

Other committees consisting solely of City employees, even if created at the initiative of a member of a policy body, the Mayor, or a department head, are not passive meeting bodies. Admin. Code § 67.3(c)(4). As previously discussed, any committee that the Charter or an ordinance, resolution, or other formal action of a policy body creates or initiates is itself a policy body subject to the requirements of the Brown Act and Sunshine Ordinance. A committee of employees formed in this manner is a policy body.

In many cases, the existence of a passive meeting body will hinge on who created it or initiated its creation. For example, a division manager in a large department creates a committee comprised of employees in that department. The committee, even if tasked with developing a City policy affecting public health, safety, or welfare, would not be a passive meeting body. But if the division manager acts at the initiative of the department head, the committee is a passive meeting body, even if the division manager creates and appoints people to the committee.

2. Rules for passive meeting body gatherings

Gatherings of passive meeting bodies are not subject to the broad array of open government requirements that apply to policy bodies. Such gatherings are subject to a limited number of requirements:

- They must be open to the public. Admin. Code §§ 67.4(a), (a)(2). But such gatherings need not occur in any particular space for accommodation of members of the public. Rather, the public has the right to observe on a space available basis consistent with legal and practical restrictions on occupancy. Admin. Code § 67.4(a)(2).
- They must occur in facilities that are accessible to the disabled.
- They must be noticed on the City's website whenever possible. Admin. Code § 67.4(a)(1). There is not a strict time deadline for posting this notice, but if possible the department should post it to allow reasonable time for interested members of the public to arrange to attend.
- If a member of the public requests the time, place, and nature of an upcoming gathering, that information must be disclosed. Admin. Code § 67.4(a)(1).
- If there is an agenda and a member of the public requests the agenda, it must be disclosed. Admin. Code § 67.4(a)(1).

Among the most basic requirements applicable to meetings of policy bodies that do not apply to gatherings of passive meeting bodies are the following:

- There is no right of public comment. Admin. Code § 67.4(a)(3).
- There is no agenda requirement, much less a requirement to post an agenda. And even if an agenda has been prepared, it need not be followed.

The Sunshine Ordinance specifies that passive meeting bodies may gather in closed session to the same extent as policy bodies. Admin. Code § 67.4(a)(6). But, as a practical matter, there will be few if any occasions where a closed session for a passive meeting body could meet the exacting legal requirements for holding a closed session.

The Ordinance is otherwise silent regarding many of the types of issues affecting policy bodies that are discussed in this Guide. Where questions arise concerning the operation of passive meeting bodies, consultation with the City Attorney's Office may be appropriate.

VI. Remedies and penalties for violations of the Brown Act, Public Records Act, and Sunshine Ordinance

City employees and officials must place a high priority on compliance with open government laws. The Brown Act, Public Records Act, and Sunshine Ordinance provide substantial remedies and penalties for violation of their provisions. And the cost in money and staff resources that must be devoted in administrative or judicial proceedings to defending against alleged violations of these laws can be substantial.

A. Violations of the Brown Act

1. Criminal penalty for willful violations

Each member of a policy body who attends a meeting of the body where an action is taken in violation of the Brown Act, with the intent to deprive the public of information to which the public is entitled, is guilty of a misdemeanor. Cal. Govt. Code § 54959.

2. Invalidation of certain actions

Courts may void an action taken by a policy body that violates certain provisions of the Brown Act:

- Cal. Govt. Code § 54953 (requirement that meetings be open to the public; rules for teleconferenced meetings; prohibition of secret ballots).
- Cal. Govt. Code § 54954.2 (requirements for posting and adhering to agendas for regular meetings).
- Cal. Govt. Code § 54954.5 (agenda requirements for closed sessions).
- Cal. Govt. Code § 54954.6 (detailed requirements, not discussed in this Guide, for public meetings and hearings regarding any new or increased general tax or new or increased assessment).
- Cal. Govt. Code § 54956 (notice and other requirements for special meetings).
- Cal. Govt. Code § 54956.5 (notice and other requirements for emergency meetings).

Cal. Govt. Code § 54960.1(a). Courts may not void actions taken in violation of other Brown Act provisions. And even as to actions taken in violation of the enumerated sections, there are limits on the ability of courts to void the action, as outlined below.

First, this judicial remedy is unavailable if the policy body violates one of the Brown Act sections enumerated above but substantially complies with the law. Cal. Govt. Code § 54960.1(d)(1). Whether there has been substantial compliance in a particular case will depend on the facts and circumstances.

