

Understanding The Brown Act

September 29, 2016

1:00 pm – 2:30 pm



Speakers

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Moderator

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**Thank you to ILG Partner Burke Williams
& Sorensen for making this webinar
possible!**

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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ILG Mission

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

Understanding the Brown Act



INSTITUTE FOR
LOCAL GOVERNMENTSM

Promoting Good Government at the Local Level

Thomas D. Jex

and

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September 29, 2016

Burke Williams & Sorensen

burke

BURKE, WILLIAMS & SORENSEN, LLP

Government in the Sunshine:



Does this look familiar?

PRESENTATION OVERVIEW

- I. BROWN ACT ESSENTIALS
- II. LEGAL UPDATES
- III. COMMON MISTAKES
(& HOW TO AVOID THEM)
- IV. QUESTIONS



I. BROWN ACT ESSENTIALS

∞ Basic Rule:

- All meetings
- of the legislative body
- of a local agency
- shall be open and public,
- unless an exception applies.

(GC 54953)



I. BROWN ACT ESSENTIALS

∞ 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** upon any item which is within its **subject matter jurisdiction**. (GC 54952.2)
- Watch out for **informal meetings**, where technology or an intermediary is used. (GC 54952(b)(1))



I. BROWN ACT ESSENTIALS

☞ Meetings Distinguished:

- Individual contacts or conversations between a member and any other person.
- Majority of members at certain open and publicized conferences; meeting of another organization or another legislative body of another agency.
- Majority of members at a purely social or ceremonial occasion.

(GC 54952.2.)



I. BROWN ACT ESSENTIALS

Teleconferencing

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

- Agendas must be posted at teleconference locations specifying all teleconference locations;
- There is public access to teleconference locations;
- There is public opportunity to speak at each teleconference location; and
- All votes are taken by roll call.

§ 54953 (a) and (b)

I. BROWN ACT ESSENTIALS

∞ Recommendations for E-mail/Technology

- **Avoid sending e-mails to the whole body.**
 - If necessary, provide information only.
 - Do not solicit a response.
- **Be careful replying to e-mails.**
 - Do not communicate your position or make a commitment on a pending matter.
 - Do not direct a reply to a majority of the body.
- **Think carefully before sending any e-mail.**
 - Remember, your e-mail can be forwarded by others to a majority of the body.

I. BROWN ACT ESSENTIALS

∞ Agenda Requirement:

- A **written agenda** must be prepared and posted prior to agency meetings.
- Must provide a "**brief general description**" which generally need not exceed 20 words for each item of business to be "**transacted or discussed**," including closed session items.
- Must allow for **public comment** on each agendized item, and
- a general comment period.

(GC 54954.2.)



I. BROWN ACT ESSENTIALS

∞ Closed Sessions:

- Closed sessions are an **exception** to the rule that agency meetings must be open and public.
- Only topics 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.

(GC 54954.3)



I. BROWN ACT ESSENTIALS

∞ Legal Challenges, Remedies and Penalties:

- Criminal Charges
- Civil Action
- Request to Cure
- Invalidation
- Costs and Attorney's Fees
(GC 54959, 54960, 54960.1)



II. LEGAL UPDATES

∞ New Cease and Desist Procedure:

- New procedure to request agencies stop engaging in practices that allegedly violate the Brown Act.
- Requester sends a “cease and desist” letter within 9 months of the alleged violation.
- Agency has 30 days to issue “unconditional commitment” to stop the past action.
- If the body fails to respond or issue the commitment, then the requester has 60 days to file a lawsuit.

(SB 1003 (Yee); GC 54960)

II. LEGAL UPDATES

- Center for Local Government Accountability v. City of San Diego

II. LEGAL UPDATES

∞ Closed Session Statutes Renumbered:

- Gov't Code section 54956.9(g) requires that the paragraph that authorizes the closed session for a “Conference with Legal Counsel” be listed on the agenda or publicly announced.
- The “Conference with Legal Counsel” statutes were renumbered to 54956.9(d)(1)-(4).
- Don't just cut and paste from old agendas.



II. LEGAL UPDATES

☞ Castaic Lake Water Agency v. Newhall County Water District

- Newhall used old numbering on an agenda for “Conference with Legal Counsel”
- Castaic sued claiming Brown Act violation
- Court held no violation because agenda was in substantial compliance with the Brown Act
- “Castaic’s argument is hyper technical and elevates form over substance”



II. LEGAL UPDATES

∞ Put Agendas Online:

- Notice of all meetings, including special meetings, must be **posted on the local agency's website**, if the agency has a website. (GC 54954.2)
- Attorney General Opinion – but not if technical difficulties prevent Agency from posting on website.

