

2019 BROWN ACT TRAINING FOR ADVISORY BODIES AND STAFF

Wednesday, July 31, 2019

4:30 p.m. to 6:00 p.m.

Board Chambers

651 Pine Street, Room 107

Martinez, CA 94553

*Presented by: Mary Ann Mason, Chief Assistant County Counsel
Steve Bolen, Deputy District Attorney
Jami Napier, Chief Assistant Clerk of the Board*

AGENDA

1) The Clerk of the Board

- ✚ Available resources

2) Legal Framework

- ✚ What is an Open Meeting Law?
 - Purpose and approach
- ✚ Are we subject to the Brown Act? What about the Better Government Ordinance?
 - Are we meeting?
 - Can't we just do it by e-mail?
 - Serial meetings
 - Staff communications
 - What is not a "meeting"?

3) How To Prepare For A Meeting

- ✚ How about we meet at Starbucks?
 - Access, geographic boundaries, and overflow
- ✚ Who needs an agenda?
- ✚ What goes on an agenda?
 - Descriptions, required language, meeting details, public comment

- ✚ **What do I do with the agenda?**
 - **Posting and distribution requirements**
- ✚ **What do I do with the agenda packet?**
 - **Distribution requirements**
 - **Late documents - what to do**
- ✚ **Accommodation requested!**
- ✚ **Help! Someone wants to teleconference!**

4) How To Conduct A Meeting

- ✚ **What rights do members of the public have?**
 - **Public comment, procedural rules, sign-in sheets, access to documents**
- ✚ **But we really need to talk about this!**
 - **Following the posted agenda, limited deviations**
- ✚ **Voting: how about secret ballots?**
 - **Public voting, roll calls**
- ✚ **We want to hold a closed session. Can we do that?**
 - **Requirements, confidentiality, announcing and reporting out**
- ✚ **How detailed should our meeting minutes be?**
 - **Record of actions**

5) Consequences Of Violating the Brown Act

- ✚ **How about a do over?**
 - **Civil action for injunction or mandamus - overturn action taken**
 - **Attorneys' fees**
 - **Public criticism**
- ✚ **Can I just do it right next time?**
 - **Civil action for injunction or declaratory relief - prospective**
- ✚ **I am reporting this to the District Attorney!**
 - **Most frequent complaints**
 - **How complaints are processed**
- ✚ **Is it a crime?**
 - **Misdemeanor and penalties**

6) Questions?

The Brown Act
and
The Better Government Ordinance

Training for Advisory Bodies and Staff

Mary Ann Mason, Chief Assistant County Counsel
Office of the County Counsel

Legal Framework

What is an Open Meeting Law?

- Open meeting laws promote transparency in government operations.
- The purpose is to give the public advance notice of what government bodies are doing, and to foster public participation in the governmental decision making process.
- Open meeting laws require that the Board of Supervisors and its advisory bodies take certain actions to ensure public notice and participation.

The open meeting laws:

- The Ralph M. Brown Act (Cal. Gov. Code §§ 54950-54962.)
- County Better Government Ordinance, which expands the state requirements (Ord. Code Chapter 25-2.)

Are we subject to the Brown Act? What about the Better Government Ordinance?

Open meeting laws apply to:

The Board of Supervisors, its subcommittees, its advisory bodies, and all of their subcommittees, even when these subcommittees are temporary ad hoc committees. (Gov. Code, § 54952; Ord. § 25-2.205.)

Open meeting laws apply: whenever there is a public meeting

The Board and its advisory bodies must comply with the open meeting laws each and every time there is a meeting.

The Rule:

Members of a board, committee, or commission may only discuss the body's business at properly noticed meetings that the public can attend.

Are we meeting?

Ask this question whenever a quorum of the body will be present, or a quorum of a subcommittee will be present.

Definition of Meeting (Gov. Code, § 54952.2)

- Any congregation of a majority of the members of the body at the same time and place where they hear, discuss, deliberate, or take action on any item within the body's jurisdiction.
- The body does not have to take action for it to be a meeting. A majority of board members receiving information about something in their jurisdiction can be a meeting; a "meet and greet" to introduce persons who are engaged on matters in the body's jurisdiction can be a meeting.

Can't we just do it by e-mail? (Gov. Code, § 54952.2)

No use of Social Media, cell phones, intermediaries, serial conversations.

The Brown Act expressly prohibits a majority of the members of a body from using social media or intermediaries to discuss, deliberate, act on, or receive information about a matter within the body's jurisdiction.

It is illegal for a majority to use cell phones, text, Twitter, Facebook, Instagram, or a staff intermediary to conduct a group conversation, or to have a series of individual conversations about the body's business.

Why? Because use of these devices or private conversations avoids transparency and excludes the public from the decision-making process.

Exception: staff to the body may talk individually to members of the body to answer questions or to provide information. Staff cannot share member positions, questions, request, etc.

What is not a "meeting"?

- Individual contacts between a member of a legislative body and a member of the public, e.g., a constituent or reporter.
- Attendance of a majority of the members at a conference or similar gathering open to the public that involves a discussion of issues of general interest to the public, or of issues of local community concern. A majority of members must not discuss the body's business, except as part of the scheduled program. (For example, a congressional representative's town hall meeting.)
- Attendance of a majority of members at an open and noticed meeting of another public body – e.g., the Board of Supervisors. A majority of members must not discuss the body's business, except as part of the other agency's meeting.

What is not a "meeting"?

- Meetings generally do not include social or ceremonial occasions. At such occasions a majority of the Board members must not discuss among themselves matters within the jurisdiction of the Board. (Holiday party; member's wedding.) (Gov. Code, § 54952.2.)

Exception: When a County body itself sponsors the occasion and a majority of the body is invited to attend, although not a meeting, the occasion must be accessible to public on request. (Ord. § 25-2.204.)

Don't assume an exception applies! Always check with our office first if you plan to have a quorum of members present for something other than a regular meeting.

How to Prepare for a Meeting

How about we meet at Starbucks?