Second, courts may not void certain types of actions, even when the violation of the enumerated section is clear and significant. Cal. Govt. Code § 54960(d). Actions that may not be voided include:

- Actions taken in connection with the sale or issuance of notes, bonds, or other evidence of indebtedness, or any related contract, instrument, or agreement (Cal. Govt. Code § 54960.1(d)(2)).
- Actions taken giving rise to a contractual obligation, other than certain personal services contracts, where a party in good faith has detrimentally relied on the action taken (Cal. Govt. Code § 54960.1(d)(3)).
- Actions taken in connection with the collection of any tax (Cal. Govt. Code § 54960.1(d)(4)).
- For certain of the enumerated violations, where the violation is based on defective notice, if the affected person had actual and timely notice of the item of business under consideration (Cal. Govt. Code § 54960.1(d)(5)).

Third, while the district attorney or any interested person may bring suit to void the policy body's action, the suit must be preceded by a "cure and correct" process that, if properly executed, will preclude the ability to sue. Cal. Govt. Code §§ 54960.1(a), (b). In brief, before filing suit, the person must serve a written demand letter on the policy body explaining the violation, to give the body a chance to correct it. Cal. Govt. Code § 54960.1(b). Tight time frames dictate when the demand letter must be submitted, when the policy body must correct the violation, and the deadline for filing suit if the body does not correct the violation. Cal. Govt. Code § 54960.1(c).

If the cure and correct process fails, suit is timely filed, and a court finds that the policy body violated one of the Brown Act sections enumerated above, the court may set aside the action (except as noted above), and award the plaintiff court costs and attorneys' fees. Cal. Govt. Code §§ 54960.1, 54960.5.

3. Injunctive and declaratory relief

Courts may issue an injunction or declaratory relief to stop or prevent violations or threatened violations of the Brown Act or to determine the applicability of the Brown Act to ongoing actions or future threatened actions of a policy body. Cal. Govt. Code § 54960(a). The district attorney or any interested person may seek such relief. In addition, suit may be brought to determine the applicability of the Brown Act to past actions of a policy body. Cal. Govt. Code §§ 54960(a), 54960.2. This latter type of suit may be brought only after the policy body has been given an opportunity to make an unconditional commitment to desist from acting in the future in the same allegedly unlawful way it has acted in the past. Cal. Govt. Code § 54960.2.

The court may award court costs and attorneys' fees to a successful plaintiff. Cal. Govt. Code §§ 54960, 54960.2, 54960.5.

4. Sanctions for disclosing confidential closed session information

The Brown Act provides certain remedies and penalties for disclosing, without the policy body's authorization, confidential information acquired in a closed session. Cal. Govt. Code § 54963. They include injunctive relief to prevent the disclosure of such information, disciplinary action, and referral to the grand jury. Cal. Govt. Code § 54963(c). But certain disclosures of such information are lawful, such as when complaining to a district attorney or grand jury about Brown Act violations that occurred in closed session. Cal. Govt. Code § 54963(e).

B. Violations of the Public Records Act

Under the Public Records Act, a person may sue to enforce the right to inspect or receive a copy of a record. Cal. Govt. Code §§ 6258, 6259(a). If the court finds that the decision to refuse disclosure was not justified, it will order the record disclosed. Cal. Govt. Code § 6259(b). The court awards court costs and attorneys' fees if the plaintiff prevails. Cal. Govt. Code § 6259(d). These sums can mount up quickly. Thus, compliance with the Public Records Act is imperative not merely to serve the laudable ends of open government, but also to preserve the public fisc. On occasion, local governments have been required to pay substantial attorneys' fee awards, in the hundreds of thousands of dollars, in public records cases where the court has ruled for the plaintiff.

If the court finds that the plaintiff's Public Records Act claim is clearly frivolous, it awards court costs and attorneys' fees to the public agency. Cal. Govt. Code § 6259(d). But few plaintiffs' claims meet the "clearly frivolous" standard. The costs and attorneys' fees incurred by public agencies in defense of claims that are unsuccessful but not clearly frivolous can be substantial and generally must be borne by the agency.

C. Remedies and penalties under the Sunshine Ordinance

1. Willful violation is official misconduct

Willful failure of any elected official, department head, or other managerial City employee to discharge any duties imposed by the Sunshine Ordinance, Brown Act, or Public Records Act is official misconduct. Admin. Code § 67.34. The Sunshine Ordinance authorizes the Ethics Commission to hear complaints involving willful violations of these laws by elected officials or department heads. Admin. Code § 67.34.

2. Administrative appeal of public records denials

The Sunshine Ordinance provides three administrative appeals processes for a requester to challenge a department's denial of access to records. If the department refuses, fails to comply, or incompletely complies with a public records request, the requester may petition (1) the Sunshine Ordinance Task Force, (2) the Supervisor of Records (City Attorney's

Office), or (3) in certain cases, the Ethics Commission, for a determination whether the requested record should be disclosed. If the Task Force or Supervisor of Records decide that denial was improper and the department then does not produce the record, the Task Force and Supervisor of Records may refer the matter to an enforcing agency. Admin. Code §§ 67.21(d), (e); 67.30(c).

