

Project Planning and Procurement

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I. PROJECT PLANNING AND PROCUREMENT

A. Introduction

California public entities, contractors and design professionals working on public works construction projects must understand and work within comprehensive public contracting statutes, city charters, regulations and case law that shape the planning and work on the project from inception until years after completion. The statutes are updated and revised nearly every year; and from time to time, entirely new “game changing” statutes or cases are decided. It is a challenge to stay current on the changing law, let alone apply it in the complex daily work of a construction project. Individual construction contracts often consist of multiple documents – plans, specifications, boilerplate – each having different authors. These legal and practical challenges are unique to public construction.

This seminar manual will focus on the most commonly arising issues and recent developments that affect the contractor’s and the public owner’s work, their planning, their contracting and their unique statutory rights and remedies. Each section of the manual will call out the current issues. The text will also cover the basic California public contracting laws and principles of construction practice, and will generally discuss the issues in the order they may arise on a construction project. The text covers both the basic nuts and bolts for the administrator new to public works construction and the finer, most current legal issues on which public entity legal counsel must remain current. The manual tries to avoid extensive legal discussions and to focus on practical, usable material, with detail devoted to the current pressing issues.

Many legal issues turn on subtle points of applicable statutes and case law; the authors recommend having specially retained legal counsel review specific issues before making a legal judgment regarding any material discussed in this text. This text is not legal advice and is for consideration in the context of the seminar overviews.

B. Project Planning

1. What Law Will Apply to a Particular Project, Entity, or Issue?

Most of the law governing public works construction projects is based in either the Public Contract Code or municipal or county charters. The Public Resources Code, Health & Safety Code, Business and Professions Code, Civil Code, Education Code, Water Code, Government Code, Labor Code, Code of Regulations, and the enabling acts of special districts also cover public contracting. These statutes are interpreted by the courts and there is substantial case or judge-made law. The applicable law will depend on a variety of factors:

1. What type of public entity? Is there a municipal, city or county charter that supersedes the Public Contract Code on specific issues? Is the specific entity required to competitively bid its contracts?
2. What type of procurement is it? Professional services, construction, and procurement of materials and supplies each have their own requirements. What is the contracting method, design-bid-build, design-build, construction

manager at-risk? Specific procurements, such as energy management contracts or unique products, have their own requirements.

3. What is the context of the procurement and the parties involved? The rules governing conflicts of interest and independent contractors have been the subject of recent clarification by the California Supreme Court, and have serious implications in the event of violations. Issues of delegated authority and authorized mode of contracting also have serious implications and turn on specific actions by the governing body for the contract.
4. What funding sources provide requirements and what regulatory agencies have jurisdiction over the work? Are there federal funds? Is construction regulated by the state, such as hospitals, schools and community college districts, that work under a different regulatory regimen than other public works, as do jails and essential facilities.
5. What environmental requirements, permits and standards apply? Are they in the contract or imposed by regulation?
6. What is the genesis of the project? Is it required by law, court order or legislation?
7. Are you a hospital or otherwise under the jurisdiction of the Office of Statewide Health Planning and Development (OSHPD)?

2. Where to Start?

For all procurements, the statutes affecting project planning, surveyed below, and the public entity's enabling legislation regarding general procurement authority, are the places to start. If the procurement is professional services, then the next step is the California Government Code on procuring professional consultants discussed in Section I.D of this seminar manual. If the procurement is construction, then the starting point is the Public Contract Code and the Labor Code discussed throughout this manual, starting at Section II. In the case of charter cities or charter counties, equivalent municipal code provisions or contracting guidelines may supplant and supersede portions of these statutes.

Procurements pursuant to court order to meet legislative mandates, and for hospitals, present special circumstances. Legislation, court orders, regulations, financing requirements, must all be examined. For hospitals, the California Building Code includes regulations prepared by the Office of Statewide Health Planning and Development (OSHPD) which provides requirements and regimens for all stages of hospital structural assessments, classification, retrofit or replacement requirements, planning, design and construction. These regulations should be consulted at the outset and carefully followed throughout the project.

3. Statutes Affecting Project Planning

Six types of statutes affect project planning by public entities, discussed in the following sections. Noncompliance with any of these statutes can result in litigation and the possibility of

a court injunction restraining the public entity from going forward with a construction project. Where a public works project encounters community opposition, these statutes often become the focus of efforts to stop or delay the construction project.

(a) What's New? California Supreme Court Applies Government Code Section 1090 Conflict of Interest Prohibitions to Independent Contractors "Whose Actual Duties Include Engaging in or Advising on Public Contracting"

Under California Government Code (Section 1090), where an officer or member of the public agency's governing board has a financial interest in the contract, the contract is void.¹ For financial interests not covered by Section 1090, the requirements of the Political Reform Act of 1974² may apply. These provisions require disclosure of any interest in the contract and abstention from voting on the contract. Violation may result in an action for injunctive relief to restrain the execution of any official action pending final adjudication.³

Section 1090 has long limited a public entity's officers and employees from making contracts in which they have a financial interest when they act in their official capacities. As used in Section 1090, a contract "made" by an officer or employee encompasses preliminary discussions, negotiations, compromises, reasoning, planning, drawing up plans and specifications and solicitation for bids.⁴ Any contract entered into in violation of Section 1090 is invalid.⁵ A willful violation of Section 1090 is punishable as a felony.⁶

