
# THE BROWN ACT

## March 2021

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This handbook is designed for general informational purposes. This handbook should not be construed as, or substituted for, formal legal advice. Additionally, this handbook is not intended to create an attorney-client relationship where none had already existed, or alter the scope of any existing attorney-client relationship.

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# I
# OVERVIEW

The Ralph M. Brown Act, commonly known as the "Brown Act," is codified at Government Code Sections 54950-54963. Throughout this Handbook, all references are to the Government Code, unless otherwise specified.

The purpose of the Brown Act is to ensure an open decision-making process through public meetings of legislative bodies of local agencies.

Public meetings mean more than merely watching the members of a legislative body vote. This law has been interpreted to mean that all of the "deliberative" processes, including discussion, debate, and the acquisition of information, should be open and available for public scrutiny.

Exceptions to the general rule of public meetings are narrowly construed and are found only in specific statutory or judicial references. If a meeting does not clearly fit a specific exception, the meeting must be public.[1]

Even if there is no intent to do so, it is easy to accidentally violate one or more provisions of the Brown Act. If a violation occurs, an aggrieved member of the public (often newspapers), or the District Attorney, may file a lawsuit to compel compliance. In many cases, court costs and attorney fees can be collected from the local agency for prosecuting the violation.

Knowledgeable members of legislative bodies can avoid losing court battles, and paying attorney fees for both sides, by understanding the provisions of the Brown Act and/or by knowing when to ask questions to ensure compliance with the Brown Act.

This Handbook is designed to be user friendly. Citations have been included to direct you to the applicable section of the Brown Act and/or the applicable section of the California Education Code.

A suggested approach to using this Handbook is:

1. Locate your point of interest in the Table of Contents;

2. Go to the page, or pages, referenced in the Table of Contents for your answer.

Primary statutory source references are provided through extensive annotations.

[1] Even if an exception exists, it is prudent for the legislative body to review its Bylaws. Legislative body Bylaws may be more restrictive than the Brown Act.

# II
# WHO IS COVERED

## A. INTENT

The California State Legislature stated in broad terms that the Brown Act applies to public commissions, boards, councils, and other public agencies that exist to aid in the conduct of "the people's business." The Act requires that actions and deliberations be openly conducted. As a general premise, the Brown Act applies to the legislative body of every local agency in the State. The limited exceptions (e.g., Education Code section 35147 [exempting certain councils and schoolsite advisory committees]; *see* Handbook, Section II.C.3., below) are referenced through the Handbook. (54950.)

## B. LEGISLATIVE BODY, AS DEFINED BY THE BROWN ACT

### 1. Governing Body of a Local Agency

"The governing body of a local agency, or any other local body created by state or federal statute," is considered a "legislative body" for the purposes of the Brown Act.

The term "local agency" includes all cities, counties, school districts, municipal corporations, and all other local public agencies. Examples of other local public agencies include fire protection districts, community services districts, local housing authorities, air pollution control districts, local health planning agencies, local utility districts, et cetera.

The body that governs each of these agencies/entities is subject to the requirements of the Brown Act. (54951 and 54952.)

Pursuant to the passage of SB 126, effective January 1, 2020, Section 47604.1 will be added to the California Education Code, which provides that a charter school and an entity managing a charter school[2] are subject to the Brown Act, the California Public Records Act, and the Political Reform Act, among other provisions of the Government Code. (See AB 126 or California Education Code section 47604.1 for the particulars.)

[2] An "entity managing a charter school" is defined as a nonprofit public benefit corporation that operates a charter school consistent with Education Code section 47604. An entity is not considered an "entity managing a charter school" solely because it contracts with a charter school to provide goods or services that are performed at het direction of the governing body of the charter school. (Cal. Education Code section 47604.1(a).)

**2. Subsidiary Board, Commission, Committee, etc.**

The Brown Act also includes in the definition of "legislative body" any commission, committee, board, or other body of a local agency that has been created by charter, ordinance, resolution, or **formal action** of a legislative body. It does not matter whether the body is permanent or temporary, or whether it is decision-making or advisory. (54952.) Except for the narrow exception described in Handbook Section II.C., below, these bodies are also subject to the requirements of the Brown Act.

**3. Board, Commission, Committee, or Body that Governs a Private Corporation, Limited Liability Company or Other Entity**

The Brown Act further defines a "legislative body" to include a board, commission, or committee that governs a private corporation, limited liability company, or other entity that either:

a. lawfully exercises authority delegated by an elected governing body; or

b. receives funds from a local agency and a member of the local agency's legislative body that has been appointed to that governing body as a full voting member by action of the local agency. (54952(c)(1)(A) and (B).)

*Note: An entity that receives funds from a local agency and that has a member of the legislative body of the local agency as a full voting member will not be relieved from the public meeting requirements simply by changing the voting member's status to a nonvoting member. (54952(c)(2).)*

## C. EXCEPTIONS

**1. Not Created by Formal Board Action**

a. The California Courts of Appeal have interpreted "formal action" by the legislative body to include:

- a formal resolution or vote;
- an informal designation;[3] or

[3] *See Joinder v. City of Sebastopol* (1981) 125 Cal.App.3d 799, 805 (holding that the city council, though it did not formally adopt a resolution, nevertheless took "formal action" when it designated two of its members to meet with two planning commission members to interview applicants and report back to the city council with recommendations).

- an authorization to an executive officer via Board Policy; or[4]

- any other action that plays a role in bringing the commission, committee, board, or other body into existence.[5]

b. Except as noted in paragraph (a) above, a commission, committee, etc. that has been created by an executive officer or other employee of the local agency will not constitute a "legislative body" under the Brown Act. Typically, formal action of the local agency governing body is required. But, should the Board direct an executive officer to create such a commission, it would qualify as a legislative body.

**2. "Standing" Committees versus "Non-Standing" (Temporary) Committees**

a. A "standing" committee is subject to the Brown Act. A "standing" committee is one that has more than one member which either:

(1) has continuous (i.e., no fixed duration) jurisdiction over a particular subject matter (e.g., budgets, audits, contracts, personnel matters); or

(2) has a meeting schedule that is fixed by formal action of the governing body.

b. A "non-standing" committee is exempt from the Brown Act provided:

(1) it is comprised of solely less than a quorum of the members of the governing body; and

(2) it does not have either continuing jurisdiction over a particular subject matter or have a meeting schedule

[4] *See Frazer v. Dixon Unified School District* (1993) 18 Cal.App.4th 781, 793 (holding that the board's adoption of a formal, written policy calling for appointment of a committee to advise the school superintendent and, in turn, the board whenever there was a request for reconsideration of "controversial reading matter," was sufficiently similar to the types of "formal action" listed in Gov. Code § 54952(b) to require that meetings be open to the public).

[5] *See Californian Aware v. Joint Labor/Management Benefits Com.,* (2011) 200 Cal.App.4th 972, 978.

that is fixed by formal action of the governing body; and

(3) it is advisory.

c. Example: An advisory committee (composed of solely less than a quorum of the members of a school district governing board) that was created for the sole purpose of advising the full board as to candidate qualifications for a vacant position was held not subject to the Brown Act requirements. (*Henderson v. Board of Education* (1978) 78 Cal.App.3d 875).

**3. Meetings of Schoolsite Councils or Schoolsite Advisory Committees**

a. Education Code section 35147: Any meeting of a schoolsite council or a schoolsite advisory committee is exempt from the provisions of the Brown Act.

b. This Education Code exemption, however, creates its own open-meeting and notice requirements which mirror the Brown Act; it simply eliminates the specific criminal and civil remedies (*see* Handbook, Section X, below), as well as special meeting and closed session exceptions.

c. Section 35147 requires the following:

(1) The meeting must be open to the public.

(2) The public must be able to address the council or committee during the meeting on any item within the subject matter jurisdiction of the council or committee.

(3) Notice of the meeting must be posted at the schoolsite, or other appropriate place accessible to the public, at least seventy-two (72) hours before the time set for the meeting.

(4) The notice must specify the date, time, and location of the meeting, and contain an agenda describing each item of business to be discussed or acted upon.

(5) The council or committee shall not take any action on any item of business unless that item appeared on the posted agenda or unless the council or committee members present, by unanimous vote, find that there is a need to take immediate action and that the need

for action came to the attention of the council or committee subsequent to the posting of the agenda.

(6) Any materials provided to a schoolsite council shall be made available to any member of the public who requests the materials pursuant to the California Public Records Act.

d. Education Code section 35147 deviates slightly from the Brown Act by exempting from the notice and agenda requirements questions or brief statements made at a meeting by members of the council, committee, or public that (1) do not have a significant effect on pupils or employees in the school or school district; or (2) can be resolved solely by the provision of information.

e. Education Code section 35147 provides an opportunity for a council or schoolsite advisory committee to cure a violation of this section if "upon demand of any person, the council or committee shall reconsider the item at its next meeting, after allowing for public input on the item."

## D. NEWLY ELECTED MEMBERS

1. Any person who has been elected to serve as a member of a legislative body, even though he/she has not yet assumed office, must conform his/her conduct to the requirements of the Brown Act. (54952.1.)

2. For purposes of enforcement of the Brown Act, the newly elected member will be treated as if he/she had assumed office. (54952.1.)

3. A person is deemed elected when the final election results are declared by the county elections official. Election results are to be declared no later than the Monday before the first Friday in December. (Elections Code section 10551.)

# III
# WHAT CONSTITUTES A MEETING

The definition of "meeting" is critical, given the underlying premise of the Brown Act. That premise is that all local agency meetings are public and that the discussion of official business must be transacted at such a public meeting(s).

## A. GENERAL RULE

1. A meeting includes any congregation (gathering) of a **majority** of the members of the legislative body at the same time and location (including teleconference as permitted by Section 54953) to **hear, discuss, deliberate, or take action** upon any item that is within the subject matter jurisdiction of the legislative body or the local agency. (54952.2(a).)

2. The Brown Act also specifically prohibits use of a series of communications of any kind, directly or through intermediaries, to **discuss, deliberate, or take action** upon any item that is within its subject matter jurisdiction outside of a properly noticed public meeting. (54952.2(b); *see* Handbook, Section III.C., below.)

    a. Most often, this type of meeting is conducted through a series of communications by individual members or less-than-a-quorum groups, ultimately involving a majority of the body's members.

    b. These meetings are called serial meetings.

3. "Deliberation" has been defined as follows:

> *To examine, weigh, and reflect upon the reasons for or against the choice. Public choices are shaped by reasons of fact, reasons of policy, or both. Deliberation thus connotes not only collective discussion, but the collective acquisition and exchange of facts preliminary to the ultimate decision. (Sacramento Newspaper v. Sacramento County Board of Supervisors* (1968) 263 Cal.App.2d 41; *216 Sutter Bay Associates v. County of Sutter* (1997) 58 Cal.App.4th 860.)

