

The Ralph M. Brown Act

Presented by:

Adrienne Konigar-Macklin, Esq.
Law Offices of Adrienne Konigar & Associates
August 22, 2022

What is the Brown Act?

Referred to as the “Open Meeting Law”, The Ralph M. Brown Act, is a series of laws designed to guarantee the public's right to **attend and participate** in meetings of local legislative bodies and prevent informal, undisclosed secret meetings, workshops and/or study sessions held by local elected officials.

California Government California Code section 54950 et seq., provides:

“The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know.” Ralph M. Brown, 1959

The entire Brown Act is contained in Government Code Section 54950 et seq.

Brown Act Basic Principles

- “All meetings of the legislative body of a local agency shall be **open and public**, and all persons shall be permitted to attend any meeting of the legislative body of a local agency, unless an exception applies”. (Gov. Code, § 54953)
- The Brown act is primarily concerned with:
 - **Meetings** by members of a governing body
 - **Communications** among and between members of a governing body
 - **Participation** by the public. Ensuring the public is aware and can meaningfully participate. (hear, view and participate in all discussions)



Meetings Defined



Definition

- A “meeting” is any gathering of a majority of the members of a legislative body at the same time and location to hear, discuss, deliberate, or take action on any item that is within the subject matter jurisdiction of the legislative body. (Gov. Code, § 54952.2)
 - Includes meetings by teleconference, or communications by other electronic means. (Gov. Code, sections 54952.2, 54953)
- Any gathering by a majority of members of a body is considered a meeting and must be open to the public, noticed and agendized or meeting maybe a violation of the Brown Act.

Committees

- **Brown Act applies to any permanent or temporary, decision-making or advisory commissions, committees, boards, and bodies created by formal action of the governing body are considered legislative bodies subject to the Brown Act.**
- **Standing committees – a committee that has continuing jurisdiction over a particular topic regardless of the number of members is a legislative body and is subject to the Brown Act §54952(b).**
- **Advisory committees that include a majority of the board are subject to the Brown Act.**
- A temporary advisory committee comprised of less than a majority is not a legislative body subject to the Brown Act.

Types of Meetings



There are **three** types of meetings:

➤ Regular Meetings

- Date, time and place for regular meetings are set by a formal rule or action of the Board.
- Requires 72 hours notice to the public

➤ Special Meetings

- Meeting is called by the agreement of a majority of the board to discuss a specific issue or matter
- Requires 24 hours notice

➤ Emergency Meetings

- Meeting called to deal with emergencies only as defined in Section 54956.5
 - A crippling activity, work stoppage or other activity which severely impairs public health, safety or both. (Gov. Code § 54956.5(a)(1))
- One-hour notice required for those who have requested to be notified.

➤ Adjourned Meetings

- Regular or special meetings that have been adjourned or re-adjourned to a time and place specified in the order of adjournment, with no agenda required for regular meetings adjourned for less than five calendar days as long as no additional business is transacted.

Please Note: There are five exceptions to the meeting requirement.

Meeting Notice

- Posting requirements: Agendas must be posted at least **72 hours** before the regular meeting, **24 hours** before a special meeting and by phone **one hour** in advance if it is an emergency meeting to those who have been asked to receive notice.
 - An agenda must also be mailed out if requested
- Locations- Posted in locations readily accessible to members of the public and on the school website.
- Remember the 30-day rule is recurring.

Note: Timelines are very stringent and require absolute compliance.

NOTICE



Meeting Agendas

All meetings
must be
properly
noticed and
publicized



Agenda and Meeting Fundamentals



- Every meeting of a legislative body—including committees, commissions and boards, must be noticed by a **posted agenda** that advises the public of the meeting and the business to be transacted or discussed.
- Meeting should mirror the agenda.
- Basic premise is that all matters must be discussed in open session of a duly noticed meeting unless there is a legal exception.
- **Requirements:**
 - Content – The agenda should contain a brief general description of each item of business to be transacted or discussed at the meeting, including items to be discussed in closed session.
 - Agendize times for the public to speak. (Multiple opportunities)
 - List closed session, open session and public hearings separately.
 - List items that are “information only” separately on the agenda.

