April 22, 2024

TO: Members, Assembly Elections Committee

SUBJECT: AB 2654 (FONG) POLITICAL REFORM ACT OF 1974: NONDISCLOSURE AGREEMENTS
OPPOSE – AS AMENDED APRIL 18, 2024

The California Chamber of Commerce is **OPPOSED** to **AB 2654 (Fong)** because it broadly limits the use of "non-disclosure agreements" (NDAs) between private parties, which will limit the opportunity for analysis, negotiation, and compromise on controversial policy issues. Additionally, given the undefined terms and scope of **AB 2654**, it could impact existing statutory privileges and numerous relationships/business contracts within the policy and political arena. While we certainly support the need for transparency and oversight in governmental actions and legislation, we are opposed to **AB 2654** for the reasons set forth below.

California Recognizes the Need For Balancing Transparency and Confidentiality in Other Areas of Law, and Those Concerns Apply to the Legislative Process As Well.

California law recognizes the importance of fostering candid communications and protecting trade secrets, proprietary, and sensitive information in a number of different areas in the private sector. For example, California evidence law section 1152 exempts settlement offers between private litigants from being admissible to show liability. Federal Rule of Evidence section 408 reflects the same principle – in order to help opponents negotiate and resolve differences, parties must be sure that those discussions will not be used against them. California Evidence Code section 912 lists a number of different relationships in which privileged, confidential communications exist to allow candid communications. California protects trade secrets and proprietary information and allows employers to prohibit former employees from using such sensitive information in future employment.[1] Even in civil court proceedings, where the overriding policy is to have open courts accessible to the public, the judge holds *in camera* hearings to review and consider confidential, proprietary or sensitive information that should not be accessible to the public or media.[2]

For the same underlying reason that existing law protects disclosure of confidential information in these settings above, confidentiality clauses or agreements are utilized by private parties in the legislative process. Such agreements protect sensitive, proprietary information and encourage candid discussions amongst parties on controversial issues. These provisions do not thwart or interfere with an elected official's ability to debate and consider language in legislation. In fact, the entire legislative process is designed for that very purpose – to provide elected officials with an open forum to ask questions about provisions in existing legislation and propose amendments or changes, and for the public to review and comment before any final votes. We agree that elected officials and their staff should not utilize confidentiality clauses and/or non-disclosure agreements to conduct the work of the public. But private parties do not represent the public and their proprietary information is not and should not automatically be subject to public disclosure.

The Term "Nondisclosure Agreement" Is Not Defined and Could Broadly Impact Statutory Protected Communications as Well as Any Contract that Includes a Confidentiality Clause.

The term "nondisclosure agreement" is not defined in **AB 2654**, nor are there any recognized exceptions to the term. In California, there are several statutory and common law privileges that apply to preclude the disclosure of communications between two parties, most notably the attorney-client privilege. Given that

[1] *See* California Civil Code sections 3246.1-3246.3. See generally, *Morlife, Inc. v. Perry*, 56 Cal.App.4th 1514, 1523 (holding that even prior employees' memories of trade secrets were protected from disclosure under California's Uniform Trade Secrets Act).
[2] *See* California Civil Code section 3226.5.

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AB 2654 fails to define what constitutes a "nondisclosure agreement," it is unclear how this proposed code section would interact with these existing privileges.

As an example: given the significance of statutory drafting and its legal implications, attorneys are often involved in drafting and negotiating legislation – either directly or indirectly. Similarly, attorneys are also often involved to provide a legal analysis on the impact of legislation to a number of different organizations involved in the legislative process. Even the Legislature has their own legal counsel to advise on language and proposed legislation. If an attorney is requested to engage at the request of a lobbyist in any capacity during the legislative process, does **AB 2654** interfere with that privilege? If the attorney provides a written analysis of legislation or proposed language to include in legislation, is that work-product subject to disclosure pursuant to **AB 2654**? And if the intent of the author is to not impact the attorney-client privilege, then is **AB 2654** creating an uneven playing field for lobbyists who are also licensed attorneys and can claim a privilege versus other lobbyists who are not?