Self-dealing in violation of Section 1090 can result in substantial civil liability including restitution of all public moneys paid under the tainted contract. Under Section 1090, "the prohibited act is the making of a contract in which the official has a financial interest." A contract that violates Section 1090 is void regardless of whether the terms of the contract are fair and equitable to all parties.⁷ Further, if the self-dealing is knowing and willful, then criminal liability may apply and the person "is forever disqualified from holding any office in this state."⁸

But how does Section 1090 apply when the contract is made by a public entity's consultant, advisor or an independent contractor? In *People v. Superior Court* (2017) 3 Cal.5th 230 (*Sahlolbei*), the California Supreme Court answered this question. Section 1090 applies to any contract by "any contractor who has been retained or appointed by a public entity and whose actual duties include engaging in or advising on public contracting." Section 1090 applies to advisors, consultants and independent contractors. The *Sahlolbei* decision overviews California

1. See *Thomson v. Call* (1985) 38 Cal.3d 633, 645-46.

2. Gov. Code Section 81000, et seq.

3. Gov. Code Section 91003.

4. *Stigall v. City of Taft* (1962) 58 Cal.2d 565, 569-71; *Millbrae Assoc. for Residential Survival v. Millbrae* (1968) 262 Cal.App.2d 222, 237.

5. Gov. Code Section 1092.

6. Gov. Code Section 1097.

7. *People v. Honig* (1996) 48 Cal.App.4th 289, 333; *Thomson v. Call* (1985) 38 Cal.3d 633, 646-49.

8. Gov. Code Section 1097.

case decisions and statutes related to conflicts in governmental decision and procurements.

Overall, the *Sahlolbei* decision suggests the courts will employ a heightened standard of review of contracts made by or with independent contractors having prior or existing relationships with a public project or procurement. The decision is required reading for all lawyers advising public entities on public contracting and procurement.

(b) The *Sahlolbei* Decision

The *Sahlolbei* decision involved a criminal prosecution under Section 1090 and a narrow fact pattern unrelated to the construction industry or typical procurements of equipment, material or supplies. The facts below are allegations and are not proven.

In *Sahlolbei*, the Riverside County District Attorney prosecuted a surgeon under Section 1090 for allegedly influencing the public hospital where Dr. Sahlolbei worked to hire another doctor and then profiting from that doctor's contract. Dr. Sahlolbei was an independent contractor and never an employee of the Hospital. He served on the Hospital's medical executive committee, an independent committee comprised of members of the medical staff that advised the Hospital and its governing board on the Hospital's operations, including physician hiring.

The Hospital's CEO asked Dr. Sahlolbei "to try to bring physician services to the hospital because [the surgeon] had better connections than [the Hospital] did." The District Attorney alleged that Dr. Sahlolbei had then negotiated what amounted to kick-backs in connection with his recruitment of an anesthesiologist to serve on the hospital's medical staff.

The District Attorney brought charges against the surgeon for grand theft and violation of Government Code section 1090. The trial court dismissed the section 1090 charge and the court of appeal affirmed, both courts relying on *People v. Christiansen* (2013) 216 Cal.App.4th 1181 (*Christiansen*), a decision involving a construction program manager for a school district construction bond program. Both courts applied the same rationale: section 1090 applied only to public employees and officers, not to independent contractors. The California Supreme Court reversed.

(c) Key Takeaways

The California Supreme Court's opinion surveys a broad range of published decisions, legislative history and secondary authority, all with direct application to public works construction and public procurement.

Who Comes Within the Scope of Section 1090? The dissent in the lower court had argued that Section 1090 should have applied to the surgeon based on case decisions that applied Section 1090 to independent contractors occupying positions "that carry the potential to exert 'considerable' influence" over public contracting."⁹ The *Sahlolbei* decision found that even

9. *Cal. Housing Finance Agency v. Hanover/Cal. Management and Accounting Center, Inc.* (2007) 148 Cal.App.4th 682, 693 (*California Housing*) [outside attorney, though an independent contractor, was covered by

these cases indicated too high a standard:

“But we decline to adopt the “considerable influence” standard when it comes to defining who is covered by section 1090 in the first instance. As we have explained, independent contractors come within the scope of section 1090 when they have duties to engage in or advise on public contracting that they are expected to carry out on the government’s behalf.”

The *Sahlolbei* decision went on and applied the new rule to the surgeon, explaining that:

“A physician who was an officer or a common law employee of the Hospital who was similarly tasked with engaging in and advising on physician recruitment would have been expected to be faithful to the public in performing those duties and would have come within the scope of section 1090. [The surgeon] is not exempt from section 1090 liability merely because he was an independent contractor.”

This new standard in *Sahlolbei* is significant because it effectively “lowers the bar” for Section 1090 scrutiny. It is, potentially, a paradigm shift in the analysis and initial screening of any transaction for potential Section 1090 scrutiny.

Are Corporations Subject to Section 1090? The answer is yes. The *Sahlolbei* decision cited with approval the holding of *Davis* that applied Section 1090 to corporations to the same degree as individual consultants.