4. For the purpose of determining whether a "meeting" has occurred, it does not matter whether the members intended to take, or in fact took, any action. (54952.2; see *Frazer v. Dixon Unified School Dist.* (1993) 18 Cal.App.4th 781, 796-797.)

5. A meeting of the governing body of a charter school to discuss items related to the operation of the charter school shall not include discussion of any item regarding an activity of the governing body that is unrelated to the operation of the charter school. (Cal. Education Code section 47604.1(f), effective January 1, 2020.)

## B. EXAMPLES OF MEETINGS

### 1. Scheduled Meetings

Clearly, a meeting has occurred if a quorum of the legislative body is present and the business of the local agency is discussed or transacted at a regular or special scheduled meeting.

### 2. Informal Meetings

Informal gatherings of the legislative body can present more difficult questions. If such gatherings occur, the following two questions should be asked:

- Were a majority of the members of the legislative body present at the gathering?

- Did communication take place on an item that is within the subject matter jurisdiction of the legislative body? (54952.2(a).)

If the answers are "yes," a meeting has likely occurred.

The concept of an informal meeting is especially important where members of a legislative body socialize with each other and, intentionally or unintentionally, talk about matters related to their official responsibilities/duties. This informal/social conversation violates the Brown Act. More importantly, it provides the facts necessary for an "interested person" to legally challenge any action taken regarding the subject matter of the informal/social conversation. Such a legal challenge may ultimately lead to the action taken being voided by a court of law.

### 3. Workshops and Retreats

a. A workshop which focuses on a narrow topic or legal issue and involves only a select few officials is covered by the Brown Act. Notice to the public of such a workshop is required and must comply with public meeting notice requirements if a majority of the legislative body will be present. (54952.2(c)(2); *see* Handbook, Section IV.A.2., below.)

b. A retreat of legislative body members from a single jurisdiction, which includes a discussion of matters related to that jurisdiction, is covered by the Brown Act. Limiting the retreat topic(s) to non-business matters (e.g., issues of procedure, morale, etc.) does not exempt the retreat from the Brown Act. (54952.2(c)(2).) Notice to the public of such a retreat is required and must comply with public meeting notice requirements if a majority of the legislative body will be present. (54952.2(c)(2); *see* Handbook, Section IV.A.2., below.)

**4. Exceptions: Conferences, Social or Ceremonial Occasions**

Provided the officials do not discuss amongst themselves the "business" of the local agency, the following events do not constitute a meeting under the Brown Act, even if a majority of the legislative body is present:

a. General conferences which are open to the public, and which involve a discussion of broad issues and a wide spectrum of public officials. (54952.2(c)(2).)

b. Meetings called by another person or agency to address a topic of local community concern. (54952.2(c)(3) and (4).)

c. Social or ceremonial occasions. (54952.2(c)(5).)

d. Meetings of Standing Committees. Attendance by a majority of the legislative body at an open and noticed meeting of a standing committee of the body, is permitted so long as the standing committee non-members attend only as observers. (54952.2(c)(6).) (For a definition of "standing committee," *see* Handbook, Section II.C.2., above.)

In order to preserve the status of an "observer," a member of the legislative body must (1) sit in the area designated for members of the public who are attending the meeting; and (2) may not ask questions or make statements while attending the meeting. (81 Ops.Cal.Atty.Gen 156 (1998).)

*Note: In general, the larger and more diverse the gathering, the more likely it will be purely social or only of general interest. The smaller and/or more focused the gathering, the more likely that impermissible "business of the public" will be discussed, thus invoking Brown Act requirements.*

## C. "SERIAL MEETINGS"

A major amendment to the Brown Act that addressed "serial meetings" became effective January 1, 2009.[6] The term "serial meeting" has been defined by the Office of the Attorney General as "a series of communications [directly or through intermediaries], each of which involves less than a quorum of the legislative body, but which taken as a whole, involves a majority of the body's members." (*See also* Handbook, Section III.A.2., above.)

Prior to the 2009 amendment, the California First District Court of Appeal, in *Wolfe vs. City of Fremont*, limited the prohibition on "serial meetings" to only the circumstances where a series of communications had actually resulted in a "collective concurrence."[7] The Court defined "collective concurrence" as "a majority of . . . members share[ing] the same view . . . and have[ing] reached that shared view after interaction between or among themselves, whether directly or through an intermediary."

The 2009 amendment eliminated the term "collective concurrence" from Government Code section 54952.2 and expressly superseded the holding in *Wolfe*, which had made "collective concurrence" a prerequisite to finding a "serial meeting" in violation of the Brown Act.[8] It is now a violation of the Brown Act when, outside of a properly noticed public meeting, "a majority of the members of a legislative body . . . use a series of communications of any kind, directly or through intermediaries, to discuss, deliberate, or take action on any item of business within the subject matter jurisdiction of the legislative body."

The effect of the 2009 amendment is that a member of the legislative body may NOT engage, directly or through intermediaries, in any conversation, email, text messages, instant messages, or any other form of discussion or deliberation concerning (1) an agenda item or (2) any other district business with other board members who ultimately comprise a board majority.

1. It is not necessary that these discussions result in a "collective concurrence."

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[6] During the 2008/2009 session, the California State Legislature passed Senate Bill 1732, amending California Government Code section 54952.2 and adding Government Code section 6252.7.

[7] *See Wolfe v. City of Fremont* (2006) 144 Cal.App.4th 533, 545, fn. 6 (providing that "serial individual meetings that do not result in a 'collective concurrence' do not violate the Brown Act.")

[8] *See* 2008 Cal.Stat.Ch.63 § 1 (declaring that the Legislature "disapproves with the court's holding in *Wolfe v. City of Fremont* . . . to the extent that it construes the prohibition against serial meetings by a legislative body of a local agency . . . to require that . . . [serial] meetings actually result in a collective concurrence [in order] to violate the prohibition . . . .")

2. In fact, any series of communications between members of the legislative body that involves a majority discussing or deliberating, outside of a properly noticed public meeting, on matters within the subject matter jurisdiction of the legislative body is a violation.

3. The following examples illustrate the pitfalls:

   a. Example 1 – The Chain: Member A contacts Member B, who then communicates the A/B discussion to Member C. This constitutes a "serial meeting" and is a violation of the Brown Act in the case of a five-person body.

   b. Example 2 – The Spokes: Member A communicates individually with Member B and Member C (the spokes). This would constitute a "serial meeting" and is a violation of the Brown Act in the case of a five-person body.

   c. Example 3 – Intermediaries: When a representative of Member A meets with representatives of Member B and Member C to discuss an agenda item, the members have conducted a "serial meeting" through their representatives as intermediaries, and a violation of the Brown Act has occurred in the case of a five-person body. [The Brown Act: Open Meetings for Local Legislative Bodies, Attorney General's Office (2003).]

During the legislative process, the Governor and others expressed concern that the "serial meeting" amendment could prevent board members from efficiently communicating with local agency employees. In response, the Legislature added subsection 54952.2(b)(2) to the Act. Subsection 54952.2(b)(2) does the following:

1. It expressly permits communications, outside a meeting authorized by the Brown Act, between local agency employees and board members for the purpose of "answer[ing] questions or provid[ing] information" regarding matters within the board's jurisdiction.

   *Note: Section 54952.2(b)(2) provides the safest outlet for a board member who desires the latest information or has questions on an agenda item or other district business between meetings. DO contact an employee of the agency (e.g., superintendent, city manager, etc.); DO NOT contact another board member.*

2. Communications under subsection 54952.2(b)(2), however, are only permitted if the "comments or position" of board members are not communicated to any other board member.

3. While subsection 54952.2(b)(2) authorizes communications between the agency's employees and board members, and acknowledges that a board member may divulge his/her position during these communications to the employee, section 54952.2(b)(2) does not authorize an employee to meet with a member or members of the board to request the member's position or make a recommendation on how to vote.

## D. INSTRUCTIVE AG/COURT OPINIONS

Over the past 50 years, the Office of the Attorney General and the courts have addressed the question of when informal contacts constitute a meeting. In most instances, these analyses remain accurate and instructive. For example:

- So-called "informal," "study," "discussion," "informational," "fact finding," or "pre-council" gatherings of a majority of the members of a board fell within the scope of the Brown Act as meetings, whether or not the individual members intended to take, or even took, any action at such gatherings. (42 Ops.Cal.Atty.Gen. 61 (1963).)

- Regularly scheduled luncheons where members of the city council met with representatives of civic organizations and discussed public problems/issues fell within the scope of the Brown Act as meetings. (*Sacramento Newspaper Guild v. Sacramento County Bd. Of Suprs.* (1968) 263 Cal.App.2d 41.)

- A meeting is any gathering of a quorum of a legislative body, no matter how informal, where business is transacted or discussed. (61 Ops.Cal.Atty.Gen. 220 (1978).)

- Meetings include informal gatherings where the public's business is discussed, as well as informal meetings. This should not be construed so as to prohibit legislative bodies from mere social attendance at luncheons and dinners that are often given by the Rotary Club, Lions, Soroptomists, or Junior League. (43 Ops.Cal.Atty.Gen. 26 (1964).)

- The court considered a series of telephone calls initiated by legal counsel for a local agency to individual members of the agency's governing board, described as "poll . . . for the purposes of obtaining a collective commitment or promise" from the members on an issue before the board an "evasive device" in violation of the Brown Act. (*Stockton Newspapers, Inc. v. Redevelopment Agency* (1985) 171 Cal.App.3d 95.)

- A "serial meeting" includes a concerted plan to engage in collective deliberation on public business through a series of letters or

telephone calls passing from one member of the governing body to the next. (*Roberts v. City of Palmdale* (1993) 5 Cal.4th 363, 376.)

- A majority of the members of a city council may not meet, either outside or inside the city's boundaries, to attend a private tour of the facilities of a water district that provides services to the city for the purposes of acquiring information regarding those services. This would be permissible under the Brown Act if the tour was held as a noticed public meeting of the council. (94 Ops.Cal.Atty.Gen. 33 (2011).)

# IV
# MEETING REQUIREMENTS

## A. AGENDA/NOTICE REQUIREMENTS

### 1. Regular Meetings

Each legislative body of a local agency, except for advisory committees and standing committees, must provide by ordinance, resolution, by-laws, or rules for the time and place of holding regular meetings. (54954.) Meetings of advisory committees or standing committees, if the agenda is posted at least seventy-two (72) hours in advance of the meeting, will be considered a regular meeting of that body. (54954(a).) The Brown Act requires that the legislative body of a local agency post an agenda at least seventy-two (72) hours before a regular meeting. (54954.2.)

The agenda of a "regular" meeting must comply with the following requirements:

a. The agenda must specify the time and place of the meeting and briefly describe the items to be discuss in both open and closed session. (*See* Handbook, Section IV.A.3., below.)

