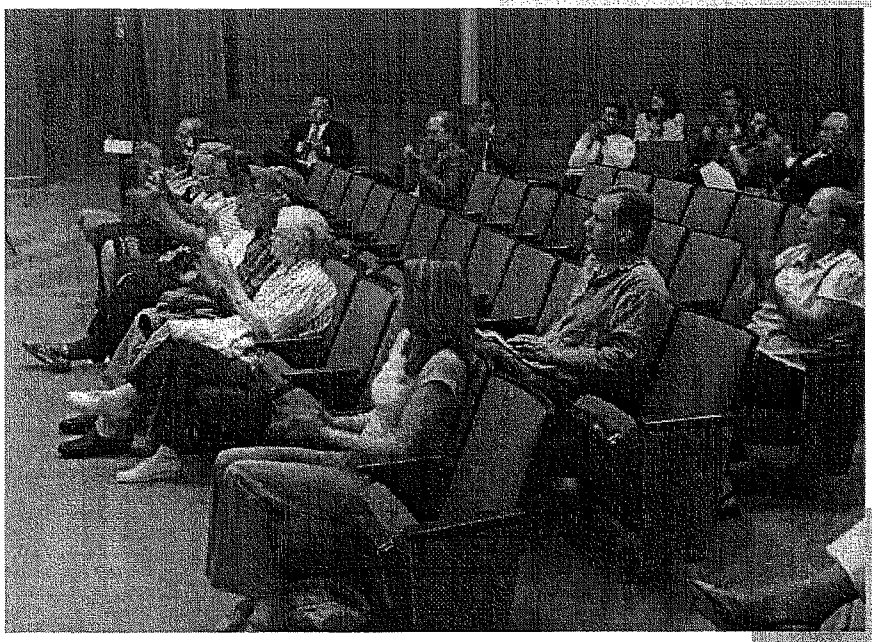
CHAPTER 4:
AGENDAS, NOTICES, AND PUBLIC PARTICIPATION



AGENDAS FOR REGULAR MEETINGS

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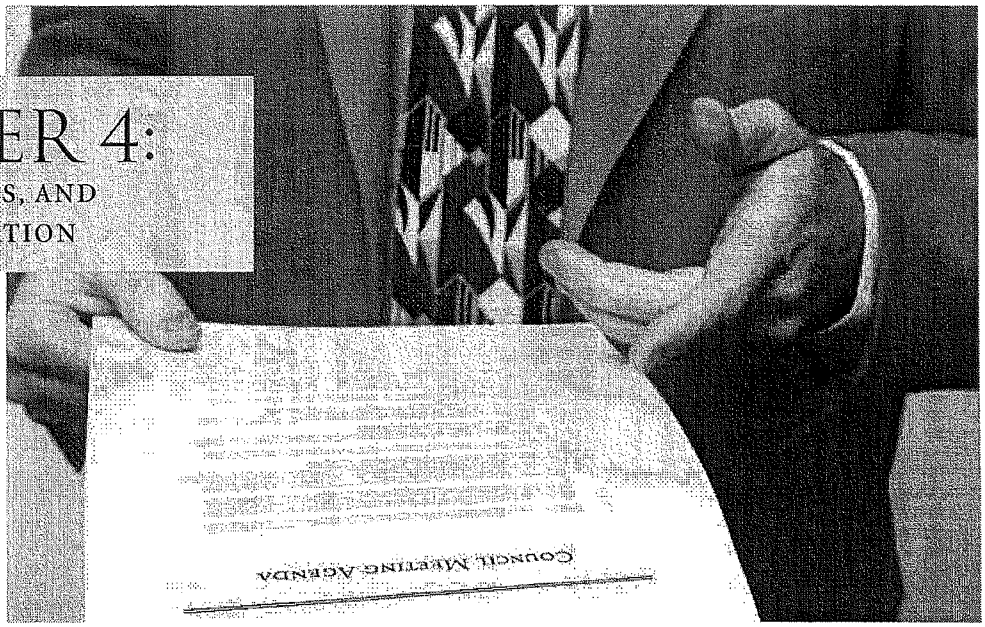


Effective notice is essential for an open and public meeting. Whether a meeting is open or how the public may participate in that meeting is academic if no one knows about the meeting.

AGENDAS FOR REGULAR MEETINGS

Every regular meeting of a legislative body of a local agency—including advisory committees, commissions, or boards, as well as standing committees of legislative bodies—must be preceded by a posted agenda that advises the public of the meeting and the matters to be transacted or discussed.

Practice Tip:
Putting together a meeting agenda requires careful thought.

The agenda must be posted at least 72 hours before the regular meeting in a location "freely accessible to members of the public."[1] The California Attorney General has interpreted this requirement to require posting in locations accessible to the public 24 hours a day during the 72-hour period.[2] Posting may also be made on a touch screen electronic kiosk accessible without charge to the public 24 hours a day during the 72-hour period.[3] However, posting an agenda on an agency's website alone is inadequate since there is no universal access to the internet. The agenda must 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."[4]

Q. The agenda for a regular meeting contains the following items of business:
- "Consideration of a report regarding traffic on Eighth Street"
- "Consideration of contract with ABC Consulting"

Are these descriptions adequate?

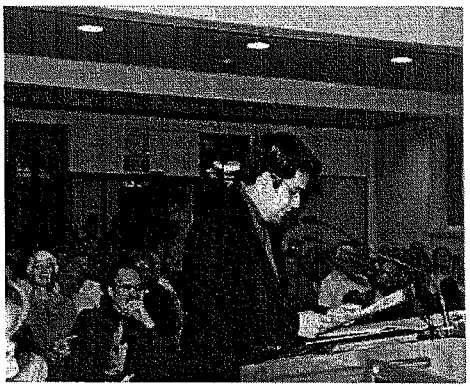
A. *If the first is, it is barely adequate. A better description would provide the reader with some idea of what the report is about and what is being recommended. The second is not adequate. A better description might read "consideration of a contract with ABC Consulting in the amount of $50,000 for traffic engineering services regarding traffic on Eighth Street."*

Q. The agenda includes an item entitled "City Manager's Report," during which time the City Manager provides a brief report on notable topics of interest, none of which are listed on the agenda.

