OPEN PUBLIC MEETING REQUIREMENTS UNDER THE BROWN ACT AND CALIFORNIA EDUCATION CODE

I. INTENT

A. Government Code Section 54950 clearly states the legislative intent underlying the Brown Act:

> **Public agencies in this state exist to aid in the conduct of the people's business. It is the intent of the law that their actions be taken openly and their deliberations be conducted openly.**
>
> **The people of this state do not yield their sovereignty to the agencies which serve them. The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may retain control over the instruments they have created.**

It is in light of this legislative policy that the Brown Act has been liberally interpreted.

B. The courts have interpreted this statement of legislative intent in the following manner.

The purpose of the Brown Act is to facilitate public participation in local government and to curb misuse of democratic process by secret legislation by public bodies. [Boyle v. City of Redondo Beach (1999) 70 Cal.App.4th 1109, 1116.]

1. Under the Brown Act -"interested persons" entitled to sue to enforce its provisions are not confined to residents within the jurisdiction of the legislative body involved, nor to taxpayers therein. [McKee v. Orange Unified School Dist. (2003) 110 Cal.App.4th 1310, 1316.]

C. At the November 2, 2004 election, the voters of California adopted Proposition 59, which adds Subdivision (b) to Section 3 of Article I of the California Constitution. Proposition 59 does the following:

1. Adds to the state Constitution the requirement that meetings of public bodies and writings of public officials and agencies be open to the public.

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2. Provides that statutes and rules furthering public access be broadly construed, or narrowly construed, if they limit public access.

3. Requires that new statutes and rules limiting access contain findings justifying the necessity of the limitation.

4. Preserves the constitutional rights of privacy, due process, and equal protection; and expressly preserves existing constitutional and statutory limitations restricting access to certain meetings and records of government bodies.

II. THE "RULE" - GOVERNMENT CODE SECTION 54953

A. All meetings of the legislative body of a local agency shall be open and public, and all persons shall be permitted to attend any meeting of the legislative body of a local agency, except as otherwise provided in this chapter. If a given entity fits within any definition of a legislative body, then it is subject to the various requirements of the Brown Act.

B. Government Code Section 54952 defines a "legislative body" to include the following:

1. The governing board of a school or community college district, ROP or JPA, etc. [Government Code Section 54952(a).]

2. Commissions, committees, boards, or other bodies of a local agency, whether permanent or temporary, decision-making or advisory, created by resolution or some other formal action of a legislative body. [Government Code Section 54952(b).]

a. E.g., personnel commissions.

b. E.g., academic senates. [66 Ops.Atty.Gen. 252 (1983).]

c. E.g., Community college student body associations. Such organizations are advisory to district boards and are therefore a legislative body and subject to the Brown Act. [75 Ops.Atty.Gen. 145 (1992).]

3. "Legislative body" does not include advisory committees composed solely of the members of the legislative body which are less than a quorum of the legislative body. [Government Code Section 54952(b).]

a. Not all less-than-a-quorum committees are excluded from the definition of a "legislative body." To be excluded, the committee must:

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1) be "advisory" only;

2) not be "decision-making"; and

3) not be a standing committee.

E.g., an ad hoc committee comprised solely of less than a quorum of the board created for the purpose of advising the full board on the qualifications of candidates for appointment to a vacant position is not a legislative body. [Henderson v. Board of Education (1978) 78 Cal.App.3d 875.]

b. If the ad hoc committee includes members who are not members of the board, the Act will apply.

c. Committees appointed by the superintendent, without any formal action by the board, are not covered by the Act. However, the board must not in any way "instigate" the formation of the committee; the concept of "formal action" is broadly construed. [Joiner v. City of Sebastopol (1981) 125 Cal.App.3d 799, 805; and Frazer v. Dixon Unified School District (1993) 18 Cal.App.4th 781, 792-793.]

d. Where a school district's board of trustees has formed a committee, known as the district liaison council, consisting of eight representatives from the community, seven employees of the district, and one student, to interview candidates for the position of district superintendent, the committee is subject to requirements of the Brown Act (e.g., the notice, agenda and public participation requirements). However, where appropriate, the committee may also rely on the personnel exception in Section 54957 and meet in closed session when it is interviewing candidates, reviewing resumes, discussing qualifications, and arriving at a decision prior to the actual appointment. [80 Ops.Atty.Gen. 308 (1997).]

e. Meetings between unions representing a community college district's employees and the district's joint labor/management benefits committee (JLMBC) were within the Educational Employment Relations Act (EERA) "meeting and negotiating discussion between a public school employer and a recognized or certified employee organization" exemption from Ralph M. Brown Act open meeting requirements, since the JLMBC was a designated representative of the district. [Cal.Gov.Code §§ 3543.3, 3549.1(a), and Californians Aware v. Joint Labor/Management Benefits Com., (2011) 200 Cal.App.4th 972.]

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The Joint Labor Management Benefits Committee ("JLMBC") of the Los Angeles Community College District was created by the District's collective bargaining agreements, and not by the Board's policy on the same subject.

1) The Court of Appeal and the Attorney General distinguished the District's JLMBC, created through the collective bargaining process, from the textbook review committee created by board policy in Frazer, supra. [92 Ops.Atty.Gen. 102, 107 (2009).]

f. The Act applies to any "other body" a local agency creates unless the other body consists of (1) less than a quorum of the local agency's members, and (2) is only advisory. [Taxpayers for Livable Communities v. City of Malibu (2005) 126 Cal.App.4th 1123.]

g. Councils and schoolsite advisory committees established pursuant to Sections 52012 (repealed), 52065 (repealed), 52176 (district-wide advisory committees on bilingual education), and 52852 (school site councils), subdivision (b) of Section 54425 (school advisory committee on compensatory education), Sections 54444.2 (migrant education parent advisory council), 54724 (repealed), and 62002.5 (parent advisory committee and school site councils), and committees formed pursuant to Section 11503 (parent involvement programs under Chapter 1 of the ESEA), or Section 2604 of Title 25 of the United States Code (repealed), are subject to some aspects of the Brown Act. [Education Code Section 35147(b).] Section 35147(c) provides the following modified rules for councils and committee described above:

1) Any meeting held by a council or committee specified in above 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.

2) Notice of the meeting shall be posted at the schoolsite, 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.

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3) The council or committee may not take any action on any item of business unless that item appeared on the posted agenda or unless the council or committee members 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.

4) 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 the 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.

5) 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.

6) Any materials provided to a schoolsite council shall be made available to any member of the public who requests the materials pursuant to the California Public Records Act (Chapter 3.5 (commencing with Section 6250) of Division 7 of Title 1). [Education Code Section 35147(d).]

4. 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 other formal action of a legislative body, are legislative bodies for purposes of the Brown Act.

5. A board, commission, committee, or other multi-member body that governs a private corporation, limited liability company, or entity is a "legislative body" if it:

   a. Is created by the elected legislative body in order to exercise authority that may lawfully be delegated by the elected body to a private entity [Government Code Section 54952(c)(1).];

   or

   b. Receives funds from a local agency and the membership of the governing body includes a member of the legislative body of the local agency appointed by the legislative body of the local agency. [Government Code Section 54952(c)(2).]

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6. Even though a nonprofit corporation, which administered subsidized childcare and education services pursuant to a contract with a board of education, was not a legislative body within the meaning of the Brown Act, provisions in the nonprofit corporation's contracts with the board requiring the corporation to comply with the Brown Act "to the extent of the publicly funded program(s)" it administered, were enforceable by members of the public in a breach of contract action for declaratory and injunctive relief, since the intended third-party beneficiary of the contractual provisions was the general public. [Service Employees Inter. Union, Local 99 v. Options--A Child Care and Human Service Agency, (2011) 200 Cal.App.4th 869, 879.]

7. The governing board of a jointly-administered trust fund, whose members are appointed equally by a city and a labor union representing city employees and whose purpose is to address labor-management issues relating to the health, safety, and training of city employees, is not required to hold its meetings open to the public. [87 Ops.Cal.Atty.Gen. 19 (2004).]

8. Other provisions of law may subject certain organizations to the Brown Act, e.g., community college district auxiliary organizations. [Education Code Section 72674.]

C. "Member of a legislative body of a local agency" is defined to include any person elected to serve as a member of a legislative body who has not yet assumed the duties of office. Such persons must conform their conduct to the requirements of the Act, and will be treated, for purposes of enforcing the Act, as if they had already assumed office. [Government Code Section 54952.1.]

A legislative body may require that each member be given a copy of the Act. Similarly, someone who has been elected to serve on the body, but has not yet assumed office, may be given a copy of the Act.

III. WHAT IS A MEETING?

A. The 1993 Amendments to the Act added a specific definition of a meeting. This definition codified prior interpretations of the Act by the Attorney General and the state appellate courts.

1. A meeting is a gathering of a quorum of the legislative body, no matter how informal, where business is discussed or transacted. [Sacramento Newspaper Guild v. Sacramento County Board of Supervisors (1978) 263 Cal.App.2d 41; and 61 Ops.Atty.Gen. 220 (1978).] (Luncheon meetings where public business is discussed are subject to the Brown Act.)

a. Deliberation in this context connotes not only collective decision-making, but also the collective acquisition and exchange of facts preliminary to the ultimate decision. [Frazer, 18 Cal.App.4th at 794.]

2. Meeting includes "study," "discussion," "informational," "fact-finding," or "pre-meeting" gatherings of a quorum of the members of a board. Whether action is or is not taken is irrelevant. [42 Ops.Atty.Gen. 61 (1963).]

3. The passive receipt by individual board members of their mail does not constitute a meeting. [Roberts v. City of Palmdale, (1993) 5 Cal.4th 363, 376.]

