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## Brown Act & Public Records Act

Mt. Diablo Unified School District



Presented by:  
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February 23, 2013

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## OPEN MEETING LAWS -THE BROWN ACT-



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### A. Overview



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## Legislative Bodies



- The school board is a legislative body subject to California's Open Meeting laws, commonly referred to as the Brown Act



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## Open Meetings



- The Brown Act requires that all meetings of a legislative body be open to the public, except for authorized closed sessions
- Purpose of meeting: to accomplish district business
- Provide public opportunities for questions and comments



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## Meeting Defined

- A meeting occurs whenever
  - A majority of the Board members gather at same time and place
  - To hear, discuss, or deliberate
  - Upon any item that is within the subject matter jurisdiction of the Board or district



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## Meeting Defined - New Case Law

- Brown Act is not limited to gatherings at which action is taken by the Board, but “deliberative gatherings” are also included (*Aaron v. Aguirre*, Slip copy, 2007 WL 959083, S.D. Cal., March 8, 2007)



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## Serial Meetings Prohibited

- Direct communication, personal intermediaries, and technological devices (e-mail, pagers, cell phones) cannot be used by a *majority* of Board members to develop a *collective concurrence* as to the action to be taken outside of the Board meeting



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## Collective Concurrence

- What does it mean?
  - Any exchange of facts and substantive discussions
  - Which advance or clarify members' understanding of an issue, or
  - Facilitate an agreement or compromise among members, or
  - Advance the ultimate resolution of an issue



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## Collective Concurrence

- Deliberative gatherings in which members collectively acquire and exchange facts prior to making the ultimate decision



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## Meetings Do Not Include...

- Individual contact
- Public conferences
- Other local agency meetings
- Community meetings
- Social gatherings



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## General Constraints

- Majority of the members cannot discuss school district business among themselves at "non-meetings"
- Can attend standing committee meetings only as observers



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## Agendas



- Agenda must be posted
  - At least 72 hours prior to holding a regular board meeting
  - At least 24 hours prior to holding a special board meeting
  - At a location freely accessible to the public



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## Agenda Description

- The agenda must contain a brief general description of each item of business to be transacted or discussed at the meeting, including closed session items
  - Generally, need not to exceed 20 words



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## Action & Discussion Of Items

- The Board may not discuss or take action on an item not appearing on the agenda except:
  - To respond to statements made or questions posed by the public during the public comment section—Be careful
  - To ask questions of staff or the public for clarification



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## Action & Discussion Of Items, cont . . .

- To ask staff to report back on an item not appearing on the agenda at a subsequent meeting
- To make a brief announcement
- When an emergency severely impairing the public health or safety exists
- When there is a need to take immediate action on an item that came to the attention of the agency after the agenda was posted



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## Placement of Items on Agenda

- Members of the public, including Board members, may ask to have a specific matter placed on a future agenda
- General process
  - Reviewed by Board President and Superintendent
  - If within subject matter of district
  - Decide whether open or closed session item
  - Decide whether information, consent or action item
- No right to demand that requested item be "action item" (*Caldwell v. Roseville Jt. Union High School District* (2007) Slip copy, 2007 WL 2669545, E.D.Cal)



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## Public Participation and Comment

- **Regular meeting:** members of the public must be provided an opportunity to address the legislative body on any item within the subject matter jurisdiction of the agency
- **Special meeting:** public provided an opportunity to address the Board on any item described in the notice



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Public Participation and Comment, cont . . .

- Regular or special meeting: members of the public must be provided an opportunity to address the legislative body on any item on the agenda either before or during the Board consideration of that item



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Public Participation and Comment, cont . . .



- The Board may not prohibit public criticism of the policies, procedures, programs, or services of the agency, or the acts or omissions of the Board



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Public Records

- All agendas and other documents distributed at a Board meeting in connection with an agenda item are public records
- This also means that any document a member brings to the Board meeting to share with the Board will become a public record



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## Public Records - New Requirements

- Effective July 1, 2008
  - "If writing that is a public record...that relates to an agenda item...is distributed less than 72 hours prior to that meeting, the writing **shall be available for public inspection...at the time the writing is distributed** to all, or a majority...of the members"
  - Must be available for public inspection at designated place listed on the agenda and may be posted on the website



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## B. Sub-boards and Commissions



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## Sub-boards and Commissions

