BRINGING MORE SUNSHINE TO CALIFORNIA:

How to Expand Open Government in the Golden State

Lawrence J. McQuillan, PhD

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March 2011

Pacific Research Institute
One Embarcadero Center, Suite 350
San Francisco, CA 94111
Tel: 415-989-0833 / 800-276-7600
Fax: 415-989-2411
Email: info@pacificresearch.org
www.pacificresearch.org

Download copies of this study at www.pacificresearch.org.

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ACKNOWLEDGMENTS

A unique aspect of this report is the observations and policy recommendations of open-government experts across the country and people who regularly attend government meetings in California and make public-records requests in the Golden State. Their willingness to speak candidly with me and permit me to quote them yielded a report filled with personal, first-hand accounts and many practical suggestions on how to improve California's transparency laws and practices.

I thank Michael K. Barnhart, president of Sunshine Review; Bruce Cain, Heller professor of political science and public policy at the University of California-Berkeley; Kevin Dayton, state government affairs director of Associated Builders and Contractors of California; Kathay Feng, executive director of California Common Cause; Terry Francke, co-founder and general counsel to Californians Aware; David Greene, executive director and staff counsel of the First Amendment Project; Thomas W. Newton, general counsel and legislative advocate of the California Newspaper Publishers Association; Peter Scheer, executive director of the First Amendment Coalition; Dan Schnur, chair of the California Fair Political Practices Commission; and Daxton R. "Chip" Stewart, professor at the Texas Christian University Schieffer School of Journalism.

I also benefited greatly from discussions on various aspects of the report with my colleagues at the Pacific Research Institute (PRI): K. Lloyd Billingsley, Jason Clemens, Steven Greenhut, Katy Grimes, Lance Izumi, and Anthony Pignataro, as well as Anthony P. Archie, senior consultant with the California Assembly Republican Fiscal Office in Sacramento, California; Daniel R. Ballon, principal consultant with the California Assembly Republican Caucus in Sacramento; W. Mark Crain, the William E. Simon Professor of Political Economy at Lafayette College in Easton, Pennsylvania; Matthew Mitchell, research fellow with the Mercatus Center at George Mason University in Arlington, Virginia; and Chris Sutton, attorney in Pasadena, California.

Lingxiao Ou of the University of California-Berkeley provided excellent research assistance.

Finally, I thank Michael Barnhart and Peter Scheer, mentioned above, for their formal peer reviews of an earlier manuscript.

I am solely responsible for any errors or omissions. My views and conclusions in the report do not necessarily represent those of the board, supporters, or staff of PRI.

Lawrence J. McQuillan, PhD
Sacramento, California

EXECUTIVE SUMMARY

To counter the powerful incentives facing elected and appointed public-sector officials and government employees to conceal information and operations, "sunshine laws" have been enacted to open the doors of government so the public can view the debates, decisions, and actions of government and the outcomes of government policies.

The laws and regulations designed to enhance transparency generally fall into one of two broad categories: (1) open government-meetings laws and (2) open public-records laws.

Open-meetings laws mandate that the public and news media be allowed to attend government meetings. Typically, the laws require that governments give advance notice to the public of when and where meetings will be held and what items will be discussed. In addition, the laws often require that government agencies assemble and publish a written record ("the minutes") after each meeting.

California's open-meetings laws consist of three acts: the Ralph M. Brown Act, which covers local governments and political subdivisions; the Bagley-Keene Open Meeting Act, which covers state agencies; and the Grunsky-Burton Open Meeting Act, which covers the state legislature.

The other major transparency category, open public-records laws, stipulate which documents in the possession of government agencies are available to the public and the steps necessary to obtain these documents. Each state has its own rules pertaining to access to documents in the custody of its state and local governments. It can be very confusing and time-consuming for members of the public and for reporters to gain access to supposedly "open" public records.

California's open-records laws consist of two acts: the California Public Records Act and the Legislative Open Records Act.

To determine the problems with California's current transparency rules, this report compares California's open-government laws to those in the other 49 states using two recent scholarly assessments: the *BGA-Alper Integrity Index*, produced by the Chicago-based Better Government Association (BGA) and Alper Services, and the *Marion Brechner Citizen Access Project* (CAP) at the University of Florida College of Journalism and Communications.

The comparative assessment is able to determine: (1) if California's transparency laws are relatively strong or weak overall and (2) which provisions are particularly strong or weak in the Golden State compared to other states. The assessment identified the primary limitations and loopholes in California's current system and spotlighted specific areas in need of reform.

After crunching the numbers, the *Integrity Index* ranked California a dismal 45th for its open-meetings laws, receiving only 5.75 of 20 possible points (29 percent). The CAP database had nine categories that pertain to open meetings. California ranked no better than a 5 (somewhat open) in any of the categories. These two assessments revealed 12 significant policy deficiencies in California's open-meetings laws and provide the basis for the open-meeting policy recommendations presented in the report.

Regarding the Golden State's open-records laws, the *Integrity Index* found that California ranked a mediocre 17th, receiving 8.5 of 16 possible points (53 percent). The state that once was a national leader in open government now receives a letter grade of "F" for its open-records laws from the National Freedom of Information Coalition (NFOIC) and BGA. CAP gave California a score of 3 (somewhat closed) in 40 categories and a score of 2 (mostly closed) in 13 categories. The closed or problem areas identified from comparative assessments of California's open-records laws with those in the other 49 states using the best scholarly research available today, provide the basis for the open-records policy recommendations presented in the report.

To strengthen California's open-meetings laws, the report recommends:

- Tighten the definition of a public meeting.
- Tighten the rules regarding informal, chance, or social gatherings/meetings.
- Abolish certain exemptions so that meetings are always open that deal with agency executive hiring, public employee salaries and benefits, collective-bargaining with employee unions, eminent domain, and meetings of the State Board of Education or the Superintendent of Public Instruction that review assessment instruments or test content.
- Require posting on the Web of an annual notice of regular public meetings. Also, meeting-agenda notices should give the public advance notice in plain English of what the public body will consider at the meeting.
- Require public bodies to post and archive minutes of public meetings on the Web and to do so within seven business days.
- Create a faster, competitive, non-judicial administrative remedy process by allowing an individual who alleges a violation of an open-meetings law to appeal to a state ombudsman who would have authority to render administrative rulings on complaints. The ombudsman should also be responsible for training public employees, via an orientation program, on compliance with open-meetings laws and open-records laws.
- Lengthen the statute of limitations for filing lawsuits.
- Mandate expedited hearings.
- Stop litigation tourism with explicit venue requirements.
- Increase criminal penalties for open-meetings violations, enact a "three strikes" penalty of job removal/impeachment for any member found guilty of three separate criminal violations of the open-meetings laws during the member's lifetime, and enact mandatory recovery of attorney fees and court costs.
- Establish civil penalties for open-meetings violations.
- Establish a separate civil penalty for improperly holding a closed, executive session. Also, the laws should uniformly require a two-thirds supermajority vote to close a meeting and all closed meetings should be recorded (preferably video and audio).

To strengthen California's open-records laws, the report recommends:

- Open police misconduct investigatory files after one year and open disciplinary proceedings and actions.
- List all exemptions to public disclosure in the laws, abolish the "public interest" test for non-disclosure, and require more "affirmative disclosure."
- Create a commission to review all exemptions to the open-meetings and open-records requirements. The law should also require a two-thirds supermajority vote by the state legislature to add new statutory exemptions.
- Mandate that indexing (providing a list) does not relieve a public agency of its duty to serve the public fully.
- Require all public agencies to develop access guidelines and make them available to the public on the Web free of charge. Also, public agencies should develop on-line forms for public-records requests.
- Make available certified copies of public records.
- Open testing material to public inspection.
- Make fees transparent.
- Keep public records for 25 years.
- Create a faster, competitive, administrative remedy process by allowing an individual who alleges a violation of a public-records law to appeal to the agency head or an ombudsman with authority to render administrative rulings on complaints.
- Mandate expedited appeals.
- Lengthen the statute of limitations for filing lawsuits and appeals.
- Establish criminal penalties for open-records violations with the same "three-strikes" and mandatory-recovery provisions as for open meetings.
- Establish civil penalties for open-records violations.

Government-employee unions are certain to oppose many of these reforms, as will many sitting and prospective public officials and government employees who will fear the bite of true sanctions for noncompliance. Opposition is to be expected. But the facts supporting these recommendations remain: California's transparency laws are weak in many areas, not consistent with best practices, and in need of updating.

Some of the reforms proposed here would be simple and inexpensive to implement. Others would be complex and more costly. If the more than two dozen policy recommendations in this report were adopted in California, the Golden State would be the national leader in open government and would fulfill the fundamental right of public access embodied in Article 1, Section 3 of the California Constitution.

INTRODUCTION

Full information is a key ingredient in efficient, well-performing markets, both economic and political. Politicians and beneficiaries of government programs know information is power, so they generally prefer to operate in secret, without public scrutiny, to craft more favorable outcomes for themselves. When you control information, you can better shape votes, contracts, and payments to benefit the few and harm the many, with less opposition. That is standard operating procedure for authoritarian and dictatorial governments around the world.

Secrecy ruled supreme in the former East Germany and the USSR, and still reigns supreme in Cuba and North Korea today. Secrecy has been more characteristic of authoritarian regimes and transparency more characteristic of democracies, but democracies often fall short. Consider, for example, the federal government of the United States.

Members of Congress face strong incentives to pass "pork-barrel projects" that advance their own narrow personal interests and those of local constituents at the expense of the general welfare. Perhaps the most infamous example in recent years is the 2005 "Bridge to Nowhere," a congressional proposal to build a $315 million bridge in Alaska to connect the town of Ketchikan (population 8,900) with its airport on the island of Gravina (population 50). The bridge would benefit a few thousand constituents, Alaska politicians, and some Alaska construction workers, but it would have never passed a general cost/benefit test. Congress would have preferred to keep the public in the dark about the project, but after the news media exposed it, the bridge project was killed.[1]

This report, within the context of California, examines the eternal struggle of the people to know what their government is doing.

In California, a recent example of secrecy involved Mary D. Nichols, chair of the California Air Resources Board (CARB), who in December 2009 admitted concealing information from the full CARB board—just before a crucial vote on trucking emission regulations—that CARB statistician Hien Tran had lied about having a PhD from the University of California-Davis.[2] Despite faking his credentials, Tran continued to receive an annual salary of $95,000 and Nichols remained CARB chair, to which California Governor Jerry Brown has reappointed her. Tran's work was used to support claims that thousands of Californians supposedly die prematurely each year from exposure to diesel PM2.5 (particulate matter) emissions and helped justify stringent new regulations on the trucking industry adopted by CARB.[3]

To counter the powerful incentives facing government agents (elected and appointed public-sector officials and government employees) to conceal information and operations, sunshine laws have been enacted to open the doors of government so the public can view the debates, decisions, and actions of government agents and the outcomes of government policies. Citizens of California have fought to achieve greater access—and for good reason. As noted by the California Supreme Court in *CBS v. Block* in 1986: "Implicit in the democratic process is the notion that government should be accountable for its actions. In order to verify accountability, individuals must have access to government files. Such access permits checks against the arbitrary exercise of official power and secrecy in the political process."[4] Or as founding father Patrick Henry said in 1788: "The liberties of a people never were, nor ever will be, secure, when the transactions of their rulers may be concealed from them. . . . [T]o cover with the veil of secrecy the common routine of business, is an abomination in the eyes of every intelligent man."[5]

Full information is a key ingredient in efficient, well-performing markets, both economic and political. Politicians and beneficiaries of government programs know information is power, so they generally prefer to operate in secret, without public scrutiny, to craft more favorable outcomes for themselves.

This report, within the context of California, examines the eternal struggle of the people to know what their government is doing. It looks at the history, strengths, and weaknesses of transparency laws and practices in California. It offers data-driven policy recommendations that would improve transparency in the Golden State and make California's open-government laws the gold standard for the rest of the country.

The report is organized into five chapters. Chapter 1 defines government-information transparency and its goals. Chapter 2 examines California's open-meetings laws. Chapter 3 looks at California's open-records laws. Chapter 4 compares California's open-government laws with those in the other 49 states to determine the problems with California's current transparency rules. Finally, chapter

5 proposes more than two dozen reforms to California's transparency rules based on the comparative assessment of California's laws and practices with those in other states.

The reforms target the state's biggest problems and are based on "best practices" among the 50 states, borrowing features of successful alternatives. Chapter 5 also "names names," spotlighting members of the "secrecy lobby" who benefit by keeping the public in the dark and who will fight serious reform in California. The chapter also spotlights members of the "sunshine lobby" who support greater public access to government information and operations.

Sunshine laws have been enacted to open the doors of government so the public can view the debates, decisions, and actions of government agents and the outcomes of government policies.

CHAPTER 1

WHAT IS GOVERNMENT-INFORMATION TRANSPARENCY AND ITS GOALS?

People refer to something as transparent when it is readily understood, easily detected, and free from deceit. For the purposes of this report, government-information transparency refers to giving the public and news media greater access to, and awareness of, the debates, decisions, actions, and outcomes of government agents and operations.

Although the primary focus is on California state transparency laws, the report recognizes that many local and regional jurisdictions have their own sunshine ordinances that can grant greater rights of access to records. The report does not examine public access to information in California's courts, which some observers believe are also in need of reform.[6]

The laws and regulations designed to enhance transparency generally fall into one of two broad categories: (1) open government-meetings laws and (2) open public-records laws.

The laws and regulations designed to enhance transparency generally fall into one of two broad categories: (1) open government-meetings laws and (2) open public-records laws.

Open-meetings laws mandate that the public and news media be allowed to attend government meetings. Typically, the laws require that governments give advance notice to the public of when and where meetings will be held, and what items will be discussed. In addition, the laws often require that government agencies assemble and publish a written record ("the minutes") after each meeting.

Sunshine Review, a nonprofit organization dedicated to promoting state and local government transparency, touts the benefits of such laws:

> Open-meeting laws are essential to the maintenance of a transparent government in which public business will be performed in an open and public manner. Citizens who are fully aware of and free to observe the performance of public officials and listen to the deliberations are in a much better position to ensure that their government is operating in an honest, cost effective, and prudent manner.[7]

Although public records are held by public-sector agencies, getting access to the records is not always quick, easy, or free.

The other major transparency rule is open public-records laws. According to Sunshine Review, the phrase "public records" traditionally refers "to information that has been filed or recorded by public agencies, such as corporate and property records. Public records are created by the federal and local government (vital records, immigration records, real estate records, driving records, criminal records, etc.), or by the individual [or private company]."[8] Public records also include mail, e-mail, or other communications between and among state agencies and those in the legislature. Other common public records are financial documents for government programs. As shown in Chapter 3, to its credit, California's definition of public records is more encompassing than the traditional definition.

