



First Amendment Coalition's California Brown Act Primer

I. Introduction

The Ralph M. Brown Act (Government Code sections 54950-54963, referred to as the "Brown Act") is intended to provide public access to meetings of California local government agencies. Its purpose is described in the Act:

"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't Code § 54950.

In order to achieve this objective, governmental bodies subject to the requirements of the Brown Act must provide public notice of their meetings, post agendas of the subjects to be discussed at those meetings, and provide public access to those meetings. Public notice of every meeting subject to the Brown Act is required, and access is mandatory unless the meeting is held in closed session under a specific exception contained in the Act.

However, the Brown Act is complex, and problems often arise in application. The following issues come up consistently:

- (1) What kinds of public bodies are subject to the Act?
- (2) Has the public body properly given notice of the matters it intends to address in the agenda for the meeting?
- (3) What constitutes a "meeting," and what kinds of communications among members of a legislative body are permitted outside of meetings?
- (4) Are the exceptions permitting closed sessions are being properly applied?

In this primer we will walk you through our summary of the Brown Act that aims to explain some of the intricacies of the Act that have led to both litigation and abuse by the agencies it governs and make it more useful to its users.

II. What public bodies are subject to the Act?

Public bodies subject to the Act include:

A. The governing body of a local agency or any other local body created by state or federal law.¹ Thus, entities such as city councils, boards of supervisors, school boards, redevelopment agencies, and air pollution control boards are covered. The judiciary is not covered. State agencies and the legislature are covered by separate, similar acts.

B. A commission, committee, board, or other body of a local agency created by charter, ordinance, resolution, or formal action of a legislative body.²

Advisory committees composed solely of the members of the legislative body that constitute less than a quorum and that have neither a continuing scope of business nor a schedule set by the legislative body are not covered by the Act.

- Standing committees are included if they have schedules fixed by official action irrespective of their composition. For example, a standing committee of a city council, such as a budget committee or a rules committee, would be subject to the Brown Act. However, an ad hoc committee consisting of three out of seven council members appointed to investigate a claim of fraud would not be. (The Brown Act would apply if a citizen or someone else who was not a member of the council was appointed to the committee.)

- In addition, while a standing committee that meets pursuant to a regular schedule is always subject to the Brown Act, even standing committees that meet infrequently or sporadically are subject to the Brown Act if they consist of more than a quorum, or if they have ongoing authority to address issues with the subject matter jurisdiction of parent body.³

C. A board, commission, committee or other multimember body that governs a private entity that either:

- Is created by that entity to exercise authority on its behalf; or

- Receives funds from a local agency and has on its governing board a member of that agency's legislative body who is appointed by the legislative body.⁴

For example:

(1) If a city creates a special local assessment district, collects assessments from local property owners, and provides by ordinance that the programs paid for with those funds will be governed by a non-profit association, the non-profit corporation set up to govern those programs will be subject to the Act;⁴ Gov't Code § 54952(c)(1).⁵ and

(2) if a private, non-profit corporation receives funds from a city, and the corporation has a council member on its board who has been appointed by the city council, the corporation will be subject to the Act.

D. The governing board of private corporation to which a public hospital district has turned over control of a hospital.⁶

E. State agencies are not covered by the Brown Act, but are subject to the Bagley-Keene Open Meetings Act, which is very similar to the Brown Act. The courts and court administrative offices are exempt from state open meeting laws.

NOTES

1 Gov't Code § 54952(a).

2 Gov't Code § 54952(b).

3 79 Ops. Cal. Atty. Gen. 69 (1996).

4 Gov't Code § 54952(c)(1).

5 This example comes from a case called Epstein v. Hollywood Entertainment District II Business Improvement Dist., 87 Cal. App. 4th 862 (2001). In addition, under a court decision in a case called Frazer v. Dixon Unified School Dist., 18 Cal. App. 4th 781 (1993), a board, committee or commission created by an individual government official, rather than a local governmental agency, also is subject to the Brown Act, if the local agency delegated to the individual official the authority to create the committee or other body.

