

MARINA COAST WATER DISTRICT

Brown Act Overview

March 20, 2023

The Ralph M. Brown Act (Government Code §§54950 – 54958)

- First Enacted in 1953
- Who, What, and When
- Meetings and Common Pitfalls
- Electronic Devices
- Social Media
- When in Doubt Error on the Side of Caution

Who Does the Brown Act Apply To?

- The Brown Act Applies to the members of **any legislative body**: The governing body of a local agency or any other local body created by state or federal statute. (Gov't. Code §54952(a))
- It is broad by design
- Excludes ad hoc committees (those created for a limited purpose; limited time duration) which consists of less than a quorum of otherwise legislative body members; employees*

What Does the Brown Act Require?

- “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...” (Gov’t. Code §54953*)
- The purpose of the Brown Act is to ensure that actions and decisions of legislative bodies occur in the public domain
- “...an agenda containing a brief general description of each item of business to be transacted or discussed at the meeting, including items in closed session.” (Gov’t. Code §54954.2)
- Agenda must be posted 72 hours in advance of meeting (24 hours for special meeting. (Gov’t. Code §54954.2)
- “No action or discussion shall be undertaken on any item not appearing on the posted agenda...” (Gov’t. Code §54954.2)

When: The Brown Act Applies to “Meetings” (Whether You Intend to Be In a “Meeting” or Not)

- Gov’t. Code Sec. 54952.2(a): “[A]ny congregation of a majority of the members of a legislative body at the same time and location, **including a teleconference**, . . . to hear, discuss, deliberate, or take action on any item that is within the subject matter jurisdiction of the legislative body.”
- “Meeting” is Defined Very Broadly and Applies to Non-MCWD Settings
- “Meeting” Exists Where There is a Gathering (even virtual) of a Majority of a Legislative Body’s Members

Exceptions to the “Meetings” Definition

- “Individual Contact”
- “Seminar/Conference”
- “Community Meeting”
- “Other Legislative Body”
- “Social/Ceremonial Occasion”
- “Standing Committee”
- Even if Members of the Legislative Body Gather at an Excepted Event, Members Should Not Discuss District Matters or Business

Pitfalls for the Individual Contact Exception (Serial Meetings)

- Contact between a director and an intermediary can violate the exception
- Serial Meeting; Daisy Chain
- “A majority of the members of a legislative body shall not . . . 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.” §54952.2(b)(1).
- (b)(1) does not prevent a District employee or official from engaging in separate conversations or communications outside a meeting with Board members “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.”

Electronic Devices and the Brown Act

- No Difference Between Face to Face Communication and Electronic Communications, i.e., Email, Text, Social Media.
- A Series of Texts Between Directors Can Violate the Brown Act
- Use of Electronic Devices During Meeting: Texts/Emails To/From Directors During Public Meeting Can Violate the Brown Act Because Member of the Public Are Not Privy to the Discussion
- Some Legislative Bodies Have Adopted Prohibitions of Use of Electronic Devices During Meetings to Avoid the Appearance of Impropriety
- Communications to Third Parties During Closed Session Could Violate Brown Act Confidentiality Provisions

Social Media and the Brown Act

Gov't. Code §54952(3)(A)

- The Brown Act does not restrict a director from “...engaging in separate conversations or communications on an internet-based social media platform to **answer questions, provide information to the public, or to solicit information from the public regarding a matter that is within the subject matter jurisdiction of the legislative body** provided that a majority of the members of the legislative body do not use the internet-based social media platform to **discuss among themselves** business of a specific nature that is within the subject matter jurisdiction of the legislative body.”
- “A **member of the legislative body shall not respond directly to any communication** on an internet-based social media platform regarding a matter that is within the subject matter jurisdiction of the legislative body that is made, posted, or shared **by any other member of the legislative body.**”
- There is caselaw which holds “liking” a Facebook post is speech. (See *Bland v. Roberts*, 730 F. 3d 368, 386 (4th Cir. 2013))

Specific Examples of Brown Act Problems

- Agency General Manager Emails a Majority of the Board on the Status of Project Z. Director A drafts a response email to the GM that he supports Project Z, but would like to see it expanded, and hits “reply all”:
 - **This violates the Brown Act:** it is a communication between public agency directors on agency business in an electronic meeting which was not publicly noticed.
- City Council Member A posts on Facebook that she would like to prohibit the City’s garbage trucks from running before 8 a.m. to reduce noise pollution; One Council Member “likes” her post, another “dislikes” the post:
 - **This violates the Brown Act:** it is a communication between public agency directors on agency business in an electronic meeting which was not publicly noticed.

Brown Act Penalties for Violation

- An action taken in violation of the Brown Act is “null and void” and any “interested person” can commence an action to challenge the violation. (Gov’t. Code §54960.1)
- Each member of a legislative body who attends a meeting of that legislative body where action is taken in violation of any provision of this chapter, and where the member **intends to deprive the public of information** to which the member knows or has reason to know the public is entitled under this chapter, is **guilty of a misdemeanor**. (Gov’t. Code §54959)
- Disclosure of Confidential Information Acquired in Closed Session Can Lead to Injunctive Relief and/or **Referral to Grand Jury**. (Gov’t. Code §54963)

Closing/Questions

- Questions Concerning Specific Situations May Be Forwarded Through General Manager to Legal Counsel
- General Counsel Can Provide Reference Materials
- California Special Districts Association (CSDA) Provides Training and Webinars