B. "Old" definition of a meeting and prohibited communications:

1. Any congregation of a majority of the members of the legislative body at the same time and place to hear, discuss, or deliberate upon any item that is within the subject matter jurisdiction of the legislative body. [Former Government Code Section 54952.2(a).]

2. Except as authorized by Section 54953, any use of direct communication, personal intermediaries, or technological devices that is employed by a majority of the members of the legislative body **to develop a collective concurrence as to action to be taken** on an item by the members of the legislative body is **prohibited**. [Emphasis added.] [Former Government Code Section 54952.2(b).]

3. See, Wolfe v. City of Fremont (2006) 144 Cal.App.3d 533, which held that a "collective concurrence" was an element of a violation of former Section 54952.2(b), and that a "collective concurrence" required not only that a majority of the council members share the same view, or "concur," but also that the members have reached that shared view after interaction between or among themselves, whether directly or through an intermediary." The Legislature overruled Wolfe, at least in part by its 2009 amendments to Government Code Section 54952(a) and (b).

C. Current definition of a meeting and prohibited communications.

1. By the enactment of Chapter 63, Statutes of 2008 (S.B. 1732), effective January 1, 2009, the Legislature repealed a significant portion of Wolfe and established a new definition for a meeting in Section 54952.2(a) and imposed new restrictions in Section 54952.2(b).

a. As used in this chapter, "meeting" means any congregation of a majority of the members of a legislative body at the same time and location, *including teleconference location as permitted by Section 54953*, to hear, discuss, deliberate, *or take action* on any item that

is within the subject matter jurisdiction of the legislative body. (Emphasis added.)

b. Correspondingly, the prohibitions in Section 54952.2(b) have been significantly amended to read as follows:

> *(b)(1) 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.* (Emphasis added.)

2. The amendments added a Section 54952.2(b)(2) which reads as follows:

> *Paragraph (1) shall not be construed as preventing an employee or official of a local agency, from engaging in separate conversations or communications outside of a meeting authorized by this chapter with members of a legislative body in order to answer questions or provide information regarding a matter that is within the subject matter jurisdiction of the local agency, if 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.* (Emphasis added.)

3. Whereas Wolfe held that a violation of the prohibition on serial meetings occurs only if a series of meetings by members of a body results in a collective concurrence, new Section 54952.2 would instead prohibit a majority of members of a legislative body of a local agency from using, outside a meeting authorized by the act, 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.

4. The new legislation also contains the Legislature's declaration that it disapproves the holding in the Wolfe case to the extent it construes the prohibition on serial meetings to apply only where there is a collective concurrence, and would state its intention that the changes made by this bill supersede the holding in Wolfe.

a. Section 1(a) of Chapter 63 in uncodified language provides as follows:

> (a) The Legislature hereby declares that it disapproves the court's holding in Wolfe v. City of Fremont (2006) 144 Cal.App.4th 533, 545, fn. 6, *to*

the extent that it construes the prohibition against serial meetings by a legislative body of a local agency, as contained in the Ralph M. Brown Act . . . to require that a series of individual meetings by members of a body actually result in a collective concurrence to violate the prohibition *rather than also including the process of developing a collective concurrence as a violation of the prohibition*. (Emphasis added.)

b. Section 1(b) makes clear that the new language in Section 54952.2(a) and (b) supersedes the holding in Wolfe.

D. Serial, but less than a quorum meetings of a district's governing board members with a mediator in an effort to reach a settlement for the termination of the district's president, constituted the collective acquisition and exchange of facts preliminary to an ultimate decision. The court found the mediator to be an intermediary for purposes of Section 54952.2(b). [Page v. MiraCosta Community College Dist. (2009) 180 Cal.App.4th 471.]

1. The meetings at issue in Page also violated the closed session exception for litigation., Section 54956.9, discussed below, since they involved the Board meeting not only meeting with the district's legal counsel, but also a mediator.

E. In Galbiso v. Orosi Public Utility Dist. (2010) 182 Cal.App.4th 652, 668 the court held that comments made by the utility district's attorneys did not give rise to an inference that a secret meeting took place. One of the referenced comments was merely a statement in The Fresno Bee to the effect that OPUD "probably will consider" going forward with a tax sale. This comment was made in the context of the protracted litigation between the district and Ms. Galbiso.

F. The requirements of the Brown Act do not apply to the following:

1. Individual contacts or conversations between a member of a legislative body and any other person *that do not violate subdivision (b) of Section 54952.2*. [Government Code Section 54952.2(c)(1).]

2. The attendance of a majority of the members of a legislative body at a conference or similar gathering open to the public that involves a discussion of issues of general concern to the public or agencies of the type represented by the legislative body, provided a majority of the members do not discuss among themselves, other than as part of the scheduled program, business of a specific nature that is within the subject matter jurisdiction of the local agency. This paragraph is not intended to allow members of the public free admission to a gathering where the

organizers have required the other participants to pay a fee as a condition of attendance. [Government Code Section 54952.2(c)(2).]

3. The attendance of a majority of the members of a legislative body at an open and publicized meeting organized to address a topic of local community concern by a person or organization other than the local agency, provided that a majority of the members do not discuss among themselves, other than as part of the scheduled program, business of a specific nature that is within the subject matter jurisdiction of the legislative body. [Government Code Section 54952.2(c)(3).]

4. The attendance of a majority of the members at an open and noticed meeting of another body of the local agency, or at an open and noticed meeting of a legislative body 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 legislative body. [Government Code Section 54952.2(c)(4).]

5. The attendance of a majority of the members at a purely social or ceremonial occasion 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 legislative body. [Government Code Section 54952.2(c)(5).]

6. The attendance of a majority of the members of a legislative body at an open and noticed meeting of a standing committee of that body, provided that the members of the legislative body who are not members of the standing committee attend only as observers. [Government Code Section 54952.2(c)(6).]

   a. Members of the legislative body of a local public agency may not ask questions or make statements while attending a meeting of a standing committee of the legislative body "as observers." [81 Ops.Atty.Gen. 156 (1998).]

   b. Members of the legislative body of a local public agency may not sit in special chairs on the dais while attending a meeting of a standing committee of the legislative body "as observers." Id.

G. Effective January 1, 2012: When two legislative bodies of the same local agency convene meetings to take place either simultaneously or subsequently, and one body is a quorum of the other, the compensation the members will receive for the meeting must be announced. [Government Code Section 54952.3.]

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IV. PUBLIC MEETING PROCEDURES

A. Certain boards must meet at least monthly and must, by rule, fix the time and place for their regular meetings. [Education Code Sections 1011, 35140, 35144, and 72000(c)(4).] [Government Code Section 54954.]

1. The governing board of any union or joint union high school district, shall hold its regular meetings either monthly or quarterly. The governing board of any other high school district, shall hold its regular meetings monthly. [Education Code Section 35141.]

B. Location of Meetings [Government Code Sections 54954(b) and (c).]

1. Regular and special meetings of school and college district boards must be held within the territory of the district, except in order to:

a. Comply with state or federal law or a court order, or attend a judicial or administrative proceeding to which the local agency is a party.

b. Inspect real or personal property which cannot conveniently be brought within the boundaries of the district provided that the topic of the meeting is limited to items directly related to the real or personal property.

c. Participate in meetings or discussions of multi-agency significance that are outside the jurisdictional boundaries of the district. However, the meeting must be held within the territory of one of the participating agencies and be noticed by all participating agencies as provided for in this chapter.

d. Meet in the closest meeting facility if the local agency has no meeting facility within the boundaries of the district, or at the principal office of the local agency if that office is located outside the territory over which the agency exercises jurisdiction.

e. Meet with state or federal officials, where a local meeting would be impractical, solely to discuss legislative or regulatory matters affecting the district over which the state or federal officials have jurisdiction.

f. Meet at or near a facility owned by the agency located outside its territory, if the meeting is limited to items directly related to that facility.

g. Meet at the office of the agency's attorney for a closed session on pending litigation, when to do so would reduce fees or costs.

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2. Additionally, school board meetings may be held outside the district for the following purposes:

   a. Attend a conference on non-adversarial collective bargaining techniques, e.g., CFEIR.

   b. Interview members of the public residing in another district regarding the potential employment of an applicant for the position of the superintendent of that district.

   c. Interview a potential employee from another district. [Government Code Section 54954(c).]

3. Community college districts must hold their meetings within their own jurisdiction, except if certain, very limited exceptions apply:

   a. Meeting with another local agency.

   b. Meeting in closed session with counsel to discuss pending litigation. [Education Code Section 72000(d)(2)(A) and (B).]

   c. It is not clear whether the language in Education Code Section 72000(d)(2) is intended to be the only authority for holding community college district board meetings outside of the district, or whether the exceptions in Government Code Section 54954(b) also provide authority for holding specified meetings outside of the District.

4. A JPA must meet within the territory of at least one of its member agencies, unless one of (a) through (g) above applies. [Government Code Section 54954(d).]

5. If, by reason of a fire, flood, earthquake, or other emergency, it is unsafe to meet in the usual place, the meetings shall be held for the duration of the emergency at the place designated by the presiding officer or his designee, in a notice to the local media that have requested notice, by the most rapid means available at the time. [Government Code Section 54954(e).]

C. All meetings of a legislative body of a local agency that are open and public shall meet the protections and prohibitions contained in the Americans with Disabilities Act of 1990 ("ADA"). [Government Code Section 54953.2, citing 42 USC Section 12132.]

D. Mailed Notice of Meetings.

1. Any person may request that a copy of the agenda or the documents constituting the agenda packet be mailed to that person. If requested, the agenda and documents in the agenda packet shall be made available in appropriate alternative formats to person with a disability as required by

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the ADA, 42 USC Section 12132, and the federal rules and regulations adopted in implementation thereof. Upon receipt of the written request, the legislative body, or its designee, shall cause the requested materials to be mailed at the time the agenda is posted, or upon distribution to all, or a majority of all, of the members of a legislative body, whichever occurs first. [Government Code Section 54954.1.]