6 Gov't Code § 54952(d).

III. What notice must be given of a public meeting?

A. Advance notice of meetings must be provided:

Regular meetings must be noticed through the posting of an agenda at least 72 hours before the meeting. ⁷ (You may request that a copy of the agenda and "all documents constituting the agenda packet" be mailed to you. They will be mailed when the agenda is posted or when it is distributed to a majority of the legislative body, whichever is first. The agency may charge a fee for mailing the materials, not to exceed the cost of providing the mailing service.)⁸

Special meetings may be called, but only upon 24-hour notice to each local newspaper of general circulation, radio or television station that has in writing requested notice. The notice must be posted in a location freely accessible to the public. Only the business specified for discussion at the special meeting may be addressed. 9

Emergency meetings may be called under specific, drastic circumstances (“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”). The 24-hour notice is not necessary, but a 1-hour notification of those media requesting notice is necessary if possible. 10

B. The agenda must contain a brief description of each item of business to be transacted(generally not to exceed 20 words). 11

Agenda descriptions must not be misleading. According to the California Attorney General's guide to the Brown Act, “the purpose of the brief general description is to inform interested members of the public about the subject matter under consideration so that they can determine whether to monitor or participate in the meeting of the body.”¹² For example, using the agenda item “flood control” to refer to a discussion on a request to Congress to exempt a certain stream from the Wild and Scenic Rivers Act would be clearly inadequate.

Closed session items must be included on the agenda. 14

(a) They must be described with enough particularity to protect the confidentiality of the subject to be discussed, but at the same time provide the public with a general idea of the topic being discussed in closed session. (See the discussion below of what must be included for specific exemptions.)

(b) The Act actually spells out the recommended content of closed session agenda notices, and provides a “safe harbor” ensuring that government agencies will not be in violation of the agenda requirements of the Act if they follow the recommended format.

C. No action can be taken on items not on the agenda, except:

- Brief responses to public testimony.
- Requests for clarification from or references of matters to staff.
- Brief reports on personal activities.
- When there is an emergency (see above).
- When two-thirds of the legislative body agree there is a need to take immediate action on a matter about which the body could not have been aware earlier (see above).

NOTES

7. Gov't Code § 54954.2(a).

8. Gov't Code § 54954.1.

9. Gov't Code § 54956.

10. Gov't Code § 54956.5.

11. Gov't Code § 54954.2(a).

12. The Brown Act, Open Meetings For Local Legislative Bodies, Office of the Attorney General, 2003, at

pp. 16-17.

13 See 67 Ops. Cal. Atty. Gen. 84 (1984) (construing Bagley-Keene Act).

14. Gov't Code §§ 54954.2(a), 54957.7(a).

15. Gov't Code § 54954.5.

IV. What is a meeting?

A. A meeting as defined by the Act includes any "congregation by a majority" of a legislative body at the same time and place to "hear, discuss, or deliberate" on any matter within the jurisdiction of the body.

As the Attorney General explains: *"This definition makes it clear that the body need not take any action in order for a gathering to be defined as a meeting. A gathering is a meeting if a majority of the members of the body merely receive information or discuss their views on an issue. A meeting also covers a body's deliberations, including the consideration, analysis or debate of an issue, and any vote which may ultimately be taken."* 16

A meeting does not have to be formally announced, agendized, or convened in order to be subject to the Act. 17

B. Serial meetings, either in person or by telephone or fax or go-betweens, constitute a meeting if done to **"develop a collective concurrence as to action."** 18

- For example, a series of individual telephone calls between the attorney for the redevelopment agency and the members of the agency's governing board was held to constitute a meeting. The agency attorney had individually polled the members of the body to get their approval for a real estate transaction. The court concluded that even though the members never met together, their communications constituted a meeting for the purposes of the Act. 19

- Similarly, when the San Diego City Council directed staff to take certain action in an eminent domain proceeding in a letter signed by a quorum of the council, the court held that it had violated the Brown Act.20

