Keeping It Open: The Brown Act

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Welcome!

• What brings you here?

• What questions would you like answered?
Topics to be covered today

• The Brown Act – the basics that apply to local senates
“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.”

California Government Code §54950

Ralph M. Brown 1959

Photo courtesy The Modesto Bee
How Much Do You Know About the Brown Act?

Quiz time...5 minutes!
The Brown Act

- Applies to meetings of all local legislative bodies (GC 54952) including:
  - The Board of Trustees
  - Any subcommittee or task force created by the Board with a majority of Board members serving on the group
  - Any subcommittee or task force created by the Board which has a definite ongoing charge (either decision-making or advisory) OR has a regularly-scheduled meeting set by the Board, regardless of Board membership
What is a Meeting?

- A meeting of a local legislative body (GC 54952.2) occurs whenever a majority of members gather to discuss business within their charge. A majority can meet in the following provided they do not discuss any business within their charge among themselves.

  - Attendance at a conference

  - An open meeting of some other group to address local issues (even a Board-recognized group under the definition of “legislative bodies”)

  - Social gatherings
Does the Brown Act Apply to Local Academic Senates?
Local Senates are Brown Act Bodies

• 1983 Attorney General’s Opinion No. 83-304, July 28, 1983 states that local senates are established by governing boards, and therefore are subject to the Brown Act.

• Callahan v. Long Beach City College Academic Senate established senates as Brown Act bodies in case law.
Committees and Subcommittees

The Brown Act also applies to meetings of all:

- **Standing committees** – a committee that has continuing jurisdiction over a particular topic §54952(b) For example: Budgets, personnel, etc.

- Advisory committees that include a majority of the body and are not standing committees

- Advisory committees that are standing committees (regardless of the size and membership)

Exception: The Brown Act does not apply to a subcommittee that is made up of less than a majority of the body, is an advisory committee AND is not a standing committee
Serial Meetings

• Serial meetings are not allowed (Reference: Government Code §54952.2(b))

• Serial meetings occur when a majority of the members have communicated about an issue and have developed a collective concurrence.

• A collective concurrence is developed when:
  – Members have either directly or indirectly heard each other’s opinion on a topic enough to collectively develop or begin to develop an agreement on an issue.
Types of Serial Meetings

A daisy chain meeting:

- **Example**: When Senator Bob calls Senator Bill to talk about a resolution then Bill calls Senator John to talk about it and finally John calls Senator Fred, etc., until a majority of senators has been contacted. A majority of the senators have talked about the topic and a collective concurrence has been established.
Types of Serial Meetings

Hub and spoke meeting:

- **Example:** For instance, if Senate President Terri calls Senator John and discusses a senate issue to get his opinion, then she calls Senator Robert, then calls Senator Bill, and then calls Senator Tim telling each what the other has said, eventually a majority of the senate may have indirectly discussed the topic without public notice and is therefore in violation of the Brown Act.
E-mail

§5492.2(b):
Except as authorized pursuant to §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.

The attorney general has issued an opinion stating that this section of the act applies to email.
In 2001 the CA Attorney General issued an opinion regarding the use of e-mail. (Opinion #00-906, 2001)

The opinion concluded: A majority of the board members of a local public agency may not e-mail each other to develop a collective concurrence as to action to be taken by the board without violating the Ralph M. Brown Act.

Even if the emails are made public they would still be a violation of the Act because the board would be depriving the public of the deliberative process.

The opinion also states, “The term ‘deliberation’ has been broadly construed to connote ‘not only collective discussion, but the collective acquisition and exchange of facts preliminary to the ultimate decision.’ [Citation.]” (Rowen v. Santa Clara Unified School Dist. (1981) 121 Cal.App.3d 231, 234; see Roberts v. City of Palmdale, supra, 5 Cal.4th at p. 376.)

You can find the opinion at: http://ag.ca.gov/opinions/published/00-906.pdf
Agendas

• Include meeting time and location, including address

• Post agenda in a 24/7 publicly accessible area 72 hours before meeting (physically and virtually) (GC §54954)

• Special meetings require 24 hours notice and are limited to agenda items (GC §54956)

• Senates do not call emergency meetings (which do not require 24 hour notice) – public safety is not under senate jurisdiction!

