MICHAEL T. RISHER (State Bar No. 191627)
LINDA LYE (State Bar No. 215584)
AMERICAN CIVIL LIBERTIES UNION
FOUNDATION OF NORTHERN CALIFORNIA
39 Drumm Street, 2nd Floor
San Francisco, California 94111
Telephone: (415) 621-2493
Facsimile: (415) 255-1478

Attorney for Petitioner
AMERICAN CIVIL LIBERTIES
UNION OF NORTHERN CALIFORNIA

SUPERIOR COURT OF CALIFORNIA

COUNTY OF SAN FRANCISCO

UNLIMITED JURISDICTION

| | |
|---|---|
| AMERICAN CIVIL LIBERTIES UNION OF NORTHERN CALIFORNIA,<br><br>Petitioner,<br><br>v.<br><br>CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION<br><br>Respondent. | No. CPF-10-510882<br><br>REQUEST FOR JUDICIAL NOTICE; DECLARATION OF LINDA LYE IN SUPPORT THEREOF<br><br>Department: Dept. 302<br>Hrg. Date: Tuesday, Dec. 14, 2010<br>Hrg. Time: 9:30 am |

Pursuant to Evidence Code §§ 452, 452 and California Rules of Court 3.113(m) and 3.1306(c), Petitioner American Civil Liberties Union of Northern California, through their attorneys of record, requests that the Court take judicial notice of the legislative history of Proposition 59, a 2004 ballot measure that established a constitutional "right of access to information concerning the conduct of" government. Cal. Const., Art. I, Sec 3.

In particular, Petitioner requests that the Court take judicial notice of the Official Ballot Pamphlet for Proposition 59. A true and correct copy of the Official Ballot Pamphlet is attached to the accompanying Declaration of Linda Lye in support of this Request.

Subsections (c) and (h) of Evidence Code Sections 452 allow the court to take judicial notice of, respectively, "official acts" of the government and "[f]acts and proposition that are not reasonably subject to dispute and are capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy." Pursuant to these provisions, courts routinely grant requests for judicial notice of legislative history. *See Stewart v. Rolling Stone LLC,* 181 Cal.App.4th 664, 676 n.8 (2010); *Arce v. Kaiser Foundation Health Plan, Inc.*, 181 Cal.App.4th 471, 483 n. 6 (2010); *see also County of Santa Clara v. Superior Court,* 170 Cal.App.4th 1301, 1312 (2009) (granting request for judicial notice of legislative history in Public Records Act case). "[T]he analysis and arguments contained in the official ballot pamphlet" constitute the official legislative history of an initiative. *Hill v. National Collegiate Athletic Assn.*, 7 Cal.4th 1, 16 (1994) (quoting *Legislature v. Eu*, 54 Cal.3d 492, 504 (1991)); *see also id.* (Constitutional initiatives are "to be interpreted and applied in a manner consistent with the probable intent of the body enacting it: the voters of the State of California."). Upon a proper request, a Court shall take judicial notice of such materials. Evid. Code § 453.

Proposition 59, enacted by the voters of California in November 2004, amended Article I, § 3 of the California Constitution and granted "the people's right of access to information in public settings... state constitutional stature." *State Office of Inspector General v. Superior Court* 189 Cal.App.4th 695, _, 2010 WL 3898237, *5 (Oct. 6, 2010) Cal.App. 3 Dist.). Proposition 59 and its legislative history are relevant to this Public Records Act case because they shed light on the proper construction of the statute. As the Third District Court of Appeal recently explained in *State Office of Inspector General,* also a Public Records Act case, Proposition 59 "provides that statutes furthering the people's right of access shall be broadly construed, while statutes limiting the right of access are to be narrowly construed." *Id.* (citing Cal. Const., art. I, § 3(b)(2).)

For the foregoing reasons, the Request for Judicial Notice should be granted.

Dated: December 13, 2010

Linda Lye

MICHAEL T. RISHER (State Bar No. 191627)
LINDA LYE (State Bar No. 215584)
AMERICAN CIVIL LIBERTIES UNION
FOUNDATION OF NORTHERN CALIFORNIA
39 Drumm Street, 2nd Floor
San Francisco, California 94111
Telephone: (415) 621-2493
Facsimile: (415) 255-1478

Attorney for Petitioner
AMERICAN CIVIL LIBERTIES

UNION OF NORTHERN CALIFORNIA

SUPERIOR COURT OF CALIFORNIA

COUNTY OF SAN FRANCISCO

UNLIMITED JURISDICTION

| | |
|---|---|
| AMERICAN CIVIL LIBERTIES UNION OF NORTHERN CALIFORNIA,<br><br>Petitioner,<br><br>v.<br><br>CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION<br><br>Respondent. | No. CPF-10-510882<br><br>DECLARATION OF LINDA LYE<br><br>Department: Dept. 302<br>Hrg. Date: Tuesday, Dec. 14, 2010<br>Hrg. Time: 9:30 am |

I, Linda Lye, declare as follows:

1. I am an attorney for Petitioner in this action. The matters set forth in this declaration are based upon my personal knowledge.

