

# Cuyama Basin Groundwater Sustainability Agency Advisory Committee

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## **Agenda** **October 16, 2017**

**Agenda for a meeting of the Cuyama Basin Groundwater Sustainability Agency Stakeholder Advisory Committee to be held on Monday, October 16, 2017 at 10:30 AM, at the Cuyama Valley Family Resource Center, 4689 CA-166, New Cuyama, CA 93254**

**In addition to that location, a telephone conferencing location for the public to participate is available at the University of California Santa Cruz, 1156 High Street, The Village Quad A-2, Santa Cruz, CA 95064 and via telephone conferencing by dialing [1 (415) 735-9405]. You will be asked for a passcode. The passcode is [377149].**

*In compliance with the Americans with Disabilities Act, if you need disability-related modifications or accommodations, including auxiliary aids or services, to participate in this meeting, please contact Matt Young at (805) 568-3546 by 4:00 p.m. on the Friday prior to this meeting. Agenda backup information and any public records provided to the Committee after the posting of the agenda for this meeting will be available for public review at 4885 Primero Street, New Cuyama, California. The Cuyama Basin Groundwater Sustainability Agency reserves the right to limit each speaker to three (3) minutes per subject or topic.*

- 1. Call to order**
- 2. Identify Secretary to take meeting minutes.**
- 3. Roll call**
- 4. Receive an update from the Consultant on the California Department of Water Resources Sustainable Groundwater Planning Grant Program's "Groundwater Sustainability Plans and Projects" Draft Grant Scope of Work, and develop recommendations regarding that draft Scope of Work for the Board Ad Hoc Committee meeting on October 18, 2017.**
- 5. Future Agenda Items:**
  - 5.1. Ralph M. Brown Act: For October 16, 2017 meeting, Advisory Committee Members should review the attached Brown Act materials. However, Staff will not provide a training at today's meeting, an overview of the Brown Act will be agendized for a future meeting with Legal Counsel.**
  - 5.2. Future Meetings: Executive Director, once hired, will coordinate with the Advisory Committee.**
- 6. Public comment for items not on the Agenda**

*At this time, the public may address the Board on any item not appearing on the agenda that is within the subject matter jurisdiction of the Board. Persons wishing to address the board should fill out a comment card and submit it to the board chair prior to the meeting. Unscheduled comments will be limited to three minutes.*
- 7. Adjourn**

**Cuyama Basin Groundwater Sustainability Agency Advisory Committee**  
**DATE: October 16, 2017**

**Agenda Item #4: “Groundwater Sustainability Plans and Projects”**  
**Draft Grant Scope of Work**

# Cuyama Basin Groundwater Sustainability Plan

## Proposed Scope of Work

### DRAFT

The Cuyama Groundwater Sustainability Agency (CGSA) plans to prepare a Groundwater Sustainability Plan (GSP) that will be fully compliant with the Sustainable Groundwater Management Act (SGMA) legislation chaptered in September 2014 and GSP regulations adopted in May 2016. Once the tasks in this scope are completed, the GSP will conform to the legislation and regulations.

There are two main foci reflected throughout this scope:

1. Develop a GSP that meets the legislative and regulatory requirements and performs the necessary technical work to meet those requirements, and
2. Develop a GSP that clearly defines the management actions, projects, monitoring and adaptive management programs that will lead to sustainable management of the basin.

### Task 1: Initiate Work Plan for GSP and Detail Stakeholder Engagement Strategy

The CGSA will initiate the Work Plan with the stakeholders, identifying and describing the activities necessary to initiate the Stakeholder Engagement Strategy, and will refine the GSP scope to ensure successful development of the GSP. The Work Plan will be developed consistent with the Scope of Work proposed here, within the framework included in the anticipated DWR grant award for GSP development, and with input by the CGSA and local stakeholders.

The Outreach and Coordination Strategy will be initiated, engaging stakeholders and presenting the process as to how the GSP development effort will provide opportunities for engagement, discussions, and comments. The Cuyama Basin has a wide variety of stakeholders, represented by the composition of the CGSA Board of Directors. Stakeholder interests include: The Cuyama Basin Water District (District), the Cuyama Community Services District (CSD), the four overlying counties (Santa Barbara, San Luis Obispo, Ventura, and Kern), Federal and State agencies, environmental groups interested in downstream fisheries, and smaller agricultural interests. The stakeholder Engagement Strategy will address outreach challenges including: building trust between residents, agricultural interests, and environmental interests; and the need for strong but transparent facilitation. The Work Plan will include:

- Explanation of the GSA's decision-making processes
- Identification of opportunities for public engagement
- Discussion of how public input will be used
- Descriptions of how CGSA will encourage active involvement of diverse social, cultural, and economic elements of the population
- Descriptions of the methods the CGSA will use to inform the public about GSP implementation

Draft and final versions of the Stakeholder Engagement Strategy and refined GSP Development Work Plan will be developed in consultation with GSA member agency personnel.

### Task 1 Deliverables

- Draft Stakeholder Engagement Strategy Plan
- Draft GSP Development Work Plan

- Final Stakeholder Engagement Strategy Plan
- Final GSP Development Work Plan

## Task 2: Data Management System, Information Gathering, Data Collection and Analysis, and Plan Review

The CGSA will develop a data management system (DMS) that can store and report information relevant to the development or implementation of a GSP and monitoring of the basin. The volume of data that will be generated for GSP preparation and updates. The data will also be used to demonstrate progress towards basin sustainability, and will be used to communicate with basin stakeholders and the State.

### *Subtask 2.1 – Data Management System*

A DMS will be developed for upload and storage of information related to the development and implementation of the GSP. This task will select DMS technology and other technical components. The types of data to be entered into the DMS will be considered, and relationships for that data will be established to ensure functionality. Data input functionality will be considered and developed, and necessary interfaces will be developed. Lastly, collected data will be entered into the DMS.

Depending on the platform selected, implementation will include development or customization of the DMS, including development and configuration of the database, development and configuration of the user interfaces, connections to external databases if needed, testing and quality control, and implementation in the production server.

This task will consolidate and QC the data collected in other Task 2 tasks. The data will be organized into a format that can be easily imported into the DMS. The data will then be imported into the DMS and the populated DMS will be quality controlled to minimize data quality issues.

### *Subtask 2.2 – Data and Information Collection and General Plan Review*

CGSA will collect recent and historical information and data for use in completing GSP development tasks. This data and information will be stored in the DMS. Data collected will include geographic information systems (GIS) data, well and well monitoring data, identification and collection of data from existing monitoring programs, general plans, existing studies, and other data and reports as needed for GSP preparation. This task will include the following steps:

- Data collection standardization and template development
- Identify existing monitoring programs, including:
  - California Statewide Groundwater Elevation Monitoring (CASGEM),
  - Department of Water Resources' (DWR) Water Data Library
    - State Water Resource Control Board (SWRCB) monitoring programs
    - Irrigated Lands
    - Geotracker
    - SB-4
  - Other state programs
  - Groundwater Ambient Monitoring and Assessment (GAMA)
  - United States Geological Survey (USGS) monitoring programs
  - Stream/river gauges, irrigation diversions, and other surface water
  - Subsidence surveys, as available

- Local agency data
- Collect data
- Process and review data
- Aggregate data where duplicative

This task will also collect, review, and evaluate existing groundwater management programs and general plans in the GSP area. This task will collect reports on groundwater management programs, and evaluate how those programs will interact with SGMA implementation through the GSP. General plans will be collected, reviewed, summarized, and evaluated. Evaluation of general plans will include how the general plans affect GSP implementation, and how GSP implementation affects general plan implementation.

### Task 2 Deliverables

- A DMS that can store and report data related to the development and implementation of the Cuyama Basin GSP
- Electronic copies of all information and data collected
- Prepared sections of the GSP related to the DMS, monitoring evaluation, existing management programs, and general plans

### Task 3: Description of the Plan Area, Hydrogeologic Conceptual Model, and Groundwater Conditions

CGSA will develop a description of the GSP Plan Area, prepare the Hydrogeologic Conceptual Model (HCM), and groundwater conditions sections of the GSP.

#### *Subtask 3.1 – Description of the Plan Area*

The Plan Area description will include a map of the Cuyama Basin, the CGSA boundary, a description of the area that is managed, how the area is managed, a description of how the GSA is organized, how its governance is operated, and who participated in its formation. The following activities will be performed under this task:

- Develop maps depicting the Plan Area as required by regulation
- Develop maps showing jurisdictions
- Summarize land use and groundwater well elements in the basin
- Develop map of communities reliant upon groundwater
- Describe conjunctive use programs in the basin

#### *Subtask 3.2 – Develop Hydrogeologic Conceptual Model*

The Basin Setting portion of the GSP is made up of three components - the Hydrogeologic Conceptual Model (HCM), the Groundwater Conditions, and the Water Budget. The components of the Basin Setting establish the conditions of the basin as of January 2015, which includes a description of the physical characteristics of the basin as well as the dynamic components affecting the water budget. This task prepares the HCM component of the Basin Setting. CGSA will perform the following activities to prepare the HCM section of the GSP:

- Refine and update the current HCM to meet the requirements in the regulations and as described in the *Hydrogeologic Conceptual Model BMP* document released by DWR in December 2016.
- Develop a graphical and narrative description of the physical components of the basin
  - Regional geologic and structural setting

- Identification of principal aquifers and aquitards
- Identification of primary use, water quality, and structural properties of principal aquifers
- Description of basin boundaries
- Cross Sections showing principal aquifers and aquitards
- Maps of topography, surficial geology, soils, recharge and discharge areas, springs, seeps and wetlands, surface water bodies, and source and point of delivery for imported water supplies.

### *Subtask 3.3 – Groundwater Conditions*

This task will prepare the Groundwater Conditions portion of the GSP. Preparation of this report section will include incorporation of information from previous subtasks, collection of data and available previous reports, and analysis that will be needed to prepare components of the section to meet regulatory requirements. Much of this section will be prepared using existing information from the Cuyama Valley Hydrologic Model (CUVHM) and observed data. Specific components of groundwater conditions include:

- Development of groundwater contour maps for each principal aquifer
- Identification of flow directions and regional patterns of groundwater movement
- Development of hydrographs of monitoring wells
- Display of vertical gradients, historical trends, and spatial coverage
- Graphs of cumulative change in storage
- Cross sections of seawater/salinity in the basin
- Maps of known groundwater quality issues, land subsidence rates and total land subsidence, interconnected surface water systems, and groundwater-dependent ecosystems
- Table of quantity and timing of surface water depletions
- Documentation of baseline conditions (either January 1, 2015, or other as selected)

### **Task 3 Deliverables**

- Figures and maps depicting the Plan Area, HCM, and Groundwater Conditions sections of the GSP
- Initial drafts of the Plan Area, HCM, and Groundwater Conditions sections of the GSP

### **Task 4: Basin Model and Water Budget**

CGSA will conduct a rapid assessment of the existing CUVHM. Necessary enhancements to the model will be made to support water budget development and technical analyses of management actions and projects for the GSP. The CUVHM model was developed by the United States Geological Survey (USGS) using a MODFLOW framework. The CUVHM model includes a geohydrologic framework, hydrologic budget, and modeling component and has a domain that extends over half of the Basin, while covering the majority of the Basin's water use.

#### *Subtask 4.1 – Assessment of Existing Model*

CGSA will assess the existing CUVHM model. During the assessment, CGSA will identify any expansion, enhancements, and refinements needed for the existing CUVHM model; and based on the outcome of the assessment, CGSA will implement those model updates in Subtask 4.2. This task will specifically assess the following model components:

- HCM: Analyze selected well logs to determine the representation of the field conditions in the existing 3-layer CUVHM.
- Crop Acreage and Crop Evapotranspiration: Collect available historical crop data and information on irrigation practices and conduct an assessment of the accuracy of the crop evapotranspiration estimates used in the CUVHM.
- Water Supply: Evaluate the completeness of the data related to groundwater pumping (recorded, reported, or estimated) and surface water use, including historical precipitation.
- Model Boundary Conditions: Evaluate the representational accuracy of the specified boundary conditions and their impact on the accuracy of the model results.
- Model Update Needs: Identify the necessary model updates needed to use the CUVHM model for SGMA.

#### *Subtask 4.2 – Update CUVHM Model*

Following the assessment of the model in Subtask 4.1, updates will be made according to the identified expansion, enhancements and refinements. The existing simulation period of CUVHM is 1950 to 2010. GSP regulation requires water budgets to be developed for historical, current, and projected conditions. To use the model to develop historical and current water budgets, the simulation period of the model will be extended, through 2015. Updating the model requires collection of the following timeseries data for the period 2010 through 2015 to the greatest extent available:

- Historical precipitation
- Crop acreages and crop evapotranspiration
- Agricultural practices such as growing periods and irrigation efficiency
- Water supply data related to groundwater pumping and surface water use
- Surface water diversions where applicable
- Stream flows at the periphery of model domain

Once the data is collected, the extended timeseries will be incorporated into the existing model to extend the simulation period through 2015.

The model will also be refined to develop reporting areas consistent with management areas determined in the GSP. Additional areas identified as needing improvement will be enhanced by resolving any data inconsistencies or gaps. Data elements that should be enhanced in CUVHM will be prioritized in order of importance of the data for developing water budget elements. Data obtained during the model assessment will be reviewed and any relevant and unambiguous data will be incorporated into the model input data.

Following the incorporation of new data into the model, CGSA will conduct a high-level recalibration of CUVHM with data enhancements. Preliminary water budgets will be validated with available crop data and agricultural demand estimates at the local level.

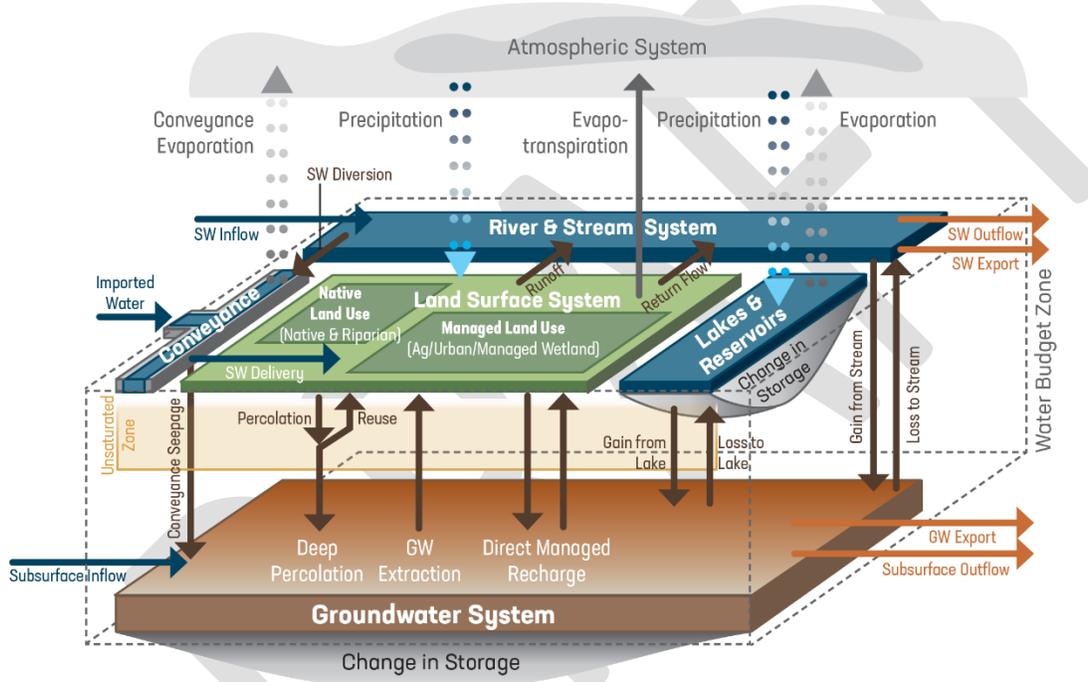
#### *Task 4.3 – Historical and Current Water Budget*

This task consists of two main components: development of historical and current water budget for the area within the CUVHM domain, and development of historical and current water budgets for the areas outside the CUVHM domain.

**Within CUVHM Domain**

Within the CUVHM domain, the water budgets will be developed using the results of the updated CUVHM. Following the update of CUVHM, CGSA will conduct the following activities:

- Develop historical total water budget (groundwater systems, stream system, and land surface system) consistent with the water budget components identified by DWR in its water budget framework schematic (see figure below)
- Develop methodology for estimating Sustainable Groundwater Yield for a base period using CUVHM results and estimate sustainable groundwater yield
- Present results to the stakeholders and obtain feedback
- Document the results in a technical memorandum



Outputs of the groundwater model will be aligned with the specific water budget reporting requirements established by the GSP Regulations and reported.

**Outside CUVHM Domain**

Analysis of the areas outside the model domain will be conducted using a data-based approach. CUVHM covers most of the developed areas in the Cuyama groundwater basin. However, the extent of the model does not cover all portions of the groundwater basin. While it is sufficient to characterize the majority of water budget components, GSPs are required to utilize an equally effective method, tool, or analytical model to evaluate water budget conditions in cases where a model is not used. DWR is currently developing a water budget

framework document intended to serve as a guide to the data and methods for estimating water budget components without the use of a numerical model. The document is expected to be published in early 2018. The portion of the basin outside the CUVHM domain, as well as any water budget components not adequately simulated using the model, will be analyzed following the methodology described in the DWR document.

#### *Task 4.4 – Water Budget Forecast*

The future conditions water budget will be developed using a combination of the enhanced CUVHM and data-driven methods prepared following DWR's water budget framework document. CGSA will collect, analyze, and prepare input data sets for the model to develop a baseline scenario representing the future hydrologic conditions in the basin. The Baseline scenario will utilize 50 years of historical hydrology and most recent land use, water demand, and water supply data. The future condition datasets will be incorporated into the model, along with any proposed sustainable management practices over the planning horizon. The outputs from the future condition scenario run will be processed and combined with forecasted water budget conditions from the data-driven approach to develop forecasted water budget conditions for the entire Cuyama Basin.

#### *Task 4.5 – Water Budget Section of GSP*

This task will prepare the Water Budget section of the GSP. Preparation of this section will include documentation and use of the outputs of the groundwater model. Components of this task will be populated by groundwater modeling efforts and the data based water budget for areas outside the CUVHM domain. Specific components to be documented in this section include:

- Identification of a hydrologic base period
- Analysis of hydrologic conditions, water demand and surface water supply availability
- Total surface water entering and exiting the basin
- Inflow to groundwater systems by source type
- Outflow from groundwater systems by source type
- Change in groundwater storage
- Sustainable yield estimate
- Development of at least 10 years of historical water budgets
- Development of current year water budget
- Development of projected 50-year water budget

#### *Task 4.6 – Modeling Analysis Support*

This task will use the CUVHM to provide assistance to evaluate projects and management actions under consideration for use in the GSP. This task will formulate alternative management scenarios and utilize the model to evaluate occurrence and frequency of undesirable results, maintenance of minimum thresholds, and attainment of measurable objectives.

#### *Task 4.7 – Modeling Technical Memorandum*

CGSA will document the modeling effort and its results in a technical memorandum that includes documentation of:

- Identification and resolution of data discrepancies between the model and collected data

- Data incorporated into the model to extend the simulation period to 2015
- Changes to model parameters made during calibration process
- Assumptions made for future condition scenario runs
- Methodology followed for developing water budget components for region outside model extent

#### Task 4 Deliverables

- Review and enhance model for historical and existing conditions
- Develop water budget for historical and existing conditions
- Develop forecast 50-year water budget
- Prepare Water Budget Section of GSP
- Provide assistance to the Cuyama Basin GSA to formulate alternative management scenarios and utilize the model to evaluate occurrence and frequency of undesirable results, maintenance of minimum thresholds and attainment of measurable objectives.
- Document the results in a technical memorandum.

#### Task 5: Establish Basin Sustainability Criteria

In this task, CGSA will identify sustainable management criteria for the GSP and develop an initial draft GSP section on sustainable management criteria. This section will describe the metrics used to track the sustainability goal, develop a description of undesirable results for the six sustainability indicators, and set thresholds to detect undesirable results through the use of minimum thresholds, interim milestones, and measurable objectives.

##### *Subtask 5.1 – Identify Sustainability Goal*

CGSA will identify a sustainability goal for the GSP. The sustainability goal is a mission statement for the GSP that meets local needs while promoting sustainable use of groundwater in the basin. The sustainability goal will be developed with input from local stakeholders and input from regulatory agencies.

##### *Subtask 5.2 – Establish Undesirable Results*

CGSA will identify undesirable results for each sustainability indicator, including a narrative description of what each undesirable result is and their potential effects on the beneficial uses and users of groundwater, on land uses, and land owners. A description will be developed for each sustainability criteria and what constitutes an undesirable outcome/result. The description will be used throughout the GSP as a check for whether the GSP is adequately preventing undesirable results through implementation. The narrative is also used to help set threshold on monitoring to avoid future undesirable results. An undesirable result narrative will be prepared for the applicable criteria:

- Groundwater levels
- Groundwater storage
- Seawater intrusion – Potentially express as salinity
- Groundwater quality
- Subsidence
- Surface water and groundwater interaction

This task will also evaluate conditions in the basin to determine if undesirable results as defined by the undesirable results narrative are occurring in the basin. Documentation of the evaluation will include a narrative, maps of the monitoring or model results used to evaluate the presence or absence of undesirable results, a description of the methodology used to evaluate monitoring results to identify undesirable results, and maps of the locations of any undesirable results that are occurring.

