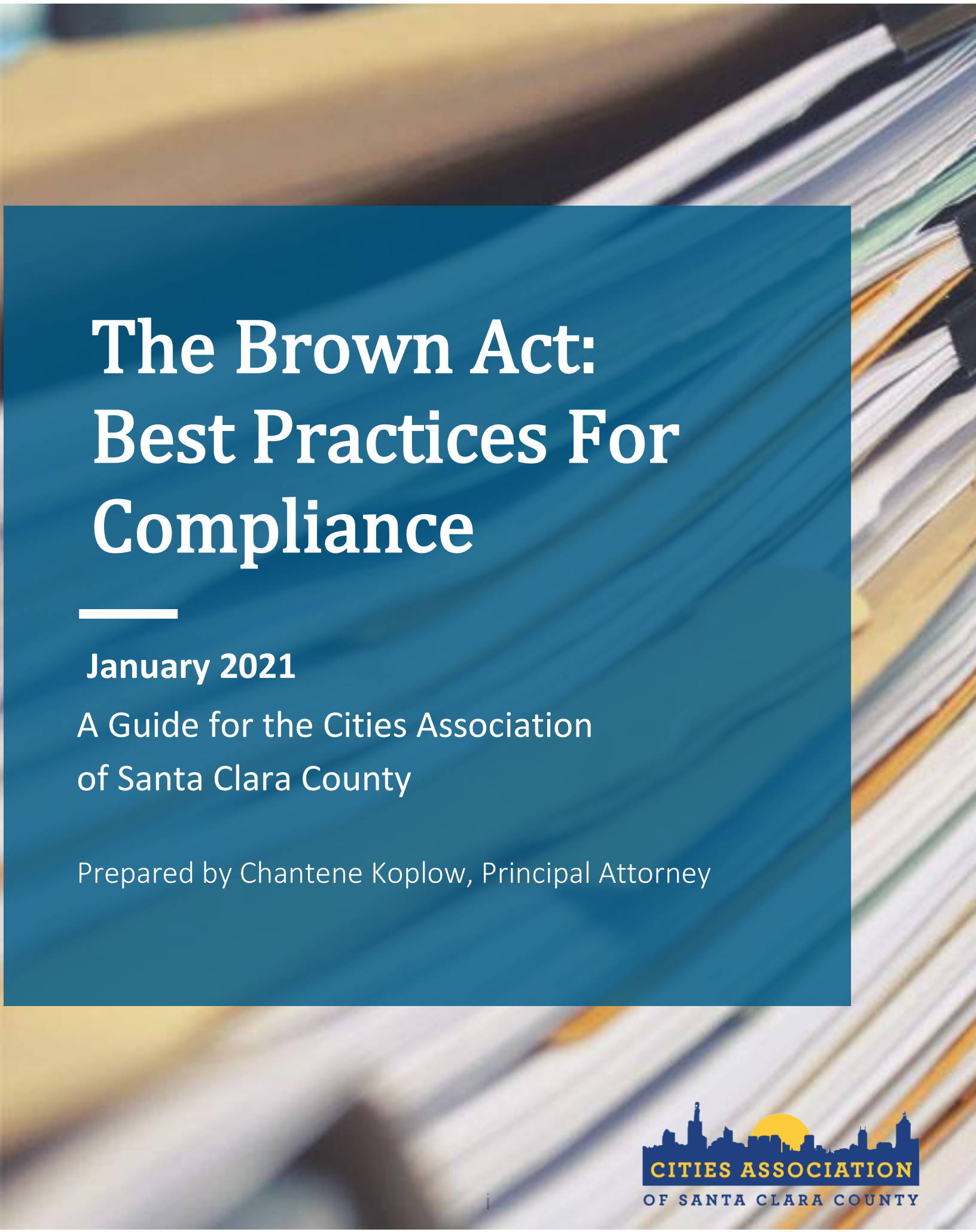

The Brown Act: Best Practices For Compliance

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A Guide for the Cities Association of Santa Clara County

Prepared by Chantene Koplow, Principal Attorney

CITIES ASSOCIATION OF SANTA CLARA COUNTY

The Brown Act Practice Guide

Understanding the Brown Act and
Best Practices for Compliance

Contents

Disclaimer: This guide is provided for informational purposes only and is not intended to and should not be relied upon as legal advice. In addition, the information is up to date as of the date listed on the cover page.

Chapter I — Introduction to the Brown Act

This guide provides a background on The Ralph M. Brown Act (Gov. Code, § 549501 et seq., "the Brown Act," or "the Act") and recommended best practices for compliance with the Act.

The Brown Act is a California law intended to provide public access to meetings of local legislative bodies. The Brown Act serves to provide the public transparency into how their local governing bodies work so that these bodies can be held accountable. These local legislative bodies include commissions, committees, boards, or other bodies of a local agency created by charter, ordinance, resolution, or formal action of a legislative body. The Brown Act also applies to local bodies such as boards of supervisors, city councils and school boards. The Cities Association of Santa Clara County (CASCC) is considered a local legislative body and is subject to the Brown Act.

The Brown Act represents the California Legislature's acknowledgement that the public should have access to meetings of multi-member public bodies. Over the years since the Brown Act has passed, courts have repeatedly emphasized that the purpose of the Brown Act is to allow open and public participation in the decisions of local government bodies and to curb abuse of the democratic process by secret legislation of the public bodies that govern.