Examples of Potential Section 1090 Liability in Public Works Construction and General Procurements. The *Sahlolbei* decision discusses a series of cases with approval that provides examples and standards for potential Section 1090 scrutiny:

Advisors and Program Managers. An independent contractor who advised a school district on a bond measure for school construction and then won a project management contract for administration of the construction program funded by the bond.¹⁰

Designers and Planners. A designer or planner serving a public entity as a consultant that plans a construction project who then later acts as the contractor who carries out the project.¹¹ (Although not cited in the *Sahlolbei* decision, this same principle is reflected in

section 1090]; *Hub City Solid Waste Services, Inc. v. City of Compton* (2010) 186 Cal.App.4th 1114, 1125 (*Hub City*) [independent contractor who provided waste management services came within section 1090]; *Davis v. Fresno Unified School District* (2015) 237 Cal.App.4th 261, 300 [extending section 1090 to corporate consultants].)

10. The facts in *People v. Christiansen* (2013) 216 Cal.App.4th 1181, reversed by *Sahlolbei*.

11. *Sahlolbei*, 3 Cal.5th at 238, approving *Davis v. Fresno Unified School Dist.* (2015) 237 Cal.App.4th 261, 301 (*Davis*); *McGee v. Balfour Betty Construction, LLC* (2016) 247 Cal.App.4th 235, 249 (*McGee*). Also see *Cal. Taxpayers Action Network v. Taber Const., Inc.* (2017) 12 Cal.App.5th 115 (*Taber*) decided shortly before *Sahlolbei* and not mentioned in the *Sahlolbei* opinion.

statutes authorizing design-build procurements that preclude a project's "bridging designer" from competing for the design-build contract that follows.¹²⁾

Construction Contractors. A construction contractor or consultant who performs preconstruction services, assisting a public entity with plans, specifications and project planning, and thereafter bids or proposes on the subsequent (and separate) construction contract.¹³ The case law relied on by the *Sahlolbei* court arose from lease-leaseback transactions where the contractor reviewed plans and specifications for school projects and then proposed on the lease-leaseback contract.¹⁴

Service on Boards or Oversight Committees. The court relied extensively on a 50-year-old decision defining the "making of a contract" for purposes of Section 1090, as including service on oversight committees regarding the project.¹⁵

Management Consultants. A waste management consultant who recommended and received a franchise to operate the waste management for the public entity as part of a cost reduction measure.¹⁶

Facts That May Warrant Close Scrutiny. The *Sahlolbei* decision discusses and provides some clarity on the underlying facts that may trigger Section 1090 scrutiny regarding consultants or independent contractors:

Engaging in or Advising on Public Contracting. The decision provides a relatively bright line standard which it restates in several locations in the opinion: any contractor who has been retained or appointed by a public entity and whose actual duties include engaging in or advising on public contracting is charged with acting on the government's behalf is expected to subordinate his or her personal financial interests to those of the public in the same manner as a permanent officer or common law employee tasked with the same duties.¹⁷

Having A Role in Planning or Preliminary Discussions Regarding the Later Contract. The decision relies on a 50-year-old California Supreme Court decision and republishes

12. See, e.g., Education Code §81703(c)(2)(A) ("An architectural firm, engineering firm, construction manager, contractor, subcontractor, consultant, or individual retained by the governing board of the community college district directly or indirectly before the award of the project to assist in the planning of the project, including, but not necessarily limited to, the development criteria or preparation of the request for proposal, shall not be eligible to participate in the competition with the design-build entity or to perform work on the project as a subcontractor."); *but see* Public Contract Code §22162(c) suggesting but not requiring the determination of a prohibited conflict ("The local agency shall develop guidelines for a standard organizational conflict-of-interest policy, consistent with applicable law, regarding the ability of a person or entity, that performs services for the local agency relating to the solicitation of a design-build project, to submit a proposal as a design-build entity, or to join a design-build team.")

13. *Sahlolbei*, 3 Cal.5th at 238, approving *Davis* and *McGee*. See also *Taber*, *supra*.

14. See *Davis*, *supra*; see also *McGee*, *supra*, *Taber*, *supra*.

15. *Sahlolbei*, 3 Cal.5th at 239, approving *Stigall v. City of Taft* (1962) 58 Cal.2d 565, 571 (*Stigall*).

16. *Hub City Solid Waste Services, Inc. v. City of Compton* (2010) 186 Cal.App.4th 1114, 1125.

17. *Sahlolbei*, 3 Cal.5th at 240.

its holding on what constitutes the “making of a contract” for purposes of Section 1090. Simply put, it goes far beyond the drafting and signing of a written instrument; it includes “planning, preliminary discussions, compromises, drawing of plans and specifications and solicitation of bids.”¹⁸

Present or Future Expectations of Profit or Loss. The court commented on the phrase ‘financially interested’ in the making of a contract, for purposes of Section 1090. The court stated that it “broadly encompasses anything that would tie a public official’s fortunes to the existence of a public contract” and “include indirect interests and future expectations of profit or loss.”

Proof of Financial Interests May Be Implied. Notably, the court discussed the standard of proof of improper financial interests: “[m]oreover, prohibited financial interests are not limited to express agreements for benefit and need not be proven by direct evidence. Rather, forbidden interests extend to expectations of benefit by express or implied agreement and may be inferred from the circumstances.”

When Section 1090 Does Not Apply. Finally, the *Sahlolbei* decision also provides some standards for when Section 1090 scrutiny does not apply.