#### *Subtask 5.3 – Define Management Areas and Representative Monitoring*

This task will define the management areas delineated in the GSP and prepare rationale for representative monitoring.

Management areas can be set for scientific and jurisdictional reasons. During GSP development, reasons to delineate a management area may become apparent from scientific justification, such as the extent of a barrier or fault, the location of salinity plumes, or the presence or absence of major aquifers. Jurisdictional management areas may also be created to match management of an area to the jurisdiction of a local agency. Documentation will include a discussion of the conditions in the management area, why they are significant (if scientific), and provide a map of management areas in the GSP.

Representative monitoring is the use of one monitoring methodology to represent monitoring of a sustainability criteria that may be difficult to monitor for. Representative monitoring used in the GSP will be justified during GSP development. This task will consider how representative monitoring and management areas will affect sustainability thresholds for the six sustainability criteria. For representative monitoring, this task will evaluate the appropriateness of use of representative monitoring and consider how they cover minimum thresholds, measurable objectives, and interim milestones for each sustainability indicator. If representative monitoring is used for a sustainability indicator, this task will provide the rationale for the representative monitoring and explain how the representative will prevent the occurrence of undesirable results. Management areas may have different thresholds and may use different representative monitoring and/or different thresholds than other areas. This task will describe the rationale for those differences.

#### *Subtask 5.4 – Develop Minimum Thresholds*

This task will establish the minimum thresholds for the six sustainability indicators. The methodologies used to set this threshold will be developed and documented and will explain how the thresholds selected will prevent the occurrence of undesirable results. Thresholds will be presented using maps, graphs, tables, and a supporting narrative in the GSP.

#### *Subtask 5.5 – Develop Measurable Objectives and Margin of Operational Flexibility*

This task will establish the measurable objective thresholds for the six sustainability indicators. The methodologies used to set this threshold will be developed and documented and will explain how the thresholds selected will allow for a reasonable margin of operational flexibility before undesirable results occur. Thresholds will be presented using maps, graphs, and tables.

#### *Subtask 5.6 – Develop Interim Milestones*

CGSA will identify an interim milestone for each sustainability indicator and describe how each one was established, its relationship to the minimum threshold and measurable objective, how it was selected, and how it may affect the interests of beneficial uses and users of groundwater in the basin.

### Task 5 Deliverables

- Draft and final sustainability goal and undesirable results narrative for the GSP
- Measurable objectives, minimum thresholds, margins of operational flexibility, and interim milestones or representative thresholds for all six sustainability indicators.
- An initial draft Sustainable Management Criteria section of the GSP document

### Task 6: Monitoring Networks

CGSA will develop a monitoring program that builds on the existing monitoring network to track future progress toward the GSP sustainability goals. The results of the proposed monitoring network evaluation (Category 1 project proposal) will be incorporated into this task. This task will prepare a monitoring section of the GSP that includes the following components required by regulation:

- Monitoring objectives for the GSP
- Description of how monitoring may vary by management area
- Description of how representative monitoring may be used to monitor for some sustainability indicators
- Monitoring rationale, describing why the monitoring network will adequately monitor for undesirable results
- Monitoring protocols, including a description of technical standards, data collection methods, and other procedures
- Data analysis and reporting protocols
- Description of how monitoring can detect impacts to beneficial users of groundwater
- Description of how monitoring changes in groundwater conditions is adequate to support water budget calculations during GSP implementation
- Review and improvement of the monitoring network
- Data gaps and identifies a plan to fill data gaps

This task will establish monitoring networks for the six sustainability indicators. Each monitoring network will be established to meet GSP regulations and will consider spatial density of monitoring locations, vertical density (depth) of monitoring locations to ensure that monitoring occurs for each sustainability indicator in all primary aquifers in the basin. This task will establish the frequency of monitoring for each sustainability indicator, develop maps of monitoring locations, and develop protocols for each type of monitoring used. If data gaps exist in the monitoring network, they will be identified during network development.

Representative monitoring is likely to be used for several sustainability indicators. This task will develop the rationale for using representative monitoring and will identify how representative monitoring for any sustainability indicator will be established. Representative monitoring descriptions in this task will also consider spatial and vertical density, monitoring frequency, and data gaps.

### Task 6 Deliverables

- Monitoring networks for all six sustainability indicators
- Monitoring Networks Section of the GSP
- Monitoring protocols

## Task 7: Projects and Actions for Sustainability Goals

CGSA will identify and prioritize projects and management actions that will be implemented. This will also include adaptive management actions that will be implemented should groundwater conditions not adequately respond to implementation of the GSP. This task will design a management program that considers potential projects and management actions to develop a management approach that meets regulatory requirements and local needs. Projects and management actions to be considered will be solicited as part of the stakeholder engagement strategy, and will potentially include these identified options:

- Demand management (potentially including rotational fallowing or land retirement)
- Method or framework for water accounting.
- Upstream capture of Twitchell Reservoir spills
- Improved wet season recharge capabilities
- Groundwater banking of exchanged surface water supplies
- Regional water exchanges involving imported/SWP water and Twitchell Reservoir surface water supplies
- Water exchanges between sub-basins
- Purchase of new supplies with development of a new 30-mile pipeline
- Reuse of water from ongoing industrial/oil and gas operations

### *Subtask 7.1 – Develop Management Program*

This task will develop the management program that documents and plans the implementation of projects and actions in the plan area. The management program will identify management options, research and vet the management options, and select management options for implementation. The management program will identify implementation hurdles and provide a program summary. The program summary will describe how the program will meet sustainability targets and forecast the effectiveness of the program, as well as provide a list of management options.

### *Subtask 7.2 – Projects, Management Actions, and Adaptive Management Actions*

This task will identify projects and management actions for consideration as part of GSP implementation. Each project or management action will be collected, described, and analyzed for effectiveness. In performing this task, it is expected that the groundwater model that was updated in Task 3 will be used when appropriate, and other analysis methods will be used in areas where the model is not appropriate. The description of each project and management action will include:

- Detailed description, per regulations
- Cost estimates and funding mechanisms
- Public notice and outreach process
- Summary of permitting and regulatory process
- Explanation of benefits
- Explanation of regional and project economic benefits and/or impacts
- Explanation of how the project will be accomplished
- Explanation of the source and reliability of water if imported supplies are a part of the project
- How the project is supported by the best available science

- How uncertainty is considered
- CEQA/NEPA considerations

The results of the proposed Water Supply Evaluation (Category 1 Project) will be incorporated into this analysis.

#### *Subtask 7.3 – Prioritization of Projects and Management Actions*

CGSA will perform an assessment of numerous alternative water management scenarios—projects, programs, and management actions or strategies—for managing groundwater use sustainably. Assessment will include an evaluation of the effectiveness of projects, programs, and management actions on reaching sustainability. As part of this process, each of the projects and management actions identified in Subtask 7.2 will be prioritized.

#### **Task 7 Deliverables**

- A prioritized list of projects and management actions
- Management Program
- Projects and Management Actions section of the GSP

### **Task 8: Groundwater Sustainability Plan Implementation**

The plan implementation section of the GSP documents and plans how implementation actions will be performed and work together to maintain compliance with the regulations and to achieve sustainability. The implementation plan will include the management program, implementation schedule, GSP costs and funding, data management plan, model updates, and other GSP implementation activities. The implementation plan will be developed to be a section in the GSP that includes subsections that contain the results of the subtasks below.

#### *Subtask 8.1 – GSP Implementation Schedule and Reporting*

This task will develop the GSP’s implementation schedule, which will document when various GSP components will be conducted. This task will also describe the activities and timing of activities needed to prepare the annual GSP report and the 5-year update reports required by regulations.

#### *Subtask 8.2 – GSP Implementation Costs and Funding*

This task will prepare a cost estimate to determine the expected costs of GSP implementation. Cost analysis will consider costs associated with monitoring activities, data management activities, implementation of projects and management actions, CGSA management (staff costs and overhead costs), as well as reporting costs for the annual reports and 5-year updates and reporting required by regulation.

This task will also describe how CGSA will fund GSP implementation. The description will consider and evaluate the mechanisms available to CGSA. Potential funding mechanisms include the use of grants, assignment of fees and fines, income from water market management (if used), and other methods as identified during analysis. The description of funding will be developed with input from GSA representatives and will consider legal limitations and hurdles (such as Proposition 218) to funding options.

#### *Subtask 8.3 – Parties Affected by GSP and Effects of Undesirable Results on Beneficial Uses*

This task identifies and describes the parties potentially affected by the GSP and the nature of consultation with those parties. The description will include the land uses and property interests affected, and the types of parties affected.

This task will also evaluate the potential effects of undesirable results on beneficial uses in the basin. Evaluation will consider all six undesirable results, and their effects on beneficial uses of groundwater such as: domestic uses, municipal uses, irrigation uses, industrial uses, and other uses including property interests. If undesirable results are thought to be currently occurring, this task will evaluate the effect of these undesirable results on beneficial uses.

#### *Subtask 8.4 – Groundwater Model and Data Management System Implementation Planning*

This task will document how the groundwater model will be used and updated during GSP implementation, especially at the 5-year updates. This task will include data updates, future model runs and calibration, and how model use will be documented.

Planning will also guide the GSP's use of the DMS during implementation. This task will describe the methodology to be used to collaborate and collect data from other agencies, and state and federal agencies. DMS maintenance activities and QA/QC planning for data to be entered into the DMS will also be documented.

#### **Task 8 Deliverables**

- Draft Plan Implementation section of the GSP

### **Task 9: Groundwater Sustainability Plan Document Development**

Under this task, CGSA will prepare an outline for the GSP, an administrative draft of the GSP a public review draft of the GSP, and a final draft of the GSP. Each GSP draft will include all required sections of the GSP, including appendices.

#### *Subtask 9.1 – Develop GSP Outline and Style Guidance*

CGSA will develop a GSP outline that will be used for the GSP document development. This task will also prepare a GSP report style guide for distribution to authors during GSP development. The style guide is valuable for guiding report authors during report writing to ensure report sections are formatted similarly and use consistent terminology when describing GSP components.

#### *Subtask 9.2 – Reference Tracking and Storage*

This task will be used to track references used during GSP preparation. GSP regulations require that a copy of every reference used in GSP preparation that is not easily available be included with the GSP submission. This task will collect copies of all references used in the report for compilation and submittal along with the completed GSP.

#### *Subtask 9.3 – Administrative Draft*

CGSA will prepare an administrative draft of the GSP that includes the GSP's supporting appendices. The administrative draft will be reviewed by the CGSA partners' staff and other stakeholders involved in the GSP development process. After comments on the administrative draft are received, they will be compiled and a response to comments will be prepared. Comments incorporated into the GSP will be used to prepare the public draft of the GSP.

#### *Subtask 9.4 – Public Draft and Final*

CGSA will prepare a public draft of the GSP and the GSP's supporting documentation. The public draft GSP will be circulated for public review and comment. After comments on the public draft are received, they will be

compiled and a response to comments document will be prepared. Comments incorporated into the GSP will be used to prepare the final draft of the GSP. Once finalized, the GSP will be adopted by the GSA.

### Task 9 Deliverables

- GSP outline and style guidance
- Administrative Draft of the GSP
- Reference compilation
- Response to comments
- Public Draft of the GSP
- Response to comments
- Final GSP

### Task 10: Outreach and Communication

Successful implementation of the GSP will depend on efficient outreach, communication, and facilitation between the GSA and locals/stakeholders. Stakeholder engagement includes efforts made to understand stakeholder concerns and involve stakeholders in the activities and decision-making process.

#### *Subtask 10.1 – Implement Stakeholder Engagement Strategy*

Work under this task will implement the Stakeholder Engagement Strategy prepared under Task 1. All outreach performed will be documented and compiled for submittal with the GSP as required by regulation. It is anticipated that the following outreach will need to be conducted as part of development of the GSP:

- Meetings
  - CGSA advisory committee,
  - State agencies
  - Local agencies
  - Non-governmental organizations
- Public meetings
- Maintenance of a website
- Flyers/handouts
- Teleconferences

#### *Subtask 10.2 – Outreach and Communication Documentation*

This task documents the outreach and communication performed during GSP development. Documentation will include identification of participants, the nature of consultation with parties affected by the GSP, a list of public meetings held where the GSP was discussed or considered by the GSA, and a collection and posting of comments received regarding the GSP. Meeting summaries and/or presentations will be compiled and included in an appendix of the GSP. This task will also be used to maintain the interested parties' list that documents people or entities who express interest in the GSP.

### Task 10 Deliverables

- Implementation of the Stakeholder Engagement Strategy Plan
- Meeting materials, agendas, and meeting summaries for each meeting
- Other outreach materials as described in the plan
- Compilation of all outreach performed for submittal with GSP

## Task 11: Project Management

Under this task, CGSA will plan and track significant activities leading to development of the Cuyama Basin GSP. This task includes QC activities, grant management, and program management; and conference calls and in-person meetings will be used to perform this coordination as needed

A QC approach will be developed that identifies how GSP components will be reviewed and checked for accuracy and completion. The approach will then be used during implementation to perform QC activities.

Grant management will include the preparation of quarterly reports and invoices to be sent to DWR throughout the project. Grant management also includes regular communication with DWR's grant manager.

Program management will consider the evolving landscape of SGMA as regulatory considerations, political activities, and changes in other conditions affect GSP development. Program management will be used to guide the GSP development process and to perform change management to the scope of work as necessary. Program management will also include coordination among the GSP development team and will include managing subcontractors, tracking and preparing invoices, and tracking project progress.

### Task 11 Deliverables

- Documentation of QA/QC activities
- Quarterly progress reports and invoices
- Coordination activities as needed

**Cuyama Groundwater Sustainability Plan Workplan Budget DRAFT**

Tasks		Labor								ODCs		Total		
Task #	Task	PM	QA/QC	Modeling	Data Management	GSP Lead	Outreach	Staff/GIS	Word Processing	Total Hours	Total Labor Costs (1)	ODCs	Total ODCs (3)	Total Fee
<b>1</b>	<b>1 - GSP &amp; Stakeholder Strategy Development</b>													
1	Initiate Work Plan for GSP	12	2			40		8	4	66	\$15,586		\$0	\$15,586
1	Stakeholder Engagement Strategy	12	2				40	8	4	66	\$14,506		\$0	\$14,506
	Subtotal Task 1:	24	4	0	0	40	40	16	8	132	\$30,092	\$0	\$0	\$30,092
<b>2</b>	<b>2 - DMS, Data Collection, Plan Review</b>													
2.1	Data Management System	8	20		60			120	2	210	\$44,538		\$0	\$44,538
2.2	Data Collection, General Plan Review	8	4		20	20		60	2	114	\$24,158		\$0	\$24,158
	Subtotal Task 2:	16	24	0	80	20	0	180	4	324	\$68,696	\$0	\$0	\$68,696
<b>3</b>	<b>3 - Plan Area, HCM, Groundwater Conditions</b>													
3.1	Description of Plan Area	8	2			32		40	2	84	\$18,016		\$0	\$18,016
3.2	Develop HCM	8	2			32		48	2	92	\$19,440		\$0	\$19,440
3.3	Groundwater Conditions	8	2			24		52	2	88	\$18,160		\$0	\$18,160
	Subtotal Task 3:	24	6	0	0	88	0	140	6	264	\$55,616	\$0	\$0	\$55,616
<b>4</b>	<b>4 - Basin Model and Water Budget</b>													
4.1	Assessment of Existing Model	8	16	60				100		184	\$37,968		\$0	\$37,968
4.2	Update CUVHM Model	8	16	80				200		304	\$60,208		\$0	\$60,208
4.3	Historical and Current Water Budget	8	16	60				100		184	\$37,968		\$0	\$37,968
4.4	Water Budget Forecast	8	16	40				120		184	\$37,088		\$0	\$37,088
4.5	Water Budget Section of GSP	8	8	32				60	2	110	\$22,482		\$0	\$22,482
4.6	Modeling Analysis Support	8	16	60				100		184	\$37,968		\$0	\$37,968
4.7	Modeling TM	8	8	24				80	2	122	\$24,266		\$0	\$24,266
	Subtotal Task 4:	56	96	356	0	0	0	760	4	1272	\$257,948	\$0	\$0	\$257,948
<b>5</b>	<b>5 - Establish Basin Sustainability Criteria</b>													
5.1	Identify Sustainability Goal	8	2			8	4		1	23	\$5,703		\$0	\$5,703
5.2	Establish Undesirable Results	8	2			16	8	32	2	68	\$14,384		\$0	\$14,384
5.3	Mgmt Areas and Representative Monitoring	8	2			24		32	2	68	\$14,600		\$0	\$14,600
5.4	Develop Minimum Thresholds	8	2			16		40		66	\$13,822		\$0	\$13,822
5.5	Dev. Meas. Objectives, Margin of Flex.	8	2			16		40		66	\$13,822		\$0	\$13,822
5.6	Develop Interim Milestones	8	2			16		40		66	\$13,822		\$0	\$13,822
	Subtotal Task 5:	48	12	0	0	96	12	184	5	357	\$76,153	\$0	\$0	\$76,153
<b>6</b>	<b>6 - Monitoring Networks</b>													
6	Establish Monitoring Networks	32	8		24	60		140	4	268	\$57,128		\$0	\$57,128
	Subtotal Task 6:	32	8	0	24	60	0	140	4	268	\$57,128	\$0	\$0	\$57,128
<b>7</b>	<b>7 - Projects and Actions for Sustainability Goals</b>													
7.1	Develop Management Program	16	2			40		60	2	120	\$25,696		\$0	\$25,696
7.2	Projects, Mgt, Actions, Adaptive Mgt. Actions	24	2	20		48		80	2	176	\$37,816		\$0	\$37,816
7.3	Prioritization of Projects & Mgt. Actions	32	2	40		60		100	2	236	\$50,932		\$0	\$50,932
	Subtotal Task 7:	72	6	60	0	148	0	240	6	532	\$114,444	\$0	\$0	\$114,444
<b>8</b>	<b>8 - Groundwater Sustainability Plan Implementation</b>													
8.1	GSP Implementation Schedule, Reporting	4	2			16				22	\$5,638		\$0	\$5,638
8.2	GSP Implementation Costs and Funding	4	2			20		32		58	\$12,330		\$0	\$12,330
8.3	Parties Affected, Effects of UR	4	2			20		32		58	\$12,330		\$0	\$12,330
8.4	Groundwater Model & DMS Planning	4	2	16	16					38	\$9,190		\$0	\$9,190
	Subtotal Task 8:	16	8	16	16	56	0	64	0	176	\$39,488	\$0	\$0	\$39,488
<b>9</b>	<b>9 - GSP Document Development</b>													
9.1	Develop GSP Outline, Style Guidance	2	1			4			4	11	\$2,243		\$0	\$2,243
9.2	Reference Tracking and Storage	2				4		8	16	30	\$4,632		\$0	\$4,632
9.3	Administrative Draft	40	20	16	16	40		80	16	228	\$49,956		\$0	\$49,956
9.4	Public Draft and Final	24	8	4	4	32		60	16	148	\$30,956		\$0	\$30,956
	Subtotal Task 9:	68	29	20	20	80	0	148	52	417	\$87,787	\$0	\$0	\$87,787
<b>10</b>	<b>10 - Outreach and Communication</b>													
10.1	Implem. Stakeholder Engagement Strategy	60	8	24	24	60	60	60	16	312	\$70,244		\$0	\$70,244
10.2	Outreach & Communication Documentation	8	2				40		16	66	\$13,278		\$0	\$13,278
	Subtotal Task 10:	68	10	24	24	60	100	60	32	378	\$83,522	\$0	\$0	\$83,522
<b>11</b>	<b>11 - Project Management</b>													
11	Project Management	80	24	8	8	24			24	168	\$40,624		\$0	\$40,624
	Subtotal Task 11:	80	24	8	8	24	0	0	24	168	\$40,624	\$0	\$0	\$40,624
	<b>TOTAL</b>	<b>504</b>	<b>227</b>	<b>484</b>	<b>172</b>	<b>672</b>	<b>152</b>	<b>1932</b>	<b>145</b>	<b>4288</b>	<b>\$911,498</b>	<b>\$0</b>	<b>\$0</b>	<b>\$911,498</b>





# Cuyama Basin Groundwater Sustainability Agency Cuyama Basin SGMA Support Project Scope of Work DRAFT

## Background

The California Department of Water Resources (DWR) has identified the Cuyama Basin as a medium priority basin in critical overdraft. Under the Sustainable Groundwater Management Act (SGMA), a Groundwater Sustainability Plan (GSP) that addresses the Cuyama Basin must be prepared and submitted to DWR by January 2020. To improve the ability of the basin to manage its groundwater sustainably, it is crucial for the recently formed Cuyama Groundwater Sustainability Agency (GSA) to gain a better understanding of the current basin status, along with assessing a range of actions to maximize opportunities for sustainable management while avoiding undesirable results.

This project will help the Cuyama GSA prepare a monitoring and adaptive management program that will support a strong GSP. These tasks aim to gain a more comprehensive understanding of the hydrologic system within the basin by assessing potential supply sources, and by identifying and reducing gaps in monitoring within the basin. Each task seeks to evaluate existing efforts and improve them by reducing gaps in data and ensuring consistent data collection in the future. This project contains three major tasks: a water supply feasibility study, which will assess sustainable and reliable water sources; an expansion of the groundwater monitoring network, which will improve understanding of groundwater conditions within the basin; and a surface water monitoring program to gain an understanding of potential opportunities to develop additional local supplies to augment the existing groundwater supplies.