Is this permissible?

A. *Yes, so long as it does not result in extended discussion or action by the body.*

A brief general description may not be sufficient for closed session agenda items. The Brown Act provides safe harbor language for the various types of permissible closed sessions. Substantial compliance with the safe harbor language is recommended to protect legislative bodies and elected officials from legal challenges.



MAILED AGENDA UPON WRITTEN REQUEST

The legislative body, or its designee, must mail a copy of the agenda or, if requested, the entire agenda packet, to any person who has filed a written request for such materials. These copies shall be mailed at the time the agenda is posted. If requested, these materials must be made available in appropriate alternative formats to persons with disabilities.

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.[5]

NOTICE REQUIREMENTS FOR SPECIAL MEETINGS

There is no express agenda requirement for special meetings, but the notice of the special meeting effectively serves as the agenda and limits the business that may be transacted or discussed. Written notice must be sent to 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 that has requested such notice in writing. This notice must be delivered by personal delivery or any other means that ensures receipt, at least 24 hours before the time of the meeting.

The notice must state the time and place of the meeting, as well as all business to be transacted or discussed. It is recommended that the business to be transacted or discussed be described in the same manner that an item for a regular meeting would be described on the agenda—with a brief general description. As noted above, closed session items should be described in accordance with the Brown Act's safe harbor provisions to protect legislative bodies and elected officials from challenges of noncompliance with notice requirements. The special meeting notice must also be posted at least 24 hours prior to the special meeting in a site freely accessible to the public. The body cannot consider business not in the notice.[6]

NOTICES AND AGENDAS FOR ADJOURNED AND CONTINUED MEETINGS AND HEARINGS

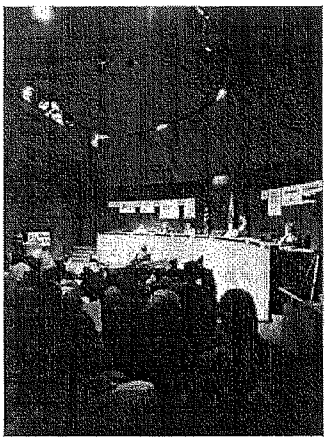
A regular or special meeting can be adjourned and re-adjourned to a time and place specified in the order of adjournment.[7] If no time is stated, the meeting is continued to the hour for regular meetings. Whoever is present (even if they are less than a quorum) may so adjourn a meeting; if no member of the legislative body is present, the clerk or secretary may adjourn the meeting. 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. 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.

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.[8]

NOTICE REQUIREMENTS FOR EMERGENCY MEETINGS

The special meeting notice provisions apply to emergency meetings, except for the 24-hour notice.[9] News media that 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.

News media make a practice of having written requests on file for notification of special or emergency meetings. 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 controversy.



EDUCATIONAL AGENCY MEETINGS

The Education Code contains some special agenda and special meeting provisions,[10] however, they are generally consistent with the Brown Act. An item is apparently void if not posted.[11] 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.[12]

NOTICE REQUIREMENTS FOR TAX OR ASSESSMENT MEETINGS AND HEARINGS

The Brown Act prescribes specific procedures for adoption by a city, county, special district, or joint powers authority of any new or increased general tax or assessment.[13] 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.[14]

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 the Constitution.[15] As a practical matter, the Constitution's notice requirements have preempted this section of the Brown Act.

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.[16]

Practice Tip:

Subject to very limited exceptions, the Brown Act prohibits any action or discussion of an item not on the posted agenda.

- 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." This 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.
- 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.

"I'd like a two-thirds vote of the board, so we can go ahead and authorize commencement of phase two of the East Area Project," said chairman Jones.

"It's not on the agenda. But we learned two days ago that we finished phase one 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 resident. 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 two determinations: (a) that there is an immediate need to take action and (b) that the need arose after the posting of the agenda. The matter is then "placed on the agenda."*
- *Second, discuss and act on the added agenda item.*

RESPONDING TO THE PUBLIC

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?

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.[17] However, caution should be used to avoid any discussion or action on such items.

Councilmember A: I would like staff to respond to Resident Joe's complaints during public comment about the repaving project on Elm Street – are there problems with this project?

City Manager: The public works director has prepared a 45-minute power point presentation for you on the status of this project and will give it right now.

Councilmember B: Take all the time you need; we need to get to the bottom of this. Our residents are unhappy.

It is clear from this dialogue that the Elm Street project was not on the Council's agenda, but was raised during the public comment period for items not on the agenda. Councilmember A properly asked staff to respond; the City Manager should have given a brief response. If a lengthy report from the public works director was warranted, the City Manager should have stated that it would be placed on the agenda for the next meeting. Otherwise, both the long report and the likely discussion afterward will improperly embroil the Council in a matter that is not listed on the agenda.

