

Is it Legal under the Brown Act? Yes, No, or It Depends . . . It's Just Not that Simple Anymore.

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Ventura Unified School District

Overview

Brown Act = Government Code Sections 54950-54963

- Part I: What's the purpose of the Brown Act
- Part II: To whom does the Brown Act apply?
- Part III: When does the Brown Act apply?
- Part IV: What does the Brown Act require?
- Part V: What if we get it wrong?

Part 1: What's The Purpose Of Brown Act?



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.**

(Gov. Code Section 54950)

Purpose of Brown Act (cont'd)

- The people have the right of access to information concerning the conduct of the people's business, and, therefore, the meetings of public bodies and the writings of public officials and agencies shall be **open to public scrutiny.**

California Constitution, Art. 1, Section 3(b)(1).
(Proposition 59, November 2004.)

Public Scrutiny

New database details pay of California public school employees



Public Scrutiny

Palos Verdes Peninsula school board accused of violating Brown Act



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The Palos Verdes Peninsula school board was accused of violating the Brown Act by holding a closed session to discuss the resignation of a board member. The board's actions were challenged by a parent, who filed a lawsuit against the board. The court ruled in favor of the parent, stating that the board's actions were in violation of the Brown Act. The board is now required to hold all meetings open to the public.

DISTRICT REPORT

The Palos Verdes Peninsula school board was accused of violating the Brown Act by holding a closed session to discuss the resignation of a board member. The board's actions were challenged by a parent, who filed a lawsuit against the board. The court ruled in favor of the parent, stating that the board's actions were in violation of the Brown Act. The board is now required to hold all meetings open to the public.

Part 2: To Whom Does The Brown Act Apply?

- Brown Act applies to “legislative bodies” of local agencies. Gov. Code Sections 54952.



“legislative bodies” of local agencies

- Governing body (e.g., the board)
 - Including newly elected members who have not taken office
- Appointed bodies
 - Created by formal action of the governing body
 - Whether permanent or temporary, decision-making or advisory
- Standing committees
 - Continuing subject-matter jurisdiction, or meeting schedule fixed by resolution or formal board action
 - EVEN if less than a quorum
- Private organization's board, if
 - Created by legislative body to exercise delegated authority, or
 - Receives agency funding and board includes board member of legislative body

Gov. Code Sections 54952 and 54952.1.

Not a “legislative body”

Brown Act does not apply to

- Temporary advisory committees (ad hoc committees) consisting solely of board members and comprised of less than a quorum
- Advisory groups that report to a single decision maker or that are appointed by staff

(Gov. Code Section 54952.)



Q U I Z Z

Is it a "legislative body" subject to Brown Act?

- Citizens oversight committee
- Executive search committee
- A committee comprised of parents, teachers and staff advising superintendent on a specific issue
- A committee comprised of 2 school district board members asked to review city's proposed general plan amendment and effect on district's real property issues
- A committee comprised of 2 school district board members and 2 members of another agency (e.g., VCOE or VCSSFA) to review and make recommendations about issue of common concern (e.g., LCFF, public safety issues)

Part 3: When Does The Brown Act Apply?

Brown Act applies to "meetings"



Brown Act applies to "meetings"

- "Meeting" means any congregation of a majority of the members of a legislative body at the same time and location to hear, discuss, deliberate, or take action on any item that is within the subject matter jurisdiction of the legislative body

(Gov. Code Section 54952.2(a).)

Brown Act applies to "meetings"

- Includes teleconferences
- Includes regular, special, emergency and adjourned meetings
 - Regular meetings = set by resolution or other formal action
 - Special meetings = called by presiding officer or majority of board
 - Emergency meetings = defined by statute. Prompt action needed due to actual or threatened disruption.
 - Adjourned meetings = regular or special meetings that have been continued to later date (usually required to be within 5 days of original meeting).