## Scope of Work

### Task 1: Water Supply Feasibility Study

This task is dedicated to recognizing the Cuyama Basin is critically over-drafted and the communities who rely on groundwater from the basin need long-term, stable water supplies to augment the current groundwater supplies. This task will identify and assess projects that will be sustainable and reliable sources of water. This effort will identify existing and potential projects and includes an alternatives analysis to evaluate their inclusion in the Cuyama Basin GSP as options to improve supply reliability. This task will assess up to six potential projects focused on contributing toward a long-term water supply solution for the Cuyama Basin.

#### *Task 1.1 – Stakeholder Coordination and Input*

Four meetings will be held throughout the duration of the task to establish collaboration with stakeholders, solicit input on potential projects to evaluate, and review recommendations for advancing the more promising of the identified projects. Stakeholders are expected to include, at a minimum, the Cuyama GSA, which includes the Cuyama Basin Irrigation District, the Cuyama Community Services District (CSD), and Kern, Santa Barbara, San Luis Obispo and Ventura counties; and its newly formed Advisory Committee. Objectives for each meeting are as follows:

- **Meeting #1:** Explain overall task objectives and goals. Solicit projects from stakeholders for analysis.
- **Meeting #2:** Discuss and refine the analysis approach for reviewing projects identified by stakeholders.

- **Meeting #3:** Present results from project analysis efforts. Discuss and refine the project prioritization process, including quantitative scoring, key benefits, and desired results.
- **Meeting #4:** Present priority projects and receive comments on results of study and draft Technical Memorandum.

#### *Task 1.2 – Solicit and Collect Potential Projects*

This task involves compiling potential projects to analyze and prioritize from stakeholders. This task includes developing project descriptions, maps, order of magnitude cost estimates, and other relevant documentation as needed to accurately describe each option. This task will culminate in a list of projects to be further analyzed and prioritized. This task will include up to three meetings with potential project partners such as oil and gas companies and Santa Maria Valley Water Conservation District. Initial projects that could be included in the alternatives analyses include:

- Capture of local stream flood flows for recharge of the groundwater basin
- Upstream capture, diversion, and recharge of Twitchell Reservoir spill flows
- Exchange of purchased imported water via the Central Coast Aqueduct with Cuyama River flows tributary to Twitchell Reservoir
- Purchase or transfer and importation of a new supply
- Recycled oil and gas operations produced water
- Conservation programs
- Development of a groundwater storage and recovery

#### *Task 1.3 – Conduct Project Analyses*

This task will perform analyses to identify the benefits and limitations of each project option. Analyses will include evaluation of water supplies added (average yield, reliability, and variability), estimated project and unit water costs, project schedule, potential challenges, and water quality components.

#### *Task 1.4 – Project Prioritization*

This task will prioritize the projects under evaluation. Prioritization methodology will be discussed with stakeholders and a ranking system will be developed. The prioritization will consider, at minimum, water supply, water quality improvement, environmental components, and regional and economic benefits. Once the prioritization process is established, projects will be scored and ranked. Projects meeting the most objectives and ranking the highest will be recommended for implementation under the GSP.

#### *Task 1.5 – Prepare Technical Memorandum*

Findings from the project collection, analysis, and prioritization process will be detailed in a Technical Memorandum (TM). The TM will document the feasibility study and will identify the top-scoring projects to be implemented and will include an implementation strategy.

#### **Task 1 Deliverables**

- Compiled list of proposed projects

- List of analyzed projects
- List of prioritized projects
- Draft and Final Technical Memorandum

### Task 1 Assumptions

- Up to 6 projects will be reviewed as part of the study
- Stakeholders will provide suggestions for potential projects
- Four coordination meetings (in person or via conference call)

### Task 2: Groundwater Monitoring Network Expansion

This task will improve existing groundwater elevation monitoring within the Cuyama Basin by expanding the groundwater level monitoring network. This task includes performing a data gap analysis, identifying existing wells for inclusion, obtaining permission from landowners to add their wells to the monitoring network, and installing monitoring equipment and providing monitoring protocols in selected wells.

#### *Task 2.1 – Perform Data Gap Analysis*

The existing monitoring network will be reviewed to identify areas in the basin that are not adequately monitored. A data gap analysis will be based on the spatial extent and screened intervals of existing monitoring wells. Areas without either adequate spatial density or wells screened in primary aquifers will be identified as a data gap. Results of the data gap analysis will narrow the area to explore for existing wells to include in the monitoring network.

#### *Task 2.2 – Identify Existing Wells*

Once areas lacking in groundwater monitoring data are identified, DWR well completion reports will be collected and reviewed to identify private wells within data gap areas to potentially add to the network. Wells will be identified based on their proximity to an identified data gap, total and screened depths, geology, and other factors. A list of new potential monitoring wells will be generated. Wells currently monitored on a bi-annual basis will be evaluated and considered for installation of continuous monitoring equipment.

#### *Task 2.3 – Obtain Permission from Well Owners*

Individual well owners will be contacted to discuss adding their well to the monitoring grid. Discussion will include the location, depth, accessibility, future maintenance, use, and other factors related to monitoring. Well owners will be asked to consent to monitoring through a formal consent form to document the owner's permission to add their well within the monitoring network. Signed consent forms will be filed with the GSA.

This task will include contacting well owners by mail, phone, and in person at the monitoring well site to establish and document monitoring information.

#### *Task 2.4 – Install Equipment and Provide Monitoring Protocols*

Wells that receive permission to be included within the monitoring network will be added to the water level monitoring grid. This task will prepare monitoring protocols for implementation by the Cuyama GSA. Selected monitoring wells will be equipped with monitoring equipment consisting of continuous, telemetered monitoring

sensors where recommended and appropriate. The focus for installation locations will be to fill identified data gaps in areas of intensive groundwater use identified under Task 2.2.

Prior to engaging in field work, a Health and Safety Field Plan will be prepared to document potential hazards, necessary trainings, and establish a communication plan and emergency procedures while in the field. Once the plan is prepared, a meeting will be held to review the plan, travel logistics, packing list, personal safety and security concerns, and any remaining training needs.

#### *Task 2.5 – Prepare Technical Memorandum*

The results of the groundwater monitoring network expansion will be summarized in a TM. The TM will identify wells selected and authorized to participate in the monitoring well network and will include maps, monitoring protocols, and document-installed equipment.

#### *Task 2.6 – Stakeholder Coordination*

Two meetings will be held throughout the duration of the task to promote collaboration across stakeholders, discuss outstanding items, and generate action items for advancing the project. Objectives for each meeting are as follows:

- **Meeting #1:** Discuss findings from data gap analysis.
- **Meeting #2:** Share results of well identification and strategy to obtain owner permission.

#### **Task 2 Deliverables**

- Health and Safety Plan
- Compilation of well completion reports for wells selected for monitoring
- GIS files for new monitoring well locations (and existing elevation data, where available)
- Signed well owner consent forms
- Draft and Final Technical Memorandum

#### **Task 2 Assumptions**

- No new wells will be drilled; only existing wells will be added to the network
- Up to 20 wells will be added to the monitoring grid
- Two coordination meetings (in person or via conference call)

### **Task 3: Surface Water Monitoring Program**

This task will improve surface water monitoring within Cuyama Basin by increasing the number of stream gages to improve understanding of surface water conditions in the Basin. Activities performed under this task will assist in identifying surface water inflows and how surface water supplies move through the basin. Elements of this task include identifying viable surface water bodies (including ephemeral and intermittent creeks, fully flowing creeks, and the Cuyama River), identification of monitoring sites, and installation of gages in recommended locations.

### *Task 3.1 – Identify Watersheds and Monitoring Locations*

This task will gather and review existing data appropriate to development of the program including maps, geographic information system (GIS) data, analytical tools, related plans, permits, and storm water management information. This task will also review and identify watershed and sub-watershed planning boundaries to characterize the land use, public agency and water utility boundaries, surface water resources, and water quality priorities. This process will help identify areas lacking monitoring (i.e. stream gages) and plan strategic monitoring points to improve understanding of surface water regimes at a basin-scale.

This task will also interview local water users to gain an improved understanding of stream conditions, as local water users are often very knowledgeable about local conditions. Additionally, land owners will be contacted to discuss willingness to grant property access for any new stream gages.

### *Task 3.2 – Recommend Monitoring Methods*

This task will review and document surface water monitoring methods available for use in the basin. Methods will be reviewed for accuracy, cost of installation, maintenance needed, and other factors as identified. The most appropriate monitoring methods available for use in the Cuyama Basin will be recommended for installation during GSP implementation.

### *Task 3.3 – Prepare Technical Memorandum*

Recommended monitoring locations and methodologies will be documented in a TM. The TM will describe the location, nature, and challenges related to the recommended locations of new stream gages to be added to the surface water monitoring network to develop a broader monitoring area.

### *Task 3.4 – Stakeholder Coordination*

Two meetings will be held throughout the duration of the task to promote collaboration across stakeholders, discuss outstanding items, and generate action items for advancing the project. Objectives for each meeting are as follows:

- **Meeting #1:** Identify known watersheds and monitoring areas; gather stakeholder input on data gaps.
- **Meeting #2:** Discuss recommended monitoring locations and methods

### **Task 3 Deliverables**

- GIS files for new gage locations
- Draft and Final Technical Memorandum

### **Task 3 Assumptions**

- Attendance at two coordination meetings (in person or via conference call)

## **Task 4: Project Management**

This task includes project coordination, project management, and quality control (QC) activities on all deliverables. This task also includes coordination and communication with DWR, the Cuyama GSA, and other relevant agencies, along with budget tracking and submittal of progress reports and invoices.

#### *Task 4.1 – Grant Management and Administration*

Grant management and administration will be performed to ensure compliance with the grant requirements and agreements. Activities performed under this task include preparation and submittal of supporting grant documents and coordination with DWR and partnering agencies.

Under this task, progress reports detailing work will be prepared during the reporting period and will include sufficient information for DWR program manager to understand and include backup documentation submitted with invoices.

In addition, a Grant Completion Report will be prepared and submitted to the DWR Project Manager for comments and review no later than 90 days after work completion. Using comments from the DWR Project Manager, the Final Grant Completion Report will be prepared and presented.

#### *Task 4.2 – Quality Control*

QC will be performed for all deliverables and work products. An independent review of each project component will be performed prior to submittal.

#### *Task 4.3 – Project Management*

This task will include all other management activities related to the project, including coordination, invoice development, and creation of back-up documentation. Budget and schedule tracking will also be performed under this task.

#### **Task 4 Deliverables**

- Project Progress Reports and Invoices
- Grant Reporting Documentation
- Draft and Final Grant Completion Report
- Monthly coordination teleconferences
- Documentation of QC activities
- Coordination activities, as needed

# Cuyama Basin Groundwater Sustainability Agency

## Category 1 Budget DRAFT

Tasks	Labor					Total Hours	Total Labor Costs	ODCs	Total Fee
	Principal-in-Charge	Project Manger	Project Engineer	Graphics / GIS	Admin / Word Processing				
<b>Task 1. Water Supply Feasibility Study</b>									
1.1 Stakeholder Coordination	32	60	32			124	\$31,000	\$0	\$31,000
1.2 Solicit and Collect Potential Projects	4	20	30	10		64	\$13,700	\$0	\$13,700
1.3 Conduct Project Analysis	4	16	60	10		90	\$18,700	\$0	\$18,700
1.4 Project Prioritization	4	20	40			64	\$14,200	\$0	\$14,200
1.5 Prepare Technical Memorandum	4	20	60	10	4	98	\$20,100	\$0	\$20,100
<b>Subtotal Task 1:</b>	<b>48</b>	<b>136</b>	<b>222</b>	<b>30</b>	<b>4</b>	<b>440</b>	<b>\$97,700</b>	<b>\$0</b>	<b>\$97,700</b>
<b>Task 2. Groundwater Monitoring Network Expansion</b>									
2.1 Perform Data Gap Analysis	4	32	60	8		104	\$10,660	\$0	\$10,660
2.2 Identify Wells	4	16	40	8		68	\$6,640	\$0	\$6,640
2.3 Obtain Permission from Well Owners	4	16	80			100	\$5,480	\$2,000	\$7,480
2.4 Install Equipment and Provide Monitoring Protocols	4	32	80			116	\$9,480	\$20,000	\$29,480
2.5 Prepare Technical Memorandum	10	32	40	8	4	94	\$12,840	\$0	\$12,840
2.6 Stakeholder Coordination	16	16	16			48	\$9,016	\$0	\$9,016
<b>Subtotal Task 2:</b>	<b>42</b>	<b>144</b>	<b>316</b>	<b>24</b>	<b>4</b>	<b>530</b>	<b>\$54,116</b>	<b>\$22,000</b>	<b>\$67,100</b>
<b>Task 3. Surface Water Monitoring Program</b>									
3.1 Identify Watersheds / Monitoring Locations, Partner Mtgs	24	54	80	10		168	\$38,200	\$0	\$38,200
3.2 Recommend Monitoring Methods	4	10	40			54	\$11,700	\$0	\$11,700
3.3 Prepare Technical Memorandum	10	20	40	10		80	\$17,500	\$0	\$17,500
3.4 Stakeholder Coordination	16	16	16			48	\$12,000	\$0	\$12,000
<b>Subtotal Task 3:</b>	<b>54</b>	<b>100</b>	<b>176</b>	<b>20</b>	<b>0</b>	<b>350</b>	<b>\$79,400</b>	<b>\$0</b>	<b>\$67,400</b>
<b>Task 4. Project Management</b>									
4.1 Grant Management and Administration	8	32			40	80	\$14,400	\$0	\$14,400
4.2 QA/QC	4	4				8	\$2,200	\$0	\$2,200
4.3 Program Management	10	20				30	\$8,000	\$0	\$8,000
<b>TOTAL</b>	<b>166</b>	<b>436</b>	<b>714</b>	<b>74</b>	<b>48</b>	<b>1968</b>	<b>\$255,816</b>	<b>\$22,000</b>	<b>\$256,800</b>

Cuyama Basin Category 1 Project Schedule

Task	Sub task	Activities	Year		2018												2019																																										
			Month	Week	January			February			March			April			May			June			July			August			September			October			November			December																					
					1	2	3	4	5	1	2	3	4	1	2	3	4	5	1	2	3	4	1	2	3	4	5	1	2	3	4	5	1	2	3	4	5	1	2	3	4	5	1	2	3	4	5	1	2	3	4	5	1	2	3	4	5	1	2
1		<b>Task 1 - Water Supply Feasibility Study</b>																																																									
1	1.1	Stakeholder Coordination																																																									
1	1.2	Solicit and Collect Potential Projects																																																									
1	1.3	Conduct Project Analysis																																																									
1	1.4	Project Prioritization																																																									
1	1.5	Prepare Technical Memorandum																																																									
2		<b>Task 2 - Groundwater Monitoring Network</b>																																																									
2	2.1	Perform Data Gap Analysis																																																									
2	2.2	Identify Wells																																																									
2	2.3	Obtain Permission from Well Owners																																																									
2	2.4	Install Equipment and Provide Monitoring Protocols																																																									
2	2.5	Prepare Technical Memorandum																																																									
2	2.6	Stakeholder Coordination																																																									
3		<b>Task 3 - Surface Water Monitoring</b>																																																									
3	3.1	Identify Watersheds and Monitoring Areas																																																									
3	3.2	Recommend Monitoring Methods																																																									
3	3.3	Prepare Technical Memorandum																																																									
3	3.4	Stakeholder Coordination																																																									
4		<b>Task 4 - Grant Management and Administration</b>																																																									
4	4.1	Grant Management and Administration																																																									
4	4.2	QA/QC																																																									
4	4.3	Program Management																																																									



**Cuyama Basin Groundwater Sustainability Agency Advisory Committee**  
**DATE: October 16, 2017**

**Agenda Item #5: Ralph M. Brown Act material**

# Open & Public V

A GUIDE TO THE RALPH M. BROWN ACT

REVISED APRIL 2016



AGENDA ITEM

1. PUBLIC COMMENT: The City Council values your comments; however, pursuant to the Brown Act, Council cannot take action on items not listed on the posted agenda. The public comment period is limited to 20 minutes, with 2 minutes allotted for each speaker. This public comment period is to address the City Council on Consent Calendar items, other agenda items (if the member of the public cannot be present at the time the item is considered) or items of genera...

CURRENT SPEAKER: Larry Block

## ACKNOWLEDGEMENTS

The League thanks the following individuals for their work on this publication:

### **Brown Act Committee**

Michael Jenkins, Committee Chair  
*City Attorney, Hermosa Beach, Rolling Hills and West Hollywood*

Michael W. Barrett  
*City Attorney, Napa*

Damien Brower  
*City Attorney, Brentwood*

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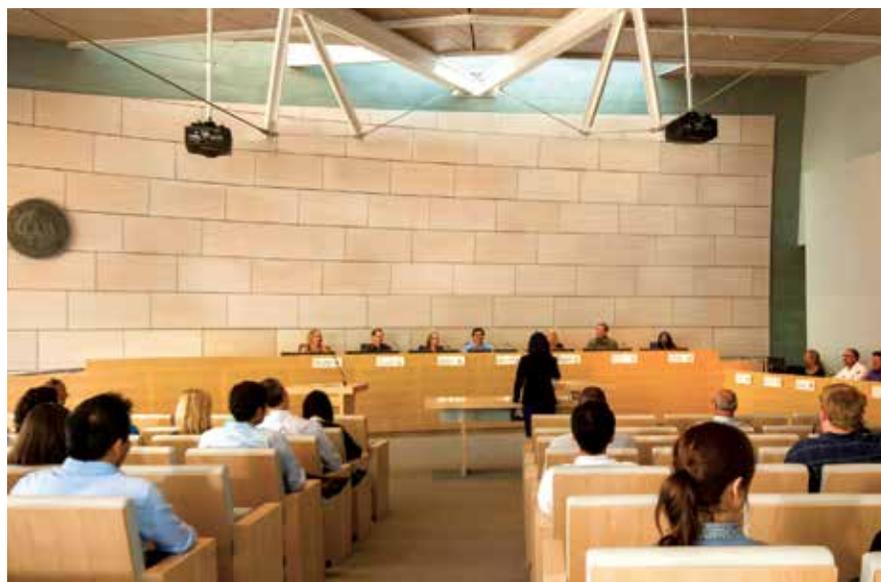
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# Open & Public V

A GUIDE TO THE RALPH M. BROWN ACT

REVISED APRIL 2016

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# Chapter 1

## IT IS THE PEOPLE’S BUSINESS

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# Chapter 1

## IT IS THE PEOPLE'S BUSINESS



### The right of access

Two key parts of the Brown Act have not changed since its adoption in 1953. One is the Brown Act's initial section, declaring the Legislature's intent:

*"In enacting this chapter, the Legislature finds and declares that the public commissions, boards and councils and the other public agencies in this State exist to aid in the conduct of the people's business. It is the intent of the law that their actions be taken openly and that their deliberations be conducted openly."*

*"The people of this State do not yield their sovereignty to the agencies which serve them. The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may retain control*

*over the instruments they have created."*<sup>1</sup>

The people reconfirmed that intent 50 years later in the November 2004 election by adopting Proposition 59, amending the California Constitution to include a public right of access to government information:

*"The people have the right of access to information concerning the conduct of the people's business, and, therefore, the meetings of public bodies and the writings of public officials and agencies shall be open to public scrutiny."*<sup>2</sup>

The Brown Act's other unchanged provision is a single sentence:

*"All meetings of the legislative body of a local agency shall be open and public, and all persons shall be permitted to attend any meeting of the legislative body of a local agency, except as otherwise provided in this chapter."*<sup>3</sup>

That one sentence is by far the most important of the entire Brown Act. If the opening is the soul, that sentence is the heart of the Brown Act.

### Broad coverage

The Brown Act covers members of virtually every type of local government body, elected or appointed, decision-making or advisory. Some types of private organizations are covered, as are newly-elected members of a legislative body, even before they take office.

Similarly, meetings subject to the Brown Act are not limited to face-to-face gatherings. They also include any communication medium or device through which a majority of a legislative body

**PRACTICE TIP:** The key to the Brown Act is a single sentence. In summary, all meetings shall be **open and public** except when the Brown Act authorizes otherwise.

discusses, deliberates or takes action on an item of business outside of a noticed meeting. They include meetings held from remote locations by teleconference.

New communication technologies present new Brown Act challenges. For example, common email practices of forwarding or replying to messages can easily lead to a serial meeting prohibited by the Brown Act, as can participation by members of a legislative body in an internet chatroom or blog dialogue. Communicating during meetings using electronic technology (such as laptop computers, tablets, or smart phones) may create the perception that private communications are influencing the outcome of decisions; some state legislatures have banned the practice. On the other hand, widespread cablecasting and web streaming of meetings has greatly expanded public access to the decision-making process.

### **Narrow exemptions**

The express purpose of the Brown Act is to assure that local government agencies conduct the public's business openly and publicly. Courts and the California Attorney General usually broadly construe the Brown Act in favor of greater public access and narrowly construe exemptions to its general rules.<sup>4</sup>

Generally, public officials should think of themselves as living in glass houses, and that they may only draw the curtains when it is in the public interest to preserve confidentiality. Closed sessions may be held only as specifically authorized by the provisions of the Brown Act itself.

