

The Brown Act

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INSTITUTE FOR
LOCAL GOVERNMENT

Speakers

Peter M. Thorson, Richards Watson & Gershon

Teresa L. Stricker, Renne Sloan Holtzman Sakai LLC

Moderator

**Melissa Kuehne, Communications and Development Manager,
Institute for Local Government**

**Thank you to ILG Partners Richards Watson &
Gershon and Renne Sloan Holtzman Sakai LLC
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How to ask a question during the webinar

- **Please type your questions into the question box at any time during the webinar.**
- **We will read your questions during the question period at the end of the webinar.**



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**California Special
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ILG Mission

- Promoting good government at the local level
- Practical, impartial and easy-to-use materials

Presentation Overview

- I. Brown Act Basics
- II. Legal Updates
- III. Hypotheticals: Common Mistakes and How to Avoid Them
- IV. Questions



Brown Act Basics

- Ralph M. Brown Act (Gov. Code, § 54950 *et seq.*)
- Purpose: to promote transparency and public participation in local government.
- All meetings of the legislative body of a local agency shall be open and public, and all persons shall be permitted to attend any meeting of the legislative body of a local agency, unless an exception applies. (Gov. Code, § 54953)

Meetings Defined

- A “meeting” is any gathering of a **majority of the members** of a legislative body at the same time and location to **hear, discuss, deliberate, or take action** on any item that is within the **subject matter jurisdiction** of the legislative body. (Gov. Code, § 54952.2)
- Includes meetings by teleconference, or communications by other electronic means. (Gov. Code, §§ 54952.2, 54953)

Exceptions to Noticed Meeting Requirements

- Individual member contacts or conversations between member and another person.

Careful: No serial meetings.

- Majority of members at certain open and publicized conferences; meeting of another organization or another legislative body of another agency.

Careful: Do not talk to each other about agency business.

- Majority of members at a purely social or ceremonial occasion.

Careful: Do not talk to each other about agency business.

Careful: Public perception of improper discussions.

(Gov. Code, § 54952.2)

Teleconferencing

Meetings may be conducted by teleconferencing (i.e., any electronic audio or video connection) under all of the following conditions:

- Agendas must be posted at teleconference locations specifying all teleconference locations.

Careful: No last minute teleconference.

- There is public access to teleconference locations.

Careful: No teleconference from car or plane while traveling.

- There is public opportunity to speak at each teleconference location.

Careful: Make sure there is public access to home, hotel room or other location of teleconference.

- All votes are taken by roll call.

(Gov. Code, § 54953 (a) and (b).)

Recommendations: Electronic Communications Among Members of a Legislative Body

DON'T

- Communicate your position or make a commitment on a pending matter to a majority of members.
- Solicit responses from other members when forwarding along information you received (such as an email received from a citizen).
- REPLY ALL!

DO

- Use caution when emailing any other member of the legislative body with informational items.
 - Use “bcc” to avoid unintentional replies to all
- When in doubt, send the email to the clerk or manager instead of forwarding it to members directly.
- Reminders from staff “Please Do Not Reply to All”

Agendas: Regular Meetings

- Post at least **72 hours** in advance in a location that is freely accessible to the public and on the local agency's website.
- Must include:
 - Brief **general description** of each item of business to be transacted or discussed at the meeting, including items to be discussed in closed session;
 - The meeting **time and location**;
 - Information for requesting disability-related modifications or accommodations.
- Must allow for public comment on every agenda item and items not on the agenda.

(Gov. Code, § 54954.2)

Notice: Special Meetings

- Notice must be **posted** at least **24 hours** in advance of the special meeting.
- **Written notice** must be sent at least **24 hours** in advance to each member of the body, to each local newspaper in general circulation, and to radio or television stations requesting written notice.
- Special meeting notice must include:
 - The meeting **time and location**;
 - Each item of business to be transacted or discussed (brief general description is recommended)
- Requires public comment **only** on agenda items.

