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OPEN PUBLIC MEETING REQUIREMENTS UNDER THE BROWN ACT AND CALIFORNIA EDUCATION CODE

A Summary for New Board Members

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I. INTENT

A. Government Code Section 54950 clearly states the legislative intent underlying the Brown Act:

> Public agencies in this state exist to aid in the conduct of the people's business. It is the intent of the law that their actions be taken openly and their deliberations be conducted openly.
>
> The people of this state do not yield their sovereignty to the agencies which serve them. The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may retain control over the instruments they have created.

B. It is in light of this legislative policy that the Brown Act has been liberally interpreted.

C. The courts have interpreted this statement of legislative intent in the following manner.

1. The purpose of the Brown Act is to facilitate public participation in local government and to curb misuse of democratic process by secret legislation by public bodies. [Boyle v. City of Redondo Beach (1999) 70 Cal.App.4th 1109, 1116 [83 Cal.Rptr.2d 164, 168].]

2. Under the Brown Act--"interested persons" entitled to sue to enforce its provisions are not confined to residents within the jurisdiction of the legislative body involved, nor to taxpayers therein. [McKee v. Orange Unified School Dist. (2003) 110 Cal.App.4th 1310, 1316 [2 Cal.Rptr.3d 774, 778].]

D. At the November 2, 2004 election, the voters of California adopted Proposition 59, which adds Subdivision (b) to Section 3 of Article I of the California Constitution. Proposition 59 does the following:

1. Adds to the state Constitution the requirement that meetings of public bodies and writings of public officials and agencies be open to the public.

2. Provides that statutes and rules furthering public access be broadly construed, or narrowly construed, if they limit public access.

3. Requires that new statutes and rules limiting access contain findings justifying the necessity of the limitation.

4. Preserves the constitutional rights of privacy, due process, and equal protection; and expressly preserves existing constitutional and statutory limitations restricting access to certain meetings and records of government bodies.

II. THE "RULE" - GOVERNMENT CODE SECTION 54953

A. 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, except as otherwise provided in this chapter.

B. If a given entity fits within any definition of a legislative body, then it is subject to the various requirements of the Brown Act.

Government Code Section 54952 defines a "legislative body" to include the following:

1. The governing board of a school or community college district, ROP or JPA, etc. [Government Code Section 54952(a).]

2. Commissions, committees, boards, or other bodies of a local agency, whether permanent or temporary, decision-making or advisory, created by resolution or some other formal action of a legislative body. [Government Code Section 54952(b).]

   a. E.g., personnel commissions.

   b. E.g., academic senates. [66 Ops.Atty.Gen. 252 (1983).]

   c. E.g., Community college student body associations. Such organizations are advisory to district boards and are therefore a legislative body and subject to the Brown Act. [75 Ops.Atty.Gen. 145 (1992).]

3. "Legislative body" does not include advisory committees composed solely of the members of the legislative body which are less than a quorum of the legislative body. [Government Code Section 54952(b).]

   a. Not all less-than-a-quorum committees are excluded from the definition of a "legislative body." To be excluded, the committee must:

      1) be "advisory" only;

      2) not be "decision-making"; and

      3) not be a standing committee.

E.g., an ad hoc committee comprised solely of less than a quorum of the board created for the purpose of advising the full board on the qualifications of candidates for appointment to a vacant position is not a legislative body. [Henderson v. Board of Education (1978) 78 Cal.App.3d 875 [144 Cal.Rptr. 568].]

b. If the ad hoc committee includes members who are not members of the board, the Act will apply.

c. Committees appointed by the superintendent, without any formal action by the board, are not covered by the Act. However, the board must not in any way "instigate" the formation of the committee; the concept of "formal action" is broadly construed. [Joiner v. City of Sebastopol (1981) 125 Cal.App.3d 799, 805 [178 Cal.Rptr. 299]; and Frazer v. Dixon Unified School District (1993) 18 Cal.App.4th 781, 792-793 [26 Cal.Rptr.2d 641, 649-650].]

d. Where a school district's board of trustees has formed a committee, known as the district liaison council, consisting of eight representatives from the community, seven employees of the district, and one student, to interview candidates for the position of district superintendent, the committee is subject to requirements of the Brown Act (e.g., the notice, agenda and public participation requirements.) However, where appropriate, the committee may also rely on the personnel exception in Section 54957 and meet in closed session when it is interviewing candidates, reviewing resumes, discussing qualifications, and arriving at a decision prior to the actual appointment. [80 Ops.Atty.Gen. 308 (1997).]

e. The Act applies to any "other body" a local agency creates unless the other body consists of (1) less than a quorum of the local agency's members, and (2) is only advisory. [Taxpayers for Livable Communities v. City of Malibu (2005) 126 Cal.App.4th 1123.]

4. Standing committees of a legislative body, irrespective of their composition, which have a continuing subject matter jurisdiction, or a meeting schedule fixed by resolution or other formal action of a legislative body, are legislative bodies for purposes of the Brown Act.

5. A board, commission, committee, or other multi-member body that governs a private corporation, limited liability company, or entity is a "legislative body" if it:

a. is created by the elected legislative body in order to exercise authority that may lawfully be delegated by the elected body to a private entity [Government Code Section 54952(c)(1)]; or

b. receives funds from a local agency and the membership of the governing body includes a member of the legislative body of the local agency appointed by the legislative body of the local agency. [Government Code Section 54952(c)(2).]

6. The governing board of a jointly-administered trust fund, whose members are appointed equally by a city and a labor union representing city employees and whose purpose is to address labor-management issues relating to the health, safety, and training of city employees, is not required to hold its meetings open to the public. [87 Ops.Cal.Atty.Gen. 19 (2004).]

7. Other provisions of law may subject certain organizations to the Brown Act, e.g., community college district auxiliary organizations. [Education Code Section 72674.]

C. "Member of a legislative body of a local agency" is defined to include any person elected to serve as a member of a legislative body who has not yet assumed the duties of office. Such persons must conform their conduct to the requirements of the Act, and will be treated, for purposes of enforcing the Act, as if they had already assumed office. [Government Code Section 54952.1.]

A legislative body may require that each member be given a copy of the Act. Similarly, someone who has been elected to serve on the body, but has not yet assumed office, may be given a copy of the Act.

III. WHAT IS A MEETING?

A. The 1993 Amendments to the Act added a specific definition of a meeting. This definition codifies prior interpretations of the Act by the Attorney General and the state appellate courts.

1. A meeting is a gathering of a quorum of the legislative body, no matter how informal, where business is discussed or transacted. [Sacramento Newspaper Guild v. Sacramento County Board of Supervisors (1978) 263 Cal.App.2d 41 [69 Cal.Rptr. 480]; and 61 Ops.Atty.Gen. 220 (1978).] (Luncheon meetings where public business is discussed are subject to the Brown Act.)

   • Deliberation in this context connotes not only collective decision-making, but also the collective acquisition and exchange of facts preliminary to the ultimate decision. [Frazer, 18 Cal.App.4th at 794 [22 Cal.Rptr. at 651].]

2. Meeting includes "study," "discussion," "informational," "fact-finding," or "pre-meeting" gatherings of a quorum of the members of a board. Whether action is or is not taken is irrelevant. [42 Ops.Atty.Gen. 61 (1963).]

B. A meeting is defined to include:

1. Any congregation of a majority of the members of the legislative body 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. [Government Code Section 54952.2(a).]

2. Except as authorized by Section 54953, 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 on an item by the members of the legislative body is prohibited. [Government Code Section 54952.2(b).]