The Brown Act, however, is limited to meetings among a majority of the members of multi-member government bodies when the subject relates to local agency business. It does not apply to independent conduct of individual decision-makers. It does not apply to social, ceremonial, educational, and other gatherings as long as a majority of the members of a body do not discuss issues related to their local agency's business. Meetings of temporary advisory committees — as distinguished from standing committees — made up solely of less than a quorum of a legislative body are not subject to the Brown Act.

The law does not apply to local agency staff or employees, but they may facilitate a violation by acting as a conduit for discussion, deliberation, or action by the legislative body.<sup>5</sup>

The law, on the one hand, recognizes the need of individual local officials to meet and discuss matters with their constituents. On the other hand, it requires — with certain specific exceptions to protect the community and preserve individual rights — that the decision-making process be public. Sometimes the boundary between the two is not easy to draw.

### **Public participation in meetings**

In addition to requiring the public's business to be conducted in open, noticed meetings, the Brown Act also extends to the public the right to participate in meetings. Individuals, lobbyists, and members of the news media possess the right to attend, record, broadcast, and participate in public meetings. The public's participation is further enhanced by the Brown Act's requirement that a meaningful agenda be posted in advance of meetings, by limiting discussion and action to matters listed on the agenda, and by requiring that meeting materials be made available.

Legislative bodies may, however, adopt reasonable regulations on public testimony and the conduct of public meetings, including measures to address disruptive conduct and irrelevant speech.

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**PRACTICE TIP:** Think of the government's house as being made of glass. The curtains may be drawn only to further the public's interest. A local policy on the use of laptop computers, tablets, and smart phones during Brown Act meetings may help avoid problems.

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### Controversy

Not surprisingly, the Brown Act has been a source of confusion and controversy since its inception. News media and government watchdogs often argue the law is toothless, pointing out that there has never been a single criminal conviction for a violation. They often suspect that closed sessions are being misused.

Public officials complain that the Brown Act makes it difficult to respond to constituents and requires public discussions of items better discussed privately — such as why a particular person should not be appointed to a board or commission. Many elected officials find the Brown Act inconsistent with their private business experiences. Closed meetings can be more efficient; they eliminate grandstanding and promote candor. The techniques that serve well in business — the working lunch, the sharing of information through a series of phone calls or emails, the backroom conversations and compromises — are often not possible under the Brown Act.

As a matter of public policy, California (along with many other states) has concluded that there is more to be gained than lost by conducting public business in the open. Government behind closed doors may well be efficient and business-like, but it may be perceived as unresponsive and untrustworthy.

**PRACTICE TIP:** Transparency is a foundational value for ethical government practices. The Brown Act is a floor, not a ceiling, for conduct.

### Beyond the law — good business practices

Violations of the Brown Act can lead to invalidation of an agency's action, payment of a challenger's attorney fees, public embarrassment, even criminal prosecution. But the Brown Act is a floor, not a ceiling for conduct of public officials. This guide is focused not only on the Brown Act as a minimum standard, but also on meeting practices or activities that, legal or not, are likely to create controversy. Problems may crop up, for example, when agenda descriptions are too brief or vague, when an informal get-together takes on the appearance of a meeting, when an agency conducts too much of its business in closed session or discusses matters in closed session that are beyond the authorized scope, or when controversial issues arise that are not on the agenda.

The Brown Act allows a legislative body to adopt practices and requirements for greater access to meetings for itself and its subordinate committees and bodies that are more stringent than the law itself requires.<sup>6</sup> Rather than simply restate the basic requirements of the Brown Act, local open meeting policies should strive to anticipate and prevent problems in areas where the Brown Act does not provide full guidance. As with the adoption of any other significant policy, public comment should be solicited.



A local policy could build on these basic Brown Act goals:

- A legislative body's need to get its business done smoothly;
- The public's right to participate meaningfully in meetings, and to review documents used in decision-making at a relevant point in time;
- A local agency's right to confidentially address certain negotiations, personnel matters, claims and litigation; and
- The right of the press to fully understand and communicate public agency decision-making.

An explicit and comprehensive public meeting and information policy, especially if reviewed periodically, can be an important element in maintaining or improving public relations. Such a policy exceeds the absolute requirements of the law — but if the law were enough, this guide would be unnecessary. A narrow legalistic approach will not avoid or resolve potential controversies. An agency should consider going beyond the law, and look at its unique circumstances and determine if there is a better way to prevent potential problems and promote public trust. At the very least, local agencies need to think about how their agendas are structured in order to make Brown Act compliance easier. They need to plan carefully to make sure public participation fits smoothly into the process.

## Achieving balance

The Brown Act should be neither an excuse for hiding the ball nor a mechanism for hindering efficient and orderly meetings. The Brown Act represents a balance among the interests of constituencies whose interests do not always coincide. It calls for openness in local government, yet should allow government to function responsively and productively.

There must be both adequate notice of what discussion and action is to occur during a meeting as well as a normal degree of spontaneity in the dialogue between elected officials and their constituents.

The ability of an elected official to confer with constituents or colleagues must be balanced against the important public policy prohibiting decision-making outside of public meetings.

In the end, implementation of the Brown Act must ensure full participation of the public and preserve the integrity of the decision-making process, yet not stifle government officials and impede the effective and natural operation of government.

## Historical note

In late 1951, *San Francisco Chronicle* reporter Mike Harris spent six weeks looking into the way local agencies conducted meetings. State law had long required that business be done in public, but Harris discovered secret meetings or caucuses were common. He wrote a 10-part series on “Your Secret Government” that ran in May and June 1952.

Out of the series came a decision to push for a new state open meeting law. Harris and Richard (Bud) Carpenter, legal counsel for the League of California Cities, drafted such a bill and Assembly Member Ralph M. Brown agreed to carry it. The Legislature passed the bill and Governor Earl Warren signed it into law in 1953.

The Ralph M. Brown Act, known as the Brown Act, has evolved under a series of amendments and court decisions, and has been the model for other open meeting laws — such as the Bagley-Keene Act, enacted in 1967 to cover state agencies.

Assembly Member Brown is best known for the open meeting law that carries his name. He was elected to the Assembly in 1942 and served 19 years, including the last three years as Speaker. He then became an appellate court justice.

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**PRACTICE TIP:** The Brown Act should be viewed as a tool to facilitate the business of local government agencies. Local policies that go beyond the minimum requirements of law may help instill public confidence and avoid problems.

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**ENDNOTES:**

- 1 California Government Code section 54950
- 2 California Constitution, Art. 1, section 3(b)(1)
- 3 California Government Code section 54953(a)
- 4 This principle of broad construction when it furthers public access and narrow construction if a provision limits public access is also stated in the amendment to the State's Constitution adopted by Proposition 59 in 2004. California Constitution, Art. 1, section 3(b)(2).
- 5 California Government Code section 54952.2(b)(2) and (c)(1); *Wolfe v. City of Fremont* (2006) 144 Cal.App.4th 533
- 6 California Government Code section 54953.7

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# Chapter 2

## LEGISLATIVE BODIES

What is a “legislative body” of a local agency? ..... 12

What is not a “legislative body” for purposes of the Brown Act? ..... 14

# Chapter 2

## LEGISLATIVE BODIES

*The Brown Act applies to the legislative bodies of local agencies. It defines “legislative body” broadly to include just about every type of decision-making body of a local agency.<sup>1</sup>*



### What is a “legislative body” of a local agency?

A “legislative body” includes:

- **The “governing body”** of a local agency<sup>2</sup> and certain of its subsidiary bodies; “or any other local body created by state or federal statute.”<sup>2</sup> This includes city councils, boards of supervisors, school boards and boards of trustees of special districts. A “local agency” is any city, county, city and county, school district, municipal corporation, successor agency to a redevelopment agency, district, political subdivision or other local public agency.<sup>3</sup> A housing authority is a local agency under the Brown Act even though it is created by and is an agent of the state.<sup>4</sup> The California Attorney General has opined that air pollution control districts and regional open space districts are also covered.<sup>5</sup> Entities created pursuant to joint powers agreements are also local agencies within the meaning of the Brown Act.<sup>6</sup>

- **Newly-elected members** of a legislative body who have not yet assumed office must conform to the requirements of the Brown Act as if already in office.<sup>7</sup> Thus, meetings between incumbents and newly-elected members of a legislative body, such as a meeting between two outgoing members and a member-elect of a five-member body, could violate the Brown Act.

**Q.** On the morning following the election to a five-member legislative body of a local agency, two successful candidates, neither an incumbent, meet with an incumbent member of the legislative body for a celebratory breakfast. Does this violate the Brown Act?

**A.** *It might, and absolutely would if the conversation turns to agency business. Even though the candidates-elect have not officially been sworn in, the Brown Act applies. If purely a social event, there is no violation but it would be preferable if others were invited to attend to avoid the appearance of impropriety.*

- **Appointed bodies** — whether permanent or temporary, decision-making or advisory — including planning commissions, civil service commissions and other subsidiary committees, boards, and bodies. Volunteer groups, executive search committees, task forces, and blue ribbon committees created by formal action of the governing body are legislative bodies. When the members of two or more legislative bodies are appointed to serve on an entirely separate advisory group, the resulting body may be subject to the

**PRACTICE TIP:** The prudent presumption is that an advisory committee or task force is subject to the Brown Act. Even if one clearly is not, it may want to comply with the Brown Act. Public meetings may reduce the possibility of misunderstandings and controversy.

Brown Act. In one reported case, a city council created a committee of two members of the city council and two members of the city planning commission to review qualifications of prospective planning commissioners and make recommendations to the council. The court held that their joint mission made them a legislative body subject to the Brown Act. Had the two committees remained separate; and met only to exchange information and report back to their respective boards, they would have been exempt from the Brown Act.<sup>8</sup>

- **Standing committees** of a legislative body, irrespective of their composition, which have either: (1) a continuing subject matter jurisdiction; or (2) a meeting schedule fixed by charter, ordinance, resolution, or formal action of a legislative body.<sup>9</sup> Even if it comprises less than a quorum of the governing body, a standing committee is subject to the Brown Act. For example, if a governing body creates long-term committees on budget and finance or on public safety, those are standing committees subject to the Brown Act. Further, according to the California Attorney General, function over form controls. For example, a statement by the legislative body that the advisory committee “shall not exercise continuing subject matter jurisdiction” or the fact that the committee does not have a fixed meeting schedule is not determinative.<sup>10</sup> “Formal action” by a legislative body includes authorization given to the agency’s executive officer to appoint an advisory committee pursuant to agency-adopted policy.<sup>11</sup>
- The governing body of any **private organization** either: (1) created by the legislative body in order to exercise authority that may lawfully be delegated by such body to a private corporation, limited liability company or other entity; or (2) that receives agency funding and whose governing board includes a member of the legislative body of the local agency appointed by the legislative body as a full voting member of the private entity’s governing board.<sup>12</sup> These include some nonprofit corporations created by local agencies.<sup>13</sup> If a local agency contracts with a private firm for a service (for example, payroll, janitorial, or food services), the private firm is not covered by the Brown Act.<sup>14</sup> When a member of a legislative body sits on a board of a private organization as a private person and is not appointed by the legislative body, the board will not be subject to the Brown Act. Similarly, when the legislative body appoints someone other than one of its own members to such boards, the Brown Act does not apply. Nor does it apply when a private organization merely receives agency funding.<sup>15</sup>

**Q:** The local chamber of commerce is funded in part by the city. The mayor sits on the chamber’s board of directors. Is the chamber board a legislative body subject to the Brown Act?

**A:** *Maybe. If the chamber’s governing documents require the mayor to be on the board and the city council appoints the mayor to that position, the board is a legislative body. If, however, the chamber board independently appoints the mayor to its board, or the mayor attends chamber board meetings in a purely advisory capacity, it is not.*

**Q:** If a community college district board creates an auxiliary organization to operate a campus bookstore or cafeteria, is the board of the organization a legislative body?

**A:** *Yes. But, if the district instead contracts with a private firm to operate the bookstore or cafeteria, the Brown Act would not apply to the private firm.*

- **Certain types of hospital operators.** A lessee of a hospital (or portion of a hospital)

**PRACTICE TIP:** It can be difficult to determine whether a subcommittee of a body falls into the category of a standing committee or an exempt temporary committee. Suppose a committee is created to explore the renewal of a franchise or a topic of similarly limited scope and duration. Is it an exempt temporary committee or a non-exempt standing committee? The answer may depend on factors such as how meeting schedules are determined, the scope of the committee’s charge, or whether the committee exists long enough to have “continuing jurisdiction.”

first leased under Health and Safety Code subsection 32121(p) after January 1, 1994, which exercises “material authority” delegated to it by a local agency, whether or not such lessee is organized and operated by the agency or by a delegated authority.<sup>16</sup>

### What is not a “legislative body” for purposes of the Brown Act?

- A temporary advisory committee composed **solely of less than a quorum** of the legislative body that serves a limited or single purpose, that is not perpetual, and that will be dissolved once its specific task is completed is not subject to the Brown Act.<sup>17</sup> Temporary committees are sometimes called *ad hoc* committees, a term not used in the Brown Act. Examples include an advisory committee composed of less than a quorum created to interview candidates for a vacant position or to meet with representatives of other entities to exchange information on a matter of concern to the agency, such as traffic congestion.<sup>18</sup>
- Groups advisory to a single decision-maker or appointed by staff are not covered. The Brown Act applies only to committees created by formal action of the legislative body and not to committees created by others. A committee advising a superintendent of schools would not be covered by the Brown Act. However, the same committee, if created by formal action of the school board, would be covered.<sup>19</sup>

**Q.** A member of the legislative body of a local agency informally establishes an advisory committee of five residents to advise her on issues as they arise. Does the Brown Act apply to this committee?

**A.** *No, because the committee has not been established by formal action of the legislative body.*

**Q.** During a meeting of the city council, the council directs the city manager to form an advisory committee of residents to develop recommendations for a new ordinance. The city manager forms the committee and appoints its members; the committee is instructed to direct its recommendations to the city manager. Does the Brown Act apply to this committee?

**A.** *Possibly, because the direction from the city council might be regarded as a formal action of the body notwithstanding that the city manager controls the committee.*

- Individual decision makers who are not elected or appointed members of a legislative body are not covered by the Brown Act. For example, a disciplinary hearing presided over by a department head or a meeting of agency department heads are not subject to the Brown Act since such assemblies are not those of a legislative body.<sup>20</sup>
- Public employees, each acting individually and not engaging in collective deliberation on a specific issue, such as the drafting and review of an agreement, do not constitute a legislative body under the Brown Act, even if the drafting and review process was established by a legislative body.<sup>21</sup>
- County central committees of political parties are also not Brown Act bodies.<sup>22</sup>

#### ENDNOTES:

1 *Taxpayers for Livable Communities v. City of Malibu* (2005) 126 Cal.App.4th 1123, 1127

- 2 California Government Code section 54952(a) and (b)
- 3 California Government Code section 54951; Health and Safety Code section 34173(g) (successor agencies to former redevelopment agencies subject to the Brown Act). But see Education Code section 35147, which exempts certain school councils and school site advisory committees from the Brown Act and imposes upon them a separate set of rules.
- 4 *Torres v. Board of Commissioners of Housing Authority of Tulare County* (1979) 89 Cal.App.3d 545, 549-550
- 5 71 Ops.Cal.Atty.Gen. 96 (1988); 73 Ops.Cal.Atty.Gen. 1 (1990)
- 6 *McKee v. Los Angeles Interagency Metropolitan Police Apprehension Crime Task Force* (2005) 134 Cal. App.4th 354, 362
- 7 California Government Code section 54952.1
- 8 *Joiner v. City of Sebastopol* (1981) 125 Cal.App.3d 799, 804-805
- 9 California Government Code section 54952(b)
- 10 79 Ops.Cal.Atty.Gen. 69 (1996)
- 11 *Frazer v. Dixon Unified School District* (1993) 18 Cal.App.4th 781, 793
- 12 California Government Code section 54952(c)(1). Regarding private organizations that receive local agency funding, the same rule applies to a full voting member appointed prior to February 9, 1996 who, after that date, is made a non-voting board member by the legislative body. California Government Code section 54952(c)(2)
- 13 California Government Code section 54952(c)(1)(A); *International Longshoremen's and Warehousemen's Union v. Los Angeles Export Terminal, Inc.* (1999) 69 Cal.App.4th 287, 300; *Epstein v. Hollywood Entertainment Dist. II Business Improvement District* (2001) 87 Cal.App.4th 862, 876; see also 85 Ops.Cal.Atty.Gen. 55 (2002)
- 14 *International Longshoremen's and Warehousemen's Union v. Los Angeles Export Terminal* (1999) 69 Cal. App.4th 287, 300 fn. 5
- 15 "The Brown Act, Open Meetings for Local Legislative Bodies," California Attorney General's Office (2003), p. 7
- 16 California Government Code section 54952(d)
- 17 California Government Code section 54952(b); see also *Freedom Newspapers, Inc. v. Orange County Employees Retirement System Board of Directors* (1993) 6 Cal.4th 821, 832.
- 18 *Taxpayers for Livable Communities v. City of Malibu* (2005) 126 Cal.App.4th 1123, 1129
- 19 56 Ops.Cal.Atty.Gen. 14, 16-17 (1973)
- 20 *Wilson v. San Francisco Municipal Railway* (1973) 29 Cal.App.3d 870, 878-879
- 21 *Golightly v. Molina* (2014) 229 Cal.App.4th 1501, 1513
- 22 59 Ops.Cal.Atty.Gen. 162, 164 (1976)

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# Chapter 3

## MEETINGS

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# Chapter 3

## MEETINGS



The Brown Act only applies to meetings of local legislative bodies. The Brown Act defines a meeting as: "... and any congregation of a majority of the members of a legislative body at the same time and location, including teleconference location as permitted by Section 54953, to hear, discuss, deliberate, or take any action on any item that is within the subject matter jurisdiction of the legislative body."<sup>1</sup> The term "meeting" is not limited to gatherings at which action is taken but includes deliberative gatherings as well. A hearing before an individual hearing officer is not a meeting under the Brown Act because it is not a hearing before a legislative body.<sup>2</sup>

### Brown Act meetings

Brown Act meetings include a legislative body's regular meetings, special meetings, emergency meetings, and adjourned meetings.

- **"Regular meetings"** are meetings occurring at the dates, times, and location set by resolution, ordinance, or other formal action by the legislative body and are subject to 72-hour posting requirements.<sup>3</sup>
- **"Special meetings"** are meetings called by the presiding officer or majority of the legislative body to discuss only discrete items on the agenda under the Brown Act's notice requirements for special meetings and are subject to 24-hour posting requirements.<sup>4</sup>
- **"Emergency meetings"** are a limited class of meetings held when prompt action is needed due to actual or threatened disruption of public facilities and are held on little notice.<sup>5</sup>
- **"Adjourned meetings"** are regular or special meetings that have been adjourned or re-adjourned to a time and place specified in the order of adjournment, with no agenda required for regular meetings adjourned for less than five calendar days as long as no additional business is transacted.<sup>6</sup>

### Six exceptions to the meeting definition

The Brown Act creates six exceptions to the meeting definition:<sup>7</sup>

#### *Individual Contacts*

The first exception involves individual contacts between a member of the legislative body and any other person. The Brown Act does not limit a legislative body member acting on his or her own. This exception recognizes the right to confer with constituents, advocates, consultants, news reporters, local agency staff, or a colleague.

Individual contacts, however, cannot be used to do in stages what would be prohibited in one step. For example, a series of individual contacts that leads to discussion, deliberation, or action among a majority of the members of a legislative body is prohibited. Such serial meetings are discussed below.

### Conferences

The second exception allows a legislative body majority to attend a conference or similar gathering open to the public that addresses issues of general interest to the public or to public agencies of the type represented by the legislative body.

Among other things, this exception permits legislative body members to attend annual association conferences of city, county, school, community college, and other local agency officials, so long as those meetings are open to the public. However, a majority of members cannot discuss among themselves, other than as part of the scheduled program, business of a specific nature that is within their local agency's subject matter jurisdiction.

### Community Meetings

The third exception allows a legislative body majority to attend an open and publicized meeting held by another organization to address a topic of local community concern. A majority cannot discuss among themselves, other than as part of the scheduled program, business of a specific nature that is within the legislative body's subject matter jurisdiction. Under this exception, a legislative body majority may attend a local service club meeting or a local candidates' night if the meetings are open to the public.



**“I see we have four distinguished members of the city council at our meeting tonight,” said the chair of the Environmental Action Coalition. “I wonder if they have anything to say about the controversy over enacting a slow growth ordinance?”**

*The Brown Act permits a majority of a legislative body to attend and speak at an open and publicized meeting conducted by another organization. The Brown Act may nevertheless be violated if a majority discusses, deliberates, or takes action on an item during the meeting of the other organization. There is a fine line between what is permitted and what is not; hence, members should exercise caution when participating in these types of events.*

- Q.** The local chamber of commerce sponsors an open and public candidate debate during an election campaign. Three of the five agency members are up for re-election and all three participate. All of the candidates are asked their views of a controversial project scheduled for a meeting to occur just after the election. May the three incumbents answer the question?
- A.** Yes, because the Brown Act does not constrain the incumbents from expressing their views regarding important matters facing the local agency as part of the political process the same as any other candidates.



### Other Legislative Bodies

The fourth exception allows a majority of a legislative body to attend an open and publicized meeting of: (1) another body of the local agency; and (2) a legislative body of another local agency.<sup>8</sup> Again, the majority cannot discuss among themselves, other than as part of the scheduled meeting, business of a specific nature that is within their subject matter jurisdiction. This exception allows, for example, a city council or a majority of a board of supervisors to attend a controversial meeting of the planning commission.