- All subcommittees and commissions created by formal action of the Board, whether temporary, decision making, or advisory, are legislative bodies subject to the Brown Act
- One exception: ad hoc advisory committees consisting of less than a quorum of Board members



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## Ad Hoc Advisory Committee Requirements



1. The committee must be purely an advisory committee with no decision making authority
2. The committee must be composed solely of two members of the legislative body (less than a quorum)
3. The committee must not have continuing subject matter jurisdiction
4. The committee must not have a meeting schedule fixed by formal action of the legislative body



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## C. Closed Sessions

- May be held only for purposes expressly authorized by the Brown Act or Education Code
- Board must disclose in open session the item(s) to be discussed in closed session
- Board may only consider those items covered in statement



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## Permissible Closed Sessions



### 1. Personnel Matters

- Purpose: to discuss appointment, employment, evaluation of performance, discipline or dismissal of a public employee



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Permissible Closed Sessions, cont...

- If specific complaints or charges against employee:
  - Employee entitled to 24-hour Brown Act Notice;
  - Right to have complaints and charges heard in open session; and



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Permissible Closed Sessions, cont...

**2. Pending Litigation**

- Purpose: to receive advice from legal counsel
- "Pending" defined as:
  - Existing litigation against the district
  - Anticipated litigation against the district where there are facts and circumstances to indicate a significant exposure to litigation
  - Deciding whether to initiate litigation

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Permissible Closed Sessions, cont...

- Allowed to reach agreement or settle litigation in closed session, i.e., Board can adopt in closes session
- Caution! If settlement includes items which require a public notice and opportunity for comment
- *Trancas Property Owners Assn. v. City of Malibu* (2006) 138 Cal.App.4<sup>th</sup> 172 (zoning changes)

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Permissible Closed Sessions, cont...

**3. Student Matters**

- Closed session is required if Board is considering the suspension of, disciplinary action against, or any other action against student when public hearing would violate student privacy right (Ed. Code, §§ 35146, 48912)



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Permissible Closed Sessions, cont...

**3. Student Matters, cont.**

- Exception: Expulsions
  - Final action to expel a student must be taken in open session (Ed. Code, § 48918)
  - Student may request expulsion hearing be public, Board may still deliberate in closed session
  - Do not disclose student name (FERPA)



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Permissible Closed Sessions, cont...

**4. Negotiations/Collective Bargaining**

- The EERA permits a school board to meet in closed session to discuss negotiations and instruct district negotiators without complying with the Brown Act
- Additional exceptions to the Brown Act: meeting and negotiation discussions between district and union, mediation, meeting or investigation conducted by fact-finder or arbitrator (Govt. Code, § 3549.1)



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Permissible Closed Sessions, cont...

**5. Security Matters**

- Purpose: to meet with law enforcement or security expert
- To discuss a threat to building security, or to essential public services (water, drinking water, wastewater treatment, natural gas service, and electric service, or public's right of access to public services or public facilities)



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Permissible Closed Sessions, cont...

**6. Real Property Negotiations**

- Purpose: to instruct negotiators on price and terms of payment for the purchase or sale of identified real property
- May not provide general briefings on area land use issues, environmental impacts, site design and related issues



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**Closed Session:  
Agenda Requirements**

- Closed sessions must be identified on the agenda
- The Brown Act provides safe harbor language which automatically satisfies this requirement



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## Closed Session: Reporting Out Requirements



- Following a closed session, the Board must publicly report actions taken unless final approval rests with another party or disclosure would hamper the initiation or defense of litigation



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## Closed Session: Exceptions to Reporting Out Requirements

- Personnel matters: dismissal or nonrenewal of contract shall be deferred until the first public meeting after administrative remedies, if any, are exhausted
- Agreements, including labor negotiations: shall be reported after the agreement is final and has been accepted or ratified by other party
- Student matters: no information shall be released in violation of student privacy rights



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## Closed Session: Exceptions to Reporting Out Requirements, cont...