When a person has initiated a Task Force proceeding to challenge a department's refusal to produce a record, and the Task Force has found a violation, the Task Force sometimes will refer the case to the Ethics Commission. The Ethics Commission may also consider some disputes concerning an alleged denial of access to records, even if the Task Force has not yet heard the matter. For matters before the Ethics Commission, different burdens of proof or procedures may apply if either the Task Force has already considered the matter, the person challenging the denial is asserting that City staff willfully refused to produce the disputed records, or the person who allegedly violated the Sunshine Ordinance is an elected official or department head. For further details concerning the Ethics Commission's processes for Sunshine Ordinance matters, see the Ethics Commission's Regulations for Violations of the Sunshine Ordinance, available on the Commission's website.

3. Administrative appeal of open meeting violations

The Sunshine Ordinance does not specifically prescribe a hearing process for alleged open meeting law violations as it does for public records denials. But, under its general authority to inquire into departmental compliance with the Brown Act and Sunshine Ordinance and report violations of those laws, the Sunshine Ordinance Task Force may hear and rule on complaints alleging a violation of the open meeting laws. Admin. Code § 67.30(c). Or the Task Force may choose to evaluate the City's compliance with open meetings laws in some other manner. The Supervisor of Records generally does not rule on such matters.

4. Court enforcement of the ordinance

The Sunshine Ordinance authorizes any person to institute court proceedings to enforce the Ordinance. Any individual may sue to enforce the right to inspect or receive a copy of any public record, to enforce the right to attend any meeting required to be open, or to compel such meeting to be open. Admin. Code § 67.35(a). If an administrative complaint or referral is filed with a responsible City or state official who then does not take action within 40 days, the suit may be filed. Admin. Code § 67.35(d). A prevailing plaintiff is entitled to have the City pay its costs and attorneys' fees. Admin. Code § 67.35(b).

VII. Other city requirements for hearings and notice

A. Charter section 16.112: required notice and hearings for certain city actions

The Charter sets forth requirements, beyond those imposed by the Brown Act and Sunshine Ordinance or other federal, state, and local laws, for providing notice and public hearings before the City takes certain actions. Charter § 16.112. This provision requires the City to hold public hearings before taking the following actions:

- Closing, eliminating, or significantly reducing the level of services at any facility used by the public.
- Significantly changing the operating schedule or route of a transit line.
- Instituting or changing any fee, rates or fares affecting the public.
- Adopting any amendment to the General Plan or change in zoning or land use.

The City must publish notice of these public hearings in the City's official newspaper. But, upon the City's adoption of an ordinance specifying other means of publishing notice, the department must comply with the ordinance to satisfy the publishing requirement. Charter Art. XVII (definition of "published"). Questions concerning publishing of the required notice may be directed to the City Attorney's Office.

A significant reduction or change in services or operating schedules or routes does not include the occasional or temporary closure to perform regular maintenance or unforeseen, necessary repairs. For example, section 16.112 would not require a public hearing regarding closure of a transit line or a recreation center for a day in order to trim a tree next to the transit line or recreation center.

Section 16.112 does not indicate who must conduct the required hearing. The responsibility for compliance with the hearing requirement rests in the City official or body with authority to make the underlying decision. That official or body may assign a deputy or subordinate to notice and conduct the hearing.

Neither the Brown Act nor the Sunshine Ordinance applies to these hearings, unless the hearing is conducted by a policy body whose meetings are already subject to those laws. But we strongly recommend that, in addition to the required notice for a hearing under section 16.112, the official or body responsible for the hearing notice and conduct the hearing as if it were subject to the Brown Act and Sunshine Ordinance.

In addition, for the following matters, Section 16.112 requires the City to publish notice in the same manner as required for the matters discussed above:

- Any sale, lease, rental, encumbrance, or exchange of real property held by the City.
- The formation of special assessment districts and the conduct of hearings on protests of special assessment districts.

- The issuance of requests for bids or proposals involving expenditures of \$50,000 or more and the award of contracts for the same.
- Polling places and precinct officers for any election.

But, for these matters, section 16.112 does not require a public hearing.

B. The Citizens’ Right-To-Know Act of 1998: pre-approval notice for certain city projects

The Citizens’ Right-To-Know Act requires the City to post a public notice 15 days before approving certain types of City projects. Admin. Code §§ 79.1-79.8. We describe below the main features of this Ordinance.

1. Scope of ordinance

The Ordinance defines a “City project” as a project that includes all these elements:

- It involves new construction, a change in use, or a significant expansion of an existing use at a specific location. The Zoning Administrator interprets the terms “change in use” and “significant expansion of an existing use.” Admin. Code § 79.2(d).
- It houses City operations at, or provides services or assistance from, the specific location.
- It is undertaken directly by the City or a contractor or other agent that receives \$50,000 or more in City funding for the construction and related work associated with the project and/or operating expenses for the project at the specific location. City funding includes funding from federal, state, or other sources that is administered by the City. Admin. Code § 79.2(c).