THE RIGHT TO ATTEND MEETINGS

A number of other Brown Act 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.[18]

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 that 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.[19] This does not mean, however, that the public is entitled to free entry to a conference attended by a majority of the legislative body.[20]

While a legislative body may use teleconferencing in connection with a meeting, the public must be given notice of and access to the teleconference location. Members of the public must be able to address the legislative body from the teleconference location.[21]

Action by secret ballot, whether preliminary or final, is flatly prohibited.[22]

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.[23]

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.[24]

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.[25] A fee or deposit may be charged for a copy of a public record.[26]

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.[27] The agency may impose its ordinary charge for copies.[28]

In addition, the public is specifically allowed to use audio or video tape recorders or still or motion picture cameras at a meeting in order to record the proceedings, absent a reasonable finding by the legislative body that recorders or cameras would persistently disrupt proceedings.[29]

A local agency cannot prohibit or restrict the public broadcast of its open and public meetings without a reasonable finding that the noise, illumination, or obstruction of view will be a "persistent" disruption.[30]

Finally, governing bodies can go beyond these minimal standards to require greater access to their meetings and to those of their appointed bodies.[31]

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.[32]

Q. Must the legislative body allow members of the public to show videos or make a power point presentation during the "public comment" part of the agenda, as long as the subject matter is relevant to the agency and is within the established time limit?

A. *Probably, although the agency is under no obligation to provide equipment.*

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.[33]

Q. May the presiding officer prohibit a member of the audience from publicly criticizing an agency employee by name during public comments?

A. *No, as long as the criticism pertains to job performance.*

Q. During the public 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?

A. *There is no case law on this subject. Some would argue that campaign issues are outside the subject matter jurisdiction of the body within the meaning of Section 54954.3(a). Others take the view that the speech must be allowed under paragraph (c) of that section because it is relevant to the governing of the agency and an implicit criticism of the incumbents.*

Practice Tip:
Public speakers cannot be compelled to give their name or address as a condition of speaking.

The legislative body may adopt reasonable regulations, including time limits, on public comments. Such regulations should be enforced fairly and without regard to speakers' viewpoints. The legislative body has the discretion to modify its regulations regarding time limits on public comment if necessary. For example, the time limit could be shortened to accommodate a lengthy agenda or it could be lengthened to allow additional time for discussion on a complicated matter.[34] The legislative body may request that persons who wish to speak fill out speaker cards; however, because anonymous speech is protected by the constitution, this must be optional.

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.[35]

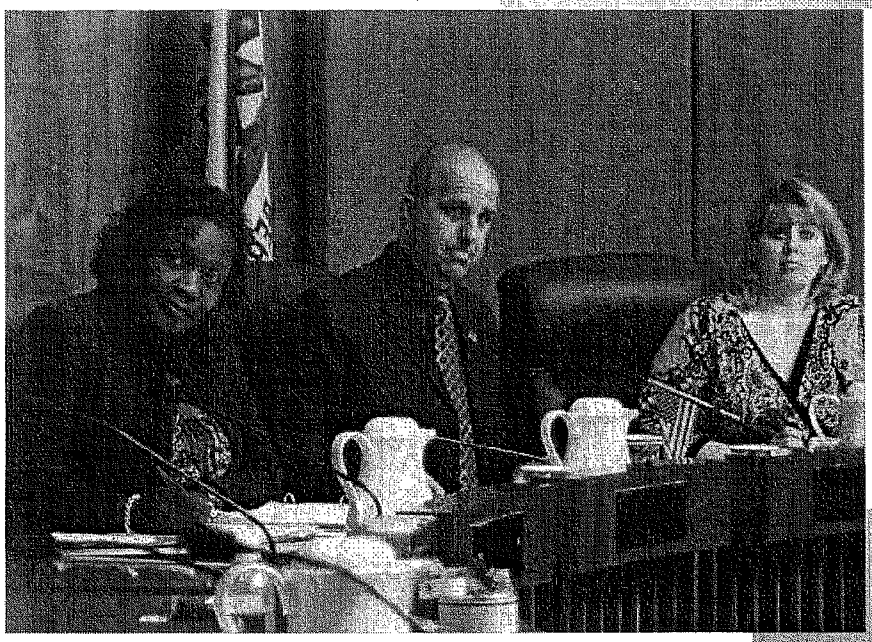
Notices and agendas for special meetings must also give members of the public the opportunity to speak before or during consideration of an item but need not allow members of the public an opportunity to speak on nonagendized items.[36]

Endnotes

1 California Government Code section 54954.2(a)(1)
2 78 Ops.Cal.Atty.Gen. 327, 331-332 (1998)
3 88 Ops.Cal.Atty.Gen. 218 (2006)
4 California Government Code section 54954.2(a)(1)
5 California Government Code section 54954.1
6 California Government Code section 54956
7 California Government Code section 54955
8 California Government Code section 54955.1
9 California Government Code section 54956.5
10 Education Code sections 35144, 35145 and 72129
11 *Carlson v. Paradise Unified School District* (1971) 18 Cal.App.3d 196
12 California Education Code section 35145.5
13 California Government Code section 54954.6
14 California Government Code section 54954.6(g)
15 *See:* Cal.Const.Art.XIIIC, XIIID and California Government Code section 54954.6(h)
16 California Government Code section 54954.2(b)
17 California Government Code section 54954.2(a)(2)
18 California Government Code section 54953.3
19 California Government Code section 54961(a)
20 California Government Code section 54952.2(c)(2)
21 California Government Code section 54953(b)
22 California Government Code section 54953(c)
23 46 Ops.Cal.Atty.Gen. 34 (1965)
24 California Government Code section 54957.9
25 California Government Code section 54957.5
26 California Government Code section54957.5
27 California Government Code section 54953.5(b)
28 California Government Code section 54957.5(c)
29 California Government Code section 54953.5(a)
30 California Government Code section 54953.6
31 California Government Code section 54953.7
32 California Government Code section 54954.3(a)
33 California Government Code section 54954.3(c)
34 California Government Code section 54954.3(b); *Chaffee v. San Francisco Public Library Com.* (2005) 134 Cal.App.4th 109; 75 Ops.Cal.Atty.Gen. 89 (1992)
35 California Government Code section 54954.3(a)
36 California Government Code section 54954.3(a)

Updates to this publication responding to changes in the Brown Act or new court interpretations are available at www.cacities.org/opengov. A current version of the Brown Act may be found at www.leginfo.ca.gov.