Nothing in the Brown Act prevents the majority of a legislative body from sitting together at such a meeting. They may choose not to, however, to preclude any possibility of improperly discussing local agency business and to avoid the appearance of a Brown Act violation. Further, aside

from the Brown Act, there may be other reasons, such as due process considerations, why the members should avoid giving public testimony or trying to influence the outcome of proceedings before a subordinate body.

- Q.** The entire legislative body intends to testify against a bill before the Senate Local Government Committee in Sacramento. Must this activity be noticed as a meeting of the body?
- A.** *No, because the members are attending and participating in an open meeting of another governmental body which the public may attend.*
- Q.** The members then proceed upstairs to the office of their local Assembly member to discuss issues of local interest. Must this session be noticed as a meeting and be open to the public?
- A.** *Yes, because the entire body may not meet behind closed doors except for proper closed sessions. The same answer applies to a private lunch or dinner with the Assembly member.*

### Standing Committees

The fifth exception authorizes the attendance of a majority at an open and noticed meeting of a standing committee of the legislative body, provided that the legislative body members who are not members of the standing committee attend only as observers (meaning that they cannot speak or otherwise participate in the meeting).<sup>9</sup>

- Q.** The legislative body establishes a standing committee of two of its five members, which meets monthly. A third member of the legislative body wants to attend these meetings and participate. May she?
- A.** *She may attend, but only as an observer; she may not participate.*

### Social or Ceremonial Events

The final exception permits a majority of a legislative body to attend a purely social or ceremonial occasion. Once again, a majority cannot discuss business among themselves of a specific nature that is within the subject matter jurisdiction of the legislative body.

Nothing in the Brown Act prevents a majority of members from attending the same football game, party, wedding, funeral, reception, or farewell. The test is not whether a majority of a legislative body attends the function, but whether business of a specific nature within the subject matter jurisdiction of the body is discussed. So long as no such business is discussed, there is no violation of the Brown Act.

### Grand Jury Testimony

In addition, members of a legislative body, either individually or collectively, may give testimony in private before a grand jury.<sup>10</sup> This is the equivalent of a seventh exception to the Brown Act's definition of a "meeting."

### Collective briefings

None of these exceptions permits a majority of a legislative body to meet together with staff in advance of a meeting for a collective briefing. Any such briefings that involve a majority of the body in the same place and time must be open to the public and satisfy Brown Act meeting notice and agenda requirements.

### Retreats or workshops of legislative bodies

Gatherings by a majority of legislative body members at the legislative body's retreats, study sessions, or workshops are covered under the Brown Act. This is the case whether the retreat, study session, or workshop focuses on long-range agency planning, discussion of critical local issues, or team building and group dynamics.<sup>11</sup>



**Q.** The legislative body wants to hold a team-building session to improve relations among its members. May such a session be conducted behind closed doors?

**A.** *No, this is not a proper subject for a closed session, and there is no other basis to exclude the public. Council relations are a matter of public business.*

### Serial meetings

One of the most frequently asked questions about the Brown Act involves serial meetings. At any one time, such meetings involve only a portion of a legislative body, but eventually involve a majority. The Brown Act provides that "[a] majority of the members of a legislative body shall not, outside a meeting ... use 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."<sup>12</sup> The problem with serial meetings is the process, which deprives the public of an opportunity for meaningful observation of and participation in legislative body decision-making.

The serial meeting may occur by either a “daisy chain” or a “hub and spoke” sequence. In the daisy chain scenario, Member A contacts Member B, Member B contacts Member C, Member C contacts Member D and so on, until a quorum has discussed, deliberated, or taken action on an item within the legislative body’s subject matter jurisdiction. The hub and spoke process involves at least two scenarios. In the first scenario, Member A (the hub) sequentially contacts Members B, C, and D and so on (the spokes), until a quorum has been contacted. In the second scenario, a staff member (the hub), functioning as an intermediary for the legislative body or one of its members,



communicates with a majority of members (the spokes) one-by-one for discussion, deliberation, or a decision on a proposed action.<sup>13</sup> Another example of a serial meeting is when a chief executive officer (the hub) briefs a majority of members (the spokes) prior to a formal meeting and, in the process, information about the members’ respective views is revealed. Each of these scenarios violates the Brown Act.

A legislative body member has the right, if not the duty, to meet with constituents to address their concerns. That member also has the right to confer with a colleague (but not with a majority of the body, counting the member) or appropriate staff about local agency business. An employee or official of a local agency may engage in separate conversations or communications outside of an open and noticed meeting “with members of a legislative body in order to answer questions or provide information regarding a matter that is within the subject matter jurisdiction of

the local agency if that person does not communicate to members of the legislative body the comments or position of any other member or members of the legislative body.”<sup>14</sup>

The Brown Act has been violated, however, if several one-on-one meetings or conferences leads to a discussion, deliberation, or action by a majority. In one case, a violation occurred when a quorum of a city council, by a letter that had been circulated among members outside of a formal meeting, directed staff to take action in an eminent domain proceeding.<sup>15</sup>

A unilateral written communication to the legislative body, such as an informational or advisory memorandum, does not violate the Brown Act.<sup>16</sup> Such a memo, however, may be a public record.<sup>17</sup>

**The phone call was from a lobbyist. “Say, I need your vote for that project in the south area. How about it?”**

**“Well, I don’t know,” replied Board Member Aletto. “That’s kind of a sticky proposition. You sure you need my vote?”**

**“Well, I’ve got Bradley and Cohen lined up and another vote leaning. With you I’d be over the top.”**

**Moments later, the phone rings again. “Hey, I’ve been hearing some rumbles on that south area project,” said the newspaper reporter. “I’m counting noses. How are you voting on it?”**

*Neither the lobbyist nor the reporter has violated the Brown Act, but they are facilitating*

a violation. The board member may have violated the Brown Act by hearing about the positions of other board members and indeed coaxing the lobbyist to reveal the other board members' positions by asking "You sure you need my vote?" The prudent course is to avoid such leading conversations and to caution lobbyists, staff, and news media against revealing such positions of others.

**The mayor sat down across from the city manager. "From now on," he declared, "I want you to provide individual briefings on upcoming agenda items. Some of this material is very technical, and the council members don't want to sound like idiots asking about it in public. Besides that, briefings will speed up the meeting."**

*Agency employees or officials may have separate conversations or communications outside of an open and noticed meeting "with members of a legislative body in order to answer questions or provide information regarding a matter that is within the subject matter jurisdiction of the local agency if that person does not communicate to members of the legislative body the comments or position of any other member or members of the legislative body."<sup>18</sup> Members should always be vigilant when discussing local agency business with anyone to avoid conversations that could lead to a discussion, deliberation or action taken among the majority of the legislative body.*

**"Thanks for the information," said Council Member Kim. "These zoning changes can be tricky, and now I think I'm better equipped to make the right decision."**

**"Glad to be of assistance," replied the planning director. "I'm sure Council Member Jones is OK with these changes. How are you leaning?"**

**"Well," said Council Member Kim, "I'm leaning toward approval. I know that two of my colleagues definitely favor approval."**

*The planning director should not disclose Jones' prospective vote, and Kim should not disclose the prospective votes of two of her colleagues. Under these facts, there likely has been a serial meeting in violation of the Brown Act.*

- Q.** The agency's website includes a chat room where agency employees and officials participate anonymously and often discuss issues of local agency business. Members of the legislative body participate regularly. Does this scenario present a potential for violation of the Brown Act?
- A.** Yes, because it is a technological device that may serve to allow for a majority of members to discuss, deliberate, or take action on matters of agency business.
- Q.** A member of a legislative body contacts two other members on a five-member body relative to scheduling a special meeting. Is this an illegal serial meeting?
- A.** No, the Brown Act expressly allows a majority of a body to call a special meeting, though the members should avoid discussing the merits of what is to be taken up at the meeting.

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**PRACTICE TIP:** When briefing legislative body members, staff must exercise care not to disclose other members' views and positions.

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Particular care should be exercised when staff briefings of legislative body members occur by email because of the ease of using the “reply to all” button that may inadvertently result in a Brown Act violation.

### Informal gatherings

Often members are tempted to mix business with pleasure — for example, by holding a post-meeting gathering. Informal gatherings at which local agency business is discussed or transacted violate the law if they are not conducted in conformance with the Brown Act.<sup>19</sup> A luncheon gathering in a crowded dining room violates the Brown Act if the public does not have an opportunity to attend, hear, or participate in the deliberations of members.

**Thursday at 11:30 a.m., as they did every week, the board of directors of the Dry Gulch Irrigation District trooped into Pop’s Donut Shoppe for an hour of talk and fellowship. They sat at the corner window, fronting on Main and Broadway, to show they had nothing to hide. Whenever he could, the managing editor of the weekly newspaper down the street hurried over to join the board.**

*A gathering like this would not violate the Brown Act if board members scrupulously avoided talking about irrigation district issues — which might be difficult. This kind of situation should be avoided. The public is unlikely to believe the board members could meet regularly without discussing public business. A newspaper executive’s presence in no way lessens the potential for a violation of the Brown Act.*

- Q.** The agency has won a major victory in the Supreme Court on an issue of importance. The presiding officer decides to hold an impromptu press conference in order to make a statement to the print and broadcast media. All the other members show up in order to make statements of their own and be seen by the media. Is this gathering illegal?
- A.** *Technically there is no exception for this sort of gathering, but as long as members do not state their intentions as to future action to be taken and the press conference is open to the public, it seems harmless.*



### Technological conferencing

Except for certain nonsubstantive purposes, such as scheduling a special meeting, a conference call including a majority of the members of a legislative body is an unlawful meeting. But, in an effort to keep up with information age technologies, the Brown Act specifically allows a legislative body to use any type of teleconferencing to meet, receive public comment and testimony, deliberate, or conduct a closed session.<sup>20</sup> While the Brown Act contains specific requirements for conducting a teleconference, the decision to use teleconferencing is entirely discretionary with the body. No person has a right under the Brown Act to have a meeting by teleconference.

“Teleconference” is defined as “a meeting of a legislative body, the members of which are in different locations, connected by electronic means, through either

audio or video, or both.”<sup>21</sup> In addition to the specific requirements relating to teleconferencing, the meeting must comply with all provisions of the Brown Act otherwise applicable. The Brown Act contains the following teleconferencing requirements:<sup>22</sup>

- Teleconferencing may be used for all purposes during any meeting;
- At least a quorum of the legislative body must participate from locations within the local agency’s jurisdiction;
- Additional teleconference locations may be made available for the public;
- Each teleconference location must be specifically identified in the notice and agenda of the meeting, including a full address and room number, as may be applicable;
- Agendas must be posted at each teleconference location, even if a hotel room or a residence;
- Each teleconference location, including a hotel room or residence, must be accessible to the public and have technology, such as a speakerphone, to enable the public to participate;
- The agenda must provide the opportunity for the public to address the legislative body directly at each teleconference location; and
- All votes must be by roll call.

**Q.** A member on vacation wants to participate in a meeting of the legislative body and vote by cellular phone from her car while driving from Washington, D.C. to New York. May she?

**A.** *She may not participate or vote because she is not in a noticed and posted teleconference location.*

The use of teleconferencing to conduct a legislative body meeting presents a variety of issues beyond the scope of this guide to discuss in detail. Therefore, before teleconferencing a meeting, legal counsel for the local agency should be consulted.

### Location of meetings

The Brown Act generally requires all regular and special meetings of a legislative body, including retreats and workshops, to be held within the boundaries of the territory over which the local agency exercises jurisdiction.<sup>23</sup>

An open and publicized meeting of a legislative body may be held outside of agency boundaries if the purpose of the meeting is one of the following:<sup>24</sup>

- Comply with state or federal law or a court order, or attend a judicial conference or administrative proceeding in which the local agency is a party;
- Inspect real or personal property that cannot be conveniently brought into the local agency’s territory, provided the meeting is limited to items relating to that real or personal property;

**Q.** The agency is considering approving a major retail mall. The developer has built other similar malls, and invites the entire legislative body to visit a mall outside the jurisdiction. May the entire body go?

**A.** *Yes, the Brown Act permits meetings outside the boundaries of the agency for specified reasons and inspection of property is one such reason. The field trip must be treated as a meeting and the public must be allowed to attend.*

- Participate in multiagency meetings or discussions; however, such meetings must be held within the boundaries of one of the participating agencies, and all of those agencies must give proper notice;
- Meet in the closest meeting facility if the local agency has no meeting facility within its boundaries, or meet at its principal office if that office is located outside the territory over which the agency has jurisdiction;
- Meet with elected or appointed federal or California officials when a local meeting would be impractical, solely to discuss a legislative or regulatory issue affecting the local agency and over which the federal or state officials have jurisdiction;
- Meet in or nearby a facility owned by the agency, provided that the topic of the meeting is limited to items directly related to the facility; or
- Visit the office of its legal counsel for a closed session on pending litigation, when to do so would reduce legal fees or costs.<sup>25</sup>

In addition, the governing board of a school or community college district may hold meetings outside of its boundaries to attend a conference on nonadversarial collective bargaining techniques, interview candidates for school district superintendent, or interview a potential

employee from another district.<sup>26</sup> A school board may also interview members of the public residing in another district if the board is considering employing that district's superintendent.

Similarly, meetings of a joint powers authority can occur within the territory of at least one of its member agencies, and a joint powers authority with members throughout the state may meet anywhere in the state.<sup>27</sup>

Finally, if a fire, flood, earthquake, or other emergency makes the usual meeting place unsafe, the presiding officer can designate another meeting place for the duration of the emergency. News media that have requested notice of meetings must be notified of the designation by the most rapid means of communication available.<sup>28</sup>



## Endnotes:

- 1 California Government Code section 54952.2(a)
- 2 *Wilson v. San Francisco Municipal Railway* (1973) 29 Cal.App.3d 870
- 3 California Government Code section 54954(a)
- 4 California Government Code section 54956
- 5 California Government Code section 54956.5
- 6 California Government Code section 54955
- 7 California Government Code section 54952.2(c)
- 8 California Government Code section 54952.2(c)(4)
- 9 California Government Code section 54952.2(c)(6)
- 10 California Government Code section 54953.1
- 11 “*The Brown Act*,” California Attorney General (2003), p. 10
- 12 California Government Code section 54952.2(b)(1)
- 13 *Stockton Newspaper Inc. v. Redevelopment Agency* (1985) 171 Cal.App.3d 95
- 14 California Government Code section 54952.2(b)(2)
- 15 *Common Cause v. Stirling* (1983) 147 Cal.App.3d 518
- 16 *Roberts v. City of Palmdale* (1993) 5 Cal.4th 363
- 17 California Government Code section 54957.5(a)
- 18 California Government Code section 54952.2(b)(2)
- 19 California Government Code section 54952.2; 43 Ops.Cal.Atty.Gen. 36 (1964)
- 20 California Government Code section 54953(b)(1)
- 21 California Government Code section 54953(b)(4)
- 22 California Government Code section 54953
- 23 California Government Code section 54954(b)
- 24 California Government Code section 54954(b)(1)-(7)
- 25 94 Ops.Cal.Atty.Gen. 15 (2011)
- 26 California Government Code section 54954(c)
- 27 California Government Code section 54954(d)
- 28 California Government Code section 54954(e)

Updates to this publication responding to changes in the Brown Act or new court interpretations are available at [www.cacities.org/opengovernment](http://www.cacities.org/opengovernment). A current version of the Brown Act may be found at [www.leginfo.ca.gov](http://www.leginfo.ca.gov).





# Chapter 4

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# Chapter 4

## AGENDAS, NOTICES, AND PUBLIC PARTICIPATION



Effective notice is essential for an open and public meeting. Whether a meeting is open or how the public may participate in that meeting is academic if nobody knows about the meeting.

### Agendas for regular meetings

Every regular meeting of a legislative body of a local agency — including advisory committees, commissions, or boards, as well as standing committees of legislative bodies — must be preceded by a posted agenda that advises the public of the meeting and the matters to be transacted or discussed.

The agenda must be posted at least 72 hours before the regular meeting in a location “freely accessible to members of the public.”<sup>1</sup> The courts have not definitively interpreted the “freely accessible” requirement. The California Attorney General has interpreted this

provision to require posting in a location accessible to the public 24 hours a day during the 72-hour period, but any of the 72 hours may fall on a weekend.<sup>2</sup> This provision may be satisfied by posting on a touch screen electronic kiosk accessible without charge to the public 24 hours a day during the 72-hour period.<sup>3</sup> While posting an agenda on an agency’s Internet website will not, by itself, satisfy the “freely accessible” requirement since there is no universal access to the internet, an agency has a supplemental obligation to post the agenda on its website if: (1) the local agency has a website; and (2) the legislative body whose meeting is the subject of the agenda is either (a) a governing body, or (b) has members that are compensated, with one or more members that are also members of a governing body.<sup>4</sup>

**Q.** May the meeting of a governing body go forward if its agenda was either inadvertently not posted on the city’s website or if the website was not operational during part or all of the 72-hour period preceding the meeting?

**A.** *At a minimum, the Brown Act calls for “substantial compliance” with all agenda posting requirements, including posting to the agency website.<sup>5</sup> Should website technical difficulties arise, seek a legal opinion from your agency attorney. The California Attorney General has opined that technical difficulties which cause the website agenda to become inaccessible for a portion of the 72 hours preceding a meeting do not automatically or inevitably lead to a Brown Act violation, provided the agency can demonstrate substantial compliance.<sup>6</sup> This inquiry requires a fact-specific examination of whether the agency or its legislative body made “reasonably effective efforts to notify interested persons of a public meeting” through online posting and other available means.<sup>7</sup> The Attorney General’s opinion suggests that this examination would include an evaluation of how long a technical problem persisted, the efforts made to correct the problem or otherwise ensure that the public was informed, and the actual effect the problem had on public*

*awareness, among other factors.<sup>8</sup> The City Attorneys' Department has taken the position that obvious website technical difficulties do not require cancellation of a meeting, provided that the agency meets all other Brown Act posting requirements and the agenda is available on the website once the technical difficulties are resolved.*

The agenda must state the meeting time and place and must contain “a brief general description of each item of business to be transacted or discussed at the meeting, including items to be discussed in closed session.”<sup>9</sup> Special care should be taken to describe on the agenda each distinct action to be taken by the legislative body, and avoid overbroad descriptions of a “project” if the “project” is actually a set of distinct actions that must each be separately listed on the agenda.<sup>10</sup>

**PRACTICE TIP:** Putting together a meeting agenda requires careful thought.

**Q.** The agenda for a regular meeting contains the following items of business:

- Consideration of a report regarding traffic on Eighth Street; and
- Consideration of contract with ABC Consulting.

Are these descriptions adequate?

**A.** *If the first is, it is barely adequate. A better description would provide the reader with some idea of what the report is about and what is being recommended. The second is not adequate. A better description might read “consideration of a contract with ABC Consulting in the amount of \$50,000 for traffic engineering services regarding traffic on Eighth Street.”*

**Q.** The agenda includes an item entitled City Manager’s Report, during which time the city manager provides a brief report on notable topics of interest, none of which are listed on the agenda.

Is this permissible?

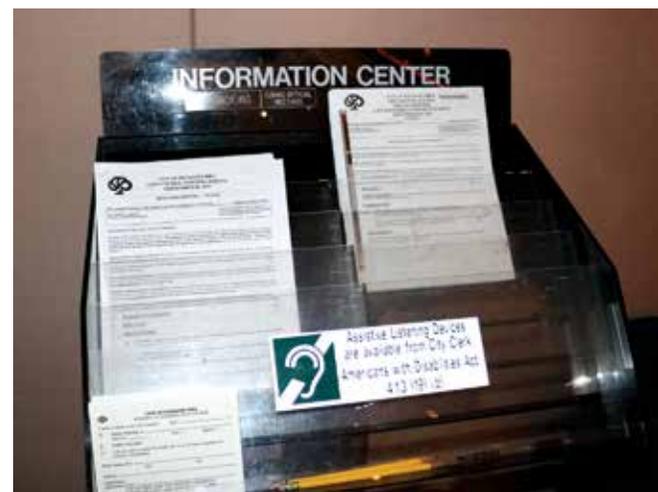
**A.** *Yes, so long as it does not result in extended discussion or action by the body.*

A brief general description may not be sufficient for closed session agenda items. The Brown Act provides safe harbor language for the various types of permissible closed sessions. Substantial compliance with the safe harbor language is recommended to protect legislative bodies and elected officials from legal challenges.

### **Mailed agenda upon written request**

The legislative body, or its designee, must mail a copy of the agenda or, if requested, the entire agenda packet, to any person who has filed a written request for such materials. These copies shall be mailed at the time the agenda is posted. If requested, these materials must be made available in appropriate alternative formats to persons with disabilities.

A request for notice is valid for one calendar year and renewal requests must be filed following January 1 of each year. The legislative body may establish a fee to recover the cost of providing the service. Failure of the requesting person to receive the agenda does not constitute grounds for invalidation of actions taken at the meeting.<sup>11</sup>



### Notice requirements for special meetings

There is no express agenda requirement for special meetings, but the notice of the special meeting effectively serves as the agenda and limits the business that may be transacted or discussed.

Written notice must be sent to each member of the legislative body (unless waived in writing by that member) and to each local newspaper of general circulation, and radio or television station that has requested such notice in writing. This notice must be delivered by personal delivery or any other means that ensures receipt, at least 24 hours before the time of the meeting.