   • "Action taken" means a collective decision by a majority of the members of the legislative body, a collective commitment or promise by a majority of the members of a legislative body to make a positive or a negative decision, or an actual vote of the body. [Government Code Section 54952.6.]

3. Wolfe v. City of Fremont (2006) 144 Cal.App.3d 533 provides important guidance as to when contacts between district staff and board members, and between board members, will or will not violate the Brown Act.

   a. While personal meetings permit an interchange of views, unlike the distribution of a written memorandum, the Brown Act does not preclude members of a local legislative body from engaging in one-on-one discussions of matters before the body.

   b. Rather, Government Code Section 54952.2(c) expressly states that the Brown Act does not prohibit individual contacts or conversations between a member of a legislative body and any other person.

   c. This is not to imply that serial meetings between a city official and individual members of the city council can never lead to a violation of the Brown Act, but more than mere policy-related informational exchanges are required before such a violation will occur.

   d. Under Section 54952.2(b), the Brown Act is violated by such serial meetings only if (1) the city official acts as a personal intermediary for council members during the course of such meetings, and (2) the meetings are used by a majority of the legislative body to develop a collective concurrence regarding a matter of interest.

   e. A "collective concurrence" would require not only that a majority of the council members share the same view, or "concur," but also that the members have reached that shared view after

interaction between or among themselves, whether directly or through an intermediary.

f. By requiring collective action in addition to a concurrence, the definition promotes the policy behind the Brown Act, which is to ensure that the deliberations--that is, the discussion of matters leading to a decision--of public bodies are done in public.

g. It is also consistent with the conclusion that the Brown Act's requirement of public meetings includes informal sessions at which a legislative body commits itself collectively to a particular future decision concerning the public business. Section 54952.2(c), must be read together with Section 54952.2(b), which holds that if such direct communication among members of a legislative body leads to a consensus about action to be taken on an item, a violation of the Brown Act has occurred.

h. Wolfe's allegations about the activities of the city council allowed the inference that, prior to a city council meeting, the council members had improperly reached a collective concurrence that they would not challenge the policy at issue.

i. Those allegations led directly to the inference that the council members had reached their consensus through the nonpublic discussions that occurred among them, thereby violating the Brown Act.

j. Supporting that inference was the council members' decision to have the chief of police address them at the meeting in advance of the public comment period, an action that created the impression of a concerted effort to shape public perceptions of the new policy. Accordingly, although the allegations of the complaint were not wholly free from ambiguity, they were sufficient to state a claim for a violation of Section 54952.2(b).

C. However, by the enactment of Chapter 63, Statutes of 2008 (S.B. 1732), effective January 1, 2009, the Legislature repealed the holding in Wolfe and established a new definition for a meeting in Section 54952.2(a) and imposed new restrictions in Section 54952.2.(b).

1. The meeting definition is changed in Section 54952.2(a) to read as follows:

As used in this chapter, "meeting" means 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 action* on any item that is within the subject matter jurisdiction of the legislative body. (Emphasis added.)

2. Correspondingly, the prohibitions in Section 54952.2(b) have been significantly amended to read as follows:

(b) (1) A majority of the members of a legislative body shall not, outside a meeting authorized by this chapter, 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. (Emphasis added.)

3. The amendments added a Section 54952.2(b)(2) which reads as follows:

Paragraph (1) shall not be construed as preventing an employee or official of a local agency, from engaging in separate conversations or communications outside of a meeting authorized by this chapter 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. (Emphasis added.)

4. Whereas Wolfe held that a violation of the prohibition on serial meetings occurs only if a series of meetings by members of a body results in a collective concurrence, new Section 54952.2 would instead prohibit a majority of members of a legislative body of a local agency from using, outside a meeting authorized by the act, 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.

5. The new legislation also contains the Legislature's declaration that it disapproves the holding in the Wolfe case to the extent it construes the prohibition on serial meetings to apply only where there is a collective concurrence, and would state its intention that the changes made by this bill supersede the holding in Wolfe.

   a. Section 1(a) of Chapter 63 in uncodified language provides as follows:

      (a) The Legislature hereby declares that it disapproves the court's holding in Wolfe v. City of Fremont (2006) 144 Cal.App.4th 533, 545, fn. 6, *to the extent that it construes the prohibition against serial meetings by a legislative body of a local agency, as contained in the Ralph M. Brown Act* . . . to require that a series of individual meetings by members of a body actually result in a collective concurrence to violate the prohibition rather than also including the process of developing a collective concurrence as a violation of the prohibition.

b. Section 1(b) makes clear that the new language in Section 54952.2(a) and (b) supersedes the holding in Wolfe

D. The requirements of the Brown Act do not apply to the following:

1. Individual contacts or conversations between a member of a legislative body and any other person. [Government Code Section 54952.2(c)(1).]

2. The attendance of a majority of the members of a legislative body at a conference or similar gathering open to the public that involves a discussion of issues of general concern to the public or agencies of the type represented by the legislative body, provided a majority of the members do not discuss among themselves, other than as part of the scheduled program, business of a specific nature that is within the subject matter jurisdiction of the local agency. This paragraph is not intended to allow members of the public free admission to a gathering where the organizers have required the other participants to pay a fee as a condition of attendance. [Government Code Section 54952.2(c)(2).]

3. The attendance of a majority of the members of a legislative body at an open and publicized meeting organized to address a topic of local community concern by a person or organization other than the local agency, provided that a majority of the members do not discuss among themselves, other than as part of the scheduled program, business of a specific nature that is within the subject matter jurisdiction of the legislative body. [Government Code Section 54952.2(c)(3).]

4. The attendance of a majority of the members at an open and noticed meeting of another body of the local agency, or at an open and noticed meeting of a legislative body of another local agency, provided that a majority of the members do not discuss among themselves, other than as part of the scheduled meeting, business of a specific nature that is within the subject matter jurisdiction of the legislative body. [Government Code Section 54952.2(c)(4).]

5. The attendance of a majority of the members at a purely social or ceremonial occasion provided that a majority of the members do not discuss among themselves business of a specific nature that is within the subject matter jurisdiction of the legislative body. [Government Code Section 54952.2(c)(5).]

6. The attendance of a majority of the members of a legislative body at an open and noticed meeting of a standing committee of that body, provided that the members of the legislative body who are not members of the standing committee attend only as observers. [Government Code Section 54952.2(c)(6).]

a. Members of the legislative body of a local public agency may not ask questions or make statements while attending a meeting of a standing committee of the legislative body "as observers." [81 Ops.Atty.Gen. 156 (1998).]

b. Members of the legislative body of a local public agency may not sit in special chairs on the dais while attending a meeting of a standing committee of the legislative body "as observers." Id.

IV. PUBLIC MEETING PROCEDURES

A. Certain boards must meet at least monthly and must, by rule, fix the time and place for their regular meetings.

[Education Code Sections 1011, 35140, 35144, and 72000(c)(4).] [Government Code Section 54954.]

B. Location of Meetings [Government Code Sections 54954(b) and (c).]

1. Regular and special meetings of school district boards must be held within the territory of the district, except in order to:

a. Comply with state or federal law or a court order, or attend a judicial or administrative proceeding to which the local agency is a party.

b. Inspect real or personal property which cannot conveniently be brought within the boundaries of the district provided that the topic of the meeting is limited to items directly related to the real or personal property.

c. Participate in meetings or discussions of multi-agency significance that are outside the jurisdictional boundaries of the district. However, the meeting must be held within the territory of one of the participating agencies and be noticed by all participating agencies as provided for in this chapter.

d. Meet in the closest meeting facility if the local agency has no meeting facility within the boundaries of the district, or at the principal office of the local agency if that office is located outside the territory over which the agency exercises jurisdiction.

e. Meet with state or federal officials, where a local meeting would be impractical, solely to discuss legislative or regulatory matters affecting the district over which the state or federal officials have jurisdiction.

f. Meet at or near a facility owned by the agency located outside its territory, if the meeting is limited to items directly related to that facility.

g. Meet at the office of the agency's attorney for a closed session on pending litigation, when to do so would reduce fees or costs.

