

**THE
BROWN
ACT:**

**CALIFORNIA'S OPEN
MEETING LAW**

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**THE RALPH M. BROWN ACT
CALIFORNIA’S OPEN MEETING LAW**

PURPOSE AND SCOPE OF THE BROWN ACT

The Brown Act states that it is the intent of the law that the actions of public legislative bodies be taken openly and that their deliberations be conducted openly.¹ The Brown Act is intended to give the citizens of California access to government agencies and prohibit governmental decisions from being made in secret. As a result, the Brown Act requires that all meetings and deliberations, including discussion, debate, and the acquisition of information be conducted in public and subject to public scrutiny, except when the closed meeting exception applies.² The Brown Act does not apply to employees of public agencies and therefore, employees may conduct private staff meetings.³

In addition, under the Education Code, the governing board of a school district may only exercise its powers and must take all actions authorized or required by law at properly noticed meetings open to the public. Minutes must be taken at each meeting and all actions taken by the governing board must be recorded in the minutes and made available to the public.⁴

DEFINITION OF LEGISLATIVE BODY

The Brown Act defines a “legislative body” as the governing body of a local agency or a commission, committee, board or other body of a local agency, whether permanent or temporary, decision making or advisory, created by resolution or formal action of the legislative body. Advisory committees, composed solely of the members of the legislative body that are less than a quorum of the legislative body, are not legislative bodies, except that standing committees of a legislative body, irrespective of their composition, which have a continuing subject matter jurisdiction, or a meeting schedule fixed by resolution or formal action of a legislative body, are legislative bodies for the purposes of the Brown Act.⁵

In essence, all committees created by formal action of a legislative body, whether permanent or temporary, decisionmaking or advisory, are subject to the Brown Act, except for advisory committees composed solely of board members that are less than a quorum. If that advisory committee is composed solely of two board members of a five member board (or three board members of a seven member board) and is not a standing committee (i.e., an ad hoc committee), then the Brown Act would not apply.⁶ If the ad hoc committee includes non-board members, then the committee must comply with the Brown Act. In order to be an ad hoc committee exempt from the

¹ Government Code section 54950.

² See, San Lorenzo Valley Community Advocates for Responsible Education v. San Lorenzo Valley Unified School District, 44 Cal.Rptr. 3d 128, 139 Cal.App. 4th 1356 (2006).

³ Government Code section 54952.

⁴ Education Code section 35145.

⁵ Government Code section 54952.

⁶ Government Code section 54952.

Brown Act, in our opinion, the committee would have to be convened for a single task, be given a brief time to complete its task, and dissolve immediately upon completion of the task.

In Joiner v. City of Sebastopol,⁷ the Court of Appeal held that a proposed meeting of two members of a city council and two members of a city planning commission to interview candidates for a vacancy on the planning commission was subject to the Brown Act. The court concluded that the city council took formal action to form the committee, even though a formal resolution was not adopted, and since the committee was to report back its recommendation to the full city council, the committee acted as an advisory body to the city council and was subject to the Brown Act. The court rejected the city's argument that the Brown Act did not apply because the committee was made up of less than a quorum of the city council and planning commission.

In Frazer v. Dixon Unified School District,⁸ the Court of Appeal held that the adoption of a policy by the board to establish a committee appointed by the superintendent was subject to the Brown Act because it was created by formal action of the board (i.e. the board voted to adopt the policy which created the committee). The court stated:

“We think the focus of our inquiry should be first on the authority under which the advisory committee was created. In this case, we believe the authority originates with the board and not...with the superintendent. The next question is whether the creation of the committee pursuant to a standing policy is sufficient to constitute ‘formal action.’ We believe that it is.”⁹

The court further stated:

“We believe the adoption of a formal, written policy calling for appointment of a committee to advise the superintendent, and, in turn, the board (with whom rests the final decision), whenever there is a request for reconsideration of ‘controversial reading matter’ is sufficiently similar to the types of ‘formal action’ listed in the [the Brown Act]. Accordingly, allegations that the review and hearing committee were created pursuant to Board Policy 7138 were sufficient to bring those advisory bodies within the coverage of the Brown Act....”¹⁰

In a 1996 opinion,¹¹ the Attorney General stated that under the Brown Act, a committee made up solely of less than a quorum of the members of a public water district was subject to the Brown Act since it was a standing committee with continuing subject matter jurisdiction over providing

⁷ 125 Cal.App. 3d 799 (1981).

⁸ 18 Cal.App. 4th 781 (1993).

⁹ Id. at 792.

¹⁰ Id. at 793.

¹¹ 79 Ops.Cal.Atty.Gen. 69 (1996).

advice concerning budgets, audits, contracts and personnel matters to the entire board. The Attorney General defined a “standing committee” as a committee that is permanent, that endures or remains.¹²

In a 1997 opinion,¹³ the Attorney General stated that when the governing board of a school district forms a committee consisting of seven employees and one student, to interview candidates for the office of district superintendent and make a recommendation to the board, the meetings are subject to the Brown Act, but may be held in closed session. In summary, only an ad hoc committee made up of two board members is not subject to the Brown Act. An ad hoc committee that includes non-board members would be subject to the Brown Act.¹⁴

Any person elected to serve as a member of the legislative body who has not yet assumed the duties of office is required to comply with the requirements of the Brown Act. The Brown Act treats such persons in the same manner as persons who have already assumed office.¹⁵

In Californians Aware v. Joint Labor/Management Benefits Committee,¹⁶ the Court of Appeal held that a committee created for the purpose of furthering the collective bargaining process between the Los Angeles Community College District and its unions is exempt from the open meeting requirements of the Ralph M. Brown Act. The Court of Appeal held that the committee was formed for the purpose of furthering the collective bargaining process and was thus exempt from the Brown Act under Government Code section 3549.1(a).

The Joint Labor/Management Benefits Committee (JLMBC) was composed of one voting and one non-voting district member, six employee members, one from each of the unions, and the chair who was to be nominated by the President of the Los Angeles College Faculty Guild and confirmed by simple majority of the regular voting members. The purpose of the committee was to review the health benefits program and make any changes to the program that it deems necessary to contain costs while maintaining the quality of the benefits available to employees.¹⁷ Government Code section 3549.1 states that, “All the proceeding set forth in subdivision (a) to (d), inclusive, are exempt from the provisions of the...Ralph M. Brown Act...unless the parties mutually agree otherwise: (a) Any meeting and negotiating discussion between a public school employer and a recognized or certified employee organization.”

The Court of Appeal agreed with an earlier Attorney General Opinion that the JLMBC is not required to comply with the Brown Act.¹⁸ The Attorney General noted that health benefits are

¹² Id. at 71.

¹³ 80 Ops.Cal.Atty.Gen. 308 (1997).

¹⁴ Government Code section 54952.

¹⁵ Government Code section 54952.1.

¹⁶ 200 Cal.App.4th 973, 133 Cal.Rptr.3d 766 (2011).

¹⁷ Id. at 975.

¹⁸ See, 92 Ops.Cal.Atty.Gen. 102, 107 (2009). In a 2009 opinion, the Attorney General concluded that the Los Angeles Community College District Joint Labor Management Benefits Committee is not required to comply with the Ralph M. Brown Act. The Attorney General concluded that the committee was created by collective bargaining agreement and not action of the legislative body. Therefore, it did not come within the definition of a legislative body under Government Code section 54952 and was not subject to the requirements of the Brown Act.¹⁸

matters of employee health safety and training which falls squarely within the recognized scope of collective bargaining and the formation of the JLMBC came directly from the collective bargaining and the exclusive bargaining representative of the employer's workforce.¹⁹

The Court of Appeal agreed with the Attorney General that the JLMBC was created as part of, and for the purpose of furthering, the collective bargaining process under the EERA and, as such, is not subject to the provisions of the Brown Act.²⁰

DEFINITION OF MEETINGS

The term "meeting" is defined in the Ralph M. Brown Act (hereinafter "Brown Act") as including any congregation of a majority of the members of a legislative body at the same time and place to hear, discuss, or deliberate upon any matter which is under its subject matter jurisdiction.²¹ Under this definition, face to face gatherings of a governing board of a school district in which issues under the subject matter jurisdiction of the governing board are discussed, decided, or voted upon are subject to the Brown Act. Effective January 1, 2009, all serial communications within the subject matter jurisdiction of the board are prohibited. Government Code Section 54952.2 states:

"A majority of the members of 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."

It is recommended that board members limit their communications, particularly e-mail communications, to a single individual (e.g., district superintendent or one other board member). Board members also are advised not to copy other board members on e-mail communications, or forward e-mails they have received from board members to other board members since this might result in a majority of the board members receiving the e-mail in violation of the Brown Act. It is permissible for an employee or official of a local agency to engage in separate conversations or communications outside of a meeting with members of the legislative body in order to answer questions or provide information, as long as that person does not communicate to members of the legislative body the comments or position of any other member or members of the legislative body.²²

The Brown Act exempts conferences and similar public gatherings that involve a discussion of issues of general interest to the public, provided that a majority of the members do not discuss among themselves, other than as part of the scheduled program, business of a specified nature that is within the subject matter jurisdiction of the governing board.²³ Also exempted are individual conversations between a board member and any other person.²⁴

¹⁹ See, 92 Ops.Cal.Atty.Gen. 102, 107 (2009).

²⁰ 200 Cal.App.4th 973, 978-82 (2011).

²¹ Government Code section 54952.2(a).

²² Government Code section 54952.2(b)(2).

²³ Government Code section 54952.2(c)(2). In our opinion, this exception does not apply to public forums sponsored or

Board members may also attend open and publicized meetings organized to address a topic of local community concern by a person or organization other than the governing board provided that a majority of the members do not discuss among themselves, other than the scheduled program, business of a specific nature that is within the subject matter jurisdiction of the board.²⁵ A majority of the board members may attend an open and noticed meeting of another local agency provided that a majority of the members do not discuss among themselves, other than as part of the scheduled meeting, business of a specific nature that is within the subject matter jurisdiction of the governing board.²⁶ The majority of the board members may attend purely social or ceremonial functions provided that a majority of the members do not discuss among themselves business of a specific nature that is within the subject matter jurisdiction of the governing board.²⁷

In 2011, the California Attorney General issued an opinion stating that a majority of city council members may not attend a private tour of water district facilities which provide services to the city to acquire information regarding services. The Attorney General held that under the Brown Act, a majority of the members of the city council may tour facilities outside of their boundaries if it is a public meeting of the council in which public notice is given and the agenda is posted.²⁸

Members of the city council and employees of a city in Southern California were invited on a trip to tour water facilities located in Northern California and owned by the Metropolitan Water District. The tour would not be open to the public at large, but only to invited guests. Given these circumstances, the Attorney General stated, in its opinion, the Brown Act applies and if a majority of the members of the city council wish to meet outside of the city boundaries to attend a tour of the facilities of the water district, it will be determined to be a meeting and it must be open to the public.²⁹

The Attorney General opined that a tour of facilities is a “meeting” under the definition of the Brown Act which defines a meeting as “...any congregation of the majority of the members of the legislative body at the same time and location, including teleconference location..., to hear, discuss, deliberate, or take action on any item that is within the subject matter jurisdiction of the legislative body.”³⁰ The Attorney General stated that the Brown Act’s definition of “meeting” encompasses informal, deliberative, and fact finding sessions, in addition to sessions to which formal action is

organized by the district. Therefore, if a quorum of the board attends, it should be treated as a meeting of the governing board under the Brown Act. Also, it is unclear whether a news conference of the entire board would fall within the exception of Section 54952.2(c)(2). Although a news conference would be open to the public and the news conference involves a discussion of issues of general interest to the public and to the community college districts, it is not clear whether a news conference is the type of conference referenced in Section 54952.2(c)(2). Also, since the majority of the members of the board would be present at the news conference, it is very likely that they would discuss among themselves their views and opinions which could lead to a violation of the Brown Act.