2. The agenda shall include information regarding how, to whom, and when, a request for disability-related modification or accommodation, including auxiliary aids or services, may be made. [Government Code Section 54954.2(a)(1).]

3. Any request to receive agenda materials shall be valid for the calendar year in which the request is filed, and must be renewed following January 1 of each year. The legislative body may establish a fee for mailing the agenda or agenda packet, which fee shall not exceed the cost of providing the service.

4. Failure of the requesting person to receive the agenda or agenda packet pursuant to this section shall not constitute grounds for invalidation of the actions of the legislative body taken at the meeting for which the agenda or agenda packet was not received.

E. Special Meetings - 24-Hour Notice [Government Code Section 54956.]

1. The board may only consider business specified in the notice. [Government Code Section 54956.]

2. The board may hold a closed session as part of a special meeting.

3. Notice of the special meeting must be mailed or delivered to the media and posted 24 hours in advance of the meeting. The notice must also be posted on the district’s website. (Effective January 1, 2012.)

4. A special meeting may be called by either the president of the board or a majority of the board.

5. A special meeting may not be called regarding the salaries, salary schedules, or compensation paid in the form of fringe benefits, of a local agency executive, as defined in subdivision (d) of Section 3511.1. However, this subdivision does not apply to a local agency calling a special meeting to discuss the local agency's budget. (Effective January 1, 2012.)

F. Emergency Meetings in Emergency Situations [Government Code Section 54956.5, as amended in 2002.]

1. Where an emergency involves the potential for disruption, or threatened disruption, of public facilities, a board may hold an emergency meeting without providing normally-required notice and/or posting.

2. An "emergency situation" is defined as either:

   a. An "emergency," defined as:

      1) Work stoppage;

      2) Crippling activity; or

      3) Other activity that severely impairs public health, safety, or both, as determined by a majority of the members of the Governing Board.

   b. A "dire emergency," defined as:

      1) Crippling disaster;

      2) Mass destruction;

      3) Terrorist act; or

      4) Threatened terrorist activity that poses peril so immediate and significant that requiring the board to provide one-hour notice may endanger public health, safety, or both, as determined by a majority of the board.

3. At least one-hour notice to media (those who previously requested notice of special meetings) is required. However, in a "dire emergency," notice need only be made at or near the time the presiding officer or designee notifies other board members. Notice must be made by telephone, unless telephone service is not functioning. In such case, notice shall be made of the meeting and any actions taken as soon as possible thereafter.

4. Board may meet in closed session following a 2/3 vote of the board or unanimous if less than 2/3 of members are present.

5. Special meeting requirements of Section 54956 are applicable except 24-hour notice.

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G. Agendas

1. The agenda shall specify the time and location of the regular meeting and shall be posted in a location that is freely accessible to members of the public.

2. An agenda must be conspicuously posted at least 72 hours prior to the time of regular meetings and on the district's web site. The web site requirement is new as of January 1, 2012. [Government Code Section 54954.2(a).]

3. The location where the agenda is posted must be publicly accessible at all times during the required 72-hour period. For example, the agenda cannot be posted inside a building that is locked and inaccessible to the public during evening hours. [78 Ops.Atty.Gen. 327 (1995).]

    a. The agenda of a meeting may be posted on a touch-screen electronic kiosk accessible without charge to the public 24 hours a day, 7 days a week, in lieu of posting a paper copy of the agenda on a bulletin board. [88 Ops.Atty.Gen. 218 (2005).]

4. A board may not change its posted agenda within the 72-hour period preceding a regular meeting unless one of the following exceptions applies:

    a. A majority determines that an emergency exists pursuant to Government Code Section 54956.5;

    b. A two-thirds vote of the board members present determines that there is a need to act immediately and the need to take action came to the district's attention after the posting of the agenda;

    c. The item was previously posted for a meeting occurring not more than five days prior to the meeting when the action is taken, and at the prior meeting the item was continued to the meeting where action was taken. [Government Code Section 54954.2(b).]

    If no exception applies, the board must either postpone consideration of the item for at least 72 hours or call and notice a special meeting.

5. The agenda must reasonably apprise the public of the matters to be considered in sufficient detail to allow the public to determine whether to participate at the meeting. [Carlson v. Paradise Unified School District (1971) 18 Cal.App.3d 196.] (Action taken pursuant to a defective agenda may be void.)

6. The Act requires that the agenda contain a brief general description of each item of business to be transacted or discussed at the meeting,

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including items to be discussed in closed session. A "brief general description" of an item generally need not exceed 20 words.

7. In Moreno v. City of King (2005) 127 Cal.App.4th 17, the agenda for a special meeting stated that the city council would only consider, in closed session, the employment contract of a public employee. Six days later, the city manager gave the employee a memorandum that contained the details of five alleged incidents of misconduct that had led the city manager to terminate his employment. The court held that the trial court's finding that the special meeting agenda violated Section 54954.2 was equivalent to a finding that it violated Section 54956 because the two statutes contained equivalent requirements. The trial court did not err in finding that the agenda was inadequate because its description provided no clue that the dismissal of a public employee would be discussed at the meeting.

   a. The city did not cure its failure to agendize the issue of the employee's dismissal when the only action reported after a later meeting was the denial of the employee's tort claim.

   b. The employee was deprived of the opportunity to respond to specific accusations, in violation of Cal. Government Code Section 54957, because the city failed to give him advance notice that it would be hearing the city manager's accusations at its closed meeting.

8. The Act imposes limitations on board members' responses to public comments. [Government Code Section 54954.2(a).] In response to public comments, board members and staff may only:

   a. Briefly respond to statements made or questions posed by persons making public comments;

   b. Ask questions for clarification or make a brief announcement;

   c. Provide a reference to staff or other resources for factual information;

   d. Request staff to report back to the body at a later meeting; or

   e. Direct staff to place the matter on a future agenda.

9. Agendas of public meetings, when distributed to all, or a majority of all, of the members of a legislative body of a local agency by any person in connection with a matter subject to discussion or consideration at an open meeting of the body, are disclosable public records under the California Public Records Act, Government Code Section 6250 et seq., and shall be made available upon request without delay. [Government Code Section 54957.5, as amended by AB 2647 (2022).]

10. If a writing is a public record related to an agenda item for an open session of a regular meeting of the legislative body of a local agency and is distributed to all, or a majority of all, of the members of a legislative body of a local agency less than 72 hours before that meeting, the writing must be made available to the public for inspection, pursuant to the following requirements [Government Code Section 54957.5(b)(1).]:

    a. A local agency shall make any writing described in Section 54957.5(b)(1) available for public inspection at a public office or location that the agency shall designate for this purpose.

    b. Each local agency shall list the address of this office or location on the agendas for all meetings of the legislative body of that agency. The local agency also may post the writing on the local agency's Internet Web site in a position and manner that makes it clear that the writing relates to an agenda item for an upcoming meeting.

11. A local agency is not required to comply with the two requirements listed in Section 10(a) above if all of the following requirements are met:

    a. An initial staff report or similar document containing an executive summary and the staff recommendation, if any, relating to that agenda item is made available for public inspection at the office or location designated by the local agency at least 72 hours before the meeting.

    b. The local agency immediately posts any public record distributed less than 72 hours prior to a meeting related to an open session agenda item on the local agency’s website in a position and manner that makes it clear that the writing relates to an agenda item for an upcoming meeting.

    c. The local agency lists the web address of the local agency’s internet website on the agendas for all meetings of the legislative body of that agency.

    d. The local agency makes the physical copies of the 72-hour document available for public inspection, beginning the next regular business hours for the local agency, at the office or location designated by the local agency. This subclause is satisfied only if the next regular business hours of the local agency commence at least 24 hours before that meeting.

12. Documents prepared by the district must be made available for public inspection at the meeting; documents prepared by any other person must be made available after the meeting. [Government Code Section 54957.5(c).]

13. Nothing in the Act prevents the district from charging a fee or deposit for a copy of a public record as authorized by the Public Records Act. [Government Code Sections 54957.5(d) and 6253.]

14. No additional charge may be imposed on persons with disabilities in order to make these documents available in appropriate alternative formats. [Government Code Sections 54957.5(b)(2) and (d).]

H. Public Participation [Government Code Section 54954.3, and Education Code Sections 35145.5, and 72121.5.]

1. Members of the public must be allowed to place matters directly related to district business on the agenda.

2. Members of the public must be able to address the board regarding items on the agenda before or during the governing board's consideration of the item. [Education Code Section 35145.5, and Government Code Section 54954.3.] However, Education Code Section 72121.5, relating to community college districts, provides that members of the public must be able to address the board regarding items on the agenda as such items are taken up.

3. In Lindelli v. Town of San Anselmo (2003) 111 Cal.App.4th 1099, 1109, the court held that while Government Code Section 54954.3 permits members of the public to provide input, it does not mandate that they do so. Nothing in the plain language of Government Code Section 54954.3 supported the city's proposed construction--that members of the public must raise a given legal concern about a potential action before any course of action has been adopted, or be forever barred from raising that concern in court.

4. Every regular meeting agenda shall provide an opportunity for members of the public to address the board on any item of interest to the public, within the subject matter jurisdiction of the board.

   a. No action shall be taken until the matter is properly noticed on an agenda or an exception to the 72-hour rule is established.

   b. Every notice of a special meeting shall provide an opportunity for members of the public to directly address the legislative body concerning any item appearing on that agenda before or during consideration of that item. [Government Code Section 54954.3(a).] However, with respect to community college districts, public comment with respect to agenda items must be allowed at the time the item is taken up by the Board. Education Code Section 72121.5 does not distinguish between speakers at a regular meeting or at a special meeting.

c. In Chaffee v. San Francisco Library Commission (2004) 115 Cal.App.4th 461, the Court of Appeal held that the Act contemplated only one public comment period per agenda, even when the agenda is covered at meetings occurring on different days.