- Meeting locations are restricted. (Gov. Code, § 54954). Generally meetings must be held within the jurisdictional boundaries of the body.
- The meeting space must be open to the public. A body cannot hold meetings in facilities that are not accessible to the disabled or that exclude members of a gender, nationality, or race. (Gov. Code, § 54961.) The Brown Act also prohibits meetings in facilities where members of the public must pay or purchase to be present. (Id.)
- Overflow capacity: For the Board of Supervisors and on-going subcommittees and advisory bodies, the meeting room must accommodate all who want to attend, or provide the ability to broadcast the meeting to an adjacent area. (Ord. § 25-2.602.)

Who needs an agenda?

- Every County board, committee, or commission for every meeting

What goes on an agenda?

The agenda must:

- specify the date, time, and location of the regular meeting.
- provide an opportunity for public comment on each agenda item and on any non-agenda item that is in the body's purview. Best practice – include rule on time limit per speaker.
- include all matters to be considered at the meeting, even if they are just informational and no action will be taken.
- include language indicating how a person with a disability who requires an accommodation or modification to participate in the meeting may request one.
- provide a location where the public may see a copy of documents that were distributed to the body after the agenda was posted.

For samples, look at Board of Supervisors agendas. These are available online on the County website.

Agenda Item Descriptions

- The agenda must contain a brief general description of each item of business to be transacted or discussed at the meeting.
- The description for an agenda item generally need not exceed 20 words. (Gov. Code § 54954.2.)
- Descriptions must:
 - use clear language that is not misleading or opaque;
 - be sufficiently descriptive to tell the public what the item is about;
 - allow public to decide whether to attend/comment; and
 - be succinct, not overly detailed.

93

What do I do with the agenda?

- You must post the agenda for a full **96 hours** before the meeting.
- Post in **two** ways during the entire 96 hour period.
 - if body has a website, by a direct link on the home page; if body does not have a website, by a direct link on the County website; best to do both.
 - physical posting in a location freely accessible to members of the public during the entire 96 hour period. (Gov. Code, § 54954.2; Ord. § 25-2.206.) Typically this is on the front of the building where the meeting will be held.

NO POSTING, NO MEETING!

94

What do I do with the agenda packet?

- Make sure staff reports and other materials prepared or forwarded by staff for the meeting are available to the Board or advisory body members and the agenda requestor list at the same time. (Gov. Code, § 54954.1)
- Materials must be complete and available at least 96 hours in advance of the meeting. As soon as they are final, they must be available to the public, even if they have not been sent to the body yet. (Ord. § 25-2.206)
- Have a hard copy available at your front counter for the public to view. Post agenda materials online with the agenda, if you have the capacity to do this.

95

Late documents – what to do?

- If staff materials for open session items are completed less than 72 hours before the meeting, make sure they are made available to the public in the location specified on the agenda for access to late documents. (Gov. Code, § 54957.5.)
- If the body posts the agenda packet on line, add the document to the posting.
- Although the Better Government Ordinance requires that all staff materials be available to the public and the body 96 hours in advance, sometimes this is not possible. In that case, there are extra steps you must take:
 - At the meeting, ask that the body waive the 96 hour timeline and accept the document.
 - When you make your request, provide the body a written explanation for why the materials are late.
 - Body must act by ¾ vote to waive the time limits and accept the late materials. (Ord. § 25-2.206.)

46

Accommodation Requested!

On request, all agendas and agenda materials distributed to body must be made available in alternative format to persons with disabilities. (Gov. Code, § 54953.2.)

If you receive a request:

- Do not ask nature of disability.
- Do not ask for written request.
- Fill out the ADA form – available at Clerk of the Board.
- Check with Clerk of the Board about accommodations available.
- Respond to the request.
- Send any complaint about failure to accommodate to County's Risk Manager.

47

Help! Someone wants to teleconference!

- Can I just call in from my car? No! (Gov. Code, § 54953.)
- During a teleconferenced meeting, members are in different locations and connected electronically.
- Rules:
 - A quorum must participate from locations within the body's territorial boundaries.
 - The teleconference location must be listed on the agenda.
 - The teleconference location must be accessible to the public.
 - 96 hours in advance, the agenda must be posted at the teleconference location in addition to usual posting places.
 - Public must be able to hear and address body directly at the teleconference location. Speaker phone or video conference needed.
 - All votes must be taken by roll call.

48

How to Conduct a Meeting

19

What rights do members of the public have?

- **Right to observe.** All meetings must be open and public, and all persons must be permitted to attend.
- **Right to anonymity.** Body cannot require the public to sign in to attend. A sign in sheet must be voluntary and should say so.
- **Right to record.** Members of the public may record, or video tape meetings.
- **Right to read.** The public is entitled to see agendas, agenda materials, and documents that are handed to the body by any person during the meeting. Unless privileged, these documents are disclosable public records. (Gov. Code, § 54957.5; Ord. § 25-2.2206.)

20

What rights do members of the public have?

- **Right to comment.** Every agenda for a regular meeting must provide an opportunity for members of the public to directly address the body on 1) items that are within the subject matter jurisdiction of the public body even if they are not on the agenda and 2) items on the agenda. The opportunity to comment on agenda items must be afforded before or during the public body's consideration of the item. (Gov. Code, § 54954.3.)
- **Right to even-handed rules.** The committee may adopt reasonable rules limiting the total amount of time for public comment on particular issues and may adopt rules limiting the amount of time per speaker. (Gov. Code, § 54954.3.) However, the chair must apply these rules evenhandedly.

If rules limit time for comment, those who use a translator shall have double the time, unless body uses translation equipment that allows body to hear translated comment simultaneously. (Gov. Code, § 54954.3.)

- **Right to criticize.** During the course of public comment, the body may not abridge or prohibit public criticism of the agency's policies, procedures, programs or services, and may not abridge or prohibit public criticism of acts or omissions of the body. However, the committee may apply its adopted rules of procedure concerning time per speaker. (§ 54954.3.)

21

But we really need to talk about this!

Boards, committees and commissions must follow the posted agenda.

- If an item is not included on the agenda, the committee may not act on or discuss that item, except in very limited circumstances.
- Plan agendas very carefully, and do not assume that you can deviate.

23

When may body deviate from posted agenda?

Deviation from agenda (§ 54954.2)

- If, during public comment, a member of the public raises a matter not appearing on the posted agenda, the body's members can make only a brief response to questions or statements made during public comment period. *The body cannot act on or discuss the matter.* Any individual member's response to the comment must be very brief.