²⁴ Government Code section 54952.2(c)(1).

²⁵ Government Code section 54952.2(c)(3).

²⁶ Government Code section 54952.2(c)(4).

²⁷ Government Code section 54952.2(c)(5).

²⁸ 94 Ops.Atty.Gen. 33 (2011).

²⁹ *Id.* at 33-34.

³⁰ Government Code section 54952.2(a).

taken.³¹ The Attorney General stated that a “meeting” includes sessions conducted for the collective acquisition and exchange of facts preliminary to the ultimate decision.

The Attorney General gave an example in which a school board and a consortium of three real estate brokers meet to garner information about the broker’s qualifications to perform future services. The Attorney General stated that this constituted a “meeting” for Brown Act purposes even though the board did not commit to retain any of the brokers.³²

The Attorney General concluded that a majority of the members of the city council may attend a tour of the water district facilities if the tour was held as a noticed and public meeting of the council for the purpose of inspecting the facilities and the topics raised and discussed at the meeting are limited to items directly related to the facilities being inspected. The same requirements would apply to the community college districts, school districts and regional occupational programs. If a majority of the members of the governing board of a community college district, school district, or regional occupational program wish to tour facilities outside the district’s boundaries, it must be held as a noticed and public meeting of the governing board of the district in compliance with the Brown Act.³³

OPEN MEETING REQUIREMENTS

Under the Brown Act, all meetings of the legislative body of the local agency are required to be open and public, except for authorized closed sessions. All members of the public must be permitted to attend any meeting of the legislative body of a local agency, unless they are disruptive.³⁴

All action taken by the legislative body must be taken in open session unless authorized in closed session. Action taken is defined as a collective decision made by a majority of the members to make a positive or negative decision, and may include an actual vote by a majority of the members.³⁵

The Brown Act prohibits taking action by secret ballot and prohibits the legislative bodies of a local agency from restricting the broadcast of open and public meetings unless it is disruptive. Members of the public may record open public meetings.³⁶

Teleconferencing (either audio or video, or both) may be used during meetings under limited circumstances. All votes taken during a teleconference must be by roll call. If the legislative body elects to use teleconferencing, the legislative body must post agendas at all teleconference locations,

³¹ See, Roberts v. City of Palmdale, 5 Cal.4th 363, 375-376 (1993).

³² Rowen v. Santa Clara Unified School District, 121, Cal.App.3d 231, 233-234 (1981).

³³ 94 Ops.Cal.Atty.Gen. 33, 37-38 (2011).

³⁴ Government Code section 54953.

³⁵ Government Code section 54952.6.

³⁶ Government Code section 54953.5.

and conduct teleconference meetings in a manner that protects the statutory and constitutional rights of the parties or the public appearing before the legislative body of the local agency.³⁷

Each teleconference location must be identified in the notice and agenda of the meeting and each teleconference location must be accessible to the public. During the teleconference, at least a quorum of the members of the legislative body must participate from locations within the boundaries of the territory over which the local agency exercises jurisdiction. The agenda must provide an opportunity for members of the public to address the legislative body at each teleconference location.³⁸

No legislative body shall take action by secret ballot, whether preliminary or final. The legislative body of a local agency shall publicly report any action taken and the vote or abstention on that action of each member present for the action.³⁹ Prior to taking final action, the legislative body shall orally report a summary of a recommendation for a final action on the salaries, salary schedules, or compensation paid in the form of fringe benefits of a local agency executive,⁴⁰ during the opening meeting in which the final action is to be taken and prior to taking that final action. This new provision does not affect the public's right under the California Public Records Act to inspect or copy records created or received and the process of developing the recommendation on the salary, salary schedules or compensation of a local agency executive.

A legislative body may not require a member of the public, as a condition to attendance at a meeting of the legislative body, to register his or her name, to provide other information, to complete a questionnaire or otherwise to fulfill any condition to his or her attendance. If an attendance list, register, questionnaire or other similar document is posted at or near the entrance to the room where the meeting is held, or is circulated to the persons present during the meeting, the attendance list, register, or questionnaire shall state clearly that the signing, registering or completion of the document is voluntary, and that all persons may attend the meeting regardless of whether a person signs, registers or completes the document.⁴¹

Any person attending an open and public meeting of the legislative body shall have the right to record the proceedings with an audio or video tape recorder. In the absence of a reasonable finding by the legislative body that the recording cannot continue without noise, illumination, or

³⁷ Government Code section 54953(b).

³⁸ Government Code section 54953(b).

³⁹ Government Code section 54953(c).

⁴⁰ A local agency executive is defined in Government Code section 3511.1 as including any person who is the chief executive officer, deputy chief executive officer or an assistant chief executive officer (e.g. chancellor, superintendent, deputy chancellor or superintendent, or any assistant or vice chancellor or superintendent) of a local agency, or person who has an employment contract between the local agency and that person.

⁴¹ Government Code section 54953.3. Districts may wish to include language in their guidelines relating to public comments which states, "Completion of the information below, including name and address, is voluntary." If a person refuses to fill in their name, they may give their name orally to the secretary of the board so that they may be called on for public comments.

obstruction of view that constitutes, or would constitute a persistent disruption of the proceedings, the legislative body must allow the recording.⁴²

Any tape or film record of an open and public meeting, made for whatever purpose, by or at the direction of the local agency, shall be subject to inspection under the California Public Records Act. Such tape or film record may be erased or destroyed thirty days after the taping or recording. Any inspection of a video or tape recording shall be provided without charge on a video or tape player made available by the local agency.⁴³

Section 54952.3⁴⁴ states that a legislative body that has convened a meeting and whose membership constitutes a quorum of any other legislative body may convene a meeting of that other legislative body, simultaneously or in serial order, only if a clerk or a member of the convened legislative body verbally announces, prior to convening any simultaneous or serial order meeting of that subsequent legislative body, the amount of compensation or stipend, if any, that each member will be entitled to receive as a result of convening the simultaneous or serial meeting of the subsequent legislative body. However, the clerk or member of the legislative body shall not be required to announce the amount of compensation if the amount of compensation is prescribed in statute and no additional compensation has been authorized by a local agency.

Section 54952.3(b) states that compensation and stipend shall not include amounts reimbursed for actual and necessary expenses incurred by a member in the performance of the member's official duties, including, but not limited to, reimbursement of expenses relating to travel, meals, and lodging.

TIME AND PLACE OF MEETINGS

Each legislative body of a local agency shall provide the time and place for holding regular meetings. Meetings of advisory committees or standing committees, for which an agenda is posted at least 72 hours in advance of the meeting, shall be considered regular meetings of the legislative body.⁴⁵

Regular and special meetings of the legislative body shall be held within the boundaries of the territory over which the local agency exercises jurisdiction, except to do any of the following:

1. Comply with state or federal law or court order, or attend a judicial or administrative proceeding to which the local agency is a party.
2. Inspect real or personal property which cannot be conveniently brought within the boundaries of the territory over which the local

⁴² Government Code section 54953.5(a).

⁴³ Government Code section 54953.5(b).

⁴⁴ Stats. 2011, ch. 91.

⁴⁵ Government Code section 54954(a).

agency exercises jurisdiction, provided that the topic of the meeting is limited to items directly related to the real or personal property.

3. Participate in meetings or discussions of multi-agency significance that are outside the boundaries of a local agency's jurisdiction. However, any meeting or discussion held pursuant to this subdivision shall take place within the jurisdiction of one of the participating local agencies and be noticed by all participating agencies as provided for in the Brown Act.
4. Meet in the closest meeting facility if the local agency has no meeting facility within the boundaries of the territory over which the local agency exercises jurisdiction, or at the principal office of the local agency if that office is located outside the territory over which the agency exercises jurisdiction.
5. Meet outside their immediate jurisdiction with elected or appointed officials of the United States or the State of California when a local meeting would be impractical, solely to discuss a legislative or regulatory issue affecting the local agency and over which the federal or state officials have jurisdiction.
6. Meet outside their immediate jurisdiction if the meeting takes place in or nearby a facility owned by the agency, provided that the topic of the meeting is limited to items directly related to the facility.
7. Visit the office of the local agency's legal counsel for a closed session on pending litigation when to do so would reduce legal fees or costs.⁴⁶

In addition, the governing boards of a school district may meet outside the territory of the school district to do any of the following:

1. Attend a conference on nonadversarial collective bargaining techniques.
2. Interview members of the public residing in another district with reference to the potential employment of an applicant for the position of the superintendent of the district.
3. Interview a potential employee from another district.⁴⁷

⁴⁶ Government Code section 54954(b).

⁴⁷ Government Code section 54954(c).

Meetings of a joint powers authority shall occur within the territory of at least one of its member agencies, or as provided above. However, a joint powers authority which has members throughout the state may meet at any facility in the state which complies with the requirements of Section 54961 and is accessible to all members of the public.⁴⁸ If by reason of fire, flood, earthquake or other emergency, it is unsafe to meet in the facility designated, the meetings of the legislative body shall be held for the duration of the emergency at the place designated by the presiding officer of the legislative body or his or her designee in a notice to the local media that have requested notice by the most rapid means of communication available at the time.⁴⁹

AGENDA REQUIREMENTS

A. Availability of Agenda

Members of the public and the media may request that the agenda of each meeting and all documents constituting the agenda packet be mailed to them. If requested, the agenda and documents in the agenda packet shall be made available in appropriate alternative formats to persons with a disability as required by the Americans with Disabilities Act and its regulations.⁵⁰

B. Agenda for Regular Meeting

At least 72 hours before a regular meeting, an agenda containing a brief general description of each item of business to be transacted or discussed at the meeting shall be posted in a location freely accessible to the public and on the district's website.⁵¹ The description must be sufficient to give the public notice of the items to be discussed or acted upon. For example, in Moreno v. City of King,⁵² the Court of Appeal held that an agenda item that stated: "Public employee (employment contract)," was insufficient. The court stated, "The agenda's description provided no clue that the dismissal of a public employee would be discussed at the meeting."⁵³ A brief description of an item generally need not exceed 20 words.

The agenda must be freely accessible to the public and posted on the agency's website, if the local agency has a website.⁵⁴ The agenda must specify the time and location of the regular meeting and must be posted in an area accessible to the public.⁵⁵ Members of the public may place matters

⁴⁸ Government Code section 54954(d).

⁴⁹ Government Code section 54954(e).

⁵⁰ Government Code section 54954.1.

⁵¹ Government Code section 54954.2(a)(1).

⁵² 127 Cal.App.4th 17, 25 Cal.Rptr.3d 29 (2005).

⁵³ Id. at 27.

⁵⁴ Government Code section 54954.2(a)(1).