∞ Limit Special Meeting Topics:

- Agencies are **prohibited** from calling a special meeting about an agency executive's **salary, salary schedule, or fringe benefits**. (GC 54956)

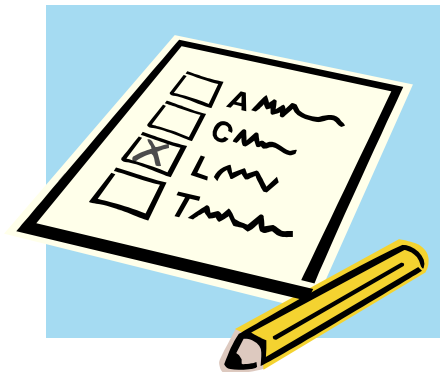


II. LEGAL UPDATES

∞ Public Reports

- Legislative bodies must publicly report: (1) any **action taken** and (2) the **vote or abstention** on each action taken **by each member**.
- When action is taken by any means other than a roll-call vote, the chair or clerk should state the names of each individual who dissented or abstained so there is a clear record of how the entire body voted.
- Ensure the minutes reflect the same.

(SB 751 (Yee); GC 54953)



II. LEGAL UPDATES

SB 1436

Agencies must publicly announce pay and benefit increases to executives before approved by a vote.



II. LEGAL UPDATES

AB 2257 –

Agendas posted in a consistent, visible location on Agency's homepage

Posted agenda must be in machine readable format so it can be indexed and searched



III. COMMON MISTAKES



∞ Hypotheticals:

- Designed to help you **spot issues** based on real world examples.
- You'll get the most out of this training if you **actively participate**.
- Please do not skip ahead in the materials.
- If you or your agency has made a mistake, change your practice going forward.
- Train regularly and implement these practice tips to avoid mistakes.

III. COMMON MISTAKES

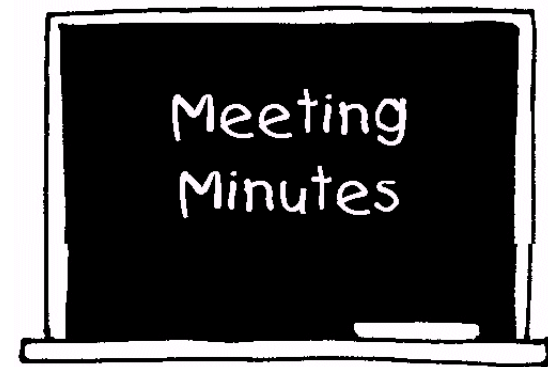
∞ Hypothetical #1:

- Clockwork Community Services District holds regular meetings on the 1st and 3rd Tuesday of the month. Board Chair Skip Calendario will be out of town for the next meeting. He tells the Clerk to move the meeting one week later to the 4th Tuesday. The Clerk complies and posts a regular meeting agenda 72 hours in advance.
- What mistake was made?



III. COMMON MISTAKES

- ∞ Answer – This was a **special meeting**, not a regular meeting.
- The time and place for **regular meetings** of the legislative body is **set by ordinance, resolution or bylaws**. (GC 54944)
 - **Special meetings** may occur at **any time** one is called by the chair or a majority of the board.



III. COMMON MISTAKES

∞ Practical Tips to Avoid Mistakes:

- Update your agency's ordinance, resolution or bylaws setting the times for regular meetings to allow flexibility.
- Label agendas accurately (regular/special).
- Note that certain actions may only be taken at regular meetings.
- Consider adjourning the regular meeting to a specific time/date and posting notice within 24 hours to create an "adjourned regular meeting."

III. COMMON MISTAKES

∞ Hypothetical #2:

- Ms. Dee Veloper is meeting with Board members Chatty and Verbose at her proposed project site. After they discuss whether the project would be eligible for a fee waiver, Dee mentions that another Board member, Gabby, liked the project and would support a fee waiver.
- What mistake was made?



III. COMMON MISTAKES

☞ Answer – The developer was acting as an intermediary in a **serial meeting**.

- “A majority of the members of a legislative body shall not...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.
- Individual contacts or conversations between a board member and any other person are otherwise permissible.

(GC 54952.2.)