Advisor/Independent Contractors Not Involved in Public Contracting. The court also made clear that not all independent contractors are covered by Section 1090: “section 1090 liability extends only to independent contractors who can be said to have been entrusted with transacting on behalf of the government” and that application “turns on the extent to which the person influences an agency’s contracting decisions or otherwise acts in a capacity that demands the public trust.” The court gave the following example:

“so, for example, a stationary supplier that sells paper to a public entity would ordinarily not be liable under section 1090 if it advised the entity to buy pens from its subsidiary because there is no sense in which the supplier, in advising on the purchase of pens, was transacting on behalf of the government.”¹⁹

Renegotiating the Advisor/Independent Contractor’s Own Contract. The decision identifies instances where advisors/independent contractors subject to Section 1090 will be involved in the making of public contracts in which they benefit, but will not be liable because they were not acting in their official capacities.²⁰

For example, an attorney may negotiate a contingency fee contract with the public entity, acting in her or his own capacity, which is permitted; but negotiating a separate referral agreement based on the contingency fee contract is not.²¹ City firefighters may negotiate a

18. *Sahlolbei*, 3 Cal.5th at 239, approving *Stigall*, 58 Cal.2d at 571.

19. *Sahlolbei*, 3 Cal. 5th at 240.

20. *Id.* at 246.

21. *Id.* (citing *Campagna v. City of Sanger* (1996) 42 Cal.App.4th 533, 539-40).

contract with the city for sale of equipment they designed.²² This is distinguished, however, from changing “hats” from advisor to contractor on the same project.²³

(d) Resolved for Now: Who Has Standing to Sue?

In *Cal. Taxpayers Action Network v. Taber Construction, Inc.* (2017) 12 Cal.App.5th 115, published May 31, 2017, the Court of Appeal recognizes taxpayer standing to bring suit for Section 1090 violations where the public entity fails to act.

The *Sahlolbei* decision was published June 26, 2017 and does not mention *Taber*. Whether due to the close proximity in time, the fact that *Taber* was published after oral argument, or for other reasons, is not known. The *Taber* holding recognizing taxpayer standing is, therefore, binding on the California trial courts.

(e) Conclusion

The *Sahlolbei* decision addresses several of the primary elements that constitute a Section 1090 violation: who is subject to section 1090? What constitutes the making of a contract? What constitutes a financial interest?

The issue of taxpayer standing was not presented nor mentioned and as of this writing, it is only resolved at the appellate level. What the trial courts and appellate courts do with the *Sahlolbei* decision and the subject of taxpayer standing will be an evolving set of issues in the years to come.

(f) Other Statutes Affecting Project Planning

Each of the statutes below could take a full day of presentation and discussion and fill hundreds of pages; they are mentioned briefly.

(g) CEQA

The California Environmental Quality Act²⁴ (CEQA) requires an analysis for any “project” which may have a significant effect on the environment, leading to a negative declaration or an environmental impact report. The term “project” is broadly defined, and specifically includes:

“An activity directly undertaken by any public agency including but not limited to public works construction and related activities, clearing or grading of land, improvements to existing public

22. 80 Ops. Cal. Atty. Gen. 41, 41 (1997) (“[C]ity firefighters who have developed a firefighting protective device may sell the device to the city’s fire department without violating...section 1090 if they contract with the city solely in their private capacities.”)

23. *McGee, supra*; *Davis, supra*. See also *Taber, supra*.

24. Public Resources Code section 21000, et seq.

structures”²⁵

Unless exempt, a project cannot be “approved” until the environmental review process is completed.²⁶ With respect to public projects, CEQA Guidelines provide that environmental documentation “should be prepared as early as feasible in the planning process” and that “CEQA compliance should be completed prior to acquisition of a site for a public project.”²⁷ CEQA is a specialty field that exceeds the scope of this seminar manual.

(h) Brown Act

The public agency’s governing board must comply with the Brown Act²⁸ when approving plans and specifications, calling for bids, or awarding contracts. “[T]he keystone of the Brown Act is the requirement that “[a]ll meetings of the legislative body of a local agency shall be open and public....”²⁹

Under the Brown Act, a local agency must, at least 72 hours prior to a regular meeting of the agency, “post an agenda containing a brief general description of each item of business to be transacted or discussed at the meeting. . . . The agenda shall specify the time and location of the regular meeting and shall be posted in a location that is freely accessible to members of the public and on the local agency’s Internet Web site, if the local agency has one.”³⁰ “A major objective of the Brown Act is to facilitate public participation in all phases of local government decision[-]making and to curb misuse of democratic process by secret legislation by public bodies.”

Thus, the act requires the public agency’s legislative body deliberate and make decisions in open public meetings.³¹ The agency must prepare and post in advance an agenda describing the items of business it will transact or discuss at the meeting.³² The Brown Act was passed by the legislature to recognize that:

[P]ublic commissions, boards and councils and the other public agencies in this State exist to aid in the conduct of the people’s business. It is the intent of the law that their actions be taken openly and that their deliberations be conducted openly. The people of this State do not yield their sovereignty to the agencies which serve them. The people, in delegating authority, do not give their public servants the right to decide what is good for the people

25. 14 Cal. Code of Regs., section 15378(a)(1).

26. See Public Resources Code section 21151.

27. 14 Cal. Code of Regs., section 15004(b)(1); see *McQueen v. Board of Directors of Mid-Peninsula Regional Open Space Dist.* (1989) 202 Cal.App.3d 1136, 1147.

28. See Gov. Code sections 54950 – 54962.

29 *Hernandez v. Town of Apple Valley* (2017) 7 Cal. App. 5th 194, 207.

30 *Cohan v. City of Thousand Oaks* (1994) 30 Cal.App.4th 547, 555.