Open-records laws stipulate which documents in the possession of government agencies are available to the public and the steps necessary to obtain these documents. Each state has its own rules pertaining to access to documents in the custody of its state and local governments. Although public records are held by public-sector agencies, getting access to the records is not always quick, easy, or free. Public availability is determined by federal, state, and local laws and regulations. It can be very confusing and time-consuming for members of the public and for reporters to gain access to supposedly "open" public records. In other words, transparency is not free. There is a cost to provide sunshine. But open-records laws create the presumption that the people own the records that agencies store.

Citizens value transparency because of a fundamental desire to know what their government is doing in order to hold government agents accountable for their actions and to establish proper incentives. And for that they are willing to pay a price to gather and disseminate the information. There is a price for a more informed public. The net effect of greater transparency on government size, however, is not unidirectional.

The California Assembly Committee on Accountability and Administrative Review held hearings in August 2010 on spending by the state's Administrative Office of the Courts (AOC).[9]

According to documents, the AOC routinely pays more than $150 to replace a light bulb. It paid $178 to replace batteries in a clock and more than $14,000 to paint a Solano County courthouse restroom. These are lucrative deals for the vendors fortunate enough or politically connected enough to get the contracts, but these spending activities could never pass a cost/benefit test and, therefore, do not promote the general welfare. In this case, exposing these practices in a committee hearing and ending the exorbitant payments will save taxpayers money.

At the local level, consider the now infamous case of lavish salaries for city officials in Bell, one of the poorest cities in Los Angeles County. In July 2010, the *Los Angeles Times* revealed, using sunshine laws,[10] that Bell was paying its city manager $787,637 annually.[11] The police chief was paid $457,000 a year (about 50 percent more than Los Angeles Police Chief Charlie Beck or Los Angeles County Sheriff Lee Baca), and the assistant city manager brought home $376,288 annually, more than most city managers. The *Times* story led to several investigations, the arrest of eight Bell officials, and an overhaul of city salaries. Government officials often make decisions and adopt policies that promote their own narrow, personal interests, rather than the general welfare. In this case, use of the California Public Records Act will save taxpayers money.

Alternatively, greater transparency might cause voters to support expansion of certain government programs when they can efficiently monitor politicians and have greater assurances that their tax dollars actually go to intended beneficiaries rather than being siphoned off by unscrupulous middlemen. A 2002 study of per capita state spending and revenues found that "fiscal transparency increases . . . the scale of government." Voters "respond by entrusting greater resources to politicians where fiscal institutions are more transparent, leading to larger government."[12]

The budget effects of transparency laws, therefore, are not unidirectional or one-dimensional. But the goal of such laws is simple: allow the public to know what their government is doing.

It is also important to understand what transparency is not about. Michael K. Barnhart, president of Sunshine Review, explains that transparency laws can be misused "to invade privacy or attack first amendment rights. Transparency is about government's obligation to disclose the information citizens need to hold officials accountable and promote self-government. Transparency is not about the forced disclosure by private citizens or nonprofit agencies. Transparency is not a club used to assault the speech and association rights of private citizens."[13]

To promote transparency, California has enacted rules designed to give the public and news media greater access to information on government debates, decisions, actions, and outcomes.[14] The next chapter summarizes California's open government-meeting laws.

CHAPTER 2

CALIFORNIA'S OPEN GOVERNMENT-MEETINGS LAWS

California's open government-meetings laws consist of three acts: the Ralph M. Brown Act, which covers local governments and political subdivisions; the Bagley-Keene Open Meeting Act, which covers state agencies; and the Grunsky-Burton Open Meeting Act, which covers the state legislature. Both the Brown and Bagley acts use the same language to state their purpose:

> In enacting this chapter, the legislature finds and declares that the public 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 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.

Ralph M. Brown Act[15]

In the early 1950s, *San Francisco Chronicle* reporter Mike Harris wrote a 10-part series about local government bodies making decisions in secret. Assemblyman Ralph M. Brown (not related to 1959–1967 California Governor Edmund "Pat" Brown or his son, Governor Jerry Brown), a Modesto Democrat, conducted committee investigations that confirmed the secrecy.[16] That prompted Brown to introduce legislation, passed by the California State Legislature in 1953 and signed by Governor Earl Warren. The Ralph M. Brown Act (Brown Act) is codified at California Government Code sections 54950 through 54963. The act ensures that the public can attend and participate in meetings of local legislative bodies with certain exceptions. It applies to California cities, counties, towns, school and special districts, and municipal corporations, and their agencies, boards, commissions, committees, and councils. The act was passed in response to the growing use of secret, informal "workshops" and "study sessions" to avoid public scrutiny. The *Sacramento Bee* in October 1952 summed up the need: "Instances are many in which officials have contrived, deliberately and shamefully, to operate in a vacuum of secrecy."[17]

The people insist on remaining informed so that they may retain control over the instruments they have created.

The Brown Act defines meetings as any gathering or teleconferencing of a majority of the members of a local public body with the intention of discussing or deliberating public matters within its jurisdiction. The law also explicitly states that public agencies cannot use communication methods such as e-mail to circumvent the act.

Notable exemptions to the act include the attendance of public conferences whose topic is governmental actions, meetings of other agencies, open and publicized meetings organized by private individuals to discuss public topics, and purely social or ceremonial events, provided a majority of the members of the public agency do not meet separately to privately discuss public matters.

The act defines government bodies as all legislative bodies of the local agencies and political subdivisions of the state created by state or federal statute or charter. This includes all boards, commissions, committees, task forces, advisory boards, and subcommittees of local agencies, both permanent and temporary. The definition also includes corporations either created and endowed with authority by the local governing body or publicly funded and whose board contains one member who is also a member of the public agency or has been appointed by the local agency. An exemption to the definition of a public body is an ad hoc advisory committee consisting of only covered members of the public agency and having less than a quorum of members.

"Action taken" means a collective decision made by a majority of the members of a legislative body, a collective commitment or promise by a majority of the members of a legislative body to make a positive or a negative decision, or an actual vote by a majority of the members of a legislative body when sitting as a body or entity, on a motion, proposal, resolution, order, or ordinance. Secret ballots are not permitted—all votes must be public.

The act prevents any public agency from collecting the names or requiring information from private individuals in attendance at a public meeting. The governmental body must allow recording and broadcast of meetings as long as the process of doing so is non-disruptive. It must let the public have access to any recording that the governmental body took of open meetings, but the agency may destroy the recordings after 30 days.

During regular, special, or committee meetings, the public may directly address a board that is subject to this act. All votes must be public without secret ballots. The governmental body must give, without delay, access to the public to review documents distributed to all or a majority of members of a board before or at the meeting, unless the documents are exempt under the California Public Records Act.

During regular, special, or committee meetings, the public may directly address a board that is subject to this act.

Meetings must occur within the jurisdiction of the agency, except under the following situations: when complying with state or federal law; to inspect property outside the jurisdiction of the political agency; to participate in meetings with other agencies; if the agency in question has no meeting facility; to meet in a facility in order to discuss that particular facility; or to visit legal counsel. School districts are also exempt for collective-bargaining conferences or for interviews of individuals outside of the district concerning potential employment. A meeting cannot be held in any facility that prohibits the admittance of any person, or persons, on the basis of race, religious creed, color, national origin, ancestry, or gender, or which is inaccessible to disabled persons, or where members of the public may not be present without making a payment or purchase.

Secret ballots are not permitted—all votes must be public.

The governmental body must post notice and an agenda for any regular meeting at least three days before the meeting, including the time, place, and any topics to be discussed in open and closed sessions. When someone requests a mailed notification, the governmental body must get it to them at least three days (72 hours) before regular meetings. The governmental body must post notice of meetings that continue from initial meetings. The posted agendas are intended to restrict the content of the meetings—topics not addressed on

the agenda cannot be included in the meeting. The act does, however, provide for emergency votes on items when a majority of the board decides that it is an emergency and that immediate action is necessary.

Minutes of emergency meetings must be posted for a minimum of 10 days in a public place as soon after the meeting as possible.

Special meetings may be called by a majority with only a 24-hour notice and the posting of an agenda along with the time and place of the special meeting. Emergency meetings can be called with only an hour warning, if the emergency "severely impairs public health or safety." The act requires that the public agency notify news media who had requested notification of special and emergency meetings.

If someone requests notification of special meetings, the governmental body must deliver notice of special meetings at least one day in advance. In the event of an emergency meeting, the governmental body must deliver notice by telephone at least one hour in advance to those who request it as well as to the news media. Minutes of emergency meetings must be posted for a minimum of 10 days in a public place as soon after the meeting as possible.

A governmental body may close a meeting if the topics to be discussed are listed as exceptions in the act. It must still give public notice and share the agenda for the closed meeting. All votes and actions taken in closed session must be publicly reported in writing or orally. The governmental body must promptly provide copies of any contracts or settlements approved.

The only exceptions allowing governmental bodies covered by this act to meet in a closed session are:

- To discuss the appointment, employment, performance evaluation, discipline, complaints about, or dismissal of a specific employee or potential employee. The employee can request a public meeting on charges or complaints brought against him or her. This exception does not include closing a meeting for general employment, independent contractors not functioning as employees, salaries, the performance of any elected official or member of the board, the local agency's available funds, funding priorities, or budget.
- To discuss pending litigation if the position of the agency would be prejudiced if the discussion were public. The litigation must be named on the public agenda or announced in an open meeting unless doing this would jeopardize the board's ability to bring the litigation or charges to someone who has not had paper served to him yet or to conclude any current settlement negotiations to the advantage of the governmental body. For this exception to be valid, the governmental body must be one of the parties in the pending litigation, must expect to be sued based on specified facts, or must expect to file suit.
- To instruct the agency's identified labor negotiator on compensation issues. (Note that school districts are covered by the Rodda Act, which allows school boards to negotiate directly with the employee organizations, but provides controls that require them to keep the public informed of the issues under discussion.)
- To discuss, with the agency's identified bargaining agent, price or payment terms for real properties. The parcel, negotiators, and prospective seller or purchaser must be identified on the agenda. Final price and payment terms must be disclosed when the actual lease or contract is discussed for approval.
- To discuss eminent domain proceedings.
- To discuss license applications by people with a criminal record, threats to public services or facilities, insurance pooling, trade secrets, or information protected by federal law.

Legislative bodies are required to reconvene in open session after a closed session in order to declare any final decisions made in the closed session.

Bagley-Keene Open Meeting Act[18]

Passed by the California State Legislature in 1967 and signed by Governor Ronald Reagan, the Bagley-Keene Open Meeting Act is codified at California Government Code sections 11120 through 11132. The act mandates open, free meetings for state agencies, boards, and commissions with certain exceptions.

The act defines meetings as all gatherings of a majority of a state body that are designed to deliberate, discuss, or decide on any matters before the public agency. The act states that the use of communication technology such as e-mails or text messages to arrive at a consensus outside of an open meeting is prohibited. The act does permit teleconferencing, provided that it is conducted in accord with the act.

Exceptions to the act include university collective bargaining and arbitration meetings with employee unions; public conferences; meetings of other public agencies or standing committees, provided that the members of the agency do not privately discuss governmental matters; open and publicized meetings sponsored by a private individual; and purely social or ceremonial meetings provided that a majority of members do not privately discuss public matters.

The act applies to all state bodies, boards, and commissions including advisory boards and private corporations on whose board at least one member of a state organization serves in an official capacity as representative of the state and which receives funding from the state. Exemptions include the entire California judiciary; local agencies, which are subject to the Brown Act; the legislature, whose meetings are required to be open under the Grunsky-Burton Act (see below); the Cancer Advisory Council at any hospital, established by the California Health and Safety Code statute 109260; and the Credit Union Advisory Committee, established by the California Financial Code statute 14380.

The Bagley-Keene Act requires public agencies to provide 10-days notice for all meetings, both in writing and online.

As used in this act, “action taken” means a collective decision made by the members of a state body, a collective commitment or promise by the members of the state body to make a positive or negative decision, or an actual vote by the members of a state body when sitting as a body or entity on a motion, proposal, resolution, order, or similar action.

The state agency must provide an opportunity for members of the public to address it on each agenda item before or during the agency’s discussion or consideration of an item.

Consistent with the Brown Act, the Bagley-Keene Act also prevents any public agency from collecting the names or requiring information from private individuals in attendance at a public meeting. The governmental body must allow recording and broadcast of meetings as

long as the process is non-disruptive. It must let the public have access to any recording it has of open meetings, but the agency may destroy the recordings after 30 days. A state agency is prohibited from meeting in any facility prohibiting admittance to any person on the basis of race, religious creed, color, national origin, ancestry, or gender. And the facility must be compliant with California's Americans with Disabilities Act (ADA).

[The governmental body] must let the public have access to any recording it has of open meetings, but the agency may destroy the recordings after 30 days.

During regular or committee meetings, the public can directly address an agency that is subject to this act on any item in the agency's jurisdiction that the agency did not address at an earlier open meeting.

The Bagley-Keene Act requires public agencies to provide 10-days notice for all meetings, both in writing and online. The notice must include contact information for someone who can provide more information on the meeting, as well as the time, date, and location of the meeting. Both open meetings and closed executive sessions must be posted with a list of what will be discussed at the meetings, including the items of business to be transacted or discussed, and no item may be added to the agenda subsequent to the notice. Agendas of public meetings and other writings, when distributed to members of a state agency for discussion or consideration at a public meeting of such body, are public records under the California Public Records Act and must be made available on request without delay to the public.

The Bagley-Keene Act, however, does permit emergency issues to be addressed without being included in the agenda, if a majority of the board votes that it is imperative. The act does allow special meetings to be called with two-days notice of the agenda and location when the public interest is in favor of action and the topic of the meeting concerns one of the following:

- **pending litigation**
- **proposed legislation**
- **issuance of a new legal opinion**
- **disciplinary action of a state officer or employee**
- **purchase or sale of real estate**
- **license examinations and applications**
- **actions on a loan or grant**
- **response to final draft audits**
- **replacement of a resigned or deceased state officer**

The state, however, is obligated to deliver notice of a special meeting to the news media and individuals who have requested notice two days before the meeting. Emergency meetings may be called with only an hour's warning if the emergency "severely impairs public health or safety." The act requires that the public agency notify news media who have requested notification of emergency meetings one hour before the meeting. The agency must also post the minutes of emergency meetings within 10 days.

The Bagley-Keene Act requires a two-thirds vote to convene a closed session for any of the exceptions below.

The Bagley-Keene Act requires a two-thirds vote to convene a closed session for any of the exceptions below. The vote must be taken in an open meeting and the board must announce the topic to be discussed. The board may only discuss in closed session the announced topic. The act also requires that the public agency announce the results of any closed meeting when it reconvenes in open session after the closed meeting.