Note: Agendas must have enough information to enable members of the general public to determine the general nature of subject matter of each agenda item to be discussed.

Agenda and Meeting Fundamentals (Con't.)

- Divided into Closed Session and Open Session
 - Always begin meeting in open session
 - Recess to closed session
 - Re-open in open session and end meeting (can have more than one closed session or have it at any point during the meeting)
- Allow for public comment at designated time(s) listed in the agenda
 - At the beginning of the meeting
 - Usually before closed session
 - Before a vote on the consent calendar
 - If there is a public hearing during the meeting, then public speaking is allowed during the hearing
- Allow for consideration of items individually or as part of a consent calendar.
- Items on a consent calendar may be pulled for separate consideration

Public Participation and Comment

➤ Public Comment

- Members may speak on agenda and non-agenda items
- Board can limit the time a member of the public may speak (e.g., 3 minutes)
- Board can limit the amount of time spent on an item (e.g., 20 minutes)
- Board cannot respond other than to ask a clarifying question unless an item is on the agenda.
- Negative public comments are allowed Gov. Code § 54957.9

➤ Public Participation

- May video and/or audio record meeting
- Accessible facilities
- Copies of agenda available
- May not disrupt meetings



Note: If members of the public are disruptive, the Board may pause the meeting, clear the room of the disruptive members and allow others to remain.

Agenda Templates

► SDCOE Example

Regular Board Meeting
San Diego County Office of Education
May 13, 2020 4:00PM

Closed Session at 4 p.m.; Open Session at 6 p.m. Due to the COVID-19 situation, this meeting will be conducted via live stream webcast: <https://stream1.sdcoe.net/wc/boardmeeting051320>; to submit any public comment for this meeting, please copy following URL link into browser address bar: <https://www.sdcoe.net/public-comment>

1. CLOSED SESSION - OPENING PROVISIONS - 4 p.m.
 - 1.a. Call to Order and Roll Call
 - 1.b. Public Comment on Closed Session Item Only
 - 1.c. Adjourn to Closed Session (per Government Code 54957)
 - 1.c.1. Public Employee Performance Evaluation: Superintendent
2. OPEN SESSION - OPENING PROVISIONS - 6 p.m.
 - 2.a. Call to Order and Roll Call
 - 2.b. Pledge of Allegiance
 - 2.c. Approval of Agenda
 - 2.d. Report Out of Closed Session
3. PUBLIC COMMENT - Agenda and Non-Agenda Items
4. ASSOCIATIONS COMMENTARY
5. APPROVAL OF CONSENT ITEMS

Quick Summary / Abstract:

Items listed in this section are considered to be routine and are acted on by the Board in one motion. It is understood that the Superintendent recommends approval on all Consent Items. Each item of the Consent agenda approved by the Board shall be deemed to have been considered in full and adopted as recommended.

5.a. Approval: Minutes of Regular Meeting on April 8, 2020

Attachments:

Minutes-Regular Meeting Apr. 8, 2020

5.b. Approval: Adopt Resolution Declaring May 13, 2020, as "California Day of the Teacher"

Quick Summary / Abstract:

In conjunction with the California Department of Education, the San Diego County Board of Education is asked to adopt the attached resolution

***Five* Exceptions to the Brown Act Meeting Requirements**

- There is nothing in the Brown Act that would prohibits committee members from participating in any of the following, ***provided no board or school business is discussed.***
- **Individual Contacts** – Committee members are not prohibited from meeting on there own
- **Conference and Retreat Attendance**
- **Community Meetings**
- **Attendance at Meetings of Other Legislative Bodies and/or other Public Meetings**
- **Social or Ceremonial Events**

Note: Attendance by any number is allowed but business still cannot be discussed. Board retreats are not an exception to the Brown Act

Reference Government Code § 54952.2



Pre-COVID

Teleconferences-Electronic Virtual Meetings

Gov. Code § 54953(b)(1) permits the use of teleconferencing.

- Requirements for teleconferences include:
 - Teleconferences must comply with the rest of the Act.
 - All votes taken during a teleconference must be taken by roll call.
 - Agendas must be posted at all teleconference locations.
 - Each teleconference location must be identified in the agenda.
 - Each teleconference location must be accessible to the public.
 - At least a quorum of the committee members must participate from locations within the district boundaries.
 - The agenda must provide for public comment at each teleconference location.

