

Open & Public III
A User's Guide to the Ralph M. Brown Act

Copyright © 2000 by the League of California Cities

“THE PEOPLE DO NOT YIELD THEIR SOVEREIGNTY”

In late 1951, San Francisco Chronicle reporter Mike Harris spent six weeks looking into the way local agencies conducted meetings. State law had long required that business be done in public, but Harris discovered secret meetings or caucuses were common. He wrote a 10-part series on “Your Secret Government” that ran in May and June of 1952.

Out of the series came a decision to push for a new state open meeting law. Harris and Richard (Bud) Carpenter, legal counsel for the League of California Cities, drafted a bill and Modesto Assemblyman Ralph M. Brown agreed to carry it. The bill passed the Legislature and was signed into law in 1953 by Governor Earl Warren.

The Ralph M. Brown Act (the “Brown Act”), as it is known, has evolved under a series of amendments and court decisions, and has been the model for other open meeting laws—such as the Bagley-Keene Act, enacted in 1967 to cover state agencies.

Ralph Brown served in the Assembly for 19 years starting in 1942, the last three years as its Speaker. He then became an appellate court justice. But, he is best known for the open meeting law, which carries his name.

The basic law

Two key parts of the Brown Act have not changed since its passage. One is the intent section with which it begins:

“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 of this State do not yield their sovereignty to the agencies which serve them. The people, in delegating authority, do not give their public servants their right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may retain control over the instruments they have created.”¹

Not all intent language in statutes has an impact on the judiciary. But the courts have leaned on the intent section of the Brown Act to narrowly construe exceptions to the law and liberally construe provisions, which further openness and access.²

That opening is the soul of the Brown Act. Its heart comes later, a section that declares:

“All meetings of the legislative body of a local agency shall be open and public, and all persons shall be permitted to attend any meeting of the legislative body of a local agency, except as otherwise provided in this chapter.”³

That one sentence is by far the most important of the entire Brown Act, and it is the basis for the next five chapters.

Change and expansion

Although these two key provisions have remained intact, very little else in the Brown Act has. Changes have been adopted in numerous sessions of the Legislature. Examples include requirements for agendas and public notice, creation of new exceptions, and addition of a mechanism to invalidate certain actions if the Brown Act has been violated.

Over the years, a number of appellate court decisions and Attorney General Opinions have interpreted key elements of the Brown Act, such as what constitutes a “meeting.” In 1994, many of these holdings were enacted into law. In addition, the 1994 changes extensively revised provisions about sessions that can be closed to the public.

The Brown Act now covers virtually every type of local government body, elected or appointed, decision-making or advisory, permanent or temporary. Even some types of private organizations are covered.

Similarly, meetings subject to the Brown Act are not limited to formal gatherings. They also include any communication or device by which a majority develops “a collective concurrence as to action to be taken.”

Limitations

Except for closed sessions, the Brown Act requires all aspects of the decision-making process by legislative bodies—including discussion, debate and acquisition of information—to be conducted in public.

But the law is limited to multi-member government bodies, and only they can violate its provisions. The Brown Act does not apply to individual decision-makers. It also exempts *ad hoc* advisory committees—as distinguished from standing committees—made up solely of less than a quorum of a legislative body. The law does not restrict local agency staff or employees except to the extent that they act as a conduit for collective action or discussion by the members.

The law on the one hand recognizes the need of individual legislators to meet and discuss matters with their constituents. On the other hand, it requires—with certain specific exceptions to protect the community and preserve individual rights—that the decision-making process be public. Sometimes the boundary between the two is not easy to draw.

The Brown Act allows a legislative body to adopt reasonable regulations on public testimony and the conduct of public meetings, including measures to address disruptive conduct and irrelevant speech. Otherwise, individual citizens, lobbyists, and members of the news media possess the right to attend, broadcast and participate in public meetings.

Controversy

Not surprisingly, the Brown Act has been a source of confusion and controversy since its inception. News media members often argue the law is toothless, pointing out that there has never been a single criminal conviction for a violation. They often suspect that the closed sessions are being misused.

Public officials,⁴ on the other hand, complain that the Brown Act makes it difficult to respond to constituents, and requires public discussions of items better discussed privately—such as why a particular person should not be appointed to a board or commission. Many elected officials find the Brown Act unnatural. The techniques that serve so well in business—the working lunch, the private lobbying and compromises, the slow evolution of a project or decision—are no longer possible. Closed meetings can be more efficient; they eliminate grandstanding and promote candor.

As a matter of public policy, California has concluded more is to be gained than lost by the public meeting process. Government behind closed doors may well be efficient and business-like. But invisible government is often unresponsive. It is invariably distrusted.

The Brown Act has without question had a major impact on the way public bodies conduct business. Closed door meetings are now the exception.

Notes

1. California Government Code section 54950
2. In reviewing these endnotes, keep in mind that the Brown Act itself has the greatest force and effect. Next in order are appellate court decisions, which interpret the Brown Act and if published serve as precedent for trial courts. Published opinions of the Attorney General do not have the force of law but are persuasive to the courts; letter opinions of the Attorney General are usually narrower in scope and less influential.
3. California Government Code section 54953(a)
4. As used in this publication, "public official" includes both elected and appointed officials.

“ALL MEETINGS OF . . .”

For most of its history, the Brown Act referred to various kinds of meetings but deferred to the courts and the California Attorney General to determine whether a particular gathering was a “meeting.” That ended in 1994, when the term “meeting” was first defined in the Brown Act. There was no change in the clear distinction between a legislative body member’s contacts with individuals on the one hand and collective gatherings of a legislative body majority on the other hand. With few exceptions, the Brown Act applies only to collective gatherings.

Specifically, the Brown Act defines a meeting as:

“. . . any congregation of a majority of the members of a legislative body at the same time and place to hear, discuss, or deliberate upon any item that is within the subject matter jurisdiction of the legislative body or the local agency to which it pertains.”¹

Thus, the term “meeting” is not limited to gatherings at which action is taken but also includes deliberative gatherings as well.

Except for teleconferencing discussed below, the Brown Act specifically prohibits “any use of direct communication, personal intermediaries, or technological devices that is employed by a majority of the members of the legislative body to develop a collective concurrence as to action to be taken on an item by the members of the legislative body.”²

After the above very inclusive language, the Brown Act creates six exceptions:³

◆ **INDIVIDUAL CONTACTS**

The first exception is individual contacts between a member of the legislative body and any other person. The Brown Act does not limit a legislative body member acting on his or her own. This exception recognizes the right to confer with constituents, advocates, consultants, news reporters, local agency staff or a colleague.

Individual contacts, however, cannot be used to do by stages what cannot be done in one step. For example, a series of individual contacts that leads to a “collective concurrence” is prohibited. Such serial meetings are discussed below.

◆ **CONFERENCES**

The second exception allows a legislative body majority to attend a conference or similar gathering open to the public that addresses issues of general interest to the public or to public agencies of the type represented by the legislative body.

Among other things, this exception permits legislative body members to attend annual association conferences of city, county, school, community college and other local agency officials, so long as those meetings are open to the public. A majority of members, however, cannot discuss among themselves, other than as part of the scheduled program, business of a specific nature that is within their local agency’s subject matter jurisdiction.

◆ **COMMUNITY MEETINGS**

The third exception allows a legislative body majority to attend an open and publicized meeting organized by another organization to address a topic of local community concern. Again, a majority cannot discuss among themselves, other than as part of the scheduled program, business of a specific nature that is within their local agency’s subject matter jurisdiction. Under this exception, a legislative body majority may attend a local service club meeting or a local candidates night if the meetings are open to the public.

“I see we have four distinguished members of the city council at our meeting tonight,” said the chair of the Environmental Action Coalition.

“I wonder if they have anything to say about the controversy over enacting a slow growth ordinance?”

The Brown Act permits a majority of a legislative body to attend and speak at an open and publicized meeting conducted by another organization. The Brown Act may nevertheless be violated if the majority engages in a collective deliberation process outside a scheduled meeting of the body. In the above example, a discussion by the majority encouraging citizen input on the issues would be permissible. A majority discussion about each member’s support of or opposition to such an ordinance would violate the Brown Act.

◆ OTHER LEGISLATIVE BODIES

In 1997 the fourth exception was expanded to allow a legislative body majority to attend an open and publicized meeting of: (1) another body of the local agency and (2) a legislative body of another local agency.⁴ Again, the majority cannot discuss among themselves, other than as part of the scheduled meeting, business of a specific nature that is within their local agency's subject matter jurisdiction. This exception allows, for example, a city council majority to attend a controversial meeting of the planning commission.

Nothing in the Brown Act prevents the majority of a legislative body from sitting together at such a meeting. They may choose not to, however, to preclude any possibility of improperly discussing local agency business.

In response to a 1996 opinion of the Attorney General, the Legislature created a fifth exception. That exception authorizes the attendance of a majority at an open and noticed meeting of a standing committee of the legislative body provided that the legislative body members who are not members of the standing committee attend only as observers,⁵ meaning that they cannot speak or otherwise participate in the meeting.

◆ SOCIAL OR CEREMONIAL EVENTS

Finally, an exception permits a legislative body majority to attend a purely social or ceremonial occasion. Once again, a majority cannot discuss business among themselves of a specific nature that is within the subject matter jurisdiction of the local agency.