1) The decision also assumes that speakers wishing to address a topic on the agenda will be permitted to speak when that item is before the body, and not as a group in advance of reaching the item on the agenda.

2) This statement is at odds with the practice of many bodies which require all speakers wishing to address an agenda item to speak at the beginning of meetings as a group and not at the time the agenda item is brought up. [See also, Galibiso v. Orosi Public Utility District, (2008) 167 Cal.App.4th 1063, 1079, adopting Chaffee's statement regarding allowing speakers on agenda items to speak when the item is reached, and holding that simply because public comments relate to pending litigation, does not preclude such comments.]

5. The board may adopt reasonable rules and regulations in order to ensure the proper functioning of the meeting. [75 Ops.Atty.Gen. 89 (1992); White v. City of Norwalk 900 F.2d 1421 (9th Cir. 1990); and Kindt v. Santa Monica Rent Control Board 67 F.3d 266 (9th Cir., 1995).] (Regulations governing when the public may address the board are reasonable, content-neutral time, place, and manner restrictions.)

6. In Chaffee v. San Francisco Public Library Com. (2005) 134 Cal.App.4th 109, the Plaintiff asserted that state law and a San Francisco "sunshine" ordinance required the commission to provide each speaker with up to three minutes to make comments at a meeting of the commission. At the meeting in question, the commission's president announced that public comment on each agenda item would be limited to two minutes per speaker, instead of the three minutes normally allotted to each speaker.

a. The court held that defendants did not violate the Brown Act or the sunshine ordinance in shortening the time allotted to each speaker.

b. The president stated in his declaration that before the meeting, he anticipated four agenda items would be lengthy. Based on his judgment of the time required for the commission to consider those four items and the other items on the agenda, he concluded the commission would not be able to complete its meeting in a reasonable period unless public comment was somewhat shortened. The minutes indicated that the meeting lasted more than four hours. Chaffee presented no evidence that the president did

not reasonably expect the four items he enumerated to be lengthy or that the commission did not reasonably apply its bylaws in the circumstances.

c. The Brown Act does not specify a three-minute time period for comments, and does not prohibit public entities from limiting the comment period in the reasonable exercise of their discretion. Id. at 116.

7. Dumping gallons of garbage on the floor of a schoolroom during a school board meeting was sufficient to support an arrest for disturbing a public meeting and was not speech protected by the First Amendment. [McMahon v. Albany Unified School Dist. (2002) 104 Cal.App.4th 1275.]

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8. "The legislative body . . . shall not prohibit public criticism of the policies, procedures, programs, or services of the agency, or of the acts or omissions of the legislative body. Nothing in this subdivision shall confer any privilege or protection for expression beyond that otherwise provided by law." [Government Code Section 54954.3(c).]

   a. This provision, and the Baca case discussed below, make it clear that an action for defamation will generally not lie for statements made at a public meeting.

   b. This provision raises concerns relating to privacy and reputation issues for public employees.

9. Under the Ralph M. Brown Act, the Superintendent of Schools of a high school district may not prohibit an administrative employee of the district from speaking during the public comment period of a public school board meeting on an agenda item concerning his demotion from assistant high school principal to a teaching position. [90 Ops.Atty.Gen. 47 (2007).]

10. In Baca v. Moreno Valley Unified School District, 936 F.Supp. 719 (C.D. Cal. 1996), the court held the board's policy prohibiting the airing of charges or complaints against identifiable district employees to be unconstitutional.

    a. The district's policy was similar to many found throughout the state:

    > "No oral or written presentation in open session shall include charges or complaints against any employee of the District, regardless of whether or not the employee is identified by name or by any reference which tends to identify the employee . . . . All charges or complaints against employees must be submitted to the board under provisions of board policy . . . .
    >
    > Any individual who violates this policy will be warned to discontinue his/her comments immediately. If the individual willfully interrupts the meeting by refusing to comply with the warning, the board President may authorize the removal of the individual pursuant to Government Code Section 54957.9."

b. Ms. Baca, who was active in the Mexican Political Association (MPA), accused a school principal and the district's superintendent of ignoring numerous complaints brought to them by parents and for acting in a discriminatory manner. Ms. Baca was warned and removed by Riverside County Sheriffs, who were present.

c. The court held that speech criticizing district employees, even if later proved to be defamatory, is protected by both the California and federal Constitutions from government censorship and prior restraint.

1) The public sessions of a board meeting are designated limited public forums. As a result, government may limit speech to certain subjects but may not engage in viewpoint discrimination within a given subject matter area.

2) The court found the following concerns not to be sufficiently compelling to justify limiting Ms. Baca's speech:

a) The employee's privacy rights;

b) The employee's liberty interests;

c) The district's interest in regulating its own meetings.

3) The presence of alternate means of communication between plaintiff and the board, or between plaintiff and other members of the public, was found not to justify or validate the otherwise unconstitutional policy. Specifically, since California law establishes as privileged, statements made in board meetings, requiring persons to bring complaints against district employees outside of such meetings does not provide an adequate alternate location.

11. In Holbrook v. City of Santa Monica (2006) 144 Cal.App.4th 1242, the plaintiff city councilmember sued arguing that the fact that city council meetings frequently ran late into the night and included public comment as the final order of business, violated the constitution and the Brown Act. Plaintiffs sought to compel the city council to end its meetings by 11:00 p.m.

a. The court concluded that, with respect to plaintiffs' constitutional claims and asserted violations of the Brown Act, the causes of action arose from protected activity. Plaintiffs failed to show that preventing the city council from conducting legislative business after 11:00 p.m. benefited the public.

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b. The court also concluded that, when plaintiffs accepted their seats on the city council, they forfeited Brown Act standing that they would otherwise have had as California citizens to sue the city council.

1) Not only did plaintiffs assert no interest that differed from that of the general public, they claimed no personal damages or consequences distinct from those of the populace that could create a beneficial interest in them.

2) As no beneficial interest in the workings of the city council was conferred by serving on that entity, plaintiffs did not establish any beneficial interest sufficient to confer standing.

12. Minutes shall be taken recording all actions taken by the governing board. The minutes are public records. [Education Code Sections 35145(a) and 72121(a).]

13. No action may be taken by secret ballot. [Government Code Section 54953(c).]

I. Government Code Section 54953(b) permits teleconferencing, not just "video teleconferencing," for all purposes in connection with any meeting within the subject matter jurisdiction of the legislative body. "Teleconferencing" means a meeting of a legislative body, the members of which are in different locations, connected by electronic means, through audio or video, or both.

1. Teleconference means a meeting of individuals in different locations, connected by electronic means, through either audio or video, or both.

2. Teleconference meetings must comply with all requirements of the Brown Act and all other applicable provisions of law relating to the specific type of meeting or proceeding.

3. All votes taken during a teleconferenced meeting shall be by roll call.

4. Agendas must be posted at each teleconferencing location, agendas must identify each teleconferencing location, and each location must be accessible to the public.

5. Teleconferenced meetings must be conducted in a "manner that protects the statutory and constitutional rights of the parties or the public." [Government Code Section 54953(b)(3).]

6. During the teleconference, at least a quorum of the members of the legislative body shall participate from locations within the boundaries of the territory over which the local agency exercises jurisdiction.

7. The agenda shall provide an opportunity for members of the public to address the legislative body directly, pursuant to Section 54954.3, at each teleconference location.

J. The Legislature enacted Assembly Bill 361 (2021) which authorizes a local agency to use teleconferencing without complying with the traditional agenda posting, physical access and quorum requirements imposed by the Act (and as discussed in Section I above) when a legislative body of a local agency holds a meeting during *a declared state of emergency*. This legislation exempting local agencies from teleconferencing requirements will expire on January 1, 2024. **However, Governor Newsom has announced that the COVID-19 State of Emergency will end on February 28, 2023, which will in effect require a legislative body to adhere to the existing and original teleconferencing requirements set forth in Section 54953.**

1. Local agencies are permitted to meet via teleconference without complying with the Brown Act's traditional requirements during a proclaimed state of emergency by the Governor in any of the following circumstances [Government Code Section 54953(e)(1)]:

    a. The legislative body holds a meeting during a proclaimed state of emergency, and state or local officials have imposed or recommended measures to promote social distancing.

    b. The legislative body holds a meeting during a proclaimed state of emergency for the purpose of determining, by majority vote, whether as a result of the emergency, meeting in person would present imminent risks to the health or safety of attendees.

    c. The legislative body holds a meeting during a proclaimed state of emergency and has determined, by majority vote, that as a result of the emergency, meeting in person would present imminent risk to the health or safety of attendees.

2. If a local agency chooses to use the teleconferencing exemption, they must adhere to the following requirements [Government Code Section 54953(e)(2)]:

    a. Give timely notice of the meeting and post agendas as required by the Brown Act. Each agenda must provide notice of the means by which the public may access the meeting and offer public comment. The agenda must identify and include an opportunity for all persons to attend via a call-in option or an internet-based service option. The legislative body is <u>not</u> required to provide a physical location from which the public may attend or comment.

    b. Allow members of the public to access the meeting and directly address the legislative body.

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c. Conduct teleconference meetings in a manner that protects the statutory and constitutional rights of the parties and the public appearing before the legislative body.