CHAPTER 5:
CLOSED SESSIONS



AGENDAS AND REPORTS

LITIGATION

REAL ESTATE NEGOTIATIONS

PUBLIC EMPLOYMENT

LABOR NEGOTIATIONS

LABOR NEGOTIATIONS - SCHOOL AND COMMUNITY COLLEGE DISTRICTS

OTHER EDUCATION CODE EXCEPTIONS

GRAND JURY TESTIMONY

LICENSE APPLICANTS WITH CRIMINAL RECORDS

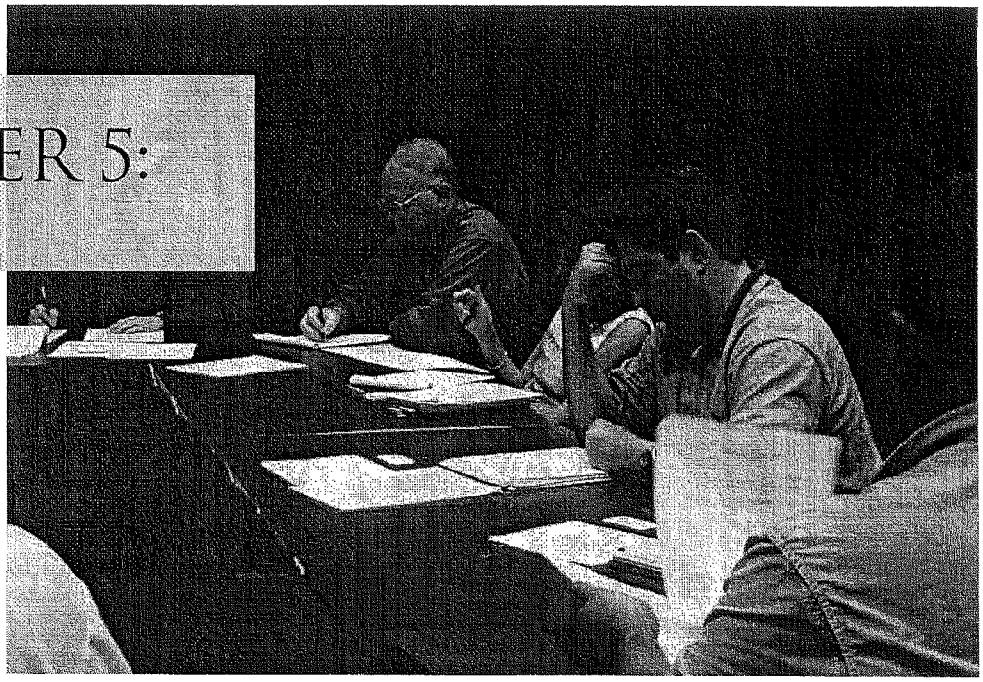
PUBLIC SECURITY

MULTIJURISDICTIONAL DRUG LAW ENFORCEMENT AGENCY

HOSPITAL PEER REVIEW AND TRADE SECRETS

THE CONFIDENTIALITY OF CLOSED SESSION DISCUSSIONS

CHAPTER 5:
CLOSED SESSIONS



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]

Practice Tip:
Meetings are either open or closed – there is no "in between."

Meetings of a legislative body are either fully open or fully closed; there is nothing in between. Closed sessions may involve only the members of the legislative body and only agency counsel, management and support staff, and consultants necessary for consideration of the matter that is the subject of closed session. Individuals who do not have an official role in advising the legislative body on closed session subject matters must be excluded from closed session discussions.[2]

Q. 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?

A. *No, attendance in closed sessions is reserved exclusively to the agency's advisors.*

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. In some circumstances, none of the closed session exceptions apply to an issue or information the legislative body wishes to discuss privately. In these cases, it is not proper to convene a closed session, even to protect confidential information. For example, the Brown Act does not authorize closed sessions for general contract negotiations.

AGENDAS AND REPORTS

Closed session items must be briefly described on the posted agenda and the description must state the specific statutory exemption. An item that appears on the open meeting portion of the agenda may not be taken into closed session until it has been properly agendized as a closed session or unless it is properly added as a closed session item by a two-thirds vote of the body after making the appropriate urgency findings.

The Brown Act supplies a series of fill-in-the-blank sample, agenda descriptions for various types of authorized closed sessions, which provide a "safe harbor" from legal attacks. These sample agenda descriptions 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.[3]

Practice Tip:
Some problems over closed sessions arise because secrecy itself breeds distrust. The Brown Act does not require closed sessions and legislative bodies may 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.

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 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.

Practice Tip:
Give close attention to closed session agenda descriptions. Using the wrong label can lead to invalidation of an action taken in closed session.

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]

The Brown Act does not require minutes, including minutes of closed session. 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] A court may order the disclosure of minutes books for the court's review if a lawsuit makes sufficient claims of an open meeting violation.

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.[9]

The Brown Act expressly authorizes closed sessions to discuss what is considered litigation. The rules that apply to holding a 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 litigation in which the agency is a party.[10] The Attorney General believes that if the agency's attorney is not a participant, a litigation closed session cannot be held.[11] 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.

Practice Tip:
Protection of the attorney/client privilege cannot by itself be the reason for a closed session.

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

Existing litigation

Existing litigation includes any adjudicatory proceedings 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

> Q. 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?
>
> A. *Yes, but the settlement agreement is a public document and must be disclosed on request. Furthermore, a settlement agreement cannot commit the agency to matters that are required to have public hearings.*

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. Generally an agreement to settle litigation may be approved in closed session. However, an agreement to settle litigation that requires actions that are subject to public hearings cannot be approved in closed session.[12]

Threatened litigation against the local agency

Closed sessions are authorized for legal counsel to inform the legislative body of specific facts and circumstances that suggest that the local agency has significant exposure to litigation. The Brown Act lists six separate categories of such facts and circumstances.[13] 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.