(Gov. Code, § 54956)

Closed Sessions

- Closed sessions are an exception to the rule that agency meetings must be open and public.
- Only topics specifically authorized under the Brown Act may be discussed in closed session.
- The most common closed session topics are Litigation, Real Estate Negotiations, Personnel Matters, and Labor Negotiations.
 - Careful:** Real property negotiations are very narrow; only price and terms of payment for real property may be discussed.
 - Careful:** Consult your attorney about special noticing requirements concerning complaints against agency personnel.
- Report out action and vote; no matter how late; some exceptions for contingent settlement

(Gov. Code, § 54954.3)

Legal Challenges, Remedies, and Penalties

- Request to Cure
- Criminal Charges
- Civil Action by private party or District Attorney
- Invalidation
- Costs and Attorney's Fees

(Gov. Code, §§ 54959, 54960, 54960.1)



LEGAL UPDATE: Allegation of a Past Brown Act Violation

- Within 30 days of receiving a cease and desist letter relating to an alleged past Brown Act violation, the legislative body may provide an “unconditional commitment” to refrain from engaging in the alleged violation. (Gov. Code, § 54960.2)
 - Must substantially comply with code template
 - Requires approval at a regular or special open public meeting. No closed session!
 - Cannot be on consent calendar
 - Commitment is not an admission
 - Cease and desist procedure is not applicable to alleged ongoing/future violations. (*Center for Local Government v. City of San Diego* (2016) 247 Cal.App.4th 1146.)
- If all requirements not met, the DA or a citizen may file a lawsuit within 60 days.
 - Attorney’s fees and costs.

LEGAL UPDATE: Allegation of a Past Brown Act Violation (continued)

- **Compliance with Unconditional Commitment**
 - Violation = independent Brown Act violation
 - Law suit permitted without again following cease and desist procedure
- **Rescission of Unconditional Commitment**
 - By resolution at a regular meeting only
 - 30-day posting requirement
 - Not on consent calendar
 - Opens door to action by DA or private citizen challenging alleged past violation

LEGAL UPDATE: Agenda Title Descriptions

- Agenda item must include a brief general description of each item of business to be transacted or discussed at the meeting so as to give the public a fair chance to participate in matters of particular or general concern.
- Public not required to guess or surmise or search out the actions that the Council would be taking on the item.
 - **Careful:** 20 words or less is only guideline; make description understandable to public.
- CEQA action must be included on agenda title.
- Action to accept payment from initiative proponent for costs of special election for initiative election must be on agenda title. (*Apple Valley Case.*)
 - Payment of costs considered to be a major factor in decision to submit initiative to election.

LEGAL UPDATE: Agenda Title Descriptions (continued)

- In a series of land use approvals, there must be notice that the approvals include a city subsidy for the development (*Oceanside Case*).
Careful: For actions involving a city subsidy to a developer, a special report describing the subsidy and public hearing is also required. (Gov. Code, § 53083)
- Practice tip: Include on the agenda, the title of proposed Resolutions, Ordinances, and motions recommended for adoption.
- *San Diegans for Open Government v. City of Oceanside* (2016) 4 Cal.App.5th 637; *Hernandez v. Town of Apple Valley* (2017) 7 Cal.App.5th 194.

LEGAL UPDATE: Report on Votes

Legislative bodies must publicly report (1) any action taken and (2) the vote or abstention on that action of each member present for the action. (Gov. Code, § 54953(c)(3))

- Action by secret ballot is prohibited.
- If votes are not taken by roll call, the clerk or chair should read aloud the name of each member with his/her vote or abstention in open session.

LEGAL UPDATE: Closed Session Agenda Accuracy

Best Practice

- Review agendas to ensure closed session code references are accurate and up to date.

Substantial Compliance

- Courts may find no violation for clerical mistakes or inaccurate code citations if the agenda is in “substantial compliance” with the Brown Act. (*Castaic Lake Water Agency v. Newhall County Water District* (2015) 238 Cal.App.4th 1196.)

LEGAL UPDATE: Posting Agendas Online

AGENDAS MUST BE POSTED ONLINE

Notice of all meetings, including special meetings, must be posted on the local agency's website, if the agency has a website. (Gov. Code, § 54954.2)

- Agendas posted in a consistent, visible location on Agency's homepage.
- Effective January 1, 2019, posted agenda must comply with several technical requirements including that agenda be on a prominent, direct link, in machine readable format so it can be indexed and searched.
- Brown Act is not necessarily violated if the local agency's website experiences technical difficulties that cause the agenda to become inaccessible to the public for a portion of the 72 hours that precede the scheduled meeting.
- Agency acts in good faith and substantially complies with other posting requirements.

