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Top 10 Points to Remember about Access to Local Government Meetings under the Ralph M. Brown Act

1. The Act applies to "legislative" bodies of local government agencies.

That term encompasses the agency's governing body (for example the board of supervisors of a county), any body created by state law (for example its planning commission), any city body created by charter, any standing committee of a legislative body, and any multi-member body created by ordinance, resolution or other formal action of an existing legislative body to serve as special advisory or study group, if the group contains one or more members who are *not* on the creating body (for example a "blue ribbon" or outreach task force comprising at least some staff members and other citizens). (Government Code §54952, subds. (a) and (b)). In the latter case, if the advisory body was created pursuant to the policy of a legislative body, it makes no difference that the members are selected or appointed by staff—the body is subject to the Act. (*Frazer v. Dixon Unified School District*, 18 Cal.App.4th 781 (1993).

In some cases, the Act may also apply to a board of a private corporation, namely if either:

- the legislative body played a significant role in creating the corporation to perform a function spun off from the local agency (§54952, subd. (c) (1) (A)); or
- the legislative body provides funding to the corporation and appoints one of its own members to the corporate board as a voting member (§54952, subd. (c) (1) (B)).

2. The Act applies when the majority of a body collectively hears, discusses or acts.

This usually means a literal "congregation of a majority of the members ... at the same time and place to hear, discuss, or deliberate upon any item that is within the subject matter jurisdiction of the legislative body or the local agency to which it pertains." (Government Code §54952.2, subd. (a)). The Act prohibits equivalent "meetings of minds" arranged indirectly, namely "any use of direct communication, personal intermediaries, or technological devices that is employed by a majority of the members of the legislative body to develop a collective concurrence as to action to be taken..." (§54952.2, subd. (b)). But such "serial meeting" violations do not arise casually, since the Act exempts isolated "individual contacts or conversations between a member of a legislative body and any other person" (§54952.2, subd. (c) (1)). And because the "meeting" definition is so broad, several occasions are specified when a majority may be present together and at least listen to matters relevant to their agency without triggering the Act's requirements, namely:

- professional conferences, local community forums, meetings of other local agency bodies, providing that the event is open to the public and the attending members do not take the occasion to discuss among themselves specific matters that they have authority to act on (§54952.2, subd. (c) (2)-(4));
- "a purely social or ceremonial occasion," with the same caveat against specific public business discussions (§54952.2, subd. (c) (5)); and
- "an open and noticed meeting of a standing committee of (their) body, provided that the (visiting) members ... who are not members of the standing committee attend only as observers" (§54952.2, subd. (c) (6)).

3. A body may meet outside agency boundaries only for certain purposes.

"Retreats" out of the area are not on the list, which does however include trips by a majority or more to:

- comply with a court-ordered or otherwise legally mandated meeting or watch a court or administrative proceeding where the agency is a party;
- inspect property the body is discussing at a special meeting;
- attend meetings of "multi-agency significance" hosted by and within the boundaries of one of the participating local agencies;
- meet in some public gathering facility if there is none within the home agency's boundaries;
- meet with federal or California state officials on matters of common interest and jurisdiction, if a local visit by the officials would be impractical;
- discuss, on-site or nearby, a remote facility owned by the local agency;
- confer in a closed litigation session (see 8 below) with outside legal counsel, at his or her office, if doing so would save the agency money; or
- in the case of a school board only, attend a conference on "nonadversarial collective bargaining techniques"; interview a potential employee from another district; or interview residents of another district about the prospects of hiring its superintendent. (Government Code §54954, subd. (b) (1)-(5)).

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Within the local agency's boundaries, if an emergency leaves the body's normal meeting place unsafe to occupy, the site can be moved for the duration of the emergency for special meetings, with appropriate notice to the local media (Government Code §54954, subd. (c))

4. Agendas and notices must be posted and accessible, and adhered to at the meeting.

For regularly scheduled meetings a notice specifying the time, place and agenda of the meeting must be posted in a place "freely accessible" to the public 72 hours in advance. The agenda must include "a brief general description of each item to be transacted or discussed..." which "generally need not exceed 20 words" per item. Nothing not on the agenda may be acted on unless an emergency meeting would be justified (see below) in any event, or the matter is continued from the agenda of a meeting less than six days previously, or the body makes a preliminary vote finding that "there is a need to take immediate action and that the need for action came to the attention of the local agency" after the agenda notice was posted. That finding must be voted by two thirds of the members present, or in the case of larger bodies where fewer than two thirds of the members are present, by all present. Action taken on off-agenda items where none of these conditions apply are voidable by a court. As for discussion or comments on off-agenda items, they are limited to brief informational responses by members to statements or questions from the public, questions for clarification, a brief announcement or report of a member's personal activities, or direction to staff to follow up on a citizen's issue or place it on the agenda of a future meeting. Meeting notices must be provided in formats accessible to the disabled if so requested (Government Code §54954.2)

