San Mateo County LGBTQ Commission

OPEN MEETING LAWS

Introduction

"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."

The Brown Act is based on the philosophy that public agencies exist for the purpose of conducting public business, and the public has the right to know how its lawmakers' collaborative decisions are being made. The Brown Act strikes a balance between two competing factors: the public's right to access to most proceedings, and the need to conduct some types of proceedings with "confidential candor."

Generally, there is a presumption in favor of access, with exceptions for confidentiality where there has been a demonstrated need. The exceptions are construed narrowly.

The most common questions about the Brown Act are as follows: (1) What types of public groups are covered by the Brown Act?; (2) What is a "meeting"?; (3) What are the notice and agenda requirements?; (4) What are the public's rights?; (5) When are closed sessions permissible?; and (6) What are the consequences of violating the Brown Act?

WHAT TYPES OF PUBLIC GROUPS ARE COVERED BY THE BROWN ACT?

A. Legislative bodies of local agencies, e.g., boards, commissions, councils and committees. A person who is elected as part of body but who has not yet taken office must also comply with its prohibitions.

B. Does not apply to individual decision makers, *e.g.*, superintendent, principals, district department heads, boards acting in judicial capacity, bodies created by a single decision-maker.

C. "Local agencies" include cities, counties, school districts, special districts, municipal corporations, etc. (There is a separate law for state agencies.)

D. "Legislative bodies" include governing bodies and their subsidiary bodies, e.g., boards, commissions, committees or other bodies of a local agency that are created by charter, ordinance, resolution or "formal action" of a legislative body. This applies regardless of whether temporary or permanent, and whether advisory or decision-making.

E. There is a specific exception for "non-standing" advisory committees, most commonly internal ad hoc committees, that are limited to less than a quorum, and are of limited duration with no continuing jurisdiction.

   1. Standing committees are those who have continuing subject matter jurisdiction (i.e., are established by resolution or action of the legislative body to address a particular issue or issues for the indefinite future), or whose meeting schedule is fixed by the legislative body.

   2. If a legislative body designates less than a quorum of its members to meet with representatives from another body to exchange info, a separate body is not formed. However, if less than a quorum meets with another agency to perform a task, e.g. to make a recommendation, a separate legislative body is formed.

F. The Act covers private corporations created by legislative bodies for purpose of exercising authority and entities which receive funds from a local agency where the agency appoints one of its members to the board. Mere receipt of public funds by a nonprofit corporation does not subject a nonprofit corporation or other entity to the Brown Act.

WHAT IS A MEETING?

A. A "meeting" is any congregation of a majority of the members of a legislative body at the same time and place to hear, discuss or deliberate on any matter within its jurisdiction, This can include lunches, social gatherings, or board retreats.

B. Exemptions for: 1) conferences open to the general public that involve issues of interest to the body, 2) other public meetings, 3) meetings of other bodies under same local agency, or 4) social or ceremonial occasions, as long as a majority of the members do not discuss application of specific issues to the legislative body.

C. "Serial meetings" are included within the Brown Act's definition of meeting if they are for the purpose of developing a concurrence as to action to be taken.

   1. A serial meeting is a series of communications (whether in person or by phone or other media), each of which individually involves less than a

quorum, but which, taken as a whole, involve a majority of the board's members. Examples include meetings of board members' intermediaries or representatives, chain communications (A –» B –» C), and hub communications (A –» B, A –» C).

2. On a five-member board, a board member may speak to another individual board member by telephone without violating the Brown Act, so long as they do not intend to use chain or hub communications to communicate with a third.

3. "Concurrence as to action to be taken" for purposes of the definition of a serial meeting means efforts to reach agreement as to substantive matters that are or are likely to be on board's agenda, but does not include purely housekeeping matters (*e.g.*, times, dates and locations of upcoming meetings.)

4. *Special problem for e-mail from third parties:* When a constituent or other third party (i.e., staff member) e-mails something to the entire board, it is advisable that no board member respond substantively to the e-mail if the response is carbon copied ("cc:ed") to the rest of the board or a quorum thereof. Knowingly allowing other board members to see your deliberative thoughts in writing may constitute a "serial meeting" in violation of the Brown Act. Limiting reply e-mails to an acknowledgement of receipt and, if appropriate, indication of further action (e.g., that a request will be made to the Board President to put the item on a future agenda) is a recommended approach.