3. If there is a service disruption that prevents broadcasting the meeting or in the event of a disruption within the local agency's control that prevents public comment, the meeting must stop and the local agency members shall not take further action on agenda items until public access is restored. Actions taken on agenda items during a disruption which prevents the public agency from broadcasting the meeting may be challenged. If a local agency chooses to use the teleconferencing exemption, they must also adhere to the following requirements regarding public comments:

    a. A local agency must abolish any requirement that public comments be submitted in advance of the meeting and must provide an opportunity for the public to address the legislative body and offer comment in real time, which allows a member of the public to read their own comment during the meeting.

    b. The legislative body may use an online third-party system for individuals to provide public comment which might require an individual to register prior to providing comment. In such circumstances:

        1) A legislative body that does not provide a time-limited comment period must allow a reasonable time for the public to register and comment on each agenda item.

        2) A legislative body that provides a timed public comment period for each agenda item may not close the comment period or the time to register to provide comment until the timed period has elapsed.

        3) A legislative body that provides a timed general public comment period that does not correspond with a specific agenda item may not close the public comment period or the opportunity to register until the timed general public period has elapsed.

4. Local agencies who use the teleconferencing exemption must also verify every 30 days that the exemption from traditional teleconference requirements is still necessary and must make the following findings no later than 30 days after the first teleconference and every 30 days thereafter:

    a. The legislative body has reconsidered the state of emergency circumstances;

b. The state of emergency continues to directly impact the ability of the members to meet safely in person, OR state or local officials continue to impose or recommend measures to promote social distancing.

K. Effective January 1, 2023, Government Code Section 54953(f) also authorizes members of a legislative body to attend meetings through teleconferencing without complying with existing requirements for teleconferencing set forth in Section 54953(b), discussed above, if:

1. At least a quorum of the members of the legislative body participates in person from a singular physical location clearly identified on the agenda.

2. The location from which at least the quorum of the members of the legislative body is participating from is open to the public and situated within the boundaries of the territory over which the local agency exercises jurisdiction.

3. Members of the legislative body who are participating in the meeting participate through both audio and visual technology and the legislative body provides a way for the public to remotely hear, visually observe, and remotely address the legislative body, either by a two-way audiovisual platform or a two-way telephonic service and a live webcasting of the meeting.

4. Members of the legislative body participating remotely disclose at the meeting before any action is taken whether any other individuals over 18 years of age or older are present in the room at the remote location and the general nature of the member's relationship with the individual.

5. Members of the legislative body participating remotely make a showing of either of the two specific circumstances:

a. "Just Cause": the member notifies the legislative body at the earliest possible opportunity, including at the start of a regular meeting, of their need to participate remotely for "just cause," which is any of the following circumstances:

1) Childcare or caregiving of a child, parent, grandparent, grandchild, sibling, spouse, or domestic partner that requires them to participate remotely;

2) A contagious illness that prevents a member from attending in person;

3) A need related to a physical or mental disability;

4) Travel while on business of the legislative body or another state or local agency.

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b. "Emergency Circumstances": the member requests the legislative body to allow them to participate in the meeting remotely due to "emergency circumstances," which means a physical or family medical emergency that prevents a member from attending in person.

6. Members of the legislative body may not participate in meetings solely by teleconferencing due to "just cause" or "emergency circumstances" for a period of more than three consecutive months or 20 percent of the regular meetings for the local agency within a calendar year. Members of the legislative body are also not authorized to use the provisions of "just cause" for more than two meetings per calendar year.

L. Any person attending a public meeting has the right to record the meeting by still or motion picture camera, or by video or audio tape, absent a finding by the board of persistent disruption of the proceedings. [Government Code Section 54953.5(a).]

1. A board may not prohibit or restrict the broadcast of its proceedings. [Government Code Section 54953.6.]

2. Any tape or film recording made by or at the direction of the board shall be subject to inspection pursuant to the Public Records Act, but may be destroyed or erased 30 days after the taping or recording. Any inspection of a video or audio tape recording shall be provided without charge on a tape recorder made available by the district. [Government Code Section 54953.5(b).]

V. CLOSED SESSION

A. Government Code Section 54957(a) authorizes a board to meet in closed session for the following purposes:

The legislative body of a local agency may hold closed session with the Attorney General, district attorney, agency counsel, sheriff, or chief of police, or their respective deputies, or a security consultant or a security operations manager on matters posing a threat to the security of public buildings, a threat to the security of essential public services, including water, drinking water, wastewater treatment, natural gas service, and electric service, or a threat to the public's right of access to public services or facilities. [Government Code Section 54957(a).]

B. Subject to the conditions in paragraph (b)(2) of Section 54957, consideration of the appointment, employment, evaluation of performance, discipline, or dismissal of an employee. [Government Code Section 54957(b)(1).]

1. This exception permits boards to meet in closed session to discuss and act upon the hiring, firing, intermediate discipline, and evaluation of particular employees, even though, on its face, the statute authorizes only a closed

session to "consider" such personnel matters. [Lucas v. Board of Trustees (1971) 18 Cal.App.3d 988; see also, Southern California Edison Co. v. Peevey (2003) 31Cal.4th 781, 799.]

2. When the legislative body of a local agency meets in closed session to consider the proposed dismissal of a public employee but ultimately rejects that proposal and retains the employee, the legislative body is not thereafter required to publicly report its decision and the vote or abstention of each member. [89 Ops.Cal.Atty.Gen. 110 (2006).]

3. A county board of education may not meet in closed session to consider the appointment, employment, evaluation of performance, discipline, or dismissal of certificated or classified employees because the county board is not the employer. [85 Ops.Atty.Gen. 77 (2002).]

4. Discussion must relate to a particular individual.

5. In Duval v. Board of Trustees of the Coalinga-Huron Unified School District (2001) 93 Cal.App.4th 902, the Court of Appeal held that evaluation extends to all employer consideration of an employee's discharge of her job duties after appointment or employment and before dismissal. Section 54957 is not limited to the consideration of formal evaluations. "We conclude the phrase 'evaluation of performance' encompasses a review of an employee's job performance even if that review involves particular instances of job performance rather than a comprehensive review of such performance."

   a. The court also concluded that evaluation may properly include such preliminary matters as the selection of evaluation criteria, the establishment of a fact-gathering mechanism, designation of particular areas of emphasis in the evaluation, and the setting of goals, since each might reflect the board's initial perception of the employee's performance since the last evaluation. All of these considerations must still relate to the employer's exercise of discretion with respect to the evaluation of a particular employee.

   b. Under evaluation of performance, a governing board may take action as to its final findings with respect to evaluation of a particular employee, and may meet with the employee to give him or her input regarding performance.

   c. Personal performance goals are an integral part of the confidential evaluation process and may be discussed in closed session. [Versaci v. Superior Court (2005) 127 Cal.App.4th 805, 822.]

6. Appointment includes the process of reviewing resumes, interviewing, discussing qualifications, and arriving at a decision prior to the actual appointment. [80 Ops.Atty.Gen. 308 (1997).]

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a. Closed sessions held pursuant to this section shall not include discussion or action on proposed compensation except for a reduction of compensation that results from the imposition of discipline.

b. Nothing in this code section limits whom the Board may choose to advise it when it conducts meetings involving employment matters. In Kaye v. Board of Trustees of San Diego County Public Law Library (2009) 179 Cal.App.4th 48, 62, the court found nothing wrong with the board having legal counsel present in closed session to advise it.

7. Consideration of charges brought against a public employee by another person or employee unless such employee requests a public hearing. [Government Code Section 54957(b)(2).]

a. As a condition to holding a closed session on specific complaints or charges brought against an employee by another person or employee, the employee must be given written notice of his or her right to have the complaints or charges heard in open session. The notice must be delivered to the employee personally or by mail 24 hours before the time for holding the session. If notice is not given, any action against the employee based on the specific complaints or charges shall be null and void.

b. In Furtado v. Sierra Community College District (1998) 68 Cal.App.4th 876, the Court of Appeal made clear that when a district is considering performance evaluations in connection with a decision to nonreelect a probationary faculty member, it is not considering "specific complaints or charges" within the meaning of Section 54957. The court reasoned that the Legislature's use of the word "or" to separate the phrase "to consider the appointment, employment, evaluation of performance, discipline, or dismissal of a public employee" from the phrase "to hear complaints or charges brought against an employee by another person or employee unless the employee requests a public session" indicated an intent that a public employee's right to a public hearing should apply only when a board is hearing "complaints or charges."

c. In Fischer v. Los Angeles Unified School District (1999) 70 Cal.App.4th 87, the court found that the mere consideration of reasons for nonreelection did not constitute the hearing of specific complaints or charges brought against an employee by another person or employee.

d. In Bollinger v. San Diego Civil Service Commission (1999) 71 Cal.App.4th 568, a case admittedly involving specific complaints or charges brought by fellow officers, the court found that the 24-

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hour notice requirement was not violated where the Commission met in closed session only to deliberate on whether to accept the findings and recommendation of a hearing officer. The consideration of the recommended decision did not constitute the hearing of specific complaints or charges. By analogy, this case supports the conclusion that a governing board need not provide the 24-hour notice when merely deliberating and acting upon the recommended decision of a hearing officer in a classified employee dismissal.

e. In Morrison v. Housing Authority of the City of Los Angeles (2003) 107 Cal.App.4th 860, the Court of Appeal held that where the governing body of a public entity, in a case involving employee discipline, rejects its hearing officer's findings of fact and engages in its own fact-finding, it is conducting a "hearing" on the charges against the employee for purposes of Section 54957 and the employee must be given notice of the right to have the hearing conducted in open session.

f. However, in Bell v. Vista Unified School District (2000) 82 Cal.App.4th 672, the Court of Appeal concluded that the governing board's consideration of the findings of a CIF commissioner constituted the hearing of specific complaints or charges brought by another person or employee when the board's consideration of the CIF's findings led to the termination of a coaching assignment for an otherwise tenured teacher.

g. The Court of Appeal concluded in Kolter v. Commission on Professional Competence of the Los Angeles Unified School District (2009) 170 Cal.App.4th 1346 that the district need not issue a 24-hour Brown Act notice to a certificated employee before commencing dismissal proceedings. This decision is a departure from the widespread precautionary practice of providing employees with 24-hour notice, pursuant to Government Code Section 54957, when a governing board will be considering any "specific complaints or charges brought against an employee by another person or employee" in closed session, regardless of whether any actual disciplinary action will be taken as a direct result of the closed session.