2. Additionally, school board meetings may be held outside the district for the following purposes:

a. Attend a conference on non-adversarial collective bargaining techniques, e.g., CFEIR.

b. Interview members of the public residing in another district regarding the potential employment of an applicant for the position of the superintendent of that district.

c. Interview a potential employee from another district.

3. Community college districts must hold their meetings within their own jurisdiction, except if certain, very limited exceptions apply:

a. Meeting with another local agency.

b. Meeting in closed session with counsel to discuss pending litigation. [Education Code Section 72000(d)(2)(A) and (B).]

4. A JPA must meet within the territory of at least one of its member agencies, unless one of (a) through (g) above applies. [Government Code Section 54954(d).]

5. If, by reason of a fire, flood, earthquake, or other emergency, it is unsafe to meet in the usual place, the meetings shall be held for the duration of the emergency at the place designated by the presiding officer or his designee, in a notice to the local media that have requested notice, by the most rapid means available at the time. [Government Code Section 54954(e).]

C. All meetings of a legislative body of a local agency that are open and public shall meet the protections and prohibitions contained in the Americans with Disabiliites Act of 1990 ("ADA"). [Government Code Section 54953.2, citing 42 USC Section 12132.]

D. Mailed notice of meetings.

1. Any person may request that a copy of the agenda or the documents constituting the agenda packet be mailed to that person. If requested, the agenda and documents in the agenda packet shall be made available in

appropriate alternative formats to person with a disability as required by the ADA, 42 USC Section 12132, and the federal rules and regulations adopted in implementation thereof. Upon receipt of the written request, the legislative body, or its designee, shall cause the requested materials to be mailed at the time the agenda is posted, or upon distribution to all, or a majority of all, of the members of a legislative body, whichever occurs first. [Government Code Section 54954.1.]

2. Any request to receive agenda materials shall be valid for the calendar year in which the request is filed, and must be renewed following January 1 of each year. The legislative body may establish a fee for mailing the agenda or agenda packet, which fee shall not exceed the cost of providing the service.

3. Failure of the requesting person to receive the agenda or agenda packet pursuant to this section shall not constitute grounds for invalidation of the actions of the legislative body taken at the meeting for which the agenda or agenda packet was not received.

4. If requested, the agenda and documents in the agenda packet shall be made available in appropriate alternative formats to persons with a disability. The agenda shall include information regarding how, to whom, and when, a request for disability-related modification or accommodation, including auxiliary aids or services, may be made. [Government Code Sections 54954.1 and 54954.2.]

E. Special Meetings - 24-Hour Notice [Government Code Section 54956.]

1. The board may only consider business specified in the notice. [Government Code Section 54956.]

2. The board may hold a closed session as part of a special meeting.

3. Notice of the special meeting must be mailed or delivered to the media and posted 24 hours in advance of the meeting.

4. A special meeting may be called by either the president of the board or a majority of the board.

F. Emergency Meetings in Emergency Situations [Government Code Section 54956.5, as amended in 2002.]

1. Where an emergency involves the potential for disruption, or threatened disruption, of public facilities, a board may hold an emergency meeting without providing normally-required notice and/or posting.

2. An “emergency situation” is defined as either:

a. An "emergency," defined as:

1) Work stoppage;

2) Crippling activity; or

3) Other activity that severely impairs public health, safety, or both, as determined by a majority of the members of the Governing Board.

b. A "dire emergency," defined as:

1) Crippling disaster;

2) Mass destruction;

3) Terrorist act; or

4) Threatened terrorist activity that poses peril so immediate and significant that requiring the board to provide one-hour notice may endanger public health, safety, or both, as determined by a majority of the board.

3. At least one-hour notice to media (those who previously requested notice of special meetings) is required. However, in a "dire emergency," notice need only be made at or near the time the presiding officer or designee notifies other board members. Notice must be made by telephone, unless telephone service is not functioning. In such case, notice shall be made of the meeting and any actions taken as soon as possible thereafter.

4. Board may meet in closed session following a 2/3 vote of the board or unanimous if less than 2/3 of members are present.

5. Special meeting requirements of Section 54956 are applicable except 24-hour notice.

G. Agendas

1. An agenda must be conspicuously posted at least 72 hours prior to the time of regular meetings in a location freely accessible to members of the public. [Government Code Section 54954.2(a).]

a. The location where the agenda is posted must be publicly accessible at all times during the required 72-hour period. For example, the agenda cannot be posted inside a building that is locked and inaccessible to the public during evening hours. [78 Ops.Atty.Gen. 327 (1995).]

b. The agenda of a meeting may be posted on a touch-screen electronic kiosk accessible without charge to the public 24 hours a day, 7 days a week, in lieu of posting a paper copy of the agenda on a bulletin board. [88 Ops.Atty.Gen. 218 (2005).]

2. A board may not change its posted agenda within the 72-hour period preceding a regular meeting unless one of the following exceptions applies:

   a. A majority determines that an emergency exists pursuant to Government Code Section 54956.5;

   b. A two-thirds vote of the board members present determines that there is a need to act immediately and the need to take action came to the district's attention after the posting of the agenda;

   c. The item was previously posted for a meeting occurring not more than five days prior to the meeting when the action is taken, and at the prior meeting the item was continued to the meeting where action was taken. [Government Code Section 54954.2(b).]

   If no exception applies, the board must either postpone consideration of the item for at least 72 hours or call and notice a special meeting.

3. The agenda must reasonably apprise the public of the matters to be considered in sufficient detail to allow the public to determine whether to participate at the meeting. [Carlson v. Paradise Unified School District (1971) 18 Cal.App.3d 196 [95 Cal.Rptr. 650].] (Action taken pursuant to a defective agenda may be void.)

   The Act requires that the agenda contain a brief general description of each item of business to be transacted or discussed at the meeting, including items to be discussed in closed session. A "brief general description" of an item generally need not exceed 20 words.

4. In Moreno v. City of King (2005) 127 Cal.App.4th 17 [25 Cal.Rptr.3d 29], the agenda for a special meeting stated that the city council would only consider, in closed session, the employment contract of a public employee. Six days later, the city manager gave the employee a memorandum that contained the details of five alleged incidents of misconduct that had led the city manager to terminate his employment. The court held that the trial court's finding that the special meeting agenda violated Section 54954.2 was equivalent to a finding that it violated Section 54956 because the two statutes contained equivalent requirements. The trial court did not err in finding that the agenda was inadequate because its description provided no clue that the dismissal of a public employee would be discussed at the meeting.

a. The city did not cure its failure to agendize the issue of the employee's dismissal when the only action reported after a later meeting was the denial of the employee's tort claim.

b. The employee was deprived of the opportunity to respond to specific accusations, in violation of Cal. Gov't Code § 54957, because the city failed to give him advance notice that it would be hearing the city manager's accusations at its closed meeting.

5. The Act imposes limitations on board members' responses to public comments. [Government Code Section 54954.2(a).] In response to public comments, board members and staff may only:

a. briefly respond to statements made or questions posed by persons making public comments;

b. ask questions for clarification or make a brief announcement;

c. provide a reference to staff or other resources for factual information;

d. request staff to report back to the body at a later meeting; or

e. direct staff to place the matter on a future agenda.