Admin. Code § 79.2(b)(i). “City project” includes but is not limited to administrative offices, housing and other residential projects, and programs that provide services or assistance to benefit the public from a fixed location. Admin. Code § 79.2(b)(ii).

The following projects are exempt from the Ordinance: (1) shelters for battered persons; (2) certain family care, foster, or group homes serving six or fewer persons; (3) projects undertaken solely to achieve compliance with disabled access requirements of federal or State law; (4) projects in the public right-of-way; and (5) projects outside the City limits. Admin. Code § 79.3.

2. Timing of required notice

The City officer, department, board, or commission that is sponsoring the City project must give the public at least 15 days’ notice before “approval” of the project. Admin. Code § 79.1. “Approval” means an action by the sponsor making a final commitment to fund or undertake the project. Admin. Code § 79.2(a). It does not include a decision to undertake a preliminary study of one or more potential sites for a project. Admin. Code § 79.2(a).

Rather, “approval” occurs when the sponsoring department makes a firm commitment to move forward with or fund a project at a specific location.

The point at which “approval” occurs differs from department to department. For example, where a commission governs the department, approval may occur when the commission approves funding for a project or approves the acquisition of land for a project. Where a department head has authority to approve projects without action by a commission, approval may occur when the department head enters into an architectural services contract, signs loan documents, or awards a grant.

3. Nature of required notice

The required notice must be posted at least 15 days before the approval of the project, and must remain posted through the actual approval or disapproval. Admin. Code § 79.5(a). A sign must be posted on the property. Admin. Code § 79.5(a). The sign must be entitled “Notice of Intent to Approve a City Project at this Location,” and must identify the officer, department, board, or commission that will consider approval of the project, the date of consideration, and how to obtain more information. Admin. Code § 79.5(c). The Ordinance describes the requirements governing location, size, and similar details regarding the sign. Admin. Code § 79.5(b). The Director of Administrative Services has developed a standardized sign that departments may use to satisfy these requirements. Admin. Code § 79.5(d).

Instead of signposting, the sponsor of the City project may send mailed notice to property owners and, to the extent practicable, occupants in a 300-foot radius of the lot line of the property at least 20 days before consideration of the project approval. Admin. Code § 79.6. Such notice should also be sent to neighborhood organizations listed with the Planning Department where the site would be within the indicated geographic area of interest of the organization. Admin. Code § 79.6.

C. Sunshine Ordinance: notice to residents of city activities affecting their property or neighborhood

The Sunshine Ordinance sets special requirements for certain types of public notices departments, boards, agencies, or commissions issue to City residents in a specific area about matters that may impact their property or neighborhood. Admin. Code § 67.7-1. This provision does not in itself mandate that the City post a notice of a meeting or hearing. Rather, it comes into operation only when there is a separate requirement imposed by City or State law for notice of the meeting or hearing.

Where there is a requirement to mail, post, or publish to residents in a specific area a notice of a matter that may impact their property or that area, the notice should inform residents of:

- The proposal or planned activity. Admin. Code § 67.7-1(b).
- The length of time planned for the activity. Admin. Code § 67.7-1(b).
- The effect of the proposal or activity. Admin. Code § 67.7-1(b).

- A telephone contact for residents who have questions. Admin. Code § 67.7-1(b).
- If the notice informs the public of a public meeting or hearing, an explanation of how persons can submit written comments that will become part of the official public record. Admin. Code § 67.7-1(c).

The notice must be brief, concise, and written in plain, easily understood English. Admin. Code § 67.7-1(a).

VIII. The application of open government laws to private entities

Open government laws do not, as a general rule, apply to private entities. But in some circumstances the law considers the relationship between private entities and the City sufficiently close to impose disclosure and public access rules on private entities. Below we highlight these rules, which derive from provisions of the Brown Act, Public Records Act, and Sunshine Ordinance, as well as the Nonprofit Public Access Ordinance.

A. Disclosure of city's receipt of outside funding

No official, employee, or agent of the City may accept, allow to be collected, direct, or influence the spending of outside funding for the purpose of carrying out or assisting any City function, unless the City and the entity providing the funding make appropriate disclosures. Admin. Code § 67.29-6.

1. Triggering the disclosure requirements

For purposes of this provision, “outside funding” means more than money alone. It also includes goods or services that have a monetary value. If the funding exceeds in value \$100 in the aggregate, the disclosure requirements apply.

Outside funding means gifts that both nonprofit and for-profit entities make to the City for City functions. It does not include state or federal funds for City programs. But the City is required to disclose receipt of government funds under the Public Records Act.