The exceptions allowing closed meetings that apply to all state agencies are:

- **to discuss the appointment, employment, performance evaluation, discipline, complaints about, or dismissal of a specific employee or potential employee who is not an elected or appointed public official**
- **to consider a confidential final draft audit**
- **to consider licensing applications or examinations**
- **to discuss the purchase or sale of land with its identified negotiator**
- **to discuss eminent domain proceedings**
- **for state bodies considering investment decisions**
- **to discuss security-related topics**
- **for meetings that qualify as attorney/client privilege**

The exceptions allowing specific closed meetings for individual state agencies are:

- for the Alcoholic Beverage Control Appeals Board to hold a deliberative session
- to consider the appointment of the executives of the Franchise Tax Board, California Postsecondary Education Commission, Council for Private Postsecondary and Vocational Education, State Board of Equalization, Teachers' Retirement Board, Board of Administration of the Public Employees' Retirement System, and Commission on Teacher Credentialing
- to consider appointment of the chief investment officer of the State Teachers' Retirement System or the Public Employees' Retirement System
- for the Franchise Tax Board or the State Board of Equalization to consider confidential tax returns or the State Compensation Insurance Fund to consider confidential medical records or audits
- for the Corrections Standards Authority to consider criminal records
- for the State Air Resources Board to consider information classified as trade secrets
- for the State Board of Education or the superintendent of public instruction to review assessment instruments or review and discuss actual test content
- for the California Earthquake Prediction Evaluation Council to consult on emergency predictions
- for the California Gambling Control Commission to discuss trade secrets
- to determine parole cases

After meeting in closed session, the state agency must reconvene in open session before adjournment and report that a closed session was held, the general nature of the matters considered, and any final actions taken in the closed session.

Grunsky-Burton Open Meeting Act[19]

Passed by the California State Legislature in 1973 and signed by Governor Reagan, the Grunsky-Burton Open Meeting Act requires that all meetings of the state's legislative branch (the senate, the assembly, and the committees, subcommittees, and conference committees) be "conducted openly," with certain exceptions, to inform the public. The act was codified at California Government Code section 9027. It is interesting to note that of the three open-meetings laws, the legislature subjected itself to transparency last and it created the shortest of the three laws to apply to itself.

Of the three open-meetings laws, the legislature subjected itself to transparency last and it created the shortest of the three laws to apply to itself.

In 1984, section 9027 was repealed and replaced with section 9926 of the Legislative Reform Act of 1983. In 1989, that section was repealed and replaced with similar provisions that are now found again in sections 9027 through 9031 of the California Government Code.

The sections require all meetings of a house of the legislature or of a committee to be open to the public, with all people permitted to attend. The sections define meetings as all gatherings of a quorum of the members of a house or committee in one place for the purpose of discussing legislative or other official matters within the jurisdiction of the house or committee. The rules cover the full legislature and all committees, subcommittees, joint committees, both standing and temporary, conference committees, select committees, special committees, research committees, and "similar bodies." Meetings, including closed session meetings, can only be held "after full and timely notice to the public," which can be determined by the rules of the houses.

Caucuses of one political party may always meet in closed sessions. Otherwise, the rules allow the legislature to convene in closed session only to discuss the appointment, employment, performance evaluation, or dismissal of a specific public employee or potential employee; to consider complaints or charges brought against a member of the legislature or other public officer or employee; to establish the classification or compensation of an employee of the legislature; to discuss matters that affect the safety of members of the legislature or buildings; and matters that fall under the attorney/client privilege in the following situations, which must be justified in a memorandum that is to be released: if a lawsuit has been formally initiated; if a lawsuit against the legislative body is reasonably anticipated; if the legislative body is expecting to file a lawsuit; or to discuss real estate purchases.

California Proposition 59[20]

In November 2004, 83 percent of California voters approved Proposition 59, also known as the Sunshine Initiative, which gives constitutional protection to the objectives embodied in the state's transparency acts.

The proposition was enacted as an amendment to the California Constitution and is now codified at Article 1, Section 3. The section had declared that the people have "the right to instruct their representatives, petition government for redress of grievances, and assemble freely to consult for the common good." Proposition 59 added to this list that the people have the right to public access to government information: "The meetings of public bodies and the writings of public officials and agencies shall be open to public scrutiny." The measure establishes the "public's right to know," amending the constitution to:

- **provide the right of public access to meetings of government bodies and writings of government officials**
- **provide that statutes and rules furthering public access must be broadly construed, or narrowly construed if limiting access**
- **require future statutes and rules limiting access to contain findings justifying necessity of those limitations**
- **preserve constitutional rights including rights of privacy, due process, and equal protection**

Proposition 59 added to this list that the people have the right to public access to government information: "The meetings of public bodies and the writings of public officials and agencies shall be open to public scrutiny."

Proposition 59 expressly preserved existing constitutional and statutory limitations restricting access to certain meetings and records of government bodies and officials, including law enforcement and prosecution records, recognized on the date the proposition went into effect. The measure exempted the legislature's records and meetings.

Remedies, Penalties, and Damages[21]

Enforcement mechanisms for transparency laws include equitable remedies (injunctions, writs of mandamus, and declaratory judgments); penalties (criminal fines, jail time, civil fines, and disciplinary action such as suspension or termination); and monetary damages (actual, punitive, and "loser pays" attorney fees and court costs reimbursements). California's transparency laws vary as to which enforcement mechanisms are included in each law.

California's transparency laws vary as to which enforcement mechanisms are included in each law.

The attorney general, the district attorney, or any interested person may commence a court action by mandamus, injunction, or declaratory relief: (1) for the purpose of stopping or preventing violations or threatened violations of the act, (2) to determine the applicability of the act to past actions or threatened future action by members of the agency, (3) to determine whether any rule or action by the agency to penalize or otherwise discourage the expression of one or more of its members is valid or invalid under the laws of this state or of the United States, or (4) to compel the agency to audio-record its closed sessions. Only (1) and (2) apply to the state legislature.

The district attorney or any interested person may commence a court action by mandamus or injunction for the purpose of obtaining a judicial determination that an action taken by a body of an agency, except for the state legislature, is null and void.

Individuals have 90 days from the date of the action that allegedly violates an act to file a complaint. Before filing a lawsuit, they are required to contact the public agency in writing and request that it remedy the action allegedly taken in violation of the act. The public agency has 30 days to "cure or correct" the action or inform the demanding party in writing of its decision not to do so. After 30 days, individuals have 15 days to file a lawsuit in court. The court may void any decision or action taken in violation of a state open-meetings act unless the action mostly followed the open-meeting law, the action involved the sale of bonds, the action resulted in a contract with which the other party has complied, or the action involved the collection of taxes.

If the body in question corrects the mistake at any time during the trial, the trial will be dismissed "with prejudice," meaning the case is dismissed for good reason based on the merits of the case and the plaintiff is barred from bringing a new lawsuit based on the same subject.

Each member of a legislative body who attends a meeting of that legislative body where action is taken in violation of any provision, and where the member intends to deprive the public of information to which the member knows or has reason to know the public is entitled, is guilty of a misdemeanor.

In the case of violations of the open-meeting rules by members of the legislature, each member who attends a meeting of the assembly, the senate, or any committee or subcommittee thereof, where action is taken in violation of section 9027, with knowledge of the fact that the meeting is in violation, is guilty of a misdemeanor.

The court may void any decision or action taken in violation of a state open-meetings act.

A court may award court costs and reasonable attorney fees to the plaintiff in an action where it is found that a body, except for the state legislature, violated an open-meeting act. The costs and fees must be paid by the agency and do not become a personal liability of any public officer or employee of the agency. A court may award court costs and reasonable attorney fees to a defendant, except for the state legislature, in any action where the defendant has prevailed in a final determination and the court finds that the plaintiff's action was clearly frivolous and totally lacking merit.

The next chapter summarizes California's open public-records laws.

CHAPTER 3
CALIFORNIA'S OPEN PUBLIC-RECORDS LAWS

California's open public-records laws consist of two acts: the California Public Records Act and the Legislative Open Records Act. The laws are intended to give the public and news media access, on request, to public records held by California governments, unless there is a specific reason not to do so.

Both acts state their purpose using the same language: "Access to information concerning the conduct of the people's business is a fundamental and necessary right of every person in this state."

California Public Records Act[22]

Passed by the California State Legislature in 1968 and signed by Governor Reagan, the California Public Records Act (CPRA) is codified at California Government Code sections 6250 through 6276.48. The act mandates disclosure of government records to the public, on request, unless there is a specific reason not to do so. The law is similar to the federal Freedom of Information Act, except that in California "the people have the right of access to information concerning the conduct of the people's business" as enshrined in Article 1 of the California Constitution after passage of California Proposition 59.

The laws are intended to give the public and news media access, on request, to public records held by California governments, unless there is a specific reason not to do so.

The CPRA is intended to give the public access to information in possession of public agencies: "public records are open to inspection at all times during the office hours of the . . . agency and every person has a right to inspect any public record, except as . . . provided, [and to receive] an exact copy [of] an identifiable record" unless impracticable. The act defines public records broadly as "any writing containing information relating to the conduct of the public's business prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics." Unless there is a specific statutory exemption, all records of included agencies are subject to the CPRA and must be made available for public inspection. Exemptions must be narrowly construed and the public agency bears the burden of proving that an exemption applies.

Most exemptions under the CPRA are listed in section 6254 and are specific as to certain records or types of records.

The act defines "writing" as "handwriting, typewriting, printing, photostating, photographing, photocopying, transmitting by electronic mail or facsimile, and every other means of recording upon any tangible thing any form of communication or representation, including letters, words, pictures, sounds, or symbols, or combination thereof, and any record thereby created, regardless of the manner in which the record has been stored."

Unlike some states such as New York, in California the "mere custody of a writing by a public agency does not make it a public record, but if a record is kept by an officer because it is necessary or convenient to the discharge of his official duty, it is a public record."

Exempt is employees' "purely personal information" that, although it may be in the custody of a government agency, does not fall under the CPRA. A court ruled that the act is "intended to cover every conceivable kind of record that is involved in the governmental process and will pertain to any new form of record-keeping instrument as it is developed. Only purely personal information unrelated to 'the conduct of the public's business' could be considered exempt from this definition, i.e., the shopping list phoned from home, the letter to a public officer from a friend which is totally void of reference to governmental activities."[23]

Also exempt is computer software "developed by a state or local agency . . . includ[ing] computer mapping systems, computer programs, and computer graphics systems." Records not yet in existence are also exempt. In other words, the CPRA 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.

Most exemptions under the CPRA are listed in section 6254 and are specific as to certain records or types of records. This does not mean they are not public records or that disclosure is prohibited. An agency may withhold the records, but can allow greater access if it wishes. "Selective" or "favored" access, however, is prohibited: once a record is disclosed to one requester, it is public for all. Many categories of records are exempt, some by the act itself, and some by other laws. These include, but are not limited to:

- Attorney/client discussions are confidential, even if the agency is the client, but the agency (not the lawyer) may waive secrecy.
- Appointment calendars and applications, phone records, and other records that impair the deliberative process by revealing the thought process of government decision-makers may be withheld only if "the public interest served by not making the records public clearly outweighs the public interest served by disclosure of the records." 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." The agency must explain, not merely state, why the public interest does not favor disclosure.
- 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 those records clearly outweighs the public interest in disclosure." Drafts are not exempt if: (1) staff normally keeps copies or (2) the report or document is final even if a decision is not. Where a draft contains both facts and recommendations, only the latter may be withheld. The facts must be disclosed.
- Home addresses and home telephone numbers in DMV, voter registration, gun license, public housing, local agency utility, and public employee records are exempt, as are addresses of certain crime victims.
- Records concerning an agency's pending litigation are exempt, but only until the claim is finally resolved or settled. The complaint, claim, or records filed in court, records that predate the lawsuit (e.g., reports about projects that eventually end in litigation), and settlement records are public.
- "Personnel, medical, or similar files" are exempt only if disclosure would reveal intimate, private details. Employment and appointment applications are exempt but employee contracts are not.
- Police incident reports, rap sheets, and arrest records are exempt (California Penal Code sections 11075, 11105, and 11105.1), but information in the "police blotter" (date, time, and circumstances of calls to police, names and details of arrests, warrants, charges, hearing dates, etc.) must be disclosed unless disclosure would endanger an investigation or the life of an investigator. Investigative files may be withheld, even after an investigation is over. Identifying data in police personnel files and misconduct complaints are exempt, but disclosure may be obtained using special procedures under California Evidence Code section 1043.
- Test questions, scoring keys, and other examination data used to administer a licensing examination, examination for employment, or academic examination are exempt, except as provided for in chapter 3 (commencing with section 99150) of part 65 of the California Education Code.
- Library circulation records are exempt.
- Trade secrets are exempt, except air pollution emission data.
- Incentives offered by state or local government agencies, if any, shall be disclosed

upon communication to the agency or the public of a decision to stay, locate, relocate, or expand, by a company, or upon application by that company to a governmental agency for a general plan amendment, rezone, use permit, building permit, or any other permit, whichever occurs first. The agency must delete, prior to disclosure to the public, information that is exempt pursuant to this section from any record describing state or local incentives offered by an agency to a private business to retain, locate, relocate, or expand the business within California.

- **Correspondence of and to the governor or employees of the governor's office or in the custody of or maintained by the governor's legal affairs secretary is exempt, provided that public records cannot be transferred to the custody of the governor's legal affairs secretary to evade disclosure. (Public records, as defined in section 6252, in the custody or control of the governor when he leaves office must be transferred to the California State Archives as soon as is practical.[24])**
- **Also exempt are records the disclosure of which is exempt or prohibited by federal or state law. (Note that there is growing opposition to the federal government's increasing preemption of state public-access laws.[25])**
- **Finally, exemptions apply to financial data submitted for licenses, certificates, or permits, or given in confidence to agencies that oversee insurance, securities, or banking firms; and to tax, welfare, and family/adoption/birth records.**

In addition to section 6254, section 6255 provides a catch-all exemption, stating: "the agency shall justify withholding any record by demonstrating that . . . on the facts of the particular case the public interest served by not disclosing the record clearly outweighs the public interest served by disclosure of the record." Needless to say, the question of what defines public interest has come up in many court cases. In reviewing the propriety of an agency decision to withhold records, a court is charged with determining whether non-disclosure was justified under either of these two sections. The agency always bears the burden of justifying non-disclosure, and "any reasonably segregable portion . . . shall be available . . . after deletion of the portions that are exempted by law."

Every state office, officer, department, division, bureau, board, and commission or other state body or agency (including advisory boards and any board, commission, and body created by the agency) is covered by the CPRA except the state legislature and the courts. Local agencies are covered, including counties, cities, towns, school districts, municipal corporations, special districts, political subdivisions, or any board, commission, or agency thereof; other local public agencies; and nonprofit entities that are legislative bodies of a local agency. Many state and local agencies are required to have written public records policies. A list appears in section 6253.4. Every employment contract between a state or local agency and any public official or public employee is a public record that is not exempt under sections 6254 or 6255.

The judicial branch of state government is not covered by the CPRA except itemized statements of total expenditures and disbursements. There are, however, some other common

law understandings, federal law, and other California laws under which some records of the judicial branch may be considered public records. The state legislature exempted itself and its committees from the CPRA. There is a separate act, the Legislative Open Records Act, to which records of the legislature are subject (see section below). Federal agencies are also not covered—they are subject to the federal Freedom of Information Act.

