DWK

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BROWN ACT MANUAL

2019 Edition

This "manual" is not intended to provide or be a substitute for legal advice. Information provided in the manual is current as of January 2019. Please consult your DWK attorney with questions.

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Role of the Brown Act

The Ralph M. Brown Act[1] ("Brown Act" or "Act") is perhaps the most important statute in the daily working life of board members and administrators. Together with the California Public Records Act, it has been referred to by the courts as one of the "twin pillars of transparency" for public agencies in California.

Enacted in 1953, the Brown Act "facilitates public participation in all phases of local government decision making and curbs misuse of the democratic process by secret legislation by public bodies."[2] In so doing, it fulfills two overriding purposes in the cause of transparency in government:

1. To keep the public informed of the actions, debates and views of its locally elected representatives; and
2. To provide the procedural framework for local legislators to meet, debate, act and listen collectively to themselves, agency staff and their constituents.

Board members of school and community college districts and county boards of education are called upon annually to respond to new, amended or recently interpreted or reinterpreted substantive law by enacting policy, approving programs, overseeing agency budgets and adopting curriculum and graduation requirements. Boards annually review, deliberate and make decisions regarding labor negotiations, pending litigation, real property transactions and personnel actions. None of these actions can occur without reference to the statutory framework for properly calling, announcing and conducting board meetings – the Brown Act.

This text provides an introduction to and overview of the Brown Act and related statutes in the Education Code applicable to school and community college districts and county boards of education. It provides board members and public school administrators with a description of the major requirements of the Brown Act, including the election and induction of new board members, proper drafting of open and closed session agendas, the bases for holding open and closed meetings, and penalties for violations of the Brown Act.

In analyzing board and administrative responsibilities under the Brown Act, it is imperative to remember the law's primary purpose:

> The people, in delegating authority, do not give their public servants the right to decide what is good for the public 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.[3]

While this text should only be relied upon in consultation with the agency's legal counsel, we hope it meets the goal of assisting boards, board members and administrators in conducting the public's business in compliance with both the letter and spirit of the law.

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[1] Gov. Code, § 54950 et seq. All statutory references are to the Government Code unless otherwise noted.
[2] *Castaic Lake Water Agency v. Newhall County Water District* (2015) 238 Cal.App.4th 1196, 1203.
[3] § 54950.

Application to Board Members & Committees

Most questions regarding application of the Brown Act involve seated members of an agency's board. The Brown Act's requirements, however, can also apply to members of other boards and committees. In a limited number of situations, where the Brown Act does not apply, the Education Code imposes Brown Act-like requirements on some commissions and committees.

BOARD & BOARD MEMBERS

The Brown Act applies to "legislative bodies" and their members fall within the Brown Act's definition of member.[1] For purposes of the Brown Act's requirements, "members" of the board include any person elected or selected to serve, even if they have not yet assumed public office.[2]

Once elected, board members are expected to know the Brown Act, conform their conduct to its requirements, and be held accountable in an action against the board for enforcement of the Brown Act as if they had already assumed office. Under the Brown Act, boards can require that copies of the Brown Act be provided to current and newly-elected members who have not yet assumed office.[3]

The weeks between a board election and when board members take office can present additional Brown Act challenges as members-elect are considered board members. Extra care to avoid Brown Act violations should be exercised, especially as part of efforts to bring new board members up to speed.

The Brown Act does not directly apply to student board members.[4] At meetings, a student board member must be recognized as a "full member" of a board and has "preferential voting rights." This means a student board member can express his or her preference before an official vote of the board. However, a student board member's presence does not count toward a board's quorum or vote requirement. Student board members may not attend closed session and may only make motions where authorized by board resolution.[5] Student board members are, however, entitled to receive all open meeting materials at the same time the materials are provided to other board members and are to be invited to staff briefings the same as other board members.[6]

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[1] § 54952. Boards of "any other local body created by state or federal statute" (e.g., special education local planning areas [SELPAs]), are also considered local agencies subject to the Brown Act. (§ 54952, subd. (a).) The Brown Act also applies to a board, commission, committee or other multi-member body that governs a private corporation created by an elected legislative body to exercise lawfully delegated authority, or receives funds from a local agency and the membership of whose governing body includes a member of the local agency's legislative body appointed to that governing body by the local agency's legislative body (§ 54952, subd. (c)) as well as where two or more public agencies establish a separate legal entity through a joint powers agreement (*McKee v. Los Angeles Interagency Metropolitan Police Apprehension Task Force* (2005) 134 Cal.App.4th 354).

[2] § 54952.1.

[3] § 54952.7.

[4] A school district which maintains one or more high schools may have one or more student board members. (Ed. Code, § 35012, subd. (d)(1).)

[5] Ed. Code, § 35012, subds. (d)(4)-(10).

[6] Ed. Code, § 35012, subd. (d)(9).

APPLICATION TO COMMITTEES

In addition to applying to boards, the requirements of the Brown Act apply to many committees formed by boards. The chart below summarizes the types of committees which are, and are not, subject to the Brown Act.

Committees Subject to the Brown Act	Committees Not Subject to the Brown Act
Any committee created by resolution or formal action of a board.[7]	Any committee created by staff (i.e., the superintendent) without action by a board.
Any committee that is a "standing committee" of a board. A "standing committee" has continuing subject matter jurisdiction or a meeting schedule fixed by resolution or formal action of a board.	Any committee that is an "ad hoc committee" composed exclusively of less than a quorum of board members. Unlike a "standing committee," an "ad hoc committee" has a specific, time-limited purpose/mission. While staff may provide assistance to an "ad hoc" committee, the committee cannot include members (including staff) other than board members.
Any committee that includes a quorum of board members.	
Any committee whose authorizing statutes, bylaws, or procedural rules indicate it is subject to the Brown Act.	

If a committee falls within the definition of a legislative body or is otherwise subject to the Brown Act, the same agenda and posting requirements that apply to a board apply to the committee[8] unless the committee is one which is explicitly exempt from the Brown Act and subject to the requirements of Education Code section 35147.[9]

COUNCILS & COMMITTEES UNDER THE EDUCATION CODE

Some agency committees which might otherwise qualify as a "legislative body" are specifically exempt from Brown Act requirements by the Education Code.[10] This exemption applies to the following councils and committees:

- LCAP Parent Advisory Committee[11]
- County Superintendent Parent Advisory Committee[12]
- English Learner Advisory Committee[13]
- Schoolsite Council[14]
- School Advisory Committee on Compensatory Education Programs[15]
- Migrant Education Parent Advisory Council[16]

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[7] See *Frazer v. Dixon Unified School District* (1993) 18 Cal.App.4th 641 (board policy "calling for appointment of a committee to advise the Superintendent" is "formal action"); *Californians Aware v. JLMBC* (2011) 200 Cal.App.4th 972 (test is whether the board "played a role in bringing [a committee] into existence").

[8] But see § 54954.2, subd. (d)(2) (committee agendas need only be posted on an agency website if the members of the committee are compensated for their appearance and at least one of the committee members is a board member).

[9] See "Councils & Committees under the Education Code," p. 6.

[10] Ed. Code, § 35147.

[11] Ed. Code, § 52063.

[12] Ed. Code, § 52069.

[13] Ed. Code, § 52176.

[14] Ed. Code, § 52852.

[15] Ed. Code, § 54425, subd. (b).

[16] Ed. Code, § 54444.2.

- Pre-1979 Parent Advisory Committees & Schoolsite Councils[17]
- Parent Involvement Program[18]

These councils and committees, while exempt from the requirements of the Brown Act, must nonetheless adhere to the following requirements:

- Any meeting must be agendized, with the agenda posted at least 72 hours prior to the meeting at a school site or other appropriate place accessible to the public, stating the date, time, and location of the meeting, and containing an agenda.
- The agenda must describe each item of business to be discussed or acted upon.
- No action may be taken on matters not on the agenda unless there is a need for immediate action, the need to act came to the body's attention after the agenda was posted, and the vote to add the matter to the agenda is unanimous.
- During a meeting, members of the public are permitted to address any matter within the subject matter jurisdiction of the council or committee.
- Questions or brief statements by members that do not have a significant effect on pupils or employees or that can be resolved solely by the provision of information need not be described on an agenda as items of business.
- No closed session is allowed.
- No "special meetings" are allowed.[19]

If a council or committee violates the procedural meeting requirements of this section, upon demand of any person, the council or committee shall reconsider the item at its next meeting after allowing for public input on the item.[20]

Finally, written materials provided to councils or committees shall be made available to the public pursuant to the California Public Records Act.[21]

[17] Ed. Code, § 62002.5.
[18] Ed. Code, § 11503.
[19] Ed. Code, § 35147, subd. (c)(1).
[20] Ed. Code, § 35147, subd. (c)(2).
[21] Ed. Code, § 35147, subd. (d).

Meetings

OPEN & PUBLIC MEETING REQUIREMENTS

One of the fundamental requirements of the Brown Act is that board meetings must be held in public following proper notice.[1] While the Brown Act provides some specific exemptions from this requirement,[2] for the most part, board members cannot discuss agency business outside of noticed public meetings. Generally, the Brown Act does not apply to "meetings" of agency staff or other individuals who are not members of a board.[3]

WHAT IS A MEETING?

The definition of a "meeting" under the Brown Act does not follow the standard understanding of the term. It also is not determined according to whether "action" is "taken" by a board.[4] Instead, under the Brown Act a "meeting" is:

> Any congregation of a majority of the members of a legislative body at the same time and location…to hear, discuss, deliberate or take action upon any item that is within the subject matter jurisdiction of the legislative body.[5]

Any assembly of a majority of the members of a board or a committee subject to the Brown Act in the same place can become a "meeting" if the members hear, discuss, deliberate or take action upon any item within the jurisdiction of the board. If the subject being discussed is or could be board business, and if a majority of the board is present, in person or via telecommunications, it is a "meeting" that requires notice. This is true regardless of whether it is a study, discussion, informational, fact-finding, or pre-meeting gathering of a majority of a board.

In sum, a meeting is not limited to gatherings at which a board decides on an action, but includes gatherings conducted for the "collective acquisition and exchange of facts preliminary to the ultimate decision."[6] For example, a gathering of a majority of a board and real estate brokers to select a broker or during which a board majority views a film pertaining to a pending curriculum decision without any discussion is a "meeting." Format is not determinative. "Informal sessions or conferences … designed for the discussion of public business" are considered meetings under the Brown Act.[7]

Although broad, the Brown Act's definition of "meeting" specifically excludes certain congregations of a majority of board members as long as board members do not discuss agency business, other than as part of a scheduled program. The chart on the following page includes examples of gatherings which are <u>not</u> meetings under the Brown Act:

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[1] § 54950; Ed. Code, § 35145 (school districts); Ed. Code, § 72121 (community college districts).
[2] See discussion of "Emergency meetings," p. 11 and "Closed Sessions," p. 23.
[3] See "Application to Committees," p. 6.
[4] § 54952.6.
[5] § 54952.2.
[6] 94 Ops.Cal.Atty.Gen. 33 (2011).
[7] *Id.*

Examples	Applicable Exemption From Definition of "Meeting"[8]
Conference of board members from across the State.	Attendance by a majority of a board at a general conference open to the public that involves a discussion of broad issues and is attended by a broad spectrum of officials from a variety of governmental agencies.
Rotary club meeting; neighborhood council meeting.	Attendance at an open and publicized meeting, organized to address a topic of local concern by a person or organization other than the local agency.
"7-11" committee meeting; city council meeting.	Attendance at open and noticed meetings of another body of the same local agency (e.g., an agency committee which is subject to the Brown Act) or any other local agency.
Ribbon cutting ceremony at a new facility.	Attendance at a purely social or ceremonial occasion.
Board standing budget advisory committee.	Attendance by a majority of members at an open and noticed meeting of a standing committee of a board otherwise subject to the Brown Act, provided that members of the board who are not members of the committee attend only as observers.

It must be stressed, that attendance at these gatherings by a majority of board members is only permitted as long as discussions by a majority of the board members do not occur, "other than as part of the scheduled program," regarding topics within the subject matter jurisdiction of the board.[9] This means a majority of a board may make and/or listen to presentations on topics within the board's jurisdiction.

While a majority of board members may attend the gatherings listed in the chart, it remains advisable for a board to send less than a majority of the board as representatives to such events to avoid any appearance of a violation. If a majority of a board does attend such events, it is also advisable that they do not sit together in the audience for the same reason.