A member may:

- Ask a question for clarification.
- Provide a reference to staff or other resources for factual information.
- Request a report back to body at a subsequent meeting.
- Request placement of the matter on a future agenda.

23

When may committee deviate from posted agenda?

Deviation from agenda (§ 54954.2) – special limited circumstances

- Upon determination by two-thirds of all members of legislative body present; or if less than two-thirds of the total membership are present, then unanimous vote of those present that:
- There is a need to take immediate action; and
- The need came to the attention of the body subsequent to posting of the agenda.

If you think this exception would apply, contact our office **before the meeting.**

24

Voting: how about secret ballots?

No secret ballots/report individuals votes - § 54953

- The Board may not take action by secret ballot, whether preliminary or final.
- Voting must occur in public, and each member's vote must be visible to the public.
- Roll call votes assure compliance.
- If simple vote is called for, members of public must be able to see the "yeas" and "nays." And board secretary must be able to record them.
- Minutes must reflect the aye, no, absence, or abstention of each board member by name for each vote taken. (Gov. Code, § 54953.)
- *Policy reason:* Right to witness the decision making process.

25

We want to hold a closed session. Can we do that?

Purpose of closed session: to give body's members an opportunity to discuss and receive information that either would prejudice the agency's position if the discussion were held in open session or would infringe individual privacy interests. Need for confidentiality is the key.

- The ability to hold a closed session is strictly limited to specific situations authorized in the Brown Act.
- Some times when a closed session is permitted:
 - Consultation with negotiator on real property price and payment terms (§ 54956.8) –to authorize negotiator regarding price and terms of payment for transaction.
 - Consultation with attorney on pending or potential litigation. (§ 54956.9)
 - Public security consultation. (§ 54957)

26

We want to hold a closed session. Can we do that?

In general, most advisory bodies do not have jurisdiction to address matters that can be proper topics of closed session.

- Assume that generally the body will not be able to hold a closed session.
- Never list a closed session on an agenda unless staff has first consulted County Counsel and received permission to hold a closed session.
- If approved, County Counsel will provide agenda language and advise if there are any special announcements before closed session or reports out that must be made.

27

How detailed should our meeting minutes be?

Brief minutes, not verbatim, are fine. Use of an annotated agenda suffices.

The minutes must accurately reflect the agenda and the actions taken, who made a motion, who seconded, and what the exact vote was, including names of each member and how they voted for each action. (Gov. Code, § 54953; Ord. § 25-2.205.)


28

Consequences of Violating the Brown Act

29

BROWN ACT ENFORCEMENT

THE ROLE OF THE DISTRICT ATTORNEY



CIVIL REMEDIES

- INVALIDATION
 - ENFORCEMENT WOULD RESULT IN A JUDICIAL DETERMINATION THAT THE ACTION TAKEN IS NULL AND VOID
 - APPLIES TO:
 - open and public meeting requirements
 - posting of the agenda of a regular/ special/ emergency meeting
 - closed session item description
 - public testimony allowed prior to new tax/assessment

CIVIL REMEDIES

- PRIOR TO ENFORCEMENT ACTION, THE DISTRICT ATTORNEY SHALL MAKE A DEMAND OF THE LEGISLATIVE BODY:
- "CURE OR CORRECT" THE ACTION
 - THE WRITTEN DEMAND SHALL BE MADE WITHIN 90 DAYS OF WHEN THE ACTION WAS TAKEN
 - EXCEPTION: IF THE ACTION WAS TAKEN IN OPEN SESSION, BUT IN VIOLATION OF AGENDA POSTING REQUIREMENT, THE DEMAND MUST BE MADE WITHIN 30 DAYS

CIVIL REMEDIES

- WITHIN 30 DAYS OF RECEIPT OF THE DEMAND, THE LEGISLATIVE BODY SHALL CURE OR CORRECT THE CHALLENGED ACTION.
- IF NO ACTION TAKEN, OR IS REFUSED, THE DISTRICT ATTORNEY HAS 15 DAYS TO COMMENCE CIVIL COURT ACTION

CIVIL REMEDIES

- CIVIL ACTION TO PREVENT FUTURE VIOLATIONS
 - STOP OR PREVENT VIOLATIONS, OR THREATENED VIOLATIONS
 - DETERMINE WHETHER THE BROWN ACT APPLIES TO ACTIONS
 - DETERMINE WHETHER ANY RULE OR ACTION OF THE BODY TO PENALIZE OR DISCOURAGE THE EXPRESSION OF A MEMBER IS VALID
 - COMPEL THE BODY TO TAPE RECORD ITS CLOSED SESSIONS

CRIMINAL PENALTIES

- EACH MEMBER OF A LEGISLATIVE BODY
- WHO ATTENDS A MEETING OF THAT BODY WHERE ACTION IS TAKEN IN VIOLATION OF THE BROWN ACT,
- 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 TO UNDER THE BROWN ACT
- IS GUILTY OF A MISDEMEANOR

CRIMINAL PENALTIES

- ACTION MUST BE TAKEN: MERE DELIBERATION WITHOUT ACTION IS NOT SUBJECT TO CRIMINAL PENALTY
- MUST **INTEND** TO DEPRIVE THE PUBLIC OF INFORMATION
- STUPIDITY IS A DEFENSE
- ADVICE OF COUNSEL IS A DEFENSE
- THERE HAVE BEEN **NO** SUCCESSFUL PROSECUTIONS OF A VIOLATION OF THIS STATUTE

Office of the County Counsel
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Contra Costa County
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Date: March 29, 2012

To: County Boards, Commissions and Committees and their
Administrative Officers and Secretaries

From: Sharon L. Anderson, County Counsel
By: Mary Ann McNett Mason, Assistant County Counsel *M.A.M.*

Re: Selected Brown Act and Better Government Ordinance Provisions

County advisory bodies are subject to both the Ralph M. Brown Act (Government Code, sections 54950 et. seq.) and the County's expanded open meeting law, the Better Government Ordinance (Contra Costa County Code, Chapter 25-2.) For your information, we provide this summary of the critical provisions of these open meeting laws.