Nothing in the Brown Act prevents a majority of members from attending the same football game, party, wedding, funeral, reception or farewell. The test is not whether a majority attends the function, but whether business of a specific nature within the subject matter jurisdiction of the local agency is discussed. So long as no local agency business is discussed, there is no violation of the Brown Act.

Collective briefings

None of these six exceptions permits a majority of a legislative body to meet together with staff in advance of a meeting for a collective briefing. Any such briefings involving a majority of the body in the same place and time must be open to the public and satisfy the notice and agenda requirements of meetings.

Retreats or workshops of legislative bodies

Formerly, there was disagreement among local agency attorneys whether the Brown Act applied to retreats or workshops of legislative bodies. The consensus today is that such gatherings by a majority of legislative body members are covered. This is the case whether the retreat or workshop focuses on long-range agency planning, discussion of critical local issues or on team building and group dynamics.⁶

Serial meetings

One of the most frequently asked questions about the Brown Act involves serial meetings. Such meetings at any one time involve only a portion of a legislative body, but eventually involve a majority.

There may be nothing improper about the substance of a serial meeting. The problem is the process, which deprives the public of an opportunity for meaningful participation in legislative body decision making.

The serial meeting may be a daisy-chain in which Member A contacts Member B, Member B contacts Member C, Member C contacts Member D and so on, until a quorum and collective concurrence has been established. A hub-and-spoke process in which, for example, a local agency attorney (the hub) telephones members of a redevelopment agency (the spokes) one by one for a decision on a proposed action,⁷ or in which a chief executive briefs board members prior to a formal meeting and, in the process, reveals information about the members respective views, also violates the Brown Act.

A member has the right, if not the duty, to meet with constituents to address their grievances. That member also has the right to confer with a colleague about local agency business. But if in that process a "collective concurrence as to action to be taken" is reached among a majority, the Brown Act has been violated. In one case, a violation occurred when a quorum of a city council directed staff by letter on an eminent domain action.⁸

On the other hand, a unilateral written communication to the legislative body, such as an informational or advisory memorandum, does not violate the Brown Act.⁹ Such a memo, however, may be a public record.¹⁰

The phone call was from a lobbyist. "Say, I need your vote for that project in the south area. How about it?"

"Well, I dunno," replied Board Member Adams. "That's kind of a sticky proposition. You sure you need my vote?"

"Well, I've got Baker and Charles lined up and another vote leaning. With you I'd be over the top . . ."

Moments later, the phone rings again. "Hey, I've been hearing some rumbles on that south area project," said the newspaper reporter. "I'm counting noses. How are you voting on it?"

Neither the lobbyist nor the reporter has done anything wrong. But the board member may have violated the Brown Act by hearing about the positions of other board members. The prudent course is to try to stop lobbyists, staff and news media from revealing such positions of others.

The mayor sat down across from the city manager. "From now on," he declared, "I want you to provide individual briefings on upcoming agenda items.

"Some of this material is very technical, and the council members don't want to sound like idiots asking about it in public. Besides that, briefings will speed up the meeting."

The Brown Act may or may not prohibit such briefings. The Attorney General concludes that staff briefings are per se illegal.¹¹ That point of view notwithstanding, the consensus among local agency attorneys is that staff briefings of legislative body members are allowed if staff is not used as a conduit for achieving collective concurrence, and if during the briefing staff does not disclose the views and positions of other members. Members should be cautious about discussions about local agency business with developers, advocates, or opponents and proponents on issues if such discussions could achieve a collective concurrence.

"Thanks for the information," said Council Member Smith. "These zoning changes can be tricky, and now I think I'm better equipped to make the right decision."

"Glad to be of assistance," replied the planning director. "Any idea what the other council members think of the problem?"

The planning director should not ask, and the member should not answer. A one-on-one meeting that involves a member of a legislative body takes a step toward collective concurrence if either person reveals or discusses the views of other members.

INFORMAL GATHERINGS

Often members are tempted to mix business with pleasure—for example, by holding a post meeting gathering. Informal gatherings at which local agency business is discussed or transacted are meetings under the Brown Act.¹² A luncheon gathering in a crowded dining room violates the Brown Act if the public does not have an adequate opportunity to hear or participate in the deliberations of members.

Thursday, 11:30 a.m. As they did every week, the board of directors of Dry Gulch Irrigation District trooped into Pop's Donut Shoppe for an hour of talk and fellowship. They sat at the corner window, fronting on Main and Broadway, to show they had nothing to hide. Whenever he could, the managing editor of the weekly newspaper down the street hurried over to join the board . . .

A gathering like this would not violate the Brown Act if board members scrupulously avoided talking about irrigation district issues. But it is the kind of situation that should be avoided. The public is unlikely to believe the board members could meet regularly without discussing public business. A newspaper executive's presence in no way lessens the potential for a violation of the Brown Act.

Technological conferencing

The Brown Act has been amended in 1994, 1997 and 1998 to allow cities to use information age technologies to conduct meetings.¹³

The Brown Act now specifically allows a legislative body to use any type of teleconferencing to receive public comment, testimony, to deliberate or conduct a closed session.¹⁴

"Teleconference" is defined as "a meeting of a legislative body, the members of which are in different locations, connected by electronic means, through either audio or video, or both."¹⁵ In addition to the specific requirements relating to teleconferencing, the meeting must comply with all provisions of the Brown Act otherwise applicable. The Brown Act contains the following specific requirements:¹⁶

- Teleconferencing may be used for all purposes during any meeting.
- At least a quorum of the legislative body shall participate from locations within the local agency's jurisdiction.
- Additional teleconference locations may be made available for the public.

- Each teleconference location must be identified in the notice and agenda of the meeting.
- Agendas must be posted at each teleconference location.
- Each teleconference location must be accessible to the public.
- The agenda must provide the opportunity for the public to address the legislative body directly at each teleconference location.
- All votes must be by roll call.

The use of teleconferencing to conduct a legislative body meeting presents a variety of new issues beyond the scope of this booklet to discuss in detail. Therefore, before teleconferencing a meeting, legal counsel for the local agency should be consulted.

Location

The Brown Act generally requires all regular and special meetings of a legislative body, including retreats and workshops, to be held within the boundaries of the territory over which the local agency exercises jurisdiction.¹⁷

An open and publicized meeting of a legislative body may be held outside of agency boundaries if the purpose of the meeting is to:

- ◆ Comply with state or federal law or a court order, or for a judicial conference or administrative proceeding in which the local agency is a party.
- ◆ Inspect real or personal property, which cannot be conveniently brought into the local agency's territory, provided the meeting is limited to items relating to that real or personal property.
- ◆ Participate in multiagency meetings or discussions, however, such meetings must be held within the boundaries of one of the participating agencies, and all involved agencies must give proper notice.
- ◆ Meet in the closest meeting facility if the local agency has no meeting facility within its boundaries, or at its principal office if that office is located outside the territory over which the agency has jurisdiction.
- ◆ Meet with elected or appointed federal or California officials when a local meeting would be impractical, solely to discuss a legislative or regulatory issue affecting the local agency and over which the federal or state officials have jurisdiction.
- ◆ Meet in or nearby a facility owned by the agency, provided that the topic of the meeting is limited to items directly related to the facility.
- ◆ Visit the office of its legal counsel for a closed session on pending litigation, when to do so would reduce legal fees or costs.¹⁸

In addition, the governing board of a school or community college district may hold meetings outside of its boundaries to attend a conference on nonadversarial collective bargaining techniques, interview candidates for school district superintendent, or interview a potential employee from another district.¹⁹ A board may also interview members of the public residing in another district if the board is considering employing that district's superintendent.

Similarly, meetings of a joint powers authority can occur within the territory of at least one of its member agencies, and a joint powers authority with members throughout the state may meet anywhere in the state.²⁰

Finally, if a fire, flood, earthquake or other emergency makes the usual meeting place unsafe, the presiding officer can designate another meeting place for the duration of the emergency. News media which have requested notice of meetings must be notified of the designation by the most rapid means of communication available.²¹

Notes:

- | | |
|--|--|
| 1. California Government Code section 54952.2(a) | 16. California Government Code section 54953 |
| 2. California Government Code section 54952.2(b) | 17. California Government Code section 54954(h) |
| 3. California Government Code section 54952.2(c) | 18. California Government Code section 54954(b)(1)-(7) |
| 4. California Government Code section 54952.2(c)(4) | 19. California Government Code section 54954(e) |
| 5. California Government Code section 54952.2(c)(6) | 20. California Government Code section 54954(d) |
| 6. "The Brown Act" California Attorney General, 1994, p. 9 | 21. California Government Code section 54954(e) |
| 7. <i>Stockton Newspaper Inc. v. Redevelopment Agency</i> (1985) 171 Cal. App. 3d 95, 214 Cal. Rptr. 561 | |
| 8. <i>Common Cause v. Stirling</i> (1983) 147 Cal. App. 3d 518, 195 Cal. Rptr. 163 | |
| 9. <i>Roberts v. City of Palmdale</i> (1993) 5 Cal. 4th 363, 20 Cal. Rptr. 2d 330 | |
| 10. California Government Code section 54957.5(a) | |
| 11. "The Brown Act" California Attorney General, 1994, p.12 | |
| 12. California Government Code section 54952.2; 43 Op. Cal. Att'y Gen. 36 (1964) | |
| 13. California Government Code section 54953(b) | |
| 14. California Government Code section 54953(b)(1) | |
| 15. California Government Code section 54953(b)(4) | |

“... THE LEGISLATIVE BODY OF A LOCAL AGENCY ...”