1) The governing board met in a closed session to initiate the process to dismiss Kolter from her employment as an elementary school teacher pursuant to Education Code Section 44934. [See Education Code Section 87672, applicable to community college districts.] LAUSD did not give Kolter any pre-meeting notice that it would be considering charges against her. However, after the closed session, the district sent Kolter notice that it would seek to

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dismiss her and informed her of her right to a public hearing.

2) The court, in ruling that the 24-hour notice was not required, found that the governing board need only provide the 24-hour notice when "hearing" complaints or charges against the employee and not when merely "considering" whether to initiate discipline.

h. "Although Section 54957 allows public employees to demand that a governing body air complaints about the employee in public, it does not grant the employees the right to force the conflict behind closed doors." [Leventhal v. Vista Unified Sch. Dist. 973 F. Supp. 951, 958 (S.D. Cal., 1997); and Morrow v. Los Angeles Unified School Dist. (2007) 149 Cal.App.4th 1424, 1439.]

i. The general rule is that closed session access is permitted only to people who have "an official or essential role to play" in the closed meeting. [83 Ops.Atty.Gen. 221, 225 (2000).]

8. The term "employee" is defined to include an officer or independent contractor who functions as an officer or an employee. Elected officers are not employees.

a. A contractor assigned to perform "executive officer services" for a county local agency formation commission (LAFCO) was an "officer" of LAFCO and thus an "employee" within meaning of Section 54957(b). [Hofman Ranch v. Yuba County Local Agency Formation Com'n (2009) 172 Cal.App.4th 805, 811.]

b. Thus, LAFCO's use of a closed session to consider renewal of his contract did not violate the Brown Act, even if contractor provided similar services to four other county LAFCOs, and even though the contract stated that contractor was not an officer or employee and was not subject to LAFCO's day-to-day direction and control, where contractor performed executive tasks including the duties described by statute as the day-to-day business of LAFCO; contractor processed LAFCO-related applications, prepared California Environmental Quality Act (CEQA) and LAFCO-related reports and documents, reviewed projects of concern and prepared responses for LAFCO, and prepared LAFCO's budget. Id.

C. Other Authority for Closed Sessions

1. A board may hold a closed session, based on the advice of counsel, to confer with, or receive advice from, its legal counsel regarding pending litigation when discussion in open session concerning those matters would

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prejudice the position of the district in the litigation. [Government Code Section 54956.9.]

a. Litigation is pending when any of the following circumstances exist:

1) Proceedings before a court, administrative body, hearing officer, or arbitrator to which the district is a party, have been formally initiated. [Government Code Section 54956.9(c) and (d)(1).]

2) A point has been reached where, in the opinion of the board on the advice of legal counsel, and based on existing facts and circumstances, there is a significant exposure to litigation. [Government Code Section 54956.9(d)(2).]

3) Deciding whether to litigate or whether closed session is proper based on existing facts and circumstances. [Government Code Section 54956.9(d)(3).]

4) Based on existing facts and circumstances, the legislative body of the local agency has decided to initiate litigation, or is deciding whether to initiate litigation. [Government Code Section 54956.9(d)(4).]

b. The "significant exposure" to litigation determination must be made from the "existing facts or circumstances." "Existing facts or circumstances" consist of only one of the following:

1) Facts and circumstances that might result in litigation but which the district believes are not known to the potential plaintiff, which facts and circumstances need not be disclosed. [Government Code Section 54956.9(e)(1).]

2) Facts and circumstances including, but not limited to, an accident, disaster, incident, or transactional occurrence that might result in litigation against the district and that are known to the plaintiff. These facts shall be publicly stated on the agenda or announced. [Government Code Section 54956.9(e)(2).]

3) Receipt of a tort claim or other written communication threatening litigation, which claim or communication shall be made available for public inspection. [Government Code Section 54956.9(e)(3).]

4) A statement made by a person in a public meeting threatening litigation on a specific matter within the

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agency's area of responsibility. [Government Code Section 54956.9(e)(4).]

5) A statement threatening litigation outside of a public meeting on a specific matter within the responsibility of the agency so long as the official or employee of the agency receiving knowledge of the threat makes a contemporaneous or other record of the statement prior to the meeting and the record is made available for public inspection. [Government Code Section 54956.9(e)(5).]

c. The board must either state on the agenda or publicly announce the paragraph of subdivision (d) authorizes the closed session, and, when known, the title of the case. [Government Code Section 54956.9(g).]

d. In Southern California Edison Co. v. Peevey (2003) 31 Cal.4th 781, 801, the Supreme Court interpreted corresponding provisions of the Bagley-Keene Act not to require a state body to announce its proposed decision relating to settlement of a case in public session-*identifying the litigation involved*--and accept public comment on the proposed settlement before voting on it. In Peevey, the PUC had recessed to closed session pursuant to the counterpart to Government Code Section 54956.9(g), which does not require the identification of the case by name prior to holding the closed session, if to do so would jeopardize pending settlement negotiations.

1) Although Section 54956.9 does not expressly so provide, it has been construed, generally, also to permit a local legislative body to approve settlements in closed session. [See Southern California Edison Co. v. Peevey, supra., 31 Cal.4th at 798-799 [discussing 75 Ops.Cal.Atty.Gen. 14 (1992), which so opined]; Trancas Property Owners Assn. v. City of Malibu (2006) 138 Cal.App.4th 172, 185.]

2) As "emphasized" in the Attorney General's manual on the Brown Act, "the purpose of [Section 54956.9] is to permit the body to receive legal advice and make litigation decisions only; it is not to be used as a subterfuge to reach nonlitigation oriented policy decisions." [Cal. Atty. Gen. Office, The Brown Act (2003), p. 40.]

3) Thus, Section 54956.9's implied allowance for adoption of settlements in closed session is subject to limits:

"And whatever else it may permit, the exemption cannot be construed to empower a city council to take or agree to

take, as part of a nonpublicly ratified litigation settlement, action that by substantive law may not be taken without a public hearing and an opportunity for the public to be heard. As a matter of legislative intention and policy, a statute that is part of a law enacted to assure public decision making, except in narrow circumstances, may not be read to authorize circumvention and indeed violation of other laws requiring that decisions be preceded by public hearings, simply because the means and object of the violation are settlement of a lawsuit." [Trancas Property Owners Assn., supra., 138 Cal.App.4th at 187.]

e. In County of Los Angeles v. Superior Court (2005) 130 Cal.App.4th 1099, the superior court had granted the county's motion to compel production of documents listed in a union's deposition subpoena directed to the district attorney, who had conducted an investigation into whether the board violated the Brown Act during two closed sessions.

1) The court of appeal held that the superior court erred when it granted the county's discovery motion. The documents sought by the union were not discoverable because closed session minutes were specifically exempt from disclosure under Section 54957.2. The closed sessions were properly convened under Section 54956.9 to discuss anticipated litigation related to a federal agency's decision to terminate Medicare funding to a medical center under investigation. The minutes of the closed sessions were confidential and were not subject to discovery.

2) Under Section 6254.5(e) of the Public Records Act, the board did not waive any privilege by disclosing the minutes to the district attorney. The letters in the district attorney's investigation file were exempt from disclosure under Sections 6254(f) and 6254.5(e).

f. Section 54956.9 does not authorize the practice of mediating disputes or discussing potential litigation with opposing parties and their counsel. [Page v. Mira Costa Community College Dist. (2009) 180 Cal.App.4th, 471; Shapiro v. Board of Directors of Centre City Development (2005) 134 Cal.App.4th 170, 182-183; and 62 Ops.Atty.Gen. 150 (1979).]

2. A board member may not publicly disclose information that has been received and discussed in closed session concerning pending litigation unless the information is authorized by law to be disclosed. [80 Ops.Atty.Gen. 231 (1997).] (NB: Much of the reasoning of this opinion is equally applicable to the improper disclosure of other closed session

discussions.) [See Government Code Section 54963. Kleitman v. Superior Court (1999) 74 Cal.App.4th 324, 334.] ("We agree with the Attorney General. Disclosure of closed session proceedings by the members of a legislative body necessarily destroys the closed session confidentiality which is inherent in the Brown Act.")

3. In 86 Ops.Atty.Gen. 210 (2003), the Attorney General concluded that where a member of a city council or county board of supervisors is appointed to sit as that body's representative on the board of another local agency, the appointee may not disclose to his or her appointing authority or its counsel information received in a closed session of the board.

    a. However, Section 54956.96 was added to the Act to permit joint power agencies to adopt policies or bylaws, or include in their joint powers agreement, provisions that authorize a member of a legislative body of a member local agency to disclose information obtained in closed sessions of the JPA that has direct financial or liability implications for that local agency to legal counsel for the member local agency for purposes of obtaining advice on whether the matter has direct financial or liability implications for that member local agency, or to other members of the legislative body of the local agency present in a closed session of that member local agency. [Government Code Section 54956.96.]

    b. The general rule is that closed session access is permitted only to people who have "an official or essential role to play" in the closed meeting. [83 Ops.Atty.Gen. 221, 225 (2000); see also 82 Ops.Atty.Gen. 29, 33 (1999); 46 Ops.Atty.Gen. 34, 35 (1965).]

4. Consideration of student disciplinary action, unless a public hearing is requested in writing [see the specific provisions of Education Code Sections 35146 and 72122], and challenges to a student's records. [Education Code Sections 49070(c) and 76232(c).]