Brown Act applies to "meetings"

- Actions OR discussions OR deliberations by a majority of board



Not a "meeting"

- Individual contacts
 - Board member can act on his or her own, including conferring with constituents, consultants, staff and colleagues
- Conferences
 - Meetings of general interest to the public or public agencies
- Community meetings
 - Open and public meetings of another organization
- Meetings of other legislative bodies
- Ad hoc committees/advisory committees
- Social or ceremonial events

BUT, Board members cannot engage in collective deliberation during the above events. If they do, the events will constitute a "meeting."

Q U I Z Z

- Testimony by entire Board against a bill before the Senate in Sacramento?
- Follow-up meeting between entire Board and local assemblymember?
- Team building session for entire Board?
- "Collective briefing" before a Board meeting?

Brown Act applies to "meetings"

- A legislative body shall not, outside a meeting authorized by this chapter, use a series of communications of any kind, directly or through intermediaries, to discuss, deliberate, or take action on any item of business that is within the subject matter jurisdiction of the legislative body.

(Gov. Code Section 54952.2(b)(1))

Brown Act applies to "meetings"

- Serial meetings that result in "collective concurrence"

"Daisy chain" serial meeting



"Spoke and hub" serial meeting



Brown Act applies to "meetings"

- Individual contacts or conversations between board member and "any other person" is not a meeting – Gov. Code Section 54952.2(c)(1)
- "Any other person" means not a board member, administrative personnel, staff person, or employee

Brown Act applies to "meetings"

- "Serial meetings" and "individual contacts" – what does it mean in the digital age?



Brown Act applies to "meetings"

- Some historical context
 - In the early 1950s, only half of U.S. households owned a T.V.
 - By 1960, 80% of U.S. households owned a phone
 - In early 1980s, less than 10% of U.S. households had a computer
 - By 2013, 85% of U.S. households had a computer; 74% had internet
 - In 2015, approximately 66% of Americans owned a smartphone
- Law hasn't caught up with technology
 - Clear that cannot have series of in person meetings, or a series of phone calls.
 - What are implications for email, Facebook, Instagram, Twitter?

Q U I Z Z

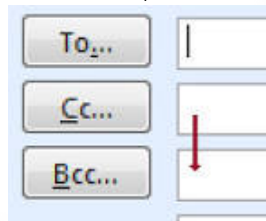
- The school district has a five member board. Tricia, a member of the public, contacts Board Member Tim and Board Member Gayle by email regarding teacher raises, which is an upcoming agenda item. Tim and Gayle both respond, separately, to say they support the raises. Tricia then emails Board Member Jon to ask whether he supports the raises, and states that Tim and Gayle have already voiced their support.
- Brown Act violation?
- How should Jon respond?

Q U I Z Z

- The superintendent wants to advise the board members about a newly filed lawsuit, which includes a request for an emergency temporary restraining order, but there will not be another board meeting before the hearing. The superintendent doesn't want the board members to hear about the lawsuit in the newspapers.
- Can the superintendent email the board members to inform them about the lawsuit and upcoming hearing?

Helpful hints

- Do not "reply all"
- Use blind carbon copy for recipients
- Send email with reminder about potential Brown Act violations



QUIZZ

- During a board meeting, there are numerous public comments about a possible school closure. Board Member Leslie texts Board Member Juan and Board Member Mayra about the current discussion.
- Brown Act violation?

QUIZZ

- Zach is a long-time close friend of Clara, a board member. Zach is watching a board meeting on live stream from home. The discussion turns to school bond matters, which is an issue that really concerns Zach. During the meeting, Zach texts Clara to share his opinion about the discussion.
- Brown Act violation?

Helpful hints

- Texts during public meeting could be considered "secret" discussions or deliberations in violation of Brown Act.
- Texts could also be subject to the Public Records Act!
 - *City of San Jose v. Superior Court*, 2 Cal.5th 608 (2017).

Q U I Z Z

- Board Member Daniela has a Facebook page. Recently, she posts her thoughts on a hot school district topic: student discipline. Board Member Noam sees Daniela's post and "likes" it.



- Brown Act violation?