- No business, other than that which was specified in the agenda, shall be transacted or discussed at the meeting.
- The posting of the agenda is required even if no action is to be taken by the legislative body at the meeting.
- The posting of the agenda is also required even if the meeting is to be held entirely in closed session.

b. The agenda must include the address of the office or location where public records pertaining to the meeting are available for inspection. (*See* Handbook, Section V.B., below.)

c. The agenda must include information regarding how, to whom, and when a request for disability-related modification or accommodation, including auxiliary aids or services, may be made by a person with a disability who requires modifications or assistance to participate in the public meeting. (54954.2(a)(1).)

d. If the meeting is to be held entirely or partially by teleconference, the agenda must so reflect. (*See* Handbook, Section IV.D., below.)

e. The agenda must be posted on the agency's website. (54954.2.)

For any meeting held on or after January 1, 2019, the agenda available on an agency's website must be posted in an "integrated agenda management platform" that meets a variety of technological requirements. Districts should consult with legal counsel to determine if their existing online agenda procedures and programs are compliant in advance of January 1, 2019.

**2. Special Meetings**

In addition to regular meetings, there may be situations where "special" meetings of the legislative body are necessary. A "special" meeting is any meeting (except for an "emergency" meeting (*see* Handbook, Section IV.I., below)) that is held outside of the "regular" meeting schedule adopted by the legislative body. In such cases, the Legislature recognized that it would be difficult or impossible to comply with normal agenda and mailed notice rules.

"Special" meetings may be called by the "presiding officer" of the legislative body (e.g., the president or the chairperson), or by a majority of the members of the legislative body, at any time. To hold a special meeting, a legislative body must provide notice of such meeting at least twenty-four (24) hours in advance.

Effective January 1, 2012, the Brown Act prohibits the use of a special meeting for the purpose of considering, discussing, or acting upon the salary, salary schedule, or other form of compensation for any "local agency executive." This does not prohibit a special meeting to discuss executive salary in the context of the local agency's budget discussion. (54956(b).)

The notice of a "special" meeting must comply with the following requirements:

a. The notice must specify the time and place of the special meeting and give a brief description of the business to be transacted or discussed in open and/or closed session. (*See* Handbook, Section IV.A.3., below.)

- No business, other than that which was specified in the notice, shall be transacted or discussed at the special meeting.

- Notice is required even if no action is to be taken by the legislative body at the special meeting.

- Notice is required even if the special meeting is to be held entirely in closed session.

b. The legislative body must provide notice at least twenty-four (24) hours in advance of such meeting to each member of the legislative body and to any local newspaper, radio, or television station which has requested notice in writing.

- The notice **must be received** at least twenty-four (24) hours in advance of the meeting. Mailing the notice twenty-four (24) hours in advance is not sufficient; notice must actually be received twenty-four (24) hours prior to the special meeting.

- The written notice requirement is waived if a member of the legislative body either files a written waiver of notice at or prior to the meeting or actually attends the meeting. (54956; Education Code section 35144.)

c. The notice for special meetings must be posted at least twenty-four (24) hours prior to the meeting in a location that is freely accessible to members of the public.

d. If the meeting is to be held entirely or partially by teleconference, the notice must so reflect. (*See* Handbook, Section IV.D., below.)

e. Pursuant to AB 1344, beginning January 1, 2012, special meeting agendas must be posted on the local agency's website (if it has a website) at least twenty-four (24) hours in advance of the meeting. (54956(a).)

*Note: If a legislative body holds an informational meeting where a majority of the body will be present, notice must be given. For example, if a city council attends a luncheon meeting to discuss area problems with a civic group, the public has a right to know of and to attend such discussions.* (43 Ops.Cal.Atty.Gen. 36 (1964).)

## 3. Agenda/Notice Descriptions

a. General Rules

An agenda for a regular meeting and a notice of a special meeting must contain a brief description of each item of business to be discussed or transacted at the meeting. Generally, this description need not exceed twenty (20) words. (54954.2(a)(1).)

In *Carlson v. Paradise Unified School District*, the court provided insight for the reasoning behind this requirement:

> *Decisions of local governing bodies of school districts may directly affect parents and teachers alike, as well as the students themselves. Thus, it is imperative that the agenda of the board's business be made public and in some detail so that the general public can ascertain the nature of such business. It is a well-known fact that public meetings of local governing bodies are sparsely attended by the public at large unless an issue vitally affecting their interests is to be heard. To alert the general public to such issues, adequate notice is a requisite. (Carlson v. Paradise Unified School District* (1971) 18 Cal.App.3d 196.)

In *San Diegans for Open Government v. City of Oceanside*, the court provided the following guidance regarding this requirement:

> *Agenda drafters must give the public a fair chance to participate in matters of particular or general concern by providing the public with more than mere clues from which they must then guess or surmise the essential nature of the business to be considered by a local agency.* (*San Diegans for Open Govt. v. City of Oceanside* (2016) 4 Cal.App.5th 637, 643.)

When drafting agenda descriptions, agencies should always list each item of business separately, even if one or more items are closely related. In *San Joaquin Raptor Rescue Center v. County of Merced* (2013) 216 Cal.App.4th 1167,

the County Planning Commission placed an item on its closed-session agenda indicating its intent to vote on a new subdivision. During the closed session, the Commission took two actions: (1) it approved the subdivision, and (2) adopted a report summarizing the subdivision's Environmental Impact Report. Despite the Commission's argument that the report was implicitly part of the subdivision's approval, the Court invalidated the Commission's action because they were separate items of business.

b. Description of Closed Session Items

Closed session items must also be described, in written form, on the agenda. (54954.2(a).) Items not adequately described shall not be heard, discussed, deliberated nor acted upon.

In Section 54954.5, the Legislature provided suggested descriptions for permitted closed session topics. The suggested descriptions create a presumptive safe haven for substantial compliance with Sections 54954.2 and 54956. (*See* Handbook, Section VI., below, for a detailed discussion of how to draft closed session items.)

**4. Requests for Mailed Notices/Agendas**

If a person or entity has filed a written request, the legislative body shall mail a copy of the notice for any special meeting or the agenda and/or the agenda packet for any meeting of a legislative body. (54954.1.)

a. Duration of Request: The request is good for the calendar year in which it is filed and must be renewed following January 1 of each year.

b. Time of Mailing: The notice, agenda and/or a copy of all documents constituting the agenda packet shall be mailed at the time the notice or agenda is posted or upon distribution to all, or a majority of all, of the members of a legislative body, whichever occurs first.

c. Fee for Mailing: Legislative bodies may establish a fee for mailing the documents pursuant to the request. The fee shall be based upon "the estimated cost of providing such a service." This could, for example, be based on postage/ envelopes, etc. for the number of mailings required (one for regular meetings, and the historical number of special meetings in prior years).

d. ADA: If requested, the documents must be made available in appropriate alternative formats to persons with a disability, as required by the Americans with Disabilities Act of 1990 (e.g., audio recordings, brailled materials, large print materials, etc.). In determining what type of alternative format is necessary, the local agency shall give primary consideration to the requests of the individual with disabilities. (Code of Federal Regulations, Title 28, Section 35.160.) A surcharge shall not be imposed for providing documents in alternative formats to persons with a disability. (54957.5(d).)

*See* Handbook, Section V., below, for further discussion on the public's entitlement to receive agenda-related material.

**5. School Districts: Agenda Items From the Public**

a. Place on Agenda: Pursuant to Education Code section 35145.5, school district governing boards are required to permit members of the public to place "matters directly related to school district business" on the agenda for regular meetings. School district governing boards are also required to adopt regulations to ensure that this requirement is carried out.

This section does not apply to "special meetings." (*Frazer v. Dixon Unified School District* (1993) 18 Cal.App.4th 781.)

*Note: This public right to place matters on the agenda is not applicable to any other local agency, including a county office of education.*

b. Related to District Business: In August of 2012, the California Court of Appeal held that Education Code section 35145.5 does not create a ministerial duty for a school district to place a proposed agenda item on its agenda. (*Mooney v. Garcia* (2012) 207 Cal.App.4th 229.)

The *Mooney* holding indicates that a school district must place an item on the agenda if it is "directly related to school district business." However, the school district has the discretion to determine what meets that standard.

The holding provides guidance that a matter will not be "directly related to school district business" if the governing board itself does not expressly direct that particular function of the district (e.g., individual activities at individual schoolsites). Based on this holding, this is a more restrictive standard than the "subject matter jurisdiction" standard that

is applicable to public comment. (*See* Handbook, Section IV.E., below.)

## B. NON-AGENDIZED MATTERS

### 1. General Rule

Absent special circumstances, no action or discussion shall be taken on any item unless it is adequately described on a timely posted agenda for regular meetings or a timely posted notice for special meetings. (54954.2.)

### 2. Discussing, Deliberating or Acting Upon Items That Are Not on the Agenda for a Regular Meeting

A legislative body may discuss, deliberate, and/or take action on an item not on its posted agenda for a regular meeting only in the following three (3) circumstances:

a. Emergency Situation – Majority Vote: A majority vote determination that an emergency situation, as defined in Government Code 54956.5(a), exists. (54954.2(b)(1), *see* Handbook, Section IV.I., below.)

b. Need to Act: Two-Thirds Vote: Pursuant to a two-thirds vote of the members of the legislative body present at the meeting (or a unanimous vote if a quorum but less than two-thirds of the legislative body is in attendance), coupled with a finding that there is a need to take action **and** that the need for action came to the attention of the legislative body subsequent to the posting of the Agenda. (54954.2(b)(2).)

c. A Continued Agenda Item: The item was properly publicized for a previous meeting that occurred not more than five (5) calendar days before and was continued at that meeting to the meeting at which the action is to be taken. (54954.2(b)(3).)

*Note: These exceptions do not apply to "special meetings." Section 54956 expressly states that "no other business" than that specified on the duly noticed agenda shall be considered at a "special meeting."*

### 3. Limited Discussion and Comment

The Brown Act permits the legislative body to briefly discuss or comment on matters not on the agenda in the following three (3) limited circumstances (54954.2(a)(3)):

a. Members of a legislative body or its staff may briefly respond to statements made or questions posed by persons exercising their public testimony rights under Section 54954.3.

b. On their own initiative, or in response to questions posed by the public, a member of a legislative body or its staff may ask a question for clarification, make a brief announcement, or make a brief report on his or her own activities.

c. A member of a legislative body, or the body itself, subject to rules or procedures of the legislative body, may provide a reference to staff or other resources for factual information, request staff to report back to the body at a subsequent meeting concerning any matter, or take action to direct staff to place a matter of business on a future agenda.

## C. LOCATION OF MEETING

Meetings must be held within the boundaries of the territory over which the legislative body exercises jurisdiction unless otherwise specifically authorized by Section 54954(b).

The most relevant exceptions include:

1. School District Governing Boards are specifically allowed to meet outside the territory in order to attend conferences on non-adversarial bargaining techniques, conduct interviews concerning potential Superintendent candidates, and interview potential employees from other districts. (54954(c).)

