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Brown Act For Cabinet

Balancing Transparency and Confidentiality in Personnel, Student, and Business/Property/Construction Matters

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Personnel Roadmap

- Complaints Against Personnel
- Appointment and Evaluation
- Employee Discipline
- Labor Negotiations
- Cabinet-level Contracts



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Complaints Against Personnel

- Governing boards may meet in closed session to hear "complaints or charges" brought against the employee by another person or employee *unless the employee requests a public session*.

  (Gov. Code, § 54957, subd. (b)(2).)

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Complaints Against Personnel (cont.)

- 24-Hour Notice Requirement
  - Written notice of right to have complaints or charges heard in open session
  - Delivered, personally or by mail, to the employee at least 24 hours before the closed session
- Failure to provide required notice will result in nullification of any disciplinary action taken by a board



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Complaints Against Personnel (cont.)

- What is a "complaint or charge"?
  - A performance evaluation is not a hearing about specific complaints or charges brought against an individual *(Fischer v. Los Angeles Unified Sch. Dist.* (1999) 82 Cal.Rptr.2d 452.)
  - "Complaint" and "Charge" connote an accusation; something which is brought against an individual (*Bell v. Vista Unified Sch. Dist.* (2000) 82 Cal.App.4th 672.)
  - Decision to initiate or consider moving forward with formal discipline is not a hearing *(Kolter v. Los Angeles Unified Sch. Dist.* (2009) 170 Cal.App.4th 1346)

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Complaints Against Personnel (cont.)

- Reporting Out:
  - Absent any action to dismiss or otherwise affect the employment status of the employee involved in the complaint, the Brown Act does not require any information on the closed session discussion or decision to be reported out in open session



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Appointment/Evaluation

The Brown Act authorizes closed sessions "to consider the appointment, employment, evaluation of performance" of a public employee. (Gov Code, § 54957, subd. (b)(1).)

Reporting Out: Action taken to appoint, employ, … a public employee in closed session pursuant to Section 54957 shall be reported at the public meeting during which the closed session is held. Any report required by this paragraph shall identify the title of the position … (Gov. Code, § 54957.1, subd. (a) (5).)

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Appointment/Evaluation

Reporting Out:

- Must report the vote of every member present
- Must provide copies of contracts, agreements or other approved documents to a requester at time session ends (if prior written request on file), otherwise next day

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Employee Discipline

- Deferred Reporting Out
  - The report of a dismissal or of the nonrenewal of an employment contract shall be **deferred** until the first public meeting following the exhaustion of administrative remedies, if any (Gov. Code, § 54957.1, subd. (a)(5).)
- Settlements

Public Employee Discipline/Dismissal/Release
(Gov. Code, § 54957, subd. (b)(1))

Conference With Legal Counsel – Existing Litigation
(Gov. Code, § 54956.9, subd. (d)(1)):
Name of Case: [Case Number]

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Labor Negotiations

- Labor negotiations may be discussed in closed session:
  - Board may discuss 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 with designated representative (Gov. Code, § 54957.6, subd. (a).)

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Labor Negotiations (cont.)



- Does the Brown Act apply?
  - Yes, for negotiations involving *unrepresented* employees
  - No, for negotiations involving *represented* employees

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Labor Negotiations (cont.)

- *Unrepresented* Employees:
  - Closed session may be held with a District's representative regarding negotiations with *unrepresented* employees to discuss salaries, salary schedules, or compensation in the form of fringe benefits

Conference with Labor Negotiators (Gov. Code, § 54957.6, subd. (a).)
Agency Designated Representative: [Name]
Unrepresented employee(s): [Title]

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Labor Negotiations (cont.)

- *Represented* Employees:
  - Compliance with the Brown Act is not required for discussions regarding negotiations with *represented* employees (Gov. Code, § 3549.1.)

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Labor Negotiations (cont.)

Brown Act Exemption in Practice for *Represented* Employees:

- Superintendent can poll Board members by email or phone to provide updates on union negotiations or seek direction
- Board can discuss labor negotiations during a closed session even if negotiations were not included on the agenda
- Board could convene a Board meeting without posting an agenda
- Board could discuss negotiations outside geographic boundaries of the District

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Labor Negotiations (cont.)