A City function is any of the services, programs, events, or responsibilities the City ordinarily undertakes. Among other things, City functions can include providing City services, such as road or park maintenance, and sponsoring civic events, such as parades, conferences or festivals. Some of the factors that may be considered in determining if something is a City function are whether:

- The City traditionally performs the function.
- The City has an obligation to perform the function.
- The City pays for any part of the function.
- The City provides insurance for the function.

- The name of the function includes the City or a City official.
- City personnel oversee the function.
- City personnel attend or work at the function on City time.

2. The disclosure requirements

Disclosure of the outside funding must include the amount of the contribution, its source, and the names of all individuals or the organization contributing such money. Disclosure must also include any financial interest the contributor has involving the City. A financial interest includes a contract, grant, lease, or request for license, permit, or other entitlement for use.

In general, the department receiving or directing the funds must make such disclosure on its website. In addition, entities that provide or manage such funds must generally agree in writing to make these disclosures.

B. Disclosure of transactional records of entities that collect fees for city functions

Any contract, agreement, or permit between the City and an outside entity for performing a City-related program, function, or service that authorizes the entity to demand funds or fees from citizens must contain a provision requiring the entity to maintain accurate records of each transaction in a professional and businesslike manner. Further, such records must be available to the public. If the entity does not comply with these requirements, the City may terminate the contract, agreement, or permit or impose a penalty equal to half of the fees derived under it during the period of noncompliance. Admin. Code § 67.29-7(c).

This disclosure requirement expressly applies but is not limited to agreements allowing an entity to:

- Tow or impound vehicles in the City.
- Collect a fee from persons in a pretrial diversion program.

For guidance as to other agreements for performance of a City program, function, or service that may be subject to this disclosure requirement, see the discussion of the “City function” concept in Section XII(A)(1), immediately above.

There is a strong likelihood that records subject to disclosure under this provision will contain personal information that must be redacted for reasons of privacy. To ensure that citizens’ privacy rights are protected, please consult the City Attorney’s Office before releasing records under this provision.

C. Disclosure of financial records of entities receiving city subsidies

The City may not give a subsidy in funds, tax abatements, land, or services to any private entity unless the entity agrees in writing to disclose certain financial records to the City. Admin. Code § 67.32. Subsidies in the form of grants, tax incremental financing, and below market leases are subject to this provision. The entity must provide the City with financial projections (including profit and loss figures) for the project for which the subsidy is provided, as well as annual audited financial statements for the project. These requirements apply only to the project for which the City provides the subsidy, not to the entity's entire operations. All such projections and financial statements are public records that must be disclosed.

D. Access to meetings and records of nonprofit entities receiving city funding

The Nonprofit Public Access Ordinance imposes public access requirements on certain nonprofit entities that receive funding under a contract with the City. See Admin. Code §§ 12L.1-12L.10. We describe below the main features of the Ordinance.

1. Scope of ordinance

The Ordinance applies to nonprofit entities that receive at least \$250,000 per year in funding provided by or through the City and have at least one contract with the City. Admin. Code § 12L.3(e). In this context, "contract" means any agreement under which a nonprofit entity receives City-provided or City-controlled funds for its operations or programs or for goods or services it provides to the public. Admin. Code § 12L.3(c). Agreements to provide the City with goods used by City government itself (such as office supplies) or to provide services or benefits to City employees or their dependents, are not "contracts" under the Ordinance. Admin. Code § 12L.3(c). But money the City receives under such agreements will count toward the \$250,000 annual threshold, so long as the entity has another agreement with the City that is a contract under the Ordinance.

2. Open board meetings

Each covered entity must allow the public to attend at least two typical meetings per year of its board of directors. Admin. Code § 12L.4(a)(1). Members of the public who attend must be allowed to address the board on subjects of public interest relating to the entity's operations or services. Admin. Code § 12L.4(c)(1). At each such designated public board meeting, the board may adopt reasonable regulations to ensure that the intent of the Ordinance regarding public comment is carried out, provided that at least 30 minutes of public comment is permitted at the meeting. Admin. Code § 12L.4(c)(2).

At least 30 days before each such designated public board meeting, the entity must send written notice of the meeting's date, time, and location to the Clerk of the Board of

Supervisors for posting, and to the City Library for posting. Admin. Code §§ 12L.4(d)(1), (2) Upon request, the entity must inform any member of the public of the next designated public meeting's date, time, and location. Admin. Code § 12L.4(d)(2).

The Ordinance does not require entities to alter the location or facility in which their boards of directors meet. Further, entities may preclude the public from attending those portions of a designated public board meeting that concern specified subjects (generally where public attendance would result in the violation of client or donor confidentiality, violation of the attorney-client privilege, or disclosure of a trade secret; or when the board will be discussing litigation, real estate acquisitions, or employee hiring or performance). Admin. Code § 12L.4(b). Finally, entities engaged primarily in abortion counseling or abortion services, domestic violence sheltering, or suicide prevention are not required to open their board meetings to the public. Admin. Code § 12L.4(a)(3).