2. On December 11, 2010 I visited http://library.uchastings.edu/library/california-research/ca-ballot-pamphlets.html, the website of the library of the University of California at Hastings Law School, and from that site printed excerpts of the General Election Ballot Pamphlet for the

November 2004 election. The excerpts included the portion of the Official Ballot Pamphlet relating to Proposition 59. A true and correct copy is attached as Exhibit A to this declaration.

I declare under penalty of perjury that the foregoing is true and correct. Executed this 13 day of December 2010 in San Francisco, California.

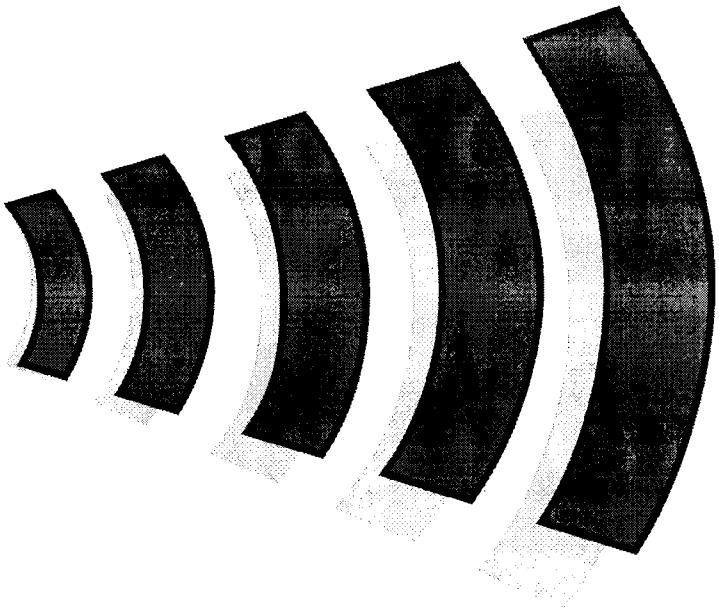
Linda Lye

# Exhibit A

# OFFICIAL
# VOTER INFORMATION GUIDE



# MAKE YOUR VOICE HEARD



# REGISTER
# LEARN
# VOTE

### ▸ MAKE YOUR VOTE COUNT

Register as a Permanent Absentee Voter

To receive your ballot in the mail each election, sign up at **www.MyVoteCounts.org.**

### ▸ MAKE AN INFORMED CHOICE

Read inside about the statewide issues on the ballot.

### ▸ MAKE YOUR VOICE HEARD

Vote on Tuesday, November 2, 2004

The polls are open from 7 a.m. to 8 p.m. on Election Day.

## CERTIFICATE OF CORRECTNESS

I, Kevin Shelley, Secretary of State of the State of California, do hereby certify that the measures included herein will be submitted to the electors of the State of California at the General Election to be held throughout the State on November 2, 2004, and that this guide has been correctly prepared in accordance with the law.

Witness my hand and the Great Seal of the State in Sacramento, California, this 9th day of August, 2004.

Kevin Shelley

Kevin Shelley

Secretary of State

# SECRETARY OF STATE

Dear Fellow Voter,

On November 2, 2004, we will have the right and the privilege to choose our next President of the United States and make many other important decisions about the future of California.

This will be one of the most significant elections in many years. And your vote could make the difference. We all know that many recent elections have been decided by just a handful of votes. Please make sure your voice is heard by voting on or even before November 2nd.

We understand that getting to the polls on Election Day is not always easy. One of the easiest ways to have your voice heard is to **vote by mail!**

This year, you can also become a Permanent Absentee Voter for any reason. That way you will be able to vote by mail automatically in every election. You can apply for an absentee ballot right now by visiting our website at **www.MyVoteCounts.org** or by contacting your local elections officials.

This year's Voter Information Guide also has a new section devoted to election technologies. This guide explains the voting system that will be used in your county. Please take a moment to learn about the voting system in your area—as it could have changed since the last election. You can also find more information on voting systems at **www.MyVoteCounts.org**.

This year, make your voice heard. Vote by mail, or vote on November 2nd, but please make sure your vote is cast.

myVOTE counts

# TABLE OF CONTENTS

PROPOSITION

# 59

## PUBLIC RECORDS, OPEN MEETINGS. LEGISLATIVE CONSTITUTIONAL AMENDMENT.

## OFFICIAL TITLE AND SUMMARY

Prepared by the Attorney General

**Public Records, Open Meetings.**
**Legislative Constitutional Amendment.**

Measure amends Constitution to:

- Provide right of public access to meetings of government bodies and writings of government officials.
- Provide that statutes and rules furthering public access shall 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, equal protection; expressly preserves existing constitutional and statutory limitations restricting access to certain meetings and records of government bodies and officials, including law enforcement and prosecution records.