COMMUNICATIONS OUTSIDE A NOTICED MEETING

As a corollary to the Brown Act's requirement that boards meet in noticed and open meetings, the Act also prohibits communications between board members outside of a meeting that might circumvent the intent of the Brown Act. The Brown Act does, however, allow for communications between staff and board members, as well as between members of the public and board members, as long as those communications are not used by board members to avoid the requirements of the Brown Act.

Prohibited In-Person & Electronic Serial Communications

The Brown Act specifically prohibits "serial communications." Serial communications are "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."[10] This means a majority of board members cannot discuss an agency matter with one another outside of a board meeting, even if the "discussion" happens over a series of conversations.

For example, a prohibited serial communication would result if board member Lee separately spoke with board members Hernandez and Williams about an upcoming agency contract decision. It would also be a prohibited serial communication if a superintendent or chancellor separately spoke with the same three

[8] § 54952.2, subds. (c)(2)-(6).
[9] *Id.*
[10] § 54952.2, subd. (b)(1).

board members about the same topic, but told each of the board members the positions of the other board members.[11] In both cases, an "intermediary" has been used for a majority of board members to discuss agency business.[12]

While board members are aware of this prohibition and avoid the scenarios described above, the proliferation of electronic communication has increased the potential for unintended serial communications. Email, text messaging, and other electronic media are considered "intermediaries" and their use (e.g., replying-all on an email addressed to board members) could lead to a prohibited serial communication.[13]

If a member of the public sends an email to all board members with a question, an individual board member may respond, but should not copy other board members. Board bylaws may direct how such correspondence should be handled; one option is for a board president or appropriate staff member to reply directly to the member of the public (without copying all board members) and then separately communicating to all board members that a response has been sent without providing the content of that response.

Prohibited serial communications may be distinguished from communication to and/or among board members for the purpose of requesting information or to help build a board meeting agenda. The key criterion is that the communication is informational, procedural, or administrative in nature as opposed to a substantive discussion.[14]

Permitted Communications with Staff & the Public

Although the Brown Act prohibits serial communications involving board members, staff and members of the public are allowed to communicate with board members outside of board meetings. This includes communications with a majority, or more, of a board.

Agency staff, counsel, or other consultants, may provide information to all board members between board meetings. This may be accomplished through individual meetings with board members[15] or through written communications to all board members.[16] The receipt of information by all board members in this manner does not constitute a meeting or violate the Brown Act as long as the comments or position of any board member is not communicated to any other board member.[17]

One way board members can protect against a Brown Act violation when speaking with members of the public is to remind the member of the public not to communicate the views of one board member to another. Board members can also suggest that if a member of the public wants to communicate with all board members the best forum is public comment at board meetings.

Members of the public may also communicate with any number of board members about agency matters without violating the Brown Act.[18] To avoid an unintended violation of the Brown Act, board members should exercise caution to ensure that discussions with members of the public are not used to allow board members to discuss or deliberate outside of a board meeting.

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[11] *Stockton Newspapers, Inc. v. Redevelopment Agency* (1985) 171 Cal.App.3d 95, 105 (series of one-on-one calls between board members and counsel to come to collective decision violated the Brown Act).
[12] These examples assume a five member board. For a seven member board, the prohibition would not be triggered unless at least four board members were involved in the conversations.
[13] § 54952.2, subd. (b); see also, 84 Ops.Cal.Atty.Gen. 30 (2001).
[14] § 54952.2, subd. (b)(2); see also, *Frazer v. Dixon Unified School District* (1993) 18 Cal.App.4th 781, 796-798.
[15] § 54952.2, subd. (b)(2).
[16] *Id.*; *Roberts v. City of Palmdale* (1993) 5 Cal.4th 363, 377.
[17] § 54952.2, subd. (b)(2).
[18] § 54952.2, subd. (b)(1).

TYPES OF MEETINGS

The Brown Act provides for four types of meetings: regular, special, emergency and adjourned. Each type of meeting has its own noticing requirements and some topics may not be discussed at all types of meetings. Most board meetings are either regular or special meetings.

The Brown Act does not refer to "study sessions," "workshops," "committee of the whole," or "town halls," as types of meetings. While boards are free to classify meetings in this way to emphasize the purpose of the meetings, for Brown Act purposes, all meetings must fit into one of the four statutory categories.

Regular Meetings

School district, community college district, and county office of education boards must hold regular meetings, generally at least monthly and must by rule fix the time and place for such meetings.[19] The agenda for regular meetings must be posted at least 72 hours before the meeting time.[20]

Special Meetings

In addition to regular meetings, boards may hold "special meetings" at any time and on most topics, if the following conditions are met:

1. The meeting is called by either the president or a majority of a board;
2. Notice of the meeting is mailed or delivered to each board member and to the media and all members of the public who request notice;
3. Notice of the meeting is posted 24 hours in advance of the meeting, including on the local agency's website, if it has one; and,
4. Only business specified in the notice is considered.[21]

Boards should be careful in agendizing items for special meetings as discussion or action on certain topics is prohibited at special meetings. For example, a board cannot consider the salaries, salary schedules, or compensation in the form of fringe benefits, of local agency executives, including superintendents, assistant superintendents, chancellors, or vice chancellors, during a special meeting.[22] Additionally, unlike a regular meeting, the agenda for a special meeting should not provide for public comment on items not on the agenda.[23]

Emergency Meetings

The board may hold an emergency meeting without complying with the 24-hour notice or posting requirements when an "emergency situation" exists, as determined by a majority of the members of a board. If required by an emergency, the location of an emergency meeting may be different than a board's normal meeting location.[24]

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[19] § 54954; Ed. Code, § 1011 (county boards of education); Ed. Code, §§ 35140-35142 (school districts); Ed. Code, § 72000, subd. (c)(4) (community college districts).
[20] See "Agenda Notice," p. 18.
[21] § 54956; Ed. Code, § 1012 (county boards of education); Ed. Code, § 35144 (school districts); Ed. Code, § 72129, subd. (b) (community college districts).
[22] § 54956, subd. (b); see "Requirements for Cabinet Employee Compensation," p. 29.
[23] § 54954.3, subd. (a).
[24] § 54954, subd. (e).

An "emergency situation" includes an "emergency," defined as a work stoppage, crippling activity, or other activity that severely impairs public health, safety, or both, as well as a "dire emergency," defined as a crippling disaster, mass destruction, terrorist act, or threatened terrorist activity that poses immediate and significant peril.[25]

The 24-hour notice and posting requirements for such a meeting may be dispensed with if the following criteria are met:

1. The emergency situation involves matters upon which prompt action is necessary due to the disruption or threatened disruption of public facilities;
2. Notice is given to the media at least one hour in advance, or in the case of a dire emergency, notice is given at or near the time that the presiding officer notifies the members of the board of the emergency meeting; and,
3. A list of persons the presiding officer attempted to notify and the minutes of the meeting are posted for a minimum of 10 days after the meeting.[26]

If otherwise permitted by the Brown Act, a board may meet in closed session at an emergency meeting if agreed to by a two-thirds vote of the members present, or, if less than two-thirds are present, by a unanimous vote of those present.[27]

Adjourned Meetings

Regular or special meetings may be continued to another date as an "adjourned meeting" by a quorum, less than a quorum, or staff if no members of the board are present.[28] If a board wishes to adjourn a meeting, it should adopt an order of adjournment indicating the time and place at which the meeting will continue. A copy of the order must be placed outside the location of the meeting within 24 hours after adjournment. If a meeting is adjourned by staff, notice of the continued meeting must be provided as if the meeting is a special meeting. If a meeting will reconvene in five days or less, the original agenda is sufficient for the continued meeting. If the meeting is adjourned for more than five days, a new agenda must be posted at least 24 hours prior to the continued meeting.[29]

LOGISTICAL REQUIREMENTS FOR A MEETING

Accessibility

The Brown Act prohibits a board from meeting in any facility that prohibits the admittance of any person based on race, religious creed, color, disability, national origin or ancestry.[30] Meetings may also not be held in facilities which are inaccessible to disabled persons or where members of the public must make a payment or purchase.[31]

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[25] § 54956.5, subd. (a).
[26] § 54956.5, subd. (b).
[27] § 54956.5, subd. (c).
[28] § 54955; see also § 54955.1 (a hearing may be continued by the same procedures applicable to the adjournment of a meeting).
[29] § 54954.2, subd. (b)(3).
[30] § 54956.5, subd. (c).
[31] § 54953.2.

While a board may ask, it cannot require individuals attending a meeting to sign in or provide other information as a condition of attendance.[32] If such information is requested, the request must indicate that providing the information is voluntary and not required for attendance.[33]

Location

A board is required to provide by resolution or bylaws for the location of regular meetings.[34] Generally, board meetings must be held within the territorial boundaries of the agency.[35]

In the limited circumstances listed below, board meetings may be held outside the agency's boundaries:

- To attend a conference on non-adversarial collective bargaining techniques.
- To interview members of the public residing in another agency's jurisdiction concerning the potential employment of an applicant for employment as superintendent.
- To interview a potential employee from another agency.
- To comply with state or federal law or court order or to attend a judicial or administrative proceeding to which the agency is a party.
- To inspect real or personal property which cannot be conveniently brought within the boundary of the agency, provided that the topic of the meeting is limited to items directly related to that property.
- To participate in discussions or meetings of "multiagency" significance as long as the meetings are within the jurisdiction of one of the agencies, are open to the public and all participating agencies provide proper notice of the meetings.
- To meet with state or federal elected or appointed officials when a local meeting would be impractical, solely to discuss legislative or regulatory issues affecting the agency over which the state or federal officials have control.
- To visit with the agency's legal counsel in closed session on pending litigation when to do so would reduce legal fees or costs.[36]

When the presiding officer or designee of a board designates a new meeting place because of fire, flood, earthquake or other emergency, the local media who have requested notice of meetings must be notified by the most rapid means of communication available at the time.[37]

A Joint Powers Authority (JPA) must meet within the territory of one of its member agencies unless it has members throughout the State, in which case it may meet at any facility within the State.[38]

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[32] § 54953.3.
[33] *Id.*
[34] § 54954, subd. (a); Ed. Code, § 1011 (county boards of education); Ed. Code, §§ 35140-35142 (school districts); Ed. Code, § 72000, subd. (c)(4) (community college districts).
[35] § 54954, subd. (b).
[36] § 54954, subd. (c). The Brown Act also includes additional exemptions from the location requirement which are unlikely to apply to local educational agencies. (See § 54954, subd. (b).)
[37] § 54954, subd. (e).
[38] § 54954, subd. (d).

Teleconference

A board may, but is not required to, allow board members to participate in a meeting via teleconference.[39] A board member attending in this manner may do so by phone or video.[40] If a board member will be attending a meeting, including closed session, via teleconference, the board and agency must make sure to complete the following checklist:

Teleconference Checklist

- ✓ The teleconference location must be open and accessible to the public.
- ✓ The agenda shall identify all locations, including teleconference locations.
- ✓ The agenda must be posted at all locations, including teleconference location(s), at the proper time before the meeting.
- ✓ The agenda shall provide for public comment at all locations.
- ✓ A majority of the board must be within the boundaries of the agency, even if participating by teleconference.
- ✓ All votes during a teleconferenced meeting shall be by roll call.[41]
- ✓ The agenda should indicate how/if the meeting will proceed if technical problems prevent teleconferencing.

Teleconference locations must be accessible to all members of the public. Hospital rooms which are not open to the public, cruise ships, or a board member's vehicle are not accessible to all members of the public and therefore cannot be used as teleconference locations.

Recording/Broadcasting

The Brown Act does not require or prohibit boards from recording or broadcasting their meetings. Any recording of a meeting made by the agency, however, must be kept for 30 days and is a public record subject to inspection during the time it is maintained by the agency. Such recordings must be made available by the agency without charge for public inspection on a player made available by the agency.[42]

If a board broadcasts its meetings, it should consider indicating on its agenda that the meeting will be broadcast and that the meeting will continue even if technical difficulties prevent the broadcast.

Any person attending an open meeting may record the meeting, through audio or video recording.[43] A board may prohibit or discontinue recording only where it finds that the noise, illumination, or obstruction of view constitutes or would constitute a persistent disruption of the proceedings.

Meeting Minutes

Minutes must be taken at all board meetings.[44] The only substantive requirement is that the minutes record all actions taken or reported by a board in open session. Minutes of a closed session are not required

The law does not require a transcription of the meeting's discussion, and it is generally inadvisable to do so as it places an unnecessary burden on staff and creates the potential for inaccurate transcription. Minutes are for the purpose of recording "what is done" as opposed to "what is said."