3. Public access to financial records

Each covered entity must make available for public inspection and copying:

- Its most recent budget, as provided to the City in a grant or contract application.
- Its most recent tax returns, except to the extent privileged by law.
- Any financial audits or performance evaluations of the entity done within the last two years by or for the City, so long as the City has not designated them as confidential.

Admin. Code § 12L.5(a). The entity is not required to make other records available to the public. Admin. Code § 12L.5(a). Further, no record need be disclosed if doing so would reveal the identity of donors, or the amount or nature of any donation. Admin. Code § 12L.5(c).

The public may inspect these records during the entity's regular business hours, or receive copies, upon 10 days' notice. Admin. Code § 12L.5(a). The entity may charge the direct copying and mailing costs for records. Admin. Code § 12L.5(a). Each entity is responsible for costs incurred in complying with these and other requirements of the Ordinance other than direct copying or mailing costs, up to \$500 per year. Admin. Code §§ 12L.1(b); 12L.3(d). If there is a question whether an entity that has expended \$500 in costs in a year must continue to comply with the Ordinance, we recommend that the department consult the City Attorney's Office.

Entities engaged primarily in abortion counseling and services, domestic violence sheltering services, or suicide prevention counseling services, may fully comply with these disclosure requirements by providing copies of records through the mail. Admin. Code § 12L.5(a).

4. Community representation on the board

As City policy, the Ordinance calls for covered entities to make good-faith efforts to promote the membership, on its board of directors, of at least one member of the community who receives goods or services from the entity, or like goods or services from

another nonprofit entity. Admin. Code § 12L.6(a). To encourage such community participation, covered entities must give public notice of board vacancies; allow members of the public to propose themselves or others for board membership; and allow the public to comment on board membership issues during at least one designated public board meeting per year. Admin. Code § 12L.6(b).

5. Enforcement of the ordinance

Complaints from the public concerning an entity's noncompliance with these requirements, or requests from the public for additional financial information which the entity is not required to disclose, are handled by a three-stage non-binding dispute resolution process, consisting of:

- The contracting City department's review of the complaint and recommended resolution.
- The Sunshine Ordinance Task Force's optional advisory review.
- The Board of Supervisors' review and recommended resolution.

Admin. Code § 12L.5(b). If an entity materially breaches its obligations under the Ordinance, the contracting City department is authorized, but not required, to terminate or decline to renew the organization's contract, partially or in its entirety. Admin. Code § 12L.7.

E. Application of passive meeting body rules to certain private entities

In limited circumstances, the Sunshine Ordinance's passive meeting body rules, discussed at Section IV(I)(2) above, apply to some meetings of some private entities.

First, private entities consisting of multimember bodies primarily formed or existing to serve as a non-governmental adviser to a member of a policy body, the Mayor, the City Administrator, a department head, or any elective officer are subject to the passive meeting body rules. Admin. Code § 67.4(a)(5). Where a City official does not form such a body, generally only its meetings with City officials will be subject to the passive meeting body rules. But the Sunshine Ordinance and other provisions of City, State, and federal law recognize privacy rights of individuals and entities. As a result, there may be instances where the Ordinance should not be interpreted to require public access to such meetings. Public officials with questions concerning their obligations arising out of attending such meetings should consult the City Attorney's Office in advance, if possible.

Second, if a private entity organizes a social, recreational, or ceremonial occasion for a policy body to which a majority of the body has been invited, the gathering is subject to the passive meeting body rules. Admin. Code § 67.3(c)(3). The entity is not required to provide notice of the event to the public, but the policy body should provide notice on the City's website if possible. Admin. Code § 67.4(a)(1). Upon inquiry to the entity by a member of the public, the entity must disclose the time, place and nature of the event. Admin. Code § 67.4(a)(1).

Third, if a private entity owns, operates, or manages property in which the City has or will have an ownership interest, including a mortgage, and on which the entity performs a governmental function related to furthering health, safety, or welfare, that portion of any meeting of the entity's governing board relating to the property, the government-related activities on the property, or performance under the City contract or grant, must comply with the passive meeting body rules. Admin. Code § 67.4(b). The City's agreement with the entity must require compliance in these circumstances with the passive meeting body rules. Admin. Code § 67.4(b). Upon request, the entity must disclose the time, place, and nature of the meeting and event, and any agenda prepared. The entity must make available to the public its records regarding the property, the government-related activities on the property, performance under the City contract or grant, and the portion of the meeting pertaining to these matters. Admin. Code § 67.4(b).