5. *Special problem for bulletin boards and chat rooms:* While board members are allowed to gain insight into constituents' views by reading their postings on an internet forum, where one board member has posted on a matter, all others should refrain from posting on that matter. In fact, the safest route is for board members to refrain from posting on an on-line forum at all. When a board member posts his/her personal position in an internet forum, it effectively shuts down other trustees from posting in response. This can create a "race to the chatroom" that discourages discussion in public meetings and discourages public participation at accessible public meetings. The preferable public place to declare one's position on a matter of District business in accordance with the Brown Act is an open session of a board meeting.

6. *Special problems for Facebook and Twitter:* Facebook and Twitter are increasingly popular ways for public officials to communicate with constituents. Board members are free to post on Facebook and Twitter on issues that fall within the board's jurisdiction without violating the Brown Act if they take several precautions. First, Board members should create a new profiles for themselves as public officials that are separate from any private-citizen profiles they may already have on Facebook or Twitter. Second, board members should not "follow" each other on Twitter and should not "friend" each other on Facebook. Finally, board members should refrain from referencing or replying to Facebook postings or Tweets from other board members.

D. Individual contacts between members of the public and board members are exempt from definition of meeting. However, no board member can use a member of the public as an intermediary to communicate with other board members for the purpose of building a concurrence.

E. "Teleconference" means "a meeting of a legislative body, the members of which are in different locations, connected by electronic means, through either audio or video, or both." The legislative body may use teleconferencing for the benefit of the public and the legislative body of a local agency in connection with any meeting or proceeding authorized by law. The teleconferenced meeting or proceeding shall comply with all requirements of the Brown Act and all otherwise applicable provisions of law relating to a specific type of meeting or proceeding. (*See* Government Code § 54953.) If the legislative body elects to use teleconferencing, it must post agendas at all teleconference locations and conduct meetings in a manner that protects the statutory and constitutional rights of the parties or the public appearing before the legislative body. Each teleconference location shall be identified in the notice and agenda of the meeting or proceeding, and each teleconference location shall be accessible to the public. 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. The agenda shall provide an opportunity for members of the public to address the legislative body at each teleconference location.

WHAT ARE THE NOTICE AND AGENDA REQUIREMENTS?

A. Regular meetings are those whose time and place is set by ordinance, by-law or resolution.

1. At least 72 hours prior to meeting, the district must post an agenda containing a brief general description (generally no longer than 20 words) of each action or discussion item to be considered, including items to be considered at closed sessions. Purpose is to notify members of public of items in which they may wish to participate.

2. Materials distributed to a majority of board members in conjunction with the agenda (i.e., "board packet"), are public records. As of July 1, 2008, materials relating to an open session agenda item and distributed to a majority of board members less than 72 hours before meeting must be made available to public at a public office or other designated location (can be on web site), with the location routinely disclosed on all agendas.

2. Exceptions for three types of matters, each of which must be publicly announced before proceeding:

    a. Emergency (requires majority vote).

    b. Need for immediate action arising after publication of agenda (requires 2/3 of entire body, or if fewer than 2/3 remain, 100% of all remaining members).

    c. Matter which has been posted for a previous meeting which is carried over for no more than five days.

3. Agenda must contain opportunity for public comment. The Board President may impose reasonable time limitations on speakers. Can't take action on matter raised for first time in "public comment" if item not on agenda.

4. The Board President may require speakers to address only items within the board's jurisdiction, and, in the case of a special meeting, may restrict speakers to the specific topic to be discussed in the special meeting.

5. At most, board members or staff may "briefly respond" to statements made or questions posed during public comment. The only permissible purpose of such discussion is to provide information to the public, to ask for clarification from District staff, to direct staff to research and report on the matter at a future meeting, or to instruct staff to schedule the matter for discussion at a future public meeting. The board is not permitted to discuss amongst itself any issue raised in public comment unless it is agendized for discussion at that meeting.

B. Special meetings require 24 hours' notice. No business may be considered except that for which meeting was called. May be held in closed session if permitted by law. Must provide an opportunity for members of the public to directly address the legislative body concerning any item that has been described in the notice for the meeting before or during consideration of that item.

