

SO YOU'RE SUBJECT TO THE BROWN ACT ...

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WHAT IS THE BROWN ACT?

- Enacted in 1953
- Law's intent is that the actions of California's public Boards, Commissions, and Councils should be taken openly and their deliberations should be public
- Law attempts to balance public's right to access most proceedings and the need to conduct some proceedings with confidential candor



Ralph M. Brown

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- Presumption is in favor of public access
 - Privacy (“closed session”) for specified topic areas only
 - Exceptions to public access are construed narrowly
 - The Brown Act can be found at California Government Code §§ 54950 et seq.

THREE MAIN RULES

1. Notice to the public before any meeting describing when, where, and what for;
2. Opportunity for public participation during the meeting;
3. Exceptions to the public access/participation rules.

WHAT DO THEY MEAN BY A “MEETING”?

- Noticed, agendized public meetings
- Any gathering of a majority of the members in a place to hear, discuss or deliberate on a matter within the subject matter jurisdiction of the body
- Any use of a technological artifice to develop a collective concurrence as to a matter within the subject matter jurisdiction of the body (e.g., e-mail; social media)

“A MEETING”

- Includes regular meetings, special meetings, study sessions, board retreats, workshops . . .
- Includes lunches and social gatherings
- Includes telephone calls and e-mail chains
- Includes social media threads and bulletin boards
- Includes using intermediaries or representatives
- Includes circumstances where no action is taken!

“A MEETING” IS NOT:

- Individual discussions with stakeholders
- Attending a conference (without discussing substantive matters together)
- Attending a meeting of another public entity
- Attending a purely social or ceremonial gathering
- Giving testimony to a grand jury
- Attending a meeting of a standing committee (as long as the members creating a quorum *observe only*)

A “QUORUM”

- Number required to be present to transact business legally, usually a majority
- What about when a quorum is necessary to have a meeting, but merely a majority of those present and voting is sufficient to carry a motion?

YOUR MAGIC
NUMBER IS:

4

(INCLUDING YOU)

WHAT ABOUT SUBCOMMITTEES?

- Subcommittees created by formal action of the body must also comply with the Brown Act
- A special type of subcommittee, “advisory committees, composed solely of the members of the legislative body that are less than a quorum of the legislative body”, may meet without posting agendas or otherwise complying
 - Basically, to research a distinct complicated issue and report back in open session with a recommendation
- Consult with staff and counsel on the appropriate measures to effectuate your intent

HOW DO I GET SOMETHING AGENDIZED?

- The notice of meeting must include a brief summary of each item of business to be conducted
 - Hear, discuss, deliberate (DISCUSSION / ACTION)
 - Must be posted at least 72 hours in advance of a regular meeting (i.e., recurring meetings and those set by the Committee itself or by its organizing documents)
 - Must be posted at least 24 hours in advance of a special meeting (i.e., those set by other action)
 - New items may only be added under special (i.e., rare) circumstances!
 - About 20 words (more is not more!)
 - The contents of the agenda packet are not sufficient notice of the item

WHAT IS THE PUBLIC ENTITLED TO?

- To adequate advance notice the time, place, and topics of meetings
- To geographically proximate meetings (within the jurisdiction)
- To accessible meeting locations and assistive devices
- To record the meeting
- To bring new issues to the Board's attention (public comment)
- To timely receive access to the materials in the Board Packet
- To comment on each item before the Board deliberates (public hearing)
- To hear the deliberation, to know the (final) actions, and to know who voted how

WHAT IS THE PUBLIC ENTITLED TO?

- The right to orderly comment is subject to reasonable rules and regulations
 - Per-speaker time limits
 - Per-item time limits
 - Not content-based (i.e., no rule against public criticism)

ADDRESSING A SPEAKER

- The public is allowed to comment on items not on the agenda
- Meanwhile, the Board is forbidden to “hear, discuss or deliberate” on items not appearing on the agenda
- The Board members may “briefly respond” to public comment
 - Give information or correct misinformation
 - Refer to staff for followup
 - Ask that matter be agendized for a future meeting

CAN I JUST CALL IN TO THE MEETING?

- The teleconference provisions of the Brown Act were written at a time when “teleconference meeting” was thought to be two public conference rooms, miles apart
- To be a legal meeting, the teleconference provisions of the Act must be strictly followed
- Both (or all) locations must be accessible to the public and have a posted agenda
- Once you find out you can’t just call in to the meeting from your car on I-80 on the way to Tahoe, just missing the meeting looks attractive by comparison

SUSPENSION OF TELECONFERENCE LIMITATIONS

- During shelter-in-place and until October 2021, the Governor suspended (by Executive Order) the most limiting restrictions on teleconferencing in the Brown Act
- Allowed meetings to take place:
 - Without provision of a physical place for the public to gather
 - Without requiring that teleconference locations be accessible to the public
 - Utilizing online meeting platforms that met certain parameters for public participation

AB 2449

- Allows individual members to participate remotely BUT
 - Only on specified grounds
 - Just cause (as defined)
 - Emergency circumstances (as defined) (basically medical emergencies only)
 - Number of times this is allowed is numerically limited
 - A quorum of members must be physically present
 - Full online access must be provided to the public in order for this even to be an option
- “Fully online” and “hybrid” meetings will in practice be a thing of the past

SOCIAL MEDIA

- Previously, the status of “public” posts on social media was questionable
- AB 992 authorized posting on “open and accessible” platforms (as defined)
- Members cannot “discuss among themselves” the posting
- Commenting, sharing, retweeting, and “liking” or “disliking” other members’ posts is prohibited
- Recent case: If you use your profile in your official capacity, you cannot block members of the public from commenting, or delete their comments or posts

WHAT IF THERE'S A VIOLATION?

- Call your staff liaison and ask to consult our office
- May result in reversal of the decision made using an improper process
- Requires that a demand be made, giving you the opportunity to correct your process
- Serious violations involving intentional conduct may result in criminal prosecutions

QUESTIONS?
