

TRAPS FOR THE UNWARY: AVOIDING INADVERTANT VIOLATIONS OF THE BROWN ACT AND THE MASS MAILING RULES

Presented by
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THE RALPH M. BROWN ACT

- Legislative bodies of local agencies (i.e., school boards) must conduct their business in meetings open to the public.
- Law addresses the following questions:
 - What is a meeting?
 - What are the exceptions to the open meeting requirement?
 - What are the notice requirements?
 - What are the procedural requirements?
 - What are the penalties for a violation?

What is a Meeting?

- Broad definition:
 - Any congregation of a majority of a local body at the same time and place, to hear, discuss, or deliberate upon any item within the body's subject matter jurisdiction is a "meeting" for purposes of the Brown Act. (§ 54952.2.)
 - Does not apply if a "quorum" of the body is not present.

So, it's not a meeting unless we're all in the same place at the same time, right?

- ***The “Serial Meeting” trap:***
- A “serial meeting” is a series of communications through direct communication, writings, personal intermediaries, e-mail or other technological devices to develop a “collective concurrence” as to a proposed action or decision. (§ 54952.2 (b).)
- Serial meeting test:
 1. Was there a series of communications between members?
 2. Were these communications used to develop a concurrence as to action to be taken?

E-Mail and Other Member Communications

- Members can receive one-way communications from members of the public and from staff, including e-mail, on agenda matters.
- Board staff can communicate separately with board members regarding a matter if staff does not communicate to members the comments or position of any other member of the board. (Section 54952.2 (b))
- As a general rule, two-way communications, including replies to e-mail, give rise to “serial meeting” questions.
- “Reply All” is a no-no.

WHAT'S PUBLIC?

- E-mail and other written communications are usually public records under the California Public Records Act.
- If one-way communications or documents are to be considered by a member in deliberations on an agenda item, they should be made available to the public.
- E-mails/texts from private e-mail accounts/phones? Addresses?

MEETINGS DO NOT INCLUDE:

- The following actions and activities do not constitute “meetings” as long as the members do not discuss the body’s business among themselves:
 - Individual contacts with non-agency members;
 - Attendance at community meetings;
 - Attendance at meetings of other local bodies;
 - Attendance at social gatherings;
 - Attendance at meetings of standing committees; or
 - Attendance at public conferences. (§ 54952.2 (c).)

WHAT ARE THE EXCEPTIONS TO THE OPEN MEETING REQUIREMENT?

- “Closed sessions” are meetings conducted in private without the attendance of the public or press.
- “Partial,” or semi-closed meetings are not authorized.
- Attendance at closed session meetings is limited to persons necessary to the issue under discussion.

CLOSED SESSIONS

- Closed sessions must take place as an agenda item of a scheduled public meeting.
- Closed session items must include specific citation to statutory authority under which closed session is being held.
- Only items on the closed session agenda may be discussed in closed session ***even if*** no action is taken.
- Discussion of a item not on the agenda in closed session is an unlawful meeting.

CLOSED SESSIONS (Cont.)

- Closed sessions are forbidden by the Brown Act unless they are expressly authorized under the Act.
- The Act's provisions authorizing closed sessions are construed narrowly by courts due to Proposition 59, passed by the voters in November, 2004.

JUSTIFICATIONS FOR CLOSED SESSIONS

- Instruct negotiators in real property transactions. (§ 54956.8.)
- Discuss pending litigation with counsel. (§ 54956.9.)
 - Only permissible where discussion in open session would prejudice the agency's position in the litigation

WHEN IS LITIGATION “PENDING”

- Litigation is “pending” in one of 4 situations:
 - 1.Litigation has been formally initiated;
 - 2.There is significant exposure to litigation, based on “existing facts and circumstances” and the advice of counsel;
 - 3.Due to “existing facts and circumstances,” the body is meeting only to decide whether there is significant exposure to litigation that would authorize a closed session; or,
 - 4.The legislative body has decided or is deciding whether to commence litigation. (§ 54956.9.)

JUSTIFICATIONS FOR CLOSED SESSIONS—(Cont.)

- **Personnel matters.** Agencies may meet in closed session to consider the appointment, employment, evaluation of performance, discipline, or dismissal of a public employee, or to hear complaints or charges brought against the employee. (§ 54957.)
 - Only applies to “employees” defined in section 54957 and does not apply to elected officials and some appointed officers.

LIMITATION ON THE PERSONNEL EXCEPTION

- Board may not discuss or act on proposed compensation in closed session except for a reduction of compensation that results from disciplinary action (Section 54957(b)(4))
- Following a closed session discussion of performance, salary discussion must take place in open session.
- ***Don't Forget:*** Employment contracts with superintendent and deputy, assistant, and associate superintendents must be ratified in an open session of the governing body, as reflected in the governing body's minutes. Copies of employment ***and*** settlement agreements must be available to public. (Section 52362)

WHAT ARE THE NOTICE REQUIREMENTS?

- The Brown Act includes notice requirements which vary based on the type of meeting being held.
- There are 3 types of meetings:
 - “Regular” meetings
 - “Special” meetings
 - “Emergency” meetings (§ 54954.)

WHAT ARE THE PROCEDURAL REQUIREMENTS?

- Must be held within the geographic area over which the local body exercises jurisdiction. (§ 54954 (b).)
- Regular or special meetings may be adjourned to a specified date, time, and place. (§ 54955.)
 - A copy of the order of adjournment listing the rescheduled date, time and place must be posted conspicuously on or near the door where the original meeting was located within 24 hours of adjournment. (§ 54955.1.)
 - Less than a quorum may adjourn a meeting. (§ 54955.)