C. Emergency meetings (crippling disasters, strikes, public health and/or safety threats) may be called on one hour's notice, determined by majority of body. No closed session permitted.

D. Closed sessions require three types of notice — agenda, pre-closed session announcement, and post-closed session report of action taken.

1. Statutes contain "safe harbor" format for agenda requirement (indicating permissible language for describing closed session items).

2. Special statutory requirements re: exposure to potential litigation (may post or announce).

    a. Facts and circumstances that might result in litigation against the local agency but which the district believes are not yet known to a potential plaintiff or plaintiffs need not be disclosed.

    b. Facts and circumstances that might result in litigation against the district and that are known to a potential plaintiff or plaintiffs shall be publicly stated on the agenda or announced.

    c. The receipt of a claim pursuant to the Tort Claims Act or some other written communication from a potential plaintiff threatening litigation must be disclosed, and the claim or communication shall be available for public inspection.

    d. A statement made by a person in an open and public meeting threatening litigation must be stated on agenda or announced.

    e. Special requirements when a statement threatening litigation made by a person outside an open and public meeting. No closed session in absence of record of the statement prior to the meeting.

    f. No requirement for disclosure of written communications that are privileged and not subject to disclosure pursuant to the Public Records Act.

3. At end of closed session, must convene in open session and report on action taken, either orally or in writing. Specific statutory requirements as to form of report. Must report the vote taken in closed session, including by identifying how each member voted.

4. There is no liability to employees/former employ-

ees for injury to reputation, liberty or other personal interest as a result of reporting out of closed session pursuant to the Act.

E. Continuance of an agenda item need not be separately posted if the item was posted for a prior meeting of the board not more than five calendar days prior to the date action is taken, and at the prior meeting the item was continued to the meeting at which action is being taken.

F. Notices, agendas and materials must be provided in "appropriate alternative formats" for disabled persons upon request. The notice of the meeting must advise of the availability of disability-related aids or services to enable persons with disabilities to participate. The following notice should be included on all agendas:

Meetings are accessible to people with disabilities. Individuals who need special assistance or a disability-related modification or accommodation (including auxiliary aids or services) to participate in this meeting; or who have a disability and wish to request an alternative format for the agenda, meeting notice, agenda packet or other writings that may be distributed at the meeting, should contact ____(name or title)____ at least ____ working days before the meeting at ____(phone, fax, and/or e-mail)____. Notification in advance of the meeting will enable the District to make reasonable arrangements to ensure accessibility to this meeting and the materials related to it.

WHAT ARE THE PUBLIC'S RIGHTS?

A. Access generally means the right to be notified of meetings, items to be considered (agenda), to attend meetings of the board without identifying oneself, to record the meeting, to have access to documents distributed to members of board, not to pay for the district's costs in complying with Brown Act, and to be free from discrimination.

B. Boards may choose to provide ***greater*** public access than required by Brown Act. However, the exceptions to the Brown Act are usually motivated by policy concerns, such as individual employee or student privacy rights, and a decision to provide greater access should be undertaken carefully with due consideration of other, potentially countervailing, legal requirements.

C. Location of regular and special meetings shall be held within the boundaries of the territory over which the local agency exercises jurisdiction, i.e., within the District. Narrow exceptions include meetings held in order to comply with law or court order, to inspect real property, meetings of multi-agency significance, nearest available facility if body has none available, meeting with state or federal officials to discuss regulatory issues, nearby facility to discuss facility itself, visit legal counsel to reduce fees, schools may attend conferences on collective bargaining or interview potential employee from another district or interview public about superintendent.

D. Right to have votes taken or reported in open session — secret ballots are expressly prohibited.

E. Any person may request that a copy of the agenda, or a copy of all the documents constituting the agenda packet, of any meeting be mailed to that person at the time the agenda is posted. Any request for mailed copies of agendas or agenda packets shall be valid for the calendar year in which it 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, not to exceed the cost of providing the service.

F. Right to comment.

1. Every agenda for regular meetings shall provide an opportunity for members of the public to directly address the board on any item of interest to the public, before or during the board's consideration of the item that is within its subject matter jurisdiction.