Exempts Legislature's records and meetings.

**Summary of Legislative Analyst's Estimate of Net State and Local Government Fiscal Impact:**

- Potential minor annual state and local government costs to make additional information available to the public.

**Final Votes Cast by the Legislature on SCA 1 (Proposition 59)**

| | | |
|---|---|---|
| Assembly: | Ayes 78 | Noes 0 |
| Senate: | Ayes 34 | Noes 0 |

## ANALYSIS BY THE LEGISLATIVE ANALYST

### BACKGROUND

The State Constitution generally does not address the public's access to government information. California, however, has a number of state statutes that provide for the public's access to government information, including documents and meetings.

*Access to Government Documents.* There are two basic laws that provide for the public's access to government documents:

- ***The California Public Records Act*** establishes the right of every person to inspect and obtain copies of state and local government documents. The act requires state and local agencies to establish written guidelines for public access to documents and to post these guidelines at their offices.
- ***The Legislative Open Records Act*** provides that the public may inspect legislative records. The act also requires legislative committees to maintain documents related to the history of legislation.

*Access to Government Meetings.* There are several laws that provide for the public's access to government meetings:

- ***The Ralph M. Brown Act*** governs meetings of legislative bodies of local agencies. The act requires local legislative bodies to provide public notice of agenda items and to hold meetings in an open forum.
- ***The Bagley-Keene Open Meeting Act*** requires that meetings of state bodies be conducted openly and that documents related to a subject of discussion at a public meeting be made available for inspection.

# ANALYSIS BY THE LEGISLATIVE ANALYST (CONT.)

- *The Grunsky-Burton Open Meeting Act* requires that meetings of the Legislature be open to the public and that all persons be allowed to attend the meetings.

*Some Information Exempt From Disclosure.* While these laws provide for public access to a significant amount of information, they also allow some information to be kept private. Many of the exclusions are provided in the interest of protecting the privacy of members of the public. For instance, medical testing records are exempt from disclosure. Other exemptions are provided for legal and confidential matters. For instance, governments are allowed to hold closed meetings when considering personnel matters or conferring with legal counsel.

## PROPOSAL

This measure adds to the State Constitution the requirement that meetings of public bodies and writings of public officials and agencies be open to public scrutiny. The measure also requires that statutes or other types of governmental decisions, including those already in effect, be broadly interpreted to further the people's right to access government information. The measure, however, still exempts some information from disclosure, such as law enforcement records. Under the measure, future governmental actions that limit the right of access would have to demonstrate the need for that restriction.

The measure does not directly require any specific information to be made available to the public. It does, however, create a constitutional right for the public to access government information. As a result, a government entity would have to demonstrate to a somewhat greater extent than under current law why information requested by the public should be kept private. Over time, this change could result in additional government documents being available to the public.

## FISCAL EFFECT

Government entities incur some costs in complying with the public's request for documents. Entities can charge individuals requesting this information a fee for the cost of photocopying documents. These fees, however, do not cover all costs, such as staff time to retrieve the documents. By potentially increasing the amount of government information required to be made public, the measure could result in some minor annual costs to state and local governments.

For text of Proposition 59 see page 81.

# PROP 59 PUBLIC RECORDS, OPEN MEETINGS. LEGISLATIVE CONSTITUTIONAL AMENDMENT.

## ARGUMENT in Favor of Proposition 59

Proposition 59 is about open and responsible government. A government that can hide what it does will never be accountable to the public it is supposed to serve. We need to know what the government is doing and how decisions are made in order to make the government work for us.

Everyone needs access to information from the government. Why was a building permit granted, or denied? Who is the Governor considering for appointment to a vacancy on the County Board of Supervisors? Why was the superintendent of the school district fired, and who is being considered as a replacement? Who did the City Council talk to before awarding a no-bid contract?

People all across the State ask these questions—and dozens of others—every day. And what they find out is that answers are hard to get.

California has laws that are supposed to help you get answers. But over the years they have been eroded by special interest legislation, by courts putting the burden on the public to justify disclosure, and by government officials who want to avoid scrutiny and keep secrets. Proposition 59 will help reverse that trend.

What will Proposition 59 do? It will create a new civil right: a constitutional right to know what the government is doing, why it is doing it, and how. It will ensure that public agencies, officials, and courts broadly apply laws that promote public knowledge. It will compel them to narrowly apply laws that limit openness in government—including discretionary privileges and exemptions that are routinely invoked even when there is no need for secrecy. It will create a high hurdle for restrictions on your right to information, requiring a clear demonstration of the need for any new limitation. It will permit the courts to limit or eliminate laws that don't clear that hurdle. It will allow the public to see and understand the deliberative process through which decisions are made. It will put the burden on the government to show there is a real and legitimate need for secrecy before it denies you information.