Attorney General Opinion; 99 Ops. Cal. Atty. Gen. 11 (2016)

LEGAL UPDATE: Special Rules for Executive Salaries and Benefits

SPECIAL RULES RE EXECUTIVE SALARIES AND BENEFITS

- Agencies must consider an agency executive's salary, salary schedule, or fringe benefits at a regular or adjourned regular meeting. Special meetings for such actions are prohibited. (Gov. Code, § 54956)
- Agencies must orally report a summary of a recommendation regarding an agency executive's salary, salary schedule, or fringe benefits during the open meeting at which final action is taken. (Gov. Code, § 54953)

Hypothetical #1

During a special City of Rome City Council meeting, the Council introduces an ordinance that would give the Chief of Police a \$10,000 raise. At the meeting, staff gave a lengthy oral presentation, including the analysis of an actuarial expert. Members of the public spoke in support of and in opposition to the proposal.

At a regular Council meeting 7 days later, the following appeared as an item on the consent calendar, and was read aloud by the Clerk prior to Council's adoption of the entire consent calendar: "Adoption of ordinance setting salary of Chief of Police."

- Any Brown Act violation?



Answer #1

- Problem 1: Council may not discuss executive compensation at a **special meeting**, unless the special meeting pertains to the budget generally. (Gov. Code, § 54956(d).) An ordinance to adjust a department head's salary may not be introduced at a special meeting.
- Problem 2: An **oral report summarizing the proposed action** to be taken regarding executive salaries, salary schedules, or compensation must be made **at the meeting where final action is taken**. (Gov. Code, § 54953(c)(3).)
 - Is what the Clerk read sufficient?

Answer #1 (continued)

Best practice with “second reading” of Executive Salary ordinances:

- Remove the item from the consent calendar and provide a brief staff presentation even on a second reading.

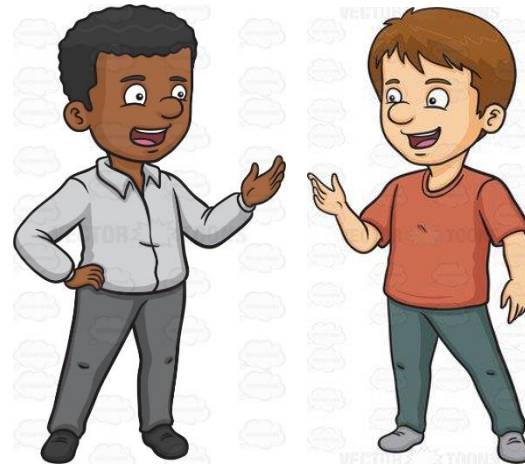
OR

- Add sufficient detail to the ordinance title so that it fairly summarizes the proposed change to executive compensation, and read that title out loud before consent calendar is adopted.

Hypothetical #2

The City Council Agenda for the City of Rome contained an item calling for a discussion of the existing social services resources available to the City's homeless population and other social services resources that this population might require in the future. Following the discussion, the Council appointed a committee composed of two of the five Council Members to develop a specific policy to provide for social services for the City's homeless population and to bring the policy recommendations back to the Council within three months.

- Must the committee's meetings be noticed and comply with the Brown Act?



Answer #2

All committees established by a legislative body subject to the Brown Act must comply with the Brown Act, UNLESS the committee:

- Is ADVISORY, not decision-making; AND
- Includes ONLY council or board Members; AND
- Includes LESS than a quorum; AND
- Does NOT have continuing subject matter jurisdiction; AND
- Is NOT meeting on a fixed schedule set by the Board.

(Gov. Code, § 54952(b).)

Hypothetical #3

Following the Council's consideration and approval of the homeless resources policy recommended by the committee, the Council instructed the Mayor to meet with the mayors of other cities in the County to explore the formation of a joint task force to address homeless issues on a regional basis.

- Must the Mayor's meeting with other mayors be noticed and comply with provisions of the Brown Act?

Hypothetical #4

The mayors all agreed that a regional approach to homeless issues was appropriate. Each City then approved the formation of a regional task force and designated one council member from each city to participate.

- Must the meetings of the task force be noticed and comply with provisions of the Brown Act?

Hypothetical #5

The 5-member City Council for the City of Rome recently created a subcommittee comprised of Council Members Roberts and Gomez to study the City's need for additional dog parks.