What is the “. . . legislative body of a local agency . . . ?”

The Brown Act defines “legislative body” broadly¹ to include:

- ◆ The **governing body** of a local agency or any other local body created by state or federal statute, such as an air pollution control district or housing authority.²
- ◆ **Advisory committees**, such planning commissions and other subsidiary bodies. Also covered are citizen volunteer groups, task forces, and “blue ribbon committees” created by formal action of the governing body. However, there is an exception for advisory committees consisting solely of less than a quorum of the legislative body (see discussion under “What is not a ‘legislative body’ for purposes of the Brown Act?” below).³

A subset of the advisory committee is the “unitary” body. The less-than-a-quorum exception for advisory committees can be used by two or more bodies to create an entirely separate advisory group—which may or may not be subject to the Brown Act.

In one case, a city council created a committee of two members of the city council and two members of the city planning commission to review qualifications of prospective planning commissioners and make recommendations to the council. The court held that their joint mission made them a “unitary body” subject to the Brown Act. Had the two committees remained separate, and met only to exchange information, they would have been exempt from the Brown Act.⁴ (See discussion of *ad hoc* committees below.)

The prudent assumption is that an advisory committee or task force is subject to the Brown Act. Even if one clearly is not, it may want to comply with the Brown Act. Public meetings may reduce the possibility of misunderstandings and controversy.

- ◆ **Standing committees**, which have either: 1) a continuing subject matter jurisdiction or 2) a meeting fixed by charter, ordinance, resolution, or other formal action of the legislative body.⁵ Standing committees comprised of less than a quorum of the governing body are covered by the Brown Act. For example, if a governing body creates long-term committees on budget and finance, or public safety, those are standing committees subject to the Brown Act.
- ◆ Any **private organization** created by the elected legislative body in order to exercise authority that may lawfully be delegated by the elected governing body to a private corporation or entity is covered.⁶ This includes nonprofit corporations created by local agencies. However, if a local agency **contracts** with a private firm for a service (for example, data processing or providing food services), the private firm is not covered by the Brown Act. Other private organizations receiving public funds are subject to the Brown Act if two elements are present: (1) receipt of public money from a local agency and (2) the presence on the organization's governing body of a member of the legislative body appointed as a full voting member by the local agency.⁷ However, if a member of a legislative body sits on the board of a private organization as a private citizen rather than in his or her official capacity, the board will not be subject to the Brown Act.⁸

Suppose a chamber of commerce is funded in part by a city and the mayor sits on the chamber's board of directors. If the mayor was appointed to that position by the city council, the chamber is subject to the Brown Act and must hold open and public meetings. If the chamber independently appoints the mayor to its governing board, or if the mayor attends chamber meetings only in an advisory capacity, the chamber is probably not subject to the Brown Act.

Another is an auxiliary organization created to run a community college bookstore or cafeteria. (However, if the college **contracts** with a private firm to operate its bookstore or provide food services, the firm is not covered by the Brown Act.)

- ◆ **Special district hospital boards.** A lessee assuming “material authority” over a special district hospital is not covered by the Brown Act.⁹ However, this provision only applies to leases created after January 1, 1994.
- ◆ **Newly elected members of legislative bodies.**

In 1994, the Brown Act was extended to cover newly-elected members of legislative bodies who have not yet assumed office.¹⁰ This amendment requires newly elected individuals to conform their conduct to the requirements of the Brown Act. For purposes of enforcement, these persons are to be treated as if already in office. Thus, meetings between incumbents and newly-elected members could constitute a majority subject to the Brown Act. Even a meeting between two outgoing members and their successors would violate the law.

What is not a "legislative body" for purposes of the Brown Act?

- ◆ An *ad hoc*, advisory committee composed solely of less than a quorum of the legislative body is exempted from the Brown Act.¹¹ The exception covers advisory committees that are *ad hoc* in nature — meaning that they serve a limited or single purpose, are not perpetual, and are to be dissolved once their specific task is completed. An example would be an advisory committee composed of less than a quorum created to interview candidates for a vacant position.

It can be difficult to determine whether a committee falls into the category of a standing committee or an exempt ad hoc committee. Suppose a subcommittee is created to explore the renewal of a franchise or a topic of similarly limited scope and duration? Is it a standing committee or an exempt ad hoc committee? The answer may depend on factors such as how meeting schedules are determined, the scope of the committee's charge, or whether the group persists long enough to have "continuing jurisdiction."

- ◆ Committees not created by formal action of the legislative body are not covered. For example, groups advisory to a single decision-maker appointed by a city manager or single city council member or otherwise not created by formal action of the legislative body are not covered by the Brown Act.¹² It is thus possible that a committee advising to a county superintendent of schools would not be covered by the Brown Act. However, the same committee, if created by formal action of the county board of education, would be covered.¹³
- ◆ Individual decision makers are not covered by the Brown Act. For example, an employee's administrative hearing with a manager regarding discipline is not a meeting.¹⁴
- ◆ County central committees of political parties are also not Brown Act bodies.¹⁵

Notes

1. California Government Code sections 54951 and 54952; *Torres v. Board of Commissioners* (1979) 89 Cal. App. 3d 545, 152 Cal. Rptr. 506
2. California Government Code section 54952(a)
3. California Government Code section 54952(b); 79 Op. Cal. Att'y Gen. 69 (1996)
4. *Joiner v. City of Sebastopol* (1981) 125 Cal. App. 3d 799, 178 Cal. Rptr. 299
5. California Government Code section 54952(b)
6. California Government Code section 54952(c)(1)(A)
7. California Government Code section 54952(c)(1)(B); see also *International Longshoremen's and Warehousemen's Union v. Los Angeles Export Terminal* (1999) 69 Cal. App. 4th 287, 81 Cal. Rptr. 2d 456
8. 67 Op. Cal. Att'y Gen. 487 (1984)
9. California Government Code section 54952(d)
10. California Government Code section 54952.1
11. California Government Code section 54952(b); see also *Freedom Newspapers, Inc. v. Orange County Employees Retirement System Board of Directors* (1993) 6 Cal. 4th 821, 25 Cal. Rptr. 2d 148
12. 56 Op. Cal. Att'y Gen. 14 (1973)
13. 56 Op. Cal. Att'y Gen. 14 (1973)
14. *Wilson v. San Francisco Municipal Railway* (1973) 29 Cal. App. 3d 870, 105 Cal. Rptr. 855
15. 59 Op. Cal. Att'y Gen. 162 (1976)

“ . . . SHALL BE OPEN AND PUBLIC . . . ”

There are two essentials for an open and public meeting. One is effective notice; whether the meeting is open or not is academic if no one knows about it. The other is an agenda which adequately describes the items to be considered.

Every meeting of the legislative body of a local agency—including advisory committees, commissions or boards, as well as standing committees of legislative bodies—must have public notice and a written agenda. The specifics vary by type of meeting.

Regular meetings

Legislative bodies must set the time and place for their regular meetings by ordinance, resolution, bylaws or similar formal rule for conducting business. Advisory committees or standing committees may but need not require regular meetings by their own rules. Meetings of these latter two categories of bodies for which an agenda is posted 72 hours in advance are considered a regular meetings.¹

An agenda must be posted at least 72 hours before a regular meeting in a location “freely accessible to members of the public.” It shall state the meeting time and place and must contain “a brief general description of each item of business to be transacted or discussed at the meeting, including items to be discussed in closed session.”²

Brief descriptions of agenda items were first required in 1987. A letter placed in the *Senate Daily Journal* explained that the intent was for agendas to “contain sufficient descriptions . . . to enable members of the general public to determine the general nature of subject matter of each agenda item, so that they may seek further information on items of interest. It is not the purpose of this bill to require agendas to contain the degree of information required to satisfy constitutional due process requirements.” There remained some disagreement over the detail necessary in an agenda. The 1994 amendments revised the section to specify that a brief description “generally need not exceed 20 words.”³

With three exceptions (see the end of this chapter), no action or discussion can take place on an item not on the posted agenda.⁴ However, there can be brief responses to questions, or some other limited, routine comments, also as discussed at the end of this chapter.

Special meetings

The presiding officer or a majority of a legislative body, including an advisory or standing committee, may call a special meeting at any time. For the majority to act, there is implied authority for them to communicate to determine if they want to call a special meeting.

Written notice must be sent, and received by, each member of the legislative body (unless waived in writing by that member) and to each local newspaper of general circulation, and radio or television station which has requested such notice in writing.⁵

The notice must state the time and place of the meeting, and all business to be transacted or discussed. It must be posted at least 24 hours prior to the special meeting in a site freely accessible to the public. Media notice must be delivered by personal delivery or any other means which ensures receipt, at least 24 hours before the time of the meeting. The body cannot consider business not in the notice.⁶

Adjourned meetings

A regular or special meeting can be adjourned and re-adjourned to a time and place specified in the order of adjournment. If no time is stated, the meeting is continued to the hour for regular meetings. Less than a quorum may so adjourn a meeting; and if no member of the legislative body is present, the clerk or secretary may adjourn the meeting.⁷ If a meeting is adjourned for less than five calendar days, no new agenda need be posted so long as a new item of business is not introduced.⁸ A copy of the order of adjournment must be posted within 24 hours after the adjournment, at or near the door of the place where the meeting was held.⁹

Closed sessions

Part or all of a regular or special meeting, or one which has been adjourned, may be closed to the public under special conditions (discussed in Chapter 6). But notice is still required, even if no action is contemplated.¹⁰

The Brown Act provides a series of “safe harbor” examples—so called because descriptions that substantially comply with them cannot be challenged as not accurately describing the action. (These examples appear in Section 54954.5 in the text at the end of this guide.)