Special meetings (those not on the regular schedule) "may be called at any time by the presiding officer ... or by a majority of the members ... by delivering written notice to each member ... and to each local newspaper of general circulation and radio or television station requesting notice in writing. The notice shall be delivered personally or by any other means and ... received at least 24 hours before the time of the meeting... The call and notice shall specify the time and place of the special meeting and the business to be transacted or discussed. *No other business shall be considered at these meetings by the legislative body*. The written notice may be dispensed with as to any member who at or prior to the time the meeting convenes files with the clerk or secretary ... a written waiver of notice... The written notice may also be dispensed with as to any member who is actually present at the meeting at the time it convenes." (Government Code §54956) (emphasis added).

"Emergency" meetings can be called by telephone notice to the members and convene an hour after local newspapers and broadcasters (that have requested such notice and provided phone numbers to be used) have been alerted. They may address only "matters upon which prompt action is necessary due to the disruption or threatened disruption of public facilities" caused by a "a work stoppage, crippling activity, or other activity that severely impairs public health, safety, or both." The only closed session permitted is one addressing personnel or public access to facilities, as provided in Government Code §54957 (see 7 below), and then only if agreed to by two thirds of those present, or if less than two thirds of the body is present, unanimously. If the topic is a "dire" emergency, defined as being caused by criminal or terrorist activity, the meeting may convene as soon as any requesting local media have been alerted. Minutes and other meeting particulars must be posted for 10 days in a public place as soon as possible (Government Code §54956.5).

5. Meeting-related records are available to the public as soon as the body gets them.

Documents in the agenda packet, or indeed any "writings, when distributed to all, or a majority of all, of the members of a legislative body of a local agency by any person in connection with a matter subject to discussion or consideration at a public meeting," become accessible to the public at that point, "available upon request without delay" unless expressly exempt from disclosure under the law (see *Top 10 Points to Remember about* Exemptions *from the California Public Records Act*). If distributed to the body only at the meeting, they must be made immediately available if prepared by agency staff or a member of the body; if by someone else, then after the meeting. Meeting-related documents must be in formats accessible to the disabled if so requested. None of these rules may be used to *postpone* access to a record that would otherwise be available sooner under the California Public Records Act (CPRA), for example on the grounds that the record "has not yet gone to the board." Fees permitted by the CPRA may be charged for copies of records (see *Top 10 Points to Remember about* Making *a California Public Records Act Request*), but not surcharges for special formats that would be prohibited by the federal Americans with Disabilities Act. (Government Code §54957.5).

6. Citizens may address the body on matters that it has authority to deal with.

Government Code §54954.3 provides:

> " (a) Every agenda for regular meetings shall provide an opportunity for members of the public to directly address the legislative body on any item of interest to the public, before or during the legislative body's consideration of the item, that is within the subject

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matter jurisdiction of the legislative body, provided that no action shall be taken on any item not appearing on the agenda unless the action is otherwise authorized ... (see 4 above). However, the agenda need not provide an opportunity for members of the public to address the legislative body on any item that has already been considered by a committee, composed exclusively of members of the legislative body, at a public meeting wherein all interested members of the public were afforded the opportunity to address the committee on the item, before or during the committee's consideration of the item, unless the item has been substantially changed since the committee heard the item, as determined by the legislative body. Every notice for a special meeting shall provide an opportunity for members of the public to directly address the legislative body concerning any item that has been described in the notice for the meeting before or during consideration of that item.

"(b) The legislative body of a local agency may adopt reasonable regulations to ensure that the intent of subdivision (a) is carried out, including, but not limited to, regulations limiting the total amount of time allocated for public testimony on particular issues and for each individual speaker.

"(c) The legislative body of a local agency shall not prohibit public criticism of the policies, procedures, programs, or services of the agency, or of the acts or omissions of the legislative body. Nothing in this subdivision shall confer any privilege or protection for expression beyond that otherwise provided by law."