"Every person has a right to inspect any public record." The act defines "person" to include any natural person, corporation, partnership, limited liability company, firm, or association. Foreign and domestic corporations are included in the CPRA's definition of "person." Unlike some states, in California a plaintiff who files a lawsuit against a public agency may use the CPRA to obtain documents for use in litigation to the same extent as any other person.

Every employment contract between a state or local agency and any public official or public employee is a public record that is not exempt under sections 6254 or 6255.

Whatever the motivation of a person may be in requesting records under the CPRA, it is irrelevant in determining whether the records must be provided to that person. Access must be immediate and allowed at all times during business hours. Staff need not disrupt operations to allow immediate access, but a decision on whether to grant access must be prompt. An agency may not adopt rules that limit the hours that records are open to inspection.

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. An agency has 10 days from receipt of a request to decide if it will disclose the records or not. In "unusual" cases (e.g., the request is "voluminous," seeks records held off-site, or requires consultation with other agencies or writing a computer program), the agency may, on written notice to the requestors, give itself an additional 14 days to respond. These time periods may not be used solely to delay access to the records. The agency may never make records available only in electronic form. The notification of denial of any request for records must state the names and titles of each person responsible for the denial.

The CPRA does not say anything about the uses to which public records may be put after being obtained through the CPRA. The act does not allow limitations on access to a public record based on the purpose for which the record is being requested, if the record is otherwise subject to disclosure.

The CPRA, however, does have an "investigatory records exemption" that says that a person who requests the address of an individual who has been arrested, or the current address of the victim of a crime, must declare under penalty of perjury that the request is made for a scholarly, journalistic, political, or governmental purpose, or is sought for investigatory pur-

poses by a licensed private investigator. The requestor must also declare that the information obtained pursuant to this subsection will not be used directly or indirectly to sell a product or service.

Whatever the motivation of a person may be in requesting records under the CPRA, it is irrelevant in determining whether the records must be provided to that person. Access must be immediate and allowed at all times during business hours.

Fees for "inspection" or "processing" are prohibited. The CPRA allows government agencies to charge "fees covering direct costs of duplication, or a statutory fee if applicable." If a specific statute defines a specific fee for a certain type of record, it takes precedence over the CPRA. In 1994, a California court defined "direct costs" to include photocopying costs only.[26] For electronic data, "direct cost" is the cost of producing "a copy of a record in an electronic format."

Copy costs are limited to "statutory fees" set by the state legislature (not by local ordinance) or the "direct costs of duplication," typically 10–25 cents per page. Charges for search, review, or deletion are not allowed. If a request for electronic records either (1) is for a record normally issued only periodically or (2) requires data compilation, extraction, or programming, copying costs may include the cost of the programming.

When a person asks to inspect records, but not copy them, the CPRA does not include a provision that allows government agencies to charge for search and retrieval time. In 1994, a California court disallowed a 25-cents-per-page fee because the agency arrived at the fee by adding staff time into its calculations.[27] The court also ruled that governmental agencies may reduce or waive fees under the CPRA provision that allows agencies to develop ways to provide greater access than the CPRA's minimum standards.

The agency must justify the withholding of any record by demonstrating that the record is exempt or that the public interest in confidentiality outweighs the public interest in disclosure. The California Supreme Court in *American Civil Liberties Union Foundation v. Deukmejian* declared that the cost incurred by any department of separating exempt material from non-exempt material represents a detriment to the public interest of the smooth and efficient flow of government. This detriment can be weighed against the benefit to the public of the release of the records when considering whether to deny records requests based on section 6255.[28]

Remedies and Damages[29]

Any person may institute proceedings for injunctive or declarative relief in any court of competent jurisdiction to enforce his right to inspect or to receive a copy of any public record or class of public records. The times for responsive pleadings and for hearings in these proceedings are set by the judge of the court with the objective of securing a decision at the earliest possible time.

Whenever it is shown to the superior court of the county where the records or some part thereof are held that certain public records are being improperly withheld from a member of the public, the court will order the officer or person charged with withholding the records to disclose the public record or show cause why he should not do so. The court must decide the case after examining the record in private, if permitted by subdivision (b) of section 915 of the California Evidence Code, papers filed by the parties, and any oral argument and additional evidence as the court may allow.

If the court finds that the public official's decision to refuse disclosure is not justified under section 6254 or 6255, he will order the public official to make the record public. If the judge determines the public official was justified in refusing to make the record public, he will return the item to the official without disclosing its content with an order supporting the decision refusing disclosure.

Fees for "inspection" or "processing" are prohibited. The CPRA allows government agencies to charge "fees covering direct costs of duplication, or a statutory fee if applicable."

To facilitate prompt public access to public records, court orders either directing disclosure of public records or supporting an agency's decision of non-disclosure are immediately reviewable by an appellate court by way of an emergency petition seeking issuance of an extraordinary writ. In 1991, the California Supreme Court made clear that under this writ procedure, trial court orders are reviewable on their merits. Thus, when a trial court order under the CPRA is reviewed by an appellate court, the independent review standard is employed for legal issues and factual findings made by the trial court will be upheld if they are based on substantial evidence.

After entry of any order, a party must, in order to obtain review of the order, file a petition within 20 days after service on him of a written notice of entry of the order, or within such further time not exceeding an additional 20 days as the trial court may for good cause allow. If the notice is served by mail, the period within which to file the petition is increased by five days. A stay of an order or judgment will not be granted unless the petitioning party demonstrates it will otherwise sustain irreparable damage and probable success on the merits. Any person who fails to obey the order of the court will be cited to show cause why he is not in contempt of court.

If the plaintiff wins, the agency must pay the court costs and reasonable attorney fees of the plaintiff. The costs and fees must be paid by the agency of which the public official is a member or employee and cannot become a personal liability of the public official or employee. If the court finds that the plaintiff's case is clearly frivolous, it must award court costs and reasonable attorney fees to the public agency.

Legislative Open Records Act[30]

Passed by the California State Legislature in 1975 and signed by Governor Jerry Brown, the Legislative Open Records Act (LORA) is codified at California Government Code sections 9070 through 9080. The act provides that legislative public records, as defined, are open to inspection, and every citizen has a right to inspect and receive a copy of any public record, with certain exceptions.

LORA defines a "person" as any natural person, corporation, partnership, limited liability company, firm, or association. Legislature includes "any member of the legislature, any legislative officer, any standing, joint, or select committee or subcommittee of the senate and assembly, and any other agency or employee of the legislature."

Every citizen has a right to inspect and receive a copy of any [legislative] public record, with certain exceptions.

"Legislative records" means "any writing prepared on or after December 2, 1974, which contains information relating to the conduct of the public's business prepared, owned, used, or retained by the legislature."

"Writing" means handwriting, typewriting, printing, photostating, photographing, and every other means of recording on any form of communication or representation, including letters, words, pictures, 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.

Legislative public records are open to inspection at all times during normal office hours of the legislature and any person has a right to inspect any legislative record, except as provided. The person must be furnished reasonable opportunities for inspection of legislative records and reasonable facilities for making memoranda or abstracts. Any person may receive a copy of a legislative record if such record is of a nature permitting copying. The legislature establishes the fees, which must be "reasonably calculated to reimburse it for its actual cost in making such copies available, provided such fee shall not exceed ten cents ($0.10) per page." All requests to inspect any legislative record must be made to the appropriate Rules Committee of each house of the legislature or the Joint Rules Committee, except that all requests to inspect any legislative record in the possession of the Auditor General must be made to the

Joint Legislative Audit Committee. Such committees are considered to have custody of all legislative records and are responsible for making all legislative public records available for inspection.

Each committee must promptly inform any person whether any legislative record will be made available for inspection. Legislative records must be available for inspection "promptly and without unnecessary delay." Whenever a committee withholds a legislative record from inspection, within four working days of the request to inspect the record the committee must justify in writing the withholding of the record by demonstrating that the record in question is exempt under the provisions of LORA, or that on the facts of the particular case, the public interest served by not making the record public clearly outweighs the public interest served by disclosure of the record, provided that when the legislature is not in session, the committee must furnish written justification within 10 working days of the request to inspect the record. The Rules Committee of each house, the Joint Rules Committee, and the Joint Legislative Audit Committee adopt written guidelines stating the procedures to be followed when making legislative records available for inspection.

Each committee must promptly inform any person whether any legislative record will be made available for inspection.

LORA exempts from disclosure the following records: preliminary drafts, notes, or legislative memoranda; records pertaining to pending litigation to which the legislature is a party until the litigation or claim has been finally adjudicated or otherwise settled; personnel, medical, or similar files, the disclosure of which would constitute an unwarranted invasion of personal privacy; records pertaining to the names and phone numbers of senders and recipients of telephone and telegraph communications, provided that records of the total charges for such communication must be open to inspection; records pertaining to the name and location of recipients of automotive fuel or lubricants expenditures, provided that records of the total charges for those expenditures must be open to inspection; records in the custody of, or maintained by, the legislative counsel, except those records in the public database maintained by the legislative counsel (legislative records cannot be transferred to the custody of the legislative counsel to evade disclosure); records in the custody of, or maintained by, the majority and minority caucuses and majority and minority consultants of each house of the legislature, provided that legislative records must not be transferred to the custody of the majority and minority caucuses and majority and minority consultants of each house of the legislature to evade disclosure;[31] correspondence of and to individual members of the legislature and their staff; records exempt or prohibited from disclosure pursuant to federal or state law including, but not limited to, provisions of the California Evidence Code relating to privilege; communications from private citizens to the legislature, except as provided in section 9080; and records of complaints to, or investigations conducted by, or records of, legislative-branch security.

Each committee of the senate or assembly, and each joint committee of the legislature, having custody of legislative records relating to a bill, resolution, or proposed constitutional amendment assigned to that committee, must maintain the legislative records in an official committee file. The committee must preserve those records in its custody or, alternatively, may arrange with the California State Archives to lodge some or all of the records there under the condition that the records be preserved.

"Committee" is defined as any entity of the senate or assembly responsible for preparing analyses of bills, resolutions, or proposed constitutional amendments that are to be put to a vote by a quorum of the members of the senate or assembly.

Legislative records contained in an official committee file must be open to inspection and copying by the public.

"Legislative records" means records contained in an official committee file including, but not limited to, all of the following: committee staff analyses, written testimony, background material submitted to the committee, press releases, and written commentary submitted to the committee on a bill, resolution, or proposed constitutional amendment.

"Written commentary" does not include the following: material not used by the staff of a fiscal committee in the preparation of any analysis for the members of that committee; communications determined by the committee or its staff to be confidential; versions of bills, resolutions, or proposed constitutional amendments assigned to the committee; or relevant interim hearing materials, studies, case materials, and articles.

Legislative records contained in an official committee file must be open to inspection and copying by the public, pursuant to sections 9073 and 9074. Each committee of the senate or assembly, and each joint committee of the legislature, must adopt and implement written procedures consistent with sections 9073 and 9074 for the public's access to official committee files maintained in the committee's office. The procedures must provide for the time, place, and other conditions under which committee files can be inspected and copied. Each committee must make copies of its written procedures available to the public.

The Rules Committee of each house of the legislature or, alternatively, the Joint Rules Committee must provide for the storage of any official committee file that is not maintained in the office of the committee that created the file or lodged with the California State Archives. The Rules Committee of each house of the legislature or the Joint Rules Committee, as the case may be, must adopt and implement written procedures consistent with section 9073 for the public's access to official committee files so stored in its custody. The procedures must provide for the time, place, and other conditions under which committee files may be inspected and copied, and the committee must make copies of its written procedures available to the public.

Nothing in the act requires making any legislative record available for inspection that relates to any unchaptered bill, resolution, or proposed constitutional amendment introduced in the current legislative session, except in accordance with the requirements and limitations specified in sections 9073, 9074, and 9075.

Remedies and Damages[32]

Any person may institute proceedings for injunctive or declarative relief in any court of competent jurisdiction to enforce his right to inspect any legislative record or class of legislative records under the act. The times for responsive pleadings and for hearings in such proceedings are set by the judge of the court with the objective of securing a decision as to such matters at the earliest possible time.

Whenever it is made to appear by verified petition to the superior court of the county where the records or some part thereof are situated that certain legislative records are being improperly withheld from a member of the public, the court must order the committee charged with withholding the records to disclose the legislative record or show cause why the committee should not do so. The court must decide the case after examining the record in private, if permitted by subdivision (b) of section 915 of the California Evidence Code, papers filed by the parties, and such oral argument and additional evidence as the court may allow.

If the court finds that the committee's decision to refuse disclosure is not justified, he will order the committee to make the record available for inspection.

If the court finds that the committee's decision to refuse disclosure is not justified, he will order the committee to make the record available for inspection. If the judge determines that the committee was justified in refusing to make the record available for inspection, he returns the item to the committee without disclosing its content with an order supporting the decision refusing disclosure. Any person who fails to obey the order of the court will be cited to show cause why he is not in contempt of court. The court awards court costs and reasonable attorney fees to the plaintiff if the plaintiff prevails in litigation. If the court finds that the plaintiff's case is clearly frivolous, it awards court costs and reasonable attorney fees to the government.

The next chapter compares California's transparency laws and practices to those in the other 49 states to reveal California's biggest weaknesses.

CHAPTER 4

HOW GOOD ARE CALIFORNIA'S TRANSPARENCY LAWS AND PRACTICES?

The previous two chapters summarized California's laws on open meetings and open records. This chapter compares California's transparency laws to those in the other 49 states to determine: (1) whether California's transparency laws are relatively strong or weak overall, and (2) which provisions are particularly strong or weak in the Golden State compared to other states. This comparative assessment will identify the primary limitations and loopholes in California's current system and spotlight specific areas in need of reform. Though not examined in this report, an important, complementary enforcement mechanism of open government is whistleblower protection laws. California's whistleblower protection statute is currently ranked second-best in the nation, so it's unlikely to be a source of problems.[33]

BGA assigned California a letter grade of "F" for its open-records laws.

Comparative Assessments of California's Open Government-Meetings Laws

This section uses recent scholarly studies to compare and assess California's open-meetings laws with those in the other 49 states. The first study is the *BGA-Alper Integrity Index*, produced by the Chicago-based Better Government Association (BGA) and Alper Services.[34] BGA is an 85-year-old civic watchdog group that fights waste, corruption, and inefficiency in government. Alper Services is a consulting and business-services company.

The objective of the *Integrity Index* is to measure the relative strength of existing laws that promote integrity in each of the 50 states. The higher each state's score, the stronger its laws and the better its citizens are protected against possible corruption, and the more open and accountable its operations are to its citizens. The *Index* looks at five categories, but for the purposes of this report, two are most relevant: "Freedom of Information Laws" (open public-records laws) and "Open Meetings Laws." The most recent comparison is from 2008.

California ranked a dismal 45th for its open-meetings laws.

California ranked a mediocre 17th for its open public-records laws.