The legislative body in a closed session can consider only matters covered in its agenda descriptions. After closed session, the legislative body must reconvene to open session and may be required to disclose actions taken. The requirement for a public report of action varies depending largely on whether the action of the agency renders the matter final or whether action of a third party is necessary. When announcements are required, they may be made at the location of the closed session announced in the agenda, or where the agency holds its open sessions, as long as the public is allowed to be present.¹¹

Continued hearings

A hearing can be continued to a subsequent meeting. The process is the same as for continuing adjourned meetings, except that if the hearing is continued to a time less than 24 hours away, a copy of the order or notice of continuance must be posted immediately following the meeting.¹²

Emergency meetings

An agency can hold an emergency meeting when prompt action is needed due to the actual or threatened disruption of public facilities. An “emergency situation” exists if the legislative body determines a work stoppage, crippling disaster, or other activity severely impairs public health, safety or both.¹³

The special meeting provisions apply to emergency meetings, except for the 24-hour notice. News media which have requested written notice of special meetings must be notified by telephone at least one hour in advance of an emergency meeting, and all telephone numbers provided in that written request must be tried. If telephones are not working, the notice requirements are deemed waived. However the news media must be notified as soon as possible of the meeting and any action taken.

The legislative body may not meet in closed session during emergency meetings.

Minutes of emergency meetings, a list of persons notified or attempted to be notified, a copy of the roll call vote, and any actions taken must be posted for a minimum of 10 days in a public place as soon after the meeting as possible.¹⁴

It behooves the news media to make sure written requests are on file for notification of special or emergency meetings. The written requests should also be periodically renewed—especially if phone numbers or addresses have been changed. Absent such a request, a local agency has no legal obligation to notify news media of special or emergency meetings—although notification may be advisable in any event to avoid controversies.

Mailed agenda upon written request

The legislative body, or its designee, shall mail a copy of the agenda or copies of all the documents in the agenda packet, to any person who has filed a written request for such materials. The mailed copies of the agenda, or agenda packets, shall be mailed at the time the agenda is posted.

A request for notice is valid for one calendar year and renewal requests must be filed January 1 of each year. The legislative body may establish a fee to recover the cost of providing the service. Failure of the requesting person to receive the agenda does not constitute grounds for invalidation of actions taken at the meeting.¹⁵

Educational agency meetings

The Education Code contains some special agenda and special meeting provisions,¹⁶ however, they are generally consistent with the Brown Act. An item is apparently void if not posted.¹⁷ A school district must also adopt regulations to make sure the public can place matters affecting district business on meeting agendas, and to address the board on those items.¹⁸

Notice requirements for tax or assessment meetings and hearings

The Brown Act contains specific procedures a city, county, special district or joint powers authority must take before adopting any new or increased general tax or assessment.¹⁹

At least one public meeting must be held to allow public testimony on the tax or assessment. In addition, there must also be at least 45 days’ notice of a public hearing at which public testimony may be given before the legislative body

proposes to act on the tax or assessment. The agency may recover the reasonable costs of the public meetings, hearings, and notice.²⁰ The Brown Act exempts certain fees, standby or availability charges, recurring assessments, and new or increased assessments that are subject to the notice and hearing requirements of articles XIII C or XIII D of the Constitution,²¹ which was added by Proposition 218 in 1996.

Non-agenda items

The Brown Act generally prohibits any action or discussion of items not on the posted agenda. However, there are three specific situations in which a legislative body can act on an item not on the agenda.²²

- ◆ When a majority decides there is an “emergency situation” (as defined for emergency meetings).
- ◆ When two-thirds of the members present (or all members if less than two-thirds are present) determine there is a need for immediate action and the need to take action “came to the attention of the local agency subsequent to the agenda being posted.”
- ◆ When an item appeared on the agenda of, and was continued from, a meeting held not more than five days earlier.

As seen in the above-described instances, the exceptions are narrow. The first two require a specific determination by the legislative body. That determination can be challenged in court, and if unsubstantiated can lead to invalidation of an action.

The second exception requires a degree of urgency. Further, an item cannot be considered under this provision if the legislative body or the staff knew about the need to take immediate action before the agenda was posted. A “new” need does not arise because staff forgot to put an item on the agenda, or because an applicant missed a deadline.

While the Brown Act does not allow discussion or action on items not on the agenda, it does allow members of the legislative body, or its staff, to “briefly respond” to comments or questions from members of the public, provide a reference to staff or other resources for factual information, or direct staff to place the issue on a future agenda. In addition, even without a comment from the public, a legislative body member or a staff member may ask for information, request a report back or to place a matter of business on the agenda for a subsequent meeting (subject to its own rules or procedures), ask a question for clarification, make a brief announcement, or briefly report on his or her own activities.²³ However, caution should be used to avoid any discussion or action on such items.

“I’d like a two-thirds vote of the board, so we can go ahead and act on phase two of the East Area Project,” said chairman Jones.

“It’s not on the agenda. But we learned two days ago that we’re ahead of schedule—believe it or not—and I’d like to keep it that way. Do I hear a motion?”

The desire to stay ahead of schedule generally would not satisfy “a need for immediate action.” Too casual an action could invite a court challenge by a disgruntled citizen. If possible, the prudent course is to place an item on the agenda for the next meeting and not risk invalidation.

“We learned this morning of an opportunity for a state grant,” said the chief engineer at the regular board meeting, “but our application has to be submitted in two days. We’d like the board to give us the go ahead tonight, even though it’s not on the agenda.”

A legitimate immediate need can be acted upon even though not on the posted agenda by following a two step process:

- *First, make the finding that there is an immediate need to take action that arose since the posting of the agenda and the matter is then “placed on the agenda.”*
- *Second, discuss and act on the item.*

Notes

- | | |
|---|--|
| 1. California Government Code section 54954(a) | 14. California Government Code section 54956.5 |
| 2. California Government Code section 54954.2(a) | 15. California Government Code section 54954.1 |
| 3. California Government Code section 54954.2(a) | 16. California Education Code section 35144 and 35145 |
| 4. California Government Code section 54954.2(a) | 17. <i>Carlson v. Paradise Unified School District</i> (1971) 18 Cal. App. 3d 196, 95 Cal. Rptr. 650 |
| 5. California Government Code section 54956 | 18. California Education Code section 35145.5 |
| 6. California Government Code section 54956 | 19. California Government Code section 54954.6 |
| 7. California Government Code section 54955 | 20. California Government Code section 54954.6(g) |
| 8. California Government Code section 54954.2(h)(3) | 21. California Government Code section 54954.6(a)(1) |
| 9. California Government Code section 54955 | 22. California Government Code section 54954.2(h) |
| 10. California Government Code section 54957.7(a) | 23. California Government Code section 54954.2(a) |
| 11. California Government Code section 55957.7(b) and (c) | |
| 12. California Government Code section 54955.1 | |
| 13. California Government Code section 54956.5 | |

“ . . . ALL PERSONS SHALL BE PERMITTED TO ATTEND . . . ”

A number of the Brown Act's provisions protect the public's right to attend and participate in meetings.

Members of the public cannot be required to register their names, provide other information, complete a questionnaire, or otherwise “fulfill any condition precedent” to attending a meeting. Any attendance list, questionnaire or other document circulated at a meeting must clearly state that its completion is voluntary, and that all persons may attend whether or not they fill it out.¹

No meeting or any other function can be held in a facility that prohibits attendance based on race, religious creed, color, national origin, ancestry or sex, or which is inaccessible to the disabled. Nor can a meeting be held where the public must make a payment or purchase in order to be present.² (This does not mean, however, that the public is entitled to free entry to a conference attended by a majority of the legislative body.³)

Action by secret ballot, whether preliminary or final, is flatly prohibited.⁴

There can be no “semi-closed” meetings, which some members of the public are permitted to attend as spectators while others are not; meetings are either open or closed.⁵

The legislative body may remove persons from a meeting who willfully interrupt proceedings. If order still cannot be restored, the meeting room may be cleared. Members of the news media who have not participated in the disturbance must be allowed to continue to attend the meeting. The legislative body may establish a procedure to re-admit an individual or individuals not responsible for the disturbance.⁶

Finally, no notice, agenda, announcement or report required by the Brown Act need identify a victim of sexual misconduct or child abuse, unless the identity of the person has been publicly disclosed.⁷

“Are there any comments from the public?” asked the Mayor during the city council meeting.

A man stepped forward from the audience, and the Mayor continued, “Please give us your name and address for the record.”

“I don't have to, and I'd rather not,” came the reply.

“You don't have to give us your name to attend the meeting,” said the Mayor, “but you do if you want to testify.”