• Allow for public comments before or during discussion of agenda items (GC §54954.3)

• Include all action items on the agenda, with a brief description (GC §54954.2)

• Can change order of agenda
Action and Discussion is Limited to Items on the Agenda

- Ensures public is aware of all debate and discussion on items before the body

- Questions can be asked about items on the agenda, but care must be taken not to veer into discussion about items not on the agenda

- Exception (GC §54954.2): Action may be taken on a non-agenda item, BUT this requires:
  - That the need for immediate action was discovered after the agenda was posted, and
  - A vote of 2/3 of members present if more than 2/3 of the total membership are present, or a unanimous vote if less than 2/3 of the total members are present.
Meetings and Votes are Open

• Meetings must be held within your senate’s jurisdiction

• Closed sessions (GC §54957) are for:
  – litigation (for instance, the senate is or will be sued)
  – personnel matters (such as, the senate has responsibility for evaluating a senate employee)
  – negotiating with a bargaining agent (which the senate does not do).

• All votes are open!
  – No secret ballots...even for elections (if they are conducted during senate meetings).

  – It is now required that all ayes, nays and abstentions on motions be attributed to member casting a vote!
At Meetings...

• Members may respond to public comments but not take action

• All items distributed by the Senate before or during meetings must be available to the public at the meeting (reasonable fees may be charged for duplication).
Be Prepared!

• Bring extra copies of documents

• If other items are brought for distribution, offer to send copies later to those requesting them in writing

• Be careful what is distributed at meetings – it becomes public document

• Set time limits for discussion, particularly for public comments

• Keep discussion within the scope of the agenda item
Teleconferences

54953(b)(1) permits the use of teleconferencing.

Requirements for teleconferences include:

– Teleconferences must comply with the rest of the Act
– All votes taken during a teleconference must be taken by roll call.
– Agendas must be posted at all teleconference locations.
– Each teleconference location must be identified in the agenda.
– Each teleconference location must be accessible to the public.
– At least a quorum of the board must participate from locations within the district boundaries.
– The agenda must provide for public comment at each teleconference location.
Enforcement

• Demand to cure or correct

• Threat to sue

• Lawsuit
Who Must Comply with the Brown Act?

A. Board of Trustees

B. Academic Senate

C. Subcommittees of the Board of Trustees

D. Senate committees, subcommittees and Curriculum committee

E. All of the above
Bottom Line

- Commitment to
  - Openness
  - Transparency
  - Public access to information
SCENARIO 1:
Your college president has made the unilateral decision to cut three college programs in order to address a significant budget shortfall. Faculty joined with students to protest the cuts and to complain about the lack of input. The college president claims fiscal urgency for her unilateral action. This is the latest in presidential actions that the faculty senate has objected to. At this point, filled with frustration in the college president’s refusal to work with faculty, the faculty senate feels moved to take a vote of no-confidence on the president. Several faculty senators have not yet achieved tenure, and they are hesitant to express support for a vote of no-confidence in public, and they have requested that a secret ballot be used at the meeting where the vote will be taken.

DISCUSS:
Under the Brown Act, is it appropriate for the faculty senate to conduct the vote of no-confidence under a secret ballot?
Scenario 1

GC section 54953 states:
(c) (1) No legislative body shall take action by secret ballot, whether preliminary or final.

(2) The legislative body of a local agency shall publicly report any action taken and the vote or abstention on that action of each member present for the action.
SCENARIO 2: Students belonging to a campus affiliate of a national political party have attached red stars to the office doors of professors, accusing the professors of trying to indoctrinate students with communist ideas, citing sections of Education Code which expressly forbids such action. The professors and the faculty in general are greatly alarmed at the students’ action. This action occurs a day before a regularly-scheduled faculty senate meeting. At the meeting, several faculty insist – quite vehemently -- that the senate must respond immediately to “the red star threat.” Some faculty request a closed-door session of the senate to discuss a coordinated response to the situation. Other faculty request that the senate pass an emergency motion to show support for the targeted faculty.