Governor's Executive Order

Executive Order N-29-20

- On September 16, 2021, Governor Gavin Newsom signed Assembly Bill 361 (AB 361) into law which allows public agencies to continue to conduct meetings remotely during the COVID-19 pandemic and other proclaimed emergencies.
- In response to COVID-19, and the need to social distance, the Governor executed several orders temporarily amending the Brown Act requirements:
 - Members may participate from any location whether public or private
 - Agenda only needs to be posted at a general location
 - All meeting may be held electronically
- Members of the public must be able to participate electronically and have a means by which to submit comments electronically.

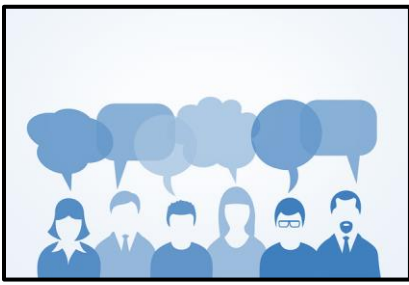




Teleconferences-Electronic Meetings

Pandemic Rules

- 30 Day Rule
 - Government Code section 54953(e)(4) also now requires local agencies to verify **every 30 days** that the exemption from traditional teleconference requirements is still necessary. Specifically, the legislative body must make findings no later than 30 days after the first teleconference and every 30 days thereafter that:
 - The Committee must specifically find that the legislative body has reconsidered the state of emergency circumstances; and either i) the state of emergency continues to directly impact the ability of the members to meet safely in person, or ii) state or local officials continue to impose or recommend measures to promote social distancing.
- Sunset Provision
 - These provisions will automatically expire on January 1, 2024 and the pre-pandemic Brown Act rules will apply.

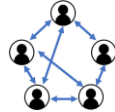


Prohibited Communications

Certain communications among committee members will constitute a prohibited meeting which is a violation of the Brown Act.

- **Serial meetings** occur when a majority of the members eventually communicate about an issue and have developed a collective concurrence.

- “Daisy Chain”



- “Hub and Spoke”



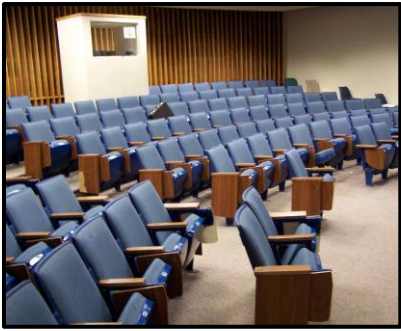
- **A collective concurrence** occurs when directors either directly or indirectly know of the other opinions and develop a collective agreement.

- Examples:

- Committee business is discussed outside of a noticed meeting is a Brown Act Violation (BAV)
- Having conversations amongst board members after a meeting in the parking lot is a BAV
- “Replying all” to a communication could be a violation of the Act (one-way communication is permissible).
- Informational (hub) collective meetings

Staff must exercise great discretion not to disclose other members' views and positions.

Email - Except as authorized pursuant to §54953, any use of direct communication, personal intermediaries, or technological devices that is employed by a majority of the members of the committee to develop a collective concurrence as to action to be taken on an item by the members of the legislative body is prohibited. §54952.2(b)



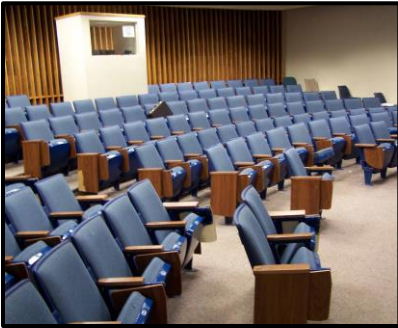
Location of Meetings

Generally, meetings must be held within district boundaries (Gov. Code § 54954(b)) under the California Government Code.

Note: A meeting may not be held in any facility that prohibits the admittance of any person on the basis of race, religious creed, color, national origin, ancestry, or sex; which is inaccessible to disabled persons; or where members of the public may not attend without making a payment or purchase.