- Addressing e-mail communications, the Attorney General has opined as follows: "This office [has] concluded that a majority of a body would violate the Act if they e-mailed each other regarding current issues under the body's jurisdiction, even if the e-mails were also sent to the secretary and chairperson of the agency, the e-mails were posted on the agency's Internet Web site, and a printed version of each e-mail was reported at the next public meeting of the body. The opinion concluded that these safeguards were not sufficient to satisfy either the express wording of the Act or some of its purposes. Specifically, such e-mail communications would not be available to persons who do not have Internet access. Even if a person had Internet access, the deliberations on a particular issue could be completed before an interested person had an opportunity to become involved."21

- On the other hand, the California Supreme Court has held that a memorandum from a public body's attorney to the members of the body did not constitute a meeting under the Act.22

- **Note** that it has been held that the public body need not actually take formal action through the serial meeting in order to have conducted a "meeting" in violation of the Act. One court has concluded that the Act applies equally to the deliberations of a body and its decision to take action. The court reasoned that if a collective commitment were a necessary element, the body could conduct most or all of its deliberation behind closed doors, as long as the body did not actually reach agreement prior to consideration in public session.23

C. Exempted from the definition of a meeting are:

- Individual contacts or conversations.24

- Attendance of a majority of members at a conference open to the public that involves a discussion of general interest to the public or "to the public agencies of the type" attending the conference provided the members do not discuss legislative business among themselves. Fees may be charged to members of the public.25

- Attendance by a majority of the members at an open and publicized meeting called by someone other than the legislative body to discuss topics of community interest.26

- Attendance by a majority of members at an open and publicized meeting of another body of the local agency, provided the members do not discuss among themselves matters within their jurisdiction that is not the subject of the meeting.

- Attendance at a ceremonial or social event by a majority of members provided they do not discuss among themselves matters within their jurisdiction.²⁸

- The attendance of a majority of the members of a legislative body at an open and noticed meeting of a standing committee of that body, provided that the members of the legislative body who are not members of the standing committee attend only as observers.²⁹

D. The meeting must be held within the boundaries of the agency's jurisdiction, except:³⁰

- When necessary to comply with state or federal law or court order.

- To inspect real or personal property over which the agency has control, provided it is the topic of the meeting is related to the property.

- To participate in multi-agency meetings, provided that the meeting is properly noticed by all the agencies and that the meeting takes place in the jurisdiction of one of the agencies involved.

- To meet with federal or state officials when a local meeting would be impractical, solely to discuss matters of relevance with such officials.

- To meet at the closest meeting facility or the principal office of the body if there exists no meeting facility within the jurisdiction of the body.

- To meet at a facility outside of the jurisdiction if the facility is owned by the body, provided the discussion at the meeting is limited to items directly related to the facility.

- To visit legal counsel to discuss pending litigation when to do so would reduce fees.

- School boards may meet outside of the District on a variety of labor and employment matters.

- Statewide joint powers authorities may meet within the territories of anyone in their organization.

E. Regular meetings must be held at a time, place, and location fixed by official action (e.g., bylaws, ordinance, resolution).³¹ If it is unsafe to meet at the designated place due to an emergency, the new location must be publicized by a notice to the local media in the most rapid means of communication available at the time.³²

- The meeting place must be accessible to all members of the public.³³

- No fees may be charged for admission to meetings.
- Registration of one's name or any other condition of admission is prohibited.³⁴
- Cameras, both still and video, and tape recorders are permitted, and any recording of a meeting subject to the Act made at the direction of the public body is a public record.³⁵
- Public bodies must permit broadcast of their meetings, unless they can demonstrate that doing so would cause a persistent disruption of their proceedings.³⁶

F. Records distributed at a public meeting are public records, unless otherwise exempted under the Public Records Act. ³⁷ The public is entitled to obtain them at the meeting if they were prepared by the public agency, or after the meeting if prepared by someone else. (This does not mean that the agency does not have to provide them prior to the meeting if they are available, only that it must make them available by the time of the meeting at the latest.)³⁸