The notice must state the time and place of the meeting, as well as all business to be transacted or discussed. It is recommended that the business to be transacted or discussed be described in the same manner that an item for a regular meeting would be described on the agenda — with a brief general description. As noted above, closed session items should be described in accordance with the Brown Act's safe harbor provisions to protect legislative bodies and elected officials from challenges of noncompliance with notice requirements.

The special meeting notice must also be posted at least 24 hours prior to the special meeting using the same methods as posting an agenda for a regular meeting: (1) at a site that is freely accessible to the public, and (2) on the agency's website if: (1) the local agency has a website; and (2) the legislative body whose meeting is the subject of the agenda is either (a) a governing body, or (b) has members that are compensated, with one or more members that are also members of a governing body.<sup>12</sup>

### Notices and agendas for adjourned and continued meetings and hearings

A regular or special meeting can be adjourned and re-adjourned to a time and place specified in the order of adjournment.<sup>13</sup> If no time is stated, the meeting is continued to the hour for regular meetings. Whoever is present (even if they are less than a quorum) may so adjourn a meeting; if no member of the legislative body is present, the clerk or secretary may adjourn the meeting. If a meeting is adjourned for less than five calendar days, no new agenda need be posted so long as a new item of business is not introduced.<sup>14</sup> A copy of the order of adjournment must be posted within 24 hours after the adjournment, at or near the door of the place where the meeting was held.

A hearing can be continued to a subsequent meeting. The process is the same as for continuing adjourned meetings, except that if the hearing is continued to a time less than 24 hours away, a copy of the order or notice of continuance must be posted immediately following the meeting.<sup>15</sup>

### Notice requirements for emergency meetings

The special meeting notice provisions apply to emergency meetings, except for the 24-hour notice.<sup>16</sup> News media that have requested written notice of special meetings must be notified by telephone at least one hour in advance of an emergency meeting, and all telephone numbers provided in that written request must be tried. If telephones are not working, the notice requirements are deemed waived. However, the news media must be notified as soon as possible of the meeting and any action taken.



News media may make a practice of having written requests on file for notification of special or emergency meetings. Absent such a request, a local agency has no legal obligation to notify news media of special or emergency meetings — although notification may be advisable in any event to avoid controversy.

### **Notice of compensation for simultaneous or serial meetings**

A legislative body that has convened a meeting and whose membership constitutes a quorum of another legislative body, may convene a simultaneous or serial meeting of the other legislative body only after a clerk or member of the convened legislative body orally announces: (1) the amount of compensation or stipend, if any, that each member will be entitled to receive as a result of convening the meeting of the other legislative body; and (2) that the compensation or stipend is provided as a result of convening the meeting of that body.<sup>17</sup>

No oral disclosure of the amount of the compensation is required if the entire amount of such compensation is prescribed by statute and no additional compensation has been authorized by the local agency. Further, no disclosure is required with respect to reimbursements for actual and necessary expenses incurred in the performance of the member's official duties, such as for travel, meals, and lodging.

### **Educational agency meetings**

The Education Code contains some special agenda and special meeting provisions.<sup>18</sup> However, they are generally consistent with the Brown Act. An item is probably void if not posted.<sup>19</sup> A school district board must also adopt regulations to make sure the public can place matters affecting the district's business on meeting agendas and to address the board on those items.<sup>20</sup>

### **Notice requirements for tax or assessment meetings and hearings**

The Brown Act prescribes specific procedures for adoption by a city, county, special district, or joint powers authority of any new or increased tax or assessment imposed on businesses.<sup>21</sup> Though written broadly, these Brown Act provisions do not apply to new or increased real property taxes or assessments as those are governed by the California Constitution, Article XIII C or XIII D, enacted by Proposition 218. At least one public meeting must be held to allow public testimony on the tax or assessment. In addition, there must also be at least 45 days notice of a public hearing at which the legislative body proposes to enact or increase the tax or assessment. Notice of the public meeting and public hearing must be provided at the same time and in the same document. The public notice relating to general taxes must be provided by newspaper publication. The public notice relating to new or increased business assessments must be provided through a mailing to all business owners proposed to be subject to the new or increased assessment. The agency may recover the reasonable costs of the public meetings, hearings, and notice.

The Brown Act exempts certain fees, standby or availability charges, recurring assessments, and new or increased assessments that are subject to the notice and hearing requirements of the Constitution.<sup>22</sup> As a practical matter, the Constitution's notice requirements have preempted this section of the Brown Act.



### Non-agenda items

The Brown Act generally prohibits any action or discussion of items not on the posted agenda. However, there are three specific situations in which a legislative body can act on an item not on the agenda:<sup>23</sup>

- When a majority decides there is an “emergency situation” (as defined for emergency meetings);
- When two-thirds of the members present (or all members if less than two-thirds are present) determine there is a need for immediate action and the need to take action “came to the attention of the local agency subsequent to the agenda being posted.” This exception requires a degree of urgency. Further, an item cannot be considered under this provision if the legislative body or the staff knew about the need to take immediate action before the agenda was posted. A new need does not arise because staff forgot to put an item on the agenda or because an applicant missed a deadline; or
- When an item appeared on the agenda of, and was continued from, a meeting held not more than five days earlier.

The exceptions are narrow, as indicated by this list. The first two require a specific determination by the legislative body. That determination can be challenged in court and, if unsubstantiated, can lead to invalidation of an action.

**“I’d like a two-thirds vote of the board, so we can go ahead and authorize commencement of phase two of the East Area Project,” said Chair Lopez.**

**“It’s not on the agenda. But we learned two days ago that we finished phase one ahead of schedule — believe it or not — and I’d like to keep it that way. Do I hear a motion?”**

*The desire to stay ahead of schedule generally would not satisfy “a need for immediate action.” Too casual an action could invite a court challenge by a disgruntled resident. The prudent course is to place an item on the agenda for the next meeting and not risk invalidation.*

**“We learned this morning of an opportunity for a state grant,” said the chief engineer at the regular board meeting, “but our application has to be submitted in two days. We’d like the board to give us the go ahead tonight, even though it’s not on the agenda.”**

*A legitimate immediate need can be acted upon even though not on the posted agenda by following a two-step process:*

- First, make two determinations: 1) that there is an immediate need to take action, and 2) that the need arose after the posting of the agenda. The matter is then placed on the agenda.
- Second, discuss and act on the added agenda item.

### Responding to the public

The public can talk about anything within the jurisdiction of the legislative body, but the legislative body generally cannot act on or discuss an item not on the agenda. What happens when a member of the public raises a subject not on the agenda?

**PRACTICE TIP:** Subject to very limited exceptions, the Brown Act prohibits any action or discussion of an item not on the posted agenda.

While the Brown Act does not allow discussion or action on items not on the agenda, it does allow members of the legislative body, or its staff, to “briefly respond” to comments or questions from members of the public, provide a reference to staff or other resources for factual information, or direct staff to place the issue on a future agenda. In addition, even without a comment from the public, a legislative body member or a staff member may ask for information, request a report back, request to place a matter on the agenda for a subsequent meeting (subject to the body’s rules or procedures), ask a question for clarification, make a brief announcement, or briefly report on his or her own activities.<sup>24</sup> However, caution should be used to avoid any discussion or action on such items.



**Council Member Jefferson: I would like staff to respond to Resident Joe’s complaints during public comment about the repaving project on Elm Street — are there problems with this project?**

**City Manager Frank: The public works director has prepared a 45-minute power point presentation for you on the status of this project and will give it right now.**

**Council Member Brown: Take all the time you need; we need to get to the bottom of this. Our residents are unhappy.**

*It is clear from this dialogue that the Elm Street project was not on the council’s agenda, but was raised during the public comment period for items not on the agenda. Council Member A properly asked staff to respond; the city manager should have given at most a brief response. If a lengthy report from the public works director was warranted, the city manager should have stated that it would be placed on the agenda for the next meeting. Otherwise, both the long report and the likely discussion afterward will improperly embroil the council in a matter that is not listed on the agenda.*

## **The right to attend and observe meetings**

A number of Brown Act provisions protect the public’s right to attend, observe, and participate in meetings.

Members of the public cannot be required to register their names, provide other information, complete a questionnaire, or otherwise “fulfill any condition precedent” to attending a meeting. Any attendance list, questionnaire, or similar document posted at or near the entrance to the meeting room or circulated at a meeting must clearly state that its completion is voluntary and that all persons may attend whether or not they fill it out.<sup>25</sup>

No meeting can be held in a facility that prohibits attendance based on race, religion, color, national origin, ethnic group identification, age, sex, sexual orientation, or disability, or that is inaccessible to the disabled. Nor can a meeting be held where the public must make a payment or purchase in order to be present.<sup>26</sup> This does not mean, however, that the public is entitled to free entry to a conference attended by a majority of the legislative body.<sup>27</sup>

While a legislative body may use teleconferencing in connection with a meeting, the public must be given notice of and access to the teleconference location. Members of the public must be able to address the legislative body from the teleconference location.<sup>28</sup>

Action by secret ballot, whether preliminary or final, is flatly prohibited.<sup>29</sup>

All actions taken by the legislative body in open session, and the vote of each member thereon, must be disclosed to the public at the time the action is taken.<sup>30</sup>

**Q:** The agenda calls for election of the legislative body’s officers. Members of the legislative body want to cast unsigned written ballots that would be tallied by the clerk, who would announce the results. Is this voting process permissible?

**A:** *No. The possibility that a public vote might cause hurt feelings among members of the legislative body or might be awkward — or even counterproductive — does not justify a secret ballot.*

The legislative body may remove persons from a meeting who willfully interrupt proceedings.<sup>31</sup> Ejection is justified only when audience members actually disrupt the proceedings.<sup>32</sup> If order cannot be restored after ejecting disruptive persons, the meeting room may be cleared. Members of the news media who have not participated in the disturbance must be allowed to continue to attend the meeting. The legislative body may establish a procedure to re-admit an individual or individuals not responsible for the disturbance.<sup>33</sup>

### Records and recordings

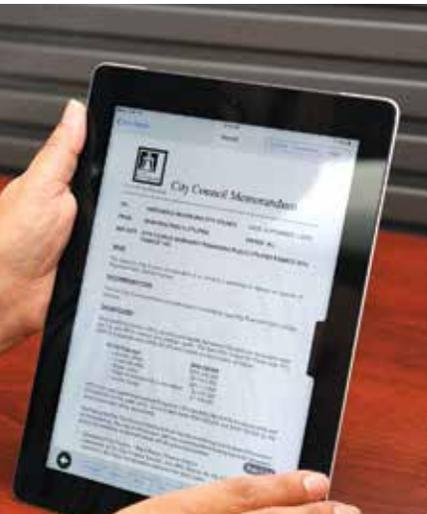
The public has the right to review agendas and other writings distributed by any person to a majority of the legislative body in connection with a matter subject to discussion or consideration at a meeting. Except for privileged documents, those materials are public records and must be made available upon request without delay.<sup>34</sup> A fee or deposit as permitted by the California Public Records Act may be charged for a copy of a public record.<sup>35</sup>

**Q:** In connection with an upcoming hearing on a discretionary use permit, counsel for the legislative body transmits a memorandum to all members of the body outlining the litigation risks in granting or denying the permit. Must this memorandum be included in the packet of agenda materials available to the public?

**A:** *No. The memorandum is a privileged attorney-client communication.*

**Q:** In connection with an agenda item calling for the legislative body to approve a contract, staff submits to all members of the body a financial analysis explaining why the terms of the contract favor the local agency. Must this memorandum be included in the packet of agenda materials available to the public?

**A:** *Yes. The memorandum has been distributed to the majority of the legislative body, relates to the subject matter of a meeting, and is not a privileged communication.*



A legislative body may discuss or act on some matters without considering written materials. But if writings are distributed to a majority of a legislative body in connection with an agenda item, they must also be available to the public. A non-exempt or otherwise privileged writing distributed to a majority of the legislative body less than 72 hours before the meeting must be made available for inspection at the time of distribution at a public office or location designated for that purpose; and the agendas for all meetings of the legislative body must include the address of this office or location.<sup>36</sup> A writing distributed during a meeting must be made public:

- At the meeting if prepared by the local agency or a member of its legislative body; or
- After the meeting if prepared by some other person.<sup>37</sup>

Any tape or film record of an open and public meeting made for whatever purpose by or at the direction of the local agency is subject to the California Public Records Act; however, it may be erased or destroyed 30 days after the taping or recording. Any inspection of a video or tape recording is to be provided without charge on a video or tape player made available by the local agency.<sup>38</sup> The agency may impose its ordinary charge for copies that is consistent with the California Public Records Act.<sup>39</sup>

In addition, the public is specifically allowed to use audio or video tape recorders or still or motion picture cameras at a meeting to record the proceedings, absent a reasonable finding by the legislative body that noise, illumination, or obstruction of view caused by recorders or cameras would persistently disrupt the proceedings.<sup>40</sup>

Similarly, a legislative body cannot prohibit or restrict the public broadcast of its open and public meetings without making a reasonable finding that the noise, illumination, or obstruction of view would persistently disrupt the proceedings.<sup>41</sup>

### The public's place on the agenda

Every agenda for a regular meeting must allow members of the public to speak on any item of interest, so long as the item is within the subject matter jurisdiction of the legislative body. Further, the public must be allowed to speak on a specific item of business before or during the legislative body's consideration of it.<sup>42</sup>

**Q.** Must the legislative body allow members of the public to show videos or make a power point presentation during the public comment part of the agenda, as long as the subject matter is relevant to the agency and is within the established time limit?

**A.** *Probably, although the agency is under no obligation to provide equipment.*

Moreover, the legislative body cannot prohibit public criticism of policies, procedures, programs, or services of the agency or the acts or omissions of the legislative body itself. But the Brown Act provides no immunity for defamatory statements.<sup>43</sup>



**PRACTICE TIP:** Public speakers cannot be compelled to give their name or address as a condition of speaking. The clerk or presiding officer may request speakers to complete a speaker card or identify themselves for the record, but must respect a speaker's desire for anonymity.

**Q.** May the presiding officer prohibit a member of the audience from publicly criticizing an agency employee by name during public comments?

**A.** *No, as long as the criticism pertains to job performance.*

**Q.** During the public comment period of a regular meeting of the legislative body, a resident urges the public to support and vote for a candidate vying for election to the body. May the presiding officer gavel the speaker out of order for engaging in political campaign speech?

**A.** *There is no case law on this subject. Some would argue that campaign issues are outside the subject matter jurisdiction of the body within the meaning of Section 54954.3(a). Others take the view that the speech must be allowed under paragraph (c) of that section because it is relevant to the governing of the agency and an implicit criticism of the incumbents.*



The legislative body may adopt reasonable regulations, including time limits, on public comments. Such regulations should be enforced fairly and without regard to speakers' viewpoints. The legislative body has discretion to modify its regulations regarding time limits on public comment if necessary. For example, the time limit could be shortened to accommodate a lengthy agenda or lengthened to allow additional time for discussion on a complicated matter.<sup>44</sup>

The public does not need to be given an opportunity to speak on an item that has already been considered by a committee made up exclusively of members of the legislative body at a public meeting, if all interested members of the public had the opportunity to speak on the item before or during its consideration, and if the item has not been substantially changed.<sup>45</sup>

Notices and agendas for special meetings must also give members of the public the opportunity to speak before or during consideration of an item on the agenda but need not allow members of the public an opportunity to speak on other matters within the jurisdiction of the legislative body.<sup>46</sup>

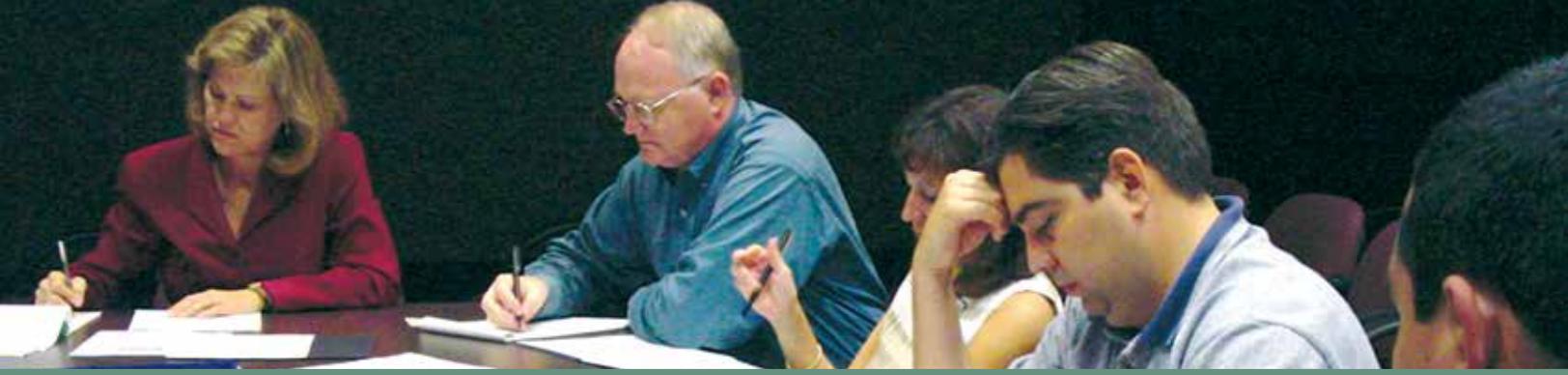
**Endnotes:**

- 1 California Government Code section 54954.2(a)(1)
- 2 78 Ops.Cal.Atty.Gen. 327 (1995)
- 3 88 Ops.Cal.Atty.Gen. 218 (2005)
- 4 California Government Code sections 54954.2(a)(1) and 54954.2(d)
- 5 California Government Code section 54960.1(d)(1)
- 6 \_\_\_ Ops.Cal.Atty.Gen.\_\_\_, No. 14-1204 (January 19, 2016) 16 Cal. Daily Op. Serv. 937 (Cal.A.G.), 2016 WL 375262
- 7 *North Pacific LLC v. California Coastal Commission* (2008) 166 Cal.App.4th 1416, 1432
- 8 \_\_\_ Ops.Cal.Atty.Gen.\_\_\_, No. 14-1204 (January 19, 2016) 16 Cal. Daily Op. Serv. 937 (Cal.A.G.), 2016 WL 375262, Slip Op. at p. 8
- 9 California Government Code section 54954.2(a)(1)
- 10 *San Joaquin Raptor Rescue v. County of Merced* (2013) 216 Cal.App.4th 1167 (legislative body's approval of CEQA action (mitigated negative declaration) without specifically listing it on the agenda violates Brown Act, even if the agenda generally describes the development project that is the subject of the CEQA analysis.)

- 11 California Government Code section 54954.1
- 12 California Government Code sections 54956(a) and (c)
- 13 California Government Code section 54955
- 14 California Government Code section 54954.2(b)(3)
- 15 California Government Code section 54955.1
- 16 California Government Code section 54956.5
- 17 California Government Code section 54952.3
- 18 Education Code sections 35144, 35145 and 72129
- 19 *Carlson v. Paradise Unified School District* (1971) 18 Cal.App.3d 196
- 20 California Education Code section 35145.5
- 21 California Government Code section 54954.6
- 22 See Cal.Const.Art.XIIIC, XIIID and California Government Code section 54954.6(h)
- 23 California Government Code section 54954.2(b)
- 24 California Government Code section 54954.2(a)(2)
- 25 California Government Code section 54953.3
- 26 California Government Code section 54961(a); California Government Code section 11135(a)
- 27 California Government Code section 54952.2(c)(2)
- 28 California Government Code section 54953(b)
- 29 California Government Code section 54953(c)
- 30 California Government Code section 54953(c)(2)
- 31 California Government Code section 54957.9.
- 32 *Norse v. City of Santa Cruz* (9th Cir. 2010) 629 F.3d 966 (silent and momentary Nazi salute directed towards mayor is not a disruption); *Acosta v. City of Costa Mesa* (9th Cir. 2013) 718 F.3d 800 (city council may not prohibit “insolent” remarks by members of the public absent actual disruption).
- 33 California Government Code section 54957.9
- 34 California Government Code section 54957.5
- 35 California Government Code section 54957.5(d)
- 36 California Government Code section 54957.5(b)
- 37 California Government Code section 54957.5(c)
- 38 California Government Code section 54953.5(b)
- 39 California Government Code section 54957.5(d)
- 40 California Government Code section 54953.5(a)
- 41 California Government Code section 54953.6
- 42 California Government Code section 54954.3(a)
- 43 California Government Code section 54954.3(c)
- 44 California Government Code section 54954.3(b); *Chaffee v. San Francisco Public Library Com.* (2005) 134 Cal.App.4th 109; 75 Ops.Cal.Atty.Gen. 89 (1992)
- 45 California Government Code section 54954.3(a)
- 46 California Government Code section 54954.3(a)

Updates to this publication responding to changes in the Brown Act or new court interpretations are available at [www.cacities.org/opengovernment](http://www.cacities.org/opengovernment). A current version of the Brown Act may be found at [www.leginfo.ca.gov](http://www.leginfo.ca.gov).