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[39] If a board has concerns about the frequent use of teleconferencing, it may adopt a policy placing limits or requirements on board member use based on the benefit to the public and the board.
[40] § 54953, subd. (b)(4).
[41] § 54953, subds. (b)(2)-(3).
[42] § 54953.5.
[43] *Id.*
[44] Ed. Code, § 1015 (county boards of education); Ed. Code, § 35145, subd. (a) (school districts); Ed. Code, § 72000, subd. (d)(4) & § 72121, subd. (a) (community college districts).

and are not advised unless required by court order. The minutes must indicate how each board member voted.[45]

Meeting Procedure/Vote Requirements/Recusals

For the most part, the Brown Act does not govern how board meetings are conducted, what vote is required for action, or how board members recuse themselves from an item, if necessary. Instead, these items are governed by other statutory provisions, parliamentary procedure, and board bylaws.

A board can decide what rules it uses to run its meetings. Some boards have adopted Robert's Rules of Order, others simply apply "parliamentary procedure." In many cases, however, the complexity of these rules can lead to more problems than they solve.[46] Board members should consult their board bylaws to determine what procedural rules apply to their board meetings.

Regardless of the procedural rules used in board meetings, in order to take action as a board, in general at least a majority vote of the entire board membership is required.[47] All votes must be open to the public. Secret ballots, whether preliminary or final, are prohibited by the Brown Act.[48]

Generally when determining what is a majority, vacant seats or absent board members are included in the count.[49] Determining what is a majority when there is a vacancy on a seven member school district or community college board is different, however.[50] In both cases, vacant seats are not included in determining the number of votes needed for unanimous action.[51]

Board Seats	Vacancies	Votes Needed for Majority Action	Votes Needed for Unanimous Action
5	1	3	4
	2	3	3
7*	1	4	6
	2	3	5

* Not applicable to county boards of education.

Where a board member has a conflict of interest in a matter before a board and must recuse him or herself, the law provides that specific procedures shall be followed. If a board member's recusal is due to a financial conflict of interest, the board member may need to publicly identify the source of the conflict of interest, may need to leave the room before any discussion or vote on the item, and may not be counted towards a quorum.[52]

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[45] § 54953, subd. (c)(2).
[46] Other procedural rule options include the Sturgis Standard Code of Parliamentary Procedure, Demeter's Manual of Parliamentary Law and Procedure, Mason's Manual of Legislative Procedure and even the Complete Idiot's Guide to Parliamentary Procedure Fast Track by Jim Slaughter.
[47] Ed. Code, § 35164.
[48] § 54953, subd. (c)(1).
[49] Ed. Code, § 35164 (school districts); Ed. Code, § 72000, subd. (d)(3) (community college districts); see also Ed. Code, § 1015 (quorum requirement for county boards of education).
[50] Ed. Code, § 35165 (school districts); Ed. Code, § 72000, subd. (d)(5) (community college districts).
[51] *Id.*
[52] Cal. Code Regs., tit. 2, § 18707; see the Fair Political Practices Commission's website (http://www.fppc.ca.gov) for more information on financial conflicts of interest under the Political Reform Act and Government Code section 1090.

Agenda Requirements

The purpose of the agenda is to reasonably inform the public of the matters to be considered during the meeting with sufficient detail to allow the public to determine whether to attend the meeting. In other words, a member of the public who may be interested in a certain topic should be able to tell from the agenda if he or she needs to attend a specific meeting to provide input or observe the discussion regarding that topic and where and when that meeting will take place. The agenda should serve as a guide for a board to follow to ensure it performs all its duties and conducts all its business during the meeting.

BASIC AGENDA REQUIREMENTS

A board is free to design its meeting agenda in a way that best informs the public and allows it to conduct its business. In order to comply with the Brown Act, however, every board agenda must meet the requirements in the checklist below.

A board agenda may include a consent agenda (items which will be voted on without discussion by a single motion), although members of the public must have the opportunity to provide comment on any item on the consent agenda prior to any vote. The agenda may also categorize items as "action" or "information" items, however, doing so may prevent the board from acting on an item that is labeled as "information."

The agenda shall be made available in appropriate alternative formats to persons with a disability, as required by Section 202 of the Americans with Disabilities Act of 1990 (42 U.S.C. § 12132), and its implementing regulations.

Agenda Checklist

The agenda should include:

- ✓ Whether the meeting is a regular or special meeting.
- ✓ The location of the meeting so members of the public can attend.[1]
- ✓ The meeting start time, whether the meeting begins with an open or closed session.[2] (A board may include times at which certain items will start; however, if it does so, it should not begin consideration of those items prior to that time.)
- ✓ Information regarding how, to whom, and when a request for disability-related modification or accommodation, including auxiliary aids or services, may be made by a person with a disability who requires a modification or accommodation in order to participate in the public meeting.[3]
- ✓ Information regarding where materials that were distributed within 72 hours of a regular meeting to a majority of board members can be inspected, starting at the time they are distributed to the board members.[4]
- ✓ A meeting opening. Even if a board will recess to closed session to begin the meeting, the meeting should be opened in public.
- ✓ A statement triggering roll call to ensure a board has a quorum present at the meeting.[5]
- ✓ For regular meetings, an opportunity for members of the public to address the board on matters within the jurisdiction of the board which are not on the agenda.

[1] § 54954.3, subd. (a).
[2] § 54954.2, subd. (a)(1) & § 54956, subd. (a).
[3] § 54954.2, subd. (a)
[4] § 54957.5, subd. (b)(2).
[5] See "Meeting Procedure/Vote Requirement/Recusals," p. 15.

- ✓ Descriptions of all items to be transacted or discussed in open and closed session.[6]
- ✓ An opportunity for members of the public to address a board prior to, or during, consideration of any agenda item.[7]
- ✓ An agenda item for a board report out of closed session whether it took any actions in closed session which must be reported in open session following closed session.
- ✓ A statement of adjournment.

AGENDA ITEM DESCRIPTIONS

The agenda must reasonably inform the public of the matters to be considered in sufficient detail to allow the public to determine whether to attend the meeting.[8] The Act requires agendas to contain a "brief general description" of agenda items which generally need not exceed 20 words.[9] Agenda items must, however, describe each item of business to be transacted or discussed.[10]

The Brown Act provides suggested language for closed session agenda items.[11] Agenda items such as "Board Reports," "Superintendent's Report," and "Comments from the Board" are permitted under the Brown Act as long as the actual reports are limited to the activities described above, e.g., the activities of a board or staff member.[12]

CONSIDERATION OF ITEMS NOT ON THE AGENDA

Generally, a board may only consider items at a meeting that were included on the agenda posted with appropriate notice. The Brown Act does, however, allow boards to consider items which did not appear on the agenda under certain limited circumstances.

An "urgency" item may be considered when a board determines there is a need for immediate action and the need to act came to the agency's attention subsequent to the agenda being posted. This determination must be made by a two-thirds vote of the board members present (or unanimous vote if less than two-thirds of a board is present).[13]

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[6] See "Agenda Item Descriptions," p. 17.
[7] § 54954.3, subd. (a).
[8] *San Diegans for Open Government v. City of Oceanside* (2016) 4 Cal.App.5th 637 (item descriptions "must give the public a fair chance to participate in matters of particular or general concern by providing the public with more than mere clues from which they must then guess or surmise the essential nature of the business to be considered by a local agency…").
[9] § 54954.2, subd. (a).
[10] *Hernandez v. Town of Apple Valley* (2017) 7 Cal.App.5th 194, 209; *San Joaquin Raptor Rescue Center v. County of Merced* (2013) 216 Cal.App.4th 1167, 1177.
[11] See "Closed Session Procedures," p. 23.
[12] § 54954.2, subd. (a)(3).
[13] § 54954.2, subd. (b)(2).

If it becomes apparent that an agenda item should be added to a regular meeting agenda or an agendized item needs to be revised less than 72 hours prior to a regular meeting, a special meeting may be noticed to occur immediately before, during, or after the regular meeting so that the item may be discussed during the special meeting, if there is enough time to provide 24 hours' notice of a special meeting.

An "emergency" item may be considered when a majority of a board determines an emergency exists.[14] While not defined by the Brown Act, "emergency" items are likely limited to the same types of circumstances that may justify an emergency meeting (e.g., work stoppage, crippling activity, etc.).

Further, while not allowing for "consideration" of an item, the Brown Act, in the absence of a noticed agenda item, allows a board member to ask a question for clarification, provide a reference to staff or other resources for factual information, request staff to report back at a subsequent meeting concerning any matter, or take action to direct staff to place a matter on a future agenda.[15]

AGENDA NOTICE

While we recommend that a committee subject to the Brown Act post its agenda on the agency's website, it is only required by the Brown Act if the members of the committee are compensated for their appearance and if one or more members of the committee are also members of the board or other legislative body.[16]

The required notice period for a meeting depends on the type of meeting. Notice for a regular meeting must be provided at least 72 hours before the meeting.[17] Notice for a special meeting must be provided at least 24 hours before the meeting.[18] The notice required is calculated based on all hours, not just business or weekday hours.

Regardless of the type of meeting, notice is provided by posting the agenda in a physical location accessible to the public and (not "or") on the agency's website if it has one.[19] Additional notice requirements apply to special meetings.[20]

For meetings occurring on and after January 1, 2019, for an agency that has a website, the Brown Act requires that the agenda be posted on the primary homepage for the agency through a prominent, direct link to the agenda.[21] (This can include a link to an integrated agenda management platform, such as BoardDocs or Agenda Online.) The online agendas will also need to be retrievable, downloadable, indexable, and electronically searchable by commonly used Internet search applications.[22]

MEETING MATERIALS

The agenda and the majority of materials distributed in relation to and at a board meeting are public records. The applicable disclosure requirements depend on the content of the material and the time at which the material is distributed, as explained in the following chart.

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[14] § 54954.2, subd. (b)(1).
[15] § 54954.2, subd. (a)(3).
[16] § 54954.2, subd. (d)(2).
[17] § 54954.2, subd. (a)(1).
[18] § 54956, subd. (a); Ed. Code, § 35145, subd. (b) (school districts); Ed. Code, § 72129, subd. (b) (community college districts).
[19] § 54954.2; see also 99 Ops.Cal.Atty.Gen. 11 (2016) (substantial compliance with posting requirements may meet requirements of Brown Act).
[20] See "Special Meetings," p. 11.
[21] § 54954.2, subd. (a)(2).
[22] *Id.*

Time of Distribution to Board	Disclosure Requirement
Any time, if unrelated to a board meeting	Records which relate to the conduct of the public's business must be disclosed pursuant to the California Public Records Act (CPRA).[23] Records which are exempt from public disclosure pursuant to the CPRA are not required to be disclosed by the Brown Act.[24]
Related to a board meeting	Meeting agendas and materials distributed to at least a majority of a board in connection with an open session, not otherwise exempt from disclosure under the CPRA, must be made available "without delay."[25]
Within 72 hours of a regular board meeting	Materials related to an open session of a regular meeting which are distributed to a majority of the board members less than 72 hours before a regular meeting, not otherwise exempt from disclosure under the CPRA, must be made available for public inspection at the same time the materials are distributed to board members at a location designated by the agency for that purpose and may be posted on the agency's website.[26]
At a meeting	• If created by the agency, copies must be available at the meeting. • If created by a third party, copies must be available after the meeting.[27] • If approved in closed session, copies must be provided following the closed session or the next day if revisions were made prior to approval, in which case a board must describe the agreement, if requested.[28]

All materials shall be made available in appropriate alternate formats upon request by a person with a disability, as required by federal law.[29]

[23] § 6252, subd. (e).
[24] § 54957.5, subd. (a).
[25] *Id.*
[26] § 54957.5, subd. (b).
[27] § 54957.5, subd. (c).
[28] § 54957.1, subd. (b).
[29] See Section 202 of the American with Disabilities Act of 1990 (42 U.S.C. § 12132), and the federal rules and regulations adopted in implementation thereof.