31. See Gov. Code sections 54950, 54953.

32. Gov. Code section 54954.2.

to know and what is not good for them to know. The people insist on remaining informed so that they may retain control over the instruments they have created.³³

Any interested person may commence a court proceeding against the agency to obtain a judicial determination that an action taken by its legislative body in violation of the Brown Act “is null and void.”³⁴ (The statute establishes time limits for protesting the governing body’s decision and for taking steps to cure it.) Thus, the validity of an action awarding a bid or approving a contract may be subject to contest for Brown Act violations. It should be noted that the courts aggressively enforce the Brown Act and actions, even approving ballot measures, will be declared null done in violation of the Brown Act.³⁵

An action cannot be declared null and void if “[t]he action taken gave rise to a contractual obligation, including a contract let by competitive bid..., upon which a party has, in good faith..., detrimentally relied.”³⁶

Under this provision the agency may avoid invalidation of a contract; however, a lawsuit may hold up the contract until the relevant good faith and reliance have been established before the court. A Brown Act claim, however, must pertain to “action” by the public body and meet prescribed time limits.³⁷ Like CEQA, the Brown Act is a specialty field that exceeds the scope of this seminar manual.

(i) Zoning And Building Ordinances

Generally, the local agency must “comply with all applicable building ordinances and zoning ordinances of the county or city in the which territory of the local agency is situated.”³⁸ This requirement does not apply to a facility for “the production, generation, storage, or transmission of water.”³⁹ Also exempt from building code requirements, but not zoning code requirements, are facilities “for the production, generation, storage, or transmission of . . . waste water.”⁴⁰

Note that some agencies may have rights of pre-emption over local zoning regulations. In 1956, California Supreme Court held that the state had completely occupied the field of regulating public school building construction, and construction of such school buildings by school districts was not subject to the building regulations of a municipal corporation in which

33. Gov. Code section 54950.

34. Gov. Code section 54960.1.

35 *Hernandez v. Town of Apple Valley* (2017) 7 Cal. App. 5th 194, 207.

36. Gov. Code section 54960.1(d)(3).

37. See *Boyle v. City of Redondo Beach* (1999) 70 Cal.App.4th 1109.

38. Gov. Code section 53091.

39. *Id.* (emphasis added).

40. Gov. Code section 53091 (emphasis added).

the building is constructed.⁴¹

Following this decision, the legislature passed a series of statutes limiting the *City of Taft* holding, including what is now Government Code section 53094. Another court interpreted this statute and determined that the legislature had “conclude[ed] instead that State educational policy should not automatically prevail over local regulatory concerns. Rather a school board decision to exempt itself from local regulation is subject to public and judicial scrutiny and reversal if found to be arbitrary and capricious. Thus, rather than grant absolute immunity from or give unqualified consent to local control, the Legislature in section 53094 struck a balance, though not equal, between State educational and local regulatory interests and control.”⁴²

Practitioners representing school districts, special districts, and state agencies may need to evaluate the extent to which local planning and zoning regulations apply to agency projects.

In addition, certain construction projects may be exempt from local building plan review and inspection. The most common examples are projects subject to review by the Division of the State Architects for schools and community colleges, and hospitals, which are under the jurisdiction of the Office of Statewide Health Planning and Development.

(j) General Plan Requirements

If a county or city has adopted a General Plan, the local agency may not construct or authorize “a public building or structure” until it submits to the planning agency having jurisdiction, the location, purpose and extent of the project and the planning agency has reported as to the project’s conformity with the General Plan.⁴³ The planning agency has 40 days to review the matter, and failure to do so constitutes a finding of conformity. If the planning agency does not approve the project, the decision may be overruled by the local agency.⁴⁴

(k) The Public Records Act

The California Public Records Act⁴⁵ (PRA) makes access to information concerning the conduct of the people’s business a fundamental and necessary right of every person in the State. The PRA makes public records open to inspection at all times during regular office hours, and subject to inspection and copying by every person except as provided in the Act.⁴⁶

41. *Hall v. City of Taft* (1956) 47 Cal. 2d 177.

42. *City of Santa Cruz v. Santa Cruz City School Bd. of Education* (1989) 210 Cal. App. 3d 1, 6 (finding that a school board was authorized to exempt a project for new stadium lighting from local zoning control); see also *Taxpayers for Accountable School Bond Spending v. San Diego Unified School Dist.* (2013) 215 Cal. App. 4th 1013 (Upholding the District’s decision to exempt from zoning a large group of projects at several sites and is in accord with the City of Santa Cruz holding).

43. Gov. Code section 65402(c).

44. See *Id.*

45 Government Code section 6250 et seq.

46 The CPRA was modeled on the federal Freedom of Information Act (FOIA) (5 U.S.C section 552 et seq.) and was enacted for the purpose of increasing freedom of information by giving members of the public access to information in the possession of public agencies. (*CBS, Inc. v. Block* (1986) 42 Cal.3d 646, 651. The Legislature

The PRA defines a “public record” as “any writing”⁴⁷ containing information relating to the conduct of the public’s business prepared, owned, used, or retained by any state or local agency.”⁴⁸ The definition is broad and “intended to cover every conceivable kind of record that is involved in the governmental process.”⁴⁹

As drafted, the PRA makes the right of access immediate and allowed at all times during business hours.⁵⁰ Staff need not disrupt operations to allow immediate access, but the agency must make a prompt decision on whether to grant access. An agency may not adopt rules that limit the hours records are open for viewing and inspection.⁵¹