# Chapter 5

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# Chapter 5

## CLOSED SESSIONS

A closed session is a meeting of a legislative body conducted in private without the attendance of the public or press. A legislative body is authorized to meet in closed session only to the extent expressly authorized by the Brown Act.<sup>1</sup>



As summarized in Chapter 1 of this Guide, it is clear that the Brown Act must be interpreted liberally in favor of open meetings, and exceptions that limit public access (including the exceptions for closed session meetings) must be narrowly construed.<sup>2</sup> The most common purposes of the closed session provisions in the Brown Act are to avoid revealing confidential information (e.g., prejudicing the city's position in litigation or compromising the privacy interests of employees). Closed sessions should be conducted keeping those narrow purposes in mind. It is not enough that a subject is sensitive, embarrassing, or controversial. Without specific authority in the Brown Act for a closed session, a matter to be considered by a legislative body must be discussed in public. As an example, a board of police commissioners cannot meet in closed session to provide general policy guidance to a police chief, even though some matters are sensitive and the commission considers their disclosure contrary to the public interest.<sup>3</sup>

**PRACTICE TIP:** Some problems over closed sessions arise because secrecy itself breeds distrust. The Brown Act does not require closed sessions and legislative bodies may do well to resist the tendency to call a closed session simply because it may be permitted. A better practice is to go into closed session only when necessary.

In this chapter, the grounds for convening a closed session are called “exceptions” because they are exceptions to the general rule that meetings must be conducted openly. In some circumstances, none of the closed session exceptions apply to an issue or information the legislative body wishes to discuss privately. In these cases, it is not proper to convene a closed session, even to protect confidential information. For example, although the Brown Act does authorize closed sessions related to specified types of contracts (e.g., specified provisions of real property agreements, employee labor agreements, and litigation settlement agreements),<sup>4</sup> the Brown Act does not authorize closed sessions for other contract negotiations.

### Agendas and reports

Closed session items must be briefly described on the posted agenda and the description must state the specific statutory exemption.<sup>5</sup> An item that appears on the open meeting portion of the agenda may not be taken into closed session until it has been properly agendized as a closed session item or unless it is properly added as a closed session item by a two-thirds vote of the body after making the appropriate urgency findings.<sup>6</sup>

The Brown Act supplies a series of fill in the blank sample agenda descriptions for various types of authorized closed sessions, which provide a “safe harbor” from legal attacks. These sample

agenda descriptions cover license and permit determinations, real property negotiations, existing or anticipated litigation, liability claims, threats to security, public employee appointments, evaluations and discipline, labor negotiations, multi-jurisdictional law enforcement cases, hospital boards of directors, medical quality assurance committees, joint powers agencies, and audits by the California State Auditor's Office.<sup>7</sup>

If the legislative body intends to convene in closed session, it must include the section of the Brown Act authorizing the closed session in advance on the agenda and it must make a public announcement prior to the closed session discussion. In most cases, the announcement may simply be a reference to the agenda item.<sup>8</sup>

Following a closed session, the legislative body must provide an oral or written report on certain actions taken and the vote of every elected member present. The timing and content of the report varies according to the reason for the closed session and the action taken.<sup>9</sup> The announcements may be made at the site of the closed session, so long as the public is allowed to be present to hear them.

If there is a standing or written request for documentation, any copies of contracts, settlement agreements, or other documents finally approved or adopted in closed session must be provided to the requestor(s) after the closed session, if final approval of such documents does not rest with any other party to the contract or settlement. If substantive amendments to a contract or settlement agreement approved by all parties requires retyping, such documents may be held until retyping is completed during normal business hours, but the substance of the changes must be summarized for any person inquiring about them.<sup>10</sup>

The Brown Act does not require minutes, including minutes of closed sessions. However, a legislative body may adopt an ordinance or resolution to authorize a confidential "minute book" be kept to record actions taken at closed sessions.<sup>11</sup> If one is kept, it must be made available to members of the legislative body, provided that the member asking to review minutes of a particular meeting was not disqualified from attending the meeting due to a conflict of interest.<sup>12</sup> A court may order the disclosure of minute books for the court's review if a lawsuit makes sufficient claims of an open meeting violation.

## Litigation

There is an attorney/client relationship, and legal counsel may use it to protect the confidentiality of privileged written and oral communications to members of the legislative body — outside of meetings. But protection of the attorney/client privilege cannot by itself be the reason for a closed session.<sup>13</sup>

The Brown Act expressly authorizes closed sessions to discuss what is considered pending litigation. The rules that apply to holding a litigation closed session involve complex, technical definitions and procedures. The essential thing to know is that a closed session can be held by the body to confer with, or receive advice from, its legal counsel when open discussion would prejudice the position of the local agency in litigation in which the agency is, or could become, a party.<sup>14</sup> The litigation exception under the Brown Act is narrowly construed and does not permit activities beyond a legislative body's conferring with its own legal counsel and required support staff.<sup>15</sup> For example, it is not permissible to hold a closed session in which settlement negotiations take place between a legislative body, a representative of an adverse party, and a mediator.<sup>16</sup>

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**PRACTICE TIP:** Pay close attention to closed session agenda descriptions. Using the wrong label can lead to invalidation of an action taken in closed session if not substantially compliant.

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The California Attorney General has opined that if the agency's attorney is not a participant, a litigation closed session cannot be held.<sup>17</sup> In any event, local agency officials should always consult the agency's attorney before placing this type of closed session on the agenda in order to be certain that it is being done properly.

Before holding a closed session under the pending litigation exception, the legislative body must publicly state the basis for the closed session by identifying one of the following three types of matters: existing litigation, anticipated exposure to litigation, or anticipated initiation of litigation.<sup>18</sup>

**Existing litigation**

- Q.** May the legislative body agree to settle a lawsuit in a properly-noticed closed session, without placing the settlement agreement on an open session agenda for public approval?
- A.** Yes, but the settlement agreement is a public document and must be disclosed on request. Furthermore, a settlement agreement cannot commit the agency to matters that are required to have public hearings.

Existing litigation includes any adjudicatory proceedings before a court, administrative body exercising its adjudicatory authority, hearing officer, or arbitrator. The clearest situation in which a closed session is authorized is when the local agency meets with its legal counsel to discuss a pending matter that has been filed in a court or with an administrative agency and names the local

agency as a party. The legislative body may meet under these circumstances to receive updates on the case from attorneys, participate in developing strategy as the case develops, or consider alternatives for resolution of the case. Generally, an agreement to settle litigation may be approved in closed session. However, an agreement to settle litigation cannot be approved in closed session if it commits the city to take an action that is required to have a public hearing.<sup>19</sup>

**Anticipated exposure to litigation against the local agency**

Closed sessions are authorized for legal counsel to inform the legislative body of a significant exposure to litigation against the local agency, but only if based on "existing facts and circumstances" as defined by the Brown Act.<sup>20</sup> The legislative body may also meet under this exception to determine whether a closed session is authorized based on information provided by legal counsel or staff. In general, the "existing facts and

circumstances" must be publicly disclosed unless they are privileged written communications or not yet known to a potential plaintiff.

**Anticipated initiation of litigation by the local agency**

A closed session may be held under the exception for the anticipated initiation of litigation when the legislative body seeks legal advice on whether to protect the agency's rights and interests by initiating litigation.

Certain actions must be reported in open session at the same meeting following the closed



session. Other actions, as where final approval rests with another party or the court, may be announced when they become final and upon inquiry of any person.<sup>21</sup> Each agency attorney should be aware of and make the disclosures that are required by the particular circumstances.

### Real estate negotiations

A legislative body may meet in closed session with its negotiator to discuss the purchase, sale, exchange, or lease of real property by or for the local agency. A “lease” includes a lease renewal or renegotiation. The purpose is to grant authority to the legislative body’s negotiator on price and terms of payment.<sup>22</sup> Caution should be exercised to limit discussion to price and terms of payment without straying to other related issues such as site design, architecture, or other aspects of the project for which the transaction is contemplated.<sup>23</sup>



**Q.** May other terms of a real estate transaction, aside from price and terms of payment, be addressed in closed session?

**A.** *No. However, there are differing opinions over the scope of the phrase “price and terms of payment” in connection with real estate closed sessions. Many agency attorneys argue that any term that directly affects the economic value of the transaction falls within the ambit of “price and terms of payment.” Others take a narrower, more literal view of the phrase.*

The agency’s negotiator may be a member of the legislative body itself. Prior to the closed session, or on the agenda, the legislative body must identify its negotiators, the real property that the negotiations may concern<sup>24</sup> and the names of the parties with whom its negotiator may negotiate.<sup>25</sup>

After real estate negotiations are concluded, the approval and substance of the agreement must be publicly reported. If its own approval makes the agreement final, the body must report in open session at the public meeting during which the closed session is held. If final approval rests with another party, the local agency must report the approval and the substance of the agreement upon inquiry by any person, as soon as the agency is informed of it.<sup>26</sup>

**“Our population is exploding, and we have to think about new school sites,” said Board Member Jefferson.**

**“Not only that,” interjected Board Member Tanaka, “we need to get rid of a couple of our older facilities.”**

**“Well, obviously the place to do that is in a closed session,” said Board Member O’Reilly. “Otherwise we’re going to set off land speculation. And if we even mention closing a school, parents are going to be in an uproar.”**

*A closed session to discuss potential sites is not authorized by the Brown Act. The exception is limited to meeting with its negotiator over specific sites — which must be identified at an open and public meeting.*

**PRACTICE TIP:** Discussions of who to appoint to an advisory body and whether or not to censure a fellow member of the legislative body must be held in the open.

### Public employment

The Brown Act authorizes a closed session “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.”<sup>27</sup> The purpose of this exception — commonly referred to as the “personnel exception” — is to avoid undue publicity or embarrassment for an employee or applicant for employment and to allow full and candid discussion by the legislative body; thus, it is restricted to discussing individuals, not general personnel policies.<sup>28</sup> The body must possess the power to appoint, evaluate, or dismiss the employee to hold a closed session under this exception.<sup>29</sup> That authority may be delegated to a subsidiary appointed body.<sup>30</sup>

An employee must be given at least 24 hours notice of any closed session convened to hear specific complaints or charges against him or her. This occurs when the legislative body is reviewing evidence, which could include live testimony, and adjudicating conflicting testimony offered as evidence. A legislative body may examine (or exclude) witnesses,<sup>31</sup> and the California Attorney General has opined that, when an affected employee and advocate have an official or essential role to play, they may be permitted to participate in the closed session.<sup>32</sup> The employee has the right to have the specific complaints and charges discussed in a public session rather than closed session.<sup>33</sup> If the employee is not given the 24-hour prior notice, any disciplinary action is null and void.<sup>34</sup>

However, an employee is not entitled to notice and a hearing where the purpose of the closed session is to consider a performance evaluation. The Attorney General and the courts have determined that personnel performance evaluations do not constitute complaints and charges, which are more akin to accusations made against a person.<sup>35</sup>

**Q.** Must 24 hours notice be given to an employee whose negative performance evaluation is to be considered by the legislative body in closed session?

**A.** *No, the notice is reserved for situations where the body is to hear complaints and charges from witnesses.*

Correct labeling of the closed session on the agenda is critical. A closed session agenda that identified discussion of an employment contract was not sufficient to allow dismissal of an employee.<sup>36</sup> An incorrect agenda description can result in invalidation of an action and much embarrassment.

For purposes of the personnel exception, “employee” specifically includes an officer or an independent contractor who functions as an officer or an employee. Examples of the former include a city manager, district general manager or superintendent. Examples of the latter include a legal counsel or engineer hired on contract to act as local agency attorney or chief engineer.

Elected officials, appointees to the governing body or subsidiary bodies, and independent contractors other than those discussed above are not employees for purposes of the personnel exception.<sup>37</sup> Action on individuals who are not “employees” must also be public — including discussing and voting on appointees to committees, or debating the merits of independent contractors, or considering a complaint against a member of the legislative body itself.

The personnel exception specifically prohibits discussion or action on proposed compensation in closed session, except for a disciplinary reduction in pay. Among other things, that means there can be no personnel closed sessions on a salary change (other than a disciplinary reduction) between any unrepresented individual and the legislative body. However, a legislative body may address the compensation of an unrepresented individual, such as a city manager, in a closed session as part of a labor negotiation (discussed later in this chapter), yet another example of the importance of using correct agenda descriptions.

Reclassification of a job must be public, but an employee's ability to fill that job may be considered in closed session.

Any closed session action to appoint, employ, dismiss, accept the resignation of, or otherwise affect the employment status of a public employee must be reported at the public meeting during which the closed session is held. That report must identify the title of the position, but not the names of all persons considered for an employment position.<sup>38</sup> However, a report on a dismissal or non-renewal of an employment contract must be deferred until administrative remedies, if any, are exhausted.<sup>39</sup>

**"I have some important news to announce," said Mayor Garcia. "We've decided to terminate the contract of the city manager, effective immediately. The council has met in closed session and we've negotiated six months severance pay."**

**"Unfortunately, that has some serious budget consequences, so we've had to delay phase two of the East Area Project."**

*This may be an improper use of the personnel closed session if the council agenda described the item as the city manager's evaluation. In addition, other than labor negotiations, any action on individual compensation must be taken in open session. Caution should be exercised to not discuss in closed session issues, such as budget impacts in this hypothetical, beyond the scope of the posted closed session notice.*

## Labor negotiations

The Brown Act allows closed sessions for some aspects of labor negotiations. Different provisions (discussed below) apply to school and community college districts.

A legislative body may meet in closed session to instruct its bargaining representatives, which may be one or more of its members,<sup>40</sup> on employee salaries and fringe benefits for both represented ("union") and non-represented employees. For represented employees, it may also consider working conditions that by law require negotiation. For the purpose of labor negotiation closed sessions, an "employee" includes an officer or an independent contractor who functions as an officer or an employee, but independent contractors who do not serve in the capacity of an officer or employee are not covered by this closed session exception.<sup>41</sup>

These closed sessions may take place before or during negotiations with employee representatives. Prior to the closed session, the legislative body must hold an open and public session in which it identifies its designated representatives.

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**PRACTICE TIP:** The personnel exception specifically prohibits discussion or action on proposed compensation in closed session except for a disciplinary reduction in pay.

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**PRACTICE TIP:** Prior to the closed session, the legislative body must hold an open and public session in which it identifies its designated representatives.

During its discussions with representatives on salaries and fringe benefits, the legislative body may also discuss available funds and funding priorities, but only to instruct its representative. The body may also meet in closed session with a conciliator who has intervened in negotiations.<sup>42</sup>

The approval of an agreement concluding labor negotiations with represented employees must be reported after the agreement is final and has been accepted or ratified by the other party. The report must identify the item approved and the other party or parties to the negotiation.<sup>43</sup> The labor closed sessions specifically cannot include final action on proposed compensation of one or more unrepresented employees.

### Labor negotiations — school and community college districts

Employee relations for school districts and community college districts are governed by the Rodda Act, where different meeting and special notice provisions apply. The entire board, for example, may negotiate in closed sessions.

Four types of meetings are exempted from compliance with the Rodda Act:

1. A negotiating session with a recognized or certified employee organization;
2. A meeting of a mediator with either side;
3. A hearing or meeting held by a fact finder or arbitrator; and
4. A session between the board and its bargaining agent, or the board alone, to discuss its position regarding employee working conditions and instruct its agent.<sup>44</sup>

Public participation under the Rodda Act also takes another form.<sup>45</sup> All initial proposals of both sides must be presented at public meetings and are public records. The public must be given reasonable time to inform itself and to express its views before the district may adopt its initial proposal. In addition, new topics of negotiations must be made public within 24 hours. Any votes on such a topic must be followed within 24 hours by public disclosure of the vote of each member.<sup>46</sup> The final vote must be in public.

### Other Education Code exceptions

The Education Code governs student disciplinary meetings by boards of school districts and community college districts. District boards may hold a closed session to consider the suspension or discipline of a student, if a public hearing would reveal personal, disciplinary, or academic information about the student contrary to state and federal pupil privacy law. The student's parent or guardian may request an open meeting.<sup>47</sup>

Community college districts may also hold closed sessions to discuss some student disciplinary matters, awarding of honorary degrees, or gifts from donors who prefer to remain anonymous.<sup>48</sup> Kindergarten through 12th grade districts may also meet in closed session to review the contents of the statewide assessment instrument.<sup>49</sup>

### Joint Powers Authorities

The legislative body of a joint powers authority may adopt a policy regarding limitations on disclosure of confidential information obtained in closed session, and may meet in closed session to discuss information that is subject to the policy.<sup>50</sup>

**PRACTICE TIP:** Attendance by the entire legislative body before a grand jury would not constitute a closed session meeting under the Brown Act.

## License applicants with criminal records

A closed session is permitted when an applicant, who has a criminal record, applies for a license or license renewal and the legislative body wishes to discuss whether the applicant is sufficiently rehabilitated to receive the license. The applicant and the applicant's attorney are authorized to attend the closed session meeting. If the body decides to deny the license, the applicant may withdraw the application. If the applicant does not withdraw, the body must deny the license in public, immediately or at its next meeting. No information from the closed session can be revealed without consent of the applicant, unless the applicant takes action to challenge the denial.<sup>51</sup>

## Public security

Legislative bodies may meet in closed session to discuss matters posing a threat to the security of public buildings, essential public services, including water, sewer, gas, or electric service, or to the public's right of access to public services or facilities over which the legislative body has jurisdiction. Closed session meetings for these purposes must be held with designated security or law enforcement officials including the Governor, Attorney General, district attorney, agency attorney, sheriff or chief of police, or their deputies or agency security consultant or security operations manager.<sup>52</sup> Action taken in closed session with respect to such public security issues is not reportable action.



## Multijurisdictional law enforcement agency

A joint powers agency formed to provide law enforcement services (involving drugs; gangs; sex crimes; firearms trafficking; felony possession of a firearm; high technology, computer, or identity theft; human trafficking; or vehicle theft) to multiple jurisdictions may hold closed sessions to discuss case records of an on-going criminal investigation, to hear testimony from persons involved in the investigation, and to discuss courses of action in particular cases.<sup>53</sup>

The exception applies to the legislative body of the joint powers agency and to any body advisory to it. The purpose is to prevent impairment of investigations, to protect witnesses and informants, and to permit discussion of effective courses of action.<sup>54</sup>

## Hospital peer review and trade secrets

Two specific kinds of closed sessions are allowed for district hospitals and municipal hospitals, under other provisions of law.<sup>55</sup>

1. A meeting to hear reports of hospital medical audit or quality assurance committees, or for related deliberations. However, an applicant or medical staff member whose staff privileges are the direct subject of a hearing may request a public hearing.
2. A meeting to discuss "reports involving trade secrets" — provided no action is taken.

A "trade secret" is defined as information which is not generally known to the public or competitors and which: 1) "derives independent economic value, actual or potential" by virtue of its restricted knowledge; 2) is necessary to initiate a new hospital service or program or facility; and 3) would, if prematurely disclosed, create a substantial probability of depriving the hospital of a substantial economic benefit.

The provision prohibits use of closed sessions to discuss transitions in ownership or management, or the district's dissolution.<sup>56</sup>



### Other legislative bases for closed session

Since any closed session meeting of a legislative body must be authorized by the Legislature, it is important to carefully review the Brown Act to determine if there is a provision that authorizes a closed session for a particular subject matter. There are some less frequently encountered topics that are authorized to be discussed by a legislative body in closed session under the Brown Act, including: a response to a confidential final draft audit report from the Bureau of State Audits,<sup>57</sup> consideration of the purchase or sale of particular pension fund investments by a legislative body of a local agency that invests pension funds,<sup>58</sup> hearing a charge or complaint from a member enrolled in a health plan by a legislative body of a local agency that provides Medi-Cal services,<sup>59</sup> discussions by a county board of supervisors that governs a health plan licensed pursuant to the Knox-Keene Health Care Services Plan Act related to trade secrets or contract negotiations

concerning rates of payment,<sup>60</sup> and discussions by an insurance pooling joint powers agency related to a claim filed against, or liability of, the agency or a member of the agency.<sup>61</sup>

**PRACTICE TIP:** Meetings are either open or closed. There is nothing “in between.”<sup>62</sup>

### Who may attend closed sessions

Meetings of a legislative body are either fully open or fully closed; there is nothing in between. Therefore, local agency officials and employees must pay particular attention to the authorized attendees for the particular type of closed session. As summarized above, the authorized attendees may differ based on the topic of the closed session. Closed sessions may involve only the members of the legislative body and only agency counsel, management and support staff, and consultants necessary for consideration of the matter that is the subject of closed session, with very limited exceptions for adversaries or witnesses with official roles in particular types of hearings (e.g., personnel disciplinary hearings and license hearings). In any case, individuals who do not have an official role in the closed session subject matters must be excluded from closed sessions.<sup>63</sup>

**Q.** May the lawyer for someone suing the agency attend a closed session in order to explain to the legislative body why it should accept a settlement offer?