⁵⁵ Ibid. The California Attorney General issued an opinion stating that a local agency may post its meeting agenda on a touch screen electronic kiosk accessible, without charge, to the public, 24 hours a day, seven days a week, in lieu of posting a paper copy of the agenda on a bulletin board. The Attorney General interpreted the language of Government Code section 54954.2 and concluded that the term "posted" includes making agendas available on an electronic kiosk. The Attorney General held that the term "posting" includes making use of an electronic format. 88 Cal.Atty.Gen. 218

directly related to district business on the agenda and shall be able to address the board regarding items on the agenda as the items are taken up.⁵⁶ If requested, the agenda shall be made available in appropriate alternative formats to persons with disabilities in conformance with the Americans with Disabilities Act (ADA).⁵⁷

No action or discussion shall be undertaken on any item not appearing on the posted agenda, except that members of the governing board or its staff may briefly respond to statements made or questions posed by persons expressing their public testimony rights during public comments. The board may also ask staff members to report back to the board on a matter and place the matter on the agenda at a future board meeting.⁵⁸

Government Code section 54954.2(a)(2) states that for a meeting occurring on and after January 1, 2019, of a district that has an Internet website, the following provisions shall apply:

1. An online posting of an agenda shall be posted on the primary Internet website homepage of the district that is accessible through a prominent, direct link to the current agenda. The direct link to the agenda shall not be in a contextual menu;⁵⁹ however, a link in addition to the direct link to the agenda may be accessible through a contextual menu.
2. An online posting of an agenda including, but not limited to, an agenda posted in an integrated agenda menu and platform shall be posted in an open format that meets all of the following requirements:
 - A. Retrievable, downloadable, indexable, and electronically searchable by commonly used Internet search applications.
 - B. Platform independent and machine readable.
 - C. Available to the public free of charge without any restrictions that would impede the reuse or redistribution of the agenda.
3. A district established by the state that has an Internet website in an integrated agenda management platform shall not be required to comply with requirements of Section 1 above if all of the following are met:

(2005).

⁵⁶ Education Code sections 35145.5, 72121.5.

⁵⁷ Government Code section 54954.2(a)(1).

⁵⁸ Government Code section 54954.2(a)(3).

⁵⁹ Districts should consult with their Information Technology Director regarding the technical issues raised by this legislation.

- A. A direct link to the integrated agenda management platform shall be posted on the primary Internet website homepage of a district. The direct link to the integrated agenda management platform shall not be in a contextual menu. When a person clicks on the direct link to the integrated agenda management platform, the direct link shall take the person directly to an Internet website with the agendas of the legislative body of a district established by the state.
 - B. The integrated agenda management platform may contain the prior agendas of a district for all meetings occurring on or after January 1, 2019.
 - C. The current agenda of the district shall be the first agenda available at the top of the integrated agenda management platform.
 - D. All agendas posted in the integrated agenda management platform shall comply with these requirements.
4. The term “Integrated agenda management platform” means an Internet website of a district dedicated to providing the entirety of the agenda information for the district.
 5. The provisions of this paragraph shall not apply to a district that was established by the legislative body of a school district or political subdivision established by the state.

Under the Brown Act,⁶⁰ the agenda must be posted 72 hours in advance but there is no requirement that the materials given to the board must be available to the public or posted 72 hours in advance. Rather, the Brown Act states that other writings, when distributed to the board members in connection with a matter that will be discussed at an open board meeting, shall be made available to the public upon request without delay and at the time the distribution is made shall be available for public inspection at the district office or the office where the board meets. These writings must be made available in alternative formats consistent with the ADA upon request.⁶¹

C. Amendment of Agenda

No action shall be taken on any item not appearing on the posted agenda unless two-thirds of the members of the governing board (or if less than two-thirds of the members are present, then by a unanimous vote) determine that the need to take action arose after the posting of the agenda.⁶²

⁶⁰ Government Code section 54954.2.

⁶¹ Government Code section 54954.2.

⁶² Government Code section 54954.2.

In Cohan v. City of Thousand Oaks,⁶³ the Court of Appeal held that under the provisions of Government Code section 54954.2(b) there must be an urgent need to amend the agenda. The Court of Appeal held in Cohan that public opposition at a public meeting does not authorize the amendment of an agenda.⁶⁴

Every agenda for regular meetings shall provide an opportunity for members of the public to directly address the legislative body on any item of interest to the public within the agency's jurisdiction before or during the board's consideration of the item, whether in open or closed session.⁶⁵ However, the legislative body may adopt reasonable regulations limiting the total amount of time allocated for public testimony on particular issues and for each individual speaker.⁶⁶ Government Code section 54954.3(b)(2) states that when the legislative body of a local agency limits time for public comment, the legislative body shall 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 directly address the legislative body of a local agency. However, this requirement shall not apply if the legislative body of a local agency utilizes simultaneous translation equipment in a manner that allows the legislative body of a local agency to hear the translated public testimony simultaneously. The legislative body may not prohibit public criticism of the policies, procedures, programs or services of the agency or of the acts or omissions of the legislative body.⁶⁷

The agenda and documents in the agenda packet shall be made available in appropriate alternative formats to persons with disabilities, as required by the Americans with Disabilities Act and its implementing regulations.⁶⁸ If requested, the agenda shall be made available in appropriate alternative formats to persons with disabilities, as required by the Americans with Disabilities Act and its implementing regulations.⁶⁹ In addition, the agenda shall include information on 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 a modification or accommodation in order to participate in the public meeting.⁷⁰ Documents in the agenda packet must also be made available in an appropriate alternative format upon request by a person with disabilities as required by the Americans with Disabilities Act and its implementing regulations.⁷¹

⁶³ 30 Cal.App.4th 547, 35 Cal.Rptr.2d 782 (1994).

⁶⁴ Id. at 555-56.

⁶⁵ Government Code section 54954.3; see, also, Leventhal v. Vista Unified School District, 973 F.Supp. 951 (S.D. Cal. 1997), Baca v. Moreno Valley Unified School District, 936 F.Supp. 719 (S.D. Cal. 1996).

⁶⁶ Government Code section 54954.3(b); see, also, Chaffee v. San Francisco Public Library Commission, 134 Cal.App.4th 109, 36 Cal.Rptr.3d 1 (2005), in which the Court of Appeal held that the San Francisco Library Commission did not violate the Brown Act by reducing the public comment period for each speaker from three minutes to two minutes.

⁶⁷ Government Code section 54954.3(c).

⁶⁸ Government Code section 54954.1.

⁶⁹ Government Code section 54954.2(a).

⁷⁰ Government Code section 54954.2.

⁷¹ Government Code section 54957.5.

D. Special Meetings

Special meetings may be called at any time by the presiding officer or a majority of the members of a legislative body. Twenty-four hours' notice must be given of special meetings and the legislative body of a local agency must post the agenda for a special meeting on the local agency's internet website, if the local agency has a website. Only the business on the special meeting notice may be considered at special meetings.⁷²

A legislative body shall not call a special meeting regarding the salaries, salary schedules or compensation paid in the form of fringe benefits, of a local agency executive, as defined in Government Code section 3511.1(d). A local agency may call a special meeting to discuss the local agency's budget. Therefore, salaries, salary schedules or compensation paid in the form of fringe benefits, may only be discussed or acted upon at a regularly scheduled board meeting.⁷³

In Boyle v. City of Redondo Beach,⁷⁴ the Court of Appeal held that Government Code section 54956 is the controlling section and that the City Council of the City of Redondo Beach could not amend the agenda of the special board meeting. The Court of Appeal further held that since the City Council of the City of Redondo Beach did not take any action in closed session, a citizen could not successfully maintain a lawsuit against the City of Redondo Beach under Government Code section 54960.1. The court ruled that under Section 54960.1, the purpose of the lawsuit must be to nullify or void any action taken by the City Council. However, since no action was taken by the City Council, the lawsuit must be dismissed.

E. Sufficiency of Agenda

In Castaic Lake Water Agency v. Newhall County Water District,⁷⁵ the Court of Appeal held that the defendant Newhall County Water District did not violate the Brown Act because its notice and agenda item regarding closed session substantially complied with the Brown Act.

The underlying facts were that the Newhall County School District erroneously cited Government Code section 54956.9(c) instead of Government Code section 54956.9(d)(4) when it advised members of the public that on March 14, 2013, the Newhall Board would be meeting with its legal counsel, in closed session, to discuss potential litigation in two cases.⁷⁶

⁷² Government Code section 54956. The requirement that no other business shall be considered at the special meeting refers to the items of business specified on the call and notice. Therefore, the agenda for the special meeting may only include the items on the call and notice and additional items of business may not be added to the agenda after the notice and call has been posted 24 hours before the special meeting. A district may have a closed session on pending litigation at a special meeting if it was included in the notice and call for the special meeting and notice was given 24 hours in advance. If the closed session was not in the notice and call for the special meeting, it cannot be added to the agenda for the special meeting.

⁷³ Government Code section 54956.

⁷⁴ 70 Cal.App.4th 1109 (1999).

⁷⁵ 238 Cal.App. 4th 1196 (2015).

⁷⁶ Id. at 1198.

The Court of Appeal held that the notice and agenda of the March 14, 2013 meeting substantially complied with the Brown Act. The Court defined “substantial compliance” as meaning the actual compliance in respect to the substance essential to every reasonable objective of the statute. The Court held that since it was clear that the Board was going to meet in closed session with its legal counsel to discuss two cases, the substance essential to every reasonable objective of the Brown Act was complied with.⁷⁷

In Hernandez v. Town of Apple Valley,⁷⁸ the Court of Appeal held that the Town of Apple Valley violated the Brown Act and, thus, the initiative that the city council placed on the ballot is null and void.

In Hernandez, the trial court granted a motion for summary judgment in favor of plaintiff, Gabriel Hernandez. The case involved a measure passed by the electorate on November 19, 2013, in a special election that amended the general plan to allow for a 30-acre commercial development which would include a Wal-Mart Supercenter. Wal-Mart provided a gift to the Town of Apple Valley to pay for the election and the town accepted the payment by adopting a memorandum of understanding at a regular council meeting held on August 13, 2013.

Hernandez alleged that the town council violated the Brown Act for actions taken at the town’s council meeting on August 13, 2013. Specifically, Hernandez argued the agenda for the town’s council meeting failed to provide proper notice of the actions to be taken at the meeting (e.g. that the town council would vote to send the initiative to the voters and approving the MOU that accepted the gift from Wal-Mart to pay for the special election).

Wal-Mart was not specifically named in the initiative, but it was clear from the other ballot materials that Wal-Mart was identified. The trial court granted the motion finding that the MOU and initiative were void and invalid.

The town appealed and the Court of Appeal affirmed the trial court’s decision that the Brown Act had been violated. The Court of Appeal held that the agenda was not sufficient to give the public notice of the action to be taken by the town council. The agenda only listed the Wal-Mart initiative measure. The agenda did not indicate that the town council was going to accept a gift from Wal-Mart in order to pay for a special election to pass the initiative.

F. Adjournment and Emergency Meetings

The legislative body of a local agency may adjourn any regular, adjourned regular, special or adjourned special meeting to a time and place specified in the order of adjournment. Less than a quorum may adjourn from time to time. If all members of the legislative body are absent from any regular or adjourn regular meeting, the clerk or secretary of the legislative body may declare the meeting adjourned.⁷⁹

⁷⁷ Id. at 1207.

⁷⁸ 7 Cal.App.5th 194 (2017).

⁷⁹ Government Code section 54955.