6. Agendas of public meetings and any other 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 an open meeting of the body, are disclosable public records under the California Public Records Act (Chapter 3.5 (commencing with Section 6250) of Division 7 of Title 1), and shall be made available upon request without delay. This requirement does not apply to certain records made exempt from public disclosure by the Public Records Act. [Government Code Section 54957.5(a).]

a. Effective July 1, 2008, if a writing that is a public record under subdivision (a) of Section 54957.5, and that relates to an agenda item for an open session of a regular meeting of the legislative body of a local agency, is distributed less than 72 hours prior to that meeting, the writing shall be made available for public inspection pursuant to Section 54957.5(b)(2) at the time the writing is distributed to all, or a majority of all, of the members of the body. [Government Code Section 54957.5(b)(1).]

b. Effective July 1, 2008, a local agency shall make any writing described in Section 54957.5(b)(1) available for public inspection at a public office or location that the agency shall designate for this purpose. Each local agency shall list the address of this office or

location on the agendas for all meetings of the legislative body of that agency. The local agency also may post the writing on the local agency's Internet Web site in a position and manner that makes it clear that the writing relates to an agenda item for an upcoming meeting.

c. Documents prepared by the district must be made available for public inspection at the meeting; documents prepared by any other person must be made available after the meeting. [Government Code Section 54957.5(c).]

d. Nothing in the Act prevents the district from charging a fee or deposit for a copy of a public record as authorized by the Public Records Act. [Government Code Sections 54957.5(d) and 6253.]

e. No additional charge may be imposed on persons with disabilities in order to make these documents available in appropriate alternative formats. [Government Code Sections 54957.5(b)(2) and (d).]

H. Public Participation [Government Code Section 54954.3 and Education Code Sections 35145.5 and 72121.5.]

1. Members of the public must be allowed to place matters directly related to district business on the agenda.

2. Members of the public must be able to address the board regarding items on the agenda before or during the governing board's consideration of the item.

3. The subdivision does not, however, require the Board to allow members of the public to address it on whether to place an item on the agenda. [Coalition of Labor v. County of Santa Barbara Bd. of Supervisors (2005) 129 Cal.App.4th 205 [28 Cal.Rptr.3d 198].]

4. In Lindelli v. Town of San Anselmo (2003) 111 Cal.App.4th 1099, 1109 [4 Cal.Rptr.3d 453, 461], the court held that while Government Code Section 54954.3 permits members of the public to provide input, it does not mandate that they do so. Nothing in the plain language of Government Code Section 54954.3 supported the city's proposed construction--that members of the public must raise a given legal concern about a potential action before any course of action has been adopted, or be forever barred from raising that concern in court.

5. Every regular meeting agenda shall provide an opportunity for members of the public to address the board on any item of interest to the public, within the subject matter jurisdiction of the board.

a. No action shall be taken until the matter is properly noticed on an agenda or an exception to the 72-hour rule is established.

b. Every notice of a special meeting shall provide an opportunity for members of the public to directly address the legislative body concerning any item appearing on that agenda before or during consideration of that item. [Government Code Section 54954.3(a).]

c. In Chaffee v. San Francisco Library Commission (2004) 115 Cal.App.4th 461 [9 Cal.Rptr.3d 336], the Court of Appeal held that the Act contemplated only one public comment period per agenda, even when the agenda is covered at meetings occurring on different days. The decision also assumes that speakers wishing to address a topic on the agenda will be permitted to speak when that item is before the body, and not as a group in advance of reaching the item on the agenda. This statement is at odds with the practice of many bodies which require all speakers wishing to address an agenda item to speak at the beginning of meetings as a group and not at the time the agenda item is brought up.

6. The board may adopt reasonable rules and regulations in order to ensure the proper functioning of the meeting. [75 Ops.Atty.Gen. 89 (1992); White v. City of Norwalk 900 F.2d 1421 (9th Cir. 1990); and Kindt v. Santa Monica Rent Control Board 67 F.3d 266 (9th Cir., 1995).] (Regulations governing when the public may address the board are reasonable, content-neutral time, place, and manner restrictions.)

7. In Chaffee v. San Francisco Public Library Com. (2005) 134 Cal.App.4th 109, the Plaintiff asserted that state law and a San Francisco "sunshine" ordinance required the commission to provide each speaker with up to three minutes to make comments at a meeting of the commission. At the meeting in question, the commission's president announced that public comment on each agenda item would be limited to two minutes per speaker, instead of the three minutes normally allotted to each speaker.

a. The court held that defendants did not violate the Brown Act or the sunshine ordinance in shortening the time allotted to each speaker.

b. The president stated in his declaration that before the meeting, he anticipated four agenda items would be lengthy. Based on his judgment of the time required for the commission to consider those four items and the other items on the agenda, he concluded the commission would not be able to complete its meeting in a reasonable period unless public comment was somewhat shortened. The minutes indicated that the meeting lasted more than four hours. Chaffee presented no evidence that the president did not reasonably expect the four items he enumerated to be lengthy

or that the commission did not reasonably apply its bylaws in the circumstances.

c. The Brown Act does not specify a three-minute time period for comments, and does not prohibit public entities from limiting the comment period in the reasonable exercise of their discretion. Id. at 116.

8. Dumping gallons of garbage on the floor of a schoolroom during a school board meeting was sufficient to support an arrest for disturbing a public meeting and was not speech protected by the First Amendment. [McMahon v. Albany Unified School Dist. (2002) 104 Cal.App.4th 1275 [129 Cal.Rptr.2d 184].]

9. "The legislative body . . . 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." [Government Code Section 54954.3(c).]

a. This provision, and the Baca case discussed below, make it clear that an action for defamation will not lie for statements made at a public meeting.

b. This provision raises concerns relating to privacy and reputation issues for public employees.

10. In Baca v. Moreno Valley Unified School District, 936 F.Supp. 719 (C.D. Cal. 1996), the court held the board's policy prohibiting the airing of charges or complaints against identifiable district employees to be unconstitutional.

a. The district's policy was similar to many found throughout the state:

> "No oral or written presentation in open session shall include charges or complaints against any employee of the District, regardless of whether or not the employee is identified by name or by any reference which tends to identify the employee . . . . All charges or complaints against employees must be submitted to the board under provisions of board policy . . . .
>
> Any individual who violates this policy will be warned to discontinue his/her comments immediately. If the individual willfully interrupts the meeting by refusing to comply with the warning, the board President may

authorize the removal of the individual pursuant to Government Code section 54957.9."

b. Ms. Baca, who is active in the Mexican Political Association (MPA), accused a school principal and the district's superintendent of ignoring numerous complaints brought to them by parents and for acting in a discriminatory manner. Ms. Baca was warned and removed by Riverside County Sheriffs, who were present.

c. The court held that speech criticizing district employees, even if later proved to be defamatory, is protected by both the California and federal Constitutions from government censorship and prior restraint.

1) The public sessions of a board meeting are designated limited public forums. As a result, government may limit speech to certain subjects but may not engage in viewpoint discrimination within a given subject matter area.

2) The court found the following concerns not to be sufficiently compelling to justify limiting Ms. Baca's speech:

(a) The employee's privacy rights;

(b) The employee's liberty interests;

(c) The district's interest in regulating its own meetings.

3) The presence of alternate means of communication between plaintiff and the board, or between plaintiff and other members of the public, was found not to justify or validate the otherwise unconstitutional policy. Specifically, since California law establishes as privileged, statements made in board meetings, requiring persons to bring complaints against district employees outside of such meetings does not provide an adequate alternate location.