Public Participation in Meetings

The right of the public to comment at open meetings is one of the fundamental requirements of the Brown Act.[1] The law also recognizes that boards have business to conduct; therefore, "regulations may specify reasonable procedures to insure the proper functioning of governing board meetings."[2] Boards may adopt rules which govern the time, place and manner of comment; in other words, regulations which apply regardless of content or viewpoint.[3]

ALLOWING PUBLIC COMMENT

A board by its rules may limit public comment to a total amount of time on a particular issue and/or for each individual speaker.[4] This is true, even if a board does not impose similar limits on staff/invited presentations.[5] A board also may alter the amount of time per item/speaker depending on the item, if necessary for conducting the meeting.[6] Where time limits are placed on public comment, an individual utilizing a translator is entitled to at least twice the allotted time for comment unless simultaneous translation is available.[7]

A board may not require a member of the public to fill out a "speaker card," or provide their name, address, or any personal information in order to address the board. While a board cannot require this information, speaker cards asking individuals to identify the item on which they wish to comment are recommended to expedite the public comment process and avoid unintentionally failing to hear public comment.

A board may not prohibit public comment on matters related to pending litigation or claims.[8] The Brown Act also provides that a board shall not prohibit public criticism of its policies, procedures, programs, or services, or of its staff or its own acts or omissions.[9] However, the right to voice criticism does not confer any privilege or protection not otherwise provided by law.[10]

PUBLIC COMMENTS ON AGENDIZED & UNAGENDIZED ITEMS

The Brown Act requires every meeting agenda to provide an opportunity for members of the public to address a board before or during consideration of every agenda item.[11] This includes allowing comment on closed session agenda items prior to the closed session. Public comment on agendized items can be taken on all items at the beginning of the meeting or prior to consideration of each agenda item.

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[1] § 54954.3, subd. (a).
[2] Ed. Code, § 35145.5 (school districts); Ed. Code, § 72121.5 (community college districts).
[3] *Chaffee v. San Francisco Public Library Commission* (2005) 13 Cal.App.4th 109.
[4] § 54954.3, subd. (b)(1); see *Ribakoff v. City of Long Beach* (2018) 27 Cal.App.5th 150 (upholding three minute limit on public speakers).
[5] *Ribakoff, supra,* 27 Cal.App.5th 150.
[6] *Chaffee, supra,* 13 Cal.App.4th 109; § 54954.3, subd. (b)(1).
[7] § 54954.3, subd. (b)(2).
[8] *Galbiso v. Orosi Public Utility District* (2008) 167 Cal.App.4th 1063, 1079-80.
[9] § 54954.3, subd. (c); see also 90 Ops.Cal.Atty.Gen. 47 (2007).
[10] *Leventhal v. Vista Unified School District* (S.D.Cal. 1997) 973 F.Supp. 951; *Baca v. Moreno Valley Unified School District* (C.D.Cal. 1996) 936 F.Supp. 719; see also, Civil Code, § 47 (absolute privilege for statements made in legislative or other official proceedings).
[11] § 54954.3, subd. (a).

The public's right to comment should not be confused with or extended to the opportunity for members of the public to question, discuss, or debate with members of a board or staff. While a board may seek to maintain an informal conversational tone during its meetings, it is important that this distinction is maintained so as to allow a board the ability to apply its regulations, if needed, for orderly conduct of its meetings.

In a limited exception to this requirement, a board is not required to entertain comments regarding matters previously considered by a committee composed exclusively of members of the board at an open meeting during which all interested members of the public were given an opportunity to comment, unless the board determines that the item has been substantially changed since the committee heard the item.[12]

In addition to allowing public comment on items which appear on the agenda, the Brown Act requires every regular meeting agenda to provide an opportunity for members of the public to comment on non-agendized items.[13] This requirement does not apply to special meetings. It also does not extend to comments concerning matters which are not within the subject matter jurisdiction of a board.[14]

Since members of the public providing comment may expect a response from a board, it may be helpful to remind members of the public of this limitation. If a comment warrants a response, a best practice is to refer questions to staff or ask that the matter be placed on a future agenda for full discussion.

While the Brown Act requires an opportunity for the public to comment on matters which are not on the agenda (of a regular meeting), it also prohibits a board from acting on or engaging in substantive discussions over matters not appearing on the agenda.[15] Nonetheless, board members or staff may briefly reply to statements made or questions posed by persons during public comment.[16]

PLACING ITEMS ON THE AGENDA

The Brown Act does not contain provisions for members of the public to place items on a board agenda. The Education Code, however, does allow members of the public to request placement of matters "directly related to [district] business on the agenda of" school district or community college district board meetings.[17] Requested items may be placed on a board agenda if they: (1) "directly relate to [district] business;" and (2) are within the "subject matter jurisdiction of the board." A board may exercise discretion in determining whether a requested item meets these requirements.[18]

Where a requested item falls within the applicable requirements, it should be placed on a board agenda for an otherwise scheduled meeting pursuant to any applicable board procedures. A board may adopt reasonable regulations as to the time, place, and manner in which requested items appear on the agenda.

A board is not required to place an item on a specific portion of an agenda (closed versus open), is not required to discuss, prepare a report, or take any action on an item requested by a member of the public, and is not required to provide any additional time to the requester for public comment. To meet the

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[12] *Id.*
[13] *Id.*
[14] *Id.*
[15] *Id.*
[16] § 54954.2, subd. (a)(3); see also Ed. Code, § 35145.5.
[17] Ed. Code, § 35145.5 (school districts); Ed. Code, § 72121.5 (community college districts).
[18] *Mooney v. Garcia* (2012) 207 Cal.App.4th 229, 233 (the statute "inherently requires the school district to exercise some judgment in determining which proposed items met [the] standard").

requirements of the statute, a board must only agendize the item, call the item, and allow for public comment as it would for any other agenda item.

In reviewing a request for an agenda item by a member of the public, a board should consult its bylaws. Most board bylaws limit appropriate agenda items to those which are not merely a request for information and which are not covered/answered by an existing policy or administrative regulation. Bylaws may also provide additional process or criteria applicable to requests to place items on the agenda.

DISRUPTION OF A PUBLIC MEETING

While boards must be mindful of the public's right to express viewpoints, they are not required to tolerate disruptive or threatening speech. Board meetings are considered "limited public forums" for which boards may have rules of decorum to prohibit behavior that disrupts, disturbs or impedes a meeting. Those rules should be tailored to address only behavior that actually disrupts, disturbs or impedes, and not to restrict speech merely because it is insulting or offensive.[19] Conduct which actually disrupts a meeting is grounds to remove an individual from a meeting, whereas conduct which may be offensive, but which does not actually disrupt the meeting, is not grounds for removal.[20]

Where a meeting has become disorderly, calling a short recess can help address the situation without the need to remove individuals from the meeting room.

If a group causes a disturbance which prevents orderly conduct of the meeting and order cannot be restored by removal of the individuals, a board may order the meeting room cleared and continue the meeting without the presence of the public.[21] While not explicit in the Brown Act, this provision likely allows a board to continue the meeting in another room closed to the public if the meeting room cannot be cleared. Members of the press not involved in the disturbance shall be allowed to attend the resumed meeting. A board may also readmit individuals who were not responsible for disturbing the meeting. Disturbance of or breaking up a lawful meeting is a misdemeanor.[22]

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[19] *Acosta v. City of Costa Mesa* (9th Cir. 2012) 694 F.3d 960.

[20] Compare *McMahon v. Albany School District* (2002) 104 Cal.App.4th 1275 (dumping trash on floor at board meeting was grounds for arrest for disturbing a meeting) with *Norse v. City of Santa Cruz* (9th Cir. 2010) 629 F.3d 966 (audience member's offensive silent "salute" during board meeting was not grounds for removal).

[21] § 54957.9.

[22] Penal Code, § 403.

Closed Sessions

PROPER CLOSED SESSION ITEMS

The Brown Act requires all board meetings to be open to the public unless the law specifically allows a board to discuss a topic and/or take action in a closed session – a portion of a board meeting which is held outside of the public's view. There is no catch-all or other provision which allows a board to meet in closed session to discuss topics which might be sensitive or uncomfortable to discuss in open session. There are, however, several provisions of the Brown Act which allow discussion of specific topics and/or actions on those subjects in closed session. Those provisions, organized by topic, are detailed in the following sections.

CLOSED SESSION PROCEDURES

The Brown Act closely regulates how closed session items are agendized and what information must, and must not, be disclosed following a closed session.

Like open session items, a board may discuss in closed session only those items that are included on the agenda.[1] The Brown Act provides specific guidelines for the agenda description of permissible closed session agenda items.[2] If a board agenda includes one of these "safe harbor" descriptions in its agenda, or a description which substantially complies with the "safe harbor" description, the agenda is considered to comply with the applicable requirements of the Brown Act.[3]

The Brown Act requires a board to verbally disclose item(s) to be discussed in closed session before holding the closed session.[4] This requirement may be satisfied by the board president referring to the closed session items by number or letter on the meeting agenda.[5] For certain types of closed sessions, however, additional information must be disclosed before adjourning to closed session.[6]

Once in closed session, a board may only discuss and/or take action on the items listed on the agenda and announced in public session.[7] Besides board members, attendance should be limited to individuals advising or providing information to a board on each specific item.[8] In limited circumstances, a board member may be excluded from closed session where an item involves the board member's dispute with the agency.[9]

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[1] § 54957.7, subd. (a).
[2] § 54954.5. Closed session descriptions which do not follow the guidelines may still be compliant with the Brown Act's requirements; however, most boards follow the Brown Act's guidelines in describing closed session items in order to take advantage of the protection they provide.
[3] *Castaic Lake Water Agency v. Newhall County Water District* (2015) 238 Cal.App.4th 1196, 1207.
[4] § 54957.7, subd. (a).
[5] *Id.*
[6] Refer to the relevant substantive section of this text for specific closed session agenda item descriptions. An appendix of all closed session agenda item descriptions is found at pages 48-49.
[7] § 54957.7, subd. (a).
[8] 88 Ops.Cal.Atty.Gen. 16 (2005) ("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.").
[9] *DeGrassi v. City of Glendora* (9th Cir. 2000) 207 F.3d 636.

REPORTING OUT & DISCLOSURE FROM CLOSED SESSION

The Brown Act requires and prohibits certain disclosures from closed sessions.

Some actions taken in closed session are not required to be disclosed immediately following closed session. The Brown Act does not contain a blanket requirement that all actions taken or directions given in closed session be disclosed. A board may decide to disclose more information than is required by the Brown Act in order to provide the public with information and eliminate speculation about what was discussed in closed session.

If a board takes specific actions in closed session, the Brown Act may require disclosure or "reporting out" regarding the action taken.[10] When required, reports of what actions were taken in closed session must, subject to exceptions, be announced at the same meeting when a board reconvenes in open session. The vote or abstention of every board member present in closed session must be included in any report of final action taken in closed session.[11]

The Brown Act specifically prohibits disclosure of confidential information acquired in a closed session to a person not entitled to receive the information, unless a board, as a whole, authorizes such disclosure.[12]

Information which is obtained outside of closed session, but discussed in closed session, is not subject to this prohibition. The limitation only applies to confidential information learned in closed session, which would include the content of the closed session discussion itself.

Remedies available to prevent, or sanctions for, the disclosure of confidential information received in closed session include injunctive relief to prevent the disclosure of confidential information and disciplinary action against an employee who willfully discloses confidential information.[13] Additionally, board members who have willfully disclosed confidential information may be referred to the grand jury or the district attorney. The following circumstances are <u>not</u> considered violations of this confidentially requirement:

- The making of a confidential inquiry or complaint to a district attorney or grand jury concerning a perceived violation of the law regarding closed sessions, including disclosure of facts necessary to establish the illegality of an action taken by a board;
- The expression of an opinion concerning the propriety or legality of actions taken in closed session, including disclosure of the nature and extent of the illegal action;
- Disclosure of information received in closed session that is not confidential information; or,
- Disclosures under the "whistleblower" statutes contained in the Labor, Government, and Education Codes.[14]

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[10] § 54957.1 & § 54957.7, subd. (b). See the relevant substantive section of this text for specific requirements for reporting out from closed session.
[11] § 54957.1, subd. (a).
[12] § 54963.
[13] In order to discipline an employee for violating this prohibition, an agency must have provided the employee training and/or notice of the confidentiality requirements. (§ 54963, subd. (d).)
[14] § 54963, subd. (e).

Personnel Items

The Brown Act authorizes closed sessions "to consider the appointment, employment, evaluation of performance, discipline or dismissal of a public employee or to hear complaints or charges brought against the employee by another person or employee unless the employee requests a public session."[1] For purposes of the Brown Act, an "employee" includes traditional employees as well as an officer or an independent contractor who functions as an officer or employee (e.g., an interim superintendent), but excludes elected officials, members of a board, or any other independent contractors.[2]

The requirements for closed session discussion or action on a personnel matter differ, however, based on the item to be considered. It is important that the item is a proper closed session topic and properly identified on the closed session agenda. It is also important that discussions during closed sessions focus solely on the agendized item and employee(s) at issue.[3]

COMPLAINTS AGAINST AN EMPLOYEE

The Brown Act contains specific requirements applicable when a board entertains a complaint against an employee.[4] Since many personnel items, such as an evaluation or the release of a probationary employee, involve reviewing negative information about an employee's performance or behavior, it is important to review the factors below to know if the additional Brown Act requirements apply.