COVID Changes

- Order N-29-20 allows public meetings to be held by video, teleconference or other electronic means during the period in which health officials have imposed or recommended social distancing measures. It further suspends numerous other Brown Act requirements, including:



Location of Meetings

- Public Participation-Brown Act requirements are fulfilled by allowing members of the public to observe and submit public comments through teleconference or other electronic means or combination thereof.
- Order N-29-20 still requires local legislative bodies to:
 - provide advance notice of and post agendas for public meetings in accordance with the Brown Act's time frames
 - provide information by which members of the public may observe and offer public comment
 - advertise and implement a procedure for receiving and resolving reasonable Americans with Disabilities' (ADA) accommodation requests.
- Order N-29-20 also allows public meetings to be held by video, teleconference or other electronic means during the period in which health officials have imposed or recommended social distancing measures.
- So no longer must identify the physical location of each members

Closed Sessions



Without specific authority in the Brown Act to meet in closed session, all board business **must** be discussed in public.

Note: **Confidentiality**-All matters discussed in closed session are confidential and may not be shared or discussed openly. Board members have a fiduciary duty to protect the confidentiality of closed session discussions.
(Office of the Attorney General)



Closed Session

- Closed Session Exceptions to the Brown Act
- Not open to the public, although agendaized and posted in the meeting notice
- **Six Exceptions**
 - **Pending/anticipated/initiation of litigation**
 - Conference with legal counsel
 - Anticipated means there are facts or circumstances that would lead one to believe there is significant exposure to litigation
 - **Pupil discipline**
 - Never held in open session
 - **Personnel** (appointment, employment, evaluation, discipline, dismissal)
 - Additional Personnel Requirement: 24-hour written notice to employee and right to have complaints and/or charges heard in open session
 - **Real estate negotiations**
 - **Negotiations**
 - **Public security**

Closed Session



Necessary Steps:

- Post Closed Session
- Announce Closed Session
 - After the Board opens the general meeting, it must announce that it is going into closed session and the reasons for going into closed session (i.e., anticipated litigation, personnel, etc.)
- Public Participation
 - Allow public to comment
- Adjourn to Closed Session
- Only discuss agenized items
- Cannot discuss salary or budgetary matters in closed session
- Publicly report action taken in closed session and the vote of every board member when board returns to open session

Closed Session

“Safe Harbor” Language



- Realizing the potential for items to be listed inappropriately, the legislature developed “safe harbor” language.
- Good defense against potential charges that Brown Act has been violated

Note: Using the template provided in the Government Code will avoid challenges to incorrect posting requirements.

When Brown Act Mistakes Happen

➤ Mistakes on the Agenda

- Substantive errors should not be corrected unless agenda can be reposted within notice period
- "Typos" that do not change the substance of the matter can be corrected from the floor or on the agenda

➤ Mistakes During the Meeting

- Board will have to redo the action taken

➤ Resolution and Remedies

➤ Voluntary resolution

- Often the easiest way to resolve issues and maintain public trust

➤ Invalidation

- Complaint to governing body to cure within 90 days
- Cure by board within 30 days

➤ Civil action to prevent future violations

- Attorney General or private citizen may bring action
- Attorney's fees and costs

➤ Criminal complaints

- Participation in a vote and deliberate attempt to deceive the public



Conflicts of Interest-Gov. Code § 1090

-----Conflict of Interest is separate from the Brown Act-----

Section 1090 applies to:

“Members of the Legislature, state, county, district, judicial district, and city officers or employees shall not be financially interested in any contract made by them in their official capacity, or by any body or board of which they are members.” This means that Section 1090 applies to virtually all state and local officers, employees, and multimember bodies, whether elected or appointed, at both the state and local level. It also applies to certain consultants and independent contractors.

- Its purpose is to protect the interest of the public. The law does not permit a public officer to place himself in a position in which he might be tempted by his own private interest to disregard the interests of the public”. (40 Ops. Cal. Atty. Gen. 210)
- Avoid impropriety and appearance of impropriety
- **Prevent financial conflicts**
- **Committee member may not use their official position to make or attempt to influence a decision when they know or have reason to know they have an economic interest. (Contracts or transactions)**

- Is the official subject to the provisions of Section 1090?
- Does the decision at issue involve a contract?
- Is the official making or participating in making a contract?
- Does the official have a financial interest in the contract?
- Does either a remote-interest or non-interest exception apply?
- Does the rule of necessity apply?

