




DATE: October 14, 2009

TO: Stuart Markey, Executive Director, Capitol Improvements
Gil Johnson, Chair Pro-tem, Proposition S ICOC

FROM: Mark Bresee, General Counsel 

SUBJECT: Posting of Agendas

You have asked for a legal opinion regarding the recent agenda posting for an ICOC Audit & Performance Subcommittee meeting. My understanding is that a physical, paper agenda was posted at the site of the meeting more than 72 hours prior to the start of the meeting, accessible to the public during the entire period between posting and the start of the meeting. The question has arisen because the agenda was apparently not posted on the ICOC website until less than 72 hours prior to the meeting. As is explained below, it is my opinion that this did not constitute a violation of the requirements of the Brown Act, because the Brown Act requires no more than the timely posting of one agenda in one location. That said, and as is also explained below, for a variety of reasons I recommend that processes be put in place to assure that all agendas – physical and electronic versions – be posted before the applicable Brown Act deadline.

The provisions of the Brown Act requiring the posting of a meeting agenda are stated in the singular. Specifically, the law requires that the agenda for a regular meeting “shall be posted in a location that is freely accessible to members of the public” during all of the 72-hour period prior to the start of the meeting. (Government Code § 54954.2(a)(1)). In 1995 the California Attorney General concluded that “[n]ot only must the agenda be posted for at least the full 72 hours immediately preceding the meeting, it must be posted in a location that is freely accessible throughout that period.” 78 Ops.Cal.Atty.Gen. 327 (1995). “Members of the public cannot be expected to have full opportunity to learn of agenda items of interest if the place where the agenda is posted is inaccessible to them during any portion of the required 72-hour period.” (Id.) It is for this reason that posting an agenda *only* on the internet would be a violation of the Brown Act, because the internet is not freely accessible to all citizens at all times. The posting of a physical, paper agenda is required by the Brown Act, accessible during all of the applicable period preceding the meeting, but there is no Brown Act requirement to post more than one agenda, to post an agenda

on the internet, or prohibiting distribution of additional agendas after the posting requirement has been met.¹

Although I am not of the opinion that the postings in this case violated the Brown Act, for a handful of reasons I recommend that the ICOC members and staff exercise diligence to ensure that all postings – physical and electronic – are accomplished within the Brown Act timeframes. The central purpose of the Brown Act is to promote openness in government, and the Legislature has made it clear that it considers “complete, faithful and uninterrupted compliance” with the Act to be a matter of overriding public importance. (Government Code § 54954.4(c)). Furthermore, the ICOC itself has endorsed a policy of complete openness beyond what may otherwise be required by law. For these reasons, I have consistently recommended throughout my career that boards and committees subject to the Brown Act avoid circumstances where technical compliance with the Brown Act can nonetheless be argued as inconsistent with the spirit of the law. This is one of those circumstances. I therefore recommend that processes be put in place to assure that all agendas that will be posted – physical and electronic versions – are posted before the applicable Brown Act deadline, and that members of the ICOC and District staff commit to whatever timelines are needed to ensure that occurs.

¹ However, Education Code section 15280(b) provides that all ICOC proceedings “shall be open to the public and notice to the public shall be provided in the same manner as the proceedings of the governing board.” While many interpret this narrowly as simply applying the Brown Act to independent citizens oversight committees, I interpret it as requiring the ICOC agendas to be posted on line because the Board agendas are posted online. Further, the same section requires that meeting minutes and “documents received and reports issued” be posted on the District website. Again, these are not Brown Act requirements, so they do not dictate the issue of when these documents must be posted.