The Brown Act demonstrates that, on balance, there is a presumption in favor of public access and facilitation of public participation in local government decisions, while recognizing the need for governmental legislative bodies to engage in debate and information gathering with candor and confidentiality. In order to maintain this balance, the Brown Act imposes an "open meeting" requirement on local legislative bodies.

However, the Brown Act also contains specific, narrow exceptions from the open meeting requirements where government has a demonstrated need to conduct its

business confidentially and privately. Indeed, unless there is a specific exception delineated in the Brown Act itself, which authorizes a closed meeting, the matter must be conducted publicly even if the matter concerns sensitive matters.

In the age of virtual communication and social media, the Brown Act specifically prohibits members of legislative bodies from using the telephone, email, or other electronic communications to make collaborative group decisions without holding formal meetings and providing the public its right of access.

Ultimately, the Brown Act applies only to multi-member bodies such as councils, boards, commissions and committees because these bodies are created for the purpose of reaching collaborative decisions through public discussion and debate. The Brown Act does not apply to individual decision-makers where collaboration with the public is not similarly required or necessary.

Chapter II — Public Bodies Covered by The Brown Act

I. Legislative Bodies

The Brown Act applies to the legislative bodies of local agencies. The Brown Act broadly defines “legislative body” to include nearly every type of decision-making body of a local agency. These legislative bodies include any board, commission, committee, or other body of a local agency created by charter, ordinance, resolution or formal action of a legislative body is itself a legislative body

In most cases, these bodies are considered legislative bodies under the Brown Act whether they are permanent or temporary, advisory or decision-making. However, there are exceptions to this rule as described further below.

II. Advisory Committees

Temporary advisory committees composed solely of the members of a legislative body, constituting less than a quorum of that legislative body, and that have neither a continuing scope of business nor a schedule set by the legislative body are not covered by the Brown Act.

If an advisory committee is created by formal action of a legislative body, *but* includes members of multiple legislative bodies, then it is most likely subject to the Brown Act.

III. Ad Hoc Committees

Ad Hoc Committees are limited to committees that meet both requirements:

1) The committee is comprised solely of less than a quorum of the legislative body which created it; and
2) The committee meets for a short duration to gather information about a single subject.

Ad Hoc Committees do not need to comply with the Brown Act's notice and open meeting requirements.

It is important to remember that even where a purported ad hoc committee meets infrequently and not on a regular basis, if the committee has the authority to hear and consider issues within the subject matter jurisdiction of its parent legislative body, and the committee's authority does not need to be periodically renewed (*i.e.*, it is open-ended), the committee may be subject to the Brown Act.
In addition, if a legislative body designates less than a quorum of its members to meet with representatives of another legislative body to perform a task, such as the making of a recommendation, an advisory committee consisting of the representatives from both bodies would be created. Such a committee would be subject to the Brown Act.

→ **Example:**

An ad hoc committee consisting of three out of seven council members appointed to investigate a singular claim of resource misuse would not be subject to the Brown Act. However, the Brown Act would apply to such a committee if a citizen or someone else who was not a member of the parent legislative body was appointed to the committee.

IV. **Standing Committees**

A standing committee is a committee which has *either* :

1) continuing jurisdiction over a particular subject matter (*e.g.*, budget, finance, legislation); or
2) a meeting schedule which is fixed by charter, ordinance, resolution or other formal action of the legislative body that created it.

Standing committees are covered by the Brown Act if they have schedules fixed by official action even where the committee is comprised solely of less than a quorum of the members of a parent legislative body.

In addition, while a standing committee that meets pursuant to a regular schedule is always subject to the Brown Act, even standing committees that meet infrequently or sporadically are subject to the Brown Act if they consist of more than a quorum, or if they have ongoing authority to address issues within the subject matter jurisdiction of parent body.

If a legislative body has multiple standing committees, those committees cannot meet to form a quorum of the legislative body and deliberate on matters falling within the

jurisdiction of the parent legislative body without triggering the notice and open meeting requirements of the Brown Act for the parent legislative body.

Best practices suggest that legislative bodies be careful when appointing standing committees and creating overlapping membership or jurisdiction. If a standing committee meets and forms a majority of another standing committee automatically, there is an appearance of if not an actual Brown Act violation if the meeting of the second committee has not also been properly noticed. In addition, the meeting could constitute a joint meeting as described below.

→ **Example:**

A legislative body has 19 members and two Standing Committees, A and B. Standing Committee A has 9 members, not forming a quorum of the legislative body. Standing Committee B has 9 different members than Standing Committee A and does not form a quorum of the legislative body. If one member of Standing Committee B meets with all of Standing Committee A to deliberate, a quorum of the legislative body is formed and the meeting should be noticed as a meeting of the legislative body.

V. **Private Entities Covered by the Act**

The Brown Act applies to private corporations, limited liability companies, and other entities that are created by a legislative body for the purpose of exercising authority that the legislative body has delegated to them.

Typically, the entities subject to the Brown Act will be nonprofit corporations that have been jointly established by multiple government bodies for the purpose of constructing, operating, or maintaining a public works project or public facility.

However, a nonprofit corporation or other entity is not subject to the Brown Act merely because it receives public funds.

The Brown Act also covers a board, commission, committee or other multimember body that 1) governs a private entity which receives funds from a local agency, and 2) has on its governing board a member of that agency's legislative body who is appointed by the legislative body.

VI. **State Agencies**

Although state agencies are not covered by the Brown Act, they are subject to the Bagley-Keene Open Meetings Act, which is very similar to the Brown Act.