This afternoon, while attending their kids' soccer game, Council Member Lee asked Council Member Gomez if the subcommittee had met. Gomez told Lee all about the elaborate new dog park initiative the subcommittee plans to propose to the full Council at the next Council meeting.

- Any Brown Act violation?



Answer #5

Careful: Serial Meeting of Council!

- Council Member Gomez conveyed to Council Member Lee the conversation between Council Members Gomez and Roberts about the dog park initiative.
- This is an improper “serial meeting” of a majority of the members of the Council.

Subcommittee Tips

PRACTICAL TIPS TO AVOID BROWN ACT PROBLEMS WITH COMMITTEES:

- When in doubt, assume all committees formed by the Board need to comply with the Brown Act.
- Most ad hoc committees will be made of less than a quorum of legislative board members only and have a short term advisory role.
- If an ad hoc committee's role continues beyond original purpose or term, disband and reform it, or comply with the Act.
- Make sure there is no overlapping jurisdiction of ad hoc committees.

Hypothetical #6

The City Council for the City of Rome received a complaint, originally submitted to the human resources department, accusing the City Manager of routinely making offensive and lude jokes during weekly staff meetings.

The City Council holds a closed session, and based on the complaint, decides in closed session to retain an independent investigator to investigate the allegations. Other than receiving the meeting agenda the Clerk properly posted in advance of the regular Council meeting, the City Manager did not receive any written notice about the closed session.

- Any Brown Act violation?

Answer #6

Council may meet in closed session to discuss personnel issues pertaining to an employee Council appoints, including complaints or charges made against the employee. (Gov. Code, § 54957(b)(1).)

- Any other Brown Act concerns?

Answer #6 (continued)

Special Written Notice:

- At least **24 hours** before holding a closed session **to hear specific complaints or charges brought** against an employee, the employee must receive **written notice** of his or her right to have the complaints or charges heard in an open session rather than a closed session.
- If notice is not given, any disciplinary action taken against the employee based on the specific complaints or charges heard in the closed session is **null and void**. (Gov. Code, § 54957(b)(2).)
 - **Careful:** The only non-curable Brown Act violation!
- Negative comments in the context of a performance evaluation do not trigger the notice requirement. (*Bell v. Vista Unified School Dist.* (2000) 82 Cal.App.4th 672.)

Was the City Manager entitled to the special written notice?

Answer #6 (continued)

- No notice required if Council was not “hearing” or evaluating the allegations, but instead considered only whether to investigate the charges.
 - **Careful:** Critical to keep Council from slipping into evaluating specific allegations of misconduct.
 - **Careful:** Consult your attorney every time!

(Bollinger v. San Diego Civil Service Com. (1999) 71 Cal.App.4th 568; Bell v. Vista Unified School Dist. (2000) 82 Cal.App.4th 672.)

Hypothetical #7

- The City Council of the City of Rome held a public hearing to consider the approval of a development permit for a very controversial housing project. During Council comments following the close of the public hearing, the Mayor said she just checked her Facebook page and saw that 15 people, including two of the five Council members, shared her concerns with the proposed Project. She also said that one person, who has a degree in geology, commented on her Facebook page that an earthquake fault runs near the Project and that Staff failed to disclose this fact.

- Any problems?



Answer #7

- Serial meeting issues:
 - Three Council Members shared concerns about the Project on the Mayor's Facebook page.
 - Members of legislative bodies should avoid comment on agency matters on social media so as to avoid inadvertent serial meeting.
- Due process issue. Significant fact concerning potential earthquake fault disclosed after the public hearing closed. Developer must have opportunity to respond to new facts. Staff needs to respond as well.
- Social media is a good source of questions and issues that may arise during the public hearing. Staff should consider addressing the questions and issues in a written supplemental staff report or in its presentation to the legislative body.

Hypothetical #8

At last week's City Council regular meeting during the public comment period, an angry citizen yelled at the Mayor:

YOU SCUMBAG! YOU DON'T CARE ABOUT OTHER PEOPLE.
YOU ARE UNFIT TO REPRESENT THIS COMMUNITY! WE
DESERVE BETTER, YOU'RE A CARELESS [X@#\$!!?8!]!!

Although the Mayor demanded that the citizen stop her insults, she continued. At the Mayor's request, the Clerk shut off the microphone before the citizen's allotted time to comment was over. The Mayor directed the next speaker to begin speaking.