- Real estate negotiations: approval of an agreement shall be reported after the agreement is final
  - Upon inquiry, if final approval with other party
- Litigation: if final approval rests with other party or with court, district shall report substance of agreement to persons who inquire once settlement final



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## Confidentiality of Closed Sessions

- Board members are prohibited from disclosing information obtained during a closed session except to persons entitled to receive that information
- Unauthorized disclosure could waive attorney-client privilege, violate privacy rights of students or employees, or impact collective bargaining
- The prohibition on disclosing confidential information learned in closed session applies to **both** current and former Board members



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## Liability for Disclosing Closed Session Information



- Liability for Disclosing Confidential Information:

Board members may be personally liable if they violate Government Code section 54963

- Removal from office



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## Liability for Disclosing Closed Session Information

- Civil lawsuit: A current or former Board member may be civilly liable for unlawfully disclosing confidential closed session information
- Injunctive relief: The Board may seek an injunction to prohibit the offending Board member (current or former) from disclosing confidential information acquired during a closed session meeting
- Criminal liability: Government Code section 1222 provides that every willful omission to perform any duty enjoined by law upon a public officer is a misdemeanor



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## Liability for Disclosing Closed Session Information



- Grand Jury: Government Code section 3060 provides that the grand jury can issue an accusation against a current Board member for "willful or corrupt misconduct"
- Written and Verbal Censure by the Board



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## Brown Act Violations

- Misdemeanor: for Board member to attend a Board meeting where action is taken in violation of The Brown Act, where the member intends to deprive public of information which the member knows the public is entitled to receive
- The District Attorney, or any interested person, may bring a civil action to stop or prevent violations or to have Board action taken in violation declared null and void



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## Cure or Correct Demands



- Before bringing the action, the Board must be given notice and an opportunity to correct the violation
- Prevailing plaintiff may be entitled to costs and attorney's fees
- For closed session violations, court can order Board to tape record all closed sessions



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## Cure or Correct - New Case Law

- Even if discussion held without agenda item at one meeting, if at next meeting was on the agenda and action taken, "cure or correct" accomplished and second action avoided "null and void" effect
- *Brethren in Christ Community Services of Ontario, Inc. v. San Bernardino County Workforce Investment Board* (2007) Unpublished case. 2007 WL 431972



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## 2006 Constitutional Amendment



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## Proposition 59

- Mandates that the Brown Act and the Public Record's Act be broadly construed in furtherance of the public's "right of access to information concerning the conduct of the people's business"
- Proposition 59 made no substantive changes to these Acts

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# PUBLIC RECORDS ACT



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## Public Records Act

- Pitfall #1:
  - Many of the documents created, read, and received by a Board member are public records and must be provided by the District to anyone who asks for them



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## Public Records Act

- Pitfall #2:
  - Public records also include audiotapes, videotapes, and compact disks (CDs)



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## Public Records Act

- Pitfall #3:
  - Voice mail as a "public record?"
  - Whether voice mail, text messages, and contents of PDA's are "public records" is a current, unresolved topic of hot debate
  - If voicemails considered electronic "records," would be subject to the Public Records Act



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## Public Records Act

- Pitfall #4:
  - Beware of email! Public documents (unless an exception applies)
  - Frequently
    - Informally written
    - Deleted emails can be retrieved
    - Easily, and frequently, forwarded to unintended recipients



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## Public Records Act

- Pitfall #5:
  - Beware of e-mail! Context and tone do not come through well in email
  - Can be used by plaintiffs in law suits against school districts as "smoking gun" evidence



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## Public Records Act

- Pitfall #6
  - Beware of email! Subject to discovery in litigation
  - Easy to locate due to their electronic nature
  - "E-discovery"
    - New and developing issue in litigation
    - Can be very burdensome
    - Again, potential discovery of all emails concerning a particular topic, even if previously deleted



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## A. Introduction

- The Public Records Act was designed to give the public access to information in the possession of public agencies
- Modeled on the federal Freedom of Information Act
- General policy of the PRA favors disclosure



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## A. Introduction, cont...

- Proposition 59: Added to the California Constitution a presumption that judges will liberally interpret the PRA



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## B.What Is A Public Record?

- The definition of "public record" under the Act is broad and intended to cover a variety of records that are involved in the governmental process
- Public records are: "any writing[s] 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." (Gov. Code, § 6252(d))



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## B.What Is A Public Record? cont...

- A writing is defined as handwriting, typewriting, printing, photostatting, photography, photocopying, transmitting by electronic mail or facsimile, and every other means of recording upon any tangible thing and form of communication or representation, including letters, words, pictures, sounds, or symbols, or combinations thereof, and any record thereby created regardless of the manner in which the record has been stored. (Gov. Code, § 6252(f))



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## What Is A Public Record?

- **Financial Records.** Financial data relied on by the agency may be subject to disclosure where there is no showing that the disclosure of this information was against public interest, or that injury to the city [public entity] would result from revealing data



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## What Is A Public Record?