A. Open Meetings. The Brown Act and Better Government Ordinance generally require that all County Board, commission and committee ("County body") meetings be open for public attendance, that all interested persons be permitted to attend and participate, and that meetings be held on noticed dates at fixed times and places and in accordance with posted agendas. Most county bodies provide for regular fixed times and places for meetings. Meetings generally must be held within the jurisdictional limits of the Board of Supervisors and at locations accessible to the public, including disabled persons. (Gov. Code, §§ 54950, 54954(a),(b), 54961; Ord. § 25-2.602.)

B. County Bodies Subject to Open Meeting Laws. The Brown Act applies to all "legislative bodies" of a local agency, i.e., the County. Legislative bodies include: 1) the governing body of the local agency, (e.g., the Board of Supervisors); 2) committees created by statute; 3) committees created by formal action of the Board, whether composed of lay persons or a combination of lay persons and board members; 4) standing committees composed solely of members of the Board which have a continuing subject matter jurisdiction (e.g., permanent subcommittees such as the "Internal Operations" committee); 5) standing committees created by a Board appointed committee and composed solely of members of that body (e.g., a Mental Health Commission subcommittee). (Gov. Code, § 54952 (a), (b).)

The Better Government Ordinance applies to all County bodies subject to the Brown Act *and* to all other Board or committee created County bodies, including temporary, ad hoc advisory committees composed solely of Board members or committee members and appointed to deal with a single topic for only one meeting or a small number of unscheduled meetings. (Ord. § 25-2.202(a), 25-2.204(a), 25-2.205.) County bodies that are not subject to the Brown Act nevertheless must comply with comparable provisions under the Ordinance. (Ord. § 25-2.202(a), 25-2.204(a), 25-2.205.) We caution that very few committees will be exempt from both the Act

and the Ordinance and that the safer course of action is to assume that both open meeting laws apply.

Bodies subject to the Brown Act and the Ordinance do not include advisory committees to a single individual which are formed by the unilateral action of that individual, e.g., a committee to assist the County Administrator or a single Supervisor and do not include committees made up entirely of County staff. (56 Ops.Cal.Atty.Gen. 14 (1973); Ord. § 25-2.202.) However, unless composed entirely of County staff, a permanent advisory committee created by the County Administrator or a department head must permit the public to attend its meetings upon request to the extent possible consistent with the facilities and the purpose of the gathering. Meetings of these committees need not be formally noticed or provide for public comment. (Ord. § 25-2.204 (d), (e).)

C. Definition of "Meeting". "Meetings" include:

* Any congregation of a majority of members of a County body at the same place and location (including teleconference locations) to hear, discuss, deliberate or take action on any item within the body's subject matter jurisdiction. (Gov. Code, 54952.2 (a).)

* Any serial use of communication, personal intermediaries, or technological devices through which a majority of the body's members discuss, deliberate, or take action on an item. (For example, for a five person body, such an illegal "serial" meeting could occur where committee member A e-mails committee member B about his position on a committee issue and B forwards A's e-mail to committee member C.) A mere series of e-mails or telephone calls by a majority of the body about one of its business items violates the Brown Act. (Gov. Code, § 54952.2 (b).)

D. Social and Ceremonial Occasions. Meetings generally do not include social or ceremonial occasions, provided that a majority of the members do not discuss among themselves business within the subject matter jurisdiction of the legislative body of the local agency. (Gov. Code, § 54952.2(c)(5).) However, when a County body, as a body, sponsors a social, recreational or ceremonial occasion, such as a holiday party, and a majority of the body is invited to attend, the occasion must be accessible to the public upon request, to the extent possible consistent with the facilities and the purpose of the gathering. The occasion need not be noticed formally, conducted at a particular location or provide for public comment. (Ord. § 25-2.204 (d) (2), (e).)

E. Regular Meetings- Agenda Posting Requirements and Related Provisions.

1. Enhanced Agenda Notice Requirement. Under the Brown Act, agendas must be posted at least 72 hours before each scheduled regular meeting. (Gov. Code, § 54954.2

(a.) However, the Better Government Ordinance extends this posting period an additional day. (Ord. § 25.2-206 (a).) Thus, at least 96 hours before each scheduled regular meeting, an agenda containing a brief general description of each item of business to be transacted at the public body's meeting, including items to be discussed in closed session, must be posted. The description generally need not exceed 20 words. The agenda must specify the time and location of the regular meeting.

The agenda must be physically posted in a location freely accessible to members of the public during the entire 96 hour period. (Gov. Code, § 54954.2(a); Ord. § 25.2-206 (a); 78 Ops.Cal.Atty.Gen.328 (1995).) In addition, certain bodies must *also* post their agendas on the their website, or arrange for posting on the County's website 96 hours in advance of the meeting. (Gov. Code, § 54951, 54954.2 (d); see attached memorandum, **Internet and Physical Agenda Posting Required for Certain Bodies.**)

If an item is not specified on the agenda, the County body may not act on or discuss that item, or add that item to the agenda as an urgency item, except as set forth below in subsections 3 and 4. (Gov. Code, § 54954.2 (a), (b); Ord. § 25.2-205.)

2. Deadline for Staff Materials. At least 96 hours in advance of a regular scheduled meeting, all staff reports and other materials prepared or forwarded by staff that provide background information and recommendations on agenda items must be made available to the public and to members of the body. (Ord. § 25-2.206 (a).) In the case of items that are placed on the agenda for a scheduled meeting at a prior meeting occurring not more than seven days before the scheduled meeting, supporting written staff materials may be made available 24 hours before the scheduled meeting. (Ord. § 25-2.206 (a).)