BGA researched the relevant laws, created a scoring system, scored each state's law, and ranked the states based on the results. Generally, "laws that encouraged transparency, provided for meaningful accountability and called for strict limits scored higher than laws that discouraged transparency, provided for minimal accountability and loose limits."[35] It is important to note that BGA does not measure (1) how transparency laws are actually implemented in each state, (2) enforcement practices, or (3) the various exemptions embodied in the laws. It only examines the statutory language. But as BGA notes: "Citizens seeking to invoke their rights to examine public records will look to the statute for guidance, not secondary sources such as case law or attorney general opinions."[36]

To compare the states based on open-meetings laws, the *Index* assessed each state's statutory language and ranked the states based on eight criteria: (1) whether a public body must post an annual notice of its meetings; (2) the time frame for notices of individual meetings; (3) the amount of content required in a notice; (4) the time frame for the publication of meeting minutes; (5) how soon a lawsuit alleging a violation of the law must be filed; (6) whether such a lawsuit is expedited once filed; (7) whether attorney fees are awarded to successful plaintiffs; and (8) the sanctions against a public body for violating the law.

After crunching the numbers, California ranked a dismal 45th for its open-meetings laws, receiving only 5.75 of 20 possible points (29 percent). Virginia, Michigan, Rhode Island, Louisiana, and Arizona ranked highest.

Looking at the eight criteria in descending order of California's strengths, California received 0.75 points out of 1 point (75 percent) for its notice time for regular meetings, 1.5 points out

of 2 (75 percent) for its regular meetings notice contents, 2 out of 4 (50 percent) for its court fees-and-costs recovery rules, 0.5 out of 2 (25 percent) for its appeals statute of limitations, 1 out of 4 (25 percent) for its noncompliance penalties, 0 out of 1 (0 percent) for annual notice, 0 out of 2 (0 percent) for expediency of appeals, and 0 out of 4 (0 percent) for its time to post minutes.

Another comparative assessment of public-access laws in each state is the *Marion Brechner Citizen Access Project* (CAP) at the University of Florida College of Journalism and Communications.[37] CAP scores the states based on a "Sunshine Index" from 7 (sunny—completely open) to 1 (dark—completely closed). This very comprehensive and searchable database allows users to see ratings for all access-law categories in one state, examine summaries (known as capsules) of individual provisions of access laws for each state, compare ratings and capsules of individual provisions of access laws of two states, see comparative ratings for one access-law category across the 50 states, and find complete legal capsules and ratings for completed categories. For the purposes of this report, the first search capability is the most useful.

Based on the author's count, CAP covers 212 searchable access-law categories or groupings of categories, although not all of these categories deal with open-meetings laws or open-records laws. For example, some of the categories assess laws regarding autopsies, sex offenders, and elections.

Nine categories pertain to open meetings. California scored no better than a 5 (somewhat open) in any of the categories.

Looking just at the laws on open meetings and records, it is clear that the CAP database gives much more attention to open records. Nevertheless, we begin by looking at CAP's assessment of the Golden State's open-meetings laws because it provides useful independent information.

Nine categories pertain to open meetings. California scored no better than a 5 (somewhat open) in any of the categories. The state received a 5 for its rules defining "e-mail as a meeting" and "teleconferencing as a meeting." It placed in the middle at 4 (neither more open nor more closed) for its "definition of a meeting" and "criminal penalties for open-meetings violations."

It came in at 3 (somewhat closed) for rules on "informal, chance, or social gatherings/meetings" and "entity created or charged by statute with oversight responsibilities for compliance." And it scored worst at 2 (mostly closed) for "civil penalties for open-meetings violations"; "entity charged with training public officials or staff on compliance with open-meetings laws"; and "penalties for improperly holding an executive session."

Table 1 lists problems with California's current open-meetings laws based on the results of the *Integrity Index* and *Citizen Access Project*. For the *Integrity Index*, an area is listed as a problem if California scored below 50 percent. For CAP, it lists any area with a score of 4 or lower.

TABLE 1.

PROBLEMS WITH CALIFORNIA'S OPEN GOVERNMENT-MEETINGS LAWS

Problem	Assessment Study
Loose definition of a public meeting	4 CAP
No annual notice of meetings required	0% BGA
Incomplete requirements to post minutes and unspecified time to post	0% BGA
Weak rules on informal, chance, or social gatherings/meetings	3 CAP
Short statute of limitations to file lawsuits	25% BGA
No expedited appeals	0% BGA
No entity created or charged by statute with oversight responsibilities for compliance	3 CAP
No entity created or charged with training public officials or staff on compliance with open-meetings laws	2 CAP
Weak penalties for improperly holding a closed, executive session	2 CAP
Weak criminal penalties for open-meetings violations	4 CAP; 25% BGA
Weak civil penalties for open-meetings violations	2 CAP; 25% BGA
Exemption loopholes	McQuillan and independent, outside observers

Sources: *BGA-Alper Integrity Index*, 2008, and *Marion Brechner Citizen Access Project*, 2010.

These 12 problem areas, with the exception of the last item, were identified from the comparative assessments of the 50 states using the best scholarly research available today. They provide the basis for the open-meeting policy recommendations presented in the next chapter. The last item, "exemption loopholes," is based on the author's own reading of the laws in chapter 2 as well as the opinions of independent, outside observers, since neither scholarly study assessed open-meetings exemptions. But before presenting specific policy recommendations, let's assess California's open-records laws.

Comparative Assessments of California's Open Public-Records Laws

To compare the states based on open-records laws, the *Integrity Index* assessed each state's statutory language and ranked the states based on five criteria: (1) the amount of time a public agency or department has to respond to a citizen's request for a public document; (2) the process a citizen must go through to appeal the decision of an agency to deny the request for the public record; (3) whether an appeal is expedited when it reaches the court system; (4) whether the complaining party, after receiving a favorable judgment in court, is awarded attorney fees and court costs; and (5) whether the agency that has wrongfully withheld a record is subject to any civil or criminal punishment.

After crunching the numbers, California ranked a mediocre 17th for its open public-records laws, receiving 8.5 of 16 possible points (53 percent). Nebraska, New Jersey, Louisiana, Utah, and Virginia ranked highest.

Looking at the five criteria in descending order of California's strengths, California received 4 points out of 4 points (100 percent) for its court fees-and-costs recovery rules, 3 points out of 4 (75 percent) for its limits on initial response time to requests, 1 out of 2 (50 percent) for expediency of appeals, 0.5 out of 2 (25 percent) for appeals processes, and 0 out of 4 (0 percent) for its non-compliance penalties.

Relative to the other states, California's open-records laws have stayed about the same since 2002, when BGA first conducted its assessment.[38] In 2002, California ranked 19th and received the same total points (8.5 of 16) as today. BGA did not rank open-meetings laws in its 2002 edition.[39]

Based on the above 2008 results, the National Freedom of Information Coalition (NFOIC) and BGA assigned California a letter grade of "F" for its open-records laws.[40] NFOIC is a national nonprofit organization founded in 1989, based at the University of Missouri School of Journalism and dedicated to protecting "the public's right to oversee its government." No state received a grade of "A"—so there is much room for improvement even among the top-ranked states. Two states, Nebraska and New Jersey, received a "B." Six states earned a "C," four a "D," and 38 states earned an "F," including the Golden State. Charles N. Davis, executive director of NFOIC, concluded: "The tools available to citizens to enforce

their rights under state FOI laws are, with rare exceptions, endemically weak. . . . This national study shows that in the vast majority of states, citizens have little to no recourse when faced with unlawful denial of access under their state's FOI laws."

Looking next at the CAP assessment, the CAP database, as mentioned earlier, gives much more attention to open-records laws than open-meetings laws. There are 151 categories or groupings of categories that relate to open records. California did not earn the highest score of 7 (completely open) in any category. The highest score that California received was a 6 (mostly open) in eight categories. The state received a 5 (somewhat open) in 31 categories and a score in the middle at 4 (neither more open nor more closed) in 59 categories. Looking at the bottom half, California scored 3 (somewhat closed) in 40 categories, 2 (mostly closed) in 13 categories, and 1 (completely closed) in none of the categories.

California is most open (with a score of 6) for: making e-mail and other electronic storage devices and computer databases public records; not limiting access based on the purpose for which the record is being requested or the citizenship of the requestor; applying the public records law to school districts and their agents and agencies; applying the public records law to the state's municipalities, cities, and towns; and making electronic public records available to the public in that format.

Table 2 lists the areas where California is currently the least open according to CAP. It lists areas where California scored a 2 or 3, and then groups the areas into seven distinct categories. Keep in mind that a state might prefer to be closed rather than open in a particular area. For example, a state might prefer less public access to investigatory files that relate to possible terrorist activities. For completeness, table 2 also includes the open-records findings of the BGA *Integrity Index* discussed earlier, listing the three areas where California scored at or below 50 percent.

TABLE 2

ASPECTS OF CALIFORNIA'S OPEN PUBLIC-RECORDS LAWS THAT ARE CLOSED

Definition of Public Records

- No direct or indirect references to the function of public records are found in the definition of a "public record"—or the term used to refer to a public record—in the California Public Records Act (hereafter referred to as "the law").
- The concept of "public ownership" is not in the definition of a "public record"—or the term used to refer to a public record—in the law.
- No direct or indirect references to financial issues of records are found in the definition of a public record—or the term used to refer to a public record—in the law.
- The concept of "personal rights" is not visible, nor is there a direct or indirect reference to the dissemination of a public record, in the definition of a "public record"—or the term used to refer to a public record—in the law.
- No direct or obvious mention of public records as they relate to the dissemination of legislative information via the Internet.
- A private entity is subject to the law if it either was created by a legislative body to exercise authority that may lawfully be delegated by the legislative body or if it receives funds from a local agency *and* has at least one fully voting board member who was appointed by, *and* is a member of, the legislative body of the local agency [the italicized "ands" limit the application of the law, thus making it more closed].

Procedures for Requesting Public Records

- If a public agency makes available an index of its records, then the agency "shall" not be required to extend additional assistance to requestors to identify the records sought.
- If a records request requires "data compilation, extraction, or programming" of the data, the requestor shall bear the cost of programming and computer services necessary to produce the record.
- Following a request, a records custodian may issue an exact copy of a public record unless impractical to do so.
- The law does not explicitly require a custodian to index or display a list of those records under that custodian's control.
- No provision explicitly mentions redaction in the context of electronic records. Generally, the law says that a custodian who denies inspection of an entire public record shall permit inspection of any part of the record that is subject to inspection and is reasonably severable.

- Every agency may adopt regulations explaining its access procedures. Agencies that adopt such regulations must make copies of their access guidelines available to any person who requests them in exchange for a fee.
- No provision mentions certified copies of public records.

Record Keeping and Compliance

- No provision creates or charges an entity with oversight of public records law compliance.
- The law does not define a records custodian or indicate what one does.
- No provision charges an entity with training public officials or staff on compliance with the law.
- The law does not prescribe guidelines for the destruction of public records by custodians or private individuals.
- The law does not prescribe guidelines for the maintenance of public records.
- The law does not explicitly address the course of action to be taken if the requested records are not kept by the agency from which the records are sought.

Fees

- The legislative body of a local agency may charge a records requestor a deposit for a copy of a public record.
- In informational transactions involving financial matters, California Commercial Code section 9525(c)(2) (2007) provides for a charge of $5 if the request is communicated in a non-paper based medium.
- The law does not explicitly mention fee reductions or waivers.
- The law does not mention providing a records requestor with an estimate or itemized list of the costs assessed during compliance with a records request.

Enforcement and Appeals

- The law does state that when deciding civil lawsuits involving challenges to public records request denials, it must be "made to appear" to the court from reading the plaintiff's initial complaint/petition that records are being improperly withheld from disclosure.
- There are poor appeals processes (25 percent assessment by BGA).
- The law states that any person seeking to file a petition with a state appellate court appealing a judicial order upholding an agency's decision to withhold a record from disclosure "shall, in order to obtain review of the order," file the petition "within 20 days after service upon him or her of a written notice of entry of the order." The law also allows for an extension of time to file such an appeal of up to 20 days if the person seeking the review can demonstrate "good cause" as to why such an extension should be granted. Finally, the law states that if notice of the trial court order uphold-

ing the denial is delivered by mail, "the period within which to file the petition shall be increased by five days."

- There is only middling expediency of appeals (50 percent assessment by BGA).

Penalties for Violations

- There are no civil or criminal non-compliance penalties (0 percent assessment by BGA).
- The law prohibits any current or former officer or employee of the state from "willfully" disclosing a record "in any manner to any person not entitled to receive it," knowing that disclosure of the record is prohibited by the state's public-records law. A convicted official or employee shall be punished by a fine of no more than $10,000 and/or imprisonment for no more than one year.
- In an action brought by a person denied access to public records, if a court finds that the plaintiff's action is clearly "frivolous," it must award "reasonable" attorney fees and court costs to the public agency.
- Apart from paying court costs and attorney fees, the law contains no direct reference to the payment of damages—civil penalties including fines or forfeitures—by public agencies, officials, or employees who are found to have violated the law.
- The law does not indicate whether a custodian is liable for improperly distributing, possessing, or maintaining a public record.

Exemptions

- Correspondence of, and to, the governor or employees of the governor's office or correspondence in the custody of, or maintained by, the governor's legal affairs secretary is exempt from public disclosure. The law states, however, that records cannot be transferred to the governor's legal affairs secretary to avoid disclosure.
- The law exempts from disclosure test questions, scoring keys, and other examination data relating to academic testing. California provides, however, that at the request of a member of the state legislature or the governor, test questions and materials used in statewide testing of public school students must be disclosed "at a location selected by the [Department of Education]." Such information must not contain individual student scores and must remain confidential.
- The law allows an agency to withhold any record when, "on the facts of the particular case," the public interest in disclosure is "clearly outweighed" by the public interest in non-disclosure.
- The law exempts from disclosure intelligence information, investigatory or security files, and security procedures of the office of the Attorney General, the Department of Justice, and any state or local police agency. The law further exempts the security and investigatory files of other state or local agencies created for "correctional, law enforcement, or licensing purposes." State and local law enforcement agencies, however,

may disclose to the victim of criminal activity, or any other person who has suffered bodily injury or property damage as a result of criminal activity, the names and addresses of persons involved in, or witness to, the criminal incident. Such information also may be disclosed to the insurance carriers who have received claims as a result of criminal activity. Such information may not be disclosed, however, if it would reveal the identity of a confidential informant, endanger any person involved in the investigation, or obstruct the successful completion of the investigation or related investigation.