G. Time must be provided for comment by the public.³⁹

- Public bodies may impose time limitations on public comment.⁴⁰
- Public bodies may not prohibit criticism of "the policies, procedures, programs, or services of the agency, or of the acts or omissions of the legislative body."⁴¹
- The ability to speak and offer criticism at the meetings of public bodies is also protected by the First Amendment. In particular, the First Amendment has been held to protect the right of citizens to criticize the conduct of particular government officials and employees at public meetings.⁴²

NOTES

16. The Brown Act, Open Meetings For Local Legislative Bodies, Office of the Attorney General, 2003, at p. 8.

17. In *Sacramento Newspaper Guild v. Sacramento County Bd. of Suprs.*, 263 Cal. App. 2d 41 (1968), the court

held that a luncheon gathering which included five county supervisors, the county counsel, a variety of county

officers, and representatives of a union to discuss a strike which was underway against the county was a

meeting within the meaning of the Act.

18. Gov't Code § 54952.2(b).

19. Stockton Newspapers, Inc. v. Redevelopment Agency, 171 Cal. App. 3d 95, 105 (1985).
20. Common Cause v. Stirling, 119 Cal. App. 3d 658 (1981).
- 21 The Brown Act, Open Meetings For Local Legislative Bodies, Office of the Attorney General, 2003, at p. 15,
citing 84 Ops. Cal. Atty. Gen. 30 (2001).
22. Roberts v. City of Palmdale, 5 Cal.4th 363, 381 (1993).
23. Frazer v. Dixon Unified School District, 18 Cal. App. 4th 781, 796-798 (1993).
24. Gov't Code § 54952.2(c)(1).
25. Gov't Code § 54952.2(c)(2).
26. Gov't Code § 54952.2(c)(3).
27. Gov't Code § 54952.2(c)(4).
28. Gov't Code § 54952.2(c)(5).
30. Gov't Code § 54954(c).
30. Gov't Code § 54954(c).
31. Gov't Code § 54954(a).
32. See generally Gov't Code §§ 54956, 54956.5.
- 33 Gov't Code §§ 54953(a), 54953.2.
- 34 Gov't Code § 54953.3.
35. Gov't Code § 54953.5.
36. Gov't Code § 54953.6.
37. Gov't Code § 54957.5.
- 38 .See Gov't Code § 54957.5(d).
39. Gov't Code § 54954.3(a).
40. Gov't Code § 54954.3(b).

41. Gov't Code § 54954.3(c).

42. *Baca v. Moreno Valley Unified School Dist.*, 936 F. Supp. 719 (C.D. Cal. 1996); *Leventhal v. Vista Unified School Dist.*, 973 F. Supp. 951 (S.D. Cal. 1997).

V. Closed Sessions: When may the public be excluded?

The public may not be excluded from a meeting, except as expressly authorized by the Brown Act.

A public body may exclude the public from meetings, holding what are called "closed sessions" or "executive sessions," in the following circumstances:

- (1) to determine whether an applicant for a license or license renewal, who has a criminal record, is sufficiently rehabilitated to obtain the license; 43
- (2) to with its negotiator to grant authority regarding the price and terms of payment for the purchase, sale, exchange, or lease of real property; 44
- (3) to confer with, or receive advice from, its legal counsel regarding pending litigation when discussion in open session concerning those matters would prejudice the position of the local agency in the litigation; 45
- (4) to meet with the 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, or a threat to the public's right of access to public services or public facilities;46
- (5) to consider the appointment, employment, evaluation of performance, discipline, or dismissal of a public employee or to hear complaints or charges brought against the employee by another person or employee; 47
- (6) to meet with the local agency's designated representatives regarding the salaries, salary schedules, or fringe benefits of its represented and unrepresented employees, and, for represented employees, any other matter within the statutorily provided scope of representation.48

There are also a number of other narrow circumstances in which closed sessions may be held.49

However, although there are many provisions permitting closed sessions, certain provisions are more commonly invoked, and hence are more frequently the subject of questions and disputes. Those provisions are discussed below.