5. A board may hold closed session, pursuant to Government Code Section 54957.6, with its designated representative regarding the salaries, salary schedules, or compensation paid in the form of fringe benefits to represented and unrepresented employees, and for represented employees, any other matter within the scope of representation. [Government Code Sections 3549.1 and 54957.6; see also, San Diego Union v. City Council (1983) 146 Cal.App.3d 947.]

    a. The Attorney General has concluded that, since the county board is not the employer, it may not meet in closed session pursuant to the labor negotiations exception. [85 Ops.Atty.Gen. 77 (2002).]

    b. Closed sessions with the local agency's designated representative regarding the salaries, salary schedules, or compensation paid in

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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.

c. Closed session held pursuant to Section 54957.6 shall not include final action on the proposed compensation of one or more unrepresented employees.

d. Note Well: Pursuant to Government Code Section 53262(a) all contracts of employment with a superintendent, deputy superintendent, assistant superintendent, associate superintendent, community college president, community college vice president, community college deputy vice president, general manager, city manager, county administrator, "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.

e. Pursuant to Section 53262(b) copies of any contracts of employment, as well as copies of the settlement agreements, shall be available to the public upon request.

6. Consideration of real property transactions. This exception permits a board to meet with its negotiator prior to purchase, sale, exchange, or lease of real property to grant authority to its negotiator regarding the price and terms of the transaction. Before discussing the transaction in closed session, the board must identify the real property at issue and the person with whom its negotiator may negotiate. [Government Code Section 54956.8. See, Shapiro v. San Diego City Council (2002) 96 Cal.App.4th 904.]

a. The real-estate-negotiations exception to the open meeting requirements of the Brown Act permits the closed-session discussion of: (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; and (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. [94 Ops.Cal.Atty.Gen. 82, 2011 WL 617511.]

7. Nothing contained in the Brown Act shall be construed to prevent the legislative body of a multijurisdictional law enforcement agency, or an advisory body of a multijurisdictional law enforcement agency, from holding closed sessions to discuss the case records of any ongoing

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criminal investigation of the multijurisdictional law enforcement agency or of any party to the joint powers agreement, to hear testimony from persons involved in the investigation, and to discuss courses of action in particular cases. [Government Code Section 54957.8.]

a. "Multijurisdictional law enforcement agency" means a joint powers entity formed pursuant Government Code Section 6500 that provides law enforcement services for the parties to the joint powers agreement for the purpose of investigating criminal activity involving drugs; gangs; sex crimes; firearms trafficking or felony possession of a firearm; high technology, computer, or identity theft; human trafficking; or vehicle theft. [Government Code Section 54957.8(a).]

b. The addition of this provision occurred after the passage of Proposition 59, and provides an example of the legislative findings now required to justify a limitation on the public's right of access to the meetings of public bodies or the writings of public officials and agencies. [See Statutes of 2006, Chapter 427, Section 2.]

8. Districts which are members of a joint powers agency formed for the purpose of insurance pooling may meet in closed session to discuss a claim for the payment of tort liability losses, public liability losses, or workers' compensation liability. [Government Code Section 54956.95.]

9. Consideration of honorary degrees or gifts from a donor who wants to remain anonymous. [Education Code Section 72122.]

10. Discussion by the legislative body of a local agency that has received a confidential final draft audit report from the Bureau of State Audits of its response to that report. [Government Code Section 54956.75.]

D. The right to consider the above matters in closed session includes the ability to take action in closed session. [75 Ops.Atty.Gen. 14 (1992).]

E. The Act requires a brief, general description of each item of business to be transacted, including items to be discussed in closed session. What this means with respect to closed sessions is somewhat ambiguous. However, Section 54954.5 provides a "safe harbor" provision, such that substantial compliance with its suggested language will prevent a finding of a violation of the Act's closed session notice requirements. Examples of the suggested language include the following:

1. CONFERENCE WITH REAL PROPERTY NEGOTIATORS

a. **Property**: (specify the street address, or if no street address, the parcel number or other unique reference to the property under negotiations.)

b. **Agency Negotiator**: (specify the name of the 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 so long as the name of the agent or designee is announced at an open session held prior to the closed session.)

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

d. **Under negotiation:** (specify whether the instructions to the negotiator will concern price, terms of payment, or both.)

2. CONFERENCE WITH LEGAL COUNSEL - EXISTING LITIGATION *(Subdivisions (c)and (d)(1) of Section 54956.9)*

a. **Name of case:** (specify by reference to claimant's name, names or parties, case or claim numbers.)

or

b. **Case name unspecified:** (specify whether disclosure would jeopardize service of process or existing settlement negotiations.)

3. CONFERENCE WITH LEGAL COUNSEL - ANTICIPATED LITIGATION

a. **Significant exposure to litigation pursuant to subdivision (d)(2) and (e) of Section 54956.9:** *(specify the number of potential cases.)*

(In addition to the information noticed above, the district may be required to provide additional information on the agenda or in an oral statement prior to the closed session pursuant to paragraphs (2) to (5), of subdivision (e) of Section 54956.9.) This may mean stating the existing facts and circumstances giving rise to a significant exposure to litigation against the district.) See the discussion of the content of paragraphs (2) to (5) of subdivision (e) of Section 54956.9 at pages 28-29, above.)

b. **Initiation of litigation pursuant to subdivision (d)(4) of Section 54956.9:** *(specify the number of potential cases.)*

4. LIABILITY CLAIMS [GOVERNMENT CODE SECTION 54956.95]

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

b. **Agency claimed against:** *(Specify name.)*

5. THREAT TO PUBLIC SERVICES OR FACILITIES

   a. **Consultation with**: (*specify name of law enforcement agency and title of officer.*)

6. PUBLIC EMPLOYEE APPOINTMENT

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

7. PUBLIC EMPLOYMENT

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

8. PUBLIC EMPLOYEE PERFORMANCE EVALUATION

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

9. PUBLIC EMPLOYEE DISCIPLINE/DISMISSAL/RELEASE

   No additional information is required to consider discipline, dismissal, or release of a public employee. Discipline includes potential reduction of compensation.

10. CONFERENCE WITH LABOR NEGOTIATORS

    a. **Agency designated representatives:** (specify names of designated representatives attending the closed session.) (If circumstances necessitate the absence of a specified 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.)

    b. **Employee organization:** (specify name of organization representing employee or employees in question.)

    or

    c. **Unrepresented employee:** (specify position title of unrepresented employee who is the subject of the negotiations.)

11. CONFERENCE INVOLVING JOINT POWERS AGENCY

    a. **Discussion will concern:** (*specify closed session description used by the joint powers agency.*)

    b. **Name of local agency representative on joint powers agency board:** *(specify name)*

12. AUDIT BY BUREAU OF STATE AUDITS

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F. Prior to holding a closed session, the board must disclose, in an open meeting, the items to be discussed in closed session. The announcement can either repeat all of the information already stated on the agenda, or it may simply refer to the items as they are listed on the agenda by number or letter. [Government Code Section 54957.7.]

Nothing in Section 54957.7 shall require or authorize a disclosure of information prohibited by state or federal law.

G. After any closed session, the board must reconvene in open session prior to adjournment and make the disclosures required by Government Code Section 54957.1. The board must report any action taken in closed session and the vote or abstention of every member present thereon as follows:

1. Approval of an agreement concluding real estate negotiations pursuant to Section 54956.8 shall be reported as follows:

a. If the board's approval renders the agreement final then it must report that approval and the substance of the agreement in open session at the public meeting during which the closed session is held;

b. If final approval rests with the other party, the board shall disclose the fact of approval and the substance of the agreement upon inquiry by any person as soon as the other party approves the agreement.

2. Approval given to legal counsel to defend, or seek or refrain from seeking appellate review or relief, or enter as amicus curiae in any form of litigation as a result of a consultation under Section 54956.9 shall be reported in open session at the public meeting during which the closed session is held. The report shall identify the adverse party, and the substance of the litigation.

3. In the case of approval given to initiate or intervene in an action, the announcement need not identify the action, the defendants, or other particulars, but shall specify that the direction to initiate or intervene in an action has been given and that the particulars will be disclosed upon request once the litigation is formally commenced, unless to do so would jeopardize the agency's ability to complete service of process, or jeopardize the ability to conclude existing negotiations.

4. Approval given to a settlement of pending litigation shall be reported after the settlement is final as specified below:

a. If the board accepts a settlement offer signed by the opposing party, the board shall report its acceptance and identify the

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substance of the agreement in open session at the public meeting during which the closed session is held.

b. If final approval rests with the other party or the court, the board shall disclose the fact of approval and the substance of the agreement upon inquiry by any person as soon as the settlement becomes final.

5. Disposition of claims discussed in closed session pursuant to Section 54956.95 must be reported as soon as reached. The board must identify the name of the claimant, the local agency claimed against, the substance of the claim, and the amount of any settlement.

6. Action taken to appoint, employ, dismiss, accept the resignation of, or otherwise affect the employment status of a public employee shall be reported at the public meeting at which the closed session is held. The report must identify the title of the position.

   <u>However, the report of a dismissal or of the non-renewal of an employment contract shall be deferred until the first public meeting following the exhaustion of administrative remedies, if any.</u>

   If none of these specified types of "actions" is "taken" during the closed session, there is no duty to report the body's deliberations or the members' votes or abstentions with respect thereto. When the legislative body of a local agency meets in closed session to consider the proposed dismissal of a public employee but ultimately rejects that proposal and retains the employee, the legislative body is not thereafter required to publicly report its decision and the vote or abstention of each member. 89 Ops.Atty.Gen. 110 (2006).

7. Approval of an agreement concluding labor negotiations 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 must identify the item approved and the other parties to the negotiation.