Similarly, if a contract between two parties includes a confidentiality provision to preclude either party from disclosing confidential information exchanged during their business relationship, is that considered a nondisclosure agreement? For example, if a lobbyist retains a public affairs firm to provide support on legislation and the contract between the lobbyist and public affairs firm includes a confidentiality clause, is that contract now prohibited because it "relates" to legislation? When a contract lobbyist is retained by a client and that agreement includes a confidentiality clause, is that clause now void because the lobbyist was a party to the contract and it "relates" to legislation? In the political arena, if an organization or even elected official hires a pollster, opposition research firm, or other business consultants for a political race and those contracts include confidentiality clauses, is that prohibited now under **AB 2654** if any prior legislation is highlighted or discussed in that race? There are a number of different scenarios in the policy and political world where two private parties enter into legal business contracts, and those contracts include a confidentiality provision while being "related" to legislation. Given that **AB 2654** fails to provide a clear definition of what is a nondisclosure agreement and what "relates to" actually means, we have significant concerns about the scope and application of this proposal.

Other Terms in AB 2654 Are Also Undefined and Ambiguous, Leading to Broad Application.

In addition to failing to define one of the most important terms in this bill – what qualifies as an NDA – the bill also fails to provide any definition of what it means to "draft, negotiate, discuss, or create" legislation. Lobbyists do not actually draft legislation; that is the role of Legislative Counsel, so it is unclear as to what is referenced by "drafting" legislation. "Discuss" – does that mean public discussions in committee hearings, or private conversations as well? And is the limitation on "discussing" legislation applicable only while the bill is still actively pending in the Legislature, or does this prohibition remain in place even months or years after a piece of legislation has failed passage or been signed into law? Defining these terms matters and is key to how broadly the proposed prohibition of **AB 2654** applies.

AB 2654 Unfairly and Arbitrarily Targets One Type of Private Individuals to Whom This Proposal Should Apply.

AB 2654 broadly applies to public officials and any staff of public officials. But, notably it unfairly targets only one type of private party: lobbyists. Lobbyists or anyone that signs an NDA at the direction of a lobbyist are subject to the prohibition under **AB 2654**. Numerous other individuals, participants, witnesses, internal government affairs staffers, officers, directors, employees, etc., engage in the legislative process. Yet, **AB 2654** focuses only on lobbyists. This is not only unfair but lacks any reasonable application or impact. For example, a non-registered, in-house government affairs person for an organization can still impose or request a nondisclosure agreement, but the lobbyist working for that organization cannot. This arbitrary limitation unnecessarily creates an unfair playing field amongst those involved in the policymaking process.

Existing Law Already Ensures Public Access to Legislation and Would Void Any NDAs that Contradicted Such Access.

California law *already ensures transparency* in the legislative process through both our Constitution and through various statutes. Most notably, Article 1, Section 3 of the Constitution provides that "[t]he people

have the right of access to information concerning the conduct of the people's business …" In addition, existing statutes already ensure that the public has access to documents involved in the legislative process and would likely void any NDA-based attempt to conceal the policymaking process from the public. Specifically, California's well-known Public Records Act[3] applies to all judicial and executive branch officers, and the Legislative Open Records Act[4] applies to legislative records. By way of example – these statutes already would cover any situation wherein a lobbyist and a governmental employee or officers were discussing legislation or amendments – and courts already apply them in this context.[5] For that reason, we do not see the legislative gap that **AB 2654** is attempting to fill.

While we believe in the need for transparency in State government, we do not see **AB 2654** as doing anything to further that cause and therefore **OPPOSE AB 2654 (Fong).**

Sincerely,

Ben Golombek
Executive Vice President and Chief of Staff for Policy
California Chamber of Commerce

cc: Legislative Affairs, Office of the Governor
Spencer Street, Office of Assemblymember Vince Fong
Ethan Jones, Assembly Elections Committee
Daryl Thomas, Assembly Republican Caucus

[3] *See* Government Code § 6250 et seq.
[4] *See* Government Code § 9070 et seq.
[5] *See generally Labor & Workforce Development Agency v. Superior Court* (App. 3 Dist. 2018) 227 Cal.Rptr.3d 744, review denied. (Reviewing the district court's grant of a request under the Public Records Act for records relating to communications between the California Labor and Workforce Development Agency and United Farm Workers of America, and holding such disclosure was not appropriate under the Public Records Act as it fell under the deliberative process and attorney work product exemptions).