Q U I Z Z

Snapchat sends photos or images that are automatically deleted a few seconds after being viewed. If the chat isn't opened, the image will be deleted in 30 days. Snapchat also deletes the images. Law enforcement can obtain basic information about the chat, such as when it was sent.



- Board Member Eric sends a chat to Board Member Penelope. The chat is a photo of overcrowded classrooms at a local school that a concerned parent sent to Eric.
- Brown Act violation?

Q U I Z Z



Twitter is an online platform where users can connect through quick, frequent messages, including photos, videos, links, and up to 140 characters of text. A message is called a "tweet."


- Board Member Malik tweets a comment about new curriculum materials, which is an upcoming board meeting agenda item. Board Members Chris and Will follow Malik on Twitter. They retweet Malik's message.
- Brown Act violation?

Helpful hints



Part IV: What does the Brown Act require?

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



Government Code Section 54953(a).

Meetings must be held in proper location

Locations - Generally

- Within the boundaries of the local agency's jurisdiction
- With few exceptions, such as:
 - Court order
 - Inspecting real property or personal property
 - Multiagency meetings
 - Meeting with elected or appointed officials
 - Meeting with legal counsel, if required to reduce costs
 - For JPAs, meeting in territory of a member agency

(Gov. Code Section 54954)

Meetings must be held in proper location

- Are teleconferences ok?



Meetings must be held in proper location

Locations – Teleconferences

- May be used during meetings
 - At least a quorum must participate at locations within the agency's jurisdiction
 - Additional teleconference locations can be made available to the public
 - Each teleconference location must be identified in the meeting notice and agenda
 - Each teleconference location must be accessible
 - The agenda must provide an opportunity for the public to participate at each teleconference location
 - All votes have to be by roll call
- Gov. Code Section 54953

Meetings must be properly noticed

- Regular meetings – post 72 hours in advance
 - Accessible to public 24 hours/day
 - And on website, if agency has one (but Internet only not acceptable)
 - Mail to any person who's requested copy
- Special meetings – post 24 hours in advance
 - Personally deliver to parties who have requested copy
- Adjournment – post within 24 hours
 - If within 5 days, no new agenda required
- Emergency meetings – post 1 hour in advance
 - By telephone to media that have requested notice, if possible
 - Comply with notice requirements after meeting
- Notices must include agenda

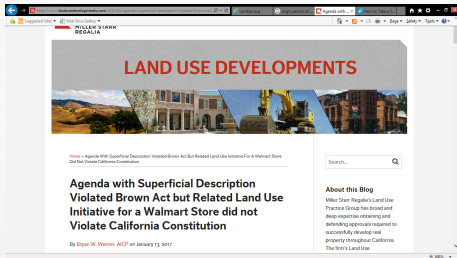
Agenda Requirements

Agenda must include:

- Meeting date, time, and place
- Brief description of each item of business to be discussed, including closed session items. Provide enough information to give the public notice of what will be discussed.

(Gov. Code Section 54954.2)

Agenda Requirements (cont'd)



Agenda Requirements

- AB 2257 (Gov. Code Section 54954.2), effective January 1, 2019
- Prominent, direct link to current board meeting agenda posted on school district's website
 - Cannot require user to search for the link
 - Must be on the website's homepage
- Must be in open format
 - Retrievable, downloadable, indexable, and electronically searchable by commonly used Internet search applications
 - Must be "platform independent" and "machine readable"
 - Available to public free of charge and without any restriction that would impede the reuse or redistribution of the agenda

Agenda Requirements (cont'd)

- Board cannot take action on or discuss matters not on posted agenda.
- Unless emergency situation (as defined in Gov. Code 54956.5 – e.g., "crippling disaster," "terrorist activity," "mass destruction")
 - 2/3 of members present determine there is a need for immediate action.
- Matter from adjourned meeting (within 5 days).
- New case law – limiting discussion of non-agendized items to determine whether to place on future agenda permitted
 - Cruz v. City of Culver City (2016) 2 Cal.App.5th 239

Education Code Requirements

- Items are void if not posted
- School district must have regulations ensuring that public can place matters affecting district business on the agenda and can address the board

(Ed. Code Sections 35144-35145)

Public Participation in Meetings

Public has right to know who voted and how

- Roll call voting
- No secret ballots



Public Participation in Meetings

Public comments:

- Agenda must provide opportunity for public to speak about closed session and open session items.
- Regular meeting - Public can discuss anything. Board can briefly respond (e.g., ask for a staff report).
- Special meeting – Public can discuss agenda items only.