Closed Session Consideration of Complaints

Due to privacy considerations, a board may discuss complaints against employees in closed session. Depending on board policy and/or administrative regulations, complaints against an employee may be brought directly to a board by an administrator or reach a board on appeal from the decision of an administrator.

Where a board is hearing a complaint against an employee brought directly to a board by an administrator, the item should be agendized as:

> **COMPLAINT AGAINST EMPLOYEE** (Gov. Code, § 54957, subd. (b)(1))

Where a board is hearing an appeal of an administrator's decision on a complaint against an employee pursuant to applicable board policies, the item should be agendized as:

> **APPEAL OF COMPLAINT AGAINST EMPLOYEE** (Gov. Code, § 54957, subd. (b)(1))

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[1] § 54957, subd. (b)(1).
[2] *Id.*; 98 Ops.Cal.Atty.Gen. 41 (2015) (closed session not allowable to discuss project labor agreement as contractors covered by the agreement were not employees of the district), compare with *Hofman Ranch v. Yuba County Local Agency Formation Commission* (2009) 172 Cal.App.4th 805, 807 (contract executive director was employee for purposes of Brown Act closed session provisions).
[3] *Travis v. Board of Trustees of the State of California State University* (2008) 161 Cal.App.4th 335, 347 (discussions regarding managing public relations or districtwide compensation program would be beyond permissible scope of closed session).
[4] § 54957.

Absent any action to dismiss or otherwise affect the employment status of the employee involved in the complaint, the Brown Act does not require any information on the closed session discussion/decision to be reported out in open session.

If a board is considering disciplinary action against an employee as a separate action following consideration of a complaint, that item should be agendized as "Public Employee Discipline/Dismissal/Release."

24-Hour Notice Requirement

Under the Brown Act, a board is deemed to be considering a "complaint" against an employee if there are specific complaints or charges from another employee or person and the board actually hears and considers the complaints or charges. When both these factors are met, before holding a closed session to discuss the complaint, a board must provide the employee written notice of his or her right to have the complaints or charges heard in open session, rather than in closed session. This notice must be provided at least 24 hours prior to the closed session. Failure to provide the notice may result in any disciplinary action taken by a board being declared null and void.[5]

Generally, the additional notice requirements do not apply to the non-reelection of probationary employees or to performance evaluations conducted in the due course of agency business.[6] The additional notice is required, however, where a board is reviewing the results of an investigation or other inquiry regarding a complaint against an employee, and there is the possibility of disciplinary action against the employee.[7] Because the interpretation of this requirement is ambiguous, and because of the serious consequences of non-compliance, a board should consult with legal counsel to determine if the employee should be provided with the "24 hour notice."[8]

OTHER ACTIONS AFFECTING EMPLOYEES

In addition to hearing complaints regarding agency employees, a board may hear and discuss a variety of personnel-related matters in closed session, including the appointment, employment, evaluation of performance, discipline or dismissal of a public employee.[9]

Appointment

Under this authority a board can discuss and take action on the appointment/hiring of an agency employee or potential agency employee in closed session. This can include discussions and/or action regarding initial hiring decisions, promotion, transfer, and reassignment.

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[5] *Id.*

[6] 78 Ops.Cal.Atty.Gen. 218 (1995).

[7] *Bell v. Vista Unified School District* (2000) 82 Cal.App.4th 672 (letter from C.I.F. Commissioner following investigation of district employee which resulted in discipline for the district employee was a "complaint" which triggered the additional notice).

[8] The Brown Act prohibits a current or former employee from bringing an action for injury to reputation, liberty or other personal interests with respect to disclosure made before and after closed sessions by a board in an effort to comply with the closed session reporting requirements. (§ 54957.1, subd. (e).) However, boards should be aware that privacy interests are constitutionally protected. Therefore, it is questionable as to whether immunity from suit on these grounds can be provided by legislation.

[9] § 54957, subd. (b)(1).

When a board will discuss appointment of an agency employee in closed session, the item should be agendized as:

> **PUBLIC EMPLOYEE APPOINTMENT** (Gov. Code, § 54957, subd. (b)(1))
> Title: [Specify description of position to be filled]

Any action by a board to appoint or employ an agency employee in closed session must be reported out at the same meeting as the closed session.[10] The report must include the title of the position.

Employment

When a board will discuss details of a particular agency employee's employment, including items such as granting or returning from leave, or workload,[11] the item should be agendized as:

> **PUBLIC EMPLOYMENT** (Gov. Code, § 54957, subd. (b)(1))
> Title: [Specify description of position to be filled][12]

The Brown Act does not require that a board report out of closed session any action regarding an employee's employment.

Employee Evaluation

A board may discuss the evaluation of an agency employee in closed session,[13] including evaluation of a superintendent. The evaluation discussion may include review of an employee's evaluation form, criteria for the evaluation form, feedback on an employee's performance, including particular instances or aspects of the overall job performance.[14]

When a board will discuss an employee's performance evaluation in closed session, the item should be agendized as:

> **PUBLIC EMPLOYEE PERFORMANCE EVALUATION** (Gov. Code, § 54957, subd. (b)(1))
> Title: [Specify position title of employee be reviewed]

The Brown Act does not require that a board report out of closed session any action regarding an employee's performance evaluation.

Discipline/Dismissal/Release of Employee

A board may also discuss and take action regarding discipline, dismissal, or release of an agency employee in closed session.[15] This includes action to accept a resignation.[16] If a board will discuss and/or take action

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[10] § 54957.1, subd. (a)(5).
[11] *Travis, supra,* 161 Cal.App.4th at p. 346; citing 63 Ops.Cal.Atty.Gen. 153, 155 (1980) ("the term 'employment' includes discussions concerning an individual employee's workload.").
[12] This agenda description is a modified version of the Brown Act's safe harbor agenda item description for "Public Employment" which suggests it should include a "description of the position to be filled," however, given the holding in *Travis*, "Public Employment" can include discussions which go beyond "filling" a position.
[13] § 54957, subd. (b)(1).
[14] *Duval v. Board of Trustees* (2001) 93 Cal.App.4th 902.
[15] § 54957, subd. (b)(1).
[16] § 54957.1, subd. (a)(5).

regarding discipline, dismissal, or release of an agency employee in closed session, the item should be agendized as:

> **PUBLIC EMPLOYEE DISCIPLINE/DISMISSAL/RELEASE** (Gov. Code, § 54957, subd. (b)(1))

An action by a board to dismiss or "otherwise affect the employment status of a public employee" in closed session must generally be reported out at the same meeting as the closed session.[17] However, the report of a dismissal or nonrenewal of an employment contract shall be deferred until the first public meeting following the exhaustion of any administrative remedies the employee has.[18] When a report is required, it must include the title of the position.

Agency staff may inform an employee prior to a board meeting of an intent to recommend dismissal/release of the employee to the board, and allow the employee an opportunity to resign prior to the meeting. Before using this approach, an agency should consult legal counsel to avoid inadvertently "coercing" a resignation which might later be subject to legal challenge.

EMPLOYMENT TERMS & CONTRACTS FOR UNREPRESENTED EMPLOYEES

Under certain circumstances, a board may discuss terms of employment and compensation for unrepresented employees (e.g., management and confidential employees) in closed session. The board may appoint a representative, such as the superintendent and/or a board member, to "negotiate" with unrepresented employees, and meet with its representative to give direction and authority for those "negotiations." The unrepresented employee(s) would not attend the closed session. These closed session discussions should be agendized as:

> **CONFERENCE WITH LABOR NEGOTIATORS** (Gov. Code, § 54957.6, subd. (a))
>
> Agency designated representative: [Specify name(s) of designated representative(s) attending closed session][19]
> Unrepresented employee(s): [Specify position title of unrepresented employee(s) who is or are the subject of the negotiations][20]

While the Brown Act's language is unclear, we believe that this procedure/agenda description could be used to discuss compensation and employment terms and contracts for existing and potential unrepresented employees.

Compensation of an unrepresented employee may not be discussed under a closed session item agendized as "public employment" or "public appointment," unless it involves a reduction of compensation that results from the imposition of discipline.[21]

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[17] *Id.*
[18] *Id.* For example, a permanent certificated or classified employee has the right to request a hearing after receiving disciplinary charges. By contrast, since probationary certificated or classified employees, and temporary certificated employees typically have no administrative remedies provided by law to challenge release, the Brown Act does not authorize a delay in reporting out such board actions.
[19] If the representative specified on the agenda is unable to attend closed session, an agent may appear in his or her place if the governing board announces the name of the agent prior to closed session. (§ 54954.5, subd. (f).)
[20] § 54954.5, subd. (f).
[21] § 54957, subd. (b)(4).

REQUIREMENTS FOR CABINET EMPLOYEE COMPENSATION

The Brown Act and other sections of the Government Code contain several provisions limiting how and when a board takes action on compensation for certain "cabinet-level" unrepresented employees:

- A board must ratify, in open session, any contract with a superintendent, deputy superintendent, assistant superintendent, associate superintendent, community college president, community college vice president, community college deputy vice president, or other similar chief administrative officer.[22] A board may not vote in closed session and report out its vote in open session; instead all action must occur in open session.
- A board may only consider the salaries, salary schedules, or compensation in the form of fringe benefits, of local school district certificated executives, including a superintendent and assistant superintendent, in a regular meeting. A board may not consider these items at a special meeting.[23] This requirement does not apply to discussions regarding classified management.
- Prior to any action on the salaries, salary schedules, or compensation paid in the form of fringe benefits of an agency executive, a board must orally report a summary of a recommendation for the final action during the open session in which the action is to be taken.[24] This likely is designed to prevent action regarding executive compensation from being included in a consent agenda.

HIRING A SUPERINTENDENT

Discussions and actions regarding the superintendent are subject to the same Brown Act requirements as those applicable to all other employees. Discussions and actions around hiring a new superintendent involve other considerations as well.

A board is authorized to conduct a closed session discussion to consider the employment of a new superintendent.[25] However, discussions about a superintendent search, search firms, and general criteria for a new superintendent, including the needs and goals of the agency, must take place in open session.

Once particular individuals/candidates have been identified, the process may move to closed session for discussion among board members about desirable qualifications, evaluation of the results of reference and other background checks, interviews with candidates, and discussion about which candidate should be extended an offer (with an exception regarding compensation, discussed above). During any such closed session a board can meet with a search firm hired to assist in the process.

The agenda item for such a closed session would be:

> **PUBLIC EMPLOYMENT** (Gov. Code, § 54957, subd. (b)(1))
> Title: Superintendent

[22] § 53262.
[23] § 54956, subd. (b); see § 3511.1 regarding positions subject to this requirement.
[24] § 54953, subd. (c)(3).
[25] § 54957, subd. (b)(1).

If a board acts to appoint a superintendent in closed session, that action must be reported out at the same meeting as the closed session.[26] The report must include the title of the position.

While a board may take action to appoint a superintendent in closed session, with ratification of the superintendent's contract in open session, it may be preferable to agendize both the appointment and contract as separate open session items.

A board may also agendize as a separate closed session item, "Conference with Labor Negotiators," to discuss the superintendent's contract[27] and must subsequently ratify any contract during an open session.[28] These discussions/actions regarding compensation may only occur at a regular meeting.

[26] § 54957.1, subd. (a)(5).
[27] See "Requirements for Cabinet Employee Compensation" above.
[28] § 53262, subd. (a).