11. In Holbrook v. City of Santa Monica (2006) 144 Cal.App.4th 1242, the plaintiff city councilmember sued arguing that the fact that city council meetings frequently ran late into the night and included public comment as the final order of business, violated the constitution and the Brown Act. Plaintiffs sought to compel the city council to end its meetings by 11:00 p.m.

a. The court concluded that, with respect to plaintiffs' constitutional claims and asserted violations of the Brown Act, the causes of

action arose from protected activity. Plaintiffs failed to show that preventing the city council from conducting legislative business after 11:00 p.m. benefited the public.

b. The court also concluded that, when plaintiffs accepted their seats on the city council, they forfeited Brown Act standing that they would otherwise have had as California citizens to sue the city council.

1) Not only did plaintiffs assert no interest that differed from that of the general public, they claimed no personal damages or consequences distinct from those of the populace that could create a beneficial interest in them.

2) As no beneficial interest in the workings of the city council was conferred by serving on that entity, plaintiffs did not establish any beneficial interest sufficient to confer standing.

12. Minutes shall be taken recording all actions taken by the governing board. The minutes are public records. [Education Code Sections 35145(a) and 72121(a).]

13. No action may be taken by secret ballot. [Government Code Section 54953(c).]

14. Government Code Section 54953(b) permits teleconferencing, not just "video teleconferencing," for all purposes in connection with any meeting within the subject matter jurisdiction of the legislative body. "Teleconferencing" means a meeting of a legislative body, the members of which are in different locations, connected by electronic means, through audio or video, or both.

a. Teleconference means a meeting of individuals in different locations, connected by electronic means, through either audio or video, or both.

b. Teleconference meetings must comply with all requirements of the Brown Act and all other applicable provisions of law relating to the specific type of meeting or proceeding.

c. All votes taken during a teleconferenced meeting shall be by roll call.

d. Agendas must be posted at each teleconferencing location, agendas must identify each teleconferencing location, and each location must be accessible to the public.

e. Teleconferenced meetings must be conducted in a "manner that protects the statutory and constitutional rights of the parties or the public." [Government Code Section 54953(b)(3).]

f. During the teleconference, at least a quorum of the members of the legislative body shall participate from locations within the boundaries of the territory over which the local agency exercises jurisdiction.

g. The agenda shall provide an opportunity for members of the public to address the legislative body directly, pursuant to Section 54954.3, at each teleconference location.

15. Any person attending a public meeting has the right to record the meeting by still or motion picture camera, or by video or audio tape, absent a finding by the board of persistent disruption of the proceedings. [Government Code Section 54953.5(a).]

16. A board may not prohibit or restrict the broadcast of its proceedings. [Government Code Section 54953.6.]

17. Any tape or film recording made by or at the direction of the board shall be subject to inspection pursuant to the Public Records Act, but may be destroyed or erased 30 days after the taping or recording. Any inspection of a video or audio tape recording shall be provided without charge on a tape recorder made available by the district. [Government Code Section 54953.5(b).]

V. CLOSED SESSION

A. Government Code Section 54957 authorizes a board to meet in closed session for the following purposes:

1. The legislative body of a local agency may hold closed session with the Attorney General, district attorney, agency counsel, sheriff, or chief of police, or their respective deputies, or a security consultant or a security operations manager on matters posing a threat to the security of public buildings, a threat to the security of essential public services, including water, drinking water, wastewater treatment, natural gas service, and electric service, or a threat to the public's right of access to public services or facilities. [Government Code Section 54957(a).]

2. Subject to the conditions in paragraph (b)(2) of Section 54957, consideration of the appointment, employment, evaluation of performance, discipline, or dismissal of an employee. [Government Code Section 54957(b)(1).]

a. This exception permits boards to meet in closed session to discuss and act upon the hiring, firing, intermediate discipline, and evaluation of particular employees, even though, on its face, the statute authorizes only a closed session to "consider" such personnel matters. [Lucas v. Board of Trustees (1971) 18 Cal.App.3d 988 [96 Cal.Rptr. 431]; see also, Southern California Edison Co. v. Peevey (2003) 31Cal.4th 781, 799 [3 Cal.Rptr.3d 703, 715].]

When the legislative body of a local agency meets in closed session to consider the proposed dismissal of a public employee but ultimately rejects that proposal and retains the employee, the legislative body is not thereafter required to publicly report its decision and the vote or abstention of each member. [89 Ops.Cal.AttyGen. 110 (2006.]

b. A county board of education may not meet in closed session to consider the appointment, employment, evaluation of performance, discipline, or dismissal of certificated or classified employees because the county board is not the employer. [85 Ops.Atty.Gen. 77 (2002).]

c. Discussion must relate to a particular individual.

d. However, in Duval v. Board of Trustees of the Coalinga-Huron Unified School District (2001) 93 Cal.App.4th 902 [113 Cal.Rptr.2d 517], the Court of Appeal held that evaluation extends to all employer consideration of an employee's discharge of her job duties after appointment or employment and before dismissal. Section 54957 is not limited to the consideration of formal evaluations. "We conclude the phrase 'evaluation of performance' encompasses a review of an employee's job performance even if that review involves particular instances of job performance rather than a comprehensive review of such performance."

The court also concluded that evaluation may properly include such preliminary matters as the selection of evaluation criteria, the establishment of a fact-gathering mechanism, designation of particular areas of emphasis in the evaluation, and the setting of goals, since each might reflect the board's initial perception of the employee's performance since the last evaluation. All of these considerations must still relate to the employer's exercise of discretion with respect to the evaluation of a particular employee.

Finally, under evaluation of performance, a governing board may take action as to its final findings with respect to evaluation of a particular employee, and may meet with the employee to give him or her input regarding performance.

e. Personal performance goals are an integral part of the confidential evaluation process and may be discussed in closed session. [Versaci v. Superior Court (2005) 127 Cal.App.4th 805, 822.]

f. Appointment includes the process of reviewing resumes, interviewing, discussing qualifications, and arriving at a decision prior to the actual appointment. [80 Ops.Atty.Gen. 308 (1997).]

g. Closed sessions held pursuant to this section shall not include discussion or action on proposed compensation except for a reduction of compensation that results from the imposition of discipline.

3. Consideration of charges brought against a public employee by another person or employee unless such employee requests a public hearing. [Government Code Section 54957(b)(2).]

a. As a condition to holding a closed session on specific complaints or charges brought against an employee by another person or employee, the employee must be given written notice of his or her right to have the complaints or charges heard in open session. The notice must be delivered to the employee personally or by mail 24 hours before the time for holding the session. If notice is not given, any action against the employee based on the specific complaints or charges shall be null and void.

b. In Furtado v. Sierra Community College District (1998) 68 Cal.App.4th 876 [80 Cal.Rptr.2d 589], the Court of Appeal made clear that when a district is considering performance evaluations in connection with a decision to nonreelect a probationary faculty member, it is not considering "specific complaints or charges" within the meaning of Section 54957. The court reasoned that the Legislature's use of the word "or" to separate the phrase "to consider the appointment, employment, evaluation of performance, discipline, or dismissal of a public employee" from the phrase "to hear complaints or charges brought against an employee by another person or employee unless the employee requests a public session" indicated an intent that a public employee's right to a public hearing should apply only when a board is hearing "complaints or charges."

c. In Fischer v. Los Angeles Unified School District (1999) 70 Cal.App.4th 87 [82 Cal.Rptr.2d 452], the court found that the mere consideration of reasons for nonreelection did not constitute the hearing of specific complaints or charges brought against an employee by another person or employee.