3. Exceptions to the Better Government Ordinance 96 hour agenda notice and staff material deadline. Under limited circumstances, the County body may waive the requirement that an agenda and supporting staff reports must be made available to the public and to members of the body at least 96 hours before the meeting. Upon a determination by *three-fourths* vote of the body that it is essential to waive the time limits *and* after receiving from staff a written explanation as to why the agenda and/or staff reports could not be made available 96 hours in advance, the body may waive the time limits. (Ord. § 25-2.206 (a).) *Notwithstanding a waiver of the Better Government Ordinance requirements, the 72 hour agenda notice requirements and exceptions thereto of the Brown Act continue to apply to all County bodies covered by the Act.*

4. Exceptions to Brown Act 72 hour agenda notice.

a. "Brief Response" to Public Comment; Reference to Staff. (Gov. Code, § 54954.2 (a).) A County body may engage in certain limited activities that are not discussion of

or action on, non-agenda items. If an item not on the agenda is raised by a member of the public during the "public comment" portion of the meeting, members of the County body may "briefly respond." Until a court has construed "briefly respond," we recommend that County bodies interpret the right to respond narrowly, and keep responses limited. On any matter, either in response to questions posed by members of the public or on their own initiative, members of County bodies may ask questions for clarification. In addition, subject to the body's rules or procedures, members of County bodies may provide a reference to staff or other resources for factual information, may request that staff report back at a subsequent meeting on a matter, or may request that staff place a matter on a future agenda. (Gov. Code, § 54954.2 (a).)

b. Limits on Discussion and Action on Non-Agenda Items. (Gov. Code, § 54954.2 (b). Discussion may occur and action may be taken on items which are not set forth on the posted agenda where, prior to discussion or action, the body publicly identifies the item and:

(1) The majority of members of the body vote and find that an emergency exists which involves a work stoppage or other activity which severely impairs public health, safety or both or a crippling disaster which severely impairs public health and safety or both, or

(2) Upon a determination by a two-thirds vote of the body (or, if less than two-thirds of the members are present, a unanimous vote of the members present) that there is a need to take immediate action and that the need for action *came to the attention of the local agency after the agenda was posted*, or

(3) The item was posted for a prior meeting, but action on the item was continued to the present meeting, which is not more than five calendar days after the meeting for which the item was posted. (Gov. Code, § 54954.2 (b).)

We caution that these exceptions will rarely apply in the case of County advisory bodies.

F. Special Meeting Notice Requirements. The Brown Act law requires that notice of a special meeting be provided by 24 hour advance written notice to each member of the public body (unless notice has been appropriately waived) and to each local newspaper, radio or television station which had requested notice in writing. Notice may be given by personal delivery or *by any other means* (i.e., facsimile or e-mail). In addition, the call and notice of the special meeting must be physically posted at least 24 hours prior to the meeting in a location that is freely accessible to members of the public. Bodies subject to the internet posting requirement must also simultaneously post the special meeting agenda on their website, or if they don't have a website, on the County's website. The notice must identify the time and place of the meeting and the business to be transacted. Only the business set forth in the notice may be transacted at the

meeting. (Gov. Code, § 54956.)

1. Public Input. The notice for the special meeting must provide an opportunity for public comment on the item which is the subject of the special meeting before the public body acts on that item. (Gov. Code, § 54956.)

G. Emergency Meeting Notice Requirements. The Brown Act allows the calling of emergency meetings in specified circumstances (work stoppages, crippling disasters, or other activities which will severely impair public health, safety or both, as determined by a majority of the public body) without complying with the special meeting 24 hour notice or 24 hour posting requirements. If telephone services are functioning, each newspaper and radio or television station that has filed a request for special notice must be noticed by telephone at least one hour prior to the emergency meeting. (Gov. Code, § 54956.5 (a) (1), (b).)

In the case of dire emergencies (crippling disaster, mass destruction, terrorist act, threatened terrorist act that poses immediate and significant peril as determined by a majority of the public body), even the one hour notice to media outlets is eliminated. If telephone services are functioning, telephone notice of the meeting must be given to the media outlets at or near the time that the chair notifies members of the body of the meeting. (Gov. Code, § 54956.5 (a) (2), (b).)

As to any emergency meeting, if telephone services are not functioning, as soon after the meeting as possible, newspapers and radio or television stations must be notified of the meeting, of its purpose, and of any action taken at it. In addition, as soon after the meeting as possible, the minutes of the emergency meeting must be posted for a minimum of 10 days in a public place. (Gov. Code, § 54956.5 (e).)

H. Public Input.

1. Provide Opportunity to Comment. Every agenda must provide an opportunity for members of the public to directly address the body on 1) items that are within the subject matter jurisdiction of the body, even if they are not on the agenda and 2) items on the agenda. The opportunity to comment on agenda items must be afforded *before or during* the body's consideration of the item. (Gov. Code, § 54954.3(a); Ord. § 25-2.205 (c).) To ensure that the public is not denied the opportunity to comment on specific agenda items, and to enhance the flow of the meeting, we suggest that the public comment period as to all items usually be scheduled for the beginning of the meeting.

If a member of the public addresses an item not appearing on the posted agenda, no response, discussion, or action on that item may occur except as set forth in section E,

subparts 3 and 4 above.

2. No Prohibition of Criticism. During a meeting, the County body may not abridge or prohibit public criticism of the County's policies, procedures, programs, or services, and may not abridge or prohibit public criticism of acts or omissions of the body. However, the body may apply its adopted rules of procedure concerning time per speaker. (Gov. Code, § 54954.3 (a); Ord. § 25-2.604.)

3. Overflow Capacity. If the number of spectators at a meeting of the Board of Supervisors, or of a permanent board or commission, or of a permanent subcommittee of the Board, exceeds the legal capacity of the meeting room, the public address system must broadcast into an adjacent area to permit the overflow audience to hear the meeting. If this is not possible, the meeting must be adjourned to a facility with sufficient capacity to accommodate the entire audience. (Ord. § 25-2.602.)

I. Teleconferencing. A body may hold meetings by "teleconference," that is, a meeting of a body whose members are in different locations, connected electronically through audio and/or video. During the teleconference, at least a quorum of the members of the body must participate from locations within the boundaries of the body. Teleconferencing may be used for all purposes in connection with a public meeting, including voting. All votes taken during a teleconferenced meeting must be by roll call. Each teleconference location must be identified in the agenda for the meeting, and each teleconference location must be accessible to the public. The agenda must permit members of the public to address the body directly at each teleconference location. Agendas must be posted at all teleconference locations. (Gov. Code, § 54953 (b).)

J. Record of Meetings. Each County body must keep a record of its meetings. Though the record need not be verbatim, i.e., a tape-recording, it must accurately reflect the agenda and the decisions made in the meeting. (Ord. § 25-2.205 (d).)