Initiation of litigation 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 should be aware of and should make other disclosures that may be required in specific instances.

REAL ESTATE NEGOTIATIONS

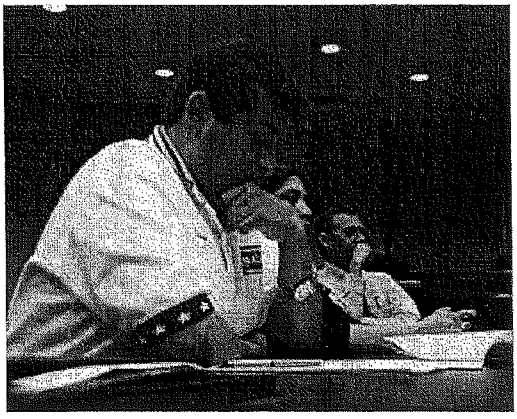
A legislative body may meet in closed session with its negotiator to discuss the purchase, sale, exchange,

Q. May other terms of a real estate transaction, aside from price and terms of payment, be addressed in closed session?

A. *No. However, there are differing opinions over the scope of the phrase "price and terms of payment" in connection with real estate closed sessions. Many agency attorneys believe that any term that directly affects the economic value of the transaction falls within the ambit of "price and terms of payment." Others take a narrower, more literal view of the phrase.*

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 on price and terms of payment.[14] Caution should be exercised to limit discussion to price and terms of payment without straying to other related issues such as site design, architecture, or other aspects of the project for which the transaction is contemplated.[15]

The agency's negotiator may be a member of the legislative body itself. Prior to the closed session, or on the agenda, the legislative body must identify its negotiator, the real property that the negotiations may concern and the names of the persons with whom its negotiator may negotiate.[16]



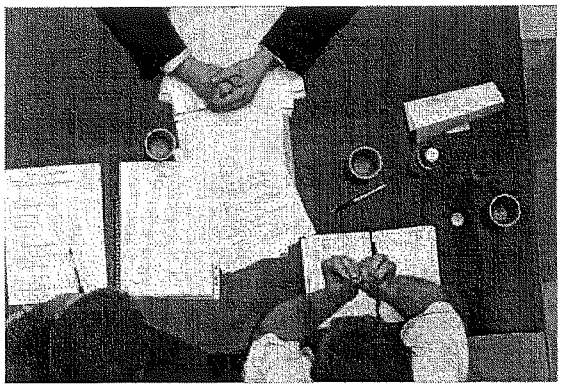
After real estate negotiations are concluded, the approval of the agreement and the substance of the agreement must be reported. If its own approval makes the agreement final, the body must report in open session at the public meeting during which the closed session is held. If final approval rests with another party, the local agency must report the approval as soon as informed of it. Once final, the substance of the agreement must be disclosed to anyone who inquires.

"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.



PUBLIC EMPLOYMENT

The Brown Act authorizes a closed session "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."[17] The purpose of this exception – commonly referred to as 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.[18] The body must possess the power to appoint, evaluate, or dismiss the employee to hold a closed session under this exception.[19] That authority may be delegated to a subsidiary appointed body.[20]

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. This occurs when the legislative body is reviewing evidence, which could include live testimony, and adjudicating conflicting testimony offered as evidence. The employee has the right to have the specific complaints and charges discussed in a public session rather than closed session. If the employee is not given notice, any disciplinary action is null and void.[21]

However, an employee is not entitled to notice and a hearing where the purpose of the closed session is to consider a performance evaluation. 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.[22]

Q. Must 24 hours' notice be given to an employee whose negative performance evaluation is to be considered by the legislative body in closed session?

A. *No, the notice is reserved for situations where the body is to hear complaints and charges from witnesses.*

Practice Tip:
Discussions of who to appoint to an advisory body and whether or not to censure a fellow member of the legislative body must be held in the open.

Correct labeling of the closed session on the agenda is critical. A closed session agenda that identified discussion of an employment contract was not sufficient to allow dismissal of an employee.[23] An incorrect agenda description can result in invalidation of an action and much embarrassment.

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, district general manager or superintendent. An example of the latter is a legal counsel or engineer hired on contract to act as local agency attorney or chief engineer.

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.[24] 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), yet another example of the importance of using correct agenda descriptions.

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.[25] However, a report on a dismissal or non-renewal of an employment contract must be deferred until administrative remedies, if any, are exhausted.[26]

> "I have some important news to announce," said Mayor Jones. "We've decided to terminate the contract of the city manager, effective immediately. The council 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 if the Council agenda described the item as the city manager's evaluation. In addition, other than labor negotiations, any action on individual compensation must be taken in open session. Caution should be exercised to not discuss in closed session issues, such as budget impacts in this hypothetical, beyond the scope of the posted closed session notice.*

Practice Tip:
The personnel exception specifically prohibits discussion or action on proposed compensation in closed session, except for a disciplinary reduction in pay.

Q. The school board is meeting in closed session to evaluate the superintendent and to consider giving her a pay raise. May the superintendent attend the closed session?

A. *The superintendent may attend the portion of the closed session devoted to her evaluation, but may not be present during discussion of her pay raise. Discussion of the superintendent's compensation in closed session is limited to giving direction to the school board's negotiator. Also, the clerk should be careful to notice the closed session on the agenda as both an evaluation and a labor negotiation.*

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,[27] on employee salaries and fringe benefits for both union and non-union employees. For represented employees, it may also consider working conditions that 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.[28]

Practice Tip:
Prior to the closed session, the legislative body must hold an open and public session in which it identifies its designated representatives.