F. Application of the Brown Act and Public Records Act to certain private entities

In two narrow circumstances, the Brown Act and Public Records Act apply to a board of directors of a private entity:

- Where the entity is created by the Board of Supervisors to exercise authority that the Board may lawfully delegate to a private corporation or entity.
- Where the entity receives City funds and the membership of the board of directors includes a member of a City policy body appointed to the board as a full voting member by the policy body.

In these circumstances, the entity's board must conduct its meetings in conformance with the Brown Act. Cal. Govt. Code § 54952(c). And the records maintained by such an entity are considered public records, just like City records. Cal. Govt. Code § 6252(a).

References

To review the California Constitution, visit:

<http://www.leginfo.ca.gov/const.html>.

To review California statutes, visit:

<http://www.leginfo.ca.gov/calaw.html>.

State statutes cited in the Good Government Guide include the following, among others:

- Government Code § 1090 et seq.
- California Political Reform Act, Government Code § 87100 et seq.
- California Public Records Act, Government Code § 6250 et seq.
- The Ralph M. Brown Act, Government Code § 54950 et seq.

To review local San Francisco laws and ordinances, visit:

<http://www.municode.com/Library/clientCodePage.aspx?clientID=4201>.

Local ordinances and laws cited in the Good Government Guide include the following, among others:

- San Francisco Administrative Code § 8.1 et seq. (Records Retention & Destruction)
- San Francisco Administrative Code § 8.15 et seq. (Rules, Regulations & Reports)
- San Francisco Administrative Code Chapter 12L (Non-Profits)
- San Francisco Administrative Code Chapter 12M (Protection of Private Information)
- San Francisco Administrative Code Chapter 67 (Sunshine Ordinance)
- San Francisco Administrative Code Chapter 79 (Citizen's Right to Know Act of 1998)
- San Francisco Charter
- San Francisco Campaign & Governmental Conduct Code

To review California Fair Political Practices Commission Regulations, visit its website at:

<http://www.fppc.ca.gov/>.

To review San Francisco Ethics Commission Regulations and access Ethics Commission Forms, visit its website at:

<http://www.sfethics.org/>.

Appendix

I. **Board of Supervisors resolution on attendance for members of boards and commissions**

FILE NO. 061175, RESOLUTION NO. 502-06

[Urging boards and commissions to adopt policies regarding members' attendance at meetings.]

Resolution urging each City board, commission, or advisory body to adopt an internal policy regarding members' attendance at meetings of the body, and requesting each body to submit a copy of its policy to the Board of Supervisors by December 1, 2006.

WHEREAS, City boards, commissions, and advisory bodies are created as multi-member bodies to make use of the talents, efforts, and perspectives of all of their members; and,

WHEREAS, The appointing authorities for such bodies strive in selecting members to promote both diversity and balance, in order to enhance both the breadth of community representation and the quality of decision-making in the conduct of the City's business; and,

WHEREAS, Excessive absenteeism by individual members of such bodies detracts from the achievement of those goals and potentially skews the decision-making process, deprives different communities of effective representation, and places an unfair burden on those members who are conscientious about attending meetings; now, therefore, be it

RESOLVED, That the Board of Supervisors urges that every appointive board, commission, or advisory body of any kind established by the Charter or by legislative act of the Board of Supervisors adopt an internal policy regarding members' attendance at meetings of the body; and, be it

FURTHER RESOLVED, That the Board urges that such policy address how and when members are to be excused from attending particular meetings, and when the body is to report a member's excessive absenteeism to the appointing authority; and, be it

FURTHER RESOLVED, That the Board requests that every appointive board, commission, or advisory body of any kind established by the Charter or by legislative act of the Board of Supervisors submit a copy of its internal policy regarding members' attendance to the Board no later than December 1, 2006.

(Adopted August 15, 2006)

II. Mayor's policy on commissioner attendance

Office of the Mayor Gavin Newsom, City & County of San Francisco
September 18, 2006

Departmental Directors and Commission Secretaries:

In a continuing effort to increase governmental efficiency and performance, I want to ensure consistent attendance of appointed representatives to our City and County commissions. I believe that consistent commissioner attendance is necessary for each commission to function well and effectively advance departmental goals. Appointments to commissions have been made by my office in order to allow for diverse viewpoints to be represented, so each commissioner's participation is essential.

Along those lines, my office is interested in establishing baseline standards of commissioner attendance across all city commissions:

- All commissioner absences be 'excused absences,' in which a commission secretary or the appropriate departmental representative is notified in advance of the meeting about the absence.
- A working goal of 100% attendance for commissioners, which recognizes the critical importance of each commissioner's attendance at meetings. As a practical matter, I believe it is appropriate to ask that each commissioner have at least 90% attendance to their regular commission's meetings—recognizing that illnesses or family emergencies arise very occasionally.
- In order to monitor efforts toward this goal, I ask that commission secretaries submit an annual report to my office at the end of each fiscal year detailing commission attendance.
- Moreover, I ask commission secretaries contact my commissions liaison if a commissioner misses a meeting without contacting the department in advance, or when a commissioner has missed three meetings in a fiscal year, so that my office may contact that commissioner.