Chapter III — Meetings

I. **Meetings Under the Brown Act**

The Brown Act only applies to "**meetings**" of local legislative bodies. The Brown Act defines a meeting as: " . . . any congregation of a majority of the members of a legislative body at the same time and location, including teleconference location as permitted by Section 54953, to hear, discuss, deliberate, or take any action on any item that is within the subject matter jurisdiction of the legislative body." Cal. Gov't Code § 54952.2.

The term "meeting" is fairly broad and is not limited to gatherings at which an action is taken, but includes discussion and deliberative gatherings as well.

Under the Brown Act, "meetings" refer generally to four types of gatherings: a legislative body's regular meetings, special meetings, emergency meetings, and adjourned meetings. There are also meetings that can occur through writings or teleconferences:

1) "Regular meetings" are meetings occurring at the dates, times, and location set by resolution, ordinance, or other formal action by the legislative body and are subject to 72-hour posting requirements.

2) "Special meetings" are meetings called by the presiding officer or majority of the legislative body to discuss only discrete items on the agenda under the Brown Act's notice requirements for special meetings and are subject to 24-hour posting requirements.

Special meetings are those meetings that have not been pre-approved by the advisory body as a regular meeting.

A meeting that is not held at the regular meeting location is also considered a special meeting and requires that the agenda be posted both at the regular location and the current location.
All other requirements with regard to the content of a special meeting agenda are the same as the requirements of a regular meeting.

Joint meetings fall under the category of special meetings. Joint meetings occur when a majority of the members of a legislative body attend an open and noticed meeting of another body of the local agency, or when a majority of the members of a legislative body attend an open and noticed meeting of a legislative body of another local agency. At a joint meeting, only those items that are of interest to both advisory bodies may be discussed. All other requirements with regard to the content of a joint meeting agenda are the same as the requirements of a special meetings. If two bodies conduct a joint meeting, each body should notice the meeting as a joint meeting of the two bodies. This exception does not apply when a majority of the members of a parent legislative body attend a meeting of a standing committee of the parent body only as observers.

3) "Emergency meetings" are a limited class of meetings held on little notice and when prompt action is needed due to actual or threatened disruption of public facilities. Absent a dire emergency, at least one hour before the meeting, telephonic notice must be provided to all media entities that have requested that they receive notice of any special meetings called pursuant to Cal. Gov't Code § 54956.

In the case of a dire emergency, notice need only be provided at or near the time that notice is provided to the members of the body. A dire emergency is a crippling disaster, mass destruction, terrorist act, or threatened terrorist activity that poses peril so immediate and significant that requiring a legislative body to provide one-hour notice before holding an emergency meeting may endanger the public health, safety, or both, as determined by a majority of the members of the legislative body.

At the conclusion of an emergency meeting, the minutes of the meeting, a list of persons who the legislative body notified or attempted to notify, a copy of the roll call vote, and any actions taken at the meeting must be posted for a minimum of 10 days in a public place as soon after the meeting as possible.

As a general rule, emergency meetings may not be held in closed session.

4) "Adjourned meetings" are regular or special meetings that have been adjourned or re-adjourned to a time and place specified in the order of adjournment. An adjourned meeting does not require an agenda for regular meetings adjourned for less than five calendar days as long as no additional business is transacted or added to the agenda.

II. **Virtual Meetings and Emails**

In the modern age, there are other types of communications which may constitute a meeting beyond formally meeting in person with a quorum of the legislative body. Below are two such examples:

1) Teleconference Meetings — The Brown Act authorizes members to conduct meetings through teleconferencing under specified circumstances. Teleconferencing may be used for all purposes in conjunction with any meeting within the subject matter jurisdiction of the body. However, at least a quorum of the members of the body must participate from locations that are within the boundaries over which the body exercises jurisdiction. Additionally, for clarity all votes taken during a teleconference meeting must be conducted by rollcall. The biggest concern with the use of teleconference meetings is the public's access to the meeting. The Act requires that each teleconference location must be fully accessible to members of the public. The Brown Act generally requires that members of the body who choose to utilize their homes or offices as teleconference locations must open these locations to the public and accommodate any member of the public who wishes to attend the meeting at that location. Further, members of the public must be able to hear the meeting and testify from each location. Lastly, the teleconference location must be accessible to persons with disabilities. Because of these requirements, most legislative bodies choose to utilize official or public meeting facilities for their remote teleconference sites. Whenever a legislative body chooses to meet through teleconferencing, it must post an agenda at each teleconference location and list each teleconference location in the notice and agenda. The meeting must comply with all other requirements for a meeting held in person.

Note: Although currently, under shelter-in-place instructions and pursuant to Executive Order N-25-20, some of the restrictions of the Brown Act have been loosened for teleconferences and virtual meetings, the loosening of these rules is currently temporary. It is recommended that you consult the CASCC attorney if there are concerns about the Brown Act as it has been affected by COVID-19 and Executive Order N-25-20.

2) Emails as Meetings — The use of email as an efficient and widespread means of communication has raised questions about when and how these communications may amount to a meeting subject to the Brown Act.

For example, authorities on the Brown Act agree that a majority of a body would violate the Act if they emailed each other regarding current issues under the body's jurisdiction even if the emails were also sent to the secretary and chairperson of the agency, the emails were posted on the agency's Internet Web site, and a printed version of each email was reported at the next public meeting of the body. *See* 84 Ops.Cal.Atty.Gen. 30 (2001).