2. Meetings of a JPA shall occur within the territory of at least one of its member agencies. (54954(d).)

3. To otherwise comply with state or federal court order or attend a judicial or administrative proceeding to which the local agency is a party. (54954 (b)(1).)

4. To inspect real property or personal property that cannot be brought within the boundaries of the territory. (54954(b)(2).)

Effective January 1, 2020, the governing body of a charter school is required to meet within the physical boundaries of the county in which the charter school is located. (Cal. Education Code section 47604.1(c)(1)(A).)

If the charter school is a non-classroom-based charter school that does not have a facility or operates at one or more resource centers, or if an entity is managing two or more charter schools that are not located in the same county, the governing board is required to meet within the physical

boundaries of the county in which the greatest number of students who are enrolled in the charter school reside. (Cal. Education Code section 47604.1(c)(2)(A), (c)(4)(A).)

A governing body of an entity that manages two or more charter schools that are located in the same county, the governing body shall meeting within the physical boundaries of the county in which the greatest number of pupils enrolled in those charter schools managed by that entity reside.(Cal. Education Code section 47604.1(c)(4)(A).A two-way teleconference shall be established at each schoolsite and/or resource center. (Cal. Education Code section 47604.1(c)(4)(B).)

## D. MEETING HELD BY TELECONFERENCE

A meeting of a legislative body (whether regular or special) may be held by teleconference. (54953.) "Teleconference" means a meeting of a legislative body, the members of which are in different locations, connected by electronic means, either audio or video or both. (54953(b)(4).) To utilize the teleconference option permitted by Section 54953, the legislative body must comply with the following:

### 1. Quorum

A quorum of the legislative body must participate from locations within the boundaries of the territory over which the local agency exercises jurisdiction. (54953(b)(3).) For example, on a five (5) member legislative body, only two members may participate by teleconference from outside the agency's jurisdiction.

### 2. Location

Each teleconference location (e.g., home, office, hotel or hospital rooms) must be open to the public (free of charge) and accessible to the disabled. (54953(b)(3); *see also* Handbook, Section IV.C., above.)

### 3. Agenda/Notice

If a member of the legislative body is to appear by teleconference, the agency must comply with the following agenda/notice requirements (54953):

a. Include in the agenda/notice, the address of every location where members of the legislative body will appear;

b. Post the agenda/notice at all locations where members of the legislative body will appear (e.g., on his/her hotel room door) as well as the district's regular posting places(s);

c. Provide in the agenda that members of the public will have an opportunity to address the legislative body from each teleconferencing location.

## E. PUBLIC PARTICIPATION IN OPEN MEETINGS

### 1. Regular Meetings

At regular meetings, subject to reasonable regulations, the public must be allowed to speak on any subject that is either on the agenda (open or closed session) or within the subject matter jurisdiction of the legislative body. It is up to the body to decide what is within its jurisdiction. (54954.3.)

*Note: No action may be taken on an item addressed by the public which is not on the agenda, unless authorized by 54954.2. (54954.3(a); see also 54954.2(a) and Handbook, Section IV.B.3., above.)*

### 2. Special Meetings

At special meetings, subject to reasonable regulations, the public must be allowed to speak on any item that has been described in the notice for the meeting. At a special meeting, there is no right to speak on any subject within the subject matter jurisdiction of the board. (54954.3.)

### 3. Reasonable Regulations

The legislative body may adopt reasonable time, place, and manner regulations to ensure the members of the public are allowed to directly address the legislative body on any item of interest to the public, before or during the legislative body's consideration of the item, and to ensure district business is conducted in an orderly and efficient manner. (54954.3)

Procedures should be established and adopted in Board Policy or Administrative Regulation and should be applied consistently and equitably to all speakers. When adopting time, place, and manner regulations, the legislative body must consider the following:

a. View-Point Neutrality: All regulations must be administered neutrally and evenhandedly without regard to the viewpoint of the speaker.

b. Specific Time, Place and Manner Regulations:

- The legislative body may establish and adopt reasonable time limitations on public comment.

(54954.3(b)(1).) Generally, agencies keep the per-speaker limit to three minutes per agenda item. The board may also limit the time for public comment on a per-topic basis, such as, twenty minutes per topic. (See, 75 Ops.Cal.Atty.Gen (1992).)

Effective January 1, 2017, agencies must allow *double* the allotted time to speakers who utilize a translator, unless the agencies uses simultaneous translation equipment in a manner that allows the legislative body to hear the translated public testimony simultaneously. ( 54954.3(b)(2).)

- The Attorney General has concluded that "a single item or several items may not reasonably be permitted to monopolize the time necessary to consider all agenda items. If the legislative body is to complete its agenda, it must control the time allocated to particular matters." (75 Ops.Cal.Atty.Gen. 89 (1992).)

- The time limitations must be content and viewpoint neutral.

- The legislative body may establish one or more public comment sessions per meeting. It may have one general public comment session or separate public comment sessions, such as one for general comments and one for agenda items of particular importance. The legislative body **must**, however, allow public comment on any item on the agenda **before or during** the body's consideration of the item. (54954.3(a).)

c. Impermissible Restrictions (Criticism):

- The legislative body may not prohibit public criticism of the policies, procedures, programs, or services of the agency or the acts/omissions or the legislative body. (54954.3(c).)

- California Courts hold that a legislative body **may not prohibit criticism of public employees**. (*Leventhal v. Vista Unified School District* (S.D. Cal. 1997) 973 F.Supp. 951; *Baca v. Moreno Valley Unified School District* (C.D.Cal. 1996) 936 F.Supp. 719.)

*Note: It is not clear, however, whether this prohibition applies to every employee or just to those in managerial/policy making positions.*

**4. Exceptions**

a. Public Comment at Previous Open Meeting of Committee: No opportunity for public comment need be provided if all interested members of the public previously had an opportunity to speak on the item to a committee composed solely of members of the legislative body. This exception does not apply if the item has changed substantially since consideration by the committee. (54954.3(a).)

b. Continued Meeting: A legislative body that continues a regularly-scheduled meeting for a second session to consider a single agenda is not required, under the Brown Act, to provide a general public comment period at each session of the continued public meeting. (*Chaffee v. San Francisco Library Com'n* (2004) 115 Cal.App.4th 461.) This exception does not apply to special meetings. (*Preven v. City of Los Angeles* (2019) 32 Cal.App.5th 925.)

## F. PUBLIC PERMITTED TO RECORD A MEETING

The public may record (audio, video, movie/still camera) the meeting unless the legislative body makes "a reasonable finding" that the recording cannot continue without noise, illumination, or obstruction of view and that constitutes a persistent disruption of the proceedings. (54953.5(a).)

## G. NO PRECONDITIONS ON ATTENDANCE

Under the Brown Act, a member of the public shall not be required, as a condition of attendance at a meeting of a legislative body of a local agency, to register his or her name, to provide other information, to complete a questionnaire, or otherwise to fulfill any condition precedent to his or her attendance.

Attendee lists, questionnaires, and/or registers can be passed around by the legislative body, but must clearly state that signing is purely a voluntary act. Completion may not be required as a condition of attendance. (54953.3.)

## H. AN ORDERLY MEETING

If an individual, or a group of persons, disrupts the meeting to the extent that an orderly meeting cannot be conducted, individuals who are disrupting the meeting may be removed.

If order cannot be restored, the meeting room can be cleared and the legislative body can continue in session. Press/news media may attend such a "cleared" meeting unless they were a part of the disturbance.

The legislative body may establish a procedure for readmitting persons who were not responsible for willfully disturbing the meeting. (54957.9.)

## I. EMERGENCY MEETING REQUIREMENTS

### 1. General Rules

The need for an emergency meeting may arise. The legal justification for such a meeting is extremely narrow in scope and the Brown Act specifically lists the two applicable definitions of an "emergency situation" as follows:

a. An emergency, defined as: A work stoppage, crippling activity, or other activity that severely impairs public health, safety, or both, as determined by a majority of the members of the legislative body. (54956.5(a)(1).)

b. A dire emergency, defined as: A crippling disaster, mass destruction, terrorist act, or threatened terrorist activity that poses peril so immediate and significant that requiring a legislative body to provide one (1) hour notice before holding an emergency meeting under this section may endanger the public health, safety, or both, as determined by a majority of the members of the legislative body. (54956.5(a)(2).)

All rules applicable to special meetings, except for the twenty-four (24) hour notice requirement, apply to emergency meetings. (54956.5(d).)

### 2. Special Rules

The following three (3) special rules apply only to emergency meetings:

a. Prior to holding an emergency meeting, newspapers of general circulation and radio and television stations who have requested notice, must be notified.

Notice must be given, by telephone, at least one (1) hour before the meeting. In the case of a dire emergency, notice must be given by telephone at or near the time the members of the legislative body are notified. If telephones are not working, notice must be given as soon after the meeting as

possible and shall relay the fact that the emergency meeting was held, the purpose of the meeting, and any action that was taken at the meeting. (54956.5(b)(2).)

b. The legislative body may meet in closed session during an emergency meeting for the purposes listed in Section 54957 if:

(1) two-thirds of the members of the legislative body agree, or

(2) less than two-thirds of the members are present, all of the members present agree. (54956.5(c).)

c. The minutes, a list of persons notified or attempted to be notified, a copy of any roll call vote and any actions taken by the legislative body must be publicly posted for at least ten (10) days in a public place "as soon after the meeting as possible." (54956.5(e).)

# V
# PUBLIC RIGHT TO RECEIVE/INSPECT MATERIALS

## A. PUBLIC RECORDS ACT

Under the Public Records Act (Government Code 6250 et seq.), members of the public have a right to either inspect or to receive copies of most documents in the possession of local agencies. This right is subject to reasonable time, place, and manner restrictions. A fee may be charged if the person wishes to receive a copy rather than simply inspect the document.

## B. BROWN ACT

The Brown Act creates additional rights and disclosure obligations. These include:

### 1. Audio/Video Recording

If the local agency records its meeting, the audio/video recording is a public record which must be available for public inspection for at least thirty (30) days. (54953.5(b).)

a. The inspection is to be without charge and on equipment provided by the local agency.

b. After thirty (30) days, the recording may be erased.

### 2. Mailed Notice

A person who files a written request shall receive a mailed notice of regular and special meetings, and/or a copy of the "agenda packet." (54954.1.) (*See* Handbook, Section IV.A.4., above, for a more detailed discussion.)

### 3. Closed Session Documents

Certain closed session documents must also be disclosed. These include "copies of any contracts, settlement agreement, or other documents that were ***finally*** approved or adopted in closed session." (54957.1(b).)

a. The documents must be made available when a closed session ends to any person who is present ***and*** who has either filed a written request for such documents within twenty-four (24) hours of the posting of the agenda or made a standing request for such documents as part of their request for mailed notice.

b. If the action taken by the legislative body requires substantive retyping, the documents need not be released until the retyping is complete; provided, however, the presiding officer must summarize the substance of the amendments.

c. The documents shall be available to any person the next business day; or, if substantial retyping is required, when that task is complete. (54957.1(c).)