- **Is Computer Software a Public Record?**

Computer software developed by a state or local agency is not itself a public record (Gov. Code, § 6254.9)



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## What Is A Public Record?

- Communications received from legal counsel (may be exempt - Section F)
- Employment contracts between state or local agency and public official or employee
  - Disclosure of city employees' salaries NOT exempt under PRA (*Internat'l Fed. Of Prof. & Tech. Engineers, Local 21, AFL-CIO et al v. Alameda County Sup.Ct. (Contra Costa Newspapers)* Cal. Supp. Ct., No. S134253, Aug. 27, 2007)



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## C. Inspection Of Records: When Are Public Records Subject To Inspection?

- At all times during the business hours of the state or local agency
- Agencies may adopt regulations stating the procedures to be followed when making public records available
- "Reasonably segregable" portions of the record
- Duty to assist requester in narrowing request
- See District's Board Policy and Procedure



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## D. Requests for Copies

- How long does District have to respond?
  - District must make non-exempt records available “promptly” upon receipt of a request that reasonably describes an identifiable record or records, upon payment of fees covering direct costs of duplication
  - 10 [calendar] days from receipt of request to determine [and inform Requester] whether responsive, non-exempt records exist
  - If necessary, can extend by 14 more days



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## Requests for Copies

- Unusual circumstances that would justify an extension:
  - The need to search for and collect the requested records from field facilities or other establishments that are separate from the office that is processing the request
  - The need to search for, collect, and appropriately examine a voluminous amount of separate and distinct records
  - The need for consultation with another agency
  - The need to compile data, to write programming language or a computer program to construct a computer report to extract data (Gov. Code, § 6253(d))



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## E. Denial Of A Request For Records

- Any notification of denial of any request for records must include the names and titles or positions of each person responsible for the denial (Gov. Code, § 6253(d))



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## F. Exempt Records

- Section 6254 provides many exemptions to the disclosure requirements of the Act
  - Exemptions narrowly construed
  - Agency opposing disclosure bears the burden of establishing that a specific exemption applies
  - There is also a “catch-all” balancing test (see below)



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## F. Exempt Records, cont'd.

- **Exempt Records.** Exemptions specifically created by the Code include:
  - Preliminary drafts, notes, or interagency or intra-agency memoranda that are not retained by the public agency in the ordinary course of business, provided that the public interest in withholding those records clearly outweighs the public interest in disclosure



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## F. Exempt Records, cont'd.

- Records pertaining to pending litigation to which the public agency is a party, or to claims made pursuant Tort Claims Act, until the pending 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



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F. Exempt Records, cont'd.

- Test questions, scoring keys, and other examination data used to administer a licensing examination, examination for employment, or academic examination, except as provided in the Education Code
- The contents of real estate appraisals or engineering or feasibility estimates and evaluations made for or by the state or local agency relative to the acquisition of property, or to prospective public supply and construction contracts, until all of the property has been acquired or all of the contract agreement obtained



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F. Exempt Records, cont'd.

- Library circulation records kept for the purpose of identifying the borrower of items available in libraries and library and museum materials made or acquired and presented solely for reference or exhibition purposes
- Records which are exempted or prohibited pursuant to provisions of federal or state law, including but not limited to, Evidence Code provisions relating to privilege



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Exempt Records: Personnel Records

- **Personnel Records.** Personnel, medical, or similar files, the disclosure of which would constitute an unwarranted invasion of personal privacy.
- State employees' home address and telephone numbers shall not be open to public inspection, except in specifically delineated situations



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### Exempt Records: Personnel Records

- Employment contracts between a public employer and a public official / employee are public records (Gov. Code, § 6254.8)
- Personnel records are not automatically exempt from disclosure. Rather, an employer must show that disclosure of the records would constitute "an unwarranted invasion of privacy"



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### Exempt Records: Personnel Records

- Recent court decisions have varied widely in their conclusions when weighing the employee's privacy rights in their personnel records against the public's right to know



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### Exempt Records: Personnel Records

- Teamsters Local v. Priceless, L.L.C. (2003) 112 Cal.App.4th 1500, 5 Cal.Rptr.3d 847 - court granted injunction, sought by union representing public employees, to prevent employer from disclosing salaries of all city employees by name; statute requiring disclosure was intended to apply only to high-level state and local officials and not to regular civil service employees



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## Exempt Records: Personnel Records, cont'd