DISCUSS: Two responses of the faculty senate have been requested: a closed-door session for discussion and the passing of an emergency motion. Under the Brown Act, is it appropriate for the faculty senate to take either of these two actions?
Scenario 2

First, can it be closed? Ask the following: Is there pending litigation, is it a personnel matter, or is there a negotiation with a bargaining agent involved?

Second, can there be a vote on an item not on the agenda?
Scenario 2

GC Section 54954 states:
(b) Notwithstanding subdivision (a), the legislative body may take action on items of business not appearing on the posted agenda under any of the conditions stated below. Prior to discussing any item pursuant to this subdivision, the legislative body shall publicly identify the item.

(1) Upon a determination by a majority vote of the legislative body that an emergency situation exists, as defined in Section 54956.5.

(2) Upon a determination by a two-thirds vote of the members of the legislative body present at the meeting, or, if less than two-thirds of the members are present, a unanimous vote of those members present, that there is a need to take immediate action and that the need for action came to the attention of the local agency subsequent to the agenda being posted as specified in subdivision (a).

(3) The item was posted pursuant to subdivision (a) for a prior meeting of the legislative body occurring not more than five calendar days prior to the date action is taken on the item, and at the prior meeting the item was continued to the meeting at which action is being taken.
**Scenario 3**

**SCENARIO 3**: The faculty senate holds its meetings on Monday afternoons at 3p. Following the requirements of the Brown Act, agendas for the meetings are distributed by 3p on the preceding Friday to faculty mailboxes and posted on a bulletin board outside the faculty senate office. Each agenda item includes a summary of the issues and actions to be taken. While agenda items may require background materials, such information is routinely provided at the meeting itself and not with the agenda. The Vice-President of Instruction has told the faculty senate that agendas should be posted three *business* days before the scheduled meeting, and that they are required to provide her with all necessary attachments with a copy of the agenda.

**DISCUSS**: Does the 72-hour agenda posting requirement include weekends? Is the faculty senate required to provide all attachments with agendas?
Scenario 3

GC section 54954.2 states:

• (a) (1) At least 72 hours before a regular meeting, the legislative body of the local agency, or its designee, shall post an agenda containing 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

• 72 hours means 3 calendar days, including weekends and holidays
Scenario 3

- Any person may request that a copy of the agenda, or a copy of all the documents constituting the agenda packet, of any meeting of a legislative body be mailed to that person.

- **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 pursuant to Section 54954.2 and 54956 or upon distribution to all, or a majority of all, of the members of a legislative body, whichever occurs first.

- Any request for mailed copies of agendas or agenda packets shall be valid for the calendar year in which it 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.

- 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.
**Scenario 4**

**Scenario 4:** The college is undergoing a presidential search. The consultant hired to conduct the search is meeting with each college constituency to find out problems that occurred with the previous president and what is desired in a new president. The meeting for faculty with the consultant is scheduled for part of the regular meeting time of the faculty senate. The faculty senate president puts together an abbreviated agenda to allow time for the meeting with the consultant to take place after the adjournment of the faculty senate meeting. On the day of the meeting with the consultant, representatives from the student paper attend the senate meeting. At the close of the meeting, the faculty senate president asks all non-faculty to leave the room. The students protest that the Brown Act is being violated and demand to be allowed to stay. The faculty senate president states that the meeting with the consultant was not called by the faculty senate, is not part of the regularly scheduled faculty senate meeting, and is therefore not subject to the Brown Act.

**Discuss:** Is the faculty senate president correct? Since the meeting with the consultant occurs during the regular meeting time for the faculty senate, should it be subject to the Brown Act?
Scenario 4

Question: Is the fact that the meeting with the consultant the relevant point?

This is tricky. Perhaps this clause of GC section 54952.2 applies?
(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 of the local agency.

What other ways could this have been handled?
Resources Available

• Text of the Brown Act – click here

• Attorney General’s Opinion No. 83-304, July 28, 1983

• CA Attorney General Guide (2003):

• League of California Cities 2010 Brown Act Guide:
  http://www.cacities.org/UploadedFiles/LeagueInternet/86/86f75625-b7df-4fc8-ab60-de577631ef1e.pdf
Questions?

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Thank you!