Litigation

The Brown Act permits a board to hold closed sessions to confer with or receive advice from legal counsel regarding pending litigation.[1] "Litigation" includes any adjudicatory proceeding before a court, administrative body exercising its adjudicatory authority, hearing officer, or arbitrator.[2]

An attorney need not actually be present at a closed session discussion regarding pending litigation. Rather, advice can be transmitted by written opinion, technological devices (e.g., teleconference), and perhaps even through a staff member or board president. Nothing in the Brown Act supersedes or negates the attorney-client privilege.[3]

ANTICIPATED LITIGATION

A board may discuss anticipated ligation in closed session.[4] This includes discussions in which, based on existing facts and circumstances, there is significant exposure to litigation against the agency.[5] It also includes situations in which an officer or employee of the agency has significant exposure to litigation concerning activities alleged to have occurred within the course and scope of their duties.[6] A board may also meet in closed session to discuss whether a closed session discussion is authorized under this standard.[7]

Outside of a few specific situations provided by the Brown Act, there is little authority as to what constitutes "significant exposure to litigation against the agency." The Brown Act explicitly defines "significant exposure to litigation against the agency" to include:

- Receipt of a written communication from a potential plaintiff threatening litigation. The communication shall be available for public inspection upon request.[8]
- A statement in an open and public meeting threatening litigation on a specific matter within the jurisdiction of the agency.[9]
- A statement outside an open and public meeting threatening litigation on a specific matter within the jurisdiction of the agency where the official or employee receiving knowledge of the threat makes a record of the threat prior to the meeting. The record shall be available for public inspection upon request.[10]
- Receipt of a claim under the Government Claims Act.[11] The claim shall be available for public inspection upon request.[12]

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[1] § 54956.9.
[2] § 54956.9, subd. (c).
[3] *Roberts v. City of Palmdale* (1993) 5 Cal.4th 363, 369-373.
[4] § 54956.9, subd. (a).
[5] § 54956.9, subd. (d)(2).
[6] § 54956.9, subd. (h).
[7] § 54956.9, subd. (d)(3).
[8] § 54956.9.
[9] § 54956.9, subd. (e)(4).
[10] § 54956.9, subd. (e)(5).
[11] § 810, et seq.
[12] § 54956.9, subd. (e)(3).

Discussion of Government Claims Act claims received by an agency should be agendized as anticipated litigation. While the Brown Act specifically provides for discussion or action on "liability claims," those provisions concern consideration and action by a joint powers authority or insurance pool.[13]

In these situations, a board may clearly meet in closed session under the "anticipated litigation" exemption.

Beyond these specific situations, however, whether a discussion is properly held in closed session (in other words, whether there is significant exposure to litigation against the agency) should be viewed in light of the purpose of the provision allowing for discussion of litigation in closed session. Specifically, the purpose is to allow for discussion in circumstances in which discussion in open session would "prejudice the position of the local agency in "…" litigation."[14] However, courts have directed that language allowing closed session litigation discussions should be interpreted narrowly.[15]

Prior versions of the Brown Act required a written memorandum from an agency's legal counsel advising of an exposure to litigation. While that requirement is no longer in statute, the Brown Act still states that the determination of significant exposure to litigation is to be based on the "opinion of the legislative body … on the advice of its legal counsel."[16] This suggests that, where any question exists, a governing body should discuss with counsel the appropriateness of a closed session discussion involving "potential ligation" prior to agendizing the item.

Closed session discussions agendized under anticipated litigation may include discussions and/or action on a wide variety of matters in which the agency faces significant exposure to litigation. This includes responses to civil grand jury reports, consideration of uniform complaints, or other matters which pose a significant exposure to litigation depending on the outcome of the matter.

When a governing body plans to discuss anticipated litigation in closed session, the following agenda language should be used:

CONFERENCE WITH LEGAL COUNSEL – ANTICIPATED LITIGATION
Significant exposure to litigation pursuant to Gov. Code, § 54956.9, subd. (d)(2) or (3): [Specify number of potential cases][17]

Further disclosure prior to closed session (either on the agenda or by oral statement) is required where the facts and circumstances which led to the closed session are known to a potential plaintiff or plaintiffs.[18] In such a case, the facts and circumstance must be disclosed. If the agency believes, however, that the facts and circumstances which led to the closed session are not yet known to a potential plaintiff or plaintiffs, no additional disclosure is required.[19]

During closed session, a board may discuss factors and options related to potential litigation. It may also provide direction to staff and/or counsel regarding the same.

[13] § 54954.5, subd. (d) & § 54956.95.
[14] § 54954.5, subd. (a).
[15] *Page v. MiraCosta Community College District* (2009) 180 Cal.App.4th 471, 501.
[16] § 54954.9, subd. (d)(2).
[17] § 54954.5, subd. (c).
[18] § 54956.9, subd. (e)(2).
[19] § 54956.9, subd. (e)(1).

Generally, a board is not required to report out from closed session discussions regarding anticipated litigation. If, however, the discussion results in direction to counsel to initiate litigation or approval of a settlement agreement, public disclosure following closed session may be required.

INITIATING LITIGATION

A board may discuss initiating litigation in closed session.[20] The following agenda language should be used to agendize such a discussion:

> **CONFERENCE WITH LEGAL COUNSEL – ANTICIPATED LITIGATION**
> Initiation of litigation pursuant to Gov. Code, § 54956.9, subd. (d)(4): [Specify number of potential cases][21]

No additional disclosure prior to closed session is required.

During closed session, a board may discuss factors and options related to potential litigation. It may also provide direction to staff and/or counsel regarding the same.

Following closed session, a board is required to report out publicly any direction to initiate or intervene in any litigation.[22] The report need not identify the action, the defendants, or other particulars. It must, however, indicate that this information shall be disclosed upon inquiry to any person once litigation has been commenced, unless to do so would jeopardize the ability to effectuate service or would jeopardize the agency's ability to conclude existing settlement negotiations to its advantage.[23]

EXISTING LITIGATION

A board may discuss existing litigation in closed session.[24] The following agenda language should be used, in most instances, to agendize this discussion:

> **CONFERENCE WITH LEGAL COUNSEL – EXISTING LITIGATION**
> (Gov. Code, § 54956.9, subd. (d)(1))
> Name of case: [Specify by reference to claimant's name, names of parties, case or claim numbers][25]

As an alternative to stating the case name on the agenda, a board may publicly announce the case name prior to closed session.[26]

Where litigation has recently been initiated by a board and identification of the litigation would jeopardize service or where identification of the litigation would jeopardize existing settlement negotiations,[27] the following language should be used:

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[20] § 54956.9, subd. (d)(4).
[21] § 54954.5, subd. (c).
[22] § 54957.1, subd. (a)(2).
[23] *Id.*
[24] § 54956.9, subd. (d)(1).
[25] § 54954.5, subd. (c).
[26] § 54956.9, subd. (g).
[27] *Id.*

CONFERENCE WITH LEGAL COUNSEL – EXISTING LITIGATION
(Gov. Code, § 54956.9, subd. (d)(1))
Name of case: Disclosure of the litigation would jeopardize ["service of process" or "existing settlement negotiations"][28]

No additional disclosure prior to closed session is required.

During closed session, a board may discuss factors and options related to existing litigation. It may provide direction to staff and/or counsel regarding litigation. It may also discuss settlement of existing litigation.[29]

Following closed session, a board is required to publicly report out as follows:

- If a board provided authorization to legal counsel to defend, seek, or refrain from seeking appellate review or relief, it must report out, if known, the adverse party or parties and the substance of the litigation.[30]
- If a board provided approval to enter as an amicus curiae in any form of litigation, it must report out, if known, the adverse party or parties and the substance of the litigation.[31]

A board is not required to report out any other action or discussion related to existing litigation from closed session, except settlement agreements as discussed below.

SETTLEMENT AGREEMENTS

A board may discuss a settlement agreement, whether to avoid the need for litigation or to settle existing litigation, in closed session.[32] This includes voting to enter into a settlement agreement or providing direction to staff and/or counsel on negotiations of a settlement agreement.[33] A board may not, however, negotiate with an opposing party or their counsel or discuss settlement with a mediator in a closed session.[34] Depending on the procedural status of the dispute underlying the settlement agreement, the proper agenda description should follow the examples provided above.

If a board votes to approve a settlement agreement in closed session, it shall report out this approval and identify the substance of the agreement if the settlement agreement was signed by the opposing party prior to the board's approval.[35] If the opposing party has not signed the settlement agreement prior to approval by a board, or court approval is required to finalize the settlement agreement, the board is not required to report out its approval following closed session.[36] However, if one of these circumstances exist, once the agreement is finalized, the agency is required to disclose the approval and identify the substance of the agreement upon inquiry by any person.[37]

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[28] § 54954.5, subd. (c).
[29] *Trancas Property Owners Association v. City of Malibu* (2006) 138 Cal.App.4th 172.
[30] § 54956.9, subd. (a)(2).
[31] *Id.*
[32] *Trancas Property Owners Association, supra,* 138 Cal.App.4th 172.
[33] *Id.*
[34] *Page, supra,* 180 Cal.App.4th 471.
[35] § 54957.1, subd. (a)(3)(A).
[36] § 54957.1, subd. (a)(3)(B).
[37] *Id.*

Labor Negotiations

The Brown Act provides that a board may meet in closed session with its labor negotiator to discuss salaries, salary schedules, or fringe benefits of its represented and unrepresented employees, and for represented employees, any other matter within the statutorily provided scope of representation.[1]

REPRESENTED EMPLOYEES

Unique to local educational agencies, the Educational Employment Relations Act ("EERA")[2] specifically exempts from the Brown Act any board discussions regarding represented employees as to any matter within the scope of representation.[3] Accordingly, compliance with the Brown Act in these circumstances may be desired, but is not required.

For example, this exemption could apply in the following circumstances:

- Polling board members by email or phone to report on new union proposals and/or to seek new direction in negotiations.
- Calling and convening a board meeting without posting an agenda.
- Discussing negotiations during a scheduled closed session for which "negotiations" was not agendized.
- Discussing negotiations at a meeting held outside of the geographic boundaries of the district (e.g., when board members are at a conference).

This exemption is useful in the context of negotiations, mediation, and factfinding when negotiators may need to discuss proposals or obtain direction from a board urgently before there is time to agendize or hold a formal meeting.

Where time permits or a board has already planned to discuss negotiations, however, it is best practice to include discussions with labor negotiators on the closed session agenda at a regular or special meeting. This discussion can be agendized as follows:[4]

> **CONFERENCE WITH LABOR NEGOTIATOR** (Gov. Code, § 54957.6, subd. (a))
> Agency designated representatives: [Specify names of designated representatives attending the closed session]
> Employee Organization: [Specify name of organization representing employee or employees in question]

While the agenda item requires identification of the designated representatives attending closed session, if circumstances necessitate the absence of the designated representative, an agent or designee may participate in place of the absent representative as long as the name of the agent or designee is announced at an open session held prior to the closed session.[5]

Board closed session discussions under this agenda item must be "for the purpose of discussing [a board's] position regarding any matter within the scope of representation and instructing its designated

[1] § 54957.6, subd. (a).
[2] § 3540 et seq.
[3] § 3549.1.
[4] § 54957.6, subd. (a).
[5] *Id.*

representatives."[6] In addition to negotiations and impasse procedures, the exemption could also apply to actual or threatened grievances and unfair practice charges.

When board discussions are focused on compensation or fringe benefits, a board may only discuss the district's available funds and funding priorities insofar as they relate to providing instructions to the district's designated representative.[7] Generic discussions of budget matters, including for anticipated reductions in personnel or programs, are not properly discussed under this closed session topic.

Beginning of the Negotiations Process

The EERA requires all initial negotiations proposals of the union and agency to "be presented at a public meeting of the public school employer."[8] Negotiations may not commence until the public has had an opportunity to review and comment on the proposals, and the proposals are formally received (union proposal) and adopted (agency proposal) by a board.[9] This is referred to as the "sunshining process."

The EERA does not require agendizing or convening a separate "public hearing" for the sunshining process. Rather, there need only be a regular agenda item indicating, for example, presentation of the agency's or union's initial negotiations proposal for the relevant school year.

Conclusion of the Negotiations Process

The Brown Act requires local agencies to report approval of an agreement concluding labor negotiations after the agreement is final and has been ratified by the union.[10] As to local educational agencies, this requirement is supplanted by the EERA's requirement for public disclosure of the major provisions of any agreement at a board meeting before the board ratifies the agreement, including disclosure of the costs that would be incurred in the current and subsequent two fiscal years.[11]

Accordingly, prior to final approval of an agreement, an agency must place the following on the open session agenda of a board meeting:

> Public disclosure of tentative agreement with [name of union]. The EERA requires [school districts /community college districts/county boards of education] to disclose to the public at a board meeting the major provisions, including costs for the current and subsequent years, of a negotiated agreement with an exclusive representative of its employees.

There are additional specific review requirements for school districts with qualified or negative budget certification which must be followed prior to board ratification.[12]

UNREPRESENTED EMPLOYEES

The EERA exemption discussed above does not apply to "negotiations" with unrepresented employees. The requirements of the Brown Act must be followed to agendize matters involving unrepresented employees.[13]

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[6] § 3549.1, subd. (d).
[7] § 54957.6, subd. (a).
[8] § 3547, subd. (a).
[9] § 3547, subd. (b).
[10] § 54957.1, subd. (a)(6).
[11] § 3547.5.
[12] § 3540.2.
[13] See "Employment Terms & Contracts for Unrepresented Employees," p. 28.