d. In Bollinger v. San Diego Civil Service Commission (1999) 71 Cal.App.4th 568 [84 Cal.Rptr.2d 27], a case admittedly involving specific complaints or charges brought by fellow officers, the court found that the 24-hour notice requirement was not violated where the Commission met in closed session only to deliberate on whether to accept the findings and recommendation of a hearing officer. The consideration of the recommended decision did not constitute the hearing of specific complaints or charges. By analogy, this case supports the conclusion that a governing board need not provide the 24-hour notice when merely deliberating and acting upon the recommended decision of a hearing officer in a classified employee dismissal.

e. In Morrison v. Housing Authority of the City of Los Angeles (2003) 107 Cal.App.4th 860 [132 Cal.Rptr.2d 453], the Court of Appeal held that where the governing body of a public entity, in a case involving employee discipline, rejects its hearing officer's findings of fact and engages in its own fact-finding, it is conducting a "hearing" on the charges against the employee for purposes of Section 54957 and the employee must be given notice of the right to have the hearing conducted in open session.

f. However, in Bell v. Vista Unified School District (2000) 82 Cal.App.4th 672 [98 Cal.Rptr.2d 263], the Court of Appeal concluded that the governing board's consideration of the findings of a CIF commissioner constituted the hearing of specific complaints or charges brought by another person or employee when the board's consideration of the CIF's findings led to the termination of a coaching assignment for an otherwise tenured teacher.

g. "Although § 54957 allows public employees to demand that a governing body air complaints about the employee in public, it does not grant the employees the right to force the conflict behind closed doors." [Leventhal v. Vista Unified Sch. Dist. 973 F. Supp. 951, 958 (S.D. Cal., 1997); and Morrow v. Los Angeles Unified School Dist. (2007) 149 Cal.App.4th 1424, 1439.]

h. The Attorney General has concluded that absent special circumstances, when members of a school district governing board discuss whether to employ a probationary certificated employee for a third consecutive school year, the board is not hearing specific complaints or charges, and the employee may not require that the discussion be held in public. [78 Ops.Atty.Gen. 218 (1995).]

i. The term "employee" is defined to include an officer or independent contractor who functions as an officer or an employee.

4. Consideration of matters concerning national or public security.

B. Other Authority for Closed Sessions

1. A board may hold a closed session, based on the advice of counsel, to confer with, or receive advice from, its legal counsel regarding pending litigation when discussion in open session concerning those matters would prejudice the position of the district in the litigation. [Government Code Section 54956.9.]

a. Litigation is pending when any of the following circumstances exist:

1) Proceedings before a court, administrative body, hearing officer, or arbitrator to which the district is a party, have been formally initiated.

2) A point has been reached where, in the opinion of the board on the advice of legal counsel, and based on existing facts and circumstances, there is a significant exposure to litigation.

3) Deciding whether to litigate or whether closed session is proper based on existing facts and circumstances.

b. The "significant exposure" to litigation determination must be made from the "existing facts or circumstances." "Existing facts or circumstances" consist of only one of the following:

1) Facts and circumstances that might result in litigation but which the district believes are not known to the potential plaintiff.

2) Facts and circumstances including, but not limited to, an accident, disaster, incident, or transactional occurrence that might result in litigation against the district and that are known to the plaintiff. These facts shall be publicly stated on the agenda or announced.

3) Receipt of a tort claim or other written communication threatening litigation, which claim or communication shall be made available for public inspection.

4) A statement made by a person in a public meeting threatening litigation on a specific matter within the agency's area of responsibility.

5) A statement threatening litigation outside of a public meeting on a specific matter within the responsibility of the agency so long as the official or employee of the agency receiving knowledge of the threat makes a contemporaneous or other record of the statement prior to the meeting and the record is made available for public inspection.

c. The board must either state on the agenda or publicly announce the authority for the closed session and, when known, the title of the case.

d. In Southern California Edison Co. v. Peevey (2003) 31 Cal.4th 781, 801 [3 Cal.Rptr. 703, 716], the Supreme Court interpreted corresponding provisions of the Bagley-Keene Act not to require a state body to announce its proposed decision relating to settlement of a case in public session--*identifying the litigation involved*--and accept public comment on the proposed settlement before voting on it. In Peevey, the PUC had recessed to closed session pursuant to the counterpart to Government Code Section 54956.9(c), which does not require the identification of the case by name prior to holding the closed session, if to do so would jeopardize pending settlement negotiations.

Although Section 54956.9 does not expressly so provide, it has been construed, generally, also to permit a local legislative body to approve settlements in closed session. [See Southern California Edison Co. v. Peevey, supra., 31 Cal.4th at 798-799 [discussing 75 Ops.Cal.Atty.Gen. 14 (1992), which so opined]; Trancas Property Owners Assn. v. City of Malibu (2006) 138 Cal.App.4th 172, 185.]

As "emphasized" in the Attorney General's manual on the Brown Act, "the purpose of [section 54956.9] is to permit the body to receive legal advice and make litigation decisions only; it is not to be used as a subterfuge to reach nonlitigation oriented policy decisions." [Cal. Atty. Gen. Office, The Brown Act (2003), p. 40.]

Thus, Section 54956.9's implied allowance for adoption of settlements in closed session is subject to limits. “And whatever else it may permit, the exemption cannot be construed to empower a city council to take or agree to take, as part of a nonpublicly ratified litigation settlement, action that by substantive law may not be taken without a public hearing and an opportunity for the public to be heard. As a matter of legislative intention and policy, a statute that is part of a law enacted to assure public decision making, except in narrow circumstances, may not be read to authorize circumvention and indeed violation of other laws

requiring that decisions be preceded by public hearings, simply because the means and object of the violation are settlement of a lawsuit. [Trancas Property Owners Assn., supra., 138 Cal.App.4th at 187.]

e. In County of Los Angeles v. Superior Court (2005) 130 Cal.App.4th 1099, the superior court had granted the county's motion to compel production of documents listed in a union's deposition subpoena directed to the district attorney, who had conducted an investigation into whether the board violated the Brown Act during two closed sessions.

1) The court of appeal held that the superior court erred when it granted the county's discovery motion. The documents sought by the union were not discoverable because closed session minutes were specifically exempt from disclosure under Section 54957.2. The closed sessions were properly convened under Section 54956.9 to discuss anticipated litigation related to a federal agency's decision to terminate Medicare funding to a medical center under investigation. The minutes of the closed sessions were confidential and were not subject to discovery.

2) Under Section 6254.5(e) of the Public Records Act, the board did not waive any privilege by disclosing the minutes to the district attorney. The letters in the district attorney's investigation file were exempt from disclosure under Sections 6254(f) and 6254.5(e).

f. A board member may not publicly disclose information that has been received and discussed in closed session concerning pending litigation unless the information is authorized by law to be disclosed. [80 Ops.Atty.Gen. 231 (1997).] (NB: Much of the reasoning of this opinion is equally applicable to the improper disclosure of other closed session discussions.) [See Government Code Section 54963. Kleitman v. Superior Court (1999) 74 Cal.App.4th 324, 334.] ("We agree with the Attorney General. Disclosure of closed session proceedings by the members of a legislative body necessarily destroys the closed session confidentiality which is inherent in the Brown Act.")

g. In 86 Ops.Atty.Gen. 210 (2003), the Attorney General concluded that where a member of a city council or county board of supervisors is appointed to sit as that body's representative on the board of another local agency, the appointee may not disclose to his or her appointing authority or its counsel information received in a closed session of the board.

h. However, Section 54956.96 was added to the Act to permit joint power agencies to adopt policies or bylaws, or include in their joint powers agreement, provisions that authorize a member of a legislative body of a member local agency to disclose information obtained in closed sessions of the JPA that has direct financial or liability implications for that local agency to legal counsel for the member local agency for purposes of obtaining advice on whether the matter has direct financial or liability implications for that member local agency, or to other members of the legislative body of the local agency present in a closed session of that member local agency. [Government Code Section 54956.96.]

i. The general rule is that closed session access is permitted only to people who have "an official or essential role to play" in the closed meeting. [83 Ops.Atty.Gen. 221, 225 (2000); see also 82 Ops.Atty.Gen. 29, 33 (1999); 46 Ops.Atty.Gen. 34, 35 (1965).]