K. Assistance for Persons with Disabilities on Request. Upon request, agendas, agenda packets, and other writings distributed to the public body must be made available in appropriate alternative formats to persons with disabilities as required by the federal Americans with Disabilities Act. In addition, every public body agenda, including all subcommittee agendas, must include information regarding how, to whom, and when a request for disability-related modification or accommodation, including auxiliary aides or services, may be made by a person with a disability who requires a modification or accommodation to participate in a meeting. (Gov. Code, §§ 54954.1; 54954.2 (a); 54957.5 (b).)

L. Distributed Materials as Public Records. Except for certain writings exempt

from disclosure under the California Public Records Act, documents distributed to the County body by staff or any other person for consideration at a public meeting are public records. If presented during a meeting during discussion on an agenda item, such records must be immediately available for public inspection. If presented during a meeting prior to commencement of discussion on the agenda item to which the records relate, such non-exempt documents must be made available to the public for inspection before and during discussion on the agenda item. (Gov. Code, § 54957.5(a),(c); Ord. § 25-2.206 (c).)

Before a meeting, except for records that are exempt by law from disclosure, any county record that is intended for distribution to the body, even if not yet distributed to the body, must be available for public inspection and copying upon request. (Ord. § 25-2.206 (b).)

M. Provision of Agenda Materials Required.

1. Written Request for Packet. The Brown Act permits a member of the public to place a standing request that copies of the agenda or of the agenda packet be mailed to him. Such request must be made in writing and will apply for the entire calendar year in which it is filed. The body must mail the requested materials at the time the agenda is posted, or upon distribution to a majority of the members of the County body, whichever is first. Thus, if the agenda packet is mailed to members of the county body a week before the meeting, the packet must be mailed simultaneously to a requestor. (Gov. Code, § 54954.1.)

2. Materials Distributed Less Than 72 Hours Before Meeting. If a document related to an open session agenda item on a regular meeting agenda is distributed to a majority of the body less than 72 hours before the meeting, the document must be made available to the public at a specified location at the same time it is provided to the body. Each meeting agenda must specify the location where such documents will be available for public inspection. (Gov. Code, § 54957.5 (b) (2).) Inasmuch as the County's Better Government Ordinance requires that the agenda and supporting staff reports be made available to the public and members of the body at least 96 hours before a regular meeting, there should be few occasions on which a document is distributed less than 72 hours before a meeting.

Please note that these two State law requirements apply, even if a legislative body subject to the Better Government Ordinance acts by a three-fourths vote to waive ordinance requirements that the agenda and supporting staff reports must be made available to the public 96 hours in advance of the meeting. (Ord. § 25-2.206 (a).)

2. Fees for Provision of Packet. The County body may establish a fee for provision of agenda packets. (Gov. Code, § 54954.1.) However, the Better Government Ordinance imposes a limitation on fees for duplication of agendas and related materials. Bodies considering establishment of a fee for mailing of the agenda or agenda packet should be sure

such fee conforms to these limitations. While a body may charge actual mailing costs, a body may not charge for copying meeting agendas and related materials that are twenty or fewer pages per document. A fee of one cent per page may be charged for a copy of agendas and related materials that contain more than twenty pages per document. (Ord., §§ 25-2.206 (d); 25-4.610.)

N. *Closed Sessions*. There are a number of express grounds (to receive legal advice concerning threatened or pending litigation, etc.) authorizing adjournment of a County body from a public meeting to a closed session. However, this office envisions only the rarest of situations arising in which the public bodies that it advises other than the Board of Supervisors or legislative special district bodies would be permitted to go into closed session. For this reason, we suggest that if the County body feels a closed session may be justified the body should authorize its chairperson or staff to contact this office to discuss whether a closed session is appropriate, how it should be noticed, and how action taken should be reported out.

1. *Agenda Notice Requirements*. Regular meeting agendas and special meeting notices must include a brief, general description of the matters to be discussed in closed session. (Gov. Code, §§ 54954.2, 54956.) The Brown Act provides agenda descriptions for each of the various closed session topics. While the Act does not require use of these descriptions, their use provides a "safe harbor" against challenges to the adequacy of the notice. (Gov. Code, § 54954.5.)

2. *Announcing and Reporting Out*. Before conducting a closed session, the body must announce in open session the items to be discussed. Disclosure may be made by reference to the agenda item number or letter. (Gov. Code, § 54957.7(a).) After completing closed session, the public body must reconvene in open session and make a public report of certain specified actions. The content of the report depends upon the nature of the closed session. Generally, in addition to other matters, where action is taken the County body must report out the vote or abstention of every member present. (Gov. Code, §§ 54957.1.)

3. *Closed Session Prohibited for Temporary Bodies*. A County body subject to the Better Government Ordinance, but not otherwise subject to the Brown Act, (i.e., a temporary ad hoc committee composed solely of members of the county body) may not hold a closed session. It must conduct all meetings in open session. (Ord., § 25-2.205 (a).)

O. *Procedure to Void Actions Taken in Violation of the Brown Act's Requirements*. The Brown Act sets forth a procedure for invalidating actions of a covered public body taken in violation of that Act. (Gov. Code, § 54960.1.) The procedure provides that before any interested person may initiate legal action to obtain a judicial determination of whether the public body has violated the Act and that any action taken is null and void, the person must make a written demand on the public body to cure the alleged defect. If your body received such a demand, it

immediately should be brought to the attention of the County Counsel's Office.

Should the interested party file and succeed in litigation, the court can award costs and reasonable attorneys fees against the County body. (Gov. Code, § 54960.5.)

P. *Criminal Penalty for Unlawful Meeting.* Each member of a body who attends a meeting of that body where action is taken in violation of any provision of the Brown Act, 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 the Brown Act, is guilty of a misdemeanor. (Gov. Code, § 54959.)

Conclusion. As can be seen from the foregoing, it is very important that your County body properly prepare agendas and provide required notice of its meetings. If these procedural matters are not done correctly, interested parties may use legal process to void actions taken at an improperly noticed meeting. If your body has any particular questions concerning these requirements, please have your chairperson or administrative staff contact this office for clarification.