Public Participation in Meetings

- AB 1787 – changes to Gov. Code Section 54954.3 effective January 1, 2017
- If board limits the time for public comment, then board must provide at least twice the allotted time to a member of the public who utilizes a translator to ensure that non-English speakers receive the same opportunity to address the board
- Exception: when simultaneous translation equipment allows the board to hear the translated public comments simultaneously

Public Participation in Meetings



Public Participation in Meetings

- First Amendment rights & reasonable regulations on public testimony
 - Enforced fairly and without considering viewpoint
- Disruptive members of the public
 - Removal of persons who willfully interrupt the meetings
 - Situations where the room can be cleared
 - Special rules for news media
 - Rules for allowing individuals to reenter the room

Closed Session Items



➔ ANYTHING



➔ LIMITED BY STATUTE

Closed Session Items

- Closed session allowed only for very specific matters
- License/permit determination
 - Litigation (existing, threatened against agency, initiated by agency)
 - Real estate negotiations (instructing negotiators on price and terms)
 - Personnel matters (appointment, employment, evaluation, discipline or dismissal of public employees)
 - Liability claims
 - Labor negotiations (instructing bargaining representatives)
 - Education Code (student disciplinary proceedings)
 - Grand jury testimony (individually or as a group)
 - License applicants with criminal records
 - Threats to public security (confer with law enforcement)
 - Case review/planning
 - Report involving trade secret
 - Hearings
 - Charges or complaints involving information protected under federal law
 - Multi-jurisdictional drug law enforcement agency
 - Hospital peer review and trade secrets
 - Conference with JPA
 - Audit by CA State Auditor

Closed session (cont'd)

- If going into closed session, use closed session "safe harbor" captions listed Gov. Code Section 54954.5
 - Protect district so ALWAYS use!



Closed session (cont'd)



- Note
- Some require presence of attorney (e.g., litigation closed sessions)
 - Some require additional notices (e.g., certain public employee matters, such as complaints against employee)
 - Some require additional announcements (e.g., real estate, certain litigation matters)
 - Read safe harbor section and primary section

litigation closed session

- Conference with legal counsel, existing litigation, pursuant to Gov. Code Section 54956.9(d)(1).
Name of case: ABC Co. v. XYZ School District, Ventura County Superior Court Case No. 12345.
- Conference with legal counsel, existing litigation, pursuant to Gov. Code Section 54956.9(d)(1). Case name unspecified: disclosure would jeopardize existing settlement negotiations.

litigation closed session

- Conference with legal counsel – anticipated litigation, pursuant to Gov. Code Section 54956.9(d)(2). Significant exposure to litigation. Number of cases: 2.
- Conference with legal counsel – anticipated litigation, pursuant to Gov. Code Section 54956.9(d)(4). Initiation of litigation. Number of cases: 1.

liability claims

- Liability Claim, pursuant to Government Code Section 54956.95.
Claimant: John Doe.
Agency claimed against: ABUSD.
- Liability Claim, pursuant to Government Code Section 54956.95.
Claimant: Name unspecified pursuant to Gov. Code Section 54961.
Agency claimed against: ABUSD.

real property closed session

- Conference with Real Property Negotiators, pursuant to Government Code Section 54956.8.
Property: 123 Main Street, Beach City, CA 91234.
Agency negotiators: Asst. Superintendent Camila Schwartz and special consultant Gary Abrams.
Negotiating party: ABC Developers.
Under negotiation: price and terms of payment.