At the same time, Proposition 59 ensures that private information about ordinary citizens will remain just that—private. It specifically says that your constitutional right to privacy won't be affected.

You have the right to decide how open your government should be. That's why Proposition 59 was unanimously passed by the Legislature and it is the reason widely diverse organizations support the Sunshine Amendment, including the American Federation of State, County and Municipal Employees and the League of California Cities.

As James Madison, a founding father and America's fourth President, said: "Knowledge will forever govern ignorance, and a people who mean to be their own governors must arm themselves with the power which knowledge gives." Tell the government that it's ordinary citizens—not bureaucrats—who ought to decide what we need to know. Vote yes on Proposition 59.

MIKE MACHADO, *State Senator*

JACQUELINE JACOBBERGER, *President*
*League of Women Voters of California*

PETER SCHEER, *Executive Director*
*California First Amendment Coalition*

## REBUTTAL to Argument in Favor of Proposition 59

As an attorney who has attempted for many years to use California laws to identify and weed out waste and corruption in local government, I am quite sympathetic to Proposition 59.

It is important, however, for voters to know what Proposition 59 would NOT do.

As written (by the State Legislature), Proposition 59 would continue to exempt from disclosure government records deemed "private" by the courts and would not apply at all to the *"confidentiality of proceedings and records of the Legislature, the Members of the Legislature, and its employees, committees, and caucuses . . .".*

Voters should also consider that insofar as electing some top persons in government (i.e., having a representative democracy) is key to making career government bureaucrats more accountable, elections (especially for State Assembly, State Senate, and Congress) have been undermined by:

(1) the dependence on private, special interest campaign money (sometimes called "legalized bribes"); and

(2) the self-serving creation (every 10 years) of gerrymandered legislative districts that protect incumbents from competition.

Moreover, anyone who blindly trusts a computer program to count votes (without any "paper trail" for potential verification) is foolish.

Sadly, we are a long way from having true representative democracy in California—and across America.

Government is getting bigger and becoming more wasteful, insular, and abusive. Proposition 59 would not do much to reverse that alarming trend.

GARY B. WESLEY, *Attorney at Law*

# PUBLIC RECORDS, OPEN MEETINGS. LEGISLATIVE CONSTITUTIONAL AMENDMENT.

PROP 59

## ARGUMENT Against Proposition 59

This measure does not go far enough in guaranteeing the people access to information and documents possessed by state and local government agencies.

In fact, this measure only provides for a general *"right of access to information concerning the conduct of the people's business"* and that laws in California *"shall be broadly construed if it furthers the people's right of access, and narrowly construed if it limits the right of access."*

Laws are construed (i.e., interpreted) by officials charged with following them—and by courts when asked. The rule of interpretation contained in this measure would probably have a very limited effect.

Indeed, this measure explicitly states that it does not supersede or modify any *"right to privacy guaranteed by Section 1"* of Article I of the California Constitution.

While a right to privacy—especially against government intrusion—is critical in today's society—government employee groups are using the state constitution's "right to privacy" to hide the amount of money, benefits, and perks they receive at public expense!

Proposition 59 may be better than nothing, but it does not go far enough. The question is whether to vote "yes" and hope for more or vote "no" and demand more.

GARY B. WESLEY, *Attorney at Law*

## REBUTTAL to Argument Against Proposition 59

Mr. Wesley's skepticism of open government laws is understandable. Several years ago, when he sued his city council under the open meeting law alleging it had illegally used a closed session to discuss a topic not mentioned on the agenda, the court would not let him question the council members about what they had discussed behind closed doors.

The court concluded that because the law did not expressly authorize such questioning and because it contained other provisions protecting closed session discussions, government officials could not be asked about what they discussed even to obtain evidence for trial, and even if there was no other way of proving a violation of the law.

In other words, he lost because the court applied the general rule of access narrowly, and the exception allowing secrecy broadly—precisely what Proposition 59 would reverse.

As for privacy, the constitution has never been interpreted to protect the abuse of official authority or the wasting of public resources by anyone, and Proposition 59 will not create a screen for anyone to use in hiding fraud, waste, or other serious misconduct.

On the contrary, Proposition 59 will add independent force to the state's laws requiring government transparency. It will create a window on how all public bodies and officials conduct the public's business, for well or ill, while sparing the dignity and reputations of ordinary people, public employees, and even high officials who have done nothing to merit public censure or concern.

MIKE MACHADO, *State Senator*

THOMAS W. NEWTON, *General Counsel*
*California Newspaper Publishers Association*

JOHN RUSSO, *City Attorney*
*City of Oakland*