A. Meetings with a body's negotiator prior to the purchase, sale, exchange or lease of real property in order to grant authority to the negotiator regarding the price and terms of payment.⁵⁰

- The closed session notice should state the address of the property, the identity of the negotiator, and whether the instruction will concern price, payment terms, or both.⁵¹

- Prior to the closed session, the public body must hold an open and public session in which it identifies its negotiators, the real property or real properties which the negotiations may concern, and the person or persons with whom its negotiators may negotiate.

- **Note:** This provision has been the subject of considerable abuse. For example, government agencies involved in enormous, multi-faceted transactions have used a real property portion of the potential transaction to discuss the entire matter in secret. It has also been invoked to cover meetings attended by representatives of the adverse party in the negotiation.

B. Meetings to discuss "pending litigation."⁵² This exception has been carefully crafted due to frequent past disputes.

- Litigation is any adjudicatory proceeding.

- Pending litigation is:

- (a) litigation formally initiated to which the body is a party;

- (b) a situation where based on the advice of counsel taking into account "existing facts and circumstances" there exists a "significant exposure" to litigation; or

- (c) when the agency itself has decided or is deciding whether to initiate litigation.⁵³

- For existing litigation, the closed session notice should state the name of the case or parties (unless it would jeopardize service of process or existing settlement negotiations), and for anticipated litigation or litigation the agency is considering initiating, it should state the number of potential cases.

- Prior to holding a closed session pursuant to this section, the legislative body of the local agency must state on the agenda or publicly announce the subdivision of this section that authorizes the closed session. If the session is closed pursuant to subdivision (a), the body must state the title of or otherwise specifically identify the litigation to be discussed, unless the body states that to do so would jeopardize the agency's ability to effectuate service of process upon one or more unserved parties, or that to do so would jeopardize its ability to conclude existing settlement negotiations to its advantage.⁵⁵

C. Meetings with law enforcement or security consultants about threats to the security of public buildings, to essential public services, or to the public's right of access to public services or public facilities;56

- The closed session notice should identify the law enforcement agency and state the name and title of the law enforcement official.57

- **Note:** Expect to see this exception invoked with increasing frequency.

D. Meetings to discuss the appointment, employment, evaluation of performance, discipline or dismissal of a public employee or to hear complaints brought against the employee. 58

1. The closed session notice should state the position to be filled or the title of the employee being reviewed. It need not do so in the case of complaints.

2. **Note:** An elected official is not a public employee.60

3. **Note:** The employee may request a public hearing.61

NOTES

43 Gov't Code § 54956.7.

44 Gov't Code § 54956.8.

45 Gov't Code § 54956.9.

46 Gov't Code § 54957(a).

47 Gov't Code § 54957(b).

48 Gov't Code § 54957.6(a).

49 See Gov't Code §§ 54956.86, 54956.87, 54956.95, 54957.8, and 54957.10. Because these provisions have much

more limited application, they are not addressed here

50 Gov't Code § 54956.8.

51 Gov't Code § 54954.5(b).

52 Gov't Code § 54956.9.

53 Gov't Code § 54956.9(a), (b), (c).

54 Gov't Code § 54954.5(c).

55 Gov't Code § 54959.

56 Gov't Code § 54957(a).

57 Gov't Code § 54954.5(e).

58 Gov't Code § 54957(b)

59 Gov't Code § 54954.5(e).

60 Gov't Code § 54957(b)(4).

61 Gov't Code § 54957(b)(1).

62 Gov't Code § 54954.5(f).

VI. After a closed session

A. The agency must publicly report action taken in closed session as follows:

1 Approval of an agreement concluding real estate negotiations immediately

if the closed session results in a final agreement, and upon inquiry if the

agreement is finalized thereafter 63

2 Action taken on claims.65

3 Action taken to appoint, employ, dismiss, accept the resignation of, or otherwise affect the employment status of a public employee by title of position.