Access is always free. Fees for “inspection” or “processing” are prohibited.⁵² The agency must provide assistance by helping to identify records and information relevant to the request and suggesting ways to overcome any practical basis for denying access.⁵³

(i) Compliance

Time Deadlines. A state or local agency, upon receiving a request by any person for a copy of public records, generally must determine within ten days whether the request seeks public records in the possession of the agency that are subject to disclosure.⁵⁴

The agency must then make the original records available in hard copy; it may never make records available only in electronic form.⁵⁵

If the agency determines that the requested records are not subject to disclosure, for example because the records fall within a statutory exemption,⁵⁶ the agency promptly must notify the person making the request and provide the reasons for its determination.⁵⁷

has declared that such “access to information concerning the conduct of the people’s business is a fundamental and necessary right of every person in this state.” (Government Code section 6250.)

47 The term “writing” means handwriting, typewriting, printing, photostating, photographing, and every other means of recording upon any form of communication or representation, including letters, words, pictures or sounds, or symbols, or combination thereof, and all papers, maps, magnetic or paper tapes, photographic films and prints, magnetic or punched cards, discs, drums, and other documents. (Evidence Code 250.)

48 Government Code section 6252(e). Mere possession by a public agency of a document, however, does not make the document a public record. (*City Council v. Superior Court* (1962) 204 Cal.App.2d 68, 73. It must be prepared, owned, used, or retained by any state or local agency.

49 *San Gabriel Tribune v. Superior Court* (1983) 143 Cal.App.3d 762, 774, quoting Government Code section 6252(e).

50 Government Code section 6253(a).

51 Government Code sections 6253(d); 6253.4(b).

52 Government Code section 6253.

53 Government Code section 6253.1.

54 Government Code section 6253(c).

55 Government Code section 6253.9(e)

56 Government Code section 6254

57 Government Code section 6253(c); See *Filarsky v. Superior Court*, (2002) 28 Cal.4th 419.

In “unusual” circumstances, the ten day time limit may be extended by up to fourteen (14) additional days by written notice to the person making the request.⁵⁸ The notice should set forth the reasons for the extension and the date on which a determination is expected to issue. “Unusual” circumstances⁵⁹ means:

- a. The need to search for and collect the requested records from field facilities or other establishments that are separate from the office processing the request.
- b. The need to search for, collect, and appropriately examine a voluminous amount of separate and distinct records which are demanded in a single request.
- c. The need for consultation, which shall be conducted with all practicable speed, among two or more components of the public entity having substantial subject matter interest therein.

Fees for Copies. A fee may be charged for copies of records, or information produced therefrom, covering the direct costs of duplication only, i.e., the direct cost of duplication is the cost of running the copy machine, and conceivably also the expense of the person operating it.⁶⁰ This limit applies even if the public entity is “put to a great amount of trouble responding to appellant’s request, much of which [may have] nothing to do with copying.”⁶¹

The “direct cost” does not include the ancillary tasks necessarily associated with the retrieval, inspection and handling of the file from which the copy is extracted. When records are requested in electronic format, however, the requestor shall bear the cost of producing a copy of the record, including the cost to construct the record and the cost of programming and computer services necessary to produce a copy of the record.⁶²

(ii) Records Not Covered by the PRA

These are three categories of records that are not covered by the PRA:

- a. Employees’ private papers, unless they “relat[e] to the conduct of the public’s business [and are] prepared, owned, used, or retained by the agency.”⁶³
- b. Computer software “developed by a state or local agency ... includ[ing] computer mapping systems, computer programs, and computer graphic systems.”⁶⁴

⁵⁸ These time periods may not be used solely to delay access to the records. Government Code section 6253(d).

⁵⁹ Government Code section 6253(c).

⁶⁰ Government Code section 6257; North County Parents Org. v. Department of Edu. (1994) 23 Cal.App.4th 144.

⁶¹ North County Parents Org. v. Department of Edu. (1994) 23 Cal.App.4th 144 (“Records were searched, documents were read for any material to be excised, such material was removed, files were refiled, etc.”).

⁶² Government Code section 6253.9.

⁶³ Government Code section 6252(e).

⁶⁴ Government Code sections 6254.9(a),(b).

c. Records not yet in existence: The PRA covers only records that already exist; an agency cannot be required to create a record, list, or compilation. “Rolling requests” for future-generated records are not permitted.

(iii) Records Covered by the PRA but Exempt from Disclosure Requirements

The PRA contains specific exceptions to disclosure.⁶⁵ To ensure maximum access, the courts generally construe the exemptions narrowly. The agency always bears the burden of justifying nondisclosure, and “any reasonably segregable portion ... shall be provided ... after deletion of the portions which are exempt.”⁶⁶

The scope of all exemptions exceeds this manual. Relevant to construction claims are the following categories:

Drafts or materials not maintained in the ordinary course of business. Preliminary drafts, notes, or interagency or intra-agency memoranda which are not retained by the public entity in the ordinary course of business, provided that the public interest in withholding those records clearly outweighs the public interest in disclosure.⁶⁷

Thus, preliminary drafts, notes and memos may be withheld *only if*: 1) they are “not retained ... in the ordinary course of business” and 2) “the public interest in withholding *clearly outweighs* the public interest in disclosure.” Drafts are not exempted if: 1) staff normally keep copies; or 2) the report or document is final even if a decision is not.⁶⁸ Where a draft contains both facts and recommendations, only the latter may be withheld. The facts *must* be disclosed.⁶⁹

