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The Ralph M. Brown Act

The People's Business and the Right of Access

Presenter



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Overview



1. Purpose of the Brown Act
2. Applications of the Brown Act
3. Serial Meetings
4. Rules Governing Meetings
5. Teleconferencing
6. Closed Session
7. Remedies/Cure

Purpose of the Brown Act

- To ensure that almost all aspects of the decision-making process of legislative bodies of local agencies are conducted in public and open to public scrutiny.
- *“The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may retain control over the instruments they have created.” (Gov. Code 54950.)*



Purpose of the Brown Act



- Two key parts of the Brown Act have not changed since its adoption in 1953:
 - *“In enacting this chapter, the Legislature finds and declares that the public commissions, boards and councils and the other public agencies in this State exist to aid in the conduct of the people’s business. It is the intent of the law that their actions be taken openly and that their deliberations be conducted openly.”*
 - *“The people of this State do not yield their sovereignty to the agencies which serve them. The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may retain control over the instruments they have created.”*

Application

- “Meetings” of legislative bodies of local agencies
 - Local agencies
 - Legislative bodies
 - Meetings
 - Persons elected to legislative bodies, even prior to assuming office



Application



- Local Agency
 - Means a county, city, whether general law or chartered, city and county, town, school district, municipal corporation, district, political subdivision, or any board, commission or agency thereof, or other local public agency
- Legislative Body
 - Governing body;
 - Board, commission, committee created by formal action of the governing body
 - Standing Committees, Task Forces

Application



- All meetings shall be open and public except when the Brown Act authorizes otherwise.
 - The Ralph M. Brown Act (Government Code sections 54950-54963).

Application



BUT ...

- What is a meeting?
- When is a meeting not a meeting?

Application



- Meeting
 - Any gathering of a majority of the members at the same time and place (even electronically) to hear, discuss or deliberate upon any matter under their jurisdiction.
 - No action needs to be taken for a meeting to occur; conversations between and among members of a legislative body about issues confronting the agency is sufficient.
 - Essentially, any collective concurrence of a quorum of the legislative body is a “meeting.”

Application

- *Not a Meeting*

- Individual contacts (less than a quorum);
 - But ... beware of serial meetings
- Conferences and seminars;
- Community meetings;
- Purely social or ceremonial occasions;
- Attendance at standing committee meetings;
- Meetings with other legislative bodies – a majority of the governing body may attend as long as they do not discuss among themselves issues related to the agency.



Serial Meetings



- Serial Meetings – Expressly Prohibited
 - “Use of direct communication, personal intermediaries, or technological devices employed by a majority of the legislative body members in order to develop a collective concurrence as to action to be taken on an item by the legislative body is prohibited.”

Serial Meetings

- Elements of a Serial Meeting
 - Series of communications
 - Between less than a quorum
 - But taken as a whole involves a majority
 - Concurrence is formed
 - Advances or Clarifies the Understanding of an Issue;
 - Facilitates an Agreement or Compromise Among Members;
 - Advances the Ultimate Resolution of an Issue.



Serial Meetings



Two types of Serial Meetings

- Chain
 - Member A speaks to Member B who speaks with Member C about a particular matter and in the process they all form a collective concurrence on a matter.
- Hub and Spoke
 - An intermediary acts as a hub of a wheel with members relaying information back and forth to each other through the hub and in the process a majority of the legislative body develops a collective concurrence.
 - Can occur via staff conversations with elected
 - Can also occur via the public if councilmembers meet with members of the public

One-On-One Contact With Others



Serial Meeting Exceptions

- While the Brown Act prohibits serial meetings, it also explicitly provides an exception for one-on-one communications by a non-member (i.e., staff) with members of the legislative body.
- But does NOT sharing of views, comments, or concerns of different members

Serial Meetings

- Ways Serial Meetings Can Happen
 - Personal Meeting
 - Telephone Call or Text Message
 - Email (especially “reply all”)
 - Work through staff
 - Written Correspondence - letters
 - Use of Intermediaries
 - Social Networking Sites such as Facebook and Twitter



Serial Meetings – Emails

Email Tips

- Refrain from “reply all” in e-mails
- Ensure that any individual e-mails do not become a serial meeting
 - Risk of forwarding



Serial Meetings – Emails – Best Practices



Email Tips for Appointed and Electeds

- If a constituent sends an email to the full Council or Commission seeking something:
 - Send email to staff liaison or City Manager (if Council).
 - Reply (but not reply-all!) to the constituent thanking them but do not express opinions.
 - Staff should then circle back to the full Commission or Council indicating the outcome.