**A.** *No, attendance in closed sessions is reserved exclusively for the agency’s advisors.*

### The confidentiality of closed session discussions

The Brown Act explicitly prohibits the unauthorized disclosure of confidential information acquired in a closed session by any person present, and offers various remedies to address breaches of confidentiality.<sup>64</sup> It is incumbent upon all those attending lawful closed sessions to protect the confidentiality of those discussions. One court has held that members of a legislative body cannot be compelled to divulge the content of closed session discussions through the discovery process.<sup>65</sup> Only the legislative body acting as a body may agree to divulge confidential closed session information; regarding attorney/client privileged communications, the entire body is the holder of the privilege and only the entire body can decide to waive the privilege.<sup>66</sup>

Before adoption of the Brown Act provision specifically prohibiting disclosure of closed session communications, agency attorneys and the Attorney General long opined that officials have a fiduciary duty to protect the confidentiality of closed session discussions. The Attorney General issued an opinion that it is “improper” for officials to disclose information received during a closed session regarding pending litigation,<sup>67</sup> though the Attorney General has also concluded that a local agency is preempted from adopting an ordinance criminalizing public disclosure of closed session discussions.<sup>68</sup> In any event, in 2002, the Brown Act was amended to prescribe particular remedies for breaches of confidentiality. These remedies include injunctive relief; and, if the breach is a willful disclosure of confidential information, the remedies include disciplinary action against an employee, and referral of a member of the legislative body to the grand jury.<sup>69</sup>

The duty of maintaining confidentiality, of course, must give way to the responsibility to disclose improper matters or discussions that may come up in closed sessions. In recognition of this public policy, under the Brown Act, a local agency may not penalize a disclosure of information learned during a closed session if the disclosure: 1) is made in confidence to the district attorney or the grand jury due to a perceived violation of law; 2) is an expression of opinion concerning the propriety or legality of actions taken in closed session, including disclosure of the nature and extent of the illegal action; or 3) is information that is not confidential.<sup>70</sup>

The interplay between these possible sanctions and an official’s first amendment rights is complex and beyond the scope of this guide. Suffice it to say that this is a matter of great sensitivity and controversy.

**“I want the press to know that I voted in closed session against filing the eminent domain action,” said Council Member Chang.**

**“Don’t settle too soon,” reveals Council Member Watson to the property owner, over coffee. “The city’s offer coming your way is not our bottom line.”**

*The first comment to the press may be appropriate if it is a part of an action taken by the City Council in closed session that must be reported publicly.<sup>71</sup> The second comment to the property owner is not — disclosure of confidential information acquired in closed session is expressly prohibited and harmful to the agency.*

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**PRACTICE TIP:** There is a strong interest in protecting the confidentiality of proper and lawful closed sessions.

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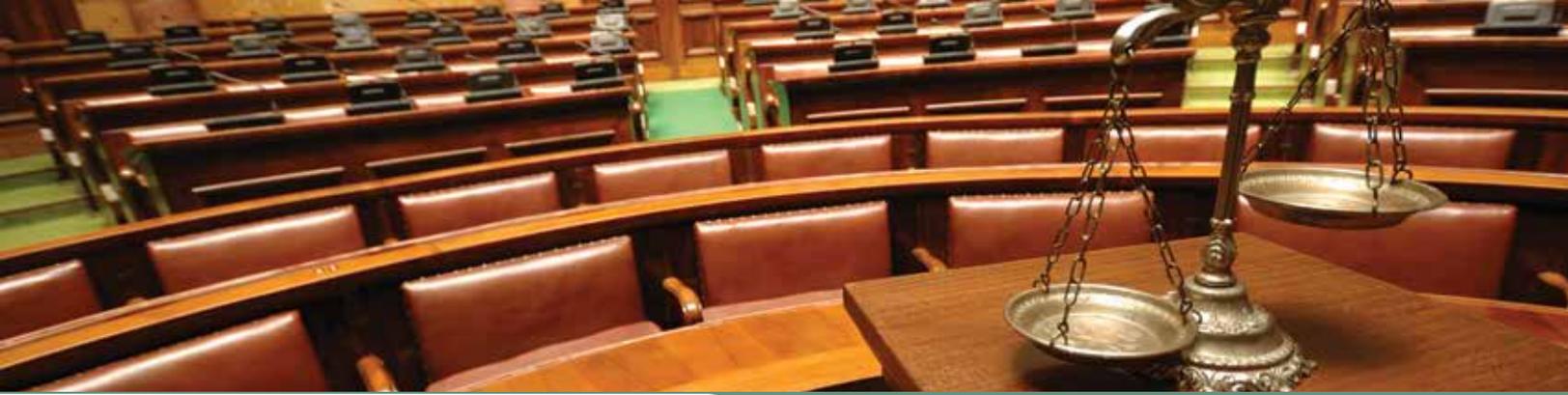
## ENDNOTES:

- 1 California Government Code section 54962
- 2 California Constitution, Art. 1, section 3
- 3 61 Ops.Cal.Atty.Gen. 220 (1978); but see California Government Code section 54957.8 (multijurisdictional law enforcement agencies are authorized to meet in closed session to discuss the case records of ongoing criminal investigations, and other related matters).
- 4 California Government Code section 54957.1
- 5 California Government Code section 54954.5
- 6 California Government Code section 54954.2
- 7 California Government Code section 54954.5
- 8 California Government Code sections 54956.9 and 54957.7
- 9 California Government Code section 54957.1(a)
- 10 California Government Code section 54957.1(b)
- 11 California Government Code section 54957.2
- 12 *Hamilton v. Town of Los Gatos* (1989) 213 Cal.App.3d 1050; 2 Cal.Code Regs. section 18707
- 13 *Roberts v. City of Palmdale* (1993) 5 Cal.4th 363
- 14 California Government Code section 54956.9; *Shapiro v. Board of Directors of Center City Development Corp.* (2005) 134 Cal.App.4th 170 (agency must be a party to the litigation).
- 15 82 Ops.Cal.Atty.Gen. 29 (1999)
- 16 *Page v. Miracosta Community College District* (2009) 180 Cal.App.4th 471
- 17 “*The Brown Act*,” California Attorney General (2003), p. 40
- 18 California Government Code section 54956.9(g)
- 19 *Trancas Property Owners Association v. City of Malibu* (2006) 138 Cal.App.4th 172
- 20 Government Code section 54956.9(e)
- 21 California Government Code section 54957.1
- 22 California Government Code section 54956.8
- 23 *Shapiro v. San Diego City Council* (2002) 96 Cal.App.4th 904; see also 93 Ops.Cal.Atty.Gen. 51 (2010) (redevelopment agency may not convene a closed session to discuss rehabilitation loan for a property already subleased to a loan recipient, even if the loan incorporates some of the sublease terms and includes an operating covenant governing the property); 94 Ops.Cal.Atty.Gen. 82 (2011) (real estate closed session may address form, manner and timing of consideration and other items that cannot be disclosed without revealing price and terms).
- 24 73 Ops.Cal.Atty.Gen. 1 (1990)
- 25 California Government Code sections 54956.8 and 54954.5(b)
- 26 California Government Code section 54957.1(a)(1)
- 27 California Government Code section 54957(b)
- 28 63 Ops.Cal.Atty.Gen. 153 (1980); but see *Duvall v. Board of Trustees* (2000) 93 Cal.App.4th 902 (board may discuss personnel evaluation criteria, process and other preliminary matters in closed session but only if related to the evaluation of a particular employee).
- 29 *Gillespie v. San Francisco Public Library Commission* (1998) 67 Cal.App.4th 1165; 85 Ops.Cal.Atty.Gen. 77 (2002)
- 30 *Gillespie v. San Francisco Public Library Commission* (1998) 67 Cal.App.4th 1165; 80 Ops.Cal.Atty. Gen. 308 (1997). Interviews of candidates to fill a vacant staff position conducted by a temporary committee appointed by the governing body may be done in closed session.

- 31 California Government Code section 54957(b)(3)
- 32 88 Ops.Cal.Atty.Gen. 16 (2005)
- 33 *Morrison v. Housing Authority of the City of Los Angeles* (2003) 107 Cal.App.4th 860
- 34 California Government Code section 54957(b); but see *Bollinger v. San Diego Civil Service Commission* (1999) 71 Cal.App.4th 568 (notice not required for closed session deliberations regarding complaints or charges, when there was a public evidentiary hearing prior to closed session).
- 35 78 Ops.Cal.Atty.Gen. 218 (1995); *Bell v. Vista Unified School District* (2000) 82 Cal.App.4th 672; *Furtado v. Sierra Community College* (1998) 68 Cal.App.4th 876; *Fischer v. Los Angeles Unified School District* (1999) 70 Cal.App.4th 87
- 36 *Moreno v. City of King* (2005) 127 Cal.App.4th 17
- 37 California Government Code section 54957
- 38 *Gillespie v. San Francisco Public Library Commission* (1998) 67 Cal.App.4th 1165
- 39 California Government Code section 54957.1(a)(5)
- 40 California Government Code section 54957.6
- 41 California Government Code section 54957.6(b); see also 98 Ops.Cal.Atty.Gen. 41 (2015) (a project labor agreement between a community college district and workers hired by contractors or subcontractors is not a proper subject of closed session for labor negotiations because the workers are not “employees” of the district).
- 42 California Government Code section 54957.6; and 51 Ops.Cal.Atty.Gen. 201 (1968)
- 43 California Government Code section 54957.1(a)(6)
- 44 California Government Code section 3549.1
- 45 California Government Code section 3540
- 46 California Government Code section 3547
- 47 California Education Code section 48918; but see *Rim of the World Unified School District v. Superior Court* (2003) 104 Cal.App.4th 1393 (Section 48918 preempted by the Federal Family Educational Right and Privacy Act in regard to expulsion proceedings).
- 48 California Education Code section 72122
- 49 California Education Code section 60617
- 50 California Government Code section 54956.96
- 51 California Government Code section 54956.7
- 52 California Government Code section 54957
- 53 *McKee v. Los Angeles Interagency Metropolitan Police Apprehension Crime Task Force* (2005) 134 Cal. App.4th 354
- 54 California Government Code section 54957.8
- 55 California Government Code section 54962
- 56 California Health and Safety Code section 32106
- 57 California Government Code section 54956.75
- 58 California Government Code section 54956.81
- 59 California Government Code section 54956.86
- 60 California Government Code section 54956.87
- 61 California Government Code section 54956.95
- 62 46 Ops.Cal.Atty.Gen. 34 (1965)
- 63 82 Ops.Cal.Atty.Gen. 29 (1999)

- 64 Government Code section 54963
- 65 *Kleitman v. Superior Court* (1999) 74 Cal.App.4th 324, 327; see also California Government Code section 54963.
- 66 *Roberts v. City of Palmdale* (1993) 5 Cal.4th 363
- 67 80 Ops.Cal.Atty.Gen. 231 (1997)
- 68 76 Ops.Cal.Atty.Gen. 289 (1993)
- 69 California Government Code section 54963
- 70 California Government Code section 54963
- 71 California Government Code section 54957.1

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# Chapter 6

## REMEDIES

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# Chapter 6

## REMEDIES



Certain violations of the Brown Act are designated as misdemeanors, although by far the most commonly used enforcement provisions are those that authorize civil actions to invalidate specified actions taken in violation of the Brown Act and to stop or prevent future violations. Still, despite all the safeguards and remedies to enforce them, it is ultimately impossible for the public to monitor every aspect of public officials' interactions. Compliance ultimately results from regular training and a good measure of self-regulation on the part of public officials. This chapter discusses the remedies available to the public when that self-regulation is ineffective.

### Invalidation

Any interested person, including the district attorney, may seek to invalidate certain actions of a legislative body on the ground that they violate the Brown Act.<sup>1</sup> Violations of the Brown Act, however, cannot be invalidated if they involve the following types of actions:

- Those taken in substantial compliance with the law. No Brown Act violation is found when the given notice substantially complies with the Brown Act, even when the notice erroneously cites to the wrong Brown Act section, but adequately advises the public that the Board will meet with legal counsel to discuss potential litigation in closed session;<sup>2</sup>
- Those involving the sale or issuance of notes, bonds or other indebtedness, or any related contracts or agreements;
- Those creating a contractual obligation, including a contract awarded by competitive bid for other than compensation for professional services, upon which a party has in good faith relied to its detriment;
- Those connected with the collection of any tax; or
- Those in which the complaining party had actual notice at least 72 hours prior to the regular meeting or 24 hours prior to the special meeting, as the case may be, at which the action is taken.

Before filing a court action seeking invalidation, a person who believes that a violation has occurred must send a written "cure or correct" demand to the legislative body. This demand must clearly describe the challenged action and the nature of the claimed violation. This demand must be sent within 90 days of the alleged violation or 30 days if the action was taken in open session but in violation of Section 54954.2, which requires (subject to specific exceptions) that only properly agendaized items are acted on by the governing body during a meeting.<sup>3</sup> The legislative body then has up to 30 days to cure and correct its action. If it does not act, any lawsuit must be filed within the next 15 days. The purpose of this requirement is to offer the body an opportunity to consider whether a violation has occurred and to weigh its options before litigation is filed.

Although just about anyone has standing to bring an action for invalidation,<sup>4</sup> the challenger must show prejudice as a result of the alleged violation.<sup>5</sup> An action to invalidate fails to state a cause of action against the agency if the body deliberated but did not take an action.<sup>6</sup>

### Applicability to Past Actions

Any interested person, including the district attorney, may file a civil action to determine whether past actions of a legislative body occurring on or after January 1, 2013 constitute violations of the Brown Act and are subject to a mandamus, injunction, or declaratory relief action.<sup>7</sup> Before filing an action, the interested person must, within nine months of the alleged violation of the Brown Act, submit a “cease and desist” letter to the legislative body, clearly describing the past action and the nature of the alleged violation.<sup>8</sup> The legislative body has 30 days after receipt of the letter to provide an unconditional commitment to cease and desist from the past action.<sup>9</sup> If the body fails to take any action within the 30-day period or takes an action other than an unconditional commitment, a lawsuit may be filed within 60 days.<sup>10</sup>

The legislative body’s unconditional commitment must be approved at a regular or special meeting as a separate item of business and not on the consent calendar.<sup>11</sup> The unconditional commitment must be substantially in the form set forth in the Brown Act.<sup>12</sup> No legal action may thereafter be commenced regarding the past action.<sup>13</sup> However, an action of the legislative body in violation of its unconditional commitment constitutes an independent violation of the Brown Act and a legal action consequently may be commenced without following the procedural requirements for challenging past actions.<sup>14</sup>

The legislative body may rescind its prior unconditional commitment by a majority vote of its membership at a regular meeting as a separate item of business not on the consent calendar. At least 30 days written notice of the intended rescission must be given to each person to whom the unconditional commitment was made and to the district attorney. Upon rescission, any interested person may commence a legal action regarding the past actions without following the procedural requirements for challenging past actions.<sup>15</sup>

### Civil action to prevent future violations

The district attorney or any interested person can file a civil action asking the court to:

- Stop or prevent violations or threatened violations of the Brown Act by members of the legislative body of a local agency;
- Determine the applicability of the Brown Act to actions or threatened future action of the legislative body;
- Determine whether any rule or action by the legislative body to penalize or otherwise discourage the expression of one or more of its members is valid under state or federal law; or
- Compel the legislative body to tape record its closed sessions.

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**PRACTICE TIP:** A lawsuit to invalidate must be preceded by a demand to cure and correct the challenged action in order to give the legislative body an opportunity to consider its options. The Brown Act does not specify how to cure or correct a violation; the best method is to rescind the action being complained of and start over, or reaffirm the action if the local agency relied on the action and rescinding the action would prejudice the local agency.

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It is not necessary for a challenger to prove a past pattern or practice of violations by the local agency in order to obtain injunctive relief. A court may presume when issuing an injunction that a single violation will continue in the future where the public agency refuses to admit to the alleged violation or to renounce or curtail the practice.<sup>16</sup> Note, however, that a court may not compel elected officials to disclose their recollections of what transpired in a closed session.<sup>17</sup>

Upon finding a violation of the Brown Act pertaining to closed sessions, a court may compel the legislative body to tape record its future closed sessions. In a subsequent lawsuit to enforce the Brown Act alleging a violation occurring in closed session, a court may upon motion of the plaintiff review the tapes if there is good cause to think the Brown Act has been violated, and make public the relevant portion of the closed session recording.

### Costs and attorney's fees

Someone who successfully invalidates an action taken in violation of the Brown Act or who successfully enforces one of the Brown Act's civil remedies may seek court costs and reasonable attorney's fees. Courts have held that attorney's fees must be awarded to a successful plaintiff unless special circumstances exist that would make a fee award against the public agency unjust.<sup>18</sup> When evaluating how to respond to assertions that the Brown Act has been violated, elected officials and their lawyers should assume that attorney's fees will be awarded against the agency if a violation of the Act is proven.

An attorney's fee award may only be directed against the local agency and not the individual members of the legislative body. If the local agency prevails, it may be awarded court costs and attorney's fees if the court finds the lawsuit was clearly frivolous and lacking in merit.<sup>19</sup>

### Criminal complaints

A violation of the Brown Act by a member of the legislative body who acts with the improper intent described below is punishable as a misdemeanor.<sup>20</sup>

A criminal violation has two components. The first is that there must be an overt act — a member of a legislative body must attend a meeting at which action is taken in violation of the Brown Act.<sup>21</sup>

"Action taken" is not only an actual vote, but also a collective decision, commitment or promise by a majority of the legislative body to make a positive or negative decision.<sup>22</sup> If the meeting involves mere deliberation without the taking of action, there can be no misdemeanor penalty.

A violation occurs for a tentative as well as final decision.<sup>23</sup> In fact, criminal liability is triggered by a member's participation in a meeting in violation of the Brown Act — not whether that member has voted with the majority or minority, or has voted at all.

The second component of a criminal violation is that action is taken with the intent of a member "to deprive the public of information to which the member knows or has reason to know the public is entitled" by the Brown Act.<sup>24</sup>

**PRACTICE TIP:** Attorney's fees will likely be awarded if a violation of the Brown Act is proven.

As with other misdemeanors, the filing of a complaint is up to the district attorney. Although criminal prosecutions of the Brown Act are uncommon, district attorneys in some counties aggressively monitor public agencies' adherence to the requirements of the law.

Some attorneys and district attorneys take the position that a Brown Act violation may be pursued criminally under Government Code section 1222.<sup>25</sup> There is no case law to support this view; if anything, the existence of an express criminal remedy within the Brown Act would suggest otherwise.<sup>26</sup>

## Voluntary resolution

Arguments over Brown Act issues often become emotional on all sides. Newspapers trumpet relatively minor violations, unhappy residents fume over an action, and legislative bodies clam up about information better discussed in public. Hard lines are drawn and rational discussion breaks down. The district attorney or even the grand jury occasionally becomes involved. Publicity surrounding alleged violations of the Brown Act can result in a loss of confidence by constituents in the legislative body. There are times when it may be preferable to consider re-noticing and rehearing, rather than litigating, an item of significant public interest, particularly when there is any doubt about whether the open meeting requirements were satisfied.

At bottom, agencies that regularly train their officials and pay close attention to the requirements of the Brown Act will have little reason to worry about enforcement.

### ENDNOTES:

- 1 California Government Code section 54960.1. Invalidation is limited to actions that violate the following sections of the Brown Act: section 54953 (the basic open meeting provision); sections 54954.2 and 54954.5 (notice and agenda requirements for regular meetings and closed sessions); 54954.6 (tax hearings); 54956 (special meetings); and 54956.5 (emergency situations). Violations of sections not listed above cannot give rise to invalidation actions, but are subject to the other remedies listed in section 54960.1.
- 2 *Castaic Lake Water Agency v. Newhall County Water District* (2015) 238 Cal.App.4th 1196, 1198
- 3 California Government Code section 54960.1 (b) and (c)(1)
- 4 *McKee v. Orange Unified School District* (2003) 110 Cal. App.4th 1310, 1318-1319
- 5 *Cohan v. City of Thousand Oaks* (1994) 30 Cal.App.4th 547, 556, 561
- 6 *Boyle v. City of Redondo Beach* (1999) 70 Cal.App.4th 1109, 1116-17, 1118
- 7 Government Code Section 54960.2(a); Senate Bill No. 1003, Section 4 (2011-2012 Session)
- 8 Government Code Sections 54960.2(a)(1), (2)
- 9 Government Code Section 54960.2(b)



- 10 Government Code Section 54960.2(a)(4)
- 11 Government Code Section 54960.2(c)(2)
- 12 Government Code Section 54960.2(c)(1)
- 13 Government Code Section 54960.2(c)(3)
- 14 Government Code Section 54960.2(d)
- 15 Government Code Section 54960.2(e)
- 16 *California Alliance for Utility Safety and Education (CAUSE) v. City of San Diego* (1997) 56 Cal.App.4th 1024; *Common Cause v. Stirling* (1983) 147 Cal.App.3d 518, 524; *Accord Shapiro v. San Diego City Council* (2002) 96 Cal. App. 4th 904, 916 & fn.6
- 17 *Kleitman v. Superior Court* (1999) 74 Cal.App.4th 324, 334-36
- 18 *Los Angeles Times Communications, LLC v. Los Angeles County Board of Supervisors* (2003) 112 Cal. App.4th 1313, 1327-29 and cases cited therein
- 19 California Government Code section 54960.5
- 20 California Government Code section 54959. A misdemeanor is punishable by a fine of up to \$1,000 or up to six months in county jail, or both. California Penal Code section 19. Employees of the agency who participate in violations of the Brown Act cannot be punished criminally under section 54959. However, at least one district attorney instituted criminal action against employees based on the theory that they criminally conspired with the members of the legislative body to commit a crime under section 54949.
- 21 California Government Code section 54959
- 22 California Government Code section 54952.6
- 23 61 Ops.Cal.Atty.Gen.283 (1978)
- 24 California Government Code section 54959
- 25 California Government Code section 1222 provides that “[e]very wilful omission to perform any duty enjoined by law upon any public officer, or person holding any public trust or employment, where no special provision is made for the punishment of such delinquency, is punishable as a misdemeanor.”
- 26 The principle of statutory construction known as *expressio unius est exclusio alterius* supports the view that section 54959 is the exclusive basis for criminal liability under the Brown Act.

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