**4. Agendas/Other Writings**

Agendas and any other writings are public records when distributed to a majority of the legislative body by any person in connection with a matter to be discussed/considered at an open meeting. (54957.5(a).)[9]

a. Disclosure is not required if the record is exempt from disclosure by Sections 6253.5, 6254, 6254.3, or 6254.7, 6254.15, 6254.16, 6254.22, or 6254.26. (54957.5(a).)

b. Disclosure of student records relating to action taken to expel a student in an open meeting pursuant to Education Code section 48918 is **prohibited**. While Education Code section 48918(k) expressly authorizes their disclosure, the California Court of Appeal for the Fourth District has held that section preempted by federal law (FERPA). (*Rim of the World Unified School District v. Superior Court* (2002) 104 Cal.App.4th 1393.)

c. Disclosable public records shall be made available, pursuant to Section 6253, upon a request without delay. If the writing was distributed during a public meeting and was prepared by the local agency or a member of the governing body, it shall be available for public inspection at the meeting, or after the meeting, if prepared by some other person. Upon request, it shall be made available in appropriate alternative formats for persons with a disability, as required by the Americans with Disabilities Act of 1990. (54957.5(c).)

d. Any writing relating to a regular meeting, open session agenda item that has been distributed to members of the legislative body less than seventy-two (72) hours prior to the meeting shall be **readily available for public inspection** at

[9] "Friday Updates" are a potential example of "other writings" if the update addresses a matter to be discussed/considered at an open meeting. As such, the update becomes a public record when it is distributed to a majority of the legislative body.

a designated office or location at the time it is distributed to the members of the body. (54957.5(b)(1).)

The legislative body **must list the address of the designated office or location on the agendas for all meetings** of the body of that agency. The body **may**, but is not required to, post the writing on its website "in a position and manner that makes it clear that the writing relates to an agenda item for an upcoming meeting." (54957.5(b)(2).)

**5. Fee for Copies of Records**

The legislative body may charge a fee or deposit for a copy of public records pursuant to Section 6253. However, persons with a disability may not be charged an additional fee or deposit for records produced in alternative formats in compliance with the ADA.[10] (54957.5(d).)

[10] If requested, the documents must be made available in appropriate alternative formats to persons with a disability, as required by the Americans with Disabilities Act of 1990 (e.g., audio recordings, brailled materials, large print materials, etc.). In determining what type of alternative format is necessary, the local agency shall give primary consideration to the request of the individual with disabilities. (Code of Federal Regulations, Title 28, Section 35.160.)

# VI
# WHEN MAY A MEETING BE CLOSED

Despite the general rule and philosophy of open government, not all "meetings" must occur in public. There are a number of statutory exceptions found in the Education Code for school districts and in the Health and Safety Code for hospital districts, in addition to those which are specifically listed in the Brown Act for all public agencies.

## A. GOVERNMENT CODE

The more commonly used exceptions to the requirement of an "open meeting" include the following (*see* 54954.5 for suggested "safe harbor" agenda descriptions):

### 1. Conference with Real Property Negotiator (54956.8)

Meetings with local agency negotiators to grant authority regarding the price and terms of payment for the purchase, sale, exchange, or lease of real property.

Prior to the closed session, the legislative body must hold an open and public session in which it identifies its negotiators who will be attending closed session, the real property or real properties which the negotiations may concern, and the person or persons with whom its negotiators may negotiate. If circumstances necessitate the absence of a negotiator as specified on the agenda, an agent or designee may participate in place of the absent negotiator so long as the name of the agent or designee is announced during open session. (54954.5 and 54956.8.)

### 2. Conference with Legal Counsel Regarding Pending Litigation (54956.9)

On the advice of legal counsel, meetings with the agency's legal counsel regarding either anticipated or existing litigation when open session discussion "would prejudice the position of the local agency in the litigation."

***Notes:***

***a. However, a settlement approved in closed session could not include agreement to take governmental action that independently requires a public hearing. (Trincas Property Owners Association v. City of Malibu (2006) 138 Cal.App. 4th 172.)***

***b.*** ***There is no authorization in section 54956.9 for a legislative body to meet in closed session to discuss and negotiate <u>with an adversary and his or her counsel</u> regarding any pending litigation. (Page v. MiraCosta Community College District (2009) 180 Cal.App.4th 471.) Such action would also violate section 54952.2 which prohibits a legislative body from using "personal intermediaries" to exchange facts [to discuss, deliberate or take action] outside the public forum. (Id. See Handbook, Section III.C. above.)***

***c.*** ***If "pending litigation" is triggered by a <u>threat</u> of litigation, that threat must be included within the agenda packet. (Fowler v. City of Lafayette (2020) 46 Cal.App.5th 360). There are specific agendizing requirements depending on the various postures in which litigation can be pending, so legal counsel should be consulted well in advance regarding how litigation is agendized on a case-by-case basis.***

**3. Liability Claims (54956.96)**

Meetings of a JPA, or a JPA member, to discuss claims for the payment of tort, public, or Workers' Compensation liabilities.

**4. Threat to Security, Public Services, or Facilities (54957)**

Meetings with the Governor, Attorney General, district attorney, agency counsel, sheriff or chief of police, or their respective deputies, or a security consultant or a security operations manager, "on matters posing a threat to the security of public buildings, a threat to the security of essential public services, including water, drinking water, wastewater treatment, natural gas service, an electric service, or a threat to the public's right of access to public services or facilities."

**5. The "Personnel" Exception (54957)**

a. <u>Generally</u>

A <u>limited</u> number of personnel related actions, often and erroneously referred to in very broad terms as the "personnel exception," may be the proper subject of a closed session during a regular or special meeting. (54957(b)(1).)

The exception applies only to "public employees." The exception does not, for example, encompass:

- Elected officers

- Consultants
- Independent contractors (most of the time)[11]
- Persons appointed to fill a vacancy for an elected office.

The "personnel" exception is limited to meetings to consider (54957(b)(1):

- The appointment, employment, evaluation of performance, discipline, or dismissal of a public employee;

- Specific complaints or charges brought against an employee by another person or employee.

*Note: Closed sessions pursuant to the personnel exception shall not include discussion or action on proposed compensation except for a reduction of compensation that results from the imposition of discipline.*

b. Complaints or Charges (54597(b)(2)

- At least 24 hours prior to a meeting where formal complaints/charges against a specific employee(s) will be heard in closed session, **notice** must be given to and received by the employee(s) of his/her right to have the specific complaints/charges heard in open session. **If proper notice is not given and received, any action taken on the complaints/ charges is null and void.**

- **Recommendation:** Because the consequence of error is great, if it can conceivably be argued that the legislative body will be considering specific complaints/charges, it is strongly urged to check with legal counsel sufficiently in advance of the closed session so that a determination can be made regarding whether the twenty-four (24) hour notice is required.

*Note: When the 24-hour notice is provided to the employee of his/her right to have the specific complaints/charges heard in open session, the agenda should include not only the typical closed*

[11] An independent contractor may be considered an employee if he/she functions as an employee would in the position he/she is contracted to fill. *Hofman Ranch v. Yuba County LAFCO* (2009) 172 Cal.App.4th 805; *see also* 54957(b)(4).

*session item/description, but also an open session action item for "discussion and action on a complaint and/or charge against an employee." This will permit the governing body to convene, if necessary, in open session at the same meeting to hear the complaint or charge if the employee has filed an open session request.*

c. Case Study: *Furtado v. Sierra Community College* (1998) 68 Cal.App.4th 876.

- Plaintiff's Argument: In *Furtado*, a second year, non-tenured Assistant Dean of the Library (Furtado), contended that the Board of Trustees violated the Brown Act by meeting in closed session for the purpose of evaluating her and then voting not to reemploy her. Furtado contended she had the right, upon demand, which she had made, to have the matter heard in public.

- Court's Holding: After a discussion concerning the rules of statutory construction, the Court of Appeal disagreed and held that (1) the Brown Act permits the Governing Board to meet in closed session for the purpose of "free and candid" discussion relating to an employee's "appointment, employment, evaluation of performance, discipline or dismissal;" and (2) it is only when "complaints or charges" will be heard that the employee has the right to request that the hearing take place in a public session. The Court found that an evaluation of performance, and a decision not to reemploy a non-tenured employee, are not "complaints or charges." Therefore, the employee did not have the right to have the matter considered in open session.

d. Case Study: *Kolter v. Commission on Professional Competence of the Los Angeles Unified School District* (2009) 170 Cal.App.4th 1346.

- Plaintiff's Argument: In *Kolter*, a permanent certificated employee (Kolter) contended that the Governing Board violated the Brown Act by meeting in closed session for the purpose of considering whether to **initiate** dismissal proceedings against her pursuant to Education Code sections 44934 and 44944. Kolter contended the Board's consideration of the charges against her triggered the twenty-four (24) hour notice provision

of Section 54957, and that because the Board did not give the twenty-four (24) hour notice, the action was void.

- Court's Holding: The Court of Appeal disagreed and held that the employee did not have the right to have the matter considered in open session and the Governing Board was not required to give the teacher twenty-four (24) hour notice pursuant to Section 54957(b)(2) because: (1) the meeting did not include an evidentiary hearing on the verified statement of charges against the teacher, rather the Board merely considered whether the charges justified the ***initiation*** of dismissal proceedings, and (2) the teacher was later able to exercise her right to a noticed public evidentiary hearing.

**6. Conference Regarding Salaries/Fringe Benefits/Mandatory Subjects (54957.6)**

Meetings with designated agency representatives to discuss salaries and/or compensation in the form of fringe benefits for represented or unrepresented employees. And, for represented employees, any other item in the scope of representation.

Prior to closed session, the legislative body shall hold an open and public session in which it identifies its designated representatives who will be attending closed session. If circumstances necessitate the absence of a designated representative as specified on the agenda, an agent or designee may participate in place of the absent representative so long as the name of the agent or designee is announced at the open session referenced above. (54954.5 and 54956.8.)

Closed sessions pursuant to this exception may include discussion of a local agency's available funds, funding priorities, or budget, but only insofar as these discussions relate to providing direction to the negotiator.

*Note: This section (including the restrictions on discussing funds, priorities, etc.) has limited application to school districts in light of Government Code 3549.1 (the Educational Employment Relations Act [EERA]). School Districts are exempt from the provisions of the Brown Act for:*

- *Any meeting and negotiating discussion between a public school employer and a recognized or certified employee organization.*

- *Any meeting of a mediator with either party or both parties to the meeting and negotiating process.*

- *Any hearing, meeting, or investigation conducted by a fact-finder or arbitrator.*

- *Any closed session of the public school employer or between the public school employer and its designated representative for the purpose of discussing its position regarding any matter within the scope of representation and instructing its designated representatives.*

In *Californians Aware v. Joint Labor/Management Benefits Committee* (2011) 200 Cal.App.4th 972, the California Court of Appeal held a labor/management benefits committee for the Los Angeles Community College District did not have to comply with the open meeting and public notice requirements of the Brown Act because it was created as part of, and for the purpose of furthering, the collective bargaining process under the Educational Employment Relations Act. Accordingly, the committee was exempt from the Brown Act under Section 3549.1(a).