- Unless disclosure would endanger a person involved in the investigation or obstruct the completion of the investigation or related investigation, state and local agencies must disclose the name, occupation, physical description, date of birth, eye and hair color, and height and weight of any person arrested. The agency also must disclose the time, date, and location of the arrest, the time and date of the booking, the circumstances of the arrest, the bail amount, the time and manner of release, the charges being made against the individual, and any other warrants or parole or probation holds against the individual. The agency also must disclose the time, location, and nature of all complaints or requests made to the agency. Finally, the agency must disclose the current address of any arrested person and any victim of a crime to any person who states that "under penalty of perjury the request is made for a scholarly, journalistic, political, or governmental purpose" or by a licensed private investigator to further an investigation.
- The law gives state and local agencies the discretion to withhold records assessing vulnerability to terrorism or "other criminal acts intended to disrupt the public agency's operation," when such records are intended for "distribution or consideration in closed session."
- The law exempts records made confidential by federal or state law.
- The law exempts library circulation records that identify library users as well as library materials "presented solely for reference or exhibition purposes." The law, however, does not exempt the fine records of individual library patrons.

Sources: *BGA-Alper Integrity Index*, 2008, and *Marion Brechner Citizen Access Project*, 2010.

These closed or problem areas, identified from comparative assessments of California's open-records laws with those in the other 49 states using the best scholarly research available today, provide the basis for the open-records policy recommendations presented in the next chapter.

California governments do a terrible job on compliance.

In addition to having generally weak transparency laws, and in some cases because the laws are weak, California governments do a terrible job on compliance. Audits by Californians Aware, a Sacramento-area nonprofit organization that advocates for open government, found that only 21 percent of 52 local agencies complied with the CPRA precisely as the law requires. Worse, none of the 31 state agencies fully complied. The worst offender, ironically, was the state Department of Consumer Affairs.[41]

The next chapter presents specific policy recommendations.

CHAPTER 5

HERE COMES THE SUN: IMPROVING CALIFORNIA'S TRANSPARENCY LAWS AND PRACTICES

This chapter presents policy recommendations based on the comparative assessments of California's open-government laws and practices reviewed in the previous chapter. The reforms target California's greatest weaknesses: areas where the law is particularly "closed" and uncompetitive with the "best practices" in other states. Let's begin with 12 reforms to the Golden State's open-meetings laws.

Policy Recommendations for California's Open Government-Meetings Laws

The first three recommendations deal with the coverage of California's open-meetings laws and exemptions to the laws.

Coverage and Exemptions

1. Tighten the definition of a public meeting: The three open-meetings laws should define a meeting as any gathering, in person or electronically, of a majority or quorum of the members where deliberation of public matters occurs. In other words, "intention of discussing or deliberating" should be removed. What the group intended to do is immaterial. What matters is whether discussion or deliberation occurred.

Meetings should always be open that deal with agency executive hiring and set public employee salaries and benefits as well as all collective-bargaining meetings with employee unions, both university and non-university.

2. Tighten the rules regarding informal, chance, or social gatherings/meetings: When two or more members of the same public body attend a gathering, meeting, or conference sponsored by a private individual or private group, or attend an informal, chance, or social gathering, they should not discuss together the body's public matters at any time. It should not matter if the number of members is less than a majority or less than a quorum. Matters before the public body should not be discussed between or among the members at such functions and outside of a public meeting.

This rule would make illegal what CARB Chair Nichols did in the Tran case described in the introduction. Nichols knew that Tran faked his credentials and before a crucial vote she shared this information informally with some board members, but not the entire board.

3. Abolish certain exemptions: Given recent scandals in California regarding pay and pensions for public employees, meetings should always be open that deal with agency executive hiring and set public employee salaries and benefits as well as all collective-bargaining meetings with employee unions, both university and non-university. Sunshine is greatly needed in these areas. Peter Scheer, executive director of the First Amendment Coalition based in San Rafael, California, elaborates:

> The biggest loophole [in California's open-meetings laws] is Government Code section 54957.1(a)(1)(6). This obscure amendment, inserted in the early '90s at the request of public employee unions, effectively assures that the public does not learn the contents of a new collective-bargaining agreement until after it is signed and sealed. Given that these agreements represent north of 80 percent of all spending by a city or county, this makes a joke of the Brown Act. This is also a major reason for the out-of-control increases in costs for pensions and other employee benefits.[42]

Public agencies should also be required to approve all collective-bargaining agreements and real-estate agreements in noticed open meetings.

In addition, any meeting that discusses eminent domain should be open to the public. The taking of private property by government is one of government's greatest powers and it has been seriously abused in California and elsewhere.[43] The public should be given advance notice to attend and address any meeting that discusses the design, scope, or execution of an eminent domain plan. This especially applies to the property owners, tenants, affected business employees, and adjacent property owners. Eminent domain proceedings should be conducted in the open.

Also, any meetings of the State Board of Education or the Superintendent of Public Instruction to review assessment instruments or review test content should be open to the public (obviously, this does not mean publicizing actual test questions before a test). These metrics help determine the quality and effectiveness of children's education; thus, parents and others should have access to the meetings. These discussions also affect how millions of taxpayer dollars are spent on educational and assessment materials.

Any meeting that discusses eminent domain should be open to the public.

These reforms would make it more difficult to shield from public view information on public finances, government seizures of private property, and school metrics and performance. Kathay Feng, executive director of California Common Cause, also suggests more sunshine regarding lobbyists: "Based on the recent [California Assemblyman Michael] Duvall scandal, we need better lobbyist disclosure of every meeting lobbyists have with elected officials and the topics discussed."[44]

The next two policy recommendations cover requirements for notifying the public.

Public Notice

4. Require the posting on the Web of an annual notice of regular public meetings: At the beginning of each fiscal or legislative year, every public body should post on the Web a list of planned regular public meetings for that year and the tentative date and location. The notice should be updated throughout the year, if needed, to keep it current. In support of this requirement, the BGA notes: "Such notice is important because it gives the public advance knowledge of the schedule for meetings and thus increases the likelihood that they will be able to attend or monitor the meetings of a public body."[45] Annual, updated notices allow the public and news media to better plan their schedules to attend regular open meetings or look for minutes if they cannot attend. Connecticut, Illinois, and New Jersey require annual notices.

Annual, updated notices allow the public and news media to better plan their schedules to attend regular open meetings or look for minutes if they cannot attend.

Since the state legislature mandates that local governments create and post meeting agendas, this mandated cost should be paid fully by the state and sufficient funds budgeted each year to reimburse local governments for this cost, including the new cost proposed here associated with creating annual notices.

Also, meeting-agenda notices should give the public advance notice in plain English of what the public body will consider at the meeting. Scheer of the First Amendment Coalition explains:

Open-meeting laws utterly fail to alert citizens to important issues on agendas for forthcoming meetings. The Brown Act should be amended to require notice language that is reasonably calculated to give notice of what the legislative body will actually do. If a city council is considering laying off 100 employees, the public notice should say that. Saying "consideration of adjustment to budgeted expenses" doesn't cut it.[46]

A uniform seven-day rule that applies to all public bodies would facilitate the public's ability to stay informed.

Assembly Constitutional Amendment 1, introduced in the current legislative session by Assemblyman Kevin Jeffries (R-Lake Elsinore), would require the Assembly and Senate to post agendas 72 hours before any meeting. Currently, meetings, including closed sessions, can only be held "after full and timely notice to the public." But this standard is very vague and determined by the rules of each house.

5. Require public bodies to post and archive minutes of public meetings on the Web and to do so within seven business days: All public bodies in California should be required to post and archive minutes of public meetings on the Web and to do so within seven business days of the meeting. Nationally, six to 10 days is most common for states that have limits.[47] Currently, minutes are only required to be taken and posted for emergency meetings under the Brown Act and Bagley-Keene Act. And only Bagley-Keene requires minutes to be posted within a specific number of days: 10 days. A uniform seven-day rule that applies to all public bodies would facilitate the public's ability to stay informed for those who cannot attend a meeting or for those who want to read an official account.

The BGA argues: "Publishing minutes allows a citizen who was unable to attend the meeting to review what happened at the meeting, determine how members of a public body voted, and find out which policies or procedures were adopted. The sooner the minutes are published the sooner a citizen can find out what happened. A long delay in publication limits the public's ability to respond in a meaningful way if they are concerned by a public body's actions. . . .The lack of a definitive measurement can result in excessive delay in publishing minutes."[48]

Kevin Dayton, state government affairs director of Associated Builders and Contractors (ABC) of California, elaborates:

> ABC's primary concern with the open-meetings act is that some agencies—generally fiscally irresponsible and mismanaged ones—fail to post their agendas and minutes on the Web. Unfortunately, these are exactly the types of local governments where there tend to be union shenanigans in the bidding process for taxpayer-funded construction. The Web has allowed much more

> effective comprehensive scrutiny of special-interest influence on state and local government agencies, but some agencies can still evade that scrutiny by simply keeping their business off the Web.[49]

Requiring all public bodies to publish and archive minutes on the Web within seven business days is reasonable and would better inform Californians. Arizona is currently the model state in this area, requiring minutes to be available for public inspection within three working days after the meeting.[50] Finally, the state legislature should explore the feasibility of requiring all agencies to Webcast and archive all proceedings covered by the state's open-meetings laws.

The state legislature should explore the feasibility of requiring all agencies to Webcast and archive all proceedings covered by the state's open-meetings laws.

The next four policy recommendations deal with filing complaints and appealing actions.

Appeals and Compliance Structures

6. Create a faster, competitive appeals process: California lawmakers should create a faster, competitive, non-judicial administrative remedy process by allowing an individual who alleges a violation of an open-meetings law to appeal to a state ombudsman who would have authority to render administrative rulings on complaints. The ombudsman's office could be inside the attorney general's office or could be a separate entity. Currently, the only recourse is a court lawsuit, which tends to be slow and costly compared to a first-tier administrative remedy by an ombudsman.

David Greene, executive director and staff counsel of the Oakland-based First Amendment Project, explains:

> The biggest weakness is the lack of some type of administrative procedure to review compliance with the law. Right now, the only way to enforce public records and open-meetings law is to file a lawsuit. Unfortunately, most citizens lack the resources (either financial or temporal) to pursue lawsuits against the government. And government agencies know that.[51]

The BGA concurs: "Appealing directly to a court will assuredly be the most expensive and consume the most time. Citizens facing several years of litigation costing thousands of dollars are less likely to challenge a denial."[52] A survey of 191 investigative journalists found by a ratio of 8:1 that "journalists believe that the cost of litigation is a deterrent to fighting improper FOI refusals" and 6:1 that "public officials would not be held accountable for violations."[53] Barnhart of Sunshine Review echoes these thoughts:

"Most citizens lack the resources (either financial or temporal) to pursue lawsuits against the government. And government agencies know that."

California's transparency laws are arcane and legalistic; placing citizens, journalists, and researchers in the position of plaintiffs pleading for information versus the defendant government. The costs of such lawsuit procedures are daunting to taxpayers and reporters. At best, such laws keep disclosure of information at the pleasure of bureaucrats. Transparency exists largely at the munificence of officials, with the burden of negotiating complex and costly Freedom of Information Act petitions resting squarely on the shoulders of citizens and journalists.[54]

Daxton R. "Chip" Stewart, a professor at the Texas Christian University Schieffer School of Journalism in Fort Worth, Texas, and an expert on open-government dispute resolution systems,[55] supports this view and is quoted at length:

> The process [in California] for resolving disputes arising under open-government laws is less than ideal. When litigation is the only process available, citizens seeking access to public records and meetings who are unlawfully denied have the burden to file lawsuits, taking on the risks of legal costs depending on if they win or lose.
>
> Besides the weaknesses inherent in the litigation-only system, which deter citizens and journalists from effectively serving as a watchdog of the institutions that they own and fund through tax dollars, there is the matter of efficient processing of disputes. Litigation can be lengthy, and there are no informal options [in California] such as institutionalized mediation or an ombuds office to aid citizens and government agencies in handling disputes when they arise. These programs, whether housed in an attorney general's office or elsewhere, have proven to be good ways to manage open-government disputes. Florida has a great mediation program in its attorney general's office. Virginia has a strong ombuds program, the Freedom of Information Advisory Council. Indiana's Public Access Counselor has a good reputation as well.
>
> I think a strong ombuds office in the mold of Virginia is the ideal program and worth the costs of establishing it.[56]

California has no alternative dispute resolution system. The ombuds alternative proposed here is overdue.

People could still appeal in the courts a decision of an ombudsman, but many disputes would be resolved at an earlier stage. Public bodies will be more likely to comply with the law when

individuals can appeal actions faster and at lower cost. Currently, members of public agencies know that most people don't have the time or money to pursue a court case, so violations are more likely to occur.

The newly created ombudsman should also be responsible for training public employees, via an orientation program, on compliance with open-meetings laws and open-records laws. Currently, California lacks any such formal orientation service. Instead, the state is left with ad hoc approaches such as the State Agency CPRA Training session sponsored by California then-Assemblyman (now state Senator) Mark Leno (D–San Francisco) on October 6, 2006, and its accompanying "top-10 points" training guide.[57] Connecticut is the model state with a five-member Freedom of Information Commission required to conduct annual training sessions. Greene of the First Amendment Project notes: "There's great variation among agencies in the state about both their awareness of what their duties are and their knowledge of what the law requires."[58] An ombudsman would help educate.

California has no alternative dispute resolution system. The ombuds alternative proposed here is overdue. . . . The newly created ombudsman should also be responsible for training public employees, via an orientation program, on compliance with open-meetings laws and open-records laws.

7. Lengthen the statute of limitations for filing lawsuits: Individuals should be allowed to file a complaint alleging a violation of an open-meeting law for a period of one year from the date of the alleged violation. The current 90-day rule is unreasonably short and allows some violations to go unchallenged because potential plaintiffs are unable to go to court by the time they realize a law was broken. The BGA notes: "Usually, a person wanting to file a lawsuit has at least one year from the time of their injury or dispute to file the lawsuit. . . . The BGA is concerned that overly short statute[s] of limitations will make enforcement very difficult because only hyper-vigilant citizens will be able to react in time to potential violations of the law."[59] A one-year period to file a complaint is fair, reasonable, and more consistent with other areas of the law. Arizona, Florida, and Texas are currently among the model states in this area.

8. Mandate expedited hearings: Complaints should be given expedited treatment by an ombudsman or a court of law. Complaints should be heard within 10 business days of filing so the public and news media receive swift resolution and any violations are quickly resolved to ensure greater public access. "Justice delayed is justice denied" applies to open-government laws as it does to all areas of the law. The BGA notes: "Without an expedited process, it may be months or years before a case is heard and resolved in a congested court system. Lengthy court battles will render time-sensitive violations moot. Absent an expedited process, litigation may practically be of little use to potential plaintiffs."[60]

Expedited hearings allow grievances to be heard in a timely manner and discourage stonewalling to keep the public in the dark. Arkansas, Massachusetts, and Virginia are model states, requiring a hearing in 14 days or less.

Expedited hearings allow grievances to be heard in a timely manner and discourage stonewalling to keep the public in the dark.

9. Stop litigation tourism: A person who files a lawsuit alleging a violation of an open-meetings law should be required to file the lawsuit in the county where the violation allegedly occurred. In cases alleging improper closure of public meetings, the county of jurisdiction would be where the closed session occurred. This requirement will prevent venue shopping.