Meetings may be called in the event of an emergency. An emergency is 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 legislative members.⁸⁰

CLOSED SESSION – PERMISSIBLE TOPICS

The governing board of a school district may meet in closed session for certain specified reasons.⁸¹ Prior to holding any closed session, the governing board of the school district shall disclose in an open meeting the item or items to be discussed in the closed session. The disclosure may take the form of a reference to the item or items as they are listed by number or letter on the agenda.⁸² In the closed session, the legislative body may consider only those matters covered in its statement.⁸³ After the closed session, the governing board shall reconvene into open session prior to adjournment and report any action taken in closed session as required by the Brown Act.⁸⁴ The announcement required to be made in open session may be made at the location announced in the agenda in the closed session, as long as the public is allowed to be present at that location for the purpose of hearing the announcements.⁸⁵

CLOSED SESSION – STUDENTS

Under the Education Code, the governing board may meet in closed session to consider the discipline of a student if a public hearing would divulge confidential information contained in the student's records⁸⁶ or to deliberate with respect to the expulsion of a student.⁸⁷ The governing board may meet in closed session to consider the appointment, employment, evaluation of performance, discipline or dismissal of a public employee or to hear complaints or charges brought against a public employee unless the employee requests a public hearing.⁸⁸

CLOSED SESSION – PERSONNEL

The Court of Appeal has ruled that the term “evaluation of performance” includes the discussion of the criteria for the evaluation, the evaluation form, the evaluation process, feedback to

⁸⁰ Government Code section 54956.5(a).

⁸¹ Education Code section 35146; Government Code section 54957.

⁸² Government Code section 54957.7(a).

⁸³ Ibid.

⁸⁴ Government Code sections 54957.1, 54957.7.

⁸⁵ Government Code section 54957.7.

⁸⁶ Education Code section 35146.

⁸⁷ Education Code section 48918.

⁸⁸ Government Code section 54957. Government Code section 54957 does not authorize a discussion of an employee's resignation in closed session, but the governing board may discuss the evaluation of performance, discipline or dismissal of the employee in closed session. Nor does Section 54957 authorize a school district board to meet in closed session to discuss the discipline or dismissal of a ROP employee. The ROP is a separate public entity of which the school district is a part. See, 85 Ops.Cal.Atty.Gen. 77 (2002) (county board may not meet in closed session regarding employees of the county superintendent).

the employee on their job performance, and particular aspects or instances of the employee's job performance.⁸⁹

In Duval v. Board of Trustees,⁹⁰ the Court of Appeal held that under evaluation of performance, the governing board could discuss matters relating to the job duties of the employee after appointment. The Court of Appeal held that evaluation of performance was not limited to the annual or periodic comprehensive formal and structured review of job performance, but also included an informal review of the superintendent's job performance, including particular instances of job performance. The court held that evaluation of performance may properly include consideration of the criteria for such evaluation, consideration of the process for conducting an evaluation or other preliminary matters, to the extent those matters constitute an exercise of the district's discretion in evaluating a particular employee. The court ruled that preliminary considerations are an integral part of the actual evaluation of the superintendent, are properly a part of the governing board's consideration of the evaluation of performance of the superintendent and feedback to the employee is a traditional part of the formal evaluation process and fall under the "evaluation of performance" closed session exception.⁹¹

However, the courts have held that the governing boards of districts may not discuss the salary level of the superintendent/chancellor in closed session.⁹² In San Diego Union v. City Council, the Court of Appeal held that when the discussion turns to the salary level of a particular management employee, a discussion must be held in open session. The court stated:

“We envision the two-step process of an executive session evaluating the performance of the public employee and a properly noticed, open session for setting that particular employee's salary as a facile matter, not negatively affecting the review process.”⁹³

“[E]valuating a specific employee's performance is a matter within the ambit of the 'personnel exception' . . . ; however, upon the determination a particular public employee is deserving of a salary increase, various other factors must be considered such as available funds, other city funding priorities, relative compensation of similar positions within the city and in other jurisdictions, before determining the salary increase. Each of these considerations is of acute public interest.”⁹⁴

⁸⁹ Duval v. Board of Trustees, 93 Cal.App.4th 902 (2001).

⁹⁰ 93 Cal.App.4th 902 (2001).

⁹¹ Id. at 909-10.

⁹² San Diego Union v. City Council, 146 Cal.App.3d 947, 953, 196 Cal.Rptr. 45 (1983).

⁹³ Id. at 955-56.

⁹⁴ Id. at 955. See, also, Government Code section 54957(b)(4) which states, “Closed sessions . . . shall not include discussion or action on proposed compensation except for a reduction of compensation that results from the imposition of discipline.”

Therefore, the scope of the discussion in closed session regarding the evaluation of an employee's performance must be limited to the formal process and informal process of evaluating the employee's performance and providing the employee with feedback for improvement. Salary levels and compensation must be discussed in open session.

In Hofman Ranch v. Yuba County Local Agency Formation Commission,⁹⁵ the Court of Appeal held that a contractor assigned to perform "executive officer services" for the county Local Agency Formation Commission (LAFCO) was an officer of LAFCO and, thus, an employee within the meaning of the statute authorizing local agencies to hold closed sessions to consider an employee's appointment, employment, or performance evaluation. Therefore, LAFCO's use of a closed session to consider renewal of his contract did not violate the Brown Act, even if the contractor provided similar services to four other county LAFCOs, and even though the contract stated that the contractor was not an officer or employee, and was not subject to LAFCO's day-to-day direction and control. The court noted that the contractor processed LAFCO related applications, prepared California Environmental Quality Act (CEQA), and LAFCO related reports and documents, reviewed projects of concern, prepared responses for LAFCO, and prepared LAFCO's budget.

A reorganization or reclassification of employees is a proper subject for closed session only if the discussion will involve the job performance of particular individuals.⁹⁶ Thus, a general discussion concerning the creation of a new position and the workload of existing positions is inappropriate for a closed session. Moreover, the "personnel exception" to the Brown Act must be construed narrowly and does not apply to discussions concerning an employee of another entity.⁹⁷

In Santa Clara Federation of Teachers v. Governing Board,⁹⁸ the Court of Appeal held that a board's consideration of a hearing officer's decision concerning teacher layoff policy must be conducted in open session. In a 1980 Attorney General's opinion,⁹⁹ the Attorney General concluded that abstract discussions concerning the creation of a new administrative position and the workload of existing positions were inappropriate for a closed session.

The Court of Appeal has also ruled that advisory committees and boards may meet in closed session to interview applicants for a position. The court held that public consideration of applicants

⁹⁵ 172 Cal.App.4th 805, 91 Cal.Rptr.3d 458 (2009).

⁹⁶ 63 Ops.Cal.Atty.Gen. 153 (1980). The Attorney General stated, "Whether the workload of existing positions would be a proper subject for executive session would depend on whether the discussions are with regard to the positions in the abstract, or whether they involve discussions of the work which is being performed by the individuals who are incumbents of such positions. In the latter case, the discussions would be a proper subject for executive sessions so long as the positions are those of employees within the meaning of Section 54957 of the Act." Id. at 153.

⁹⁷ 85 Ops.Cal.Atty.Gen. 77 (2002). The Attorney General also stated that discussion of the establishment of the new administrative positions would not be a proper subject for closed session since the positions are not yet in existence and hence have no incumbents. However, if the establishment of new positions arises in the context of a reorganization which might involve a discussion of the job performance of particular individuals, then a closed session could be held pursuant to Section 54957. 63 Cal.Ops.Atty.Gen. 153 (1980).

⁹⁸ 116 Cal.App.3d 831, 846 (1981).

⁹⁹ 63 Ops.Cal.Atty.Gen. 153 (1980).

could potentially expose them to embarrassment and the unwanted disclosure of their interest in the position. The court noted that if it ruled otherwise, qualified applicants would be lost, the interviewing process would be inhibited, and the entire hiring procedure would be unworkable.¹⁰⁰

As a condition of holding a closed session on specific complaints or charges brought against an employee by another person or employee, the employee shall be given written notice of his/her right to have complaints or charges heard in open session at least 24 hours in advance and must be provided an opportunity to rebut the allegations before action is taken.¹⁰¹ Government Code section 54957(b)(2) states:

“As a condition to holding a closed session on specific complaints or charges brought against an employee by another person or employee, the employee shall be given written notice of his or her right to have the complaints or charges heard in an open session rather than a closed session, which notice shall be delivered to the employee personally or by mail at least 24 hours before the time for holding the session. If notice is not given, any disciplinary or other action taken by the legislative body against the employee based on the specific complaints or charges in the closed session shall be null and void.”

Any disciplinary action or other action taken by the governing board in the closed session will be held to be null and void if notice is not appropriately given.¹⁰² However, the 24-hour notice provision applies only when the board hears specific complaints and charges, not when it considers the appointment, employment, evaluation of performance, discipline or dismissal of a public employee.¹⁰³ The review of a probationary employee’s evaluation and termination of the probationary employee’s contract does not require the 24-hour notice.¹⁰⁴

In Kolter v. Commission on Professional Competence of the Los Angeles Unified School District,¹⁰⁵ the Court of Appeal held that the governing board of a school district may convene in closed session to initiate the process to dismiss a permanent certificated teacher without complying with the provision of the Brown Act that requires 24-hour written notice to an employee of the right to have the matter heard in an open session. The court held that the determination to initiate a dismissal proceeding is not a “hearing” on the charges and, therefore, such notice is not required.¹⁰⁶

¹⁰⁰ Gillespie v. San Francisco Public Library Commission, 67 Cal.App.4th 1165, 79 Cal.Rptr. 2d 649 (1998).

¹⁰¹ Moreno v. City of King, 127 Cal.App.4th 17, 25 Cal.Rptr.3d 29 (2005).

¹⁰² Government Code section 54957.

¹⁰³ Fischer v. Los Angeles Unified School District, 70 Cal.App. 4th 87, 82 Cal.Rptr.2d 452 (1999).

¹⁰⁴ Furtado v. Sierra Community College, 68 Cal.App.4th 876, 80 Cal.Rptr.2d 589 (1998).

¹⁰⁵ 170 Cal.App.4th 1346, 88 Cal.Rptr.3d 620 (2009).

¹⁰⁶ Id. at 1349.

The Court distinguished another case involving charges against a teacher who also served as a football coach in the district. In Bell v. Vista Unified School District,¹⁰⁷ the board heard the charges against the football coach and decided to remove him from the coaching assignment. The Court in Kolter held that the decision to initiate dismissal proceedings under Education Code section 44934 does not effectuate the employee's termination.¹⁰⁸

Therefore, if a governing board is considering whether to initiate the dismissal process for a permanent certificated employee, it is not necessary to give the 24-hour notice to the teacher under Government Code section 54957. However, if the board is hearing specific complaints or charges against an employee for the purpose of imposing discipline (such as termination of a coaching assignment or termination of a classified employee), the 24-hour notice must be given.¹⁰⁹

CLOSED SESSION – REAL PROPERTY NEGOTIATIONS

The governing board may meet in closed session with its negotiator prior to the purchase, sale, exchange or lease of real property to give instructions to its negotiator regarding the price and terms of payment for the purchase, sale, exchange or lease.¹¹⁰ In 2011, the Attorney General issued an opinion¹¹¹ stating that the real property negotiations exception to the open meeting requirements of the Brown Act permits discussion in closed session of the following:

1. The amount of consideration that the local agency is willing to pay or accept in exchange for the real property rights to be acquired or transferred in the particular transaction.
2. The form, manner, and timing of how that consideration will be paid.
3. Items that are essential to arriving at the authorized price and payment terms, such that their public disclosure would be tantamount to revealing the information that the exception permits to be kept confidential.¹¹²

The Attorney General noted that the Ralph M. Brown Act was adopted to ensure the public's right to attend the meetings of public agencies, as well as to facilitate public participation in all phases of local government decision-making and to curb misuse of the democratic process by secret legislation by public bodies.¹¹³ The Brown Act makes an exception for real property negotiations. Government Code section 54956.8 states in part:

¹⁰⁷ 82 Cal.App.4th 672 (2000).