Email Tips for Staff

- Do not add individual commission or councilmembers to emails responding to a constituent.
- If constituent adds individual commission members or councilmembers to an email, when replying, remove them but email them separately indicating outcome.

Serial Meetings - Social Media

Social Media Tips:

- Beware of the comments section: Engaging in discussions using social media or the comments section of article, etc. can qualify as a meeting
- Example: A series of comments on a news article, Facebook or “X” post, may qualify as a meeting
- Take caution



AB 992 – Brown Act and Use of Internet-Based Social Media Platforms

New!



- New law effective January 1, 2021.
- Addresses permitted and prohibited public official communications via social media.
- Permitted: A member of a legislative body may communicate with the public using an internet-based social media platform that is open and accessible to the public (e.g., Facebook, Twitter) regarding a matter that is within the subject matter jurisdiction of the agency (“agency business”).
 - Ok to answer questions, provide information to the public, or to solicit information. Treat as a public forum – do not censor people.
 - But ... beware of engaging with fellow councilmembers on social media – even emojis, likes, or sharing of posts

AB 992 – Brown Act and Use of Internet-Based Social Media Platforms

- Prohibited communications via social media:
- NO: A majority of the members may not use an internet-based social media platform to discuss agency business.
- NO: A member may not respond directly to any communication posted or shared by another member regarding agency business on an internet-based social media platform. 1-on-1 privately (email) or in person is OK; 1-on-1 on publicly available social media (Facebook) is NOT OK
- Includes: NO likes, thumbs up, emojis or other symbols.



Serial Meeting Hypo – Text/Emails

- During a Commission meeting, 5 of 7 members frequently look down into their laps. In some instances, an audible bell is heard sounding like a notification from an iPhone.
- A local reporter later asks if the Commissioners violated the Brown Act by sending texts or e-mails to each other about agency business.
- Was the Brown Act violated?



Serial Meeting Hypo - Brown Act in Cyberspace



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- Blog post: Agency seeking new GM
- Comment #1 (board member): We need someone with great communication skills.
- Comment #2 (board member): And with a high degree of technical knowledge
- Comment #3 (board member): Anyone will be better than the last guy
- Comment #4 (resident): Has the Brown Act just been violated?



Serial Meetings Hypo

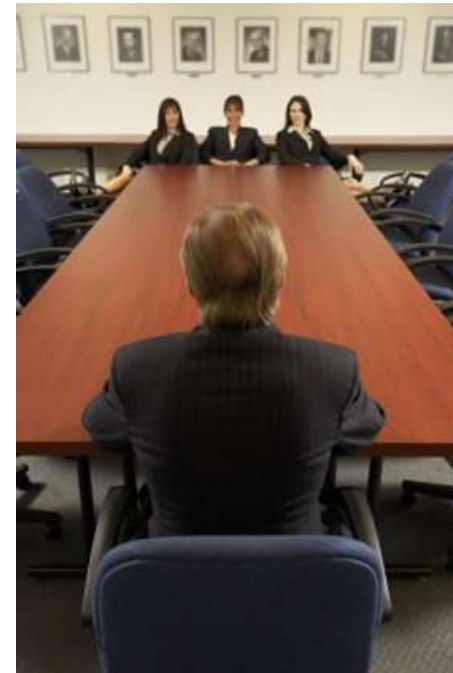


- City's Facebook post: Next budget workshop will examine long-term impacts of capital needs
- Board member 1 comments: Yes, this must be a priority. Please attend Tuesday's meeting!
- Board member 2: I agree. Top budget priority!
- Board member 3 replies: Me too.
- Board member 4 "likes" Board Member 1's post.
- Vendor: Please consider us for this work!
- Resident: We can't afford to pay for this. Our drought surcharged rates are already too high!



Rules Governing Meetings

- Regular meeting
- Special meeting
- Public's right to comment
- Closed Sessions



Rules Governing Meetings



- REGULAR MEETINGS - Agenda Requirements:
 - Post 72 hours prior to the meeting.
 - Must include the time and location of the meeting.
 - Must contain a brief general description of each item to be discussed or addressed, including closed session items.
 - Must provide opportunity for comment on non-agenda items – general public comment period.