The final three policy recommendations to improve California's open-meetings laws deal with strengthening penalties for violations. These reforms are crucial. Without strong penalties, open-government laws lack teeth and remain of limited effectiveness. Members of public bodies ignore the rules or play fast and loose with compliance because they face few consequences. But with the possibility of stiff penalties for noncompliance, it is more likely that practices will follow the law, there will be accountability, the public will be granted greater access, and violations will be deterred.

Penalties and Damages

10. Increase criminal penalties for open-meetings violations: Each member of a public body who attends a meeting of that body in violation of any provision of the pertinent open-meeting law should be guilty of a misdemeanor punishable by a *mandatory* minimum jail time of 30 days for a first offense and a minimum fine of $500 up to $1,000. Criminal penalties should be more severe for each successive offense as in Louisiana, Michigan, and South Carolina. Minimum fines for a second offense should be $2,500 up to $5,000 with 60 days in jail minimum. Third or subsequent offenses should carry a fine of $10,000 and jail time of six months to one year. As in Illinois, proof of intent should not be required for a conviction since a knowledge requirement guts the penalty for all practical purposes.[61] Strict liability should apply. An agency can always seek a declaratory judgment when it is in doubt about the legality of an action.

The proposed maximum penalty of a $10,000 fine and a year in jail matches the current penalty for the wrongful disclosure of confidential information. To create fair incentives, the penalty for wrongfully granting public access should match the penalty for wrongfully closing public access.

California's current misdemeanor provision is "useless," says Thomas W. Newton, general counsel and legislative advocate of the California Newspaper Publishers Association (CNPA), due in part to members' ability to "excuse themselves from criminal liability by saying 'we relied on advice from counsel.'"[62] This defense should not be allowed nor should "ignorance

of the law" (especially if California institutes ombudsman training). Iowa law provides that ignorance is no defense to a violation of its public-access law.

Furthermore, so-called "corrective actions" by the public body, either after the complaint is filed or after the court trial begins, should not dismiss the complaint or trial if harm has occurred to the public's access. Allowing easy dismissal encourages violations of the law.

To create fair incentives, the penalty for wrongfully granting public access should match the penalty for wrongfully closing public access.

Also, a "three-strikes" penalty of job removal/impeachment should apply to any member found guilty of three separate criminal violations of the open-meetings laws during the member's lifetime. Minnesota has a three-violation rule, while Hawaii has a "one-strike" rule at the discretion of the judge. Following removal, the member should be banned from serving on any public agencies covered by the state's open-meetings laws.

A petitioner who prevails or substantially prevails in a court of law against an agency should be awarded *mandatory recovery* (not subject to the judge's discretion) of attorney fees and court costs, which will encourage citizens to vindicate their rights in court, deter agencies, and promote compliance. This award should occur even if the agency claims it acted in good faith. Florida is the model fee-and-cost state.

11. Establish civil penalties for open-meetings violations: Citizens should be able to sue in civil court any public agency for a violation of an open-meetings law or each member of a public body who failed to exercise "due care" (see California Government Code section 820.4) and attended a meeting of that agency in violation of any provision of the pertinent open-meeting law. Fines awarded to the petitioner should be a *mandatory* minimum of $500 up to $1,000 for the first offense, mandatory minimum of $2,500 up to $5,000 for the second offense, and $10,000 for the third and any subsequent offenses. New Jersey and Virginia escalate penalties for second and third offenses. As in Wisconsin, proof of intent should not be required to assess a civil penalty. Alabama, Missouri, and Virginia currently have some of the strongest civil penalties. The above rules regarding recovery of attorney fees and court costs should also apply.

12. Establish a separate civil penalty for improperly holding a closed, executive session: A separate, additional civil penalty of up to $10,000 per violation should be assessed against the public agency or members if they failed to exercise due care for each executive session later determined by a court to have been an invalid closed meeting. The rules above regarding proof of intent and recovery of attorney fees and court costs should also apply. Alabama currently has the strongest such penalty at $1,000.

Furthermore, the laws should uniformly require a two-thirds supermajority vote to close a meeting (as is the case under Bagley-Keene) and all closed meetings should be recorded (preferably video and audio). If it is later determined that a closed meeting should have been open to the public, or parts of the meeting should have been open, the recording should be released, redacting the appropriately closed portions. The recordings should be kept for 10 years by the public agency or the California State Archives. This requirement would deter public bodies from improperly closing meetings, deter members from discussing items not on the closed meeting's agenda, and allow the public and appellate authorities to know what went on in an improperly closed meeting after the fact. Current law allows a court to compel a public agency to audio-record its closed sessions under specific circumstances. Instead, the law should require recording of all closed meetings. Currently, as Terry Francke, co-founder and general counsel to Californians Aware, notes: according to case law, "members of government bodies cannot be queried in discovery to determine what was discussed in closed session."[63]

A penalty structure that holds the possibility of a criminal penalty, a civil penalty, and job removal along with an expedited competitive dispute resolution system provides the greatest safeguards that members of public agencies will not violate the open-meetings laws.

In 2003, on the 50th anniversary of the Brown Act, Francke said: "The unfulfilled promise, I'm afraid, that 50 years has revealed, is enforcement."[64] A penalty structure that holds the possibility of a criminal penalty, a civil penalty, and job removal along with an expedited competitive dispute resolution system provides the greatest safeguards that members of public agencies will not violate the open-meetings laws. As the BGA notes: "Without a sanctions provision, individual government employees will be less motivated to follow the law because they will not personally be held responsible. By holding out the possibility of accountability, compliance is more likely."[65]

It must be recognized, however, that not everyone favors strengthening California's open-meetings laws. For example, Bruce Cain, Heller professor of political science and public policy at the University of California-Berkeley, states:

> I am not a fan of tightening open-meeting laws. . . . I think elected officials need to have space to make decisions out of the glare of publicity. Opening up meetings too much makes negotiations more difficult and creates more opportunities for groups that want to obstruct change. . . . I would not amend the Brown Act or Bagley-Keene to make it more stringent.[66]

Next, 13 policy recommendations are presented on California's open-records laws.

Policy Recommendations for California's Open Public-Records Laws

The first two recommendations deal with the coverage and exemptions of California's open-records laws.

Coverage and Exemptions

13. Open police misconduct investigatory files after one year and open disciplinary proceedings and actions: California's policing agencies do a poor job of complying with the state's public-records law. A 2007 audit found that less than half of the state's policing agencies properly handled requests for public records, concluding: "Many, if not most, California policing agencies fail the open-government obligations that they share with other public agencies so radically that it is hard to view them as part of the same public universe."[67] In the area of police misconduct and discipline, the legislature and courts have given police special protections from public scrutiny that should be abolished.

In *Williams v. Superior Court*, the California Supreme Court held that the intent of the legislature in enacting section 6254(f) of the CPRA was to shield police investigatory files from public view without a time limit on the exemption.[68] The state legislature should amend the law such that all complaints of police misconduct and any reports, findings, or investigatory files and personnel disciplinary actions relating to the complaints should be covered by the CPRA and open to public disclosure after one year whether the investigation is closed or not (since investigations can be strategically left unclosed to shield them from public disclosure). Current laws (CPRA 6254[f] and California Penal Code sections 832.7 and 832.8) allow police departments to shield police misconduct files and internal personnel disciplinary files from public view indefinitely, preventing the public from knowing the details of police internal investigations and denying victims information that might be necessary to sue. Police officers are tax-supported public servants who should be held to the highest standards of professional conduct and public accountability. As Wendy McElroy argues: "On-duty police conduct is not an internal or private matter but one of overriding public concern."[69] Public safety requires open access.

Also, the state legislature should overturn *Copley Press v. Superior Court* in which the California Supreme Court held that records of an administrative appeal by a police officer for job discipline received as the result of a sustained misconduct charge are confidential and may not be disclosed.[70] The decision prevents the public from learning the extent to which police officers have been disciplined as a result of misconduct.

All complaints of police misconduct and any reports, findings, or investigatory files and personnel disciplinary actions relating to the complaints should be covered by the CPRA.

According to the ACLU of Northern California: "*Copley Press* has effectively shut off all avenues for the public to learn about misconduct involving individual police officers, such as

The decision prevents the public from learning the extent to which police officers have been disciplined as a result of misconduct.

excessive force and dishonesty; officer-involved shootings; patterns of misconduct and leniency; previous discipline for misconduct by another agency; and even the identity of officers in misconduct cases."[71] Before *Copley Press*, administrative appeals to outside bodies such as civil service commissions or independent civilian review boards were open to the public, hearing complaints separately from the police department. California should permit open complaint-review processes.

Newton of the CNPA laments: "The law on access to records of confirmed instances of serious police misconduct is screwed up."[72] The changes proposed here would help fix the problems.

14. List all exemptions to public disclosure in the laws and require more "affirmative disclosure": Any exemption to public disclosure should be specifically spelled out and itemized in the public records laws. Furthermore, the "public interest" test for non-disclosure should be abolished. Currently, the law allows an agency to withhold any record when, "on the facts of the particular case," the public interest in disclosure is "clearly outweighed" by the public interest in non-disclosure (CPRA section 6255). This vague catch-all exception should be abolished since it creates a loophole large enough for a Mack truck and creates endless delays and costly court battles.

For example, in the wake of the Bell, California, pay scandal, the *Los Angeles Times* requested the names and salaries of all Los Angeles County employees paid more than $250,000 annually. County counsel replied that it needed more time in order to redact information for many employees who expressed "personal safety" concerns for not releasing their information.[73]

If the legislature wants to carve out an exception for employees who do not want their name, job title, and salary publicly available due, for example, to a restraining order against an abusive spouse, the law should be amended to specifically list this exception. Otherwise, as the California Supreme Court ruled in 2007: "The public has a strong, well-established interest in the amount of salary paid to public employees. . . . The names and salaries of public employees are records that are subject to disclosure under the California Public Records Act."[74] In the absence of this approach of specific exemptions, the public records laws are constantly held hostage to inventive lawyers and novel challenges.

The CPRA contains nearly 40 pages listing records not required to be disclosed pursuant to subdivision (k) of section 6254. The governor should create a commission to review all exemptions to the open-meetings and open-records requirements. The commission would be similar to the federal military base closure commission created after the end of the cold war. The commission would review all exemptions, including case law exceptions such as the

"deliberative process privilege," and recommend which exemptions should be eliminated or narrowed, especially in light of Proposition 59. The state legislature would then vote up or down on each recommendation. The public would benefit from a thorough review. As early as 1990 the *San Francisco Bay Guardian* reported that the explosion of new exemptions has crippled California's historic open-government laws.[75] Things have gotten worse since then. The law should also require a two-thirds supermajority vote by the state legislature to add new statutory exemptions (as required in Florida).

In the area of government financial transparency, the ideal solution would be a legislative requirement to post on a searchable Web site the salaries, benefits, business expenditures, and gifts for all city, county, special district, school district, joint powers agencies, and state elected and appointed officials and employees including legislators and their staffs. Public pay is the public's business. This is the approach favored by former California Governor Arnold Schwarzenegger, California State Controller John Chiang, and Dan Schnur, chair of the California Fair Political Practices Commission (FPPC).[76]

The governor should create a commission to review all exemptions to the open-meetings and open-records requirements.

Following the City of Bell scandal, Chiang directed cities and counties to submit detailed information on how much they pay their employees, including elected officials.[77] Chiang said: "The absence of transparency and accountability invites corruption, self-dealing, and the abuse of public funds." Preliminary results are now available on the Web along with a list of local governments that either ignored the request or provided partial information.[78]

Schnur also favors greater transparency in compensation:

> I would greatly expand the amount of information that elected and appointed officials must disclose as to their public compensation. As we have seen in the Bell scandal, the potentials for abuse are rife if all forms of compensation are not made public. The FPPC is preparing a form for public officials to fill out voluntarily that lists not only salaries but other types of compensation, and we intend to work with the state legislature to make such disclosure mandatory.[79]

Government financial transparency should also require clearly posting on a searchable Web site itemized government expenditure data, including lawsuit/litigation costs for attorneys, judgments, and settlements.

Requiring the disclosure of certain information before a request is made is called "affirmative disclosure." It is the next big thing in transparency according to Barnhart:

> Sunshine Review is now suggesting that state and local governments adopt affirmative disclosure, "Sunshine Standard" laws that prescribe in detail what information must be posted on a searchable site even if no citizen or journalist asks for it. Simply put, government has an affirmative duty to disclose certain kinds of information; it chills sunshine when citizens, journalists, and researchers must fight for data the taxpayer already owns using procedures drearily like discovery in a civil lawsuit.[80]

Feng of Common Cause agrees with this approach:

> The biggest area of improvement might be automatically publishing all government documents and business on the Internet rather than requiring reporters to file public records act requests in order to get public information.[81]

But even affirmative disclosure requires ongoing compliance checks and enforcement penalties when necessary. Otherwise the disclosure laws will be ignored or only partially fulfilled.

In summary, if the legislature wants to exclude a public record or class of records from disclosure, it should explicitly create the exemption in section 6254. Public pay should never be one of the exemptions—its reporting on the Web should be mandatory. Section 6255 should be abolished. And a sunset commission should review all exemptions.

Public pay should never be one of the exemptions—its reporting on the Web should be mandatory.

The lack of government financial transparency is not limited to California. Barnhart argues: "It is certain that hundreds, perhaps thousands, of local governments in our country are looting their citizens. Of more than 5,000 state and local government Web sites analyzed by Sunshine Review, only 40 scored a nine or 10 on a simple 10-point transparency checklist. This lack of transparency is why abuses such as recently uncovered in Bell, California, occur."[82]

The next four policy recommendations deal with access to public records.

Access to Public Records

15. Indexing should not relieve a public agency of its duty to serve the public fully: If a public agency makes available an index of its records, the agency must still extend additional assistance to requestors to specifically determine and locate the exact records sought such as helping identify records, investigating where they might be located, and providing other suggestions for facilitating access and overcoming barriers. Public records requests should not be a contest of wills—full cooperation of public agencies is essential and expected. Model indexing states include Arkansas, Illinois, North Carolina, and Virginia.

Also, when a public agency looks for electronic records to fulfill a request, its information technology (IT) person should do a keyword search on its server, not ask individual employees to provide relevant e-mails and documents. Keyword searches are faster and more thorough and do not require the cooperation of often reluctant employees.

16. Access guidelines should be required of all public agencies and made available to the public on the Web free of charge: All public agencies should have written public-access procedures and make them available to any person who requests them, free of charge, and post the guidelines on the Web. As an example, California State Parks has a Web page that explains thoroughly its public records access guidelines: http://www.parks.ca.gov/?page_id=1084. The guidelines should include the name and contact information of the person responsible for fulfilling public-records requests. Existing technology makes it easy and low-cost for governments to disseminate such information. All public agencies should be mandated to create such access guidelines if they are not currently required to under section 6253.4 of the CPRA and to post the guidelines on the Web free of charge. They should also be required to develop online forms for public-records requests—it's time to leave the paper-based world with metal file cabinets. States with best practices in this area include Hawaii, Kansas, Kentucky, and Pennsylvania.