### 7. Multijurisdictional Drug Enforcement (54957.8)

Meetings with a "multijurisdictional drug law enforcement agency" or to discuss ongoing investigations with the same.

## B. EDUCATION CODE

The Education Code contains several exceptions to the Brown Act open meetings requirement. (54962.)

### 1. Student Suspension/Expulsion Hearings

Education Code sections 35146, 48912, 48918, 48918.5: Meetings of a school district governing board to consider student suspension or expulsion shall be closed unless a parent/Guardian of the student (or the student) requests an open hearing within five (5) days (forty-eight (48) hours for suspension hearings) of receipt of written notice of the closed hearing. Deliberations are specifically authorized in closed session whether the hearing is held in open or closed session.

If an open hearing is requested, it shall be conducted in open session except that any discussion or testimony that might conflict with the right to privacy of any pupil, other than the pupil requesting the open hearing shall be in closed session.

A final action to suspend or expel, however, "shall be taken by the school district governing board at a public meeting." (Education Code section 35146 and 48918(j).)

*Note: The Federal Family Educational Rights and Privacy Act (FERPA) prohibits the public disclosure of student discipline/suspension/expulsion records. To comply with FERPA when taking final action to suspend/expel, the governing board should only reference the student by a series of letters and/or numbers that do not readily identify the student. Neither the student's name nor the cause for suspension/expulsion may be disclosed in public session.*[12] *(See Handbook, Section V.B.4.b., above, for further discussion on the application of FERPA to the public's entitlement to receive agenda-related material.)*

**2. Testimony of Complaining Witness in Student Expulsion Hearing Where Sexual Assault or Battery is Alleged**

Education Code sections 48918 and 48918.5: If a student expulsion hearing is to be conducted at a public meeting, and there is a charge of committing or attempting to commit a sexual assault or committing a sexual battery (as defined in Education Code 48900(n)), a complaining witness shall have the right to have his/her testimony heard in a closed session when testifying at a public meeting would threaten serious psychological harm to the complaining witness and there are no alternative procedures to avoid the threatened harm.

**3. Appeals of Student Expulsions to County Board of Education**

Education Code sections 48918, 48919, 48920: These sections require a county board of education to hold a closed hearing for the appeal of student expulsion cases unless the student, the parent(s) or the guardian(s) request a public hearing. Deliberations are specifically authorized in closed session whether the hearing is held in open or closed session.

[12] *See Rim of the World USD* (2002) 104 Cal.App.4th 1393, 1399 (providing that FERPA defines non-disclosable education records as "those records, files, documents, and other materials which (i) contain information directly related to a student; and (ii) are maintained by an education agency or institution . . ." (20 U.S.C. § 1232g(a)(4)(A).) Even if the student's name and other identifying information were redacted from an expulsion record, it would still contain "information directly related to a student," such as the specific reasons for the expulsion and other details.

**4. Mental Illness of a Certificated Employee**

Education Code section 44942: All hearings to determine such matters are to be held in closed session unless the employee requests an open hearing.

**5. Hearing to Dismiss/Suspend a Certificated Employee**

Education Code section 44944.3: At an administrative hearing pursuant to Government Code sections 11500, et seq., to dismiss or suspend a certificated employee, the administrative law judge, before admitting any testimony or evidence concerning an individual pupil, shall determine whether the introduction of the testimony or evidence at an open hearing would violate the privacy of pupil records. If the administrative law judge, in his or her discretion, determines that any of such privacy would be violated, he or she shall order that the hearing, or any portion thereof at which the testimony or evidence would be produced, be conducted in closed session.

**6. Challenges to Content of Pupil Records**

Education Code section 49070 and 49071: Proceedings shall be in closed session.

**7. Other Student Issues**

Education Code section 35146: Meetings of a school district governing board to consider any action or discussion in connection with any pupil of the school district shall be in closed session if consideration in open session would lead to the disclosure of information in conflict with any pupil's right to privacy, unless a parent/guardian of the student (or the student) requests an open hearing within five (5) days (forty-eight (48) hours for suspension hearings) of receipt of written notice of the closed hearing.

## C. WHO MAY ATTEND

As a general rule, closed sessions may involve only the membership of the governing body plus other persons or staff who have an official or essential role to play in the closed session. Permitting attendance of non-essential persons in a closed session meeting may eliminate the closed session exemption and create an unlawful "semi-closed" meeting.

The Attorney General has opined that the following people should not be permitted to attend closed sessions:

- Unless sitting in place of an absent or disqualified regular member, an "alternate" governing body member (82 Cal.Atty.Gen.29 (1999));

- An investigative committee of a grand jury performing its duties of investigating the agency's business;

- Select members of the public.

# VII
# MINUTES AND REPORTING OF CLOSED SESSION ITEMS

A legislative body is not required by the Brown Act to keep minutes or make recordings of its closed sessions.

## A. OPTIONAL MINUTE BOOK

The legislative body **may**, by ordinance or resolution, designate a clerk, officer, or employee of the local agency, who shall then attend each closed session and keep and enter a minute book of a record of topics discussed and decisions made at the meeting.

Such minute book may, but need not, consist of a recording of the closed session. This minute book is not subject to disclosure under the Public Records Act. It will only be available to the legislative members or to a court for the purpose of an "in-camera" review of allegations of Brown Act violations. "In-camera" means only a judge examines the document(s). (54957.2.)

## B. REPORT OF ACTION TAKEN IN CLOSED SESSION

Public reports of action taken in closed session, described below, may be made orally or in writing. There are additional requirements concerning legislative body obligations with respect to parties who have submitted written requests for documents (*see* 54957.1(b) and (c) for further particulars).

To protect local agencies, no action for injury to a reputational, liberty, or other personal interest may be commenced by or on behalf of an employee or former employee with respect to whom a disclosure is made by a legislative body in an effort to comply with this section. (54957.1(e).)

The legislative body of the local agency shall publicly report any action taken in closed session and the vote or abstention of every member present thereon, as follows:

### 1. Conference with Real Property Negotiator (54956.8)

After the agreement is final:

a. Where its approval renders the agreement final, the body shall report that approval and the substance of the agreement in open session at the public meeting during which the closed session is held. (54957.1(a)(1)(A).)

b. If final approval rests with the other party to the negotiations, the local agency shall disclose the fact of that approval and the substance of the agreement upon inquiry of any person as soon as the other party has informed the local agency of its approval. (54957.1(a)(1)(B).)

**2. Conference with Legal Counsel Regarding Pending Litigation (54956.9)**

Approval given to the body's legal counsel to defend, or seek or refrain from seeking appellate review or relief, or to enter as an amicus curiae in any form of litigation as a result of a consultation under 54956.9 shall be reported in public session at the public meeting during which the closed session is held (*see* 54957.1(a)(2) for further particulars).

Approval given to the body's legal counsel of a settlement of pending litigation at any stage prior to or during a judicial or quasi-judicial proceeding shall be reported after the settlement is final as follows:

a. If the body accepts a settlement signed by the opposing party, the body shall report its acceptance and identify the substance of the agreement in open session, at the public meeting during which the closed session is held. (54957.1(a)(3)(A).)

b. If final approval rests with some other party or the court, then as soon as the settlement becomes final and upon inquiry by any person, the local agency shall disclose the fact of that approval and identify the substance of the agreement. (54957.1(a)(3)(B).)

**3. Liability Claims (54956.95)**

Disposition reached as to claims discussed in closed session shall be reported as soon as reached (*see* 54957.1(a)(4) for further particulars).

**4. Public Employee Appointment, Public Employment, Public Employee Performance Evaluation, Public Employee Discipline/ Dismissal/Release (54957)**

Action taken to appoint, employ, dismiss, accept the resignation of, or otherwise affect the employment status of a public employee in closed session shall be reported at the public meeting during which the closed session is held (*see* 54957.1(a)(5) for further particulars).

Exception: If the legislative body meets in closed session to consider the proposed dismissal of an employee, **but ultimately rejects that proposal and retains the employee**, it is not required to publicly report its decision and the vote or abstention of each member. (89 Ops.Cal.Atty.Gen. 110 (2006).)

**5. Conference with Labor Negotiator (54957.6)**

Approval of an agreement concluding labor negotiations shall be reported after the agreement is final and has been accepted or ratified by the other party. The report shall identify the item approved and the other party or parties to the negotiation. (54957.1(a)(6).)

*Note: Assembly Bill (AB) 1200 (enacted, in pertinent part, at Government Code section 3547.5) requires local education agencies to publicly disclose the provisions of all collective bargaining agreements before entering into a written agreement. Government Code section 3547.5 states: "Before a public school employer enters into a written agreement with an exclusive representative covering matter within the scope of representation, the major provisions of the agreement, including, but not limited to, the costs that would be incurred by the public school employer under the agreement for the current and subsequent fiscal years, shall be disclosed at a public meeting of the public school employer . . . ." Therefore, while the LEA must also report out after the agreement is final, it must follow the public disclosure requirements of Section 3547.5.*

**6. Pension Fund Investment (54956.81)**

Transaction decisions made pursuant to Section 54956.81 shall be disclosed at the first open meeting of the legislative body held after the earlier of the close of the investment transaction or the transfer of pension fund assets for the investment transaction. (54957.1(a)(7).)

# VIII
# WHEN HAS ACTION OCCURRED?

Whether or not "action" has occurred is a critical determination, since it could subject individual members of the legislative body to misdemeanor criminal prosecution. (*See* Handbook, Section X., below.)

**Criminal prosecution** will only occur if:

1. **Action is taken**; and

2. The **requisite wrongful intent is present**.

**"Action"** can be broadly interpreted and does not require an actual vote of the legislative body. For example, it also includes a collective commitment, promise, or decision by a majority of the legislative body to make a positive or negative decision. (54952.6.)

Prior to the 1994 legislative changes, and wholly consistent with them, the Attorney General had stated that the term "action taken" included a **collective decision, commitment, promise, or an actual vote**. (61 Ops.Cal.Atty.Gen. 283 (1978).) In that opinion, the Attorney General noted that even if a vote is to be taken later in an open session, this did not negate a determination that a tentative decision in closed session was "action taken."

# IX
# VOTING

## A. MAJORITY VOTE

### 1. General Rule

Except as noted below, a majority vote of the total membership of the legislative body is required for a governing body to take action.

### 2. Exceptions

There are exceptions to the majority vote rule for County Boards of Education and City Councils. A majority vote of the total membership is only required in the following cases:

a. County Boards of Education: For the issuance or renewal of a teacher's certificate or adoption of books or apparatus. (Education Code section 1014.)

b. City Councils: For resolutions, order for the payment of money and all ordinances. (36936.)