III. COMMON MISTAKES

∞ Practical Tips to Avoid Mistakes:

- The Brown Act doesn't require board members to stop engaging with the public.
- But it does prevent them from learning about the other members' perspectives through the public.
- Before meeting or discussing agency business with the public, warn them that you cannot discuss the other official's views.



III. COMMON MISTAKES

∞ Hypothetical #3:

- The Gobbledygook Garbage Disposal District's first business item on the agenda is: *“Board Discussion and Direction regarding WALL-E Compaction Project 2014-9”*
- Following a staff presentation, the Board awards a contract to Axiom Technologies to purchase a Waste Allocation Load Lifter.
- What mistake was made?



III. COMMON MISTAKES

☞ Answer – Using jargon laden agenda descriptions that don't identify **potential action**.

- Case law suggests each independent action of the Board should be agendized, even if it is related to a single project.
- Other cases have held that the Brown Act was violated when agenda descriptions used internal lingo that was meaningless to the public.



III. COMMON MISTAKES

∞ Practical Tips to Avoid Mistakes:

- Understand that in some cases, 20 words or less won't be sufficient to let the public know what the Board will consider.
- Use agenda descriptions that would make sense to an out-of-towner.
- Give your agency options by including a range of possible actions.



III. COMMON MISTAKES

∞ Hypothetical #4:

- The Teamville Transportation District appointed two Board members to act as the Recruitment Committee. The Committee works with staff on an on-going basis to interview all management-level employees and make hiring recommendations to the Board. The Committee meets in private when needed.
- What mistake was made?



III. COMMON MISTAKES

- ☞ Answer – All **committees** established by the Board must comply with the Brown Act, **UNLESS** it:
- Is **ADVISORY**, not decision-making; **AND**
 - Includes **ONLY** 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.
- (GC 54952(b))

III. COMMON MISTAKES

∞ Practical Tips to Avoid Mistakes:

- Assume all committees formed by the Board need to comply with the Brown Act.
- Most *ad hoc* committees will be made of 2 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.



III. COMMON MISTAKES

∞ Hypothetical #5:

- Following a lengthy staff presentation, Chair Anita Break of Inclusive Irrigation District asks each Board member individually to express their opinion on the item. A motion and a second is made to approve the project. The Chair opens public comment, hears the testimony of an angry neighbor and two proponents. She closes public comment and calls for a vote on the motion, which passes.
- What mistake was made?



III. COMMON MISTAKES

∞ Answer – Public comment was taken after significant deliberations occurred.

- The agenda must provide an opportunity for the public to comment on agenda items before or during the consideration of the item.
- Soliciting input after deliberations are concluded arguably does not satisfy this requirement.

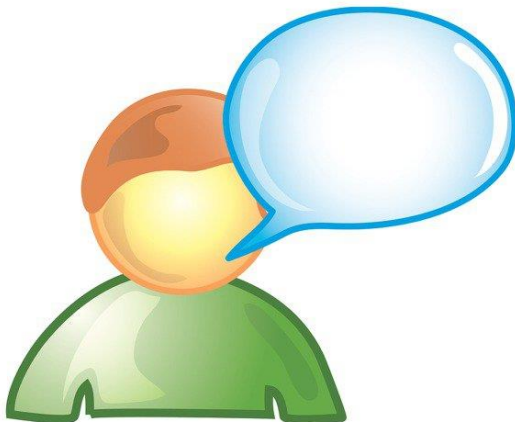
(GC 54954.3)



III. COMMON MISTAKES

∞ Practical Tips to Avoid Mistakes:

- Consider giving the Chair prompts to solicit public comment before deliberations.
- Even if your agency uses speaker cards, and none were submitted, always ask for public comment.
- Close the public comment period once those wishing to comment are done to ensure meeting management.



III. COMMON MISTAKES

∞ Hypothetical #6:

- Reverend Brimstone regularly comments at Wayward Water District meetings because a Town Crier reporter always attends and he wants publicity. During the comment period of one meeting, he accuses the Chair of being a “sinner” because the District has failed to shut off water service to a certain business that began operating without paying applicable fees. The Clerk turns off the microphone at the Chair’s request.
- What mistake was made?

III. COMMON MISTAKES

- Answer – The legislative body cannot prohibit public criticism of policies, procedures, programs, or services of the agency or the omissions of the legislative body itself.
 - Expressions of support or opposition to matters before the agency (provided they are not overly disruptive) constitute protected speech.
 - The legislative body may not preclude speech based on its content. It may only adopt content-neutral restrictions, such as time limits, on public comments.