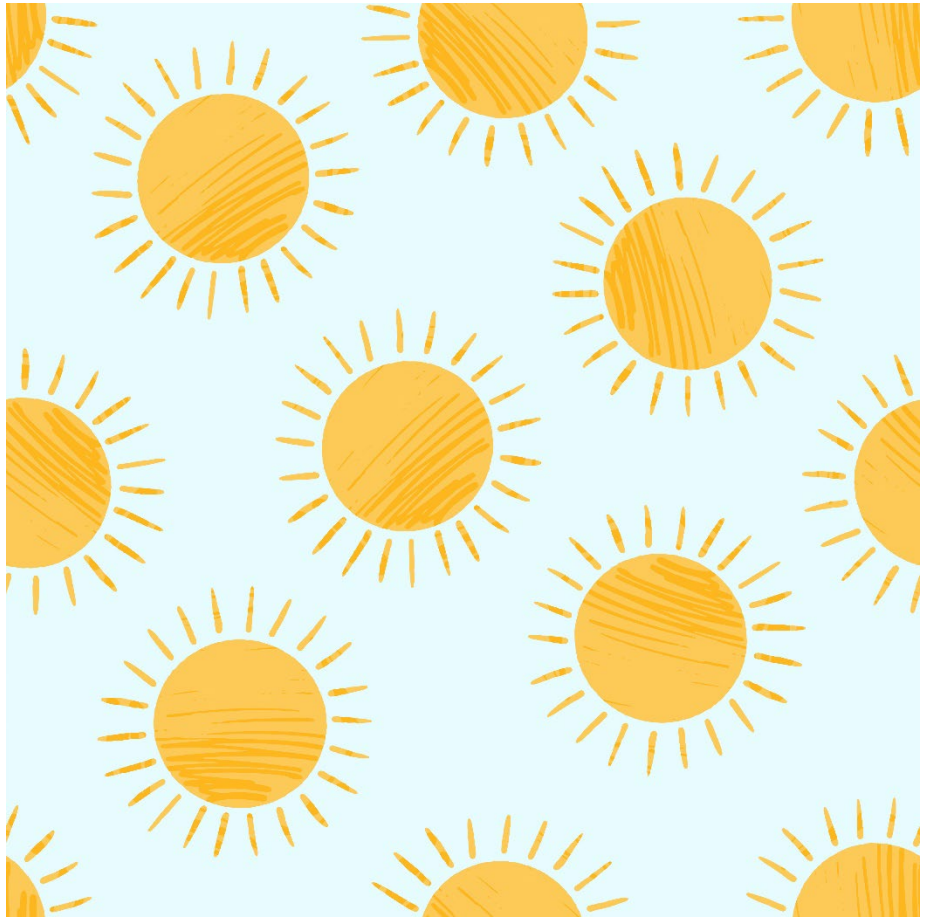
- Best Practices for *Represented* Employees:
  - If time allows, should still include in closed session agenda
  - Can be during regular or special meeting

Conference with Labor Negotiators (Gov. Code, § 54957.6, subd. (a).)
Agency designated representative: [Title]
Employee organization: [CTA, CSEA, etc.]

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Labor Negotiations (cont.)

- Don’t forget the sunshine for represented groups
- Be careful to stay focused on negotiations during the closed session – not meant for general budget and/or layoff discussions



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Cabinet-Level Employment Contracts

- Governing boards may meet in closed session to discuss the terms of employment and compensation for unrepresented employees
- For cabinet-level employees, there are certain special rules that apply:
  - Contract ratification in open session
  - Regular meeting requirement
  - No consent agenda

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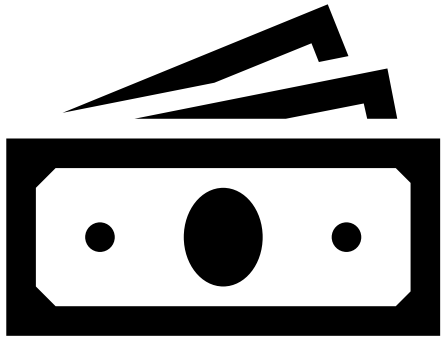
Cabinet-Level Employment Contracts (cont.)

- Contract Ratification in Open Session:
  - All contracts of employment with a superintendent, deputy superintendent, assistant superintendent, associate superintendent… or other similar chief administrative officer or chief executive officer of a local agency **shall be ratified in an open session of the governing body which shall be reflected in the governing body's minutes** (Gov. Code, § 53262, subd. (a).)

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Cabinet-Level Employment Contracts (cont.)

- Regular Meeting Requirement:
  - The Brown Act **prohibits a board from holding a special meeting** "regarding the salaries, salary schedules, or compensation paid in the form of fringe benefits, of a "local agency executive." (Gov. Code § 54956, subd. (b).)



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Cabinet-Level Employment Contracts (cont.)

- No Consent Agenda:
  - Prior to any action on compensation of a cabinet-level employee, the Board must orally report a summary of a recommendation for final action (Gov. Code § 54953, subd. (c)(3).)
  - Must be done during the open session of the meeting in which the action is to be taken

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Student Issues – Education Code

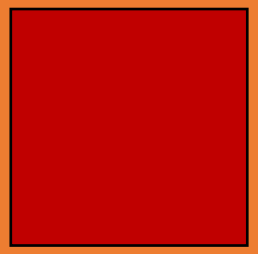
The Brown Act does not directly address student matters but defers to the Education Code (Government Code § 54962)

Four Education Code sections address governing board consideration of student matters:

1. Section 35146 – Covers suspension, disciplinary action and any other action against a student except expulsion
2. Section 48912(b) – Same as 35146
3. Section 72122 – Similar to 35146, for community college districts
4. Section 48918(c) – Covers expulsions

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Student Issues – Education Code



Education Code sections 35146 and 48912 address all student-related matters except expulsion:



The Board must hold a closed session when considering suspension, discipline, or "any other action except expulsion in connection with any pupil of the school district, if a public hearing…would lead to the giving out of information concerning school pupils which would be in violation of the…[student record privacy requirements of the Education Code]," unless the parent has made a request for a public hearing as provided for in these sections.