For all other matters before a County Board of Education or a City Council, a majority of the quorum is sufficient. (61 Ops.Cal.Atty.Gen. 243 (1978).)

## B. ABSENCE, ABSTENTION AND RECUSAL

### 1. Generally

Legislative body members have a duty to act on issues brought before them. (*Dry Creek Valley Association, Inc. v. Bd. of Sups. of Sonoma County* (1977) 67 Cal.App.3d 839, 843.) The members should not "by inaction, prevent action by the [governing body]." (*Id.*) However, events or circumstances, such as absences or conflicts of interest, may prohibits a member or members from voting.

When a member is absent from a meeting, it is clear that he/she cannot vote and his/her vote cannot be counted. The effect on voting becomes more complicated when a member is present at a meeting and chooses not to vote or is prohibited from voting. Such action by a member is often referred to as "abstention" or "recusal." Abstention and recusal, while closely related concepts, are different.

Abstention: The first definition of "abstain" in Black's Law Dictionary (8th ed. 2004) is "[t]o voluntarily refrain from doing something, such as voting in a deliberative assembly." However, to abstain also means "to refrain from exercising jurisdiction over a matter." *Id.* It is in that latter sense that abstention most resembles recusal. *When the terms "abstention" or "abstain" are used in this Handbook, we are referring to one who refrains from voting on the final issue.*

Recusal: In Black's Law Dictionary, recusal is defined as "[r]emoval of oneself as a judge or policy-maker in a particular matter, especially because of a conflict of interest. (*Id.)* Removing oneself entirely as a legislative body member from consideration of an issue is "recusal." We tend to think of recusal as generally being accompanied by a greater or earlier separation of oneself from the proceeding than may be the case with abstention. *When the term "recusal" is used in this Handbook, we are referring to a process by which the member completely removes himself or herself from the deliberations, as well as abstains from voting.*

In Sum: Abstention focuses on not participating in the final decision, whereas recusal usually entails withdrawing from the entire proceeding. Where a conflict of interest is present, if it is a curable conflict, recusal is usually necessary. Often, mere abstention will not cure a conflict. Depending on the need for recusal or abstention, statutory law may set forth a specific process that must be followed in order for the recusal to be legally recognized.[13]

## 2. When is Abstention Appropriate?

Abstention alone is insufficient to cure many conflicts of interest. However, in the following circumstances abstention is appropriate:[14]

a. School Boards (Education Code section 35107(e)): A member of the governing board of a school district **shall** abstain from voting on personnel matters that uniquely affect a relative within the third degree of the member but may vote on collective bargaining agreements and personnel matters that affect a class of employees to which the relative belongs.

[13] Conflicts of interest is a complex area of law. Summaries of certain conflict of interest laws provided in this section are illustrative, and do not constitute a comprehensive review of conflicts of interest laws. For a more detailed discussion, see the KB Conflicts of Interest Handbook.

[14] Abstention may be appropriate in other statutorily specified circumstances not listed here.

Under Section 35107(e), a relationship "within the third degree" includes the individual's parents, grandparents and great-grandparents, children, grandchildren and great-grandchildren, brothers, sisters, aunts, uncles, nieces and nephews, and the similar family of the individual's spouse unless the individual is widowed or divorced.

***Note: Section 35107(e) does not alter the prohibition on a legislative body member being financially interested in a contract (e.g., a contract with the member's spouse). If a school board member is not otherwise precluded from voting under Government Code section 1090 or the Political Reform Act, he/she may be precluded by Section 35107(e), but Section 35107(e) does not authorize mere abstention in the case of Government Code section 1090 or Political Reform Act conflict of interest.***

b. Charter School Employee Member of the Governing Body: A member of the governing body of a charter school who is an employee of the charter school shall abstain from voting on all matters uniquely affecting that member's employment. (Cal. Education Code section 47604.1(d), effective January 1, 2020.)

c. Personal Choice – Not Legally Prohibited from Voting: Occasionally, a legislative body member will choose not to vote based upon his or her personal choice. Often times, the personal choice results from dislike, discomfort, disdain, or antipathy for the issue or the outcome. However, in this circumstance, the member is not legally prohibited from voting. Such inaction runs counter to the legislative body member's official duties. Many would argue that this should be avoided if possible. If, however, the member simply cannot bring himself or herself to vote, the member may abstain. The member should be aware that, in this circumstance, their abstention may be counted as a vote, as discussed below.

**3. When is Abstention AND Recusal Appropriate?**

a. Remote Financial Interest in Contract (Government Code section 1091): A legislative body member shall not be deemed to be interested in a contract entered into by a body or board of which he/she is a member if:

- The member has only a "remote interest" in the contract (as defined in Government Code section 1091(b));

- That interest is disclosed to the legislative body;
- That interest is noted in the official records; and
- The member abstains from voting and recuses himself from participation in the deliberative process.[15]

b. Financial Interest Under the Political Reform Act: Under the Political Reform Act, legislative body members are disqualified from making, participating, or using their official position to influence the making of government decisions in which they have a **financial interest**.[16] (Government Code section 87100.) The Political Reform Act sets forth a specific procedure that must be followed for the recusal and abstention to be legally recognized. This process is discussed in detail in our Conflicts of Interest Handbook as well as Government Code sections 87100, et seq.

c. Non-economic/Common Law Conflicts of Interest: The common law conflicts of interests doctrine "prohibits public officials from placing themselves in a position where their private, personal interests may conflict with their official duties." (*Clark v. City of Hermosa Beach* (1996) 48 Cal.App.4th 1152, 1171, quoting 64 Ops.Cal.Atty.Gen. 795, 797 (1981); *see also Kunec v. Brea Redevelopment Agency* (1997) 55 Cal.App.4th 511, 519.) While the focus of the statutes identified above is on financial conflicts, the common law prohibition extends to non-economic interests as well.

To avoid a conflict between his/her official and personal interests, the board member should abstain from any official action with regarding to the perceived non-economic interest and recuse him/herself (i.e. make no attempt to influence the discussions, negotiations, or vote concerning that agreement. (92 Ops.Cal.Atty.Gen. 19 (2009).)

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[15] *See* Government Code section 1091(c); 83 Ops.Cal.Atty.Gen. 246 (2000); 78 Ops.Cal.Atty.Gen 230 (1995); 65 Ops. Cal.Atty.Gen. 305 (1982).

[16] The determination of whether a financial interest exists involves a review of statutes, court decisions and attorney general opinions as they apply to the particular facts at issue. The analysis can be complex and legal counsel should be consulted.

**4. Effect of Abstention and/or Recusal**

a. Government Code section 1090 Conflict of Interest - Financial Interest in a Contract: Pursuant to Government Code section 1092, if any one legislative body member has a financial interest in a contract under Section 1090, it is an absolute bar for that legislative body to enter into the prohibited contract. Accordingly, if a Section 1090 conflict of interest exists, the board may not act (absent the rare application of the "rule of necessity"). Abstention and/or recusal will have no effect.

b. Remote Financial Interest in Contract (Government Code section 1091): If a remote financial interest under Government Code section 1091 prohibits a member from voting, his or her vote will not be counted (absent the rare application of the "rule of necessity").

c. Political Reform Act Conflict of Interest (Financial Interest):

(1) General Rule: If a member is disqualified under the Public Records Act, that member's vote is generally not counted.

(i) Exception – Participation Legally Required: A disqualified member's vote may be counted only if an insufficient number of members remain to constitute a quorum.

- If a sufficient number of non-disqualified members exist to form a quorum, but one or more is absent from the current meeting, this exception does not apply.

- This exception expressly excludes the situation in which the official's vote is merely needed to break a tie. (Cal. Code Regs., tit. 2, section 18708.)

- If multiple disqualifications leave less than a quorum, the process by which disqualified members may return may be accomplished by a random drawing. Only the number of members needed to constitute a quorum are brought back to

participate. (Cal. Code Regs., tit. 2, section 18708.)

d. Common Law Conflict of Interest: If a common law conflict of interest prohibits a member from voting, his or her vote will not be counted (absent the rare application of the "rule of necessity").

e. Personal Choice – Not Legally Prohibited From Voting:[17]

(1) Votes Cast are Unequal: If the votes cast are unequal, **the abstentions will be added to the greater of the Aye/No votes**. For example, if there is a seven (7) member body, and the vote is three (3) noes, two (2) ayes, one (1) abstention, and one (1) absent, the abstention would be added to the "no" votes and the action would not pass.

(2) Tie Vote: If the votes cast result in a tie, the limited case law that has addressed such circumstances regarding California public governing board actions suggests that where a Board member abstains, his or her vote, in the event of a tie, is to be counted as an affirmative vote. (*Martin v. Ballinger* (1938) 25 Cal.App.2d 435; *Dry Creek Valley Association, Inc. v. Bd. of Sups. of Sonoma County* (1977) 67 Cal.App.3d 839, 843.)

For example, if there is a seven (7) member body, and the vote is three (3) ayes, three (3) noes and one (1) abstention, the abstention would be added to the "aye" votes, and the action would pass. However, Legislative body bylaws or policies have an impact on this determination. Prior to taking action in any particular circumstance, advice of legal counsel should be obtained.

*Note: The determination of a conflict of interest and/or the appropriateness of abstention and recusal involves a review of statutes, court decisions, and attorney general opinions as they apply to the particular facts at issue. The analysis can be complex and legal counsel should be consulted.*

[17] Legislative body bylaws may contain specific rules on the effect of an abstention and should be considered. Past practice should also be considered.

## C. SCHOOL BOARD VACANCIES (SEVEN-MEMBER BOARDS)

The Education Code provides specific instructions for voting when there are vacancies on a school board that has a total membership of seven (7). On a seven (7) member school board with two (2) or fewer vacancies:

1. The vacant members are not counted for the purpose of determining how many members constitute a majority. (Education Code section 35165.)

2. In addition, when a provision of the Education Code requires a unanimous vote to take action, the vacant members are excluded from the determination of the total membership constituting the governing board. (*Id.*)

## D. SECRET BALLOT

No legislative body shall take action by secret ballot, whether preliminary or final. (54953(c).)

## E. VOTE REPORTING

A district must report the vote or abstention (1) on **any** board action (this includes consent and/or minute actions); and (2) of each board member present for the action. (54953(c)(2).)

Effective January 1, 2017, the Board must orally report a summary of any recommendation for a final action on the salaries, salary schedules, and/or fringe benefits to be granted to a "local agency executive." (54953(c)(3).) A "local agency executive" is any non-classified employee who is either:

1. A chief executive; or
2. The head of a department.

This term would plainly include district superintendents and assistant superintendents, and, depending on a district's employment practices, may also include directors.

# X
# ENFORCEMENT OF THE BROWN ACT

There are two types of legal enforcement authorized by the Brown Act: criminal and civil.