It is unclear whether members of the public can be required to provide their names, addresses or other information as a condition to participating in (as opposed to attending) a meeting. If such information is relevant and necessary to the subject matter of a public hearing or evidentiary proceeding, it probably can be required. On the other hand, it seems less likely that such information can be required as a prerequisite to addressing the legislative body during oral communication on general matters within the subject matter jurisdiction of the agency.⁸

Records and recordings

The public has the right to review agendas and other writings distributed to a majority of the legislative body. Except for privileged documents, those materials are public records and must be made available.⁹ A fee or deposit may be charged for a copy of a public record.¹⁰

To ensure action is not taken on documents not available for public review, writings must be made public:

- ◆ At the meeting if prepared by the local agency or a member of its legislative body, or
- ◆ After the meeting if prepared by some other person.

Any tape or film record of an open and public meeting made for whatever purpose by or at the direction of the local agency is also subject to the Public Records Act; however, it may be erased or destroyed 30 days after the taping or recording. Any inspection of a video or tape recording is to be provided without charge on a video or tape player made available by the local agency.¹¹ The agency may impose its ordinary charge for copies.¹²

In addition, the public is specifically allowed to use audio or video tape recorders or still or motion picture cameras at a meeting, absent a reasonable finding by the legislative body that recorders or cameras would persistently disrupt proceedings.¹³

A local agency cannot prohibit or restrict the public broadcast of its open and public meetings without reasonable finding that the noise, illumination or obstruction of view will be a "persistent" disruption.¹⁴

Finally, governing bodies can go beyond these minimal standards to require greater access to their meetings and to those of their appointed bodies.¹⁵

The public's place on the agenda

Every agenda for a regular meeting must allow members of the public to speak on any item of interest, so long as the item is within the subject matter jurisdiction of the legislative body. Further, the public must be allowed to speak on a specific item of business before or during the legislative body's consideration of it.¹⁶

Moreover, the legislative body cannot prohibit public criticism of policies, procedures, programs, or services of the agency or the acts or omissions of the legislative body itself. But, the Brown Act provides no immunity for defamatory statements.¹⁷

The legislative body may adopt reasonable regulations, including time limits, on public comments.¹⁸ Such regulations should be enforced fairly and without regard to speakers' viewpoints.

The public need not be given an opportunity to speak on an item that has already been considered by a committee made up exclusively of members of the legislative body at a public meeting, if all interested members of the public had the opportunity to speak on the item before or during its consideration, and if the item has not been substantially changed.

Notices and agendas for special meetings must also give members of the public the opportunity to speak before or during consideration of an item but need not allow members of the public an opportunity to speak on nonagendized items.¹⁹

Reactive discussion

The public can talk about anything, but the legislative body generally cannot act on or discuss an item not on the agenda. What happens when a member of the public raises a subject not on the agenda?

The Brown Act specifically allows members of the legislative body or its staff to "briefly respond" to comments or questions from members of the public.²⁰ Other brief or routine comments may also be made, as mentioned at the end of the previous chapter.

Notes

1. California Government Code section 54953.3
2. California Government Code section 54961(a)
3. California Government Code section 54952.2(c)(2)
4. California Government Code section 54953(c)
5. 46 Op. Cal. Att'y Gen. 34 (1965)
6. California Government Code section 54957.9
7. California Government Code section 54961(b)
8. California Government Code section 54954.3(b)
9. California Government Code section 54957.5
10. California Government Code section 54957.5
11. California Government Code section 54953.5(b)
12. California Government Code section 54957.5(c)
13. California Government Code section 54953.5(a)
14. California Government Code section 54953.6
15. California Government Code section 54953.7
16. California Government Code section 54954.3(a)
17. California Government Code section 54954.3(c)
18. California Government Code section 54954.3(b); 75 Op. Cal. Att'y Gen. 89 (1992)
19. California Government Code section 54954.3(b)
20. California Government Code section 54954.2(a)

“...EXCEPT AS OTHERWISE PROVIDED...”

The Brown Act begins with a strong statement in favor of open meetings; private discussions among a majority of a legislative body are prohibited, unless expressly authorized under the Brown Act. It is not enough that a subject is sensitive, embarrassing or controversial. Without specific authority in the Brown Act for a closed session, a matter must be discussed in public. As an example, a board of police commissioners cannot generally meet in closed session, even though some matters are sensitive and the commission considers their disclosure contrary to the public interest.¹

Meetings of a legislative body are either open or closed. A legislative body cannot invite selected members of the public to attend a meeting while excluding others.² Closed sessions should involve only the members of the body, plus any additional support staff required, legal counsel, a supervisor involved in a disciplinary matter, consultants, a labor negotiator or any witnesses in the case where the legislative body is hearing complaints and charges against an employee. Individuals who do not have an official role in advising the legislative body on closed session subject matters should be excluded from closed session discussions.³

In general, the most common purpose of a closed session is to avoid revealing confidential information that may, in specified circumstances, prejudice the legal or negotiating position of the agency or compromise the privacy interests of employees. Closed sessions should be conducted keeping those narrow purposes in mind. In this chapter, the grounds for convening a closed session are called “exceptions,” because they are exceptions to the general rule that meetings must be conducted openly.

Agendas and reports

The legal authority for a closed session must be included on the posted agenda, with the same kind of brief description required of a regular meeting item.

The Brown Act supplies a series of fill-in-the-blank samples, which provide a “safe harbor” from legal attacks. These samples cover license and permit determinations, real property negotiations, existing or anticipated litigation, liability claims, threats to security, public employee appointments, evaluations and discipline, labor negotiations, multi-jurisdictional drug cases, hospital boards of directors, and medical quality assurance committees. (For details, see section 54954.5 of the Brown Act text at the end of this guide.)

If the legislative body intends to convene in closed session, it must include the section of the Brown Act authorizing the closed session in advance on the agenda and it must make a public announcement prior to the closed session discussion. In most cases, the announcement may simply be a reference to the agenda item.⁴

Following a closed session, if action is taken, the legislative body must provide an oral or written report on certain actions taken and the vote of every elected member present. The timing and content of the report varies according to the reason for the closed session.⁵ The announcements may be made at the site of the closed session, so long as the public is allowed to be present to hear them.

In addition, if there is a standing or written request for documentation, any copies of contracts, settlement agreements, or other documents finally approved or adopted in closed session must be provided to the requestor(s) after the closed session, if final approval of such documents does not rest with any other party to the contract or settlement. If substantive amendments to a contract or settlement agreement approved by all parties requires retyping, such documents may be held until retyping is completed during normal business hours, but the substance of the changes must be summarized for any person inquiring about them.⁶

A confidential “minute book” may be kept to record actions taken at closed sessions.⁷ If one is kept, it must be made available to members of the legislative body, provided that the member asking to review minutes of a particular meeting was not disqualified from attending the meeting due to a conflict-of-interest.⁸ Minute books must also be disclosed to a court if a lawsuit claims an open meeting violation. Minutes of an improper closed session are not confidential.

Some problems over closed sessions arise because secrecy itself breeds distrust. The Brown Act does not require closed sessions, and legislative bodies do well to

resist the tendency to call a closed session simply because it may be permitted. A better practice is to go into closed session only when necessary.

Personnel

Meetings can be closed for “personnel matters”—a term used more for convenience than for accuracy. The text of the Brown Act never mentions “personnel.”

The law instead says a meeting can be closed “to consider the appointment, employment, evaluation of performance, discipline, or dismissal of a public employee or to hear complaints or charges brought against the employee.”⁹ The purpose of the personnel exception is to avoid undue publicity or embarrassment for an employee or applicant for employment and to allow full and candid discussion by the legislative body; thus, it is restricted to discussing individuals, not general personnel policies.¹⁰

An employee must be given at least 24 hours notice of any closed session convened to hear specific complaints or charges against him or her, and has the right to have the specific complaints and charges discussed in a public session. If the employee is not given notice, any disciplinary action is null and void.¹¹ However, an employee is not entitled to notice and a hearing where the purpose of the closed session is to consider a performance evaluation, as distinguished from consideration of specific complaints and charges made against an employee. In recent opinions, the Attorney General and the courts have determined that personnel performance evaluations do not constitute complaints and charges, which are more akin to accusations made against a person.¹² The opinions say that the Brown Act’s notice and hearing requirements apply when the legislative body is reviewing evidence of specific complaints and charges and adjudicating conflicting testimony offered as evidence.

For purposes of the personnel exception, “employee” specifically includes an officer or an independent contractor who functions as an officer or an employee. Examples of the former include a city manager, department head or chief engineer. An example of the latter is a legal counsel hired on contract to act as local agency attorney.

Elected officials, appointees to the governing body or subsidiary bodies, and independent contractors other than those discussed above are not employees for purposes of the personnel exception.¹³ Action on individuals who are not “employees” must also be public—including discussing and voting on appointees to committees, or debating the merits of independent contractors, or considering a complaint against a member of the legislative body itself.

The personnel exception specifically prohibits discussion or action on proposed compensation in closed session, except for a disciplinary reduction in pay. Among other things, that means there can be no personnel closed sessions on a salary change (other than a disciplinary reduction) between any unrepresented individual and the legislative body. However, a legislative body may address the compensation of an unrepresented individual, such as a city manager, in a closed session as part of a labor negotiation (discussed later in this chapter.)

