

Navigating the Gray Haze of the Brown Act



Fagen Friedman & Fulfrosts LLP

The Brown Act ensures that California public agencies conduct their business in public. This legal mandate requires public agencies to discuss, deliberate and vote in public, with very limited exceptions. It is also just good common sense – the public has a right to observe and comment on how its elected officials direct and manage public affairs and spend public money.

Purpose of the Agenda

- A legislative body meeting gives the public advance notice of the business to be addressed.
- Agenda descriptions need not be overly detailed, but must give the public reasonable notice of items the board will consider at the meeting so the public has the opportunity to attend and comment on the item.
- The legislative body sets policy for how the agenda is determined. Typically, the chair and chief executive, e.g. superintendent or chancellor, work together to outline the agenda details.
- Posting of the agenda at an accessible site is required at least 72 hours in advance for regular meetings, 24 hours in advance for special meetings, and the agenda must be posted on the public agency's website if it has one.
- A legislative body may consider only those items that are on the agenda; otherwise the purpose of the Brown Act is foiled.

Open Session/Closed Session

- All business must be conducted in open public session, unless specific exception authorizes closed session consideration.
- Documents provided or received in open session are public documents that must be produced upon demand.
- Very limited exceptions in the Brown Act allow certain items to be considered in closed session.
- Closed sessions are permitted for:
 - Most personnel matters affecting agency employees.
 - Existing or threatened litigation.
 - Real property negotiations – to direct the agency's negotiator.
 - Confidential student matters.
 - Superintendent's evaluations and his/her specific goals.
 - Other limited exceptions.
- Even when business may be conducted in closed session, the meeting and items discussed must still be properly agendized. In most circumstances, actions taken in closed session must be "reported out" to the public after the closed session.
- The permissible subjects for closed sessions are very narrow. There is no "catch-all" closed session allowed for attorney-client conferences or any other reason.
- Discussions in closed sessions are strictly confidential with very narrow and limited statutory exceptions.
- Consequences for revealing closed session information include referral to a grand jury; court order prohibiting such disclosure; formal public censure of an offending member of the legislative body; and disciplinary action against an employee, among other things.
- Agendas must reflect the permitted matters to be held in closed session, and the legislative body must first meet in open session before convening in closed session; public comment should also be allowed on the closed session agenda.

A legislative body must reconvene in open session following closed session.

The legislative body must report on actions taken in closed session or report that no reportable action took place.

It is wise to work with staff and/or legal counsel to prepare the appropriate language to be used in the report.

This information is a summary only and not legal advice. We recommend that you consult with legal counsel to determine how this may apply to your specific facts and circumstances. Please call 323.330.6300

© 2012 Fagen Friedman & Fulfrosts, LLP

All rights reserved. No portion of this work may be copied, or sold or used for any commercial advantage or private gain, nor any derivative work prepared therefrom, without the express prior written permission of Fagen Friedman & Fulfrosts, LLP through its Managing Partner. The Managing Partner of Fagen Friedman & Fulfrosts, LLP hereby grants permission to any client of Fagen Friedman & Fulfrosts, LLP to whom Fagen Friedman & Fulfrosts, LLP provides a copy to use such copy intact and solely for the internal purposes of such client.

Board Committees

Committees set up by the legislative body are governed by specific rules:

- If the committee includes a quorum of the board, it is a "legislative body" covered by the Brown Act and must comply with all requirements.
- If the committee includes less than a quorum of the board, but is a standing committee with ongoing jurisdiction or a regularly scheduled meeting governed by law or rule, it is a "legislative body" covered by the Brown Act and must comply with all requirements, including producing an agenda and meeting minutes.
- If the committee includes less than a quorum of the board and is an ad hoc committee with limited jurisdiction or is temporary in nature, it is not a "legislative body" covered by the Brown Act.

Taking Public Comments

- Meetings of legislative bodies are business meetings that must be conducted in public.
- At regular meetings, the public may address the legislative body on any matter within the agency's jurisdiction whether or not on the agenda.
- An agency's policy may indicate the amount of time that each speaker has to address the Board. Further, the agenda may indicate the total amount of time allocated for public comment, e.g., 30 minutes.
- Speakers should offer their name for the record, but they are not required to provide any other information.
- The public may criticize the board, its individual members and public employees. Members of the legislative body should resist engaging in debate or dialogue with the public when personally criticized and not comment on any personal matter that might be raised by members of the public.
- Special meetings ... are also public meetings, however public comment is limited to items listed on the special meeting agenda.
- Study sessions or retreats of a legislative body are public meetings too, and the right of the public to attend and comment applies.
- Large groups or particularly vocal or demonstrative individuals also have the right to provide public comment and cannot be treated differently than any other group or speaker.
- However, existing policies with reasonable limits on an individual's time and the amount of public comment time on any one topic can be extended.
- Consider requesting that large groups of speakers pool their comments or select a spokesperson.
- Disruptions: the meeting chairperson may halt the meeting or eject persons where such persons unreasonably disrupt the ability of the Board to continue its meeting.

Meetings May Occur When You Least Expect It

- A majority of a legislative body must not discuss the agency's business with each other at any time or place other than during properly and publicly noticed and agendized open or closed session meetings.
- Beware of Serial Meetings:
 - Once a majority of a public body discusses any matter within the jurisdiction of the agency, a "meeting" governed by the Brown Act may have occurred.
 - Such discussions can occur even where members do not speak directly to each other, i.e., they effectively communicate via intermediaries.
 - One-way email from agency staff to members of a public body is OK, but it is important to remember that, unintentionally or intentionally, email can be forwarded, moving beyond the intended recipient. Board members should generally refrain from responding to one-way email from staff. These messages and any responses are likely to be deemed public records and are disclosable.
 - Never "Reply All" to an email addressed to members of a public body; do not "bcc" other members of a public body.
- Social gatherings, community events and meetings of other agencies that are attended by members of a legislative body can also result in a "meeting" violation.
- Comments on Facebook, Twitter, blogs and even comments in line at the supermarket are all governed by these rules.
- Best advice: Public body members' discussions among themselves about the agency's business should only take place at a properly agendized open or closed meeting.

The Brown Act, Email and Social Media

Tips: Discuss and establish protocols for email communication among board members. Carefully consider Brown Act implications. Limit acceptance of electronic messages, (including text messages) during Board meetings, as the goal is transparency, (and such data can be subject to Public Records Act requests).

Strictly avoid: Online communication with fellow board members on matters that will be discussed and voted on at a public meeting, or offering opinions on social media sites regarding matters within the board's jurisdiction.

Remember: All communication can be subject to the Public Records Act, so a good rule of thumb is: If you do not want to read it in a newspaper tomorrow, do not post, Tweet, text, blog or email the message today.