- Any concerns?



Answer #8

- A legislative body cannot prohibit public criticism or prevent speech based on content unless the speech, or the accompanying behavior, actually disrupts the meeting – must render the orderly conduct of such meeting unfeasible.
- First Amendment protects the speech unless the speech itself constitutes a threat of physical harm.
- Insulting remarks must be allowed.
- Words of Wisdom: Better to be annoyed for 3 minutes than to endure the expense and uncertainty of First Amendment litigation.

Hypothetical #9

- Is the Answer different if the member of the public had been insulting city staff rather than an elected official?

Hypothetical #10

During public comment, a staff member for the State Senator representing the district in which the City of Rome is located informed the City Council that a Senate committee meeting would be held in two days to consider an unexpected amendment to legislation that would eliminate funding for a public works project of critical importance to the City. The Staff Member requested that the City take action to oppose the amendment and send Council Members to Sacramento to testify in opposition to the amendment.

- Is there a way for the Council to discuss the issues raised by the State Senator?
- Is there a way for the Council to take the action requested by the State Senator to oppose the amendment?

Answer #10

With narrow and limited exceptions, discussion and action on matters not on the agenda is prohibited. Members may only:

- Briefly respond to statements/questions from the public,
- Ask a question for clarification,
- Make a brief announcement,
- Make a brief report on his or her activities,
- Provide a reference to staff or other sources for factual information,
- Request staff report back at a later meeting, or
- Direct staff to place the matter on a future agenda.

(Gov. Code, § 54954.2(a)(2).)

Answer # 10 (continued)

ACTION ON ITEMS NOT ON THE AGENDA

Items may only be added to an agenda for action when:

- A majority decides that an emergency situation exists (work stoppage, crippling disaster, etc.); or
- 2/3 of the Board (or all members if less than 2/3 are present) determine there is a need to take immediate action that came to the attention of the agency after the agenda was posted.

Careful: Must establish that no one in agency knew of issue before agenda was posted.

Careful: Make sure that the need to take action cannot wait for the next regular meeting.

Careful: Agency attorney should draft proposed motion so that all of the required findings and facts supporting the findings are included.

Careful: Remember an agency board can hold a special meeting on 24 hours notice.

(Gov. Code, § 54954.2(b).)

Hypothetical #11

The Hasty Harbor District Board meets monthly. At a regular meeting, the General Manager advises that Phase I of the Marina Project was completed early and if the contractor starts Phase II now, they'll save tens of thousands of dollars in costs.

Is there a way for the Board to discuss this issue?

Is there a way for the Board to take the requested action?



Tips for Items Not on Agenda

PRACTICAL TIPS TO AVOID MISTAKES IN DEALING WITH MATTERS NOT ON THE AGENDA:

- Let the agenda be your guide for discussions, not comments made by public or staff.
- Review your agenda and evaluate whether general agenda items (such as “matters from/for Board” “City Manager Update”) are potentially traps for Brown Act violations if not handled carefully.
- Add topics to be updated by General Manager or City Manager, such as “Status Report from City Manager re Main Street reconstruction project.”
- Add language to the Agenda explaining that the Brown Act prohibits the agency board from discussing or taking action on items not on the agenda.

More Tips for Items Not on Agenda

- Anticipate the need for future actions.
- Provide regular agenda reports to agency board that describe significant pending projects and issues so as to allow for discussion.
- Use agenda reports to develop agency positions on legislative proposals and projects of other agencies so that Staff has authority to present the agency's policy positions whenever needed.
- General Manager or City Manager can announce that she or he will take an administrative action within her or his authority to meet a deadline or deal with an issue and add the item to the next agenda for further review.

Questions?



Contact

- **Peter M. Thorson, Richards Watson & Gershon,**
(213) 253-0216, pthorson@rwglaw.com
- **Teresa L. Stricker, Renne Sloan Holtzman Sakai LLC,**
(415) 678-3811, tstricker@publiclawgroup.com

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AB 1234 Training

Understanding Public Service Ethics Laws

The Brown Act and Open Meetings

Good Governance Checklist



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**The webinar recording and PowerPoint slides
will be available on ILG's website shortly.**

**If you have additional questions please
contact Melissa at mkuehne@ca-ilg.org**