H. Making the required reports.

1. The reports may be made either orally or in writing. [Government Code Section 54957.1(b).]

2. The board must provide to any person who has submitted a written request to the board within 24 hours of the posting of the agenda, or to any person who has made a standing request for all documentation as part of a request for notice of meetings pursuant to Section 54954.1 or 54956, if the requester is present at the time the closed session ends, copies of any contracts, settlement agreements, or other documents that were finally

approved or adopted in the closed session. [Government Code Section 54957.1(b).]

If the action taken results in one or more substantive amendments to the related documents requiring retyping during normal business hours, the documents need not be released until the retyping is completed, provided that the presiding officer of the legislative body or his designee orally summarizes the substance of the amendments for the benefit of the document requester or any other person present and requesting the information.

3. In addition, the documents referred to above shall be 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 substantial amendments, when any necessary retyping is complete. [Government Code Section 54957.1(c).]

4. No action for injury to a reputation, liberty, or other personal interest may be commenced by or on behalf of any employee or former employee with respect to whom a disclosure is made by a legislative body in an effort to comply with this section. [Government Code Section 54957.1(e).]

VI. ENFORCEMENT OF THE BROWN ACT

A. Criminal Consequences: Each member of a board who attends a meeting of the board where action is taken in violation of any provision of this chapter, and where the member intends to deprive the public of information to which the member knows or has reason to know the public is entitled under this chapter, is guilty of a misdemeanor. [Government Code Section 54959.]

1. Action taken is defined to include "collective commitment." Mere deliberation of some action will not trigger the criminal penalty. [Government Code Section 54952.6.]

2. Good faith reliance on an opinion of counsel that a closed meeting is proper, normally would preclude a finding of "wrongful intent to deprive the public of information." [See, Attorney General Index letter 76-173 interpreting pre-amendment language.]

B. Civil Remedies - actions in the form of injunction, mandamus or declaratory relief.

C. The district attorney or any interested person may commence an action by mandamus, injunction, or declaratory relief for the purpose of **stopping** or **preventing violations** or **threatened violations** of this chapter by members of the legislative body of a local agency or to determine the applicability of this chapter to **ongoing actions** or **threatened future actions** of the legislative body, or to determine the applicability of this chapter **to past actions** of the legislative body, subject to Section 54960.2, or to determine whether any rule or action by the

legislative body to penalize or otherwise discourage the expression of one or more of its members is valid or invalid under the laws of this state or of the United States, or to compel the legislative body to audio record its closed sessions as hereinafter provided. [Government Code Section 54960.]

1. The district attorney or any interested person may file an action to determine the applicability of this chapter to **past actions** of the legislative body pursuant to subdivision (a) of Section 54960 only if all of the following conditions are met [Government Code Section 54960.2(a).]:

   a. The district attorney or interested person alleging a violation of this chapter first submits a cease and desist letter to the clerk or secretary of the legislative body being accused of the violation, clearly describing the past action of the legislative body and nature of the alleged violation. (Government Code Section 54960.2(a)(1).]

   b. The cease and desist letter must be submitted to the legislative body within nine months of the alleged violation. [Government Code Section 54960.2(a)(2).]

   c. The time during which the legislative body may respond to the cease and desist letter has expired and the legislative body has not provided an unconditional commitment. [Government Code Section 54960.2(a)(3).]

   d. Within 60 days of receipt of the legislative body's response to the cease and desist letter, other than an unconditional commitment, or within 60 days of the expiration of the time during which the legislative body may respond to the cease and desist letter, whichever is earlier, the party submitting the cease and desist letter shall commence the action or thereafter be barred from commencing the action. [Government Code Section 54960.2(a)(4).]

2. The legislative body may respond to a cease and desist letter submitted pursuant to subdivision (a) within 30 days of receiving the letter. This subdivision shall not be construed to prevent the legislative body from providing an unconditional commitment pursuant to subdivision (c) at any time after the 30-day period has expired, except that in that event the court shall award court costs and reasonable attorney fees to the plaintiff in an action brought pursuant to this section, in accordance with Section 54960.5.

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3. If the legislative body 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 this chapter, that response shall be in substantially 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 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]
>
> [Government Code Section 54960.2(c)(1).]

4. An unconditional commitment pursuant to this subdivision shall be approved by the legislative body in open session at a regular or special meeting as a separate item of business, and not on its consent agenda. [Government code Section 54960.2(c)(2).]

5. An action shall not be commenced to determine the applicability of the Brown Act to any past action of the legislative body for which the legislative body has provided an unconditional commitment as specified above. During any action seeking a judicial determination regarding the applicability of this chapter to any past action of the legislative body, if the court determines that the legislative body has provided an unconditional commitment, the action shall be dismissed with prejudice. [Government Code Section 54960.2(c)(3).]

6. The fact that a legislative body provides an unconditional commitment shall not be construed or admissible as evidence of a violation of this chapter. [Government Code Section 54960.2(c)(4).]

7. If the legislative body provides an unconditional commitment, the legislative body shall not thereafter take or engage in the challenged action described in the cease and desist letter. Violation of the commitments shall constitute independent violations of the Brown Act, without regard to whether the challenged action would otherwise violate the Brown Act. An action alleging past violation or threatened future violation of this subdivision may be brought pursuant to subdivision (a) of Section 54960, without regard to the procedural requirements of this section. [Government Code Section 54960.2(d).]

8. The legislative body may resolve to rescind an unconditional commitment made by a majority vote of its membership taken in open session at a regular meeting as a separate item of business not on its consent agenda, and noticed on its posted agenda as "Rescission of Brown Act Commitment," provided that not less than 30 days prior to such regular meeting, the legislative body provides written notice of its intent to consider the rescission to each person to whom the unconditional commitment was made, and to the district attorney. Upon rescission, the district attorney or any interested person may commence an action pursuant to subdivision (a) of Section 54960. [Government Code Section 54960.2(e).]

9. A court may impose the requirement that closed sessions be taped if it finds that the board has violated the statutes authorizing closed sessions. [Government Code Section 54960(a).]

10. Tape recordings of closed sessions will be discoverable under very limited circumstances.

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D. Violations of the meeting notice and agenda provisions may result in having action taken adjudged null and void. Such actions may be commenced by the district attorney or by any interested person. [Government Code Section 54960.1.]

1. Prior to commencing such an action, the interested person or the district attorney must demand in writing that the board cure or correct the alleged violation.

2. The written demand shall be made within 90 days unless the action was taken in an open session but in violation of the agenda requirements, in which case the demand must be made within 30 days from the date the action was taken.

3. Suit must be brought within 15 days of the board's decision as to whether it will cure or correct or within 15 days after the expiration of the 30-day period to cure or correct demand, whichever is earlier. Even after a lawsuit is filed, the board may cure and correct and have the lawsuit dismissed.

4. Certain actions are not subject to rescission. [Government Code Section 54960.1(d)(1-4).]

5. Successful plaintiffs are entitled to their attorney's fees. Boards may recover attorney's fees only where the lawsuit is frivolous and without merit. [Government Code Section 54960.5.]

6. "Even where a plaintiff has satisfied the threshold procedural requirements to set aside an agency's action, Brown Act violations will not necessarily invalidate a decision. Appellants must show prejudice." [Cohan v. City of Thousand Oaks (1994) 30 Cal.App.4th 547, 555-556 (no prejudice shown from violation of Government Code Section 54954.2, subd. (a), which "requires that an agenda be posted at least 72 hours before a regular meeting and forbids action on any item not on that agenda").] [San Lorenzo Valley Community Advocates for Responsible Education v. San Lorenzo Valley Unified School Dist. (2006) 139 Cal.App.4th 1356; Galbiso v. Orosi Public Utility Dist. (2010) 182 Cal.App.4th 652, 671.]

7. To state a cause of action under Section 54960.1, the complaint must allege: (1) that a legislative body violated one or more enumerated Brown Act statutes; (2) that there was "action taken" by the local legislative body in connection with the violation; and (3) that before commencing the action plaintiff made a timely demand of the legislative body to cure or correct the action alleged to have been taken in violation of the enumerated statutes, and the legislative body did not correct the challenged action. [Boyle v. City of Redondo Beach (1999) 70 Cal.App.4th 1109, 1116-1117.] (Mere conference with legal counsel and the giving of direction to staff did not constitute "an action taken" within the meaning of Section 54952.6. Further, the council's rescission of all

action relating to the improperly-agendized litigation, even though there was no action taken, constituted the cure and correction of the alleged violation.)

E. Attorney Fees.

1. "A court may award court costs and reasonable attorney fees to the *plaintiff* in an action brought pursuant to Section 54960 or 54960.1 *where it is found that a legislative body of the local agency has violated this chapter.* The costs and fees shall be paid by the local agency and shall not become a personal liability of any public officer or employee of the local agency." [Government Code Section 54960.5.]

2. Such awards are not mandatory, and are entrusted to the discretion of the trial court. [Galibiso v. Orosi Public Utility District (2008) 167 Cal.App.4th 1063, 1077.]

3. In determining whether to award attorney fees it "should consider among other matters 'the necessity for the lawsuit, lack of injury to the public, the likelihood the problem would have been solved by other means and the likelihood of recurrence of the unlawful act in the absence of the lawsuit.' [Citations.]" [Galbiso supra, 167 Cal.App.4th 1063, 1083, and Bell v. Vista Unified School Dist., supra, 82 Cal.App.4th at p. 686.]

4. "[T]he trial court has the discretion to deny successful Brown Act plaintiffs their attorneys fees, but only if the defendant shows that special circumstances exist that would make such an award unjust." [Id., and Los Angeles Times Communications v. Los Angeles County Bd. of Supervisors, supra, 112 Cal.App.4th at p. 1327.]

5. A court may award court costs and reasonable attorney fees to a local agency defendant in an action only where the defendant has prevailed in a final determination of such action and the court finds that the action was clearly frivolous and totally lacking in merit. [Government Code Section 54960.5.]