

Top 10 Points to Consider about Proposition 59 (California Constitution Article 1, Section 3, subdivision b)

1. Prop 59 is about public scrutiny of governmental conduct.

It states: “The people have the right of access to information concerning the conduct of the people's business, and, therefore, the meetings of public bodies and the writings of public officials and agencies shall be open to public scrutiny.”

2. Prop 59 is not simply another law.

As a provision added to the Declaration of Rights in the California Constitution, it has the same fundamental gravity as the rights of privacy, speech, assembly or petition, for example. It is a law to which less fundamental laws such as acts of the Legislature, and to which actions of government generally, must conform. Practices running contrary to Prop 59 are not simply to be avoided. They are unconstitutional, meaning that actions and decisions made possible by such practices may be directly attacked as invalid.

3. Prop 59 does not affect how privacy rights are to be interpreted.

It states, “Nothing in this subdivision *supersedes or modifies* the right of privacy guaranteed by Section 1 *or affects the construction of* any statute, court rule, or other authority to the extent that protects that right to privacy, including any statutory procedures governing discovery or disclosure of information concerning the official performance or professional qualifications of a peace officer.”

4. Prop 59 does not affect how other basic rights are to be interpreted.

It states, “Nothing in this subdivision *supersedes or modifies* any provision of this Constitution, including the guarantees that a person may not be deprived of life, liberty, or property without due process of law, or denied equal protection of the laws, as provided in Section 7.”

5. Prop 59 leaves in place the laws stating what is public and not public.

It states, “This subdivision does not *repeal or nullify*, expressly or by implication, any constitutional or statutory exception to the right of access to public records or meetings of public bodies that is in effect on the effective date of this subdivision, including, but not limited to, any statute protecting the confidentiality of law enforcement and prosecution records.”

6. Prop 59 affects how most statutes and other rules are to be interpreted.

Those not dealing with personal privacy, while not “repealed or nullified,” may be “superseded or modified.” In particular, “A statute, court rule, or other authority, including those in effect on the effective date of this subdivision, shall be broadly construed if it furthers the people's right of access, and narrowly construed if it limits the right of access.”

When, in other words, there is room for doubt as to the required scope of disclosure vis-à-vis the permitted scope of non-disclosure, the doubt must be resolved in favor of disclosure. For example, where the Brown Act permits but does not require a closed session for certain discussions, or where the California Public Records Act permits but does not require the withholding of certain information, the practice of treating that rule as a license for routine, invariable secrecy rather than an allowance for discretionary confidentiality to avoid certain harm may be subject to attack.

Equally, a practice of stretching occasions for excluding or not informing the public to cover all related information just because it is somehow related may be likewise vulnerable. If an exception to the Brown Act's rule of access has a clearly defined purpose such as keeping a litigation or bargaining adversary uninformed as to the facts known to a public agency or its position on a given issue, that purpose is not served by keeping the public ignorant of what the adversary already knows, or of information it has itself communicated to the agency. If the purpose of confidentiality of law

enforcement investigations is to avoid educating a suspect or perpetrator as to the evidence and witnesses being accumulated against him, her or it—to preserve the government’s advantage of surprise in developing a case—that purpose is not served by keeping case records entirely secret long after the case is closed by successful prosecution, or once the statute of limitations has run.

Interpreting limits to the right of access narrowly means using discretionary confidentiality judiciously, to protect what must be protected and avoid what needs to be avoided, to the extent necessary—but no more than that.

7. Prop 59 affects how new limitations on access are to be justified. It states, “A statute, court rule, or other authority adopted after the effective date of this subdivision that limits the right of access shall be adopted with findings demonstrating the interest protected by the limitation and the need for protecting that interest.” This requirement applies not only to the Legislature, Judicial Council and regulatory agencies but to any level of government creating a policy or procedure that limits access to meetings of government bodies, or to records of government officials or agencies. The phrase “findings demonstrating” refers to factual determinations, not simply expressions of opinion or preference. What is the public interest to be protected? Why is this approach (as opposed to others) the *necessary* one? What experience *demonstrates* these conclusions?

8. Prop 59 exempts the Legislature, but not from public scrutiny.

The Legislature is already bound by another provision of the Constitution, namely Article 4, Section 7, which states:

(c) (1) The proceedings of each house and the committees thereof shall be open and public.

However, closed sessions may be held solely for any of the following purposes:

- (A) To consider the appointment, employment, evaluation of performance, or dismissal of a public officer or employee, to consider or hear complaints or charges brought against a Member of the Legislature or other public officer or employee, or to establish the classification or compensation of an employee of the Legislature.
 - (B) To consider matters affecting the safety and security of Members of the Legislature or its employees or the safety and security of any buildings and grounds used by the Legislature.
 - (C) To confer with, or receive advice from, its legal counsel regarding pending or reasonably anticipated, or whether to initiate, litigation when discussion in open session would not protect the interests of the house or committee regarding the litigation.
- (2) A caucus of the Members of the Senate, the Members of the Assembly, or the Members of both houses, which is composed of the members of the same political party, may meet in closed session.
 - (3) The Legislature shall implement this subdivision by concurrent resolution adopted by rollcall vote entered in the journal, two-thirds of the membership of each house concurring, or by statute, and shall prescribe that, when a closed session is held pursuant to paragraph (1), reasonable notice of the closed session and the purpose of the closed session shall be provided to the public. If there is a conflict between a concurrent resolution and statute, the last adopted or enacted shall prevail.

Documents of the Legislature are presumed to be public under the Legislative Open Records Act (Government Code Section 9070), which has far fewer exemptions than the California Public Records Act.

There are no reported cases brought under either the constitutional or the statutory access laws.

9. Prop 59 applies to business meetings and records of judicial agencies.

It does not apply to court proceedings and records, but access to them is already presumed under the First Amendment, state statutes and common law. It does apply, however, to meetings of the

California Judicial Council, the Administrative Office of the Courts, and local court administrative bodies and records.

10. Prop 59 will be interpreted officially only gradually.

Points one through nine represent the views of one who was closely involved in its drafting and modification over more than two years of legislative effort. What Prop 59 finally and really does will be decided through a series of court decisions over the next generation. But the immediate effect will be to cause perceived excessive secrecy in local and state government to be more readily and frequently challenged in the meantime. Some agencies and officials will anticipate Prop 59's thrust and adapt their practices accordingly. Others will wait to be forced to change their ways, if change is required. But since 83.2 percent of voters lent their assent to the change on November 2, it is likely that most Californians will begin to judge the officials and agencies they encounter with a higher, if not altogether defined, expectation of openness from here on out.