## A. CRIMINAL

Section 54959 makes it a criminal violation for a member of a legislative body to attend a meeting of that legislative body where "action is taken in violation of any provision of this chapter, **and** where the member intends to deprive the public of information to which the member knows or has reason to know the public is entitled under this chapter . . . ."

In such cases, the member(s) is guilty of a misdemeanor. Misdemeanors are punishable by fines up to One Thousand Dollars ($1,000) and/or jail terms up to six (6) months. (Penal Code section 19.)

**The operative words are "meeting," "action," and "wrongful intent."**

Only violations where there has been a meeting and action is taken and the member intends to deprive the public of information to which the public is entitled are covered by this penalty. Clearly, the legislature did not want to jail an offender for an incorrect guess on the requirements of the Brown Act. (*Sacramento Newspaper Guild v. Sacramento County Board of Supervisors* (1968) 263 Cal.App.2d 41.)

Merely deliberating in an illegal fashion will not create criminal liability – action must be taken. (54959.)

Sound legal counsel on a close Brown Act question should enable all good faith legislative body members to avoid this potentially severe, but narrow, penalty.

## B. CIVIL

The Brown Act authorizes any interested individual or the district attorney to enforce its provisions by seeking a civil remedy (either a request for a writ of mandamus, or an injunction for declaratory relief). Such relief may be sought to correct either a past violation, a present violation, or to avoid a future violation. This includes actions to determine the validity of any rule or action by the legislative body to penalize or discourage expression of any of its members. (54960(a).) Any interested person may sue the legislative body under this provision.

Effective January 1, 2013, provisions were added to the Brown Act for enforcement of ***past*** violations. (*See* Handbook, Section X.D., below for further discussion on alleged ***past*** violations.)

## C. PREREQUISITES TO A CIVIL SUIT – PRESENT OR FUTURE VIOLATIONS

### 1. Demand

Section 54960.1 provides that the district attorney or an interested person must send a written demand to the legislative body to cure or correct any alleged present or threatened future violation of Sections 54953, 54954.2, 54954.5, 54954.6, 54956 or 54956.5.

### 2. Opportunity to Correct

Within thirty (30) days of receipt of the demand, the legislative body shall either:

a. Cure or correct the challenged action and inform the demanding party in writing of its actions; or

b. Inform the demanding party in writing of its decision not to correct.

### 3. Filing the Civil Action

Within fifteen (15) days of receiving the legislative body's decision to cure or correct, or within fifteen (15) days of the expiration of the thirty (30) day response time if no response is given (whichever is earlier), the action must be filed. (54960.1(c)(4).)

### 4. Effect of Action to Cure

If the court determines, pursuant to a showing by the legislative body, that an action alleged to have been taken in violation of Section 54953, 54954.2, 54954.5, 54954.6, 54956, or 54956.5 has been cured or corrected by a subsequent action of the legislative body, the action filed shall be dismissed with prejudice. (54960.1(e).)

The fact that a legislative body takes a subsequent action to cure or correct an action taken pursuant to this section shall not be construed as, or admissible as, evidence of a violation of this chapter. (54960.1(f).)

## D. PREREQUISITES TO A CIVIL SUIT – PAST VIOLATION

Government Code section 54960.2 is relatively new. It was added to the Government Code during the 2011/2012 legislative session and was effective January 1, 2013. Its provisions are discussed below.

### 1. Cease and Desist

Section 54960.2 provides that the district attorney or an interested person must send a written demand to a legislative body to cease and desist a ***past*** action(s) that violated the Brown Act prior to filing a civil action. The cease and desist letter must be submitted to the legislative body within nine (9) months of the alleged violation. This section only applies to ***past*** actions. An on-going or threatened future violation is subject to the cure and correct provisions.

### 2. Unconditional Commitment

To avoid a civil action, Section 54960.2(c) provides that the legislative body may commit to "cease, desist from, and not repeat the past action that is alleged to violate [the Brown Act]." The commitment must be:

a. Approved in open session at a regular or special meeting;

b. A separate agenda item and must not be on the consent agenda;

c. Approved within thirty (30) days of receipt of the cease and desist letter to avoid the filing of a civil action and attachment of attorney's fees/costs; and

d. Communicated to the sender of the cease and desist letter in a specific format as provided within Section 54960.2(c)(1).

The commitment may be made after thirty (30) days has expired. However, if a civil action has been filed, attorney's fees/costs may be awarded to the petitioner.

### 3. Filing the Civil Action

Section 54960.2(a)(4) provides that an action for a past violation of the Brown Act must be filed within sixty (60) days of either:

a. Receipt of the legislative body's response, if the response does not comply with Section 54960.2(c); or

b. The expiration of the thirty (30)-day response time if no response is given (whichever is earlier).

**4. Effect of an Unconditional Commitment**

Section 54960.2(a) provides that a civil action may not be filed if an unconditional commitment is made within the thirty (30) day window and complies with the provisions in Section 54960.2(c).

If the unconditional commitment is made after an action is filed and otherwise complies with the necessary provisions, the action shall be dismissed with prejudice. However, in this circumstance, attorney's fees/costs may be awarded.

If the unconditional commitment is later violated by subsequent action of the legislative body, that action is an independent violation of the Brown Act.

*Note: The statute provides an independent cause of action for violation of an unconditional commitment. As such, a legislative body must be cautious before committing to cease and desist from an act that does not otherwise violate the Brown Act. Doing so may subject the legislative body to additional restraints and/or litigation not otherwise contemplated by the Brown Act. As a result, consultation with legal counsel is recommended before approving an unconditional commitment.*

**5. Rescission of an Unconditional Commitment**

Section 59460.2(e) provides that the unconditional commitment may be rescinded. To be effective, the rescission must be:

a. Approved in open session at a regular meeting;

b. A separate agenda item and must not be on the consent agenda; and

c. Described on the agenda as "Rescission of Brown Act Commitment."

At least thirty (30) days prior to considering the rescission, written notice must be given to the interested parties and the district attorney that the legislative body intends to consider the rescission.

## E. EFFECT OF A VIOLATION

### 1. Validity of Action

Most actions are legally null and void if they violate Government Code Sections 54953, 54954.2, 54954.5, 54954.6, 54956 or 54956.5. (54960.1(d).)

However, the following actions are not null and void even in the face of a judicial determination of a violation (54960.1(d)):

a. Action taken that was in substantial compliance with Sections 54953, 54954.2, 54954.6, 54956 and 54956.5.

b. Action taken that was in connection with the sale or issuance of notes, bonds, or other evidences of indebtedness or any contract, instrument, or agreement thereto.

c. Action taken that gave rise to a contractual obligation, including a contract let by competitive bid other than compensation for services in the form of salary or fees for professional services, upon which a party has, in good faith, and without notice of a challenge to the validity of the action, detrimentally relied.

d. Action taken that was in connection with the collection of any tax.

e. Action taken where the complaining parties had good and sufficient notice even though the legislative body technically failed to comply with notice requirements.

### 2. Audio Recording

In certain cases, the court could order a legislative body to audio record its closed sessions. (54960(b).) Violating an order issued in such a matter could result in the judge finding the offender(s) in contempt of court.

## F. COSTS AND ATTORNEY FEES

The award of costs and attorney fees is permissive with the court.

### 1. To a Plaintiff

If awarded to a plaintiff, they are to be paid by the local agency and are not a personal liability of the public officer/employee. (54960.5.)

### 2. To a Defendant

Although more unusual, costs and attorney fees may also be awarded to a defendant (typically, a member of the legislative body or the agency). Such an award will only occur where the defendant prevails and the court also finds that the action was "clearly frivolous and totally lacking in merit." (54960.5)

## G. DISCLOSURE OF CONFIDENTIAL INFORMATION ACQUIRED DURING A CLOSED SESSION

Section 54963, effective January 1, 2003, provides that a "person" (includes not only legislative body members but others also in attendance) may not disclose confidential information acquired by being present at a closed session to someone not entitled to receive the information, unless the legislative body has authorized disclosure. (54963(a).)

Confidential information is defined as "a communication made in a closed session that is specifically related to the basis for the legislative body of a local agency to meet lawfully in closed session." (54963(b).)

### 1. Available Remedies

The remedies available for a violation of Section 54963 include all those that are available at law. Examples include:

a. Injunctive relief to prevent disclosure. (54963(c)(1).)

b. Referring to the grand jury, any members who have willfully and unlawfully disclosed confidential information. (54963(c)(3).)

c. Disciplinary action against an employee who has willfully disclosed confidential information, provided that they have received training as to the requirements of Section 54963, or have been given notice of the requirements. (54963(c)(2) and (d).)

### 2. Non-Violations

Actions that do not constitute violations of this section include the following:

a. Confidential Inquiries or Complaints: Confidential inquiries or complaints to a district attorney or grand jury regarding a perceived violation of law, including disclosing facts that are necessary to establish the illegality of an action taken by a legislative body of a local agency or the potential illegality of an action that has been the subject of deliberation at a

closed session, if the action were to be taken by a legislative body of a local agency. (54963(e)(1).)

b. Opinions: Expressing an opinion regarding the propriety or legality of actions taken in closed session, including the disclosure of the nature and extent of the illegal or potentially illegal action. (54963(e)(2).)

c. Information That is Not Confidential: Disclosing information acquired by being present in a closed session that is not confidential information. (54963(e)(3).)

d. Whistleblowers: Disclosures made under whistleblower statutes contained in Section 1102.5 of the Labor Code or Article 4.5 (commencing with Section 53296) of Chapter 2 of the Government Code. (54963(f).)

# XI
# CONSTITUTIONAL RIGHT TO ACCESS GOVERNMENT INFORMATION

## A. BACKGROUND

For much of California's history, access to the meetings of legislative bodies was a topic addressed only in the Government Code.

In November 2004, public access to government information became a constitutional right (Proposition 59). As a constitutional right (Article I), courts are required to interpret the existing access laws more favorably while invoking privacy protection in a more limited fashion.

## B. THE CALIFORNIA CONSTITUTION PROVIDES OR REQUIRES

- The public shall have access to meetings of government bodies and writings of public officials. (Cal. Const., art. I, section 3(b)(1).)

- Statutes and rules furthering public access shall be broadly construed, or narrowly construed if limiting access. (Cal. Const., art. I, section 3(b)(2).)

- Future statutes and rules limiting access must contain findings which justify the necessity of the limitations. (Cal. Const., art. I, section 3(b)(2).)

- Constitutional rights, including rights of privacy, due process and equal protection, are preserved. (Cal. Const., art. I, sections 3(b)(3) and (4).)

- Existing constitutional and statutory limitations restricting access to certain meetings and records of government bodies and officials are preserved, including law enforcement and prosecution records. (Cal. Const., art. I, sections 3(b)(3) and (5).)

- Records and meetings of the State Legislature are exempt. (Cal. Const., art. I, section 3(b)(6).)