Rules Governing Meetings



- SPECIAL MEETINGS - Agenda Requirements:
 - Posted no later than 24 hours prior to the meeting.
 - Must include the time and location of the meeting.
 - Must contain a brief general description of each item to be discussed or addressed, including closed-door items.
 - Only requires that we allow public comment on the items listed on the special meeting agenda – no need for general public comment period.

Rules Governing Meetings



- Distribution of Agenda Packet to Public
 - In addition to posting an agenda, a local agency must also make the agenda packet available to the public when the materials are distributed to all or a majority of the legislative body.
- Distribution of Late Materials
 - If within 72 hour window – make available for the public and post on the agency website.
 - May need to include address of the office on the agenda where documents are made available for the public (i.e. City Clerk’s information).
 - If at the meeting, ensure copies are available for the public at the meeting if City controlled document, or after the meeting if public provided.

Rules Governing Meetings

- The Public's Right to Comment
 - At every regular meeting, members of the public have the right to directly address the body on any item under the jurisdiction of the body – general public comment.
 - For agenda items, the public must be given an opportunity to comment before or during the body's consideration of the item.
 - At special meetings, members of the public have the right to address the body about any item that is listed on the agenda.



Rules Governing Meetings

Willful Interruptions

- SB 1100, which will become effective January 1, 2023, added Section 54957.95 to the Government Code. It allows the presiding member of the legislative body to remove individuals disrupting the meeting after first providing a warning that if they continue their disruptive behavior they will be removed.
- Removal is only justified for “disrupting”
 - disturbs, impedes, or renders infeasible the orderly conduct of the meeting and includes, but is not limited to, failure to comply with the agency’s rules regarding public comment or engaging in behavior that constitutes the use of force or a true threat of force.
 - Basically the inability to proceed with the meeting
- City council may not prohibit “insolent” (i.e. rude, disparaging, defamatory, even profane) remarks by members of the public **absent actual disruption**.



Rules Governing Meetings



- Public Recording of Meetings
 - The public must be allowed to audio or video tape a meeting unless the agency can make a reasonable finding that the recording would constitute a persistent disruption of the proceedings
 - Recordings of public meetings by the agency are public records
 - If the agency records, the recording must be kept for 30 days
 - But ... check City's records retention schedule which may have a different timeline.

Rules Governing Meetings



- *No action or discussion allowed for any item not listed on agenda except for:*
 - Adding Items of Subsequent Need. Adding items by 2/3 vote because of **need for “immediate action”** that came to the agency’s attention **after** the agenda is posted

Rules Governing Meetings



No action or discussion allowed for any item not listed on agenda except:

- Brief responses to statements or questions from public
- Questions to staff for clarification of matters based upon public comments
- Brief announcements or reports on member's or staff's own activities
 - Tied to public comment time
- Providing references or information to staff
- Asking staff to report back at a future meeting on any matter

Special Circumstances at Meetings



- For bilingual public speakers Brown Act requires twice as much time to speak during public comment
 - Enough time to provide original statement in native language and translation
 - Example: instead of 3 minutes, the agency should provide 6 minutes.

Teleconferencing



- Teleconferencing may be used for any meeting of the legislative body.
 - All votes by roll call.
 - Agendas posted at all teleconference locations and teleconference locations identified.
 - Teleconference locations must be accessible to the public.
 - At least a quorum must be within the boundaries of the local agency.

Teleconferencing during and post COVID



- **March 17, 2020:** Governor Newsom issues Executive Order N-29-20 suspending certain provisions in the teleconferencing provision in the Brown Act.
 - Change waived the four basic requirements, with the exception of roll call voting.
- **September 15, 2021:** Governor signs AB 361 essentially codifying the terms of the Governor’s Executive Order, but required ongoing findings
- **September 16, 2022:** Governor signs AB 2449 adding “just cause” and “emergency” provisions for teleconferencing.