¹⁰⁸ Id. at 1352.

¹⁰⁹ Id. at 1353-54.

¹¹⁰ Government Code section 54956.8.

¹¹¹ 94 Ops.Cal.Atty.Gen. 82 (2011).

¹¹² Id. at 87.

¹¹³ Government Code sections 54950-54963. See, also, Freedom Newspapers Inc. v. Orange County Employees' Retirement System, 6 Cal.4th 821, 825 (1993); Cohan v. City of Thousand Oaks, 30 Cal.App.4th 547, 555 (1994).

“Notwithstanding any other provision of this chapter, a legislative body of a local agency may hold a closed session with its negotiator prior to the purchase, sale, exchange, or lease of real property by or for the local agency to grant authority to its negotiator regarding the price and terms of payment for the purchase, sale, exchange, or lease.

“However, prior to the closed session, the legislative body of the local agency shall 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.” [Emphasis added.]

The Attorney General recognized that there is a need for a closed door exception for real property negotiations, noting that no purchase of real property would ever be made for less than the maximum amount a public agency would pay if the public (including the seller) could attend the session at which the maximum price was set. The Attorney General noted that the same would be true for minimum sales prices and lease terms.¹¹⁴

The Attorney General then went on to analyze what is meant by the phrase “regarding price and terms of payment for the purchase, sale, exchange, or lease” of real property. The Attorney General concluded that the word “price” is the amount of consideration given or sought in exchange for the real property rights that are at stake. The Attorney General concluded that the phrase “terms of payment” is the form, manner, and timing upon which the agreed upon price is to be paid (e.g., all cash, installments, a seller-financed mortgage, and exchange of property). The Attorney General concluded that the phrase “terms of payment” limits the authority for closed session discussions to terms of payment and rules out discussions of any terms of the transaction as a whole. The Attorney General also stated that the legislative history of amendments to Government Code section 54956.8 support this view.¹¹⁵

Therefore, the Attorney General concluded that the real estate negotiations or real property negotiations exception to the Brown Act authorizes a local agency to discuss two topics in closed session:

1. The negotiator’s authority regarding the price; and
2. The negotiator’s authority regarding the terms of payment.¹¹⁶

The Attorney General stated that the Brown Act does not allow closed session discussions of issues that might affect the economic value of the transaction or to discuss such issues as the availability of easements on the subject property, the credit worthiness of the buyer or seller, or the financial condition of the local agency itself. The Attorney General noted that in Shapiro v. San

¹¹⁴ See, Kleitman v. Superior Court, 74 Cal.App.4th 324 (1999).

¹¹⁵ 94 Ops.Cal.Atty.Gen. 82, 85-87 (2011).

¹¹⁶ Id. at 86.

Diego City Council,¹¹⁷ a city council was considering a development project that included the construction of a new baseball stadium for the San Diego Padres. The city council argued that the complexity of the proposed transaction justified closed session discussion of various matters reasonably related to the ballpark deal, including land acquisition matters, design work of architects and engineers, infrastructure and parking development, capping interim expenses, environmental impact report considerations, issues of alternative sites, traffic, stadium naming rights, expert consultants, and the impact of the ballpark project on the homeless. The Court of Appeal in Shapiro rejected the city's argument that these matters could be discussed in closed session.¹¹⁸

Based on the court's decision in Shapiro, the Attorney General concluded that while the real property negotiations exception should be narrowly construed, it must still be interpreted in a manner that gives effect to the underlying purpose of the law. Among those purposes is the need to conserve scarce public resources through effective negotiation of real property transactions. Therefore, the Attorney General concluded that a closed session discussion regarding price or terms of payment must allow the public agency to consider the range of possibilities for payment that the agency might be willing to accept, including how low or how high to start the negotiations with the other party, the sequencing and strategy of offers or counteroffers, as well as various payment alternatives. Information designed to assist the agency in determining the value of the property in question, such as the sales or rental figures for comparable properties, should also be permitted, because that information is often essential to the process of arriving at a negotiating price.¹¹⁹

In conclusion, the Attorney General stated that the purpose of the real property exception to the Brown Act is to protect a local agency's bargaining position, not to keep confidential its deliberations as to the wisdom of the proposed transaction. Therefore, a local agency is permitted to discuss in closed session the amount of the consideration that the local agency is willing to pay or accept in exchange for the real property rights to be acquired or transferred in the particular transaction, the form, manner, and timing of how that consideration will be paid and items that are essential to arriving at the authorized price and terms, such that their public disclosure would be tantamount to revealing the information that the exception permits to be kept confidential.¹²⁰

CLOSED SESSION – LABOR NEGOTIATIONS

Further, while a general discussion about budget priorities, budget cuts and/or layoffs must be held in open session, the governing board may meet in closed session with its labor negotiator to discuss salaries, salary schedules and fringe benefits for the purpose of reviewing its position and instructing its negotiator.¹²¹ For example, the board may meet in closed session to indicate, by

¹¹⁷ 96 Cal.App.4th 904 (2002).

¹¹⁸ Id. at 924.

¹¹⁹ See, also, Government Code section 6254(h), which exempts from public disclosure under the Public Records Act the contents of real estate appraisals made for or by a local agency relative to the acquisition of property until after the property has been acquired.

¹²⁰ 94 Ops.Cal.Atty.Gen. 82, 88 (2011). In our opinion, a broad discussion about the process for selling surplus real property must be held in open session.

¹²¹ Government Code sections 3549.1, 54956.8, 54957.6. In our opinion, this exception would allow a discussion of a proposed salary decrease or change in fringe benefits in closed session.

consensus, to its designated representative whether it approves or disapproves of a tentative agreement. If the board approves, it may direct staff to place the matter on the agenda for discussion and approval in open session at the next meeting, or may meet in closed session at the next meeting to discuss approval of the agreement in its final form after it has been accepted and ratified by the employee organization and report that action in open session. However, the entire governing board may not meet in closed session with union representatives since Government Code section 54957.6(a) states, in part, “Closed sessions of a legislative body of a local agency, as permitted in this section, shall be for the purpose of reviewing its position and instructing the local agency’s designated representatives...” Such meetings must be held in open session.

In addition, the Brown Act distinguishes between represented employees and unrepresented employees. With respect to represented employees, the governing board may meet in closed session with its designated representative to review the status of collective bargaining negotiations including the provisions of a tentative agreement reached at the bargaining table. The governing board may indicate, by consensus, to its designated representative whether it approves or disapproves the tentative agreement. If the board approves the terms of the tentative agreement, the board may direct staff to place the matter on the agenda for discussion and approval in open session at the next meeting or meet in closed session at the next meeting to discuss approval of the agreement in its final form after it has been accepted and ratified by the employee organization and report that action in open session.

With respect to unrepresented employees, the Brown Act requires a somewhat different process. The Brown Act states that closed session shall not include final action on the proposed compensation of one or more unrepresented employees. The board may discuss the job performance of unrepresented employees (if agendized) and discuss whether the unrepresented employees should receive a salary increase and may receive a recommendation from its designated representative as to the amount of the raise but any discussion or comments by board members as to the amount of the salary increase must take place at a public meeting with proper notice to the public.

Government Code section 3549.1 authorizes a governing board of a district and its designated representative to meet in closed session, “...for the purpose of discussing its position regarding any matter within the scope of representation and instructing its designated representatives.”

The Brown Act, Government Code section 54957.6, states that notwithstanding any other provision of law, a legislative body of a local agency may hold a closed session with the local agency’s designated representatives regarding the salaries, salary schedules, or compensation paid in the form of fringe benefits of its represented and unrepresented employees. A local agency may also meet in closed session to discuss any other matter within the statutorily provided scope of representation with respect to represented employees. Prior to the closed session, the legislative body of the local agency must hold an open and public session in which it identifies its designated representative. The purpose of the closed session must be for the purpose of reviewing the local agency’s position and instructing the local agency’s designated representative.

The closed session may take place prior to and during consultations and discussions with representatives of employee organizations and unrepresented employees. Closed sessions may include discussion of the agency's available funds and funding priorities, but only insofar as these discussions relate to providing instructions to the local agency's designated representative. Closed session "...shall not include final action on the proposed compensation of one or more unrepresented employees."¹²²

The Brown Act, Government Code section 54957.6(a) states in part:

“Notwithstanding any other provision of law, a legislative body of a local agency may hold closed sessions with the local agency's designated representatives regarding the salaries, salary schedules, or compensation paid in the form of fringe benefits of its represented and unrepresented employees, and, for represented employees, any other matter within the statutorily provided scope of representation. . . .

Closed sessions of a legislative body of a local agency, as permitted in this section, shall be for the purpose of reviewing its position and instructing the local agency's designated representatives.

Closed sessions, as permitted in this section, may take place prior to and during consultations and discussions with representatives of employee organizations and unrepresented employees.

Closed sessions with the local agency's designated representative regarding the salaries, salary schedules, or compensation paid in the form of fringe benefits may include discussion of an agency's available funds and funding priorities, but only insofar as these discussions relate to providing instructions to the local agency's designated representative. . . .”

CLOSED SESSION – RECOMMENDED AGENDA FORMAT

For purposes of describing closed session items, the Brown Act recommends a specific agenda format which, if specifically complied with, satisfies the requirements of the Brown Act.¹²³ The closed session exceptions that most frequently apply to school districts are:

¹²² Government Code section 54957.6(a). [Emphasis added.]

¹²³ Government Code section 54954.5; see, also, Shapiro v. San Diego City Council, 96 Cal.App.4th 904 (2002).

CONFERENCE WITH REAL PROPERTY NEGOTIATORS

Property: (specify street address, or if no street address, the parcel number or other unique reference, of the real property under negotiation).

Agency negotiator: (specify names of negotiators attending the closed session). (If circumstances necessitate the absence of a specified negotiator, an agent or designee may participate in place of the absent negotiator as long as the name of the agent or designee is announced at an open session held prior to the closed session).

Negotiating parties: (specify name of party (not agent)).

Under negotiation: (specify whether instruction to negotiator will concern price, terms of payment or both).

CONFERENCE WITH LEGAL COUNSEL – EXISTING LITIGATION

(Subdivision (a) of Section 54956.9).

Name of case: (specify by reference to claimant's name, names of parties, case or claim numbers) or case name unspecified: (specify whether disclosure would jeopardize service of process or existing settlement negotiations).

CONFERENCE WITH LEGAL COUNSEL - ANTICIPATED LITIGATION

Significant exposure to litigation pursuant to subdivision (b) of Section 54956.9: (specify number of potential cases).

(In addition to the information noticed above, the agency may be required to provide additional information on the agenda or in an oral statement prior to the closed session pursuant to subparagraphs (B) to (E), inclusive, of paragraph (3) of subdivision (b) of Section 54956.9).

Initiation of litigation pursuant to subdivision (c) of Section 54956.9: (specify number of potential cases).

LIABILITY CLAIMS

Claimant: (specify name unless unspecified pursuant to Section 54961).

PUBLIC EMPLOYEE APPOINTMENT

Title: (specify description of position to be filled).

PUBLIC EMPLOYMENT

Title: (specify description of position to be filled).