Reclassification of a job must be public, but an employee’s ability to fill that job may be considered in closed session. Any closed session action to appoint, employ, dismiss, accept the resignation of, or otherwise affect the employment status of a public employee must be reported at the public meeting during which the closed session is held. That report must identify the title of the position, but not the names of all persons considered for an employment position.¹⁴ However, a report on a dismissal or non-renewal of an employment contract must be deferred until administrative remedies, if any, are exhausted.¹⁵

“I have some important news to announce,” said board chairman Jones. “We’ve decided to terminate the contract of the chief executive, effective immediately. The board has met in closed session, and we’ve negotiated six months’ severance pay.”

“Unfortunately, that has some serious budget consequences, so we’ve had to delay phase two of the East Area Project.”

This may be an improper use of the personnel closed session. Any action on individual compensation must be taken in open session. However, if an employee has filed a claim or had threatened litigation the governing body may hold a potential litigation closed session and approve a severance package in connection with a settlement agreement.

Pending litigation

There is an attorney/client relationship, and legal counsel may use it for privileged written and verbal communications—outside of meetings—to members of the legislative body. But protection of the attorney/client privilege cannot by itself be the reason for a closed session.¹⁶

The Brown Act expressly authorizes closed sessions to discuss what is considered “pending litigation.” The rules that apply to holding a pending litigation closed session involve complex, technical definitions and procedures. The essential thing to know is that a closed session can be held by the body to confer with, or receive advice from, its legal counsel when open discussion would prejudice the position of the local agency in pending litigation.¹⁷ While the issue is not absolutely clear, the Attorney General believes that if the agency’s attorney is not a participant, a “pending litigation” closed session cannot be held.¹⁸ In any event, local agency officials should always consult the agency’s attorney before placing this type of closed session on the agenda, in order to be certain that it is being done properly.

“Litigation” that may be discussed in closed session includes the following three types of matters:

- (1) Existing litigation,
- (2) Threatened or anticipated litigation, and
- (3) Potential litigation.

Existing litigation

Existing litigation includes any adjudicatory proceedings, including eminent domain, before a court, administrative body exercising its adjudicatory authority, hearing officer, or arbitrator.

The clearest situation in which a closed session is authorized is when the local agency meets with its legal counsel to discuss a pending matter that has been filed in a court or with an administrative agency and names the local agency as a party. The legislative body may meet under these circumstances to receive updates on the case from attorneys, participate in developing strategy as the case develops or to consider alternatives for resolution of the case.

Threatened or anticipated litigation against the local agency

Closed sessions are authorized for legal counsel to inform the legislative body of specific facts and circumstances which suggest that the local agency has significant exposure to litigation. The Brown Act lists six separate categories of such facts and circumstances. The legislative body may also meet under this exception to determine whether a closed session is authorized based on information provided by legal counsel or staff.

Potential litigation initiated by the local agency

A closed session may be held under the pending litigation exception when the legislative body seeks legal advice on whether to protect the agency’s rights and interests by initiating litigation.

In certain cases, the circumstances and facts justifying the closed session must be publicly noticed on the agenda or announced at an open meeting. Before holding a closed session under the pending litigation exception, the legislative body must publicly state which of the three basic situations apply. It may do so simply by making a reference to the posted agenda. Certain actions must be reported in open session at the same meeting following the closed session.

Other actions, as where final approval rests with another party or the court, may be announced when they become final and upon inquiry of any person. Each agency attorney is aware of and should make other disclosures that may be required in specific instances.

Real estate negotiations

A legislative body may meet in closed session with its negotiator to discuss the purchase, sale, exchange or lease of real property by or for the local agency. A “lease” includes a lease renewal or renegotiation. The purpose is to grant authority to the legislative body’s negotiator or negotiators on price and terms of payment.¹⁹

The agency’s negotiator may be a member of the legislative body itself. Prior to the closed session, the legislative body must identify its negotiator, the real property which the negotiations may concern and the names of the persons with whom its negotiators may negotiate.²⁰

After real estate negotiations are concluded, the approval of the agreement and the substance of the agreement must be reported. If its own approval makes the agreement final, the body must

report in open session at the public meeting during which the closed session is held. If final approval rests with another party, the local agency must report the approval as soon as informed of it, as well as the substance of the agreement, upon the inquiry of any person.

"Our population is exploding, and we have to think about new school sites," said Board Member Baker.

"Not only that," interjected Board Member Charles, "we need to get rid of a couple of our older facilities."

"Well, obviously the place to do that is in a closed session," said Board Member Doe. "Otherwise we're going to set off land speculation. And if we even mention closing a school, parents are going to be in an uproar."

A closed session to discuss potential sites is not authorized by the Brown Act. The exception is limited to meeting with its negotiator over specific sites—which must be identified at an open and public meeting. However, a legislative body can make a final decision on real property in a closed session.

Labor negotiations

The Brown Act allows closed sessions for some aspects of labor negotiations. Different provisions (discussed below) apply to school and community college districts.

A legislative body may meet in closed session to instruct its bargaining representatives, which may be one or more of its members,²¹ on employee salaries and fringe benefits for both union and non-union employees; for represented employees, it may also consider working conditions which by law require negotiation. These sessions may take place before or during negotiations with employee representatives. Prior to the closed session, the legislative body must hold an open and public session in which it identifies its designated representatives.

During its discussions with representatives on salaries and fringe benefits, the legislative body may also discuss available funds and funding priorities, but only to instruct its representative. The body may also meet in closed session with a conciliator who has intervened in negotiations.²²

The approval of an agreement concluding labor negotiations with represented employees must be reported after the agreement is final and has been accepted or ratified by the other party. The report must identify the item approved and the other party or parties to the negotiation.²³ The labor sessions specifically cannot include final action on proposed compensation of one or more unrepresented employees. For purposes of this prohibition, an "employee" includes an officer or an independent contractor who functions as an officer or an employee. Independent contractors who do not serve in the capacity of an officer or employee are not covered by this closed session exception.

Labor negotiations—school and community college districts

Employee relations for school districts and community college districts are governed by the Rodda Act, where different meeting and special notice provisions apply. The entire board, for example, may negotiate in closed sessions.

Four types of meetings are exempted from compliance with the Act:

- (1) a negotiating session with a recognized or certified employee organization;
- (2) a meeting of a mediator with either side;
- (3) a hearing or meeting held by a fact finder or arbitrator; and
- (4) a session between the board and its bargaining agent, or the board alone, to discuss its position regarding employee working conditions and instruct its agent.²⁴

Public participation under the Rodda Act also takes another form.²⁵ All initial proposals of both sides must be presented at public meetings and are public record. The public must be given reasonable time to inform itself and to express its views before the district may adopt its initial proposal. In addition, new topics of negotiations must be made public within 24 hours. Any votes on such a topic must be followed within 24 hours by public disclosure of the vote of each member.²⁶ The final vote must be in public.

Other Education Code exceptions

Student disciplinary meetings by boards of school districts and community college districts are governed by the Education Code. District boards may hold a closed session to consider the suspension or discipline of a student, if a public hearing

would reveal personal, disciplinary or academic information about students contrary to state and federal pupil privacy law. The pupil's parent or guardian may request an open meeting.

Final action concerning kindergarten through 12th grade students must be taken at a public meeting, and is a public record.²⁷ In the case of community colleges, only expulsions need be made public.

Community college districts may also hold closed sessions to discuss some student disciplinary matters, awarding of honorary degrees, or gifts from donors who prefer to remain anonymous.²⁸ Kindergarten through 12th grade districts may also meet in closed session to review the contents of the statewide assessment instrument.²⁹

Grand jury testimony

A legislative body, including its members as individuals, may specifically testify in private before a grand jury, either individually or as a group.³⁰ Attendance by the entire legislative body before a grand jury would not constitute a closed session meeting under the Brown Act, since the body would not be meeting to make decisions or reach a consensus on issues within the body's subject matter jurisdiction.

License applicants with criminal records

A closed session is permitted when an applicant, who has a criminal record, applies for a license or license renewal and the legislative body wishes to discuss whether the applicant is sufficiently rehabilitated to receive the license.

If the body as a result decides to deny the license, the applicant may withdraw the application. In that case, no record is to be kept of the decision and all elements of the closed session are confidential.

If the applicant does not withdraw, the body must deny the license in public, immediately or at its next meeting. No information from the closed session can be revealed without consent of the applicant, unless the applicant takes action to challenge the denial.³¹

Public security

Legislative bodies can meet in closed session to discuss matters posing a threat to the security of public buildings, or to the public's right of access to public services or facilities over which the legislative body has jurisdiction. Closed session meetings for these purposes must be held with either the Attorney General, district attorney, sheriff or chief of police, or their deputies.³² Action taken in closed session with respect to such public security issues is not reportable action.

Multijurisdictional drug law enforcement agency

A joint powers agency formed to provide drug law enforcement services to multiple jurisdictions may hold closed sessions to discuss case records of an on-going criminal investigation, to hear testimony from persons involved in the investigation, and to discuss courses of action in particular cases.

The exception applies to the legislative body of the joint powers agency and to any body advisory to it. The purpose is to prevent impairment of investigations, to protect witnesses and informants, and to permit discussion of effective courses of action.³³

Hospital peer review and trade secrets

Two specific kinds of closed sessions are allowed for district hospitals and municipal hospitals, under other provisions of law.³⁴

- One is to hear reports of hospital medical audit or quality assurance committees, or for related deliberations. However, an applicant or medical staff member whose staff privileges are the direct subject of a hearing may request a public hearing.
- The other allows district or municipal hospitals to hold closed sessions to discuss "reports involving trade secrets"—provided no action is taken.

