The Real "Suspense" Over the Brown Act Suspension

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Portions of The Brown Act Have Been Suspended
When the 736 pages of the **2012-2013 California budget bill, AB 1464**, were signed into law, a flurry of discussions began about a provision that impacts cities and counties in a more fundamental way today than the funding of programs and the allocation of the State's revenues. As has happened once before, the Legislature acted to suspend certain provisions of California's open government laws, thereby causing numerous city councils and boards of supervisors to contemplate whether they would continue to follow the procedures long imposed on them to reveal to the public in a timely manner the government business being conducted. Later, SB 1006 generically extended all suspended mandates through FY 2014-2015, thereby extending the suspension of portions of the Brown Act for a three year period.

But the situation is not simple. **Dueling provisions of the California Constitution and confusing statutes make the effect unclear.** On top of that, proposed ballot measures and a pending lawsuit add to the excitement. Many local legislative bodies have addressed the uncertainty by continuing their practices of disclosure. Perhaps that is a good direction, as the following roadmap through the confusing landscape suggests.

New Developments
An initiative which has qualified for the November election–primarily a tax measure–contains a provision which would change the current legal situation.[1] A State Senator from San Francisco will be pushing for his previously introduced proposed amendment to the California Constitution that would also address the issue.[2] An organization which monitors open government practices state-wide has commenced a petition drive.[3] And litigation, such as that filed by a San Diego-based open government group is seeking to have the provisions at the root of the discussion declared unconstitutional.[4] Any or all of these changes would complicate matters.

Background of Relief from State Mandates
But the new developments would only be adding to the confusing legal landscape. To understand the maze of issues and arguments, one begins with the adoption of SB 90 in 1972. The Property Tax Relief Act of 1972 (SB 90, stats. 1972, ch.1406) had as its primary purpose the limitation of local agencies and school districts to levy taxes. **Included was a measure to force the State to compensate local governments whenever local governments incurred costs as a result of new state legislation–that is, a state mandate.** The legislation originally authorized the State Board of Control to conduct hearings and decide claims filed by local governments for reimbursement of the additional costs of compliance with the new legislation. In 1979, Proposition 4 was

approved, adding article XIII B to the California Constitution. That measure imposed appropriations limits on tax proceeds of both state and local governments. It superseded SB 90, and section 6 of article XIII B provided that, with some exceptions, **whenever the state Legislature or a state agency mandates a new program or a higher level of service on local government, state funding must be provided for such costs.** Five years later, the Legislature created the Commission on State Mandates to perform the function previously undertaken by the State Board of Control with respect to these claims. (Stats. 1984, ch. 1459.)

When the **Ralph M. Brown Act**, more simply known as the Brown Act, had been adopted in 1953, **it was designed to require that legislative bodies conduct their business not in secret or private meetings, but in public forums.**

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

(Government Code section 54950) This law, together with the **Public Records Act** (Gov. Code, §§ 6250, et. seq), formed the foundation of California's open government laws.

Ultimately the following local government requirements were found to be reimbursable by the Commission on State mandates (Commission decisions CSM 4257 and CSM 4469), and **which therefore are now, suspended as a result of the trailer bill.** These decisions by the Commission on State Mandates found that activities of preparing and posting agendas and making announcements both before and after closed sessions had added costs for which claims could be submitted. **No other provisions of the Brown Act were affected.**

Dueling Laws
Nevertheless, dueling provisions of state statutes and the Constitution attempt to trump each other as to whether the open government laws must be obeyed regardless of whether the state funding is provided.

For example, 2004's Proposition 59 amended article 1, section 3 of the **California Constitution, reaffirmed the right of the people to access information and required public meetings with interpretation to tilt in favor of openness.** Section 3(a)(2) states:

(2) 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. 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.

In contrast, the State Constitution, article 13B, section 6, currently provides that for state mandates (beginning in the 2005-2006 fiscal year) **funds are either to be appropriated by the state or the mandate is suspended.**

However, the legislature expects local agencies to adhere to the provisions of the Brown Act as is clearly expressed in the Brown Act at section 54954.4, subdivision (c), which provides as follows:

(c) The Legislature hereby finds and declares that complete, faithful, and uninterrupted compliance with the Ralph M. Brown Act (Chapter 9 (commencing with Section 54950) of Part 1 of Division 2 of Title 5 of the Government Code) is a matter of overriding public importance. Unless specifically stated, **no future Budget Act, or related budget enactments, shall, in any manner, be interpreted to suspend, eliminate, or otherwise modify the legal obligation and duty of local agencies to fully comply** with Chapter 641 of the Statutes of 1986 in a complete, faithful, and uninterrupted manner.

So, time will tell. Will Proposition 30 pass in November and, if it does, will it be viewed as the latest (and controlling) expression of California? Will Senator Yee's proposed Constitutional amendment make it out of the Legislature, get on a future ballot, and be passed by the voters? Will the San Diego (or some other) case be litigated to judgment as 'the last word?" Only time will tell, so stay tuned.

In the mean time, local governments are best served by continuing to comply with the provisions of the Brown Act – both to keep their constituents informed and not to get trapped by the uncertainties of the suspension.

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[1] Proposition 30, "The Schools and Local Public Safety Protection Act of 2012," an initiative constitutional amendment, is billed as a temporary tax increase measure to fund education and guarantee local public safety funding. Section 4 would add section 36 to article XIII of the California Constitution. Subsection (c)(3) includes the following: " Any requirement that a local agency comply with Chapter 9 (commencing with Section 54950) of Part 1 of Division 2 of Title 5 of the Government Code, with respect to performing its Public Safety Services responsibilities, *or any other matter*, shall not be a reimbursable mandate under Section 6 of Article XIII B." (Emphasis added)

[2] Senate Constitutional Amendment No. 7 by Senator Yee would by a simple

amendment to section 3 of article I of the California Constitution: changes the people's "right of access to information" to the people's "right to access information."

[3] Californians Aware, a Sacramento-based watchdog group, has commenced a petition drive to seek to place on a future ballot a measure to counter any suspension of provisions of the Brown Act.

[4] San Diegans for Open Government filed suit against the State of California on July 16, 2012, contending that the budget action was unconstitutional. *San Diegans for Open Government v. State of California*, San Diego Superior Court Case No. 37-2012-00100773-CU-MC-CTL