Student Matters

While the Brown Act does not explicitly include requirements for the discussion of matters involving individual students by boards, it incorporates the authorization for closed sessions permitted by the Education Code.[1] The Education Code includes several provisions which allow closed session discussion of student matters.

EXPULSION & DISCIPLINE OF DISTRICT STUDENTS

The Education Code imposes specific requirements where a school district or community college district board will consider expulsion of a student.[2] It authorizes a board to hold expulsion hearings in closed session, unless otherwise requested by a student.[3] Board deliberation on an expulsion may occur in closed session even if the hearing was held in public pursuant to the student's request.[4] A hearing or deliberation in closed session may be agendized as follows:

> **STUDENT EXPULSION** [identifier] (Ed. Code, [*school districts use* § 48918; *community college districts use* § 72122])

Where a district has assigned an identifier or file number to a specific expulsion matter, it should be included in the closed session agenda item description. Given the federal and state protections for pupil information, a board agenda should not include any information that would allow identification of a student, and a board should not discuss any information in open session that would lead to the identification of a student in relation to a disciplinary matter.[5] If a student/parent waives this protection by requesting an open session discussion of the matter, a board should still avoid disclosing information which could otherwise identify any other student.[6]

Any final action on expulsion of a student must take place in open session.[7]

Although less common, a board also is required by the Education Code to meet in closed session to discuss discipline of a student (including suspension), unless a student/parent requests otherwise.[8] Prior to such a closed session, a board must provide written notice to the student and/or parent of its intent to hold a closed session.[9] At that time, the student and/or parent may request that the discussion be held in open session.[10]

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[1] § 54962.
[2] See Ed. Code, § 48918 (school districts); Ed. Code, §§ 66300, 76030 & 76033 (community college districts).
[3] Ed. Code, § 48912, subd. (c)(1).
[4] *Id.*
[5] *Rim of the World Unified School District v. Superior Court* (2002) 104 Cal.App.4th 1393.
[6] Ed. Code, § 48912, subd. (c) (school districts); Ed. Code, § 72122 (community college districts).
[7] Ed. Code, § 48918, subd. (j).
[8] Ed. Code, §§ 35146 & 48912 (school districts); Ed. Code, § 72122 (community college districts).
[9] See Education Code sections 35146 and 48912 (school districts) and section 72122 (community college districts) for specific notice requirements.
[10] *Id.*

If the discussion is held in closed session it may be agendized as follows:

> **STUDENT DISCIPLINE MATTER** [identifier] (Ed. Code, [*school districts use* §§ 35146 & 48912; *community college districts use* § 72122])

Where a district has assigned an identifier or file number to a specific discipline matter, it should be included in the closed session agenda item description. The board should observe the same protections for student information noted above in relation to expulsions.

Whether discipline of a student is considered during a closed session or an open session, the final board action on the discipline must be taken during an open session.[11]

SETTLEMENT AGREEMENTS

Settlement agreements involving students should be handled the same as any other settlement agreement which requires approval by a board.[12]

Although not specified in the Brown Act, where litigation has not yet been initiated, the student's name or other identifying information should not be disclosed by a board or a board meeting agenda in connection with discussion of a settlement involving a student. Further, while any approved settlement agreement may be subject to disclosure in response to a request for public records, any information which may identify the student should be redacted prior to disclosure.

APPEALS TO A COUNTY BOARD OF EDUCATION

County boards of education hear appeals of school district decisions which involve students. The most common appeals heard by county boards of education are appeals of school district decisions to expel a student[13] or decisions regarding failure to grant an interdistrict transfer.[14]

When a county board of education is hearing an appeal of a student expulsion, the Education Code authorizes a board to hold expulsion hearings in closed session, unless otherwise requested by a student.[15] Board deliberation on an expulsion may occur in closed session even if the hearing was held in public pursuant to the student's request.[16] A hearing or deliberation in closed session may be agendized as follows:

> **APPEAL OF STUDENT EXPULSION** [identifier] (Ed. Code, § 48920)

When a school district has assigned an identifier or file number to a specific expulsion matter, it should be included in the closed session agenda item description. Given the federal and state protections for pupil information, a board agenda should not include any information that would allow identification of a student, and a board should not discuss any information in open session that would lead to the identification of a student in relation to a disciplinary matter.[17]

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[11] Ed. Code, § 35146 (school districts); Ed. Code, § 72122 (community college districts).
[12] See "Settlement Agreements," p. 34.
[13] Ed. Code, § 48919.
[14] Ed. Code, § 46601.
[15] Ed. Code, § 48920.
[16] *Id.*
[17] Ed. Code, § 35146.

Any final action on an expulsion appeal should take place in open session observing the protections for student information noted above.

The Education Code generally allows for school districts or community college districts to bring student matters into closed session where open session would disclose confidential student information. Thus, where a county board of education is concerned that hearing an appeal of an interdistrict transfer request could lead to disclosure of confidential student information material to the transfer request, the county board of education may hear the appeal in closed session.[18]

County boards of education may also hear appeals regarding failure of a school district to grant an interdistrict transfer. Neither the Education Code, nor the Brown Act explicitly allow a county board of education to hear this type of appeal in closed session. Thus, in most cases, the appeal should be heard in open session.

OTHER STUDENT MATTERS

The Education Code authorizes closed session discussions by a board regarding:

- An appeal of a challenge to the contents of a student's record.[19]
- To consider a challenge regarding a student's assigned grade.[20]
- Review of the content of an approved or adopted assessment.[21]
- To discuss "any … action … in connection with any pupil…" where a public discussion would result in disclosure of confidential information.[22]

Agendizing these matters for closed session may require written notice to the student and/or parent and the opportunity for the student and/or parent to request that the discussion be held in open session.[23] While a board may discuss these topics in closed session, it may be required to take any action in open session.[24] A board should consult with its counsel before employing any of these lesser-used closed session provisions.

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[18] *Rim of the World Unified School District v. Superior Court* (2002) 104 Cal.App.4th 1393.
[19] Ed. Code, § 49070.
[20] Ed. Code, § 49066.
[21] Ed. Code, § 60617.
[22] Ed. Code, § 35146 (school districts); Ed. Code, § 72122 (community college districts).
[23] *Id.*
[24] *Id.*

Business, Property, Finance & Construction

Boards need to meet to discuss business, property, finance and construction matters, ranging from authorizing procurement methods, to approving borrowing for capital projects, to acquiring school sites, to approving, modifying or terminating contracts and analyzing contract liability or other forms of legal exposure. As always, these discussions must be conducted in open session unless the topic/action falls within the scope of an express statutory authorization allowing discussion in closed session.[1]

CONTRACT APPROVAL, RATIFICATION, OR DISPUTE

Contracts entered into by an agency are generally not valid or enforceable unless and until approved or ratified by a board, regardless of whether contract approval has been delegated to an agency official.[2] As a result, boards are required to consider contracts during their meetings. Depending on the nature or size of the contract, approval may be considered as a separate action item or as part of the consent calendar.[3]

The Brown Act's open meeting requirements have no general exception for discussions or actions regarding business, property, or construction contracts. The discussion/action must be conducted in open session unless an express statutory authorization for a closed session applies. For example, a contract dispute likely to lead to litigation may qualify to be agendized for closed session as anticipated litigation.[4]

REAL PROPERTY NEGOTIATIONS

The Brown Act permits a board to hold a closed session to discuss real property transactions.[5] Specifically, a board may meet in closed session "with its negotiator prior to the purchase, sale, exchange, or lease of real property ... to grant authority to its negotiator regarding the price and terms of payment for the purchase, sale, exchange, or lease."[6] The "negotiator" may be staff, legal counsel, another consultant or a member of a board, and the "lease" may include a renewal or renegotiation of an existing lease.[7]

The application of the exemption, however, is narrower than it appears. A closed session conducted under this section must be limited to:

1. the amount of money or other consideration the agency is willing to pay or accept in the transaction; and/or,
2. the form, manner, and timing of payment; and/or,
3. items essential to arriving at the authorized price and payment terms, for which public disclosure would be tantamount to revealing information the exception permits an agency to keep confidential.[8]

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[1] § 54962.
[2] Ed. Code, § 17604 (school districts); Ed. Code, § 81566 (community college districts).
[3] See e.g., § 53635.7 (decisions that involve borrowing $100,000 or more cannot be placed on a consent agenda).
[4] See "Anticipated Litigation," p. 31.
[5] § 54956.8.
[6] *Id.*
[7] *Id.*
[8] 94 Ops.Cal.Atty.Gen. 82 (2011).

To discuss these topics in closed session, a board should agendize the discussion as follows:

> **CONFERENCE WITH REAL PROPERTY NEGOTIATORS** (Gov. Code, § 54956.8)
> Property: [Specify street address, or if no street address, the parcel number or other unique reference, of the real property under negotiation]
> Agency negotiators: [Specify names of negotiators attending the closed session]
> Negotiating parties: [Specify name of each party (not agent)]
> Under negotiation: [Specify whether instructions to negotiator concern price, terms of payment, or both][9]

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.[10] The board must limit the closed session discussion to the items disclosed on the agenda and not discuss other aspects of the real property transaction.[11]

A board is not required to report out of a closed session regarding real property unless it acts to approve an agreement concluding real property negotiations. If a board's approval makes the agreement final, approval of the agreement and the substance of the agreement must be reported during an open session of the same meeting.[12] If final approval rests with the other party to the negotiation, a board shall disclose its approval and the substance of the agreement upon inquiry by any person as soon as the other party informs the board of its approval.[13]

PUBLIC SERVICES OR FACILITIES SECURITY

The Brown Act allows a board to hold a closed session discussion regarding "matters posing a threat to the security of public buildings, a threat to the security of essential public services … or a threat to the public's right of access to public services or public facilities."[14] However, in order to hold such a discussion, the closed session must include the district attorney, agency counsel, sheriff, or chief of police, or their respective deputies, or a security consultant or a security operations manager.[15]

A closed session discussion regarding security threats or an assessment of those threats may be agendized as follows:

> **PUBLIC SERVICES OR FACILITIES SECURITY**
> Consultation with [Specify name of law enforcement agency and title of officer, or name of applicable agency representative and title].

A board is not required to report out following this discussion.

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[9] § 54954.5, subd. (b).
[10] *Id.*
[11] *Shapiro v. San Diego City Council* (2002) 96 Cal.App.4th 904, 924 (holding legislative body cannot claim substantial compliance where its closed session discussions "range far afield of a specific buying and selling decision that the negotiator is instructed to work toward").
[12] § 54957.1, subd. (a)(1)(A).
[13] § 54957.1, subd. (a)(1)(B).
[14] § 54957, subd. (a).
[15] *Id.* (a closed session may also be held with the Governor, Attorney General or their respective deputies).

Other Board Matters

Other matters come before a board which, although not directly addressed in the Brown Act, routinely raise questions about its application. In many of these circumstances, a board should work with their counsel to ensure compliance with the Brown Act.

COMPLAINT APPEALS

Many board policies include provisions allowing individuals who file complaints or are the subject of complaints to appeal a staff decision on a complaint to a board for decision or allow a board to decide if it will hear such an appeal. Many of the policies also indicate that a board's consideration of an appeal or whether to hear an appeal should take place in closed session, although not all complaints are appropriately agendized for consideration in closed session. An appeal of a complaint or determination as to whether to hear an appeal may only be heard in closed session and agendized based on the type/content of the complaint.

Appeals involving complaints against employees or review of whether a board will hear an appeal of a complaint against an employee should be agendized as such.[1]

An appeal of a complaint against a student or involving the actions of a student, or a board discussion on whether to hear such an appeal, may be agendized in closed session as follows:

> **APPEAL OF COMPLAINT INVOLVING A STUDENT** (Ed. Code, [*school districts use § 35146; community college districts use § 72122*])

Such items may require written notice to the student and/or parent and the opportunity for the student and/or parent to request that the discussion be held in open session.[2] While a board may discuss an appeal in closed session, it may be required to take any action in open session.[3]

Complaints processed under a district's uniform complaint policy may also be agendized as noted above (if they involve a complaint against an employee or a student). Alternatively, where appropriate based on advice of counsel, an appeal may be agendized as anticipated litigation.[4]

Unless resolution of the complaint involves approval of a settlement agreement,[5] a board is not required to report out from a closed session discussion regarding a complaint.