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.[29] 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.[30]

Public participation under the Rodda Act also takes another form.[31] All initial proposals of both sides must be presented at public meetings and are public records. 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.[32] 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.[33] 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.[34] Kindergarten through 12th grade districts may also meet in closed session to review the contents of the statewide assessment instrument.[35]

GRAND JURY TESTIMONY

A legislative body, including its members as individuals, may testify in private before a grand jury, either individually or as a group.[36] 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 decides to deny the license, the applicant may withdraw the application. 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.[37]

Practice Tip:

Attendance by the entire legislative body before a grand jury would not constitute a closed session meeting under the Brown Act.

PUBLIC SECURITY

Legislative bodies may meet in closed session to discuss matters posing a threat to the security of public buildings, essential public services, including water, sewer, gas, or electric service, 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 designated security or law enforcement officials including the Attorney General, district attorney, agency attorney, sheriff or chief of police, or their deputies or agency security consultant or security operations manager.[38] 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.[39]

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.[40]

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.[41]

- 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.[42]

THE CONFIDENTIALITY OF CLOSED SESSION DISCUSSIONS

Practice Tip:
There is a strong interest in protecting the confidentiality of proper and lawful closed sessions.

It is not uncommon for agency officials to complain that confidential information is being "leaked" from closed sessions. The Brown Act prohibits the disclosure of confidential information acquired in a closed session by any person present and offers various remedies to address willful breaches of confidentiality.[43] It is incumbent upon all those attending lawful closed sessions to protect the confidentiality of those discussions. 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.[44] Only the legislative body acting as a body may agree to divulge confidential closed session information; as regards attorney/client privileged communications, the entire body is the holder of the privilege and only the entire body can decide to waive the privilege.[45]

Before adoption of the Brown Act provision specifically prohibiting disclosure of closed session communications, agency attorneys and the Attorney General long believed that officials have a fiduciary duty to protect the confidentiality of closed session discussions. The Attorney General issued an opinion that it is "improper" for officials to disclose information received during a closed session regarding pending litigation,[46] though the opinion also concluded that a local agency may not go so far as to adopt an ordinance criminalizing public disclosure of closed session discussions,[47] making it difficult to plug closed session leaks.

The Brown Act now prescribes remedies for breaches of confidentiality. These include injunctive relief, disciplinary action against an employee, and referral of a member of the legislative body to the grand jury.[48]

The duty of maintaining confidentiality, of course, must give way to the obligation to disclose improper matters or discussions that may come up in closed sessions. In recognition of this public policy, the Brown Act exempts from its prohibition against disclosure of closed session communications disclosure of closed session information to the district attorney or the grand jury due to a perceived violation of law, expressions of opinion concerning the propriety or legality of actions taken in closed session, including disclosure of the nature and extent of the illegal action, and disclosing information that is not confidential.[49]

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.

> "I want the press to know that I voted in closed session against filing the eminent domain action," said Council Member Arnold.
>
> "Don't settle too soon," reveals Council Member Baker to the property owner, over coffee. "The city's offer coming your way is not our bottom line."
>
> *The first comment to the press is appropriate - the Brown Act requires that certain final votes taken in closed session be reported publicly.[50] The second comment to the property owner is not - disclosure of confidential information acquired in closed session is expressly prohibited and harmful to the agency.*

Endnotes

1 61 Ops.Cal.Atty.Gen. 220 (1978)
2 98 Ops.Cal.Atty.Gen. 1011 (1999)
3 California Government Code section 54954.5
4 California Government Code sections 54956.9 and 54957.7
5 California Government Code section 54957.1(a)
6 California Government Code section 54957.1(b)
7 California Government Code section 54957.2
8 *Hamilton v. Town of Los Gatos* (1989) 213 Cal.App.3d 1050; 2 Cal.Code Regs. section 18702.1(c)
9 *Roberts v. City of Palmdale* (1993) 5 Cal.4th 363
10 California Government Code section 54956.9; *Shapiro v. Board of Directors of Center City Development Corp.* (2005) 134 Cal.App.4th 170 (agency must be a party to the litigation).
11 *"The Brown Act,"* California Attorney General (2003), p. 40
12 *Trancas Property Owners Association v. City of Malibu* (2006) 138 Cal.App.4th 172
13 Government Code section 54956.9(b)
14 California Government Code section 54956.8
15 *Shapiro v. San Diego City Council* (2002) 96 Cal.App.4th 904
16 California Government Code section 54956.8
17 California Government Code section 54957
18 63 Ops.Cal.Atty.Gen. 215 (1980); *but see: Duvall v. Board of Trustees* (2000) 93 Cal.App.4th 902 (board may discuss personnel evaluation criteria, process and other preliminary matters in closed session).
19 *Gillespie v. San Francisco Public Library Commission* (1998) 67 Cal.App.4th 1165; 85 Ops.Cal.Atty.Gen. 77 (2002)
20 *Gillespie v. San Francisco Public Library Commission* (1998) 67 Cal.App.4th 1165; 80 Ops.Cal.Atty.Gen. 308 (1997). Interviews of candidates to fill a vacant staff position conducted by a temporary committee appointed by the governing body may be done in closed session.
21 California Government Code section 54957
22 78 Ops.Cal.Atty.Gen. 218 (1995); *Bell v. Vista Unified School District* (2000) 82 Cal.App.4th 672; *Furtado v. Sierra Community College* (1998) 68 Cal.App.4th 876; *Fischer v. Los Angeles Unified School District* (1999) 70 Cal.App.4th 87
23 *Moreno v. City of King* (2005) 127 Cal.App.4th 17
24 California Government Code section 54957
25 *Gillespie v. San Francisco Public Library Commission* (1998) 67 Cal.App.4th 1165
26 California Government Code section 54957.1(a)(5)
27 California Government Code section 54957.6
28 57 Ops.Cal.Atty.Gen. 209 (1974)
29 California Government Code section 54957.1(a)(6)
30 California Government Code section 3549.1
31 California Government Code section 3540
32 California Government Code section 3547
33 California Education Code section 48918
34 California Education Code section 72122
35 California Education Code section 60617
36 California Government Code section 54953.1
37 California Government Code section 54956.7