One of the problems with this type of correspondence was that such email communications would not be available to persons who do not have Internet access. Moreover, even if a person had Internet access, the deliberations on a particular issue could be completed before an interested person had an opportunity to become involved.

It is advised that deliberations do not occur over email where the public cannot participate timely in the discussion, whether that is due to the unavailability of an Internet connection or the inability to deliberate before decisions are completed.

III. Exceptions to Brown Act Meetings

The Brown Act creates six exceptions to the meeting definition:

1) Individual Contacts — The first meeting exception involves individual contacts between a member of the legislative body and any other person. The Brown Act does not limit a legislative body member acting individually, on his or her own. This exception recognizes the need and right for an individual member to confer with constituents, consultants, media, advocates, local agency staff, or a colleague. As discussed further in Chapter IV for serial meetings, the exception for individual contacts does not permit an individual to engage in a series of individual contacts that

leads to discussion, deliberation, or action among a majority of the members of a legislative body.

2) Conferences — The second exception allows a majority of the members of a legislative body to attend a conference or similar gathering open to the public that addresses issues of general interest to the public. A majority of members may attend even if the gathering concerns matters relevant to public agencies of the type represented by the legislative body. This exception permits legislative body members to attend annual association conferences of city, county, school, community college, and other local agency officials, so long as those meetings are open to the public. However, members must be careful — a majority of members cannot discuss among themselves, other than as part of the scheduled program, business of a specific nature that is within their legislative body's subject matter jurisdiction.

3) Community Meetings — The third exception allows the majority of a legislative body to attend an open and publicized meeting held by another organization to address a topic of local community concern. Here, too, members must be careful — a majority of the legislative body cannot discuss among themselves, other than as part of the scheduled program, business of a specific nature that is within the legislative body's subject matter jurisdiction. Members should exercise caution at these events, because there is a fine line between what is permitted and what might be seen as an impermissible deliberation under the Brown Act.

4) Other Legislative Bodies —The fourth exception allows a majority of a legislative body to attend an open and publicized meeting of: (1) another body of the local agency; and (2) a legislative body of another local agency. Again, the majority cannot discuss among themselves, other than as part of the scheduled meeting, business of a specific nature that is within their subject matter jurisdiction. For example, within a county, a majority of the board of supervisors could attend a meeting of the county council but must be careful not to deliberate on matters they oversee outside of a specified time during the scheduled meeting where they are permitted to do so.

The Brown Act does not prevent the majority of a legislative body from sitting together at such a meeting. However, members may choose not to sit together in order to avoid the possibility of improperly discussing business of their legislative body and to avoid the appearance of a Brown Act violation.

5) Standing Committees — The fifth exception to "meetings" concerns the attendance of a majority of members of a legislative body at an open and noticed meeting of a standing committee of that legislative body. This exception applies provided that the legislative body members who are not members of the standing committee attend only as observers (meaning that they cannot speak or otherwise participate in the meeting).

6) Social or Ceremonial Events — The final exception to "meetings" allows a majority of a legislative body to attend a purely social or ceremonial occasion. The Brown Act does not prohibit a majority of members from attending the same party, wedding, sports game, funeral, or other social gathering. The majority must be careful not to discuss matters within their legislative body's jurisdiction at these events.

IV. The Brown Act and Collective Briefings

These exceptions to "meetings" do not allow the majority of a legislative body to meet together with staff in advance of a meeting for a collective briefing. Such a briefing is a meeting under the Brown Act, and any such briefings that involve a majority of the body in the same place and time must be open to the public and satisfy Brown Act meeting notice and agenda requirements.

Chapter IV — Serial Meetings

I. Serial Meetings Under the Brown Act

A serial meeting is a discussion that, at least initially, involves only a portion of a legislative body, but eventually involves a majority. The Brown Act provides that "[a]

majority of the members of a legislative body shall not, outside a meeting … use a series of communications of any kind, directly or through intermediaries, to discuss, deliberate, or take action on any item of business that is within the subject matter jurisdiction of the legislative body." Cal. Gov't Code § 54952.2(b)(1)

The problem with serial meetings is that its process deprives the public of an opportunity for meaningful observation of and participation in legislative body decision-making. Thus, serial meetings violate the spirit and law of the Brown Act.

There are two types of serial meetings: "daisy chain" or "hub and spoke."

1) Daisy Chain Serial Meetings — In the daisy chain scenario, Member A contacts Member B, Member B contacts Member C, Member C contacts Member D and so on, until a quorum has discussed, deliberated, or taken action on an item within the legislative body's subject matter jurisdiction. In the daisy chain scenario, the public was not able to observe or participate in the deliberations, and a Brown Act violation has occurred.

2) Hub and Spoke Serial Meetings — There are four common hub and spoke scenarios.

I. In the first scenario, Member A acts as the hub and sequentially contacts the spokes, Members B, C, and D, until a quorum has been contacted for purposes of deliberation on a matter within the legislative body's jurisdiction.

II. In the second scenario, a staff member (the hub), acts as an intermediary for the legislative body or one of its members, and communicates with a majority of members (the spokes) one-by-one to discuss, deliberate, or make a decision on a proposed action.

III. In the third scenario, a chief executive officer (the hub) briefs a majority of members (the spokes) prior to a formal meeting and, in the process, information about the members' respective views is revealed.