MAM/am

attachment

cc: Members, Board of Supervisors, District Offices
County Administrator
Clerk of the Board
Thomas Kensok, Senior Deputy District Attorney
County Department Heads

Office of the County Counsel

651 Pine Street, 9th Floor
Martinez, CA 94553

Contra Costa County

Phone: (925) 335-1800

Fax: (925) 646-1078

Date: January 15, 2014

To: David W. Twa, County Administrator,
Attn: Tiffany Lennear, Chief Clerk of the Board of Supervisors,
County Boards, Commissions, and Committees and their Administrative
Officers and Secretaries

From: Sharon L. Anderson, County Counsel
By: Mary Ann McNett Mason, Assistant County Counsel

Re: **Ralph M. Brown Act Amendment Requires Detailed Public Report of
Individual Votes**

For your information, we discuss a recent amendment to the Ralph M. Brown Act, the open meeting law, Statutes of 2013, Chapter 257, effective January 1, 2014. Government Code section 54953, subsection (c) (2) now provides:

“The legislative body of a local agency shall publicly report any action taken and the vote or abstention on that action of each member present for the action.”

Previously, the law prohibited public bodies from voting by secret ballot, but did not expressly require that individual votes be reported on open session items, unless the meeting involved a teleconference location.¹ Thus, some agencies would state in their minutes that an item passed, without specifying how the various board members voted. This made it hard for members of the public either not attending the meeting, or watching the meeting of a very large body, to know with certainty how individual members voted on any given item. Government Code section 54953 (c) (2) was added to improve public accountability by requiring agencies to clearly report the vote or abstention of each member present at the meeting.²

A. Specificity in Minutes/Record of Actions Now Required

To comply with this new public reporting requirement, each time a board, committee, or commission votes on an agenda item, the minutes or record of actions must

¹ Gov. Code, § 54953 (b) (2).

² Senate Floor, Bill Analysis, SB 751 (5/28/13); Assembly Committee on Appropriations, Bill Analysis, SB 751 (7/3/13).

state how each individual board or committee member voted. If the member did not vote, the minutes/record of actions must specify whether the member was absent or abstained. To do this, include the following information in the minutes/record of actions for every vote:

- AYES: (list names of members voting aye)
- NOES: (list names of members voting no)
- ABSENT: (list names of members absent)
- ABSTAIN: (list names of members who abstained)

A written record of the body's actions must be made available for public review. This is usually done by posting approved minutes or a record of actions.

If bodies pass resolutions or otherwise reflect their actions by annotating individual board orders, these documents must detail the vote in the form shown above. A simple statement of the number of votes pro and con on a resolution or an annotated board order will not suffice. Each board member's name and vote, absence, or abstention also must be listed on the resolutions or board orders.

B. Enhancing Transparency in Open Session

Sometimes when a vote taken in open session is not unanimous, it can be difficult for members of the public attending the meeting to follow. To enhance transparency in this circumstance, it is a good practice to publicly announce the vote immediately after it occurs. After a vote in open session that either is not unanimous or from which a member abstains, the chair may summarize the vote and action taken as follows:

- “The motion passes 3-2, with Smith and Jones dissenting. Item x is approved.” or
- “The motion passes 4-0, with Smith abstaining. Item x is approved.”
- “The motion fails 3-2, with Smith, Jones, and Black voting against. Item x is not approved.”

C. Report of Vote following Closed Session

Not all boards, committees, and commissions are authorized by the Brown Act to meet in closed session. Legal counsel must always be consulted before listing a closed

session item on an agenda. When a closed session is authorized, and the body reports an action taken in closed session in the minutes/record of actions or other written document, the same format described in Section A above must be used to describe the vote.³

In an oral report of action taken or direction given in a closed session, the vote or abstention of every member present for the closed session must be reported. This applies even if

the vote is unanimous.⁴ For example, the chair or counsel may state:

“In closed session, the board voted unanimously to seek appellate review in the case of *Green v. Miller*.” or

“In closed session, the board voted 3-2, to seek appellate review in the case of *Green v. Miller*, with Smith, Jones, and Black voting aye, and White and Rose dissenting.” or

“In closed session, the board voted unanimously to seek appellate review in the case of *Green v. Miller*, with Black abstaining.

MAM/am

cc: Members, Board of Supervisors
County Administrator
Attn: Terry Speiker, Chief Assistant County Administrator
Julie Enea, Senior Deputy County Administrator
Department Heads
Steven Moawad, Senior Deputy District Attorney

³ Gov. Code, §§ 54953, 54957.1.

⁴ Gov. Code, § 54957.1.

Office of the County Counsel
651 Pine Street, 9th Floor
Martinez, CA 94553

Contra Costa County
Phone: (925) 335-1800
Fax: (925) 646-1078

Date: February 21, 2012
To: County Boards, Commissions, and Committees
From: Sharon L. Anderson, County Counsel
By: Mary Ann McNett Mason, Assistant County Counsel *M. A. M.*
Re: **Internet and Physical Agenda Posting Required for Certain Bodies**

For your information, we summarize a recent amendment to the Ralph M. Brown Act, the open meeting law.

PHYSICAL AND INTERNET AGENDA POSTING REQUIRED

Effective January 1, 2012, State law requires that certain public bodies post regular and special meeting agendas on their websites. **This is not a substitute for physically posting the agenda. Agendas must be posted both on the website and on the building.** (Gov. Code, §§ 54954.2, 54956.) County bodies must post regular meeting agendas at least 96 hours before the regular meeting and must post special meeting agendas at least 24 hours before the special meeting. The same time limits apply to both physical and internet posting.

This new internet posting requirement applies to governing bodies of local agencies such as the Board of Supervisors or a joint powers agency governing board. Additionally, the new requirement applies to statutory bodies such as the County Planning Commission and Municipal Advisory Councils, and to certain bodies whose membership is compensated for service *and* includes a Supervisor or other member of a statutory body, such as the Internal Operations Committee. (Gov. Code, §§ 54951, 54954.2 (d), 54956 (c).) A comprehensive list of County bodies subject to the new internet posting requirement is attached. (See list, **Bodies That Must Post Agendas Physically and on Website.**)

If a listed body does *not* have its own website, it must arrange to have its agenda posted on the County's website 96 hours before regular meetings and 24 hours before special meetings. A body without a website must deliver a hard copy of its agenda to the Clerk of the Board, attention Arsenio Escadero, Senior Management Analyst, **at least one full business day** before the required posting deadline. Bodies that have websites should forward links for their websites to the Clerk of the Board who will create a master index of such websites on the County's website.

