

THE BROWN ACT

Office of Yolo County Counsel
Special District Workshop—2016

Presented by Phil Pogledich, County Counsel

TRAINING TOPICS

- History and intent
- Legislative bodies
- Meetings
- Notice/agenda and public participation requirements
- Closed sessions
- Remedies for noncompliance

I. HISTORY AND INTENT

- History and intent
- Legislative bodies
- Meetings
- Notice/agenda and public participation requirements
- Closed sessions
- Remedies for noncompliance

HISTORY

- Authored by Ralph M. Brown (1908–1966) a Central Valley assemblyman, the Legislature adopted the Brown Act in 1953 to safeguard the public's right to access and participate in government meetings within the State.
- “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, except as otherwise provided in this chapter.”
- “House of glass” metaphor for legislative bodies covered by the Brown Act.
- The Brown Act is found at California Government Code Sections 54950-54963.

INTENT OF THE BROWN ACT

- To ensure that deliberations and actions of legislative bodies are open and public.
- To ensure meaningful public access to local government decisions.
- Meetings must be open to the public, held on a regular schedule, follow a noticed agenda.
- No secret ballots.
- Not just the law, but a good business practice as well!

II. LEGISLATIVE BODIES

- History and intent
- Legislative bodies
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- Notice/agenda and public participation requirements
- Closed sessions
- Remedies for noncompliance

WHO MUST COMPLY?

- The Act applies to the meetings of “legislative bodies” of local agencies.
- Governing bodies
- Subsidiary bodies
 - Any board, commission, committee, or other body of a local agency created by charter, ordinance, resolution or formal action of a legislative body is itself a legislative body.
 - **Exception:** Ad hoc advisory committees.

STANDING COMMITTEES

- Notice and agenda requirements are the same as the parent body.
- Must be less than a quorum.
- Other members can attend but only as passive, neutral observers. (Note: *This is unusual*)
 - No wincing, frowning, smiling, thumbs up.
 - Must be neutral in expression and body language.
 - No questions or comments.

AD HOC COMMITTEES

- Must be:
 - Composed solely of less than a quorum of the legislative body (i.e., no public members)
 - Created for limited or single purpose
 - Limited term—to be dissolved upon completion of task
 - Meeting schedule is not fixed by legislative body
- Unless all of these requirements are satisfied, it is a standing committee and subject to the Brown Act

III. MEETINGS

- History and intent
- Legislative bodies
- Meetings
- Notice/agenda and public participation requirements
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WHEN DOES THE BROWN ACT APPLY?

MEETINGS!

- Congregation of a majority of the members of a legislative body
 - Same time and place
 - To hear, discuss or deliberate
 - Agency business
- Can include use of technology (email, phone) by a majority of board members to discuss an issue (though teleconference meetings can legally occur if requirements are met)
- Meeting requires quorum to get started and stay in business

WHEN DOES THE BROWN ACT NOT APPLY?

- Individual contacts & conversations
- Conferences open to the public (e.g., annual association conferences)
- Open and publicized community meetings (e.g., local service club)
- Other legislative bodies (e.g., members of city council attending meeting of planning commission)
- Social/ceremonial events (e.g. football games, wedding, retirement party, etc.)
- **BUT.... DON'T DISCUSS AGENCY BUSINESS!**

SERIAL MEETINGS

- **Hub and Spoke** (i.e., a superintendent briefs board members prior to a formal meeting and reveals information about the members' respective views.)
- **Daisy Chain** (i.e., Member A contacts Member B, Member B contacts Member C, Member C contacts Member D and so on.)
- Email—Beware of “reply to all”
- Collective concurrence required? No longer the law!

OOPS! WAS THAT A MEETING?

- **Collective Briefings**
 - Quorum cannot meet together with staff in advance of a meeting for a collective briefing
- **Retreats or Workshops**
 - Brown Act will apply whether the focus is on long-term agency planning or team building and group dynamics
- **Informal Gatherings**
 - Beware of pre- or post-meeting gatherings

TYPES OF MEETINGS

- **Regular meetings:**
 - Agenda posted in publicly accessible location 72 hours before meeting.
- **Special meetings:**
 - Called by chair or majority of board members.
 - 24 hours before meeting: Post notice. Notify board members in writing. Notice to requesting newspapers.
- **Emergency meetings:**
 - For health and safety emergencies.
 - Same notice requirements as for special meetings, but only one hour notice required

IV. NOTICE/AGENDA AND PUBLIC PARTICIPATION REQUIREMENTS

- History and intent
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REQUIREMENTS FOR MEETINGS

- **Notice:** Required for all meetings
- **Agenda:** Required only for regular meetings (but in practice, agenda/notice often one in the same)
- **Open and public**
 - All persons must be permitted to attend, no secret ballots
- **No conditions on attendance**
 - May not require to sign-in, cannot charge for attendance.

REQUIREMENTS FOR MEETINGS (CONTINUED)

- **Accessible**
 - Must provide reasonable accommodations, cannot allow some members of public to attend and others not, can't hold in facility that prohibits attendance on discriminatory bases
- **Video/audio recording**
 - Must allow photos, audio/videotaping of the meeting (unless it is disruptive to the meeting)
- **Voting (New in 2014)**
 - Must report how each individual official votes on any action, and record the vote in the minutes.