CHARTER SCHOOL MATTERS

Actions pertaining to charter schools are before boards with increasing frequency. Charter petitions submitted to a school district or county office of education for consideration generally require multiple board actions: to receive a petition for review, to hold a public hearing, and to render a decision.

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[1] See "Complaints Against an Employee," p. 25.
[2] Ed. Code, § 35146 (school districts); Ed. Code, § 72122 (community college districts).
[3] *Id.*
[4] See "Anticipated Litigation," p. 31.
[5] See "Settlement Agreements," p. 34.

The Brown Act does not provide any authority for a board to meet in closed session to consider a charter petition, absent a liability or claim situation that might qualify for closed session under those provisions.[6] In addition, given the requirements of a public hearing during the petition process, agencies should consider how their standard public hearing protocols should be applied, particularly if the matter attracts a large number of speakers. For example, the district may want to amend its time limits per speaker and/or total time rules to ensure that all interested members of the public are given an opportunity to be heard.

Decisions regarding petition renewal, petition material revisions, and charter school revocation have their own unique legal procedures that must be followed, including procedures involving board action and notice. Counsel should be consulted with regard to the interplay between Brown Act requirements and Education Code requirements unique to these actions; for example, the initiation of revocation proceedings may qualify as the initiation of "litigation" as that term is defined by the Brown Act, therefore allowing closed session discussion.

Finally, agencies often make decisions regarding the use of facilities or space by charter schools in accordance with Education Code section 47614 and its interpreting regulations.[7] In some circumstances, it may be appropriate to discuss facility use/lease agreements in closed session under the exception for real property negotiations. A general discussion of options for where a charter school may be placed would not meet the more specific requirements for that exception, however; nor would the approval of a preliminary or final offer of space under those laws.

BOARD VACANCIES

When a vacancy occurs on a board, in many cases the Education Code will allow the remaining board members to appoint a temporary member to fill the vacancy.[8] Neither the Brown Act nor the Education Code allows any discussion or deliberation regarding filling a vacancy to occur outside of a noticed meeting or in a closed session. While the law does not dictate the selection process, secret ballots may not be used as part of the selection process (i.e., the public must be able to identify the vote/preference of each board member.).[9]

BOARD MEMBER CONDUCT & COMPLAINTS AGAINST A BOARD MEMBER

Members of a board are not employees of the agency; therefore, the agency (and other members of the board) does not have the ability to discipline or take other action against another board member. Where the conduct of a board member is not appropriate, a board may vote to censure the board member or anyone may refer the board member to the district attorney if the member's actions may be criminal. Discussions related to censure may not take place in closed session unless they fall within the purview of anticipated litigation.

Notwithstanding the limitation on the ability of a board to take action against one of its own members, where complaints against a board member allege discrimination or harassment, the agency should take appropriate steps to investigate and address the allegations.

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[6] See "Anticipated Litigation," p. 31.
[7] Ed. Code, § 47614; Cal. Code Regs., tit. 5, § 11969.1 et seq.
[8] Ed. Code, § 5090 et seq.
[9] See "Meeting Procedure/Vote Requirements/Recusals," p. 15.

COMMUNITY COLLEGE DISTRICT CLOSED SESSIONS

Boards of community college districts may hold a closed session to consider the conferring of honorary degrees. Such an item would be agendized as:

> **CONFERRING OF HONORARY DEGREE** (Ed. Code, § 72122.)

It may also hold a closed session to consider gifts from a donor who wants to remain anonymous. Such an item would be agendized as:

> **ACCEPTANCE OF ANONYMOUS GIFT** (Ed. Code, § 72122.)

Neither item requires a board to report out following closed session.

Violations of the Brown Act

The district attorney or any interested person may obtain judicial relief for alleged violations of the Brown Act. They may seek an order preventing future violations, an order invalidating action taken in violation of the Brown Act, or an order declaring past acts of a board to have been in violation of the Brown Act.[1] The Brown Act also allows actions to determine whether any rule or action of a board unlawfully penalizes or otherwise discourages the free expression of one or more of its members.[2] In some cases, the district attorney may seek criminal penalties for violations of the Brown Act.

JUDICIAL RELIEF

The Brown Act contemplates three types of judicial relief for violations. Depending on the relief requested, the Brown Act imposes different requirements and limitations. These requirements and limitations are summarized in the chart.

Relief & Application	Deadline	Procedure	Limitations
Judgment that an action taken in violation of the Brown Act is "null and void."[3] Applicable only to violation of sections: • 54953 (open meetings); • 54954.2 (agenda); • 54954.5 (closed sessions); • 54954.6 (taxes); • 54956 (special meetings); or, • 54956.5 (emergency meetings).[4]	90 days from action challenged or 30 days if the action was taken in violation of section 54954.2.	• Complainant or district attorney must submit a written demand seeking a board cure the violation. • A demand must be made within the statutory timeline. • A board has 30 days to cure the action.[5] • If a board does not cure, a complainant or district attorney may file an action within 15 days of notice from the board or, if no response is provided, within 15 days from the expiration of the 30-day cure period.[6]	Applies only to an "action."[7] An action will not be deemed null and void if: • Taken in substantial compliance with the Brown Act.[8] • Taken in connection with the sale or issuance of notes, bonds, or other evidences of indebtedness. • It gave rise to a contractual obligation upon which another party has detrimentally relied. • Taken in connection with the collection of a tax. • The alleged violation was improper notice, but the complainant or district attorney had actual notice.[9] • Complainant or district attorney does not show prejudice.[10]

[1] § 54960, subd. (a).
[2] *Id.*
[3] § 54960.1, subd. (a); Ed. Code, § 35145, subd. (b) (school districts); Ed. Code, § 72121, subd. (b) (community college districts); see *Hernandez v. Town of Apple Valley* (2017) 7 Cal.App.5th 194, 209 (invalidating election results approving ballot measure based on Brown Act violation).
[4] § 54960.1, subd. (a).
[5] *Page v. MiraCosta Community College District* (2009) 180 Cal.App.4th 471, 505 (discussion of cure).
[6] § 54960.1, subds. (b)-(c).
[7] *Page, supra,* 180 Cal.App.4th at p. 499.
[8] 99 Ops.Cal.Atty.Gen. 11 (2016); *North Pacifica LLC v. California Coastal Commission* (2008) 166 Cal.App.4th 1416, 1431-32.
[9] § 54960.1, subd. (d).
[10] *Galbiso v. Orosi Public Utility District* (2010) 182 Cal.App.4th 652, 670.

Relief & Application	Deadline	Procedure	Limitations
Judgment that a board violated the Brown Act.[11] Applicable to any violation of the Brown Act.[12]	Nine months from the alleged violation.	• Complainant or district attorney must submit a cease-and-desist letter to a board. • The letter must be submitted within the statutory deadline. • A board has 30 days in which to respond to the letter. • If a board adopts an "unconditional commitment" to not repeat past actions, complainant or district attorney cannot proceed with a lawsuit. • If a board does not adopt an "unconditional commitment," a plaintiff may proceed to court within 60 days.[13]	• If a board commits the same violation after adopting an unconditional commitment, a complainant or district attorney may proceed to court without sending another cease-and-desist letter.[14]
Order to prevent future violations.[15] Applicable to any ongoing or threatened violation of the Brown Act.[16]	Prior to the violation.	None specified.[17]	None specified.

If a court finds a violation of the Brown Act, it may require that the agency pay the plaintiffs' attorneys' fees and costs.[18] While a fee award is not mandatory, the court's discretion to deny an award is narrow.[19] A court may award fees and costs to an agency for prevailing in such an action only if the challenge was clearly frivolous.[20] A court may also order recordings of future closed session discussions if it finds a violation of the Brown Act's closed session requirements.[21]

CRIMINAL LIABILITY

A violation of the Brown Act may also lead to criminal liability. Specifically, each member of a board who attends a meeting where action is taken in violation of the Brown Act, if the member intends to deprive the public of information, is guilty of a misdemeanor.[22]

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[11] § 54960.2, subd. (a).
[12] *Id.*
[13] § 54960.2, subds. (a)-(c).
[14] § 54960.2, subd. (d).
[15] § 54960, subd. (a).
[16] *Id.*
[17] *Center for Local Government Accountability v. City of San Diego* (2016) 247 Cal.App.4th 1146, 1154 (requirements of section 54960.2 only applicable to past actions).
[18] § 54960.5.
[19] *Galbiso, supra,* 167 Cal.App.4th at p. 1077.
[20] *Id.*
[21] § 54960, subd. (b); see §§ 54956.7, 54956.8, 54956.9, 54956.95, 54957, & 54957.6.
[22] § 54959.

Closed Session Agenda Descriptions

The following closed session item descriptions are based on the "safe harbor" provisions of the Brown Act. For additional information on agenda descriptions for closed session items see pages 23-24.

PERSONNEL ITEMS

For additional detail see pages 25-30.

COMPLAINT AGAINST EMPLOYEE (Gov. Code, § 54957, subd. (b)(1))

APPEAL OF COMPLAINT AGAINST EMPLOYEE (Gov. Code, § 54957, subd. (b)(1))

PUBLIC EMPLOYEE APPOINTMENT (Gov. Code, § 54957, subd. (b)(1))
Title: [Specify description of position to be filled]

PUBLIC EMPLOYMENT (Gov. Code, § 54957, subd. (b)(1))
Title: [Specify description of position to be filled]

PUBLIC EMPLOYEE PERFORMANCE EVALUATION (Gov. Code, § 54957, subd. (b)(1))
Title: [Specify position title of employee be reviewed]

PUBLIC EMPLOYEE DISCIPLINE/DISMISSAL/RELEASE (Gov. Code, § 54957, subd. (b)(1))

CONFERENCE WITH LABOR NEGOTIATORS (Gov. Code, § 54957.6, subd. (a))

LITIGATION

For additional detail see pages 31-34.

CONFERENCE WITH LEGAL COUNSEL – ANTICIPATED LITIGATION
Significant exposure to litigation pursuant to Gov. Code, § 54956.9, subd. (d)(2) or (3): [Specify number of potential cases]

CONFERENCE WITH LEGAL COUNSEL – ANTICIPATED LITIGATION
Initiation of litigation pursuant to Gov. Code, § 54956.9, subd. (d)(4): [Specify number of potential cases]

CONFERENCE WITH LEGAL COUNSEL – EXISTING LITIGATION
(Gov. Code, § 54956.9, subd. (d)(1))
Name of case: [Specify by reference to claimant's name, names of parties, case or claim numbers]

CONFERENCE WITH LEGAL COUNSEL – EXISTING LITIGATION
(Gov. Code, § 54956.9, subd. (d)(1))
Name of case: Disclosure of the litigation would jeopardize ["service of process" or "existing settlement negotiations"]

LABOR NEGOTIATIONS

For additional detail see pages 35-36.

CONFERENCE WITH LABOR NEGOTIATOR (Gov. Code, § 54957.6, subd. (a))
Agency designated representatives: [Specify names of designated representatives attending the closed session]
Employee organization: [Specify name of organization representing employee or employees in question]

STUDENT MATTERS

For additional detail see pages 37-39.

STUDENT EXPULSION [identifier] (Ed. Code, [*school districts use* § 48918; *community college districts use* § 72122])

STUDENT DISCIPLINE MATTER [identifier] (Ed. Code, [*school districts use* §§ 35146 & 48912; *community college districts use* § 72122])

BUSINESS, PROPERTY, FINANCE & CONSTRUCTION

For additional detail see pages 40-41.

CONFERENCE WITH REAL PROPERTY NEGOTIATORS (Gov. Code, § 54956.8)
Property: [Specify street address, or if no street address, the parcel number or other unique reference, of the real property under negotiation]
Agency negotiators: [Specify names of negotiators attending the closed session]
Negotiating parties: [Specify name of each party (not agent)]
Under negotiation: [Specify whether instructions to negotiator concern price, terms of payment, or both]

PUBLIC SERVICES OR FACILITIES SECURITY
Consultation with [specify name of law enforcement agency and title of officer, or name of applicable agency representative and title]

OTHER BOARD MATTERS

For additional detail see pages 42-44.

APPEAL OF COMPLAINT INVOLVING A STUDENT (Ed. Code, [*school districts use* § 35146; community *college districts use* § 72122])

CONFERRING OF HONORARY DEGREE (Ed. Code, § 72122)

ACCEPTANCE OF ANONYMOUS GIFT (Ed. Code, § 72122)

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