PUBLIC EMPLOYEE PERFORMANCE EVALUATION

Title: (specify position title of employee being reviewed).

PUBLIC EMPLOYEE DISCIPLINE/DISMISSAL/RELEASE

(No additional information is required in connection with a closed session to consider discipline, dismissal, or release of a public employee. Discipline includes potential reduction of compensation).

CONFERENCE WITH LABOR NEGOTIATORS

Agency designated representatives: (specify names of designated representatives attending the closed session). (If circumstances necessitate the absence of a specified designated representative, 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 an open session held prior to the closed session).

Employee organization: (specify name of organization representing employee or employees in question) or unrepresented employee: (specify position title of unrepresented employee who is the subject of the negotiations) or unrepresented employee: (specify position title of unrepresented employee who is the subject of the negotiations).

CLOSED SESSION – ANTICIPATED OR PENDING LITIGATION

The governing board may meet in closed session with its legal counsel to confer with or receive advice from its legal counsel regarding pending litigation if discussion in open session would prejudice the position of the school district in the litigation. Litigation includes any adjudicatory

proceeding, including eminent domain, before a court, administrative body, hearing officer or arbitrator. For this purpose, litigation is pending when any of the following occurs:

1. Litigation to which the agency is a party has been initiated formally;
2. The agency has decided or is meeting to decide whether to initiate litigation; or
3. In the opinion of the governing board and its legal counsel, there is a significant exposure to litigation if matters related to specific facts and circumstances are discussed in open session.¹²⁴

Governing boards are authorized to meet in closed session to consider whether a significant exposure to litigation exists based on existing facts and circumstances (anticipated litigation).¹²⁵ These are defined as follows:

1. The governing board believes that facts creating significant exposure to litigation against the district are not yet known to potential plaintiffs and need not be disclosed.¹²⁶
2. Facts (e.g., accident, disaster, incident, or transaction) creating significant exposure to litigation are known to potential plaintiffs.¹²⁷
3. A claim pursuant to the Tort Claims Act or other written communication threatening litigation is received by the agency.¹²⁸
4. A person makes a statement in an open and public meeting threatening litigation.¹²⁹
5. A person makes a statement outside of an open and public meeting threatening litigation, and an agency official having knowledge of the threat makes a contemporaneous or other record of the statement prior to the meeting.¹³⁰

Prior to conducting a closed session under the anticipated or pending litigation exception, the governing board must state on the agenda or publicly announce the subdivision of the Brown Act, Government Code section 54956.9, which authorizes the closed session. If litigation has already

¹²⁴ Government Code section 54956.9.

¹²⁵ Government Code section 54956.9(b)(2).

¹²⁶ Government Code section 54956.9(b)(3)(A).

¹²⁷ Government Code section 54956.9(b)(3)(B).

¹²⁸ Government Code section 54956.9(b)(3)(C).

¹²⁹ Government Code section 54956.9(b)(3)(D).

¹³⁰ Government Code section 54956.9(b)(3)(E).

been initiated, the governing board must state the title of the litigation unless to do so would jeopardize service of process or settlement negotiations.¹³¹

Under the pending litigation exception, a governing board or school district generally must be a party or a potential party to litigation in order to meet in closed session with its attorney. In addition, it is possible that a governing board may receive advice from its legal counsel concerning its participation in litigation as an *amicus curiae*. The purpose of the exception is to permit the governing board to receive legal advice and make litigation decisions only. The Attorney General has stated that it may not be used as a subterfuge to reach nonlitigation oriented policy decisions.¹³²

The purpose of the pending litigation exception is to protect confidential attorney-client communications. Nonconfidential communications between an attorney and his or her client are not protected.¹³³

It should be noted that the Brown Act does not limit the attorney-client privilege as to written communications between public sector attorneys and their clients. Written attorney-client communications are privileged and exempt from disclosure under the California Public Records Act.¹³⁴

Settlement negotiations, however, may be conducted by the attorneys for the respective litigating bodies, and a limited closed session, pursuant to the attorney-client exception, may be held by each body to consult with its attorney about the settlement.¹³⁵

CLOSED SESSION – PUBLIC REPORT OF ANY ACTION TAKEN

The legislative body must publicly report any action taken in closed session and the vote or abstention of every member present. Reports may be made orally or in writing. Documents approved or adopted by the governing board in closed session must be made available to the public upon request. Districts may keep minutes or record closed sessions, but are not required to do so.¹³⁶

The public report of closed session shall include the approval of an agreement concluding real estate negotiations after the agreement is final. If the agency's own approval renders the agreement final, the legislative 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. If final approval rests with the other party to the real property negotiations, the local agency shall disclose the fact of that approval and the substance of the agreement upon inquiry by any person, as soon as the other party or its agent has informed the local agency of its approval.¹³⁷

¹³¹ Government Code section 54956.9

¹³² 71 Ops.Cal.Atty.Gen. 96 (1988).

¹³³ 62 Ops.Cal.Atty.Gen. 150 (1979).

¹³⁴ See, St. Croix v. Superior Court, 228 Cal.App.4th 434, 445, 175 Cal.Rptr.3d, 202, 210 (2014); Roberts v. City of Palmdale, 5 Cal.4th 363, 20 Cal.Rptr.2d 330 (1993).

¹³⁵ Ibid.

¹³⁶ Government Code sections 54957.1, 54957.2.

¹³⁷ Government Code section 54957.1(a).

The legislative body must publicly report approval given to the agency’s legal counsel to defend, or seek or refrain from seeking appellate review or relief, or to enter as amicus curiae, in any form of litigation, as the result of a consultation. Approval given to legal counsel of the settlement of pending litigation shall be reported after the settlement is final. If the legislative body accepts a settlement offer signed by the opposing party, the legislative 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. If final approval rests with some other party to the litigation or with the court, then as soon as a 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. Dispositions reached as to claims discussed in closed session shall also be reported publicly.¹³⁸

The legislative body shall report any action taken to appoint, employ, dismiss, accept the resignation of, or otherwise affect the employment status of a public employee in closed session. Any action taken shall be reported at the public meeting during which the closed session is held and identify the title of the person.¹³⁹ If no action is taken on the proposed personnel action, no public report is required.¹⁴⁰ It is recommended that the minutes from the public session reference employee numbers as opposed to employee names.

The report of a dismissal or the nonrenewal of an employment contract shall be deferred until the first public meeting following the exhaustion of the administrative remedies, if any. Approval of an agreement concluding labor negotiations with represented employees shall be reported after the agreement is final and has been accepted and ratified by the other party.¹⁴¹

Government Code section 54957.1 set forth the circumstances in which the governing board of a school district must publicly report any action taken in closed session to approve a labor agreement. Section 54957.1 states in part:

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

(6) Approval of an agreement concluding labor negotiations with represented employees pursuant to Section 54957.6 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.”

The legislative body shall provide to any person who has submitted a written request copies of any contracts, settlement agreements or other documents that were finally approved or adopted in closed session. If the action taken results in one or more substantive amendments to the related

¹³⁸ Government Code section 54957.1(a).

¹³⁹ Government Code section 54957.1(a).

¹⁴⁰ 89 Ops.Cal.Atty.Gen. 110 (2006).

¹⁴¹ Government Code section 54957.1(a).

documents requiring retyping, the documents need not be released until the retyping is completed during normal business hours, provided that the presiding officer of the legislative body or his or her designee orally summarizes the substance of the amendments for the benefit of the document requester or any other person present in requesting the information.¹⁴²

The documents shall be made available to any person on the next business day following the meeting in which the action referred to is taken or, in the case of substantive amendments, when any necessary retyping is complete.¹⁴³

DISRUPTION OF PUBLIC MEETINGS

A person who disrupts a public meeting may be removed or arrested.¹⁴⁴ In McMahon v. Albany School District, the California Court of Appeal held that the First Amendment free speech rights of a member of the public were not violated when the individual was arrested for dumping gallons of garbage on the floor of a school room during a school board meeting. The Court of Appeal held that there was sufficient evidence to support an arrest for disturbing a public meeting and that the free speech clause of the First Amendment was not violated.¹⁴⁵

At an April 1996 meeting of the school board of the Albany Unified School District, Mr. McMahon, who had previously complained about high school students leaving trash in his neighborhood, brought five 13-gallon bags of trash to a board meeting. During the public comment period, Mr. McMahon addressed the board. During his public comments, he went to the back of the room and retrieved two or three bags, gloves and a plastic tarp. Mr. McMahon opened the tarp, spread the tarp on the floor and untied the bag. The multipurpose room where the school board meeting was held was used as the school's cafeteria and student assembly room and for an after school child care program. Meals for the school and other elementary schools were cooked in the kitchen adjacent to the multipurpose room.¹⁴⁶

Mr. McMahon, wearing gloves, lifted a bag and dumped its contents on the tarp despite the principal's protest, who was sitting in the front row. Some of the trash spilled on to the floor. The police were then called, the meeting was adjourned and the board left the room. The school board remained in the adjoining kitchen while Mr. McMahon continued emptying trash and speaking to the audience.¹⁴⁷

Mr. McMahon was still talking to the audience when the police arrived. A board member made a citizen's arrest of Mr. McMahon for willfully disturbing a public meeting since the police sergeant refused to arrest Mr. McMahon because he had not committed a felony, nor did he commit a misdemeanor in the presence of a police officer. Based on the citizen's arrest, Mr. McMahon was

¹⁴² Government Code section 54957.1(b).

¹⁴³ Government Code section 54957.1(c).

¹⁴⁴ Government Code section 54957.9.

¹⁴⁵ McMahon v. Albany Unified School District, 104 Cal.App.4th 1275 (2002).

¹⁴⁶ Id. at 1279-1280.

¹⁴⁷ Id. at 1281.

placed in handcuffs and taken to the police station. The board meeting resumed and Mr. McMahon was issued a citation and released. No criminal charges were filed against Mr. McMahon.¹⁴⁸

Mr. McMahon then sued the district, its board members and the superintendent alleging false arrest and false imprisonment. After trial, the jury returned a verdict in favor of the school district. Mr. McMahon filed a motion for a directed verdict to overturn the jury's decision. His motion was denied and Mr. McMahon appealed to the Court of Appeal.¹⁴⁹

The Court of Appeal affirmed the lower court's refusal to find in favor of Mr. McMahon. The Court of Appeal noted that Mr. McMahon was arrested for violating Penal Code section 403, which makes it a misdemeanor to willfully disturb or break up any assembly or meeting that is not unlawful in character. The California Supreme Court in a previous decision¹⁵⁰ upheld the constitutionality of Penal Code section 403.

The Court of Appeal noted that Mr. McMahon was allowed to exercise his First Amendment rights and to complain about the trash in his neighborhood. Mr. McMahon was allowed to illustrate his point by holding up a bag of discarded items he had collected. However, the jury concluded and the Court of Appeal agreed that the dumping of trash on the floor was another matter. Mr. McMahon had told the audience that the bags contained drug paraphernalia and bottles of alcohol. The Court of Appeals held, "It is well within the jury's province to conclude that McMahon's conduct exceeded the bounds of constitutionally protected speech and crossed the line into the tumult of license."¹⁵¹

The Court of Appeal noted that Mr. McMahon substantially impaired the conduct of the school board meeting.