- If the answer to all four questions is “yes,” a conflict of interest exists, and the member is precluded from voting on a contract or transaction even if the transaction is advantageous to the agency.

Conflicts of Interest

Financial Interest

Remote and Non-Interests

Conflicts of Interest Gov. Code Sections 1091-1091.6 sets forth specific interests which are either remote or a non-interests for purposes of determining whether a conflict applies.

If the interest is remote or a non-interest there is no conflict. (See Government Code section 1091 for “remote interests” and Section 1091.5 for “non-interest”

Gov. Code Sections 1091-1091.6:

§ 1091: “Remote interest” in contract; Disclosure of interest; Penalty for willful failure to disclose

§ 1091.1: Right of public officer to subdivide land in which he has interest

§ 1091.3: Inapplicability of Section 1090 as relating to contract or grant made by county children and families commission

§ 1091.4: “Remote interest” to include persons with financial interest in contract under specified conditions; Burden of proof.

§ 1091.5. Interest in contract; quantity and quality of interest; Relation to contracting party

§ 1091.6. Abstention from vote if interest in property

Examples:

Remote interest member is not involved in the contracting process even though he/she is employed or has a diminimus interest in the company

Remote – remote interests are where the interest does not affect the outcome because it would have been the same whether or not a board member.

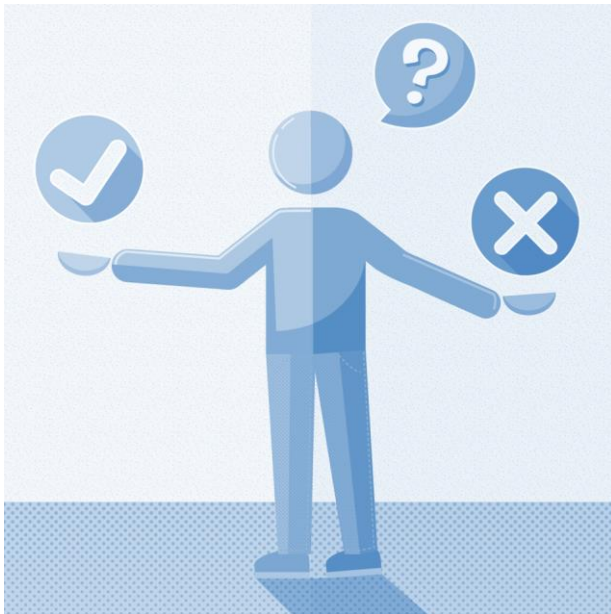
Conflicts of Interest



- Section 1090 applies to virtually all state and local officers, employees, and multimember bodies, whether elected or appointed, at both the state and local level.
- When an employee of an agency, as opposed to a board member, has a financial conflict the employee's agency may enter into the contract provided the employee plays no role in the contracting process.

Conflicts of Interest

I think I have a PRA conflict, now what?



- ▶ Disclose the interest in writing to all (board members, manager, director, supervising CEO or CFO)
- ▶ Refrain from discussing your interest or position at any time before or after the vote
- ▶ Abstain from voting and physically leave the room or leave virtual meetings
- ▶ Determine if there have been discussions and whether the remaining board members can vote on the matter. (Transaction or contract)

Questions ?

1. What are our current flexibilities/allowances to hold Brown Act meetings virtually?
2. What constitutes a conflict of interest as it relates to chairing the council and its committees – all of which are bound by the Brown Act? Are there any issues with an LPC Chair also being the Chair of one of the Council's committees?
3. To what degree can LPC related topics be discussed outside of the Council or Committee meetings? Can LPC members meet outside of the meetings to work collaboratively on LPC related documents, letters, reports, etc.?

Others _____



Thank you for your participation!

Disclaimer: The information provided in this presentation was designed to be a general guide to the Brown Act and should NOT be considered legal advice. For questions about specific situations concerning the Brown Act, please seek the advice of counsel.