AGENDAS

- Must post in a location “freely accessible to members of the public” 24/7.
- Must state time and place of meeting and a “**brief general description**” of each item of business to be transacted or discussed, including items to be discussed in closed session.
- People should have enough information to decide whether they want to attend.
- Notices must be posted on agency’s website, if it has one

ITEMS NOT ON THE AGENDA

- No action can be taken... except:
 - Majority decides there is an **emergency** situation; or
 - 2/3 of the members present (or all members if less than 2/3 are present) vote that immediate action is needed **and** the need came to board's attention after agenda was posted (regular meetings only); or
 - When an item appeared on the agenda of, and was continued from, a meeting held not more than 5 days earlier.

ITEMS NOT ON THE AGENDA (CONTINUED)

- During general public comment:
 - Brief response to statements or questions during public comment is permitted
 - May refer to staff for response during meeting
 - May request staff to report back and/or place on a future agenda
- May also briefly announce or report on member's own activities

RIGHTS OF THE PUBLIC

- May address Board:
 - Matters on the agenda—before or during consideration of the item
 - Other matters within jurisdiction—regular meetings only unless Board allows otherwise
 - Brief response and/or referral to staff, but **NO ACTION!**
- Cannot prohibit public criticism, but there is no immunity for defamatory statements
- **Reasonable time limitations and other regulations are permitted (be consistent)**

RECORDS & PUBLIC ACCESS

- General rule: agendas, minutes and handouts distributed at board meetings are public records.
- Documents pertaining to an agenda item must be made available to the public. This includes staff handouts distributed to board members less than 72 hours prior to the meeting.
- Handouts provided by staff during a meeting must be made available to public at same time; handouts from public must be made available after meeting.

V. CLOSED SESSIONS

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CLOSED SESSIONS

- If situation meets one of the specific exceptions to the open meeting rules, may hold in closed session
- Not enough that it is sensitive, embarrassing or controversial
- Meeting is either open or closed. Cannot invite selected members of public
- **Generally used to avoid revealing confidential information that would prejudice legal or negotiating position of the body or compromise privacy interest of employee**

CLOSED SESSIONS – AGENDAS AND REPORTS

- Legal authority for closed session must be on the posted agenda with the same kind of brief description
- Brown Act supplies a series of **fill-in-the-blank templates** for agenda description that provide a safe harbor from legal attacks
- Must report out on certain actions taken and the vote of each member present. Required content specified in Government Code section 54957.1
- May keep a confidential minute book to record actions taken in closed session (Note: This is unusual)
 - Minutes are open to a court if lawsuit claims an open meeting violation and
 - Board members may inspect.

PERSONNEL CLOSED SESSIONS

- **Limited Topics:** Appointment, employment, evaluation of performance, discipline or dismissal of a public employee or to hear complaints or charges brought against the employee
- Restricted to discussing particular employees, **not** general personnel policies or employee compensation (consider labor negotiation closed session instead)
- For disciplinary issues, must give employee 24 hours notice – they have a right to a public meeting. Failure to notice makes any action void.

PENDING LITIGATION CLOSED SESSIONS

- Existing litigation
 - May discuss existing litigation with counsel, approval to settle, etc.
- Threatened litigation
 - Legal counsel can inform body of exposure to litigation
- Potential litigation initiated by the agency
 - May seek legal advice about whether to initiate litigation

REAL ESTATE NEGOTIATIONS CLOSED SESSIONS

- Discuss purchase, sale, exchange or lease of specific real property by or for the agency
- Must identify negotiator and the real property involved
- Must focus on price and other terms of purchase (or lease)

LABOR NEGOTIATIONS CLOSED SESSIONS

- To instruct bargaining representatives on employee salaries and benefits
- Before or after negotiations
- Prior to closed session, must identify designated representatives and employee(s) or employee groups

REPORTING OUT OF CLOSED SESSION

- Not all decisions must be reported – some examples of items that must be reported:
 - Real estate agreement
 - Approval of lawsuit initiation or intervention
 - Settlement of litigation (if action makes it final)
 - Agreement with labor union
 - Actions affecting employee's status
- Some reports not required until issue is finalized (i.e., administrative remedies are exhausted.)

VI. REMEDIES FOR NONCOMPLIANCE

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ENFORCEMENT, PENALTIES & REMEDIES

■ Civil Action

- District Attorney or any interested person may ask court to:
 - Stop violations
 - Determine applicability of Brown Act to certain actions
 - Compel Board to tape record closed session

■ Invalidation

- Any person may seek to invalidate an action that violates the Brown Act
- Board first has a chance to cure—best opportunity to address an issue!

ENFORCEMENT, PENALTIES & REMEDIES

- **Costs and Attorneys' Fees**
 - Someone who successfully invalidates an action or enforces one of the Act's civil remedies may seek court costs and attorneys' fees
 - Award is only against the local agency, not individual members

ENFORCEMENT, PENALTIES & REMEDIES

■ **Criminal Complaints**

- Within District Attorney's discretion to file
- A violation done with improper intent is a misdemeanor
- Requirements:
 - **Overt act.** Board must have taken action. Not just deliberation or a vote, but a collective decision.
 - **Intent.** Must have intended to deprive public of information to which the Board knew or should have known public is entitled.

RESOURCES

- Best: “Open and Public V”—League of California Cities
 - (<http://www.cacities.org/Resources-Documents/Resources-Section/Open-Government/Open-Public-2016.aspx>)
- Good but Dated: “The Brown Act—Open Meetings for Local Legislative Bodies)—California Attorney General, 2003
 - http://ag.ca.gov/publications/2003_Intro_BrownAct.pdf
- The Brown Act, California Government Code § 54950-54963
- Office of the County Counsel—530-666-8172 or philip.pogledich@yolocounty.org