A trade secret is defined as information which is not generally known to the public or competitors and which (1) "derives independent economic value, actual or potential" by virtue of its restricted

knowledge, (2) is necessary to initiate a new hospital service or program or facility, and (3) would, if prematurely disclosed, create a substantial probability of depriving the hospital of a substantial economic benefit.

The provision prohibits use of closed sessions to discuss transitions in ownership or management, or the district's dissolution.³⁵

Maintaining the confidentiality of closed session discussions

The Brown Act lacks guidance on whether remedies are available to prohibit or punish closed session "leaks." The law remains unsettled in this area. Agency attorneys and the Attorney General believe that officials have a fiduciary duty to protect the confidentiality of closed session discussions. This duty, of course, must give way to the obligation to disclose improper matters or discussions which may come up in closed sessions.

The Attorney General has issued an opinion that it is "improper" for officials to publicly disclose information received during a closed session regarding pending litigation, though he also concludes that a local agency may not go so far as to adopt an ordinance criminalizing public disclosure of closed session discussions.³⁶ The opinion includes a list of sanctions that could apply to a person who discloses closed session information, including

- an injunction barring the person's attendance at future closed sessions,
- an injunction against future public disclosures, and
- a formal accusation filed against the person for willful or corrupt misconduct in office.³⁷

The interplay between these possible sanctions and an official's first amendment rights is complex and beyond the scope of this guide. Suffice it to say that this is a matter of great sensitivity and controversy.

One court has held that members of a legislative body cannot be compelled to divulge the content of closed session discussions through the discovery process.³⁸ This holding supports the notion that there is a strong interest in protecting the confidentiality of proper and lawful closed session discussions.

"I want the press to know that I voted in closed session against settlement and will continue to do so as long as these discussions progress," said Council Member Arnold.

"Don't settle," reveals Council Member Baker to the plaintiff, over coffee. "The city's offer coming your way is not our bottom line."

The Brown Act expressly permits—in fact, requires—that final votes taken in closed session be reported publicly.³⁹ Disclosure of other closed session information is risky, at best. The only completely safe way to divulge closed session discussions is pursuant to a court order issued under section 54960(a) of the Brown Act. That section provides a remedy to a member of a legislative body to determine by court order whether the legislative body's efforts to discourage the official's disclosure of information passes muster under federal or state law.

Notes

- | | | | |
|-----|--|-----|---|
| 1. | 61 Op. Cal. Att'y Gen. 220 (1978) | 20. | California Government Code section 54956.8 |
| 2. | 46 Op. Cal. Att'y Gen. 34 (1965) | 21. | California Government Code section 54957.6 |
| 3. | 98 Op. Cal. Attorney Gen. 1011 (1999) | 22. | 57 Op. Cal. Att'y Gen. 209 (1974) |
| 4. | California Government Code sections 54956.9 and 54957.7 | 23. | California Government Code section 54957.1(a)(6) |
| 5. | California Government Code section 54957.1(a) | 24. | California Government Code section 3549.1 |
| 6. | California Government Code section 54957.1(h) | 25. | California Government Code section 3540 |
| 7. | California Government Code section 54957.2 | 26. | California Government Code section 3547 |
| 8. | <i>Hanilton v. Town of Los Gatos</i> (1989) 213 Cal. App. 3d 1050, 261 Cal. Rptr. 888 | 27. | California Education Code section 48918 |
| 9. | California Government Code section 54957 | 28. | California Education Code section 72122 |
| 10. | 63 Op. Cal. Att'y Gen. 215 (1980) | 29. | California Education Code section 60617 |
| 11. | California Government Code section 54957 | 30. | California Government Code section 54953.1 |
| 12. | 78 Op. Cal. Att'y Gen. 218 (1995); <i>Furudado v. Sierra Community College</i> (1998) 68 Cal. App. 4th 876, 80 Cal. Rptr. 2d 589; <i>Fischer v. Los Angeles Unified School District</i> (1999) 70 Cal. App. 4th 87, 82 Cal. Rptr. 2d 452 | 31. | California Government Code section 54956.7 |
| 13. | California Government Code section 54957 | 32. | California Government Code section 54957 |
| 14. | <i>Gillespie v. San Francisco Public Library Commission</i> (1998) 67 Cal. App. 4th 1165, 79 Cal. Rptr. 2d 649 | 33. | California Government Code section 54957.8 |
| 15. | California Government Code section 54957.1(a)(5) | 34. | California Government Code section 54962 |
| 16. | <i>Roberts v. City of Palmdale</i> (1993) 5 Cal. 4th 363, 20 Cal. Rptr. 2d 330 | 35. | California Health and Safety Code section 32106 |
| 17. | California Government Code section 54956.9 | 36. | 76 Op. Cal. Att'y Gen. 289 (1993) |
| 18. | "Open Meeting Laws," California Attorney General, 1989, p. 41 | 37. | 80 Op. Cal. Att'y Gen. 231 (1997) |
| 19. | California Government Code section 54956.8 | 38. | <i>Kleitman v. Superior Court</i> (1999) 74 Cal. App. 4th 324, 327, 87 Cal. Rptr. 2d 813, 815 |
| | | 39. | California Government Code section 54957.1 |

REMEDIES

The Brown Act had no penalties or methods for enforcing compliance when first enacted. However, subsequent amendments have put teeth into enforcement. Specifically, the Brown Act was amended in 1961 to make violations a crime, and to authorize civil action to stop or prevent violations. A provision went into effect in 1987 permitting invalidation of some actions taken in violation of the law. The 1994 amendments extended the time limits for starting an invalidation action, and altered the definition of a misdemeanor violation.

As discussed below, persons wishing to invoke the Brown Act's civil remedies must first provide the legislative body the opportunity to cure its actions.

Even with safeguards such as posting a specific agenda, closed session parameters, and new remedies to enforce these provisions, it is ultimately impossible for the public to monitor every aspect of public officials' interactions. In other words, compliance ultimately requires a good measure of self-regulation on the part of public officials. This chapter discusses the remedies available to the public when that self-regulation is ineffective.

Invalidation

Any person, including the district attorney, may seek to invalidate a legislative body's actions that violate the Brown Act. Not all actions can be challenged; and in any case the legislative body has a chance to cure or correct its actions.¹

Only actions taken in violation of certain provisions of the Brown Act may be invalidated. Invalidation is limited to actions which violate the following sections of the Brown Act: Section 54953 (the basic open meeting provision); Sections 54954.2 and 54954.5 (notice and agenda requirements for regular meetings and closed sessions); 54954.6 (tax hearings); and 54956 (special meetings).

Even violations of these provisions cannot be invalidated if they involve the following types of actions:

- those in substantial compliance with these provisions;
- those involving sale or issuance of notes, bonds or other indebtedness, or any related contracts or agreements;
- those creating a contractual obligation, including a contract awarded by competitive bid for other than compensation for professional services, upon which a party has in good faith relied to its detriment;
- those connected with the collection of any tax; or
- those in which the complaining party had actual notice at least 72 hours prior to the meeting at which the action is taken.

The challenger to the action must also show prejudice as a result of the alleged violation.²

Violations of sections not listed here cannot give rise to invalidation actions, but are subject to the other remedies.³

Before filing a court action, the aggrieved party must send a written "cure or correct" demand to the legislative body. This demand must clearly describe the challenged action, the nature of the alleged violation, and the "cure" sought, and it must be sent within 90 days of the alleged violation. (However, the time limit is 30 days if the action was taken in open session but in violation of Section 54952.2, which defines "meetings.")⁴

The legislative body then has up to 30 days to cure and correct its action. If it does not act, any law suit must be filed within the next 15 days.

Despite its limitations, the invalidation language means legislative bodies should be even more careful not to violate the Brown Act. Challenges are likely to come from the general public and news media as well as from unexpected quarters—such as disgruntled business people. Some violations, such as inadequate agenda descriptions or posting, may be relatively easy to cure and correct. Other violations—such as inappropriate closed sessions—may be more difficult to correct.

A legislative body should cure and correct a challenged action whenever feasible. Two items should be placed on the next agenda, the first for a decision on whether to correct or cure an action, and the second for consideration of the action if the answer to the first item is "yes." The recommended action in the latter case is not to rescind a previous action but to supersede it. The record of the earlier meeting can be incorporated, but new public testimony should be allowed.

Civil action

The district attorney or any interested person can file a civil action asking the court to:

- Stop or prevent violations or threatened violations of the Brown Act by members of the legislative body of a local agency;
- Determine the applicability of the Brown Act to actions or threatened future action of the legislative body;
- Determine whether any rule or action by the legislative body to penalize or otherwise discourage the expression of one or more of its members is valid under state or federal law; or
- Compel the legislative body to tape record its closed sessions. The court may later review the tapes if there is good cause to think the Brown Act has been violated, and make public the relevant sections.⁵

Costs and attorney's fees

Someone from the agency who successfully invalidates an action taken in violation of the Brown Act or who successfully enforces one of the Brown Act's civil remedies may seek court costs and reasonable attorney's fees. However, the award is only against the local agency and not the individual members of the legislative body. A local agency may be awarded court costs and attorney's fees if the court finds the law suit was clearly frivolous and lacking in merit.⁶

Criminal complaints

A violation of the Brown Act by a member of the legislative body who acts with the improper intent described below is punishable as a misdemeanor.⁷

A criminal violation has two components. The first is that there must be an overt act—a member of a legislative body must attend a meeting at which **action is taken** in violation of the Brown Act.⁸

"Action taken" is defined elsewhere as not only an actual vote, but also a collective decision, commitment or promise by a majority of the legislative body to make a positive or negative decision.⁹ If the meeting involves mere deliberation without the taking of action, there can be no misdemeanor penalty.