TELECONFERENCE MEETINGS

- Meetings may be held by teleconference as long as all other Brown Act provisions are met, and:
 - As long as the meeting is audible to the public at all locations where members are present;
 - Agendas include the location where members will be present to teleconference and agendas are posted at each location;
 - Members of the public are able to address all members of the body at each location; and
 - All votes taken are by roll-call.

Items Not on The Agenda

(§ 54954.2 (b).)

- Items not on the agenda may not be discussed unless they relate to:
 - A response to a statement made by a member of the public exercising their public testimony rights;
 - An emergency situation;
 - Brief questions, announcements or reports on a member's activities; or,
 - A purely procedural matter.

Items Not on The Agenda (cont.)

- A additional exception to the rule against discussion of non-agendized items relates to “immediate action” items. (§ 54954.2 (b).)
 - “Immediate action” items are those that meet all of the following:
 - Require immediate action by the body;
 - Came to the attention of the body after posting the agenda; and
 - Are approved by two-thirds of the present members of the body.

The Right to Public Participation and Comment

(§ 54954.3.)

- The public has a right to criticize the policies, procedures, programs, and services of the local body; the local body may not prohibit this kind of public input.
- Public comments or testimony must be allowed on all agenda items before the body takes action.

The Right to Public Participation and Comment-(cont.)

- The public has a right to require that the body deliberate on its actions in public.
- Members of the public have a right to access to documents distributed to members of the body in connection with discussion or consideration of agenda items, unless such documents are exempt under the Public Records Act.

Matters of General Interest

(§ 54954.3.)

- Members of the public may address the body on matters of general interest.
 - However, the agency may not take official action on any item raised by the public at the same meeting at which it was raised.
 - The agency may limit the amount of time a person may speak and limit the subject of public comments to topics within the jurisdiction of the body, as long as the limitations are reasonable.

ENFORCEMENT

- ***CRIMINAL***

- A member of a covered body who attends a meeting where action is taken in violation of the Brown Act is guilty of a misdemeanor if the member intends to deprive the public of information to which the member knows or has reason to know the public is entitled. (§ 54959.)

ENFORCEMENT (Cont.)

- ***CIVIL***
 - Remedies available in such legal proceedings include:
 - Judicial declaration that action by body is void; and
 - Injunction preventing body from taking future or prospective action in violation of the Act.
 - A prevailing plaintiff may be entitled to costs of litigation and attorneys' fees.
 - Public body must first be provided written notice of alleged violation and provided 30 days to cure or correct.

WHEN THINGS GO HORRIBLY WRONG--

- ***Page v. Miracosta Community College District (2009)***
180 Cal. App. 4th 471
 - District President felt she was publicly undermined by a minority of board of trustees. While majority of board supported her, she felt that her due process rights had been violated and hired an attorney.
 - District claims adjuster concluded that significant threat of litigation existed, hired counsel for District, and agreed to mediation.
 - Closed session/anticipated litigation matter was noticed. At meeting, small groups of trustees (< quorum) met with mediator outside of boardroom. Settlement reached/taxpayer challenged on multiple grounds that included Brown Act violations.

MIRACOSTA

- Pending litigation exception does not permit board to meet in closed session to discuss and negotiate with an adversary and her counsel.
- Alleged board actions constituted a “collective acquisition and exchange of facts” preliminary to a decision that must occur openly.
- Use of “personal intermediary” (the mediator) to reach a collective concurrence violated serial meeting rules.
- Subsequent attempt to “cure” alleged violations was not effective.

QUESTIONS?

PROHIBITION ON MASS MAILINGS AT PUBLIC EXPENSE

- A mass mailing at public expense is prohibited if all of the following exist:
 - The item is to be delivered, by any means, to the recipient at his/her residence, place of employment, business or post office.
 - Must be a ***tangible item***.
 - The item ***features*** an ***elected official*** affiliated with the agency producing or sending the mailing; or
 - Includes an elected official's signature or photograph and is prepared or sent in cooperation, consultation or coordination with the elected official.
 - Any of the costs of distributing the item are paid for with public monies ***or*** the costs of design, production and printing exceed \$50 and are paid with public money. Applies even if only part of the mailing is paid for with public funds.
 - More than 200 substantially similar items are sent in a single calendar month, excluding unsolicited requests.

WHAT IS A TANGIBLE ITEM?

- Examples: a written document, button or CD/DVD.
- **Not** a document distributed by e-mail.
- **Not** information available on a website.

WHAT DOES “FEATURES” MEAN?

- Singles out the elected official by the display or layout of the document
 - Does it emphasize the elected official through a headline, caption, type size or type color?

WHO IS AN “ELECTED OFFICER”

- County superintendent of schools
- All School Board members
- ***Not*** school district superintendents

EXCEPTIONS INCLUDE:

- Letterhead, roster listing, directory or business card (without signature or photograph; cannot “feature” elected officer)
- Press releases
- Intergovernmental or intragovernmental communications sent in the ordinary course of business.
- Meeting notices and agendas

ENFORCEMENT

FPPC:

Administrative fines and penalties for violation.
Up to \$5000 per violation.

District Attorney/State Attorney General:

May prosecute as civil or criminal matters.

Violators may be removed from office.

Examples of Violations

- School district assessed a \$3500 fine for mailing a newsletter that featured the pictures and signatures of the board of education.
- School district assessed a \$2000 fine for printing at its expense a newsletter that featured an incumbent trustee running for reelection. The newsletter was included as an insert to a local newspaper.

THIS IS A TEST----



LOOK OUT FOR:

- Pictures of school board members in a school or district newsletter
- Advertisements in a school or district newsletter for an elected officer's business that includes his or her last name.
- General information letter sent to school households signed by school board chair.

When in doubt, consult with counsel!

QUESTIONS?

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