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Student Issues – Education Code

- Before calling a closed session, the Board must notify the parent/guardian/student, by certified/registered mail or in person, of the Board's intent to hold a closed session
- Student/parent/guardian must request in writing, within 48 hours of receipt of the Board's notice, that the matter be heard in a public (open) meeting
- Any discussion at a public meeting that might conflict with the right to privacy of any other student shall in closed session
- Whether the matter is considered in closed or open session, the Board's final action shall be taken in a public meeting, and the result of such action shall be a public record. See below re: not using the student's name in public
- Note: the requirements under section 72122 for community colleges are the same

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Student Issues – Education Code

Procedural requirements under section 48918 for expulsions:

- The Board shall hold an expulsion hearing in closed session unless the student requests in writing five (5) days before the hearing that it be in open session (subd. (c)(1))
- Regardless of whether the hearing is conducted in open or closed session, the Board may meet in closed session to deliberate and determine whether the student should be expelled (subd. (c)(1))
- If the Board admits any other person to a closed deliberation, the parent/guardian/student and counsel shall also be allowed to attend (subd. (c)(2))
- Final action to expel a student shall be taken only in public (open) session (subd. (j)). See below re: not using the student's name in public

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Privacy Concerns

Both state and federal law strictly protect student privacy and confidentiality:

- California Education Code sections 49060 *et seq*. Under section 49076, only designated persons may receive student record information without parental consent or a court order
- Federal law is similar in its protection of student records (Family Educational Rights and Privacy Act (FERPA, 20 USC § 1232g))

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Privacy Concerns

State and federal laws governing student records and privacy form the basis for the requirement that all student matters be heard by the Board in closed session, unless the student/parent/guardian requests an open session

The respect for privacy also requires that other students should not be discussed in an open session

The student who is the subject of the closed session should always be referred to publicly (on the agenda, final action, and any other public communication) without using the student's name, e.g., by a student ID # or similar alternative

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Closed Session Matters

Typical student closed session matters include the following:

- Expulsions (Ed. C. § 48918)
- Suspensions (Ed. C. § 48912)
- Grade change request appeals (Ed. C. § 49066)
- Record change request appeals (Ed. C. § 49070)
- Appeals of complaints and UCPs (Ed. C. § 35146)
- Interdistrict attendance request appeal (where applicable) (Ed. C. § 46600.2(a)(3))
- Review of the content of an approved or adopted assessment (Ed. C. § 60617)

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Typical BPC Board Items

- Business
  - Vendor Contracts
  - Lease Financing (Copiers and Equipment)
- Property
  - Purchase and Sale Agreements
  - Leases and Cell Site Agreements
- Construction
  - Progress Payments/Change Orders
  - RFP/Q for Construction Services
  - Updates on Status of Construction Program

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Special BPC Board Items

- CEQA (California Environmental Quality Act)
- School Consolidation/Closure
- Surplus Property Disposition/7-11 Committee
- Workforce Housing
- Eminent Domain

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How to Agendize BPC Board Items

- Consent
- Information/Discussion
- Action
- Closed Session

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How to Agendize BPC Board Items

Item	Consent	Information	Action	Closed
Vendor Contracts	X	X	X	
Lease Financing		X	X	
PSA/Leases	X	X	X	X
Progress Payments	X	X	X	
RFP Construction Contract Award		X	X	
CEQA		X	X	
School Closure		X	X	
Surplus Land/7-11		X	X	
Workforce Housing		X	X	X
Eminent Domain		X	X	X

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Limited BPC Closed Session Items

- Relevant closed session exemptions:
  - Existing Litigation
  - Anticipated Litigation
  - Direction to Real Property Negotiator
- ***Best Practice**: Be sure to use the safe harbor agenda item language set forth in the Brown Act.*

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Reporting Out

- Board must publicly report action taken in closed session
  - "Action taken" is defined in the Act
  - Must report the vote of every member present
  - Must provide copies of contracts, agreements or other approved documents to a requester at time session ends (if prior written request on file), otherwise next day
- Specific requirements for reporting out depending on type of action taken
- Special rules for settlement agreements.

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Resolutions and Public Hearings

- Many BPC matters are presented through resolutions and/or require a public hearing
- Resolution Best practices:
  - Check relevant statutes for actions that must be take via resolution
  - Even if statute does not require resolution, consider using one if findings by the Board are required
  - If topic is controversial, use resolution recitals to “tell the story”
- Public Hearing Best Practices
  - Note the difference between a public “hearing” and a public “meeting”
  - Confirm and follow the posting and notice rules for public hearing
  - Public hearings should be a stand-alone agenda item

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Questions?



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