"Subject matter jurisdiction" is simply the scope of issues that the body has authority to deal with; for example a city council need not take comments on matters exclusively within the powers of a county or other public agency, or that strictly concern the private lives of members of the council or employees and have no bearing on their official duties or responsibilities. But this should not preclude the right of citizens, for example, to urge the city council to communicate with the county and request its action on a matter of general interest.

Because this speech provision amounts to the Legislature's creation of a limited public forum, under the First Amendment the body may not prevent a citizen from making a statement that may be unfair, untrue and/or even defamatory, so long as it concerns the agency's business. *Baca v. Moreno Valley Unified School District, 36 F.Supp. 719* (1996). But the body may curtail speech that is unduly repetitive or wanders off the appropriate topic. *White v. City of Norwalk*, 900 F.2d 1421 (1989). Above all, application of time limits and other ground rules must be strictly neutral, not favoring speech the body welcomes and/or burdening speech it dislikes. *Rubin v. City of Santa Monica*, 823 F.Supp. 709, 713 (1993)

7. Closed sessions are permitted to discuss prospective or current employees.

Government Code §54957 states, in pertinent part:

"(b) (1) Subject to paragraph (2), nothing contained in (the Brown Act) shall be construed to prevent the legislative body of a local agency from holding closed sessions... to consider the appointment, employment, evaluation of performance, discipline, or dismissal of a public employee or to hear complaints or charges brought against the employee by another person or employee unless the employee requests a public session.

"(2) As a condition to holding a closed session on specific complaints or charges brought against an employee by another person or employee, the employee shall be given written notice of his or her right to have the complaints or charges heard in an open session rather than a closed session, which notice shall be delivered to the employee personally or by mail at least 24 hours before the time for holding the session. If notice is not given, any disciplinary or other action taken by the legislative body against the employee based on the specific complaints or charges in the closed session shall be null and void.

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"(4) For the purposes of this subdivision, the term 'employee' shall include an officer or an independent contractor who functions as an officer or an employee but shall not include any elected official, member of a legislative body or other independent contractors. ... *Closed sessions held pursuant to this subdivision shall not include discussion or action on proposed compensation except for a reduction of compensation that results from the imposition of discipline*. (emphasis added) The body may discuss compensation matters only in a differently structured and listed closed session (see 8 below).

The right to a notice in paragraph (2) above does not apply to a routine evaluation of performance, nor for example to a school or community college district board's discussion of the performance of a probationary employee, as part of the decision whether or not to retain him or her

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on the permanent staff, (*Furtado v. Sierra Community College*, 68 Cal.App.4th 876 (1998)), especially where by that point any "specific complaints or charges" had been dealt with on lower administrative appeal and were not part of the board's deliberation. (*Fischer v. Los Angeles Unified School Dist.*, 70 Cal.App.4th 87 (1999)). Similarly, the court in *Bollinger v. San Diego Civil Service Com.*, 71 Cal.App.4th 568 (1999) concluded that since the Act refers to the employee's right to have complaints or charges "heard" in open session, if the body is not conducting an evidentiary hearing but simply deliberating whether to ratify the recommendations of a prior administrative hearing, the right to notice does not apply. But the court in *Bell v. Vista Unified School District*, 82 Cal.App.4th 672 (2000) held that a high school football coach had been denied his rights when his school board employer held a closed session, without giving him the 24-hour written notice, to consider disciplining him. The California Interscholastic Federation (CIF) had imposed a one-year suspension on Bell's school's athletic program as the result of his involvement in the transfer of a foreign student, ineligible under CIF rules, into the school in order to join the football team, and CIF's notice to the district, the court held, qualified as a "specific complaint or charge."

8. Closed sessions are permitted to guide sensitive legal or bargaining processes.

That is, when the body needs to consult with its attorney on pending litigation, or with its negotiator concerning a proposed deal to acquire or dispose of a real property interest or concerning employee union bargaining, these consultations may take place in closed session to avoid disclosing the agency's litigation or negotiation strategy to the adversary.

The pending litigation session may involve an actual case in court or before an administrative law tribunal, or a case the agency may want to bring in such a forum, or the threat of litigation made by some other person or entity. In the latter instance, the closed session must be justified in light of "existing facts and circumstances" threatening litigation, which generally must be disclosed on request prior to the session or afterwards: who is making the threat and what they say. Within a litigation session the body may actually vote to sue, defend a suit, settle or appeal. But it may not meet directly with the adversary to discuss settlement. (Government Code §54956.9).