The decision in McMahon should be beneficial to districts when a disruption occurs at a public meeting. While members of the public may address the governing board of a district on issues under the jurisdiction of the governing board, members of the public may not act in such a way (e.g., dumping of garbage) as to disturb or disrupt the conduct of a public meeting. Certainly, any type of conduct which is noisy, loud, disruptive, disturbing, or creates a health or safety risk to other members of the public would be considered disruptive and not protected free speech under the First Amendment. When such conduct occurs, districts should contact local law enforcement to remove or arrest the offending member of the public.

PARTICIPATION IN PUBLIC MEETINGS

In Lacy Street Hospitality Services, Inc. v. City of Los Angeles,¹⁵² the Court of Appeal held that the failure of members of the City Council to pay attention during an administrative hearing on a company's request in a zoning matter deprived the company of due process.

¹⁴⁸ Ibid.

¹⁴⁹ Id. at 1281-1282.

¹⁵⁰ In re Kay, 1 Cal.3d 930 (1970).

¹⁵¹ Id. at 1286-1287.

¹⁵² Lacy Street Hospitality Services, Inc. v. City of Los Angeles, 125 Cal.App.4th 526, 22 Cal.Rptr.3d 805 (2004).

The company was seeking a modification of city ordinances relating to the regulation of adult business. After holding a public hearing, the city zoning administrator granted the modification sought by the company. Neighborhood and community members who opposed the modifications appealed the zoning administrative decision to the Los Angeles City Council which scheduled a public hearing.

The public hearing was videotaped. The tape shows that when the City Council heard the matter, only two council members were visibly paying attention. Other council members were engaged in other activities, including talking with aides, eating, reviewing paperwork, talking with each other, talking on the cell phone, and walking around the room. The videotape showed that council members engaged in similar behavior when speakers in opposition to the zoning change spoke.

The Court of Appeal stated:

“We do not presume to tell the city council how it must conduct itself as a legislative body. Here, however, the city council was sitting in a quasi-judicial role, adjudicating the administrative appeal of constituents. A fundamental principle of due process is ‘he who decides must hear.’... The inattentiveness of council members during the hearing prevented the council from satisfying that principle. . . .

. . . [T]he tape shows the council cannot be said to have made a reasoned decision based upon hearing all the evidence and argument, which is the essence of sound decision making and to which [the company] was entitled as a matter of due process.”¹⁵³

The holding in Lacy Street points out that when the governing boards of districts conduct a hearing on employee discipline matters, student discipline matters, and other similar issues, the governing board is acting in a quasi-judicial role and that the decorum, demeanor and the method of conducting the hearing all contribute to the process of conducting a fair hearing and providing all parties with due process under the law.

In a 2007 Attorney General’s opinion, it was determined that a school district superintendent may not prohibit a management employee of the district from attending a public school board meeting and speaking during the public comment period concerning his demotion from assistant principal to a teaching position.¹⁵⁴

¹⁵³ Id. at 530-531.

¹⁵⁴ 90 Ops.Cal.Atty.Gen. 47 (2007).

DISTRIBUTION OF DOCUMENTS

Agendas of public meetings and any other writings, when distributed to all, or a majority of all, of the members of the legislative body of the local agency by any person in connection with a matter subject to discussion or consideration at a public meeting of the legislative body are disclosable public records under the California Public Records Act and shall be made available upon request without delay.¹⁵⁵ However, any writing that is exempt from public disclosure shall not be included. Writings that are public records and are distributed during a public meeting shall be made available for public inspection at the meeting if prepared by the local agency or a member of the legislative body, or after the meeting if prepared by some other person. These writings shall be made available in appropriate alternative formats upon request by a person with a disability in conformance with the Americans with Disabilities Act.¹⁵⁶

Beginning July 1, 2008, if a writing that is a public record that is related to an agenda item for open session of a regular meeting is distributed less than 72 hours prior to that meeting, the writing shall be made available for public inspection at the time the writing is distributed to a majority of the board members. The writing must be made available for public inspection at a public office or location. The address of the location shall be listed on the agendas of the meetings of the district and shall be posted on the district's Internet web site in a manner that makes it clear that the writing relates to an agenda item for an upcoming meeting.¹⁵⁷

When members of a legislative body are authorized to access a writing of the body or of the agency in the administration of their duties, the local agency may not discriminate between or among any of the members of the legislative body as to which writing or portions thereof is made available or when it is made available.¹⁵⁸

STATUTORY PENALTIES FOR VIOLATION OF THE BROWN ACT

Each member attending a meeting of the governing board where the public is intentionally deprived of information to which the member knows or has reason to know the public is entitled to is in violation of the Brown Act and may be charged with a criminal offense.¹⁵⁹ In addition, the district attorney or any interested person may bring a civil action against a school district for past violations, ongoing violations, or threatened future violations of the Brown Act and recover costs and attorney fees.¹⁶⁰

Prior to any action being commenced, the District Attorney or interested person shall make a demand on the legislative body to cure or correct the action alleged to have been taken in violation of

¹⁵⁵ Government Code section 54957.5.

¹⁵⁶ Government Code section 54957.5(b).

¹⁵⁷ Government Code section 54957.5(b).

¹⁵⁸ Government Code section 6252.7.

¹⁵⁹ Government Code section 54959.

¹⁶⁰ Government Code sections 54960, 54960.1, 54960.5.

the open meeting requirements, agenda requirements, or notice requirements of the Brown Act. The written demand shall be made within 90 days from the date the action was taken, unless the action was taken in open session but in violation of Government Code section 54954.2 (agenda requirements), in which case the written demand shall be made within 30 days from the date the action was taken. Within 30 days of the receipt of the demand, the legislative body shall cure or correct the challenged action and inform the demanding party in writing of its actions to cure or correct, or inform the demanding party in writing of its decision not to cure or correct the challenged action. A court may award court costs and reasonable attorney's fees to the plaintiff in an action if it is found that the legislative body violated the Brown Act. The court may also order the legislative body to tape record its closed sessions and preserve the tape recordings for the period deemed appropriate by the court if the court finds that the legislative body violated the closed session requirements of the Brown Act.¹⁶¹

With respect to past violations, the District Attorney or any interested person must submit a cease and desist letter by mail or fax.¹⁶² The cease and desist letter must be submitted to the governing board within nine months of the alleged violation and state the time during which the governing board may respond to the cease and desist letter. The governing board may respond within 30 days after receiving the cease and desist letter. Within 60 days of the governing board's response to the cease and desist letter, if there is no unconditional commitment to cease all further violations, the District Attorney or any interested party may commence an action in court. If the governing board elects to respond to the cease and desist letter with an unconditional commitment to cease, desist from, and not repeat the past action that is alleged to violate the Brown Act, Government Code section 54960.2, states that the response shall be in the following form:

To _____:

The [name of legislative body] has received your cease and desist letter dated [date] alleging that the following described past action of the legislative body violates the Ralph M. Brown Act:

[Describe alleged past action, as set forth in the cease and desist letter submitted pursuant to subdivision (a).]

In order to avoid unnecessary litigation and without admitting any violation of the Ralph M. Brown Act, the [name of legislative body] hereby unconditionally commits that it will cease, desist from, and not repeat the challenged past action as described above.

The [name of legislative body] may rescind this commitment only by a majority vote of its membership taken in open session at a regular meeting and noticed on its posted agenda as "Rescission of

¹⁶¹ Government Code sections 54960, 54960.1.

¹⁶² In Center for Local Government Accountability v. City of San Diego, 247 Cal.App.4th 1146 (2016), the Court of Appeal held that Government Code section 54960.2 applies to past actions.

Brown Act Commitment.” You will be provided with written notice, sent by any means or media you provide in response to this message, to whatever address or addresses you specify, of any intention to consider rescinding this commitment at least 30 days before any such regular meeting. In the event that this commitment is rescinded, you will have the right to commence legal action pursuant to subdivision (a) of Section 54960 of the Government Code. That notice will be delivered to you by the same means as this commitment, or may be mailed to an address that you have designated in writing.

Very truly yours,

[Chairperson or acting chairperson of the legislative body]¹⁶³

The unconditional commitment must be approved by the governing board in open session at a regular or special meeting as a separate item of business (not on its consent agenda). If the governing board has provided an unconditional commitment to cease and desist from further violations, then an action in court shall not be commenced. If a lawsuit has been filed alleging a past violation of the Brown Act, if the court determines that the governing board has provided an unconditional commitment to cease and desist from further violations, the lawsuit shall be dismissed with prejudice (i.e., the lawsuit cannot be refilled).¹⁶⁴

An unconditional commitment to cease and desist from further violations of the Brown Act shall not be construed or admissible as evidence as a violation of the Brown Act. If the governing board provides an unconditional commitment, the governing board shall not thereafter take or engage in the challenged action described in the cease and desist letter. If the governing board engages in the challenged action in the future, the violation shall constitute an independent violation of the Brown Act, without regard to whether the challenged action would otherwise violate the Brown Act.¹⁶⁵

The governing board may rescind an unconditional commitment by a majority vote of its membership taken in open session at a regular meeting as a separate item of business so long as it is not on its consent calendar. The agenda item shall state, “Rescission of Brown Act Commitment.” The governing board must provide at least 30 days’ notice prior to the regular meeting that the governing board intends to consider the rescission of the unconditional commitment and give notice to the District Attorney and each interested person. Upon rescission, the District Attorney or any interested person may file a lawsuit for violation of the Brown Act without regard to the procedural requirements for past action violations of the Brown Act.¹⁶⁶

¹⁶³ Government Code section 54960.2.

¹⁶⁴ Government Code section 54960.2(c).

¹⁶⁵ Government Code section 54960.2(d).

¹⁶⁶ Government Code section 54960.2(e).

A court may award court costs and reasonable attorney's fees to the plaintiff in a lawsuit when it is found that the governing board has violated the Brown Act. If the governing board has provided an unconditional commitment at any time after the 30-day period for making such a commitment, the court shall award court costs and reasonable attorney's fees to the plaintiff if the filing of the action caused the governing board to issue the unconditional commitment. The costs and fees shall be paid by the local agency, it shall not become a personal liability of any public officer or employee of the local agency.¹⁶⁷

CASE LAW – VIOLATION OF THE BROWN ACT

In Los Angeles Times Communications, LLC v. Los Angeles County Board of Supervisors,¹⁶⁸ the Court of Appeal held that absent special circumstances, a plaintiff who successfully sues a government agency for violation of the Brown Act is entitled to an award of attorneys' fees. In Los Angeles Times, the Court of Appeal found that the lawsuit was necessary to bring about change in the practices of the Los Angeles County Board of Supervisors. The Court of Appeal also found that the lawsuit remedied a public injury because it uncovered violations of the Brown Act on January 4, 2002 and January 8, 2002. The Court of Appeal also held that the Los Angeles Times, even though it had great resources, was entitled to an award of attorneys' fees. The Court of Appeal stated:

“Given the strong public policy behind that act and the need to spur private enforcement through an award of attorneys' fees . . . we see no reason to distinguish between a well-funded major metropolitan newspaper and those with fewer resources. Even the well-heeled should be encouraged to enforce the Brown Act for the public's benefit with full assurance that, absent special circumstances, they, too, will recover their attorneys' fees.”¹⁶⁹

Thus, the courts will, in most cases, award successful plaintiffs attorneys' fees in cases involving violations of the Brown Act.

In Moreno v. City of King,¹⁷⁰ the Court of Appeal held that the City of King had violated the Brown Act and that it had not “cured” its violations in a subsequent meeting. The Court of Appeal held that the City had failed to give prior notice to the employee before discussing complaints or charges against the employee and the City Council's action terminating the employee was null and void. The Court of Appeal affirmed the lower court's order reinstating the employee.