38 California Government Code section 54957
39 *McKee v. Los Angeles Interagency Metropolitan Police Apprehension Crime Task Force* (2005) 134 Cal.App.4th 354
40 California Government Code section 54957.8
41 California Government Code section 54962
42 California Health and Safety Code section 32106
43 Government Code section 54963; *Harron v. Bonilla* (2005) 125 Cal.App.4th 738
44 *Kleitman v. Superior Court* (1999) 74 Cal.App.4th 324, 327; *see also:* California Government Code section 54963
45 *Roberts v. City of Palmdale* (1993) 5 Cal.4th 363
46 80 Ops.Cal.Atty.Gen. 231 (1997)
47 76 Ops.Cal.Atty.Gen. 289 (1993)
48 California Government Code section 54963
49 California Government Code section 54957
50 California Government Code section 54957.1

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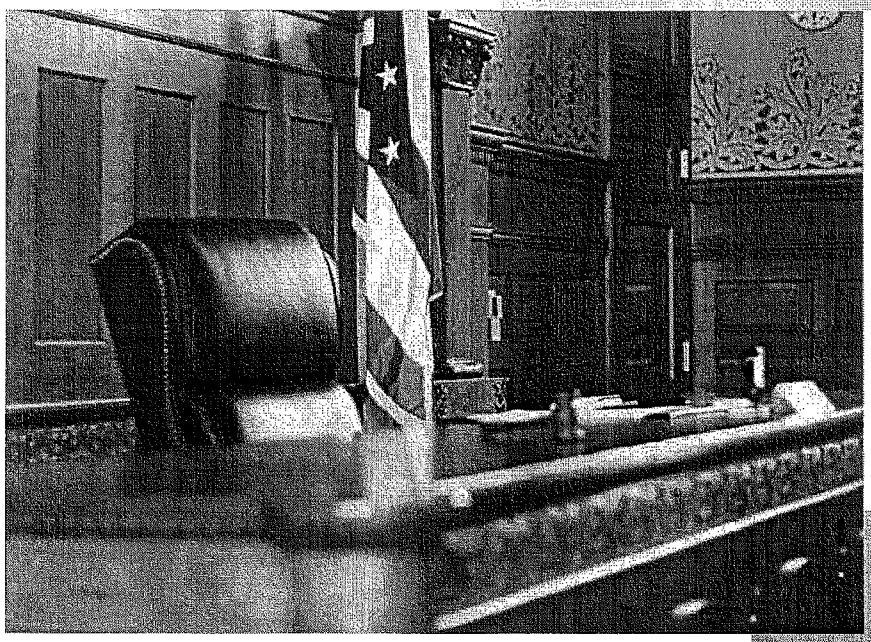
CHAPTER 6:
REMEDIES



INVALIDATION

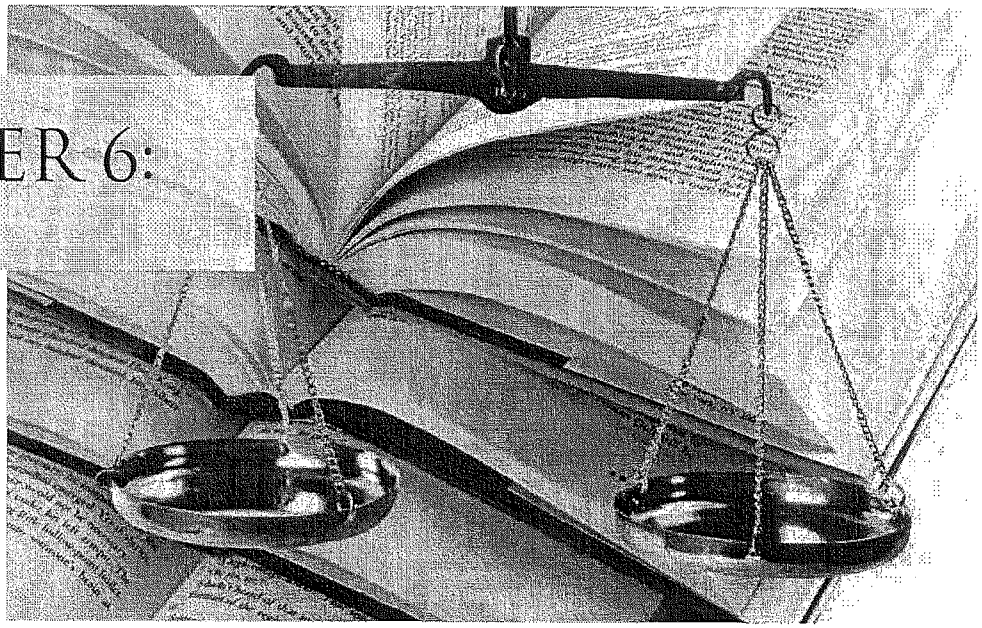
CIVIL ACTION TO PREVENT FUTURE VIOLATIONS

COSTS AND ATTORNEY'S FEES

CRIMINAL COMPLAINTS

VOLUNTARY RESOLUTION

CHAPTER 6:
REMEDIES



Certain violations of the Brown Act are designated as misdemeanors, although by far the most commonly used enforcement provisions are those that authorize civil actions to invalidate specified actions taken in violation of the Brown Act and to stop or prevent future violations. Still, despite all the safeguards and remedies to enforce them, it is ultimately impossible for the public to monitor every aspect of public officials' interactions. Compliance ultimately results from regular training and 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 interested person, including the district attorney, may seek to invalidate certain actions of a legislative body on the ground that they violate the Act.[1] Violations of the Brown Act, however, cannot be invalidated if they involve the following types of actions:

- Those taken in substantial compliance with the law;
- 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.