NO POSTING, NO MEETING

If a body on the attached list fails to timely post its agenda physically in a location

that is freely accessible to the public *and* on its website (or the County's website,) the body may not hold its meeting. (Gov. Code, §§ 54954.2 , 54956 .)

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MAM/am

attachment

cc: Members, Board of Supervisors

County Administrator

Attn: Terry Speiker, Chief Assistant County Administrator

Attn: Lara Delaney, Senior Management Analyst

Department Heads and Fire Chiefs

Executive Director, Housing Authority

Bodies That Must Post Agendas Physically and on Website:

Advisory Council on Aging
Airport Land Use Commission
Airports Committee
Alamo Municipal Advisory Council
Assessment Appeals Board
Bay Point Municipal Advisory Council
Bethel Island Municipal Advisory Council
Board of Directors Contra Costa County Fire Protection District
Board of Directors Crockett-Carquinez Fire Protection District
Board of Supervisors
Byron Municipal Advisory Council
Contra Costa Centre Municipal Advisory Council
Contra Costa County Flood Control and Water Conservation District Governing Board
Contra Costa County Housing Authority Board of Commissioners
Contra Costa County In-home Supportive Services Public Authority
Contra Costa County Mental Health Commission
Contra Costa County Merit Board
Contra Costa County Planning Commission
Contra Costa County Public Financing Authority Governing Board
Contra Costa County Public Law library Board of Trustees
Contra Costa County Redevelopment Successor Agency Oversight Board
Contra Costa County Workforce Development Board
Contra Costa Health Plan Joint Conference Committee
Contra Costa Health Plan Oversight Committee
Diablo Municipal Advisory Council
Dougherty Valley Oversight Committee
East Contra Costa County Habitat Conservancy, Governing Board
Economic Opportunity Council
El Sobrante Municipal Advisory Council
Family and Human Services Committee
Finance Committee
First 5 Contra Costa Children and Families Commission
Hazardous Materials Commission
Internal Operations Committee
Keller Canyon Mitigation Fund Review Committee
Kensington Municipal Advisory Council
Knightsen Town Advisory Council
Legislation Committee
Local Child Care & Development Planning Council
Medical Services Joint Conference Committee

North Richmond Municipal Advisory Council
North Richmond Waste and Recovery Mitigation Fee Committee
Open Space/Parks & East Bay Regional Parks District Liaison Committee
Pacheco Municipal Advisory Council
Public Protection Committee
Relocation Appeals Board of Contra Costa County
Rodeo Municipal Advisory Council
Transportation, Water, and Infrastructure Committee
Treasury Oversight Committee

GUIDE TO DRAFTING AGENDA LANGUAGE UNDER THE BROWN ACT

Wise Words from County Counsel Sharon L. Anderson

Writing agenda language is a chore and a challenge for every department. But it is also one of the most important things we do because, absent a true emergency, the governing body of a public agency is prohibited by law from discussing or taking action on any item that is not properly listed on an agenda.¹ The purpose of this memorandum is to assist departments in preparing agenda language that is legally defensible and conforms to standard County protocols.

1. **The Prime Directive.** The Brown Act requires that the agenda for a local agency's meeting contain a *brief general description of each item of business* to be transacted or discussed at the meeting. The brief general description need not exceed 20 words, although it may do so. With limited exceptions, no action or discussion may be taken on any item not appearing on the posted agenda.² An agency fulfills its agenda obligations under the Brown Act so long as it "substantially complies" with statutory requirements.³ Agenda language that gives the public fair notice of the essential nature of what the Board of Supervisors will be considering and is not in any sense confusing, misleading or unfairly opaque should meet the test of substantial compliance.⁴

2. **The purpose of the Prime Directive.** The purpose of the Prime Directive is to give the public a fair chance to participate in matters of particular or general concern. The public should not have to guess or surmise the essential nature of the business to be considered by a local agency, based on clues in the agenda.⁵ The action that the Board is being asked to take should be clearly and succinctly stated in the agenda so that members of the public have enough information to decide if they want to read the Board Order or appear at a Board meeting to comment on the item.

¹ "No action or discussion shall be undertaken on any item not appearing on the posted agenda, except that members of a legislative body or its staff may briefly respond to statements made or questions posed by persons exercising their public testimony rights under Section 54954.3. In addition, on their own initiative or in response to questions posed by the public, a member of a legislative body or its staff may ask a question for clarification, make a brief announcement, or make a brief report on his or her own activities...[or] provide a reference to staff or other resources for factual information, request staff to report back to the body at a subsequent meeting...or take action to direct staff to place a matter of business on a future agenda." (Gov. Code, § 54954.2(a)(3). See also, Gov. Code, § 54954.2(b).)

² Gov. Code, § 54954.2(a)(1) and (2)(E)(3).

³ Gov. Code, § 54960.1(d)(1).

⁴ *San Diegans for Open Government v. City of Oceanside* (2016) 4 Cal.App.5th 637, 645.

⁵ *Olson v. Hornbrook Community Services Dist.* (2019) 33 Cal.App.5th 502, 519.

3. **Summarize multiple, complex, or wordy recommendations.** If a Board Order includes multiple recommendations, or a single recommendation that is either complex or wordy, the agenda language should not be a verbatim recitation of the full recommendation(s). Agenda language should be limited to a single sentence. Agenda language that includes more than one sentence or a series of semicolons likely contains unnecessary detail. Agenda language that is so cumbersome as to be confusing or unnecessarily opaque may fail the test of “substantial compliance” under the Brown Act. Generally, the essential nature of the Board’s action will be more easily identified by the public if the agenda language is not cluttered with unnecessary detail such as contract or grant numbers, statutory references, past history, policy statements or similar commentary. Not only does extraneous information obscure the focus of the agenda item, it is also fertile ground for mistakes.

4. **What is meant by “each item of business?”** As noted above, the Brown Act requires that a local agency’s meeting agenda contain a brief general description of *each item of business* to be transacted or discussed at the meeting. This means that the agenda should provide the public with “notice of the essential matter” the agency will consider.⁶ The definition of “each item of business” may differ depending on the action that the Board is asked to approve.

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⁶ *Olson v. Hornbrook Community Services Dist.*, *supra*, 33 Cal.App.5th at 519.