

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: 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).)

B. 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