- Bakersfield City School District v. Superior Court (2004) 118 Cal.App.4th 1041, 13 Cal.Rptr.3d 517 - required district to disclose disciplinary records of an employee, i.e., the complaint and investigation documents concerning alleged sexual misconduct and violence, after being redacted to exclude the names, addresses, and telephone numbers of all persons other than the employee, after finding that the complaint was "well-founded."
- Outcome of any litigation may depend largely on judge



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## Exempt Records: Home Address or Phone of Elected Official / Family

- No public employer shall post the home address or telephone number of any elected or appointed official (or of the official's residing spouse or child) on the Internet without first obtaining the written permission of that individual (Gov. Code, § 6254.21)



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## Exempt Records: Home Address or Phone of School District Employees

- The home addresses and home telephone numbers of employees of a school district or county office of education are not public records and are not open to public inspection, except:



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### Exempt Records: Home Address or Phone of School District Employees

- To an agent, or a family member of the individual to whom the information pertains
- To an officer or employee of another state agency, school district, or county office of education when necessary for the performance of its official duties



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### Exempt Records: Home Address or Phone of School District Employees

- To an employee organization pursuant to regulations and decisions of the Public Employment Relations Board (PERB), except that the home addressees and home telephone numbers of employees performing law enforcement-related functions need not be disclosed, however upon written request of any employee, a school district or county office of education shall not disclose the employee's home address or home telephone number as described in this paragraph



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### Exempt Records: Home Address or Phone of School District Employees

- To an agent, or employee of a health benefit plan providing health services or administering claims for health services to school districts, and county office of education employees and their enrolled dependents, for the purpose of providing the health services or administering claims for employees and their enrolled dependents (Gov. Code, § 6254.3)



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**Exempt Records:  
Communication from Legal Counsel**

- The disclosure of a memorandum submitted to a state body or to the legislative body of a local agency by its legal counsel is not required until the pending litigation has been finally adjudicated or is otherwise settled (Gov. Code, § 6254.25)



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**Exempt Records:  
The Catch-All Exception**

- Section 6255 provides that an agency can withhold 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"



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**Exempt Records:  
The Catch-All Exception**

- In applying section 6255, courts apply a "balancing test" on a case-by-case basis, between the public interest in disclosure and the public interest in nondisclosure
- The burden of proof will be on the employer resisting disclosure to demonstrate a clear overbalance on the side of not disclosing the records



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## Exempt Records: The Catch-All Exception

- Courts have determined that the following types of records are exempt under Section 6255: (1) applications of candidate for employment; (2) staff evaluations and recommendations discussing applicant's fitness for employment; and (3) telephone records of council members



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## Exempt Records: Waiver of Exemption

- Whenever a public employer discloses a public record which is otherwise exempt from disclosure pursuant to the Act, the disclosure constitutes a waiver of the exemption, subject to certain exceptions (Gov. Code, § 6254.5)



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## Exempt Records, cont'd.

- **Records do not lose their confidential or restricted classification by mere passage of time**
  - In the absence of statutory change or designation of a termination date, confidentiality remains



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## G. Legal Action To Compel Disclosure Of Public Records

- Sought through injunctive or declarative relief in a court of competent jurisdiction
- Court decides whether or not the records must be disclosed
- The court shall award **costs and reasonable attorney fees** to a prevailing plaintiff



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**Resources**  
Timely and Timeless Topics

Webinars, handouts, tip sheets and practical videos on a wide range of education issues are available at [www.fagenfriedman.com/resources](http://www.fagenfriedman.com/resources). Access these materials for use in your staff and department meetings. Contact F3 for additional copies of these materials.

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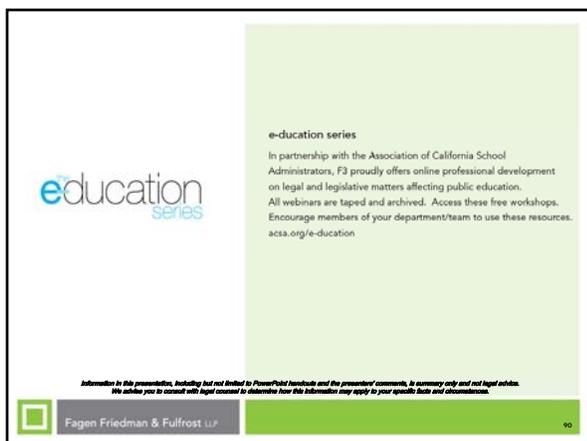
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