2. Consideration of student disciplinary action, unless a public hearing is requested in writing [see the specific provisions of Education Code Sections 35146 and 72122], and challenges to a student's records. [Education Code Sections 49070(c) and 76232(c).]

3. A board may hold closed session, pursuant to Government Code Section 54957.6, with its designated representative regarding the salaries, salary schedules, or compensation paid in the form of fringe benefits to represented and unrepresented employees, and for represented employees, any other matter within the scope of representation. [Government Code Sections 3549.1 and 54957.6; see also, San Diego Union v. City Council (1983) 146 Cal.App.3d 947 [196 Cal.Rptr. 45].]

   The Attorney General has concluded that, since the county board is not the employer, it may not meet in closed session pursuant to the labor negotiations exception. [85 Ops.Atty.Gen. 77 (2002).]

   Closed sessions with the local agency's designated representative regarding the salaries, salary schedules, or compensation paid in the form of fringe benefits may include discussion of an agency's available funds and funding priorities, but only insofar as these discussions relate to providing instructions to the local agency's designated representative.

   Closed session held pursuant to Section 54957.6 shall not include final action on the proposed compensation of one or more unrepresented employees.

4. Consideration of real property transactions. This exception permits a board to meet with its negotiator prior to purchase, sale, exchange, or lease of real property to grant authority to its negotiator regarding the price and terms of the transaction. Before discussing the transaction in closed

session, the board must identify the real property at issue and the person with whom its negotiator may negotiate. [Government Code Section 54956.8. See, Shapiro v. San Diego City Council (2002) 96 Cal.App.4th 904.]

5. Nothing contained in the Brown Act be construed to prevent the legislative body of a multijurisdictional law enforcement agency, or an advisory body of a multijurisdictional law enforcement agency, from holding closed sessions to discuss the case records of any ongoing criminal investigation of the multijurisdictional law enforcement agency or of any party to the joint powers agreement, to hear testimony from persons involved in the investigation, and to discuss courses of action in particular cases. [Government Code Section 54957.8.]

   a. "Multijurisdictional law enforcement agency" means a joint powers entity formed pursuant Government Code Section 6500 that provides law enforcement services for the parties to the joint powers agreement for the purpose of investigating criminal activity involving drugs; gangs; sex crimes; firearms trafficking or felony possession of a firearm; high technology, computer, or identity theft; human trafficking; or vehicle theft. [Government Code Section 54957.8(a).]

   b. The addition of this provision occurred after the passage of Proposition 59, and provides an example of the legislative findings now required to justify a limitation on the public's right of access to the meetings of public bodies or the writings of public officials and agencies. [See Statutes of 2006, Chapter 427, Section 2.]

6. Districts which are members of a joint powers agency formed for the purpose of insurance pooling may meet in closed session to discuss a claim for the payment of tort liability losses, public liability losses, or workers' compensation liability. [Government Code Section 54956.95.]

7. Consideration of honorary degrees or gifts from a donor who wants to remain anonymous. [Education Code Section 72122.]

8. Discussion by the legislative body of a local agency that has received a confidential final draft audit report from the Bureau of State Audits of its response to that report. [Government Code Section 54956.75.]

C. The right to consider the above matters in closed session includes the ability to take action in closed session. [75 Ops.Atty.Gen. 14 (1992).]

D. The Act requires a brief, general description of each item of business to be transacted, including items to be discussed in closed session. What this means with respect to closed sessions is somewhat ambiguous. However, Section 54954.5 provides a "safe harbor" provision, such that substantial compliance with

its suggested language will prevent a finding of a violation of the Act's closed session notice requirements. Examples of the suggested language include the following:

1. CONFERENCE WITH REAL PROPERTY NEGOTIATORS

   a. **Property**: (specify the street address, or if no street address, the parcel number or other unique reference to the property under negotiations.)

   b. **Agency Negotiator**: (specify the name of the negotiators attending the closed session.) (If circumstances necessitate the absence of a specified negotiator, an agent or designee may participate in place of the absent negotiator so long as the name of the agent or designee is announced at an open session held prior to the closed session.)

   c. **Negotiating parties:** (specify name of party - not agent.)

   d. **Under negotiation:** (specify whether the instructions to the negotiator will concern price, terms of payment, or both.)

2. CONFERENCE WITH LEGAL COUNSEL - EXISTING LITIGATION *(Subdivision (a) of Section 54956.9)*

   a. **Name of case:** (specify by reference to claimant's name, names or parties, case or claim numbers.)

   or

   b. **Case name unspecified:** (specify whether disclosure would jeopardize service of process or existing settlement negotiations.)

3. CONFERENCE WITH LEGAL COUNSEL - ANTICIPATED LITIGATION

   a. **Significant exposure to litigation pursuant to subdivision (b) of Section 54956.9:** *(specify the number of potential cases.)*

   (In addition to the information noticed above, the district may be required to provide additional information on the agenda or in an oral statement prior to the closed session pursuant to subparagraphs (B) to (E), of paragraph (3) of subdivision (b) of Section 54956.9.) This may mean stating the existing facts and circumstances giving rise to a significant exposure to litigation against the district.

b. **Initiation of litigation pursuant to subdivision (c) of Section 54956.9:** *(specify the number of potential cases.)*

4. LIABILITY CLAIMS [GOVERNMENT CODE SECTION 54956.95]

a. **Claimant:** (*specify name unless unspecified pursuant to Section 54961.*)

b. **Agency claimed against:** *(Specify name.)*

5. THREAT TO PUBLIC SERVICES OR FACILITIES

Consultation with: *(specify name of law enforcement agency and title of officer.)*

6. PUBLIC EMPLOYEE APPOINTMENT

Title: *(specify description of position to be filled.)*

7. PUBLIC EMPLOYMENT

Title: *(specify description of position to be filled.)*

8. PUBLIC EMPLOYEE PERFORMANCE EVALUATION

Title: *(specify position title of employee being reviewed.)*

9. PUBLIC EMPLOYEE DISCIPLINE/DISMISSAL/RELEASE

No additional information is required to consider discipline, dismissal, or release of a public employee. Discipline includes potential reduction of compensation.

10. CONFERENCE WITH LABOR NEGOTIATORS

a. **Agency designated representatives:** (specify names of designated representatives attending the closed session.) (If circumstances necessitate the absence of a specified representative, an agent or designee may participate in place of the absent representative so long as the name of the agent or designee is announced at an open session held prior to the closed session.)

b. **Employee organization:** (specify name of organization representing employee or employees in question.)

or

c. **Unrepresented employee:** (specify position title of unrepresented employee who is the subject of the negotiations.)

11. CONFERENCE INVOLVING JOINT POWERS AGENCY

a. **Discussion will concern:** *(specify closed session description used by the joint powers agency.)*

b. **Name of local agency representative on joint powers agency board:** *(specify name)*

12. AUDIT BY BUREAU OF STATE AUDITS

E. Prior to holding a closed session, the board must disclose, in an open meeting, the items to be discussed in closed session. The announcement can either repeat all of the information already stated on the agenda, or it may simply refer to the items as they are listed on the agenda by number or letter. [Government Code Section 54957.7.]