A violation occurs for a tentative as well as final decision.¹⁰ In fact, criminal liability is triggered by a member's participation in a meeting in violation of the Brown Act—not whether that member has voted with the majority or minority, or has voted at all.

The second component of a criminal violation is that action is taken with the intent of a member "to deprive the public of information to which the member knows or has reason to know the public is entitled" by the Brown Act.¹¹ As with other misdemeanors, the filing of a complaint is up to the district attorney.

Informal resolution

Public agencies always have the opportunity to re-notice and re-hear items of significant public interest. Arguments over Brown Act issues often become emotional on all sides. Newspapers trumpet relatively minor violations, unhappy citizens fume over an action, and legislative bodies clam up about information better discussed in public. Hard lines are drawn and rational discussion breaks down.

The best solution is prevention.

Notes

1. California Government Code section 54960.1
2. *Cohan v. City of Thousand Oaks* (1994) 30 Cal. App. 4th 547, 556, 35 Cal. Rptr. 2d 782, 786
3. California Government Code section 54960.1(a)
4. California Government Code section 54960.1, subs. (b) and (c)(1)
5. California Government Code section 54960
6. California Government Code section 54960.5
7. California Government Code section 54959. A misdemeanor is punishable by a fine of up to \$1,000 or up to six months in county jail, or both. California Penal Code section 19. Employees of the agency who participate in violations of the Brown Act cannot be punished criminally under section 54959. However, at least one district attorney instituted criminal action against employees based on the theory that they criminally conspired with the members of the legislative body to commit a crime under section 54949.
8. California Government Code section 54959
9. California Government Code section 54952.6
10. 61 Op. Cal. Att'y Gen. 283 (1978)
11. California Government Code section 54959

BEYOND THE LAW

This guide has focused not only on the Brown Act, but also on meeting practices or activities that, legal or not, are likely to create controversy. Problems may crop up, for example, when agenda descriptions are too brief or vague, when an informal get-together takes on the appearance of a meeting, or when controversial issues arise that are not on the agenda.

The Brown Act allows a legislative body to adopt practices for itself and its subordinate committees and bodies that are more stringent than the law itself requires. Rather than simply restate the basic requirements of the Brown Act, local open meeting policies should strive to anticipate and prevent problems in areas where the Brown Act is insufficiently precise. As with any other significant policy, public comment should be solicited.

A local policy could reflect:

- A legislative body's need to get its business done smoothly.
- The public's right to participate meaningfully in meetings, and to review documents used in decision-making at a relevant point in time.
- A local agency's right to confidentially address certain negotiations, personnel matters, claims and litigation.
- The right of the press to fully understand and communicate public agency decision-making.

Many agencies may have specific constituencies with other expectations. An explicit and comprehensive public meeting and information policy, especially if reviewed periodically could be an important element in maintaining or improving public relations.

Such a policy exceeds the absolute requirements of the law—but if the law were enough this guide would be unnecessary. A narrow legalistic approach will not avoid or resolve potential controversies. It may be well for an agency to go beyond the law, to look at its unique circumstances and determine if there is a better way to prevent potential problems.

At the very least, local agencies need to think about how their agendas are structured, and to work at making compliance with the Brown Act easier. They need to plan carefully to make sure public participation fits smoothly into the process.

The Brown Act should be neither an excuse for bureaucratic obfuscation nor a mechanism for public filibusters. And it should not preclude efficient and orderly meetings.

The Brown Act represents a balance among the interests of constituencies whose interests do not always coincide. It calls for the maximum degree of openness in local government, yet should allow government to function responsively and productively.

On the one hand, there must be adequate notice of what discussion and action is to occur during a meeting; on the other there must be a normal degree of spontaneity in the dialogue between elected officials and their constituents.

The ability of an elected official to confer with constituents or colleagues must be balanced against the important public policy prohibiting decision-making outside of public meetings.

In the end, the Brown Act must assure full participation of the public and preserve the integrity of the decision-making process, yet not stifle government officials and impede the effective and natural operation of government.

Twenty Frequently Asked Questions and Answers

1. The agency's web-site includes a chat room where agency employees and officials participate anonymously and often discuss issues of local agency business. Members of the legislative body participate regularly. Does this scenario present a potential for violation of the Brown Act? *Yes, because it is a technological device that may serve to allow for the development of a collective concurrence as to action to be taken.*
2. A member of the legislative body contacts two other members on a five-member body relative to scheduling a special meeting. Is this an illegal serial meeting? *No, the Brown Act expressly allows this kind of communication, though the members should avoid discussing the merits of what is to be taken up at the meeting.*
3. The local chamber of commerce sponsors an open and public candidate debate during an election campaign. Three of the five agency members are up for re-election and all three participate. All of the candidates are asked their views of a controversial project scheduled for a meeting to occur just after the election. May the three incumbents answer the question? *Yes, because the incumbents should not be constrained from participating in the political process as any other candidate.*
4. The entire legislative body intends to travel to Sacramento to testify against a bill before the Senate Local Government Committee. Must this activity be noticed as a meeting of the body? *No, because the members are attending and participating in an open meeting of another governmental body to which the public may attend.*
5. The members in question #4 then proceed upstairs to the office of their local assemblyperson to discuss issues of local interest. Must this session be noticed as a meeting and be open to the public? *Yes, because the entire body may not meet behind closed doors except for proper closed sessions.*
6. A member on vacation desires to participate in a meeting of the legislative body and vote by cellular phone from her car while driving from Washington, D.C. to New York. May she? *She probably may participate, but she may not vote because she is not in a noticed and posted teleconference location.*
7. The agency has won a major victory in the Supreme Court on an issue of importance. The presiding officer decides to hold an impromptu press conference at city hall in order to make a statement to the print and broadcast media. All the other members show up in order to make statements of their own and be seen by the media. Is this gathering illegal? *Technically there is no exception for this sort of gathering, but as long as members do not state their intentions as to future action to be taken by the council and the press conference is open to the public, it seems harmless.*
8. The agency is considering approving a major retail mall. The developer has built other similar malls, and invites the entire legislative body to visit a mall outside the jurisdiction. May the entire body go? *Yes, the Brown Act permits meetings outside the boundaries of the agency for specified reasons and inspection of property is one such reason. The field trip must be treated as a meeting and the public must be able to attend.*
9. The legislative body wants to hold a team-building session to improve relations among its members. May such a session be conducted behind closed doors? *No, this is not a proper subject for a closed session, and there is no other basis to exclude the public. Council relations are a matter of public business.*
10. A member of the legislative body informally establishes an advisory committee of five residents to advise her on issues as they arise. Is this committee covered by the Brown Act? *No, because the committee has not been established by formal action of the legislative body.*
11. On the morning following the election to a five-member legislative body of a local agency, the three successful candidates, none incumbents, meet for a celebratory breakfast. Does this violate the Brown Act? *It might, and absolutely would if the conversation turns to*

agency business. Even though not officially sworn in, the Brown Act applies to these individuals. If purely a social event, there is no violation but it would be preferable if others were invited to attend to avoid the appearance of impropriety.

12. The legislative body establishes a standing committee of two of its five members, which meets monthly. A third member of the legislative body wants to attend these meetings and participate. May she? *She may attend, but only as an observer; she may not participate.*

13. The agenda for a regular meeting of the legislative body contains the following item of business under New Business:

"Consideration of a report regarding traffic on Eighth Street."

Is this description adequate? *If it is, it is barely adequate. A better description would provide the reader with some idea of what the report is about, and what is being recommended.*

14. The agenda always includes an opportunity for the "Chief Executive Officer's Report," during which time the officer provides a brief report on notable topics of interest, none of which are listed on the agenda. Is this permissible? *Yes, as long as it does not result in legislative body discussion or action.*

15. Must the legislative body allow members of the public to show videos during the "audience participation" part of the agenda, as long as the subject matter is relevant to the agency and is within the established time limit? *Probably, though the agency is under no obligation to provide equipment.*

16. May the presiding officer prohibit a member of the audience from publicly criticizing an agency employee by name during audience comments? *No, as long as the criticism pertains to job performance.*

17. During the audience comment period of a regular meeting of the legislative body, a resident urges the public to support and vote for a candidate vying for election to the body. May the presiding officer gavel the speaker out of order for engaging in political campaign speech? *No, for Brown Act purposes, the speech is relevant to the governing of the agency and an implicit criticism of the incumbents.*

18. May the legislative body agree to settle a lawsuit in a properly noticed closed session, without placing the settlement agreement on an open session agenda for public approval? *Yes, but the settlement agreement is a public document and must be disclosed on request.*

19. May the lawyer for someone suing the agency attend a closed session in order to explain to the legislative body why it should accept a settlement offer? *No, attendance in closed sessions is reserved exclusively to the agency's advisors.*

20. Must 24 hours' notice be given to an employee whose negative performance evaluation is to be considered by the legislative body in closed session? *No, the notice is reserved for situations where the body is to hear complaints and charges from witnesses.*