Records related to pending litigation. Records pertaining to pending litigation to which the agency is a party, or to claims made pursuant to Division 3.6 (commencing with Section 810) of Title 1 of the Government Code, until the pending litigation or claim have been finally adjudicated or otherwise settled.⁷⁰

Courts have adopted a limited construction of the pending litigation exemption of section 6254, subdivision (b) as follows: “a document is protected from disclosure only if it was specifically prepared for use in litigation.”⁷¹ “A document or report prepared for a dual purpose is privileged, or not privileged, depending on the ‘dominant purpose’ behind its preparation.”⁷²

Courts have observed that the current standard permits a litigant opposing a public entity

65 See Government Code sections 6253.5-6253.7, 6254, 6254.1-6254.21, 6255, 6267 and 6276.

66 Government Code section 6253(a).

67 Government Code section 6254(a).

68 Government Code section 6254(a).

69 CBE v. CDFa., (1985) 171 Cal.App.3d 704.

70 Government Code section 6254(b).

71 City of Hemet v. Superior Court (1995) 37 Cal.App.4th 1411, 142; Filarsky v. Superior Court (1998) 66 Cal.App.4th 1414.

72 City of Hemet, supra. at 1419.

to use the PRA to accomplish earlier or greater access to records pertaining to pending litigation or tort claims than would otherwise be allowed under the rules of discovery in litigation. A public entity must nonetheless comply, and may only refuse to disclose documents which it prepares for use in litigation.⁷³ The complaint, claim, or records filed in court, records that pre-date the suit (e.g., reports about projects that eventually end in litigation), and settlement records are *public*.⁷⁴

Personnel files. Personnel, medical, or similar files, the disclosure of which would constitute an unwarranted invasion of personal privacy.⁷⁵ “Personnel, medical and similar files” are exempt *only if* disclosure would reveal intimate, private details.⁷⁶ Employment and appointment applications are exempt but employee contracts are not.⁷⁷

Utility systems development materials. Geological and geophysical data, plant production data, and similar information relating to utility systems development, or market or crop reports, which are obtained in confidence from any person.⁷⁸

Feasibility studies prior to contracting/acquisitions. The contents of real estate appraisals, engineering or feasibility estimates and evaluations made for or by the state or local agency relative to the acquisition of property, or to prospective public supply and construction contracts, until such time as all of the property has been acquired or all of the contract agreements obtained. However, the law of eminent domain shall not be affected by this provision.⁷⁹

Privileged documents. Records the disclosure of which are exempted or prohibited pursuant to federal or state law, including, but not limited to, provisions of the Evidence Code relating to privilege.⁸⁰ This exemption encompasses confidential communications between the public entity and its attorneys; records of documents covered by the attorney work product privilege doctrine; or any other judicially recognized privilege, including but not limited to, the deliberative process privilege; and records which relate to Grand Jury testimony.⁸¹

Attorney/Client and Work product Privileges. The PRA exemptions specifically include broad interpretations of the attorney client privileges including traditional attorney client, agents and consultants, necessary third parties and joint defense privileges.⁸²

⁷³ Filarsky v. Superior Court (1998) 66 Cal.App.4th 1414.

⁷⁴ Government Code sections 6254(b), 6254.25; Register Div. of Freedom Newspapers, Inc. v. Orange County (1984) 158 Cal.App.3d 893; County of Los Angeles v. Superior Court (2000) 82 Cal App. 4th 819.

⁷⁵ Government Code section 6254(c).

⁷⁶ Government Code section 6254(c).

⁷⁷ Government Code section 6254.8.

⁷⁸ Government Code section 6254(e).

⁷⁹ Government Code section 6254(h).

⁸⁰ Government Code section 6254(k).

⁸¹ See Evidence Code section 954, et. seq.

⁸² STI Outdoor v. Superior Court, (2001) 91 Cal.App.4th 334, 339-34.

Deliberative process privilege. The public entity may withhold appointment calendars and applications, phone records, and other records, which impair the deliberative process by revealing the thought process of government decision-makers *only* if “the public interest served by not making the records public clearly *outweighs* the public interest served by disclosure of the records.”⁸³ If the interest in secrecy does not *clearly outweigh* the interest in disclosure, the records *must* be disclosed, “whatever the incidental impact on the deliberative process.”⁸⁴ The agency must explain, not merely state, why the public interest does not favor disclosure.

“Official Information” acquired in confidence.⁸⁵ The official information privilege, “represents the exclusive means by which a public entity may assert a claim of governmental privilege based on the necessity for secrecy.”⁸⁶ To invoke this exception, the public entity must show that the information was (1) acquired in confidence and (2) that “there is a necessity for preserving the confidentiality of the information that outweighs the necessity for disclosure in the interest of justice.”⁸⁷

Public Interest. Records in which the public entity determines that on the facts, the public interest served by not making the record public clearly (not minimally) outweighs the public interest served by disclosure of the record.⁸⁸ The cost and burden to the public entity are relevant factors in determining the public interest in not making the record public. The interest of the public and not just the interest of the public entity is to be considered.

Public Entity Employee Home Address and Telephone Numbers.⁸⁹ These generally are not discoverable in construction disputes.