The real property negotiation session must concern a disclosed, specifically identified piece of property under negotiation with a specifically identified party. The scope of discussion is confined to the "price" and/or "terms of payment" for the transaction. (Government Code §54956.8). If there are no such specific negotiations under discussion, the closed session may not be lawful, and at a minimum all other topics of the discussion must be disclosed on the agenda. *Shapiro v. San Diego City Council*, 96 Cal.App.4th 904 (2002).

The employee bargaining closed session concerning pay, benefits and other negotiable items may refer to budgetary priorities as part of the variables. The session is to allow the body to confer with its own bargaining agent, who separately meets with representatives of employee unions, or with top-level executives as "unrepresented employees" negotiating for better pay or benefits. In the latter category, any final action on increased compensation must be confined to open session. (Government Code §54957.6).

9. Some information must be disclosed before and after closed sessions.

As noted in 4 above every item to be addressed at a meeting must be given a "brief general description" on the posted agenda. This includes closed sessions, and the agency has a choice of using its own approach and language to disclose closed session topics, an option that may leave it open to being sued for having given inadequate notice, or to adopt the standard agenda listing templates provided in Government Code §54954.5, which will insulate it from being sued on such grounds. That section provides elements of such a "safe harbor" agenda listing for most but not quite all closed sessions authorized by the Act, and if there is doubt about the conformity with the safe harbor rules, which are lengthy, they should be consulted in the statute.

The Act also requires that most, if not all, actions taken by the body in closed session be disclosed afterwards, either immediately at the same meeting in most cases, or upon request later if there remains some formality (or acceptance by the other party, such as in employee union or litigation settlement negotiations) to complete the action. In either case the body must reveal the action taken, the votes or abstentions of the members present, and if the action amounted to approving a document such as a contract, lease or settlement agreement, that document likewise is available on request after the closed session, or when the body's action is accepted by the adverse party. (Government Code §54957.1). The "upon request" status of some of these delayed disclosures leaves the burden on the press or public to be alert when the agenda no longer refers to a closed session on a certain matter, since that silence probably signals an achieved property deal, union agreement or litigation settlement.

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10. Violations of the Act may justify court action as correction or punishment.

If the object is to force the body to comply with the law when it is consistently failing to do so or insists that its conduct is lawful, the Act allows any person or the district attorney to file a lawsuit in the superior court seeking a declaratory judgment that the law has been or is being violated, usually coupled with an injunction ordering compliance. If the court finds that the body used a closed session for an unlawful discussion or action, it may order the body to tape record its closed sessions (and preserve the recordings) for a certain period thereafter, to encourage compliance and provide evidence of repeated violations. The tapes are not public records but may be reviewed by a court in any similar subsequent lawsuit. (Government Code Section 54960).

If the goal instead is to overturn a particular action taken in violation of the Brown Act, any person or the district attorney may file a suit asking the superior court find that the body violated the Act in taking an action that should be therefore declared null and void. This remedy is confined to actions taken with unlawful secrecy (outside a public meeting) or unlawful surprise (at a public meeting, but not given adequate notice on the agenda). Invalidation of secret actions must be preceded by a written notice to the body, delivered no later than 90 days from the date of the alleged action, demanding a suitable "cure and correction." To invalidate surprise actions, the notice period for demanding cure and correction is only 30 days, and in any event no one has standing to sue who had actual notice of the surprise item at least 72 hours before the meeting at which action was taken. Once the body makes an unsatisfactory response to the demand, or when 30 days passes without response, the plaintiff has just 15 days to file the nullification action in court. The court may decline to nullify an action if:

- the body has satisfactorily cured the violation;
- the action dealt with the sale or issuance of notes, bond or other instruments of debt, or with the collection of a tax;
- the action resulted in a contract with a third party who had no knowledge of a Brown Act violation and would be harmed by having the contract nullified (this does not apply to a salary or fee for professional services, which contract may be nullified). (Government Code §54960.1)

If the plaintiff wins in any of these civil actions, he or she may be entitled to an award of attorney's fees and costs from the defendant agency, especially if the lawsuit clearly benefited the public rather than just the plaintiff's private interests, and was necessary to force compliance with the law. If the plaintiff loses and the court finds that the lawsuit was "clearly frivolous and totally lacking in merit," the defendant agency may ask the court to order the plaintiff to pay its costs and fees. (Government Code §54960.5)

Finally, Government Code §54949 provides: "Each member of a legislative body who attends a meeting of that legislative body where action is taken in violation of any provision of this chapter, and where the member intends to deprive the public of information to which the member knows or has reason to know the public is entitled under this chapter, is guilty of a misdemeanor."

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