IV. In the last scenario, a member of the public (the hub), acts as an intermediary for the legislative body or one of its members, and communicates with a majority of members (the spokes) to learn each members' respective views, and shares these views with the other members as part of the deliberative process.

→ Example

Assuming an 11 member body, if a constituent contacts at least six members of that body and conveys to each member that five other council members are already in support of a certain measure and states that the member's support will ensure the proposal succeeds, the interaction may constitute a "hub-spoke" serial meeting.

Crucially, it is up to the legislative member, who is not only likely to be more knowledgeable about the Brown Act but also legally liable for its violations, to halt any conversations that amount to a serial meeting or might create an impermissible serial meeting. Members of a legislative body should discourage such constituent communications and be vigilantly aware that in the world of social media and digital communications, even a perception of misconduct can raise allegations of violating the Brown Act.

The Brown Act often draws fine lines. For example, the Brown Act permits an employee or official of a local agency to engage in separate conversations or communications outside of an open and noticed meeting "with members of a legislative body in order to answer questions or provide information regarding a matter that is within the subject matter jurisdiction of the local agency if that person

does not communicate to members of the legislative body the comments or position of any other member or members of the legislative body." Cal. Gov't Code § 54952.2.

While the Brown Act prohibits a quorum of a legislative body from privately deliberating through written communications, the Brown Act allows unilateral written communications to the legislative body, such as an informational or advisory memorandum. Note that an advisory memorandum may be a public record subject to the Brown Act.

II. Serial Meetings to Set an Agenda

For items that have been placed on an agenda or that are likely to be placed upon an agenda, members of legislative bodies should avoid serial communications of a substantive nature regarding these items.

However, the Brown Act's prohibition against serial meetings does not necessarily prevent an executive officer of a body from planning upcoming meetings by discussing times, dates, and placement of matters on the agenda. An executive officer may also receive spontaneous input from any of the board members with respect to these or other matters so long as a quorum is not involved.

III. Serial Meetings and Contact with Staff

One of concerns under the Brown Act pertains to members of a body contacting staff. In the context of serial meetings, staff can inadvertently become an intermediary for an illegal serial meeting. To avoid a prohibited serial meeting through a staff briefing, there are several best practices recommended:

I. Individual briefings of a majority of members of a legislative body should be "unidirectional." This means that information should flow from staff to the member and the member's participation should be limited to asking questions and acquiring information. Members should avoid giving staff direction on these matters so that the members do not cause staff to shape or modify their

recommendations in order to conform to the views of the various members, resulting in an impermissible deliberation and action outside a meeting.

II. Staff may present its viewpoint to the member, but staff should not ask for the member's views and the member should avoid providing his or her views unless it is absolutely clear that the staff member is not discussing the matter with a quorum of the legislative body unless such a discussion will occur during a properly held meeting.

III. Members should not ask staff to describe the views of other members of the body, and staff should not volunteer those views if they are aware of them.

IV. Serial Meetings and Contacts with Constituents and Lobbyists

As with staff, a constituent or lobbyist can also inadvertently become a conduit for an impermissible serial meeting.

Members should not assume that constituents are familiar with the requirements of the Brown Act and should be wary of causing or participating in an illegal serial meeting with a constituent or lobbyist.

In order to prevent participation in an impermissible serial meeting through constituent conversations, there are several recommended best practices:

I. State the ground rules of the conversation up front to the constituent. Ask if the constituent has or intends to talk with other members of the body about the same subject; if so, make it clear that the constituent should not disclose the views of other members during the conversation.

II. Explain to the constituent that you cannot and will not make a final decision on a matter prior to the meeting. For example, you may say: "State law prohibits me from giving you a commitment on this matter outside of a meeting. I can, however, listen to what you have to say and consider it as I make my decision.

III. Listen, ask questions, but refrain from expressing your opinions on a matter.

IV. If you inadvertently or intentionally disclose your thoughts about a matter, ask that the constituent not to share them with other members of the legislative body and explain to them that you are required by state law to make your decisions during a meeting.

Why Are These Steps Necessary? These best practices may seem unduly restrictive and burdensome, and may make it more difficult and/or time-consuming for members of a legislative body to acquire important information. However, if you follow these guidelines you will be in a better position to assure your actions meet the requirements of the Brown Act and comport with the spirit of providing open and public meetings.

Chapter V — Public Comment

I. Public Comment Under the Brown Act

The Brown Act requires that every agenda for a regular meeting provide an opportunity for members of the public to directly address the legislative body on any item under the subject matter jurisdiction of the body.

With respect to any item which is already on the agenda, or in connection with any item which the body will consider (pursuant to the exceptions contained in section 54954.2(b)), the public must be given the opportunity to comment before or during the legislative body's consideration of the item.

The Brown Act appears to apply the same public testimony requirement to closed sessions as it does to a regular meeting. Thus, for closed sessions, it is advised that legislative bodies afford the public an opportunity to comment on closed session items prior to the body's adjournment into closed session. The only exception to the public testimony requirement is where a committee comprised solely of members of the legislative body has previously considered the item at a public meeting in which all members of the public were afforded the opportunity to comment on the item before or during the committee's consideration of it, so long as the item has not substantially changed since the committee's hearing.

Where a member of the public raises an issue, which has not yet come before the legislative body, the item may be briefly discussed but no action may be taken at that meeting. The purpose of the discussion is to permit a member of the public to raise an issue or problem with the legislative body or to permit the legislative body to provide information to the public, provide direction to its staff, or schedule the matter for a future meeting as an agenda item.