The quality and compensation of public school teachers is the public's business. The public should have access to such evaluation information to hold school teachers and administrators accountable.

17. Certified copies of public records should be available: A person who requests and is granted permission to receive a copy of a public record should also be permitted to request a certified copy of that record for an additional cost. A certified copy of a document, often a photocopy, has on it an endorsement or certificate that it is a true copy of the original document. It does not certify that the original document is genuine, only that it is a true copy of the original document. Eight states currently provide certified copies on request. If a public employee does not provide a true copy of a record when the copy has been certified, that employee would be guilty of a misdemeanor.

18. Testing material should be open to the public: At the request of any member of the public or news media, test questions, scoring keys, and other examination materials or data relating to statewide academic testing of public school students, licensing examinations, and public-employment examinations should be disclosed *after a testing period*. Such information must not publicly identify an individual test-taker's name. Ohio uses this approach for educational tests. Currently, the law does not permit disclosure (section 6254[g]). The law currently allows academic-testing information to be disclosed, in advance of a test, only at the request of a member of the state legislature, the governor, or the governor's designee (section 6254.13), all of whom are required to keep the information confidential.

"Currently, there is no records-retention requirement in the public-records laws."

Furthermore, section 45274 of the California Education Code should be amended to bring school employee merit system examination records under the CPRA and remove their confidentiality. The quality and compensation of public school teachers is the public's business. The public should have access to such evaluation information to hold school teachers and administrators accountable.

Finally, in the area of records access, the state legislature should explore the feasibility of requiring all public records to be sent to requestors electronically as of a certain date, such as January 1, 2015. Schnur of the FPPC explains:

> My recommendation is that any document subject to public records laws be available online rather than just on paper. Given the capabilities of technology, there is no reason to force a citizen to travel to Sacramento or to a local or county government office to access any disclosable information.[83]

Lucy Dalglish, executive director of the Reporters Committee for Freedom of the Press in Arlington, Virginia, agrees: "If a document is available in a file cabinet, it should be available electronically."[84]

The state legislature should explore the pros and cons of these ideas. New York requires state agencies to release public records electronically whenever possible.

The next policy recommendation deals with fees.

Fees

19. Fees should be transparent: When a requestor asks, a public agency should provide a public-records requestor with a cost estimate or itemized list of the costs assessed to comply with the records request before the request is fulfilled. Arkansas, Georgia, Nevada, Rhode Island, and Virginia are model states.

The next policy recommendation deals with the retention and destruction of public records.

Retention and Destruction of Public Records

20. Public records should be kept for 25 years: All public records, whether thought to be exempt or not, should be retained by the public agency or California State Archives for a minimum of 25 years unless the legislature has prescribed another time period. After 25 years, the records may be ordered destroyed by the agency but only after consultation with the California State Archives and State Library to determine if some records are worthy of preservation. Current best practices are found in North Carolina and Rhode Island.

Currently, there is no records-retention requirement in the public-records laws. Francke of Californians Aware notes: "Without some kind of legal requirement, agencies are left to their own devices. . . . But I can imagine it's like a warehouse full of records burning down every six months."[85] Records retention is essential to inform the public and hold government employees accountable.[86]

The next three policy recommendations deal with appeals and compliance structures.

Appeals and Compliance Structures

21. Create a faster, competitive appeals process: As discussed in the section above on open-meetings reforms, California lawmakers should create a faster, competitive administrative remedy process by allowing an individual who alleges a violation of a public-records law to appeal to the agency head or an ombudsman with authority to render administrative rulings on complaints. Currently, the only recourse is a court lawsuit, which tends to be slow and costly compared to a first-tier administrative remedy by an agency director or ombudsman. Kevin Dayton with Associated Builders and Contractors of California relates this story:

> In one case this year, the Northern California Power Agency allowed several months to elapse without providing the requested records, and ABC had to retain an attorney and threaten the agency with litigation before it finally ponied up the documents. The law needs an enforcement mechanism to ensure agencies comply in a reasonable period of time to fulfill public-records requests.[87]

Currently, as CNPA's Newton explains: the "choices after denial are (1) walk away or (2) sue in superior court. There needs to be a third option such as intermediate administrative review by a unit of the attorney general."[88] Under the proposal here, people could still appeal in the courts a decision of a director or ombudsman, but many disputes would be resolved at an earlier stage. As noted by the BGA: "If citizens are able to appeal in a cost and time efficient manner . . . citizens are more likely to challenge an agency's denial [of a disclosure request]."[89] Public agencies will be more likely to comply with the laws when individuals can appeal decisions faster and at lower cost.

Public agencies will be more likely to comply with the laws when individuals can appeal decisions faster and at lower cost.

The newly created ombudsman should also be responsible for training public employees, via an orientation program, on compliance with public-records laws.

22. Mandate expedited appeals: As discussed in the section above on open-meetings reforms, all appeals should be expedited so delays do not block the public's access to timely information. Regarding public records, appeals to an agency director, ombudsman, or eventually a court of law should be expedited and heard within 10 business days of filing. As the BGA notes within the context of court appeals: "Without an expedited process, it may be months or years before an appeal is heard and resolved in a congested court docket. As a result, the enormous costs of a lengthy court battle may prevent a citizen from challenging a denial. Furthermore, lengthy court battles will render time-sensitive documents useless. Absent an expedited process, litigation may serve as a tool to stall the production of records until the records are no longer of use, or until the citizen simply gives up on the request."[90] Arkansas and Virginia are model states, requiring cases to be heard within 11-20 days after filing.

Because California does not punish violations of its public-records laws, the BGA concludes the state lacks "a serious commitment to the policy underlying an open-records act."

23. Lengthen the statute of limitations for filing lawsuits and appeals: As discussed in the section above on open-meetings reforms, individuals should be allowed to file a complaint alleging a violation of an open-record law for a period of one year from the date of the alleged violation. Residents of Hawaii have two years.

Also, any person seeking to file a petition with a state appellate court appealing a trial court order upholding an agency's decision to withhold a record from disclosure should have, in order to obtain review of the order, 90 days to file the petition after service upon him of a written notice of entry of the order. The current standard of 20 days is unreasonably short.

The final two policy recommendations deal with penalties for violations. Because California does not punish violations of its public-records laws, the BGA concludes the state lacks "a serious commitment to the policy underlying an open-records act."[91]

Penalties and Damages

24. Establish criminal penalties for open-records violations: Each person who violates any provision of the pertinent open-records law should be guilty of a misdemeanor punishable by a mandatory minimum jail time of 30 days for a first offense and a minimum fine of $500 up to $1,000. Minimum fines for a second offense should be $2,500 up to $5,000 with 60 days in jail minimum. Third or subsequent offenses should carry a fine of $10,000 and jail time of six months to one year. Proof of intent should not be required. These criminal penalties are consistent with the criminal penalties proposed above for open-meetings violations.

Also, there should be a "three-strikes" penalty of job removal/impeachment for any person found guilty of three separate criminal violations of the open-records laws during the person's lifetime. Following removal, the person should be banned from employment with any public agency covered by the state's public-records laws. The BGA argues that job removal imposes "direct accountability and is most likely to result in compliance."[92] The individual is held directly responsible for a pattern of wrongful conduct. Iowa, Minnesota, Nebraska, and Utah permit job termination for any employee who violates their public-records acts.

Government-employee unions are certain to oppose many of these reforms.

A petitioner who prevails or substantially prevails in a court of law against an agency or person should be awarded mandatory recovery (not subject to the judge's discretion) of attorney fees and court costs, which will encourage citizens to vindicate their rights in court, deter agencies, and promote compliance. This award should occur even if the agency claims it acted in good faith.

25. Establish civil penalties for open-records violations: Citizens should be able to sue in civil court any public agency for a violation of an open-records law or a public employee who failed to exercise "due care" (see California Government Code section 820.4) and violated the law. Fines awarded to the petitioner should be a mandatory minimum of $500 up to $1,000 for the first offense, mandatory minimum of $2,500 up to $5,000 for the second offense, and $10,000 for the third and any subsequent offenses. The rules above regarding proof of intent and recovery of attorney fees and court costs should also apply. These civil penalties are consistent with the civil penalties proposed above for open-meetings violations. The BGA emphasizes: "Penalties and sanctions provide incentives for agencies to comply with the law as well as a deterrent for violations. Without penalties, the procedural provisions mean very little."[93] The importance of sanctions is highlighted by the City of Bell pay scandal. The *Los Angeles Times* broke the story using the CPRA. One of the reporters, Jeff Gottlieb, kept track of his records request with Bell officials by calling every day. When it appeared that he was being stonewalled, he said: "Look, we don't want to sue you, but trust me, we will. And we will ask the judge to have you pay our legal expenses under the law."[94] That got the attention of Bell officials, who eventually complied.

Finally, an "honorable mention" recommendation is the creation of a new Web site by a private entity that allows anyone who has received a public record to upload the records received or post a description of the records received or denied. The point of this Web site would be to prevent public agencies from playing favorites: releasing records to favored requestors while denying the same

California's transparency laws are weak in many areas, not consistent with best practices, and in need of updating.

records to disfavored requestors. The CPRA prohibits "selective" or "favored" access: once a record is disclosed to one requestor, it is public for all. This Web site would act as an additional check on the behavior of public agencies. Sunshine is the best disinfectant.

Government-employee unions are certain to oppose many of these reforms, especially the recommendations to open collective-bargaining negotiations, educational/teacher assessment discussions, and police-misconduct files. They prefer to operate in the shadows as much as possible to make deals that further their interests outside the public spotlight. But if government of the people, by the people, and for the people is to have meaning, the decisions and actions of government must be open to public scrutiny.

If the more than two dozen policy recommendations in this report were adopted in California, the Golden State would be the national leader in open government.

The "secrecy lobby" would also likely include many sitting and prospective public officials and government employees who would fear the bite of true sanctions for noncompliance. Opposition is to be expected. But the facts supporting these recommendations remain: California's transparency laws are weak in many areas, not consistent with best practices, and in need of updating.

Alternatively, the many California organizations that fight for greater transparency would support many, if not all, of these recommendations. The "sunshine lobby" includes: Associated Builders and Contractors of California, California Newspaper Publishers Association, Californians Aware, First Amendment Coalition, and First Amendment Project, as well as citizens such as Tim Crews and Paul Boylan, known as "The Sunshine Boys."[95]

Competition among interest groups and pressure from the public will determine the final details of California's transparency laws and practices. Nobel laureate economist George J. Stigler noted that representative democracies are "calculated to implement all strongly felt preferences of majorities and many strongly felt preferences of minorities but to disregard the lesser preferences of majorities and minorities."[96] If a majority of Californians demand these transparency updates, the state legislature will follow.

If the more than two dozen policy recommendations in this report were adopted in California, the Golden State would be the national leader in open government. It would have a more informed public and likely less looting of citizens for waste, fraud, and abuse; more efficient spending on many programs; and better service in such areas as law enforcement and education. But as Professor Stewart at TCU has argued: "Any effort a state can make to improve communications between citizens and the government regarding records and meetings is a step toward greater transparency, which is a fundamental requirement of our democracy."[97]

Some of the reforms proposed here would be simple and inexpensive to implement. Others would be complex and more costly. But each improvement would help fulfill the fundamental right of public access embodied in Article 1, Section 3 of the California Constitution.

In a historical twist, one early supporter of open government in California, Jerry Brown, is governor again. He signed the Legislative Open Records Act in 1975. Governor Brown could cement a legacy as a "sunshine governor," and show he is serious about government reform, by fighting to enact the recommendations in this report.

ENDNOTES

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23 *San Gabriel Tribune v. Superior Court* (1983) 143 Cal. App. 3d 762, 774.

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plications for clemency or extradition in cases that have been closed for a period of at least 25 years. Subject to any restrictions, the secretary of state, as custodian of the California State Archives, must make all such public records and other writings available to the public as otherwise provided for by CPRA.

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ABOUT THE AUTHOR

Lawrence J. McQuillan is director of Business and Economic Studies and senior fellow in political economy at the Pacific Research Institute (PRI) in San Francisco and Sacramento. *Human Events* describes him as a "distinguished conservative leader" in public policy.

Since joining PRI in 2001, Dr. McQuillan has specialized in tax, budget, regulation, and lawsuit-reform issues. He is coauthor of *Jackpot Justice* (cited in *The Economist* and *Washington Post*), *Tort Law Tally*, and the *U.S. Tort Liability Index*. Because of this work, PRI is now one of the nation's "leading organizational proponents of tort reform" (*Journal of Empirical Legal Studies*). He is also coauthor of the *U.S. Economic Freedom Index*, published with *Forbes*, which ranks the 50 states according to how friendly or unfriendly their state-government policies are to free enterprise and consumer choice.

McQuillan speaks regularly to civic and policy groups across the country and to reporters around the world. His television appearances include NBC news, FOX, CNBC, and CNN. YouTube hosts some of his interviews. He is a frequent guest on nationally syndicated radio talk shows hosted by Ron Insana, Jim Bohannon, Roger Hedgecock, Ronn Owens, and Lars Larson, to name a few. He advises lawmakers and advocacy groups around the world, provides legislative testimony, and was a member of Governor Schwarzenegger's task force on a constitutional spending limit for California.

McQuillan has had more than 240 articles published in such leading outlets as the *Wall Street Journal*, *New York Times*, *Chicago Sun-Times*, *Los Angeles Times*, *Washington Times*, *San Francisco Chronicle*, *New York Daily News*, *Weekly Standard*, *Forbes*, *USA Today*, and *Investor's Business Daily*. He writes on such topics as lawsuit abuse, economic freedom, tax and spending limits, workers' compensation, and medical-liability reform.

McQuillan created the *California Golden Fleece Awards*, exposing fraud and abuse in California government. Cited in *The Nation* and the *Los Angeles Times*, these awards led to the overhaul of the California Victim Compensation Program, helped reform California's workers' compensation system, and made PRI "one of the leading players" to end direct taxpayer funding of the University of California's Miguel Contreras Labor Program.

From 1998 until 2001, McQuillan was a research fellow at the Hoover Institution, Stanford University, where he specialized in international economics. He edited the book *The International Monetary Fund: Financial Medic to the World?* (translated into Japanese) and wrote the study *The Case against the International Monetary Fund*, which Nobel laureate Milton Friedman described in his review as "excellent."

From 1993 until 1997, McQuillan was the founding publisher and contributing editor of *Economic Issues*, a national subscription newsletter based in Chapel Hill, North Carolina, which reviewed economic journal articles relevant to current public-policy issues.

While in graduate school at George Mason University in Fairfax, Virginia, where he earned an MA and a PhD in economics, McQuillan was a research assistant for Nobel laureate James M. Buchanan and received the H. B. Earhart Fellowship for research excellence. Trinity University in San Antonio, Texas, awarded him a BA in economics and business administration.

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