Before filing a court action seeking invalidation, a person who believes a violation has occurred must send a written "cure or correct" demand to the legislative body. This demand must clearly describe the challenged action, the nature of the claimed violation, and the "cure" sought. This demand must be sent within 90 days of the alleged violation or 30 days if the action was taken in open session but in violation of Section 54952.2, which defines "meetings".[2] The legislative body then has up to 30 days to cure and correct its action. If it does not act, any lawsuit must be filed within the next 15 days.

The purpose of this requirement is to offer the body an opportunity to consider whether a violation has occurred and to weigh its options before litigation is filed. The Act does not specify how to cure or correct a violation; the best method is to rescind the action being complained of and to start over.

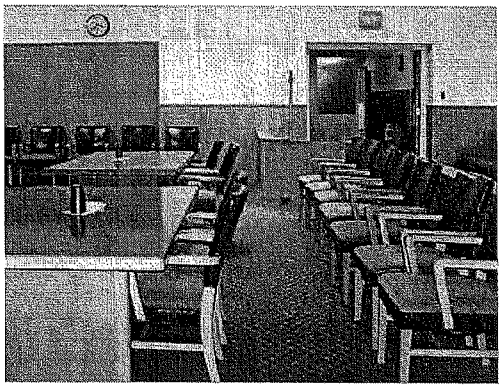
Although just about anyone has standing to bring an action for invalidation[3], the challenger must show prejudice as a result of the alleged violation.[4] An action to invalidate fails to state a cause of action against the agency if the body deliberated but did not take an action.[5]

Practice Tip:
A lawsuit to invalidate must be preceded by a demand to cure and correct the challenged action in order to give the legislative body an opportunity to consider its options.

CIVIL ACTION TO PREVENT FUTURE VIOLATIONS

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.



It is not necessary for a challenger to prove a past pattern or practice of violations by the local agency in order to obtain injunctive relief. A court may presume when issuing an injunction that a single violation will continue in the future where the public agency refuses to admit to the alleged violation or to renounce or curtail the practice.[6] Note, however, that a court may not compel elected officials to disclose their recollections of what transpired in a closed session.[7]

Upon finding a violation of the Brown Act pertaining to closed sessions, a court may compel the legislative body to tape record its future closed sessions. In a subsequent lawsuit to enforce the Act alleging a violation occurring in closed session, a court may upon motion of the plaintiff review the tapes if there is good cause to think the Brown Act has been violated, and make public the relevant portion of the closed session recording.

COSTS AND ATTORNEY'S FEES

Someone 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. One court has held that attorney's fees must be awarded to a successful plaintiff unless special circumstances exist that would make a fee award against the public agency unjust.[8] When evaluating how to respond to assertions that the Brown Act has been violated, elected officials and their lawyers should assume that attorneys fees will be awarded against the agency if a violation of the Act is proven.

Practice Tip:
If a violation of the Brown Act is proven, attorney's fees will likely be awarded.

An attorney fee award may only be directed against the local agency and not the individual members of the legislative body. If the local agency prevails, it may be awarded court costs and attorney's fees if the court finds the lawsuit was clearly frivolous and lacking in merit.[9]

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.[10]

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.[11]

"Action taken" is 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.[12] 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.[13] 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.[14]

As with other misdemeanors, the filing of a complaint is up to the district attorney. Although criminal prosecutions of the Brown Act are uncommon, district attorneys in some counties aggressively monitor public agencies' adherence to the requirements of the law.

VOLUNTARY RESOLUTION

Arguments over Brown Act issues often become emotional on all sides. Newspapers trumpet relatively minor violations, unhappy residents fume over an action, and legislative bodies clam up about information better discussed in public. Hard lines are drawn and rational discussion breaks down. Occasionally the district attorney or even the grand jury becomes involved. Publicity surrounding alleged violations of the Brown Act can result in a loss of confidence by constituents in the legislative body. There are times when it may be preferable to consider re-noticing and rehearing, rather than litigating, an item of significant public interest, particularly when there is any doubt about whether the open meeting requirements were satisfied.

Practice Tip:

Training and exercising good judgment can help avoid Brown Act conflicts.

At bottom, agencies that regularly train their officials and pay close attention to the requirements of the Brown Act will have little reason to worry about enforcement.

Endnotes

1 California Government Code section 54960.1. Invalidation is limited to actions that 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). Violations of sections not listed above cannot give rise to invalidation actions, but are subject to the other remedies.

2 California Government Code section 54960.1 (b) and (c)(1)

3 *McKee v. Orange Unified School District* (2003) 110 Cal.App.4th 1310

4 *Cohan v. City of Thousand Oaks* (1994) 30 Cal.App.4th 547

5 *Boyle v. City of Redondo Beach* (1999) 70 Cal.App.4th 1109

6 *California Alliance for Utility Safety and Education (CAUSE) v. City of San Diego* (1997) 56 Cal.App.4th 1024; *Common Cause v. Stirling* (1983) 147 Cal.App.3d 518

7 *Kleitman v. Superior Court* (1999) 74 Cal.App.4th 324

8 *Los Angeles Times Communications, LLC v. Los Angeles County Board of Supervisors* (2003) 112 Cal.App.4th 1313

9 California Government Code section 54960.5

10 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.

11 California Government Code section 54959

12 California Government Code section 54952.6

13 61 Ops.Cal.Atty.Gen.283 (1978)

14 California Government Code section 54959

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