2. However, the agenda need not provide an opportunity for members of the public to address the board on any item that has already been considered by a committee, composed exclusively of board members, at a public meeting wherein all interested members of the public were afforded the opportunity to address the committee on the item, before or during the committee's consideration of the item, unless the item has been substantially changed since the committee heard the item.

3. Every notice for a special meeting shall provide an opportunity for members of the public to directly address the board concerning any item that has been described in the notice for the meeting before or during consideration of that item.

4. The board may adopt reasonable regulations to ensure that the intent of providing public input is effectively carried out, including, but not limited to, regulations limiting the total amount of time allocated for public testimony on particular issues and for each individual speaker.

5. The board may not prohibit public criticism of the policies, procedures, programs, or services of the

agency, or of the acts or omissions of the board.

6. The Board President has some power over members of the public to ensure orderly conduct of official business, including removal of persons who disrupt a meeting.

WHEN ARE CLOSED SESSIONS PERMISSIBLE?

A. The law establishes a number of topics that may be discussed by the board in closed session outside the presence of the public. These "closed sessions" must be held as or as part of meetings complying with the Brown Act (*i.e.*, properly noticed and agendized, held in an accessible building within the jurisdiction, and attended by a quorum of members). The only thing that is different about them is the exclusion of the public. Items not appearing on the statutory list may not be discussed in closed session, even if the board and the affected parties agree to privacy or confidentiality.

B. The fact that an item may be discussed in closed session does not give board members permission to discuss it privately amongst themselves in a manner that violates the Brown Act — in other words, a serial meeting is not made legal merely because it relates to a matter that may be discussed in closed session.

C. The Education Code provides for certain kinds of closed sessions not available to other public bodies, including student disciplinary matters.

D. A full review of the list of topics permitted to be discussed in closed session is not the purpose of this overview. The Superintendent is aware of the list of permissible closed session topics, which is set forth within the Brown Act itself.

E. Government Code section 54963 provides that a person may not disclose "confidential information" that has been acquired by being present in a closed session authorized under the Act, unless the legislative body authorizes disclosure of that confidential information. Board members should refuse to disclose to anyone, including their constituents, any confidential information they learn in closed session unless the board as a whole considers a motion to permit disclosure.

   1. "Confidential information" is defined as a communication made in a closed session that is specifically related to the basis for the legislative body of a local agency to meet lawfully in closed session.

   2. Disclosure of confidential closed session information may be remedied by injunctive relief, disciplinary action of employees, and the referral of a member of a legislative body who has willfully disclosed confidential information to the grand jury for investigation. However, before disciplining an employee for disclosing confidential closed session information the employee must have been trained or otherwise notified of the confidentiality requirements of the law. Moreover, a local agency may not take any of these actions against a person for making a confidential inquiry or complaint to a district attorney or grand jury concerning a perceived violation of law, expressing an opinion concerning the propriety or legality of actions taken by a legislative body in closed session, disclosing nonconfidential closed session information, or acting under an applicable "whistleblower protection" statute.

WHAT ARE THE CONSEQUENCES OF VIOLATING THE BROWN ACT?

A. Criminal penalties. Each member of a legislative body who attends *a meeting of that legislative body 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.

B. Civil remedies.

   1. 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 the Brown Act by board members or to determine the applicability of the Brown Act to actions or threatened future action of the board, or to determine whether any rule or action by the board to penalize or otherwise discourage the expression of one or more of its members is valid or invalid under law, or to compel the board to tape record its closed sessions.

   2. Prior to any enforcement action being commenced, the district attorney or interested person shall make a written demand of the board to cure or correct the action alleged to have been taken in violation of the Brown Act. The demand shall clearly describe the challenged action of the board and nature of the alleged violation, and shall be made within specific time frames. Within 30 days of receipt of the demand, the board shall cure or correct the challenged action and inform the demanding party in writing of its actions to cure or correct or inform the demanding party in writing of its decision not to cure or correct the challenged action.

3. Thereafter, a lawsuit (if any) must be filed within 15 days.

4. An action taken that is alleged to have been taken in violation of Brown Act may be determined by a court to be null and void.

C. Attorneys' fees may be awarded against the public agency in the event a lawsuit is successful. Attorneys' fees may not be awarded against the individual board member.