Public Employment Contracts.⁹⁰ Every employment contract between the public entity

⁸³ Government Code section 6255; Times Mirror v. Sup. Ct. (1991) 53 Cal.3d 1325; Rogers v. Sup. Ct. (1993) 19 Cal.App.4th 469; California First Amendment Coalition v. Superior Court, *supra* 67 Cal.App.4th 159, 172 [action under Public Records Act; intergovernmental communications between the Governor and staff held not within Governor’s correspondence privilege in Government Code section 6254(l), but must instead be analyzed under Government Code section 6255, which requires balancing the interests].

⁸⁴ Times Mirror v. Sup. Ct. *supra* 53 Cal.3d 1325.

⁸⁵ Evidence Code section 1040. “Official information” means information acquired in confidence by a public employee in the course of his or her duty and not open, or officially disclosed, to the public prior to the time the claim of privilege is made. (b) A public entity has a privilege to refuse to disclose official information, and to prevent another from disclosing official information, if the privilege is claimed by a person authorized by the public entity to do so and: (1) Disclosure is forbidden by an act of the Congress of the United States or a statute of this state; or (2) Disclosure of the information is against the public interest because there is a necessity for preserving the confidentiality of the information that outweighs the necessity for disclosure in the interest of justice.. . .In determining whether disclosure of the information is against the public interest, the interest of the public entity as a party in the outcome of the proceeding may not be considered.”

⁸⁶ Shepherd v. Superior Court, *supra*, 17 Cal.3d at p. 123 [italics on “the exclusive means” in original, other italics added]; Pitchess v. Superior Court (1974) 11 Cal.3d 531, 539-540.

⁸⁷ Shepherd v. Superior Court, *supra*, 17 Cal.3d at pp. 123-125; see PSC Geothermal Services Co. v. Superior Court (1994) 25 Cal.App.4th 1697, 1714; Rubin v. City of Los Angeles (1987) 190 Cal.App.3d 560, 585-587; CBS, Inc. v. Block (1986) 42 Cal.3d 646, 656.

⁸⁸ Government Code section 6255.

⁸⁹ Government Code section 6254.3.

⁹⁰ Government Code section 6254.8.

and any employee is generally a public record and not exempt from disclosure requirements and may not be withheld on the grounds that the public interest is best served by non-disclosure.

Computer Software. Computer software, which includes computer mapping systems, computer programs, and computer graphics systems, developed by a state or local agency including the public entity, is generally not a public record.⁹¹ Computer software developed by the Public entity is not itself a public record. However, the public record status of information is not affected merely because it is stored in a computer.

(iv) Waiver of Exemptions⁹²

Whenever the public entity discloses a public record, which is otherwise exempt from disclosure requirements to any member of the public, this disclosure shall generally constitute a waiver of the pertinent exemption. Once a record otherwise exempt from disclosure has been disclosed to a member of the public that exemption generally cannot be claimed regarding that public record when requested by another member of the public at a later date. Exceptions exist for disclosures made pursuant to the Information Practices Act, discovery proceedings, other legal proceedings, limiting statutes or as confidential information to another governmental agency.⁹³

(v) Denial of Request for Records

Any notification of denial of any request for records shall set forth the names and titles of positions of each person responsible for the denial.⁹⁴

(vi) Judicial Enforcement

The PRD sets forth specific procedures for seeking a judicial determination of a public entity's obligation to disclose records in the event the public entity denies a request by a member of the public. "Any person may institute proceedings for injunctive or declarative relief or writ of mandate in any court of competent jurisdiction to enforce his or her right to inspect or to receive a copy of any public record or class of public records under [the Act]."⁹⁵

The statute permits a declaratory relief proceeding commenced only by an individual or entity seeking disclosure of public records, and not by the public entity from which disclosure is sought. After a person commences such a proceeding, the court must set the times for responsive pleadings and for hearings "with the object of securing a decision . . . at the earliest possible time."⁹⁶

If it appears from the plaintiff's verified petition that "certain public records are being

91 Government Code section 6254.9(a) and (b).

92 Government Code section 6254.5.

93 Government Code section 6254.5.

94 Government Code section 6256.2.

95 Government Code section 6258.

96 Government Code section 6258.

improperly withheld from a member of the public,” the court must order the individual withholding the records to disclose them or to show cause why he or she should not do so.⁹⁷ The court’s order either directing disclosure by a public official or supporting the decision to refuse disclosure is immediately reviewable by petition to the appellate court for the issuance of an extraordinary writ filed within 20 days after service of the notice of entry of the order, or within an additional 20 days as the trial court may allow for good cause.^{98 99}

(vii) Attorney Fees and Costs

The Act requires that the court award court costs and reasonable attorney fees to the plaintiff should the plaintiff prevail in litigation filed pursuant to this section. “The costs and fees shall be paid by the public agency of which the public official is a member or employee and shall not become a personal liability of the public official. In contrast, only if the court finds that the plaintiff’s case is *clearly frivolous*, may the court award court costs and reasonable attorney fees to the public agency.”¹⁰⁰

97 Government Code section 6259(a).

98 Government Code section 6259(c).

99 The Act’s provision regarding a public agency’s obligation to act promptly upon receiving a request for disclosure Government Code section 6253(c), the provision directing the trial court in a proceeding under the Act to reach a decision as soon as possible Government Code section 6258, and the provision for expedited appellate review Government Code section 6259(c) all reflect a clear legislative intent that the determination of the obligation to disclose records requested from a public agency be made expeditiously.

100 Government Code section 6259(d), italics added. Rogers v. Superior Court (1993) 19 Cal.App.4th 469, 484.

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