In Moreno, the City terminated the finance director for the City and the finance director filed a lawsuit alleging that the City had violated the Brown Act when it allegedly terminated his contract. The finance director serves at the pleasure of the City Council.

¹⁶⁷ Government Code section 54960.5.

¹⁶⁸ 112 Cal.App.4th 1313, 5 Cal.Rptr.3d 776 (2003).

¹⁶⁹ Id., at 791.

¹⁷⁰ 127 Cal. App.4th 17, 25 Cal.Rptr.3d 29 (2005).

On October 17, 2002, the City Council's agenda for a special meeting stated, "Per Government Code section 54957: Public Employee (employment contract)." The finance director was not notified that his employment would be discussed at the October 17, 2002 meeting. The minutes from the October 17, 2002 meeting stated that no reportable action was taken in closed session.

On October 23, 2002, the City Manager gave the finance director a copy of a two-page memorandum that contained the details of five alleged incidents of the finance director's misconduct that led the City Manager to the decision to terminate the finance director's employment. The termination was effective at the end of the business day on October 23, 2002. The finance director was not given an opportunity to respond to the accusations in the City Manager's memo.

In December, 2002, the finance director filed a lawsuit against the City. The lawsuit alleged that the City had violated the Brown Act by failing to notify him that the City Council would be considering his employment or any complaints or charges against him and by failing to indicate in its agenda and minutes that action to terminate his employment would be considered or had been taken. On January 15, 2003, the finance director sent a letter to the City demanding that it cure or correct the action taken by the City Council on October 17, 2002 in violation of the Brown Act.

The agenda for the City Council's January 28, 2003 meeting included the following item: "Consent Agenda." "Deny Tort Claim of Roberto Moreno, Claimant v. City of King." The staff recommendation was to re-affirm its concurrence in and approval of the City Manager's termination of Roberto Moreno, the City's finance director, and denying Mr. Moreno's government tort claim. The addendum to the agenda contained a two-page staff report prepared by the City Attorney.

The finance director claimed that the City had violated the Brown Act in three ways:

1. The inadequacy of the agenda of October 17, 2002, violated Sections 54954.2 and 54954.5;
2. The failure to report the action taken on Moreno's employment at the meeting of October 22, 2002, violated Section 54957.1; and
3. The failure to notify Moreno in advance of the meeting that the Council would be hearing "complaints or charges" against him violated Section 54957.

The finance director insisted that the City had not cured any of the violations at the January 28, 2003 meeting.

The City claimed that no complaints or charges had been heard by the City Council at the October 17, 2002 meeting, and that it had cured any Brown Act violations at the Council's January 28, 2003 meeting. At trial, the City Manager testified that the subject of the October 17,

2003 meeting was the prospective public employment contract with another individual to serve as interim finance director. The City Manager understood that, as a result of the approval of the hiring of the new interim finance director, he had the approval of the City Council to terminate Mr. Moreno's employment. The City Manager also testified, at another point in the trial, that the City Council approved of Roberto Moreno's termination as finance director at the October 17, 2002 meeting. The City Manager also testified that he had provided a draft of the memorandum containing the details of these five complaints about Mr. Moreno's conduct as finance director at the October 17, 2002 meeting. In response to the memorandum, the Council members discussed Mr. Moreno and the termination of his employment.

On May 14, 2003, the trial court issued a written ruling granting Mr. Moreno's petition with respect to the Brown Act violations. The court found that the City had violated Sections 54954.2, 54954.5, 54957 and 54957.1, and had not cured any of these violations. The court declared the City Council's action terminating Mr. Moreno null and void, and ordered the City to reinstate him as finance director and reserved the issues of damages, attorney's fees and costs to be decided at a later time.

The matter was appealed and the Court of Appeal affirmed the action of the trial court declaring the termination of Mr. Moreno null and void and reinstating Mr. Moreno to his position as finance director. The Court of Appeal agreed with the trial court that the City violated Section 54957 and that the trial court was correct in declaring the City's action terminating Mr. Moreno's employment null and void. The Court of Appeal also agreed with the trial court that the City failed to cure its violations of the Brown Act.

The Court of Appeal found that the City's agenda for the meeting of October 17, 2002, was deficient and it omitted the brief general description required by Section 54954.2 of the business to be transacted or discussed. The Court of Appeal found that the agenda which described the business as "Public Employee (employment contract)" did not give the public or Mr. Moreno notice that his employment was going to be discussed and that possible termination would be discussed. The Court of Appeal also held that the Council's January 28, 2003 meeting only referenced Mr. Moreno's tort claim and the only action reported after that meeting was the denial of his tort claim, and that this did not achieve a cure of the City's failure to agendize the issue of Mr. Moreno's dismissal.

The Court of Appeal also found that the Council heard complaints or charges at the October 17, 2002 meeting, against Mr. Moreno, and that under Section 54957(b)(2), Mr. Moreno was entitled to advance notice that the City would be holding a closed session on specific complaints or charges brought against him by the City Manager. The Court of Appeal held that when a public agency receives accusations of misconduct from others and considers whether to dismiss an employee based on those accusations, it must give advance notice to the employee because its actions amount to a hearing of complaints or charges.¹⁷¹ Although the City Manager insisted he did not discuss the contents of the document with the accusations in it with the City Council, he admitted

¹⁷¹ See, Bell v. Vista Unified School District, 82 Cal.App.4th 672, 683-684 (2000); Morrison v. Housing Authority of the City of Los Angeles Board of Commissioners, 107 Cal.App.4th 860 (2003).

that the City Council responded to the document by spending a significant portion of the meeting of October 17, 2002 discussing Moreno and his potential termination.

The Court of Appeal held that the trial court could reasonably infer from this testimony that the City Council considered and discussed the City Manager's accusations against Finance Director Moreno, and that this amounted to a hearing of "complaints or charges" within the meaning of Section 54957. The Court of Appeal held that the purpose of Section 54957 is to provide an employee with the opportunity to respond to specific accusations made by another person. The Court of Appeal held when there is a failure to give an employee advance notice of the hearing on specific complaints or charges, any disciplinary or other action taken by the public agency against the employee based on specific complaints or charges in a closed session, is null and void.¹⁷² The Court of Appeal then affirmed the trial court's order declaring the termination of Finance Director Moreno null and void and reinstated him as the City's Finance Director.

The Court of Appeal also noted that the City never reported the action taken by the City Council publicly in the minutes but since the trial court rendered relief based on Section 54957, the Court of Appeal declined to decide whether a violation of Section 54957.1 (action in closed session must be reported out) was violated.

In summary, if the governing boards of districts are going to discuss the possible termination of an employee based on reports from the public or other persons, they must give 24 hours' advance notice to the employee under Section 54957 and give the employee an opportunity to rebut the allegations before they take action, or the action could be declared null and void by a court and the employee could be reinstated to his or her position.

DISCLOSURE OF CONFIDENTIAL INFORMATION

The Brown Act states that a person may not disclose confidential information that has been acquired by being present in closed session to a person not entitled to receive it, unless the legislative body authorizes disclosure of that confidential information. 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.¹⁷³ Violations of confidentiality may be addressed by the use of such remedies as are currently available by law, including, but not limited to:

1. Injunctive relief to prevent the disclosure of confidential information;
2. Disciplinary action against an employee who has willfully disclosed confidential information in violation of this section;
3. Referral of a member of a legislative body who has willfully disclosed confidential information to the grand jury.¹⁷⁴

¹⁷² Government Code section 54957.

¹⁷³ Government Code section 54963.

¹⁷⁴ Government Code section 54963(c).

However, it is not a violation of the Brown Act to do any of the following:

1. Make a confidential inquiry or complaint to a district attorney or grand jury concerning a perceived violation of law, including disclosing facts to a district attorney or grand jury 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 that action were to be taken by a legislative body of a local agency.
2. Express an opinion concerning the propriety or illegality of action taken by a legislative body of a local agency in closed session, including disclosure of the nature and extent of the illegal or potentially illegal action.
3. Disclosing information acquired by being present in a closed session under the Brown Act that is not confidential information.¹⁷⁵

In addition, nothing in this provision of the Brown Act shall be construed to prohibit disclosures under the whistleblower statutes.¹⁷⁶

EXEMPTIONS FROM THE BROWN ACT

The Education Code exempts meetings of councils or committees of school site advisory committees from the Brown Act.¹⁷⁷ Education Code section 35147(c) states that any meeting held by a specified council or committee shall be open to the public and any member of the public shall be able to address the council or committee during the meeting on any item within the subject matter jurisdiction of the council or committee. Under Section 35147, the following requirements apply:

1. Notice of the meeting shall be posted at the school site or other appropriate place accessible to the public at least 72 hours before the time set for the meeting. The notice shall specify the date, time and location of the meeting and contain an agenda describing each item of business to be discussed or acted upon.

¹⁷⁵ Government Code section 54963(e).

¹⁷⁶ Government Code section 54963(f).

¹⁷⁷ The councils and school site advisory committees which are exempt must be established pursuant to Education Code section 52012 (school site councils), 52065 (American Indian Advisory Committee), 52176 (Bilingual Advisory Committee), 52852 (school site councils), 54425(b) (Advisory Committee on Compensatory Education Programs), 54444.2 (Parent Advisory Committee for Migrant Education), 54724 (School Site Council for Motivation and Maintenance Programs), 62002.5 (School Site Councils and Parent Advisory Committees) or committees formed pursuant to Education Code section 11503 (committees formed under Chapter I programs) or 20 U.S.C. Section 2604 (committees formed under Chapter I programs).

2. The council or committee may not take any action on any item or business unless that item appeared on the posted agenda or unless the council or committee member is 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. Questions or brief statements made at a meeting by members of the council, committee or public that do not have a significant effect on pupils or employees in a school or school district or that can be resolved solely by the provision of information need not be described on an agenda as items of business.
3. If a council or committee violates the procedural meeting requirements of this section, and 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.

Any materials provided to a school site council must be made available to any member of the public who requests the materials.¹⁷⁸ Special education community advisory committees are not included among the bodies exempted by the Education Code.¹⁷⁹ Therefore, special education community advisory committees which are formed by board action, pursuant to the local special education plan or SELPA plan, are subject to the requirements of the Brown Act, which defines a legislative body as a commission, committee, board or other body, whether permanent or temporary, decisionmaking or advisory, created by formal action of the legislative body.¹⁸⁰ Therefore, if the special education community advisory committee was formed by board action, it would be subject to the provisions of the Brown Act.

ROBERT’S RULES OF ORDER

The Brown Act does not require the adoption of Robert’s Rules of Order. Generally, our office has recommended that school districts use Robert’s Rules of Order as a guide.

Under the Brown Act, the board has the power to suspend or ignore its parliamentary rules if the rules are not required by Education Code or the Brown Act. The Education Code requires the governing boards of school districts and community college districts to act by a simple majority vote of the entire membership of the board.¹⁸¹ In general, the board may suspend or repeal its own parliamentary rules, but it may not suspend or repeal any provisions imposed by law, including provisions of the Education Code and the Brown Act.¹⁸²

¹⁷⁸ Education Code section 35147(d).

¹⁷⁹ Education Code section 35147.

¹⁸⁰ Government Code section 54952.

¹⁸¹ Education Code sections 35164 and 72203.

¹⁸² Grosjean v. Board of Education of the City and County of San Francisco, 40 Cal.App.434, 181 P.113 (1919).