The Brown Act specifically authorizes the legislative body to adopt regulations to assist in processing comments from the public. The body may establish procedures for public comment and the body may specify reasonable time limitations on particular topics or individual speakers. So long as the body acts fairly with respect to the interest of the public, it has great discretion in regulating the time and manner, as distinguished from the content, of testimony by interested members of the public.

When a member of the public testifies before a legislative body, the body may not prohibit the individual from criticizing the policies, procedures, programs or services of the agency or the acts or omissions of the legislative body. This provision does not confer on members of the public any privilege or protection that is not otherwise provided by law. Members of the public have broad constitutional rights to comment on any subject relating to the business of the legislative body or local agencies more broadly, and any attempt to restrict the content of such speech must be narrowly

tailored to effectuate a compelling state interest. If there are any concerns regarding restrictions of public speech, it is advised to consult with an attorney.

II. Time Limits on Public Comment

The legislative body may set time-limits on public comment for items on the agenda as well as during open comment. The California Attorney General has concluded that five minutes per speaker is a reasonable amount of time, (*see* 75 Ops. Cal. Atty. Gen. 89 (1992)), and a court has said that it is not a violation of the Brown Act to limit public comment to two minutes per speaker on each agenda item. *See Chaffee v. San Francisco Public Library Comm.*,134 Cal. App. 4th 109, 116 (2005).

III. Identification of Members of the Public

Under the Brown Act, a member of the public can attend a meeting of a legislative body without having to register or give other information as a condition of attendance.

If a register, questionnaire, or similar document is posted or circulated at a meeting, it must clearly state that completion of the document is voluntary and not a prerequisite for attendance.

IV. Agenda Setting and Noticing

To ensure transparency and public participation, the Brown Act requires that legislative bodies post agendas prior to their meetings and that no action or discussion may occur on items or subjects not listed on the posted agenda. There are some limited exceptions discussed herein.

Legislative bodies, except advisory committees and standing committees, are required to establish a time and place for holding regular meetings. Meeting agendas must contain a brief general description of each item of business to be transacted or

discussed at the meeting. However, the description does not need to exceed 20 words.

Each agenda must be posted in a place that is freely accessible to the public and must be posted on the agency's website, if it has one. It is important to note that the agenda posting requirements differ depending on the type of meeting to be conducted:

1) Regular Meeting Agenda Requirements — If the meeting is a "regular meeting" of the legislative body (*i.e.*, occurs on the body's regular meeting day, without a special meeting call), the agenda must be posted 72 hours in advance of the meeting.

2) Special Meeting Agenda Requirements — For special meetings, the call of the meeting and the agenda (which are commonly one and the same) must be posted at least 24 hours prior to the meeting. Each member of the legislative body must personally receive written notice of the special meeting either by personal delivery or by "any other means" (such as fax, electronic mail or U.S. mail) at least 24 hours before the time of the special meeting, unless they have previously waived receipt of written notice. Members of the press (including radio and television stations) and other members of the public can also request written notice of special meetings. If they have made such a request, notice must be given at the same time notice is provided to members of the legislative body.

3) Adjourned Meeting Agenda Requirements — Both regular and special meetings may be adjourned to another time. The Brown Act requires that notices of adjourned meetings be posted on the door of the meeting chambers where the meeting occurred within 24 hours after the meeting is adjourned. If the adjourned meeting occurs more than five days after the prior meeting, a new agenda for that adjourned meeting must be posted 72 hours in advance of the adjourned meeting.

V. Public Requests for Agendas

The Brown Act also requires the legislative body to mail the agenda or the full agenda packet to any person making a written request no later than the time the agenda is posted or is delivered to the members of the body, whichever is earlier. However, the body may charge a fee to recover its costs of copying and mailing. In addition, such a request for notice is not perpetual. Any person may make a standing request to receive these notices or full agenda packets but this request must be renewed annually. The Brown Act specifies that failure by any requestor to receive the agenda does not constitute grounds to invalidate any action taken at a meeting.

If materials pertaining to a meeting are distributed less than 72 hours before the meeting, they must be made available to the public as soon as they are distributed to the members of the legislative body. Further, the agenda for every meeting of a legislative body must state where a person may obtain copies of materials pertaining to an agenda item delivered to the legislative body within 72 hours of the meeting.

VI. Discussion of Non-Agenda Items

A body may not *take action or discuss* any item that does not appear on the posted agenda. There are three classes of exceptions to this rule:

1) The first exception is if the body determines by majority vote that an emergency situation exists. The term “emergency” is limited to work stoppages or crippling disasters.

2) The second exception is if the body finds by a two-thirds vote of those present, or if less than two-thirds of the body is present, by unanimous vote, that there is a need to take immediate action on an item and the need for action came to the attention of the local agency subsequent to the posting of the agenda. This means that if four members of a five-member body are present, three votes are required to add the item; if only three are present, a unanimous vote is required.

3) The third exception is a body of exceptions regarding interactions with staff:

I. Members of the legislative body or staff may briefly respond to statements made or questions posed by persons, including constituents, during public comment periods.

II. Members or staff may ask questions for clarification and provide a reference to staff or other resources for factual information.

III. Members or staff may make a brief announcement, ask a question or make a brief report on his or her own activities.

IV. Members may, subject to the procedural rules of the legislative body, request staff to report back to the legislative body at a subsequent meeting concerning any matter.