4 Approval of a labor agreement.67

5 The public is entitled to copies of contracts, settlement agreements, and other documents approved by the public body and subject to any of these reporting requirements. 68

B. Records maintained during a closed session.

1 A local agency may maintain a minute book for actions taken during a closed session, but is not required to do so.69

2 If it does maintain a minute book, or similar documentation, such records are not a public record. 70

3 Absent court order, a local agency is not required to record its closed sessions.71

63.Gov't Code § 54957.1(a)(1).

64. Gov't Code § 54957.1(a)(2), (3).

65. Gov't Code § 54957.1(a)(4).

66.Gov't Code § 54957.1(a)(5).

67. Gov't Code § 54957.1(a)(6).

68.Gov't Code § 54957.1(b).

69. Gov't Code § 54957.2.

70.Gov't Code § 54957.2.

71. Gov't Code § 54960(b).

VII. Enforcement of the Brown Act

A. A knowing violation of the Brown Act with the intent to deprive the public of information to which it is entitled is a crime. However, no one has ever been successfully prosecuted for a violation of the Brown Act.

B. Individual citizens may bring essentially three types of legal suits to enforce the Brown Act: a suit over a government entity's alleged violation of the Act based on that entity's *past* violation of the Brown Act; a suit to contest or enjoin *ongoing or future* actions in alleged violation of the Brown Act; and a suit to *void* an action taken by a government entity in alleged violation of the Brown Act.

Challenging past actions to stop their recurrence:

Under amendments to the Brown Act adopted in 2012, persons alleging a past violation of the Brown Act, and seeking to bar further violations—but NOT to invalidate a specific

government decision or action—must first attempt to resolve the matter, short of litigation, though an elaborate settlement procedure set forth in Government Code section 54960.2, as follows:

1) Within 9 months of the violation, a complainant must file a “cease and desist” letter with the government entity “clearly describing the past action of the legislative body and nature of the alleged violation.” Gov Code sec. 54960.2(1)

2) The legislative body has 60 days to respond with “an unconditional commitment to cease, desist from, and not repeat the past action.” Gov Code sec 54960.2(a)(4). (If it makes such a commitment within 30 days, the government body will immunize itself against any claim, in the course of litigation, for payment of the complainant's attorney's fees or costs, Gov Code Sec. 54960.2(b))

3) If the Government body responds with a timely and unconditional commitment, that will be the end of the dispute (unless, subsequently, the agency reneges on its commitment). However, if the government doesn't respond, or responds unsatisfactorily or conditionally, the complainant may file suit, and must do so within 60 days. Gov Code Sec. 54960.2(a)(4).

Barring an ongoing or future action:

1) “. . . any interested person may commence an action by mandamus, injunction, or declaratory relief for the purpose of stopping or preventing violations or threatened violations of this chapter . . . or to determine the applicability of this chapter to ongoing actions or threatened future actions. . . of the legislative body.” Gov Code Sec 54960(a). Because, practically speaking, lawsuits seeking injunctive relief against future actions usually are based on evidence of past violations, most cases involving prospective relief will be brought under Gov Code section 54960.2, discussed above.

Suits to Void Past Action:

If a complainant's objective is to have a court declare a government action *null and void* on account of a Brown Act violation, the procedure spelled out in Gov Code Sec 54960.1 (a) applies. Notice and a demand to “cure and correct” the violation must be given, in writing, within 90 days from the date the action was taken (30 days if the basis for the notice is that the action was not on an agenda or not adequately described). The local agency has 30 days to take action. If the local agency responds and refuses to correct the problem or does nothing, the challenger has 15 days to initiate court proceedings to nullify the action.

C. Other

The District Attorney or a member of the public may also sue to obtain a ruling that the local agency is violating the free speech rights of a member in seeking to silence that member. In all Brown Act cases brought by citizens, attorneys' fees may be recovered. They are not mandatory, but they are usually awarded to prevailing plaintiffs.

NOTES

73. Gov't Code § 54960(a).

74. Gov't Code § 54960(a).

75. Gov't Code § 54960.1(a).

76. Gov't Code § 54960.1(b).

77. Gov't Code § 54960.1(c).

78. Gov't Code § 54960.1(c).

79. Gov't Code § 54060.5.