public employee closed session

- Public Employee Appointment, pursuant to Gov. Code Section 54957(b).
Title: Superintendent.
- Public Employment, pursuant to Gov. Code Section 54957(b).
Title: Principal II.
- Public Employee Discipline/Dismissal/Release, pursuant to Gov. Code Section 54957(b)(1).

labor negotiations closed session

- Conference with Labor Negotiators, pursuant to Government Code § 54957.6.
Designated agency negotiator: Cristina Gomez.
Employee organization: Teamsters.

student discipline closed session

- Consideration Of Student Discipline – Suspension Or Disciplinary Act Other Than Expulsion, pursuant to Education Code Sections 35146 and 48912. Case numbers: 00-11-22 and 00-11-23.

Closed session (cont'd)

- No requirement to go into closed session
- Use only when (very) necessary
 - Remember purpose of Brown Act
- Report out final action taken by roll call
 - Some exceptions on timing and substance.
- Closed session discussions must remain confidential

Part V: What if we get it wrong?



Invalidation Actions

- Civil action to invalidate actions taken in violation of Brown Act – Gov. Code 54960.1
- District attorney or any interested person can bring action re: violation of Sections 54953, 54954.2, 54954.5, 54954.6, 54956 or 54956.5, and asking court to find action "null and void"
 - Before bringing lawsuit, must demand that school district "cure and correct" the violation
 - Cure and correct letter within 90 days or 30 days if action taken in open session and concerned violation of 54954.2

Invalidation Actions

- Public agency has 30 days to cure and correct, and inform complainant in writing of its actions, or inform the complainant that public agency decided not to cure and correct
 - If no action within 30 days, then deemed decision not to cure and correct
- Within 15 days of receipt of written notice of cure and correct decision, or within 15 days of expiration of 30 day period to send notice, whichever is earlier, the complainant must file lawsuit or be barred from bringing lawsuit

Invalidation Actions

Defenses

- Substantial compliance
- Actions taken in connection with sale or issuance of notes, bonds or other indebtedness
- Action gave rise to contractual obligation and other party relied upon contract in good faith
- Action taken in connection with tax collection
- Person alleging noncompliance with 54954.2, 54956 or 54956.5 had actual notice

Invalidation Actions

- If court determines that school district cured and corrected, then lawsuit dismissed with prejudice
- Fact that school district took action to cure or correct not admissible as evidence of violation

Civil action to prevent future violations

Civil action to prevent future violations (e.g., injunctive relief) - Gov. Code 54960

- Stop or prevent violations or threatened violations
- Determine applicability of Act to actions or threatened future actions
- Determine whether any rule or action to penalize or discourage expression of member is valid
- Compel recording of closed sessions

Civil action re: applicability to past actions

- Any interested person or district attorney can bring lawsuit to determine whether past actions constitute violation of Act (Gov. Code 54960.2)
- Before filing, must send "cease and desist" letter to public agency within 9 months of alleged violation
 - Describe past action and nature of alleged violation
- Public agency has 30 days to respond
 - Can provide an unconditional commitment to cease and desist from past action
- If public agency fails to take action within 30 days or does not provide an unconditional commitment, then complainant can file lawsuit

Civil action re: applicability to past actions

- Unconditional commitment process
 - Must be approved at regular or special meeting as separate item of business (not on consent agenda)
 - Must be in substantially the form in the Act
- If public agency makes unconditional commitment, then lawsuit is barred
 - But, a violation of the unconditional commitment is a new violation of the Act
- Public agency can rescind the unconditional commitment by majority vote
 - Have to give at least 30 days notice to complainant
 - Complainant can then file lawsuit

Criminal action

- Against member with intent to deprive public of information which members knows/should know public is entitled – Gov. Code Section 54959
- Constitutes a misdemeanor offense

Additional considerations

- Prevailing complainant in civil actions can get attorneys fees and costs
- Unintended consequences unrelated to lawsuits

Questions?