V. The legislative body may itself as a body, subject to the rules of procedures of the legislative body, take action to direct staff to place a matter of business on a future agenda.

The body may not discuss non-agenda items to any significant degree under these exceptions and the comments *must* be brief. These exceptions do not permit extensive question and answer sessions between the public and the legislative body or between legislative body and staff.

When the body is considering whether to direct staff to add an item to a subsequent agenda, the exceptions above do not permit the body to engage in a debate about the underlying issue or discuss the merits of the matter.

In order to avoid impermissible discussion of items to be placed on a subsequent agenda, it is recommended for legislative bodies to adopt a rule that any one member may request an item to be placed on a subsequent agenda, so that discussion of the merits of the issue can be easily avoided. However, if the legislative body does not

wish to adopt this rule, then the body's consideration and vote on the matter must take place with virtually no discussion.

It is crucial to follow these exceptions carefully and interpret them as narrowly as possible in order to avoid an otherwise important by a non-agendized discussion of the item.

Chapter VI — Public Record and Record-Keeping

The public has the right to obtain copies of the minutes of open meetings under the California Public Records Act. However, the legislative body may charge a fee or deposit for the minutes.

Additionally, the public is entitled to inspect any writing or document distributed to members during a meeting. If a document was prepared by the legislative body itself, the public is entitled to inspect the document at the time of the meeting. If a document was prepared by someone other than a member of the legislative body, the public is entitled to inspect it after the meeting.

It is recommended for at least one member of the body to ensure that staff receives a copy of any distributed documents so that copies can be made for the body’s records and for members of the public who request a copy.

Legislative bodies may, but need not, make audio recordings of their meetings. If the body chooses to record its meetings, those recordings are public records, just like ordinary minutes.

The public is not entitled to copies of the minutes or recordings of closed sessions or meetings unless the person requesting such copies can prove to a court that a closed session was held in violation of the open meetings laws or that discussion in a closed session strayed from the topics listed in the agenda.

l. Public's Right to Videotape or Broadcast Public Meetings

As stated above, the public has the right to videotape or broadcast a public meeting or to make a motion picture or still camera record of such meeting. However, the legislative body may prohibit or limit recording of a meeting if the body finds that the recording cannot continue without noise, illumination, or obstruction of a view that constitutes, or would constitute, a disruption of the proceedings.

These grounds do not permit a legislative body to prohibit recording based purely on a disruption of the nonphysical type, such as breach of decorum or behavior that causes solely mental discomfort to the members.

Any audio or video tape record of an open and public meeting that is made, for whatever purpose, by or at the direction of the city is a public record and is subject to inspection by the public consistent with the requirements of the Public Records Act. The legislative body must not destroy the tape or film record of the open and public meeting for at least 30 days following the date of the taping or recording. Furthermore, the public must be permitted to inspect the audiotape or videotape for free on equipment provided by the legislative body.

II. **Closed Sessions**

Under the Brown Act, a legislative body may meet in "closed session," meaning the meeting is closed to the public in very specific situations. Closed sessions may include meetings to discuss:

- ✓ License or permit determinations.
- ✓ Conference with real property negotiators.
- ✓ Conference with legal counsel regarding existing or anticipated litigation.
- ✓ Liability claims.
- ✓ Threats to public services or facilities.
- ✓ Public employee appointment, employment, performance evaluation, discipline, dismissal or release.
- ✓ Conference with labor negotiators.
- ✓ Case reviews or planning.
- ✓ Reports involving trade secrets or hearings.
- ✓ Charges or complaints involving information protected by federal law.

The meeting agenda should identify closed session items. This will facilitate participation of a member of the public to speak on the closed session item in open session, prior to the legislative body going into the closed session meeting.

If the legislative body seeks to hold a closed session, the legislative body must follow a number of rules:

1) Prior to meeting in closed session, a representative of the body must orally announce the items to be discussed in closed session. Generally, this requirement may be satisfied by referring to the numbered item on the agenda which describes the closed session in question. However, when the body is meeting in closed session because of significant exposure to pending litigation the statement may need to include additional information.

2) At the conclusion of each closed session, the agency must reconvene into open session. If any final decisions have been made in the closed-session meeting, a report may be required. The Brown Act also contains specific requirements with respect to adjourning or continuing meetings (discussed below).

3) Unless specifically exempted, all meetings must be conducted within the geographical boundaries of the body's jurisdiction.

It is important to note that the fact that material may be sensitive, embarrassing, or controversial does not justify the use of a closed session unless it is authorized by some specific exception. Rather, in many circumstances these characteristics may be further evidence of the need for public scrutiny and participation in discussing such matters.

III. Semi-Closed Meetings and Secret Ballots

Authorities on the Brown Act have determined that meetings should not be semi-closed. Therefore, certain interested members of the public may not be admitted to a closed session while the remainder of the public is excluded.

As a general rule, closed sessions may involve only the membership of the body in question plus any additional support staff which may be required (*e.g.*, an attorney required to provide legal advice; supervisors or witnesses may be required in connection with disciplinary proceedings; labor negotiators may be required for consultation). Persons without an official role in the meeting should not be present.

Secret ballots are expressly prohibited by section 54953(c) of the Brown Act. Therefore, items under consideration which are not subject to a specific closed meeting exception must be conducted in a fully open forum. One aspect of the public's right to scrutinize and participate in public hearings is their right to witness the decision-making process. If votes are secretly cast, the public is deprived of the full exercise of this right.