Please consider incorporating these standards into your commission's policies and procedures as appropriate.

Each individual commissioner's experiences and skills are highly valued, and consistent attendance allows for the full potential of each commission to be utilized. Meeting attendance is also one of the many factors my office uses to consider future appointments of individuals currently serving on commissions, so detailed attendance records will be helpful to our appointment process.

Should you have any questions about this letter, please contact Wade Crowfoot at 554-6640.

Yours sincerely,

Gavin Newsom

III. Mayor's policy on discriminatory or harassing remarks made at public meetings

[Full Official Title: Mayor's Policy on Discriminatory or Harassing Remarks Made at Public Meetings of City Boards and Commissions.]

1. **CITY POLICY AND GOVERNING LAW PROHIBIT DISCRIMINATION AGAINST OR HARASSMENT OF CITY EMPLOYEES.**

The City invites public comment about its operations, including comment about the performance of its public officials and employees, at the public meetings of City boards and commissions. But City policies, along with federal, state and local laws, prohibit discrimination against or harassment of City employees based on race, sex and the other categories listed below. Discriminatory or harassing comments about or in the presence of City employees, even comments by third parties, may create a hostile work environment, if severe or pervasive.

City policy prohibits discrimination or harassment of its employees on the basis of:

Race, color, ancestry, national origin, ethnicity, place of birth, sex, age, religion, creed, disability or medical condition, HIV/AIDS status, sexual orientation, marital or domestic partner status, gender identity, parental status, pregnancy, weight or height or any other characteristic protected by state or federal employment discrimination laws or by the San Francisco Charter or local ordinance.

The City Attorney's Office is available to assist Boards and Commissions in identifying prohibited discrimination or harassment.

In order to acknowledge the public's right to comment on City operations at public meetings, while taking reasonable steps to protect City employees from discrimination and harassment, City Boards and Commissions shall adhere to the following procedures.

2. **HOW TO RESPOND TO DISCRIMINATORY OR HARASSING REMARKS MADE AT A PUBLIC MEETING.**

If any person makes discriminatory or harassing remarks at a public meeting that violate the above City policy, the chair of the meeting shall immediately take the following actions:

- a. The chair shall read the City's policy against discrimination and harassment, set forth above in bold type, into the record. The chair shall state that comments in violation of City policy will not be condoned and will play no role in City decisions.
- b. The chair shall further state that any City employee in the room who is offended by the discriminatory or harassing remarks is excused from attendance at the meeting, and that no City employee is compelled to remain in attendance where it appears likely that speakers will make further discriminatory or harassing comments.
- c. If that person or others continue to make discriminatory or harassing remarks that violate City policy, the chair shall remind the speaker of City policy, and then may

recess the meeting temporarily. After this temporary interruption, speakers engaged in public comment shall be permitted to finish their allotted time.

3. HOW TO RESPOND TO WILLFUL DISRUPTION OF THE ORDERLY CONDUCT OF A MEETING.

If persons engage in misconduct that disrupts the orderly conduct of the meeting, the chair shall follow the standards and procedures set forth in the state Brown Act (Cal. Gov. Code Section 54957.9) to deal with disruption of meetings. The Brown Act provides:

- a. If the “meeting is willfully interrupted by a group or groups of persons so as to render the orderly conduct of such meeting unfeasible,” the chair may ask for the assistance of the Sheriff’s Department in removing the persons engaged in the willful interruption.
- b. If “order cannot be restored by the removal of persons who are willfully disrupting the meeting,” the public body, by motion and majority vote, may order the meeting room cleared and continue the meeting in conformity with the Brown Act (representatives of news media, except those participating in the disturbance, shall be allowed to attend, and the public body may establish a procedure for readmitting individuals not responsible for willfully disturbing the orderly conduct of the meeting).

4. QUESTIONS.

Questions about this policy shall be directed to the Deputy City Attorney assigned to advise the Board or Commission.

(Adopted in 2005)

Public records request form

Name _____

Date _____

Address _____

City _____

Telephone _____

Fax _____

Information Requested:

(Please provide a reasonable description of the record(s). Please be as specific as possible.)

I want to see the file.

I want copies of certain pages in the file(s) that I have marked.

I want the entire file copied.

I will pick up the information on

I want the information mailed to the address above.

If less than 10 pages, please fax the information to the number shown above.

The cost for copies is 10 cents per page plus postage, except for mass-produced documents. Checks should be made payable to: "City and County of San Francisco."

FOR OFFICE USE ONLY:

Name: _____

Date: _____

By Name: _____

Good Government Guide

An Overview of the Laws Governing
the Conduct of Public Officials

Last updated: September 3, 2014



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