III. COMMON MISTAKES

∞ Practical Tips to Avoid Mistakes:

- The 1st Amendment is a highly protected right, so err on the side of allowing speech.
- Be prepared to receive harsh comments.
- Let the public use their three minutes as they wish. This avoids escalating the issue and potentially drawing additional criticism.



III. COMMON MISTAKES

∞ Hypothetical #7:

- After Reverend Brimstone's microphone was cut off, he begins yelling a sermon from the podium. He refuses to leave after the three minute comment period has ended. The Wayward Water District Chair warns him he will clear the board room if he doesn't stop. The Reverend continues yelling so the Chair orders everyone in attendance to leave.
- What mistake was made?



III. COMMON MISTAKES

∞ Answer – Members of the news media who have not participated in the disturbance must be allowed to continue to attend the meeting.



- The legislative body may remove persons from a meeting who willfully interrupt proceedings. If order still cannot be restored, the meeting room may be cleared.
- However, there is an exception for members of the press.

(Gov. Code 54957.9)



III. COMMON MISTAKES

∞ Practical Tips to Avoid Mistakes:

- First, warn the member that they are being disruptive and may be ejected.
 - Second, warn the member that if they continue to be disruptive you will order a recess.
 - Third, take a short break.
 - Then, ask the member to leave.
- ∞ If they don't leave voluntarily, remove the individual.
- ∞ Don't clear the room unless necessary, and let the media stay.

LAST WARNING

III. COMMON MISTAKES

∞ Hypothetical #8:

- The Board of the Revival Reclamation District has a lengthy agenda with a closed session as the last item. The Board goes into closed session to discuss existing litigation at 8:45 P.M. After three hours, the Board finishes the closed session. The members return to an empty boardroom, adjourn the meeting, and head home.
- What mistake was made?



III. COMMON MISTAKES

∞ Answer – Failing to announce reportable action from the closed session.

- Brown Act has nuanced requirements for reporting final actions taken in closed session. Consult agency counsel.
- If no reportable action is taken, an announcement to that effect should be made and included in the minutes.

(Gov Code 54957.1)



III. COMMON MISTAKES

∞ Practical Tips to Avoid Mistakes:

- Designate a staff member or official to be in charge of reporting out.
- Make sure to follow up if action is not final until some time after the meeting.



III. COMMON MISTAKES

∞ Hypothetical #9:

- Joe Justice informs the Fused Fire District Board during general public comment that tomorrow is the deadline to comment on a CalTrans EIR for a new highway that would split the District, affecting response times. During the portion of the agenda for “matters from/for the Board,” the vice-chair asks staff for more info. The Board discusses the issue and votes to have staff submit a comment letter to CalTrans on behalf of the District.
- What mistake was made?



III. COMMON MISTAKES

☞ Answer – Action or discussion on non-agendized items is generally 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't Code 54954.2(a)(2).)

III. COMMON MISTAKES

∞ Practical Tips to Avoid Mistakes:

- Let the agenda be your guide of discussions, not comments made by public or staff.
- Review your agenda and evaluate whether general agenda items (such as “matters from/for Board”) are potentially traps for Brown Act violations.
- If you wish to keep general agenda items on, note on the agenda that no action will be taken and ensure this rule is followed.



III. COMMON MISTAKES

∞ Hypothetical #10:

- 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. Director Em Parative moves to add this to the agenda. The motion is seconded and approved. The Board votes to issue a notice to proceed to the contractor.
- What mistake was made?



III. COMMON MISTAKES

∞ Answer – The Board didn't make the **findings** necessary to add an item to the agenda.

- Items may only be added to an agenda 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.

(Gov't Code 54954.2(b))

III. COMMON MISTAKES

∞ Practical Tips to Avoid Mistakes:

- To add an item, the Board should make the following findings:
 - There is an immediate need to take action because of [factual explanation], and
 - That need arose [identify time after agenda posting]; and
 - The agenda was posted on [date].
- Consider having a cheat sheet for this.
- If the findings can't be made, hold a special meeting.

CONCLUSION

⑩ The Brown Act can be a trap for the unwary:

- Regular training for the Board and staff is an important step to help avoid mistakes.
- Your agency counsel is an important resource to help prevent violations.



QUESTIONS?

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ILG's Ethics and Transparency Resources

AB 1234 Training

Understanding Public Service Ethics Laws

The Brown Act and Open Meetings

Good Governance Checklist



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Thank You!

**And thank you to ILG Partner Burke Williams &
Sorensen**

**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