However, members of a body may cast their ballots either orally or in writing so long as the written ballots are marked and tallied in open session and the ballots are disclosable public records.

IV. **After A Closed Session**

The legislative body must publicly report if they have taken any of the following actions in a closed session:

1) Approval of an agreement concluding real estate negotiations immediately if the closed session results in a final agreement, and upon inquiry if the agreement is finalized thereafter.

2) Action taken on claims.

3) Action taken to appoint, employ, dismiss, accept the resignation of, or otherwise affect the employment status of a public employee by title of position.

4) Approval of a labor agreement.

The public is entitled to copies of contracts, settlement agreements, and other documents approved by the public body and subject to any of these reporting requirements.

V. **Closed Session Records**

A legislative body may maintain a minute book for actions taken during a closed session, but is not required to do so. If the body does maintain a minute book, or similar documentation, such records are not a public record. Furthermore, absent a court order, a legislative body is not required to tape record its closed sessions.

Chapter VII — Enforcement and Remedies

The Brown Act lays out a number of ways to enforce its requirements as well as remedies and consequences for violating its requirements.

A knowing violation of the Brown Act is a crime and certain violations are classified as criminal misdemeanors. Specifically, under California Government Code section 54959, each member of a legislative body who attends a meeting of that legislative 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" is guilty of a misdemeanor. The member must have the "intent" to deprive the public of information to which it is entitled.

Legislative body members and staff may also be penalized for violating the confidentiality of a closed session by disclosing information without the authorization of the legislative body. Such a violation may result in disciplinary action and/or injunctive relief.

However, by far the most commonly used enforcement provisions are those that permit the public to file a civil case to invalidate certain actions taken in violation of the Brown Act and to stop or forestall future violations.

I. Civil Actions to Enforce the Brown Act

Individual citizens may bring legal suits of three types to enforce the Brown Act: 1) a suit over a legislative body's alleged violation of the Brown Act based on the that entity's *past* violation of the Brown Act; 2) a suit to contest or enjoin *ongoing or future* actions in alleged violation of the Brown Act; and 3) a suit to *void* an action taken by a legislative body in alleged violation of the Brown Act.

1) Allegations of Past Violations Not Seeking to Void Past Actions — Persons alleging a past violation of the Brown Act, and seeking to bar further violations, (but

NOT to invalidate a specific decision or action) must first attempt to resolve the matter through the procedures set forth in Cal. Gov't Code § 54960.2:

Within nine months of the violation, a complainant must file a "cease and desist" letter with the body clearly describing the past action of the legislative body and nature of the alleged violation. The legislative body then has 60 days to respond with an unconditional commitment to cease, desist from, and not repeat the past action. If the Government body responds with a timely and unconditional commitment, that will be the end of the dispute. However, if the body fails to respond, responds unsatisfactorily or conditionally, or reneges on its commitment the complainant may file suit, and must do so within 60 days.

2) Ongoing or Future Action — Any interested person may file an action by mandamus, injunction, or declaratory relief for the purpose of stopping or preventing violations or threatened violations of the Brown Act or to determine the applicability of the Brown Act to ongoing actions or threatened future actions of the legislative body.

3) Suits to Void Past Action — If a complainant's goal is for a to court declare a legislative body's action null and void due to a Brown Act violation, the procedure outlined in Cal. Gov't Code § 54960.1 (a) applies. Before filing an action in court seeking invalidation, a person who believes that a violation has occurred must send a written "cure or correct" demand to the legislative body. This demand must be sent within 90 days of the alleged violation and must clearly describe the challenged action and the nature of the claimed violation

A demand must be sent within 30 days if the action was taken in open session but in violation of Cal. Gov't Code § 54954.2, which requires (subject to specific exceptions) that only properly agendized items are acted on by the governing body during a meeting. The legislative body then has up to 30 days to cure and correct its action. If it does not act, any lawsuit must be filed within the next 15 days. The purpose of this

requirement is to allow the body a chance to consider whether a violation has occurred and to weigh its options before litigation is filed.

II. **Other Remedies**

In all Brown Act cases brought by citizens, attorneys' fees may be recovered. The award of attorneys' fees is not mandatory, but these fees are often awarded to prevailing plaintiffs.

III. **Responsibilities of Members**

Ultimately, the public cannot monitor every action of the governing legislative body and it falls to the members to follow the rules of the Brown Act and act in good faith to comply. Compliance results from regular training, discretion, and self-regulation on the part of public officials.

Resources

Ralph M. Brown Act- California Government Code, § 54950 *et seq*.

First Amendment Coalition, *FAC Brown Act Primer*, https://firstamendmentcoalition.org/facs-brown-act-primer/ (last visited May 29, 2020).

League of California Cities*, Open & Public V: A Guide to the Ralph M. Brown Act*, Rev. Apr. 2016, https://www.cacities.org/Resources-Documents/Resources-Section/Open-Government/Open-Public-2016.aspx
(last visited May 29, 2020)

California Attorney General's Office, *The Brown Act: Open Meetings for Local Legislative Bodies*, 2003
https://oag.ca.gov/sites/all/files/agweb/pdfs/publications/brownAct2003.pdf (last visited May 29, 2020)

Digital Media Law Project*, Open Meetings Laws in California*, https://www.dmlp.org/legal-guide/california/open-meetings-laws-california (last visited May 29, 2020)

California Executive Order N-25-20.