Nothing in Section 54957.7 shall require or authorize a disclosure of information prohibited by state or federal law.

F. After any closed session, the board must reconvene in open session prior to adjournment and make the disclosures required by Government Code Section 54957.1. The board must report any action taken in closed session and the vote or abstention of every member present thereon as follows:

1. Approval of an agreement concluding real estate negotiations pursuant to Section 54956.8 shall be reported as follows:

a. If the board's approval renders the agreement final then it must report that approval and the substance of the agreement in open session at the public meeting during which the closed session is held;

b. If final approval rests with the other party, the board shall disclose the fact of approval and the substance of the agreement upon inquiry by any person as soon as the other party approves the agreement.

2. Approval given to legal counsel to defend, or seek or refrain from seeking appellate review or relief, or enter as amicus curiae in any form of litigation as a result of a consultation under Section 54956.9 shall be reported in open session at the public meeting during which the closed session is held. The report shall identify the adverse party, and the substance of the litigation.

3. In the case of approval given to initiate or intervene in an action, the announcement need not identify the action, the defendants, or other particulars, but shall specify that the direction to initiate or intervene in an action has been given and that the particulars will be disclosed upon

request once the litigation is formally commenced, unless to do so would jeopardize the agency's ability to complete service of process, or jeopardize the ability to conclude existing negotiations.

4. Approval given to a settlement of pending litigation shall be reported after the settlement is final as specified below:

   a. If the board accepts a settlement offer signed by the opposing party, the board shall report its acceptance and identify the substance of the agreement in open session at the public meeting during which the closed session is held.

   b. If final approval rests with the other party or the court, the board shall disclose the fact of approval and the substance of the agreement upon inquiry by any person as soon as the settlement becomes final.

5. Disposition of claims discussed in closed session pursuant to Section 54956.95 must be reported as soon as reached. The board must identify the name of the claimant, the local agency claimed against, the substance of the claim, and the amount of any settlement.

6. Action taken to appoint, employ, dismiss, accept the resignation of, or otherwise affect the employment status of a public employee shall be reported at the public meeting at which the closed session is held. The report must identify the title of the position.

   <u>However, the report of a dismissal or of the non-renewal of an employment contract shall be deferred until the first public meeting following the exhaustion of administrative remedies, if any.</u>

   If none of these specified types of "actions" is "taken" during the closed session, there is no duty to report the body's deliberations or the members' votes or abstentions with respect thereto. When the legislative body of a local agency meets in closed session to consider the proposed dismissal of a public employee but ultimately rejects that proposal and retains the employee, the legislative body is not thereafter required to publicly report its decision and the vote or abstention of each member. 89 Ops.Atty.Gen. 110 (2006).

7. Approval of an agreement concluding labor negotiations pursuant to Section 54957.6 shall be reported after the agreement is final and has been accepted or ratified by the other party. The report must identify the item approved and the other parties to the negotiation.

G. Making the required reports.

1. The reports may be made either orally or in writing. [Government Code Section 54957.1(b).]

2. The board must provide to any person who has submitted a written request to the board within 24 hours of the posting of the agenda, or to any person who has made a standing request for all documentation as part of a request for notice of meetings pursuant to Section 54954.1 or 54956, if the requester is present at the time the closed session ends, copies of any contracts, settlement agreements, or other documents that were finally approved or adopted in the closed session. [Government Code Section 54957.1(b).]

   If the action taken results in one or more substantive amendments to the related documents requiring retyping during normal business hours, the documents need not be released until the retyping is completed, provided that the presiding officer of the legislative body or his designee orally summarizes the substance of the amendments for the benefit of the document requester or any other person present and requesting the information.

3. In addition, the documents referred to above shall be available to any person on the next business day following the meeting in which the action referred to is taken or, in the case of substantial amendments, when any necessary retyping is complete. [Government Code Section 54957.1(c).]

4. No action for injury to a reputation, liberty, or other personal interest may be commenced by or on behalf of any employee or former employee with respect to whom a disclosure is made by a legislative body in an effort to comply with this section. [Government Code Section 54957.1(e).]

VI. ENFORCEMENT OF THE BROWN ACT

A. Each member of a board who attends a meeting of the board 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. [Government Code Section 54959.]

1. Action taken is defined to include "collective commitment." Mere deliberation of some action will not trigger the criminal penalty. [Government Code Section 54952.6.]

2. Good faith reliance on an opinion of counsel that a closed meeting is proper, normally would preclude a finding of "wrongful intent to deprive the public of information." [See, Attorney General Index letter 76-173 interpreting pre-amendment language.]

B. Civil Remedies - actions in the form of injunction, mandamus or declaratory relief.

1. Remedies are available to prevent future or further violations of the Brown Act; or to determine the applicability of the Act to actions or threatened future action of the board; or to determine the validity under the laws of the state or the United States of any rule or action of the board to penalize or otherwise discourage the expression of one or more of its members; or to compel the board to tape record its closed sessions. [Government Code Section 54960.]

   a. A court may impose the requirement that closed sessions be taped if it finds that the board has violated the statutes authorizing closed sessions.

   b. Tape recordings of closed sessions will be discoverable under very limited circumstances.

2. Violations of the meeting notice and agenda provisions may result in having action taken adjudged null and void. Such actions may be commenced by the district attorney or by any interested person. [Government Code Section 54960.1.]

   a. Prior to commencing such an action, the interested person or the district attorney must demand in writing that the board cure or correct the alleged violation.

   b. The written demand shall be made within 90 days unless the action was taken in an open session but in violation of the agenda requirements, in which case the demand must be made within 30 days from the date the action was taken.

   c. Suit must be brought within 15 days of the board's decision as to whether it will cure or correct or within 15 days after the expiration of the 30-day period to cure or correct demand, whichever is earlier. Even after a lawsuit is filed, the board may cure and correct and have the lawsuit dismissed.

   d. Successful plaintiffs are entitled to their attorney's fees. Boards may recover attorney's fees only where the lawsuit is frivolous and without merit. [Government Code Section 54960.5.]

   e. "Even where a plaintiff has satisfied the threshold procedural requirements to set aside an agency's action, Brown Act violations will not necessarily invalidate a decision. Appellants must show prejudice." [Cohan v. City of Thousand Oaks (1994) 30 Cal.App.4th 547, 555-556 (no prejudice shown from violation of Gov. Code, § 54954.2, subd. (a), which "requires that an agenda be

posted at least 72 hours before a regular meeting and forbids action on any item not on that agenda").] [San Lorenzo Valley Community Advocates for Responsible Education v. San Lorenzo Valley Unified School Dist. (2006) 139 Cal.App.4th 1356.]

3. To state a cause of action under Section 54960.1, the complaint must allege: (1) that a legislative body violated one or more enumerated Brown Act statutes; (2) that there was "action taken" by the local legislative body in connection with the violation; and (3) that before commencing the action plaintiff made a timely demand of the legislative body to cure or correct the action alleged to have been taken in violation of the enumerated statutes, and the legislative body did not correct the challenged action. [Boyle v. City of Redondo Beach (1999) 70 Cal.App.4th 1109, 1116-1117 [83 Cal.Rptr.2d 164, 168.] (Mere conference with legal counsel and the giving of direction to staff did not constitute "an action taken" within the meaning of Section 54952.6. Further, the council's rescission of all action relating to the improperly-agendized litigation, even though there was no action taken, constituted the cure and correction of the alleged violation.)