Closed Sessions



- Must be expressly authorized
- Must be briefly described in agenda
- Must verbally announce items
- If action is taken, may need to report to the public
- Used when public is better served by closed session
 - Think real estate negotiation or litigation strategy

37

Limited Closed Sessions



- Real Property Transactions (price and terms of payment)
- Litigation--Existing, Anticipated and Initiation
- Personnel Issues--Appointment, Performance, Evaluation, Discipline/Dismissal/Release
- Labor Negotiations
- Threats to Public Services or Facilities
- Joint Powers Authority
 - Can disclose closed session discussions with authorizing legislative body in closed session – but limited scenarios – check with both JPA Counsel and City Attorney

Closed Session



- Brown Act Agenda Safe Harbor Language
- Requires specific wording for each specific instance
- CLOSED SESSIONS MUST BE ON THE AGENDA AND ONLY FOR SPECIFIC REASONS LISTED IN THE BROWN ACT
- Consult with your City Attorney for language requirements

Closed Session Pitfalls



- Must allow public comment prior to closed session
- Must announce or provide reasons why going into closed session.
- Only members of legislative body, legal counsel for body, staff, and **necessary** consultants may be present
- Real Estate Negotiations – what does “Price and Terms of Payment” really mean?
- Human Relations and Personnel Traps for the Unwary: Evaluating the Police Chief and Compensation of Chief Executive

Threatened Litigation

- The documentation of the threat must be included in the agenda packet
- Include a sentence describing the threat on the face of the agenda and include whatever written documentation is available of the threat
 - Internal memo
 - Lawyer letter
 - Bottom line- transparency

Reportable Actions



- The legislative body must publicly report any action taken in closed session and the vote or abstention on that action of every member present regarding:
 - Approval of an agreement concluding real estate negotiations
 - Approval given to 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
 - Approval given to legal counsel of a settlement of pending litigation
 - Disposition reached as to claims discussed pursuant to joint powers insurance authority
 - Action taken to appoint, employ, dismiss, accept the resignation of, or otherwise affect the employment status of a public employee
 - Approval of an agreement concluding labor negotiations with represented employees
 - Pension fund investment decisions

The Confidentiality of Closed Session Discussions



- The Brown Act explicitly prohibits the unauthorized disclosure of confidential information acquired in a closed session by any person present, and offers various remedies to address breaches of confidentiality
- Only the legislative body acting as a body may agree to divulge confidential closed session information; regarding attorney/client privileged communications, the entire body is the holder of the privilege and only the entire body can decide to waive the privilege.

Remedies for Disclosure



- Employee
 - Disciplinary action against an employee who has willfully disclosed confidential information in violation of this section; up to dismissal
- Member of the Legislative Body
 - Referral of the member who willfully disclosed confidential information in violation of this section to the Grand Jury

Remedies for Violations



- Any interested person, including the district attorney, may seek to invalidate certain actions of a legislative body on the ground that they violate the Brown Act. Violations of the Brown Act, however, **cannot be invalidated** if they involve the following types of actions:
 - Those taken in substantial compliance with the law.
 - Those involving the sale or issuance of notes, bonds or other indebtedness, or any related contracts or agreements;
 - Those creating a contractual obligation, including a contract awarded by competitive bid for other than compensation for professional services, upon which a party has in good faith relied to its detriment;
 - Those connected with the collection of any tax; or
 - Those in which the complaining party had actual notice at least 72 hours prior to the regular meeting or 24 hours prior to the special meeting, as the case may be, at which the action is taken.

Brown Act Cure



- The remedy is available to “[t]he district attorney or any interested person” who must first mail or fax a “cease and desist letter” “to the clerk of secretary of the legislative body being accused of the violation” “clearly describing the past action of the legislative body and nature of the alleged violation.”
- Such a demand must be made within nine months of an alleged violation.
- The legislative body has 30 days to respond to a cease-and-desist letter although a later response may still obviate subsequent suit, but will oblige the agency for the plaintiff’s attorneys’ fees and costs.
- Such a response may be “an unconditional commitment to cease, desist from, and not repeat the past action that is alleged to violate this chapter” in substantially the form specified in section 54960.2, subdivision (c)(1)
- Such an unconditional commitment “shall be approved by the legislative body in open session at a regular or special meeting as a separate item of business, and not on its consent agenda.”

Remedies for Violations



- For violations, Court may:
 - Enjoin action
 - Invalidate action
 - Mandate correction
- Court costs & attorney fees are recoverable
- Individuals who intentionally violate may be guilty of a misdemeanor

Enshrined in Statute and Quoted by Justices

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



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Questions?

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