



CITY OF HAYWARD AGENDA REPORT

AGENDA DATE 05/24/01

AGENDA ITEM _____

WORK SESSION ITEM B

TO: Planning Commission
FROM: City Attorney
SUBJECT: Review and Comment on the Brown Act

Recommendation:

It is recommended that the Planning Commission review and comment upon the following information.

Introduction:

In keeping with the City's strong commitment to the principles of open government, as well as the Alameda County Grand Jury's recommendation for periodic Brown Act updates, this report is presented to apprise the Planning Commission of current Brown Act issues.

Discussion:

The Ralph M. Brown Act ("Brown Act") is California's "sunshine" law for local governments. Based upon a state policy that the people must be informed so that they can maintain oversight of the government, it requires that all meetings of the legislative body of a local agency be open and public, and that all persons be permitted to attend any meeting of the legislative body of a local agency, unless an exception exists.

The Brown Act is organized into three main components which apply to local bodies covered by the Act: (1) What constitutes a meeting under the Act, and (2) Agenda and (3) Public Records. This report will focus primarily on the meeting component of the Brown Act.

Brown Act Requirements

Meetings: Under the Brown Act, a meeting is any congregation of a majority of the members of a legislative body at the same time and the same place to hear, discuss or deliberate on any item that is within the subject matter jurisdiction of the local agency. The Brown Act does not limit individual contacts between a member of the legislative body and any other person, except in the context of "serial meetings" which are discussed below. The Brown Act also permits the majority to attend a social gathering, provided that agency business of a specific nature is not discussed. The Brown Act does apply to a majority meeting with staff members for a collective briefing.

Exemptions. Since 1994, the Brown Act has allowed a majority of a legislative body to attend a meeting of another legislative body, provided there are no "sidebar" discussions about specific city business. Recent Brown Act amendments clarify this provision and provide that the majority can speak as part of the scheduled meeting, again provided there are no sidebar discussions about city business. An example of this would be a Commission majority appearing to testify on an issue in a neighboring city.

Recent amendments also explicitly permit a majority to attend a standing committee meeting, but only as "observers,," meaning that they cannot speak or otherwise participate in the meeting.

Setting Meeting Time and Place. Recent amendments exempt advisory committees and standing committees from the requirement of taking formal action to establish a time and place for holding regular meetings. This change will reduce the administrative burden and inconvenience associated with staff support for advisory committees.

Teleconferencing

Recent amendments have made electronic, remote meetings a real possibility. Under the former law, "video teleconferencing" was the only way to allow people to participate in a meeting from remote locations. But members of the legislative body could not participate, be counted as part of the quorum, or vote from remote locations.

Recent amendments allow "teleconferencing" to be used as a method for conducting electronic meetings. Commission members may be counted toward a quorum and participate fully in the meeting from remote locations. There are several technical requirements, including:

- Any remote location may be connected to the main meeting location by telephone, video or both.
- The notice and agenda of the meeting must identify any remote locations.
- Any remote locations must be posted and accessible to the public.
- All votes must be made by roll call.

- The meeting must in all respects comply with the Brown Act, including enabling participation by members of the public present in remote locations.
- At least a quorum of the legislative body shall participate from locations within the local agency's jurisdiction.

Adding Items To An Agenda

Recent Brown Act amendments liberalized former law on adding “urgency” items to the agenda. The old law required a two-thirds vote of the total voting membership, or a unanimous vote if less than two-thirds of the Commission was present (assuming the Commission finds an immediate need to take action on an item and the item came to the agency’s attention after the agenda was posted).

Recent amendments reduce the vote requirement by allowing a vote of two-thirds of those present, or by unanimous vote if less than two-thirds of members are present. This means that if five members of a seven-member body are present, three votes are required to add the item; if only four are present, a unanimous vote is required.

Mailing Of Agenda Materials

Formerly the Brown Act required the City to mail notice of regular and special meetings upon request at least one week before the meeting.

Recent amendments require the City to mail the agenda or the full packet to any person making a written request no later than the time the agenda is posted or is delivered to the members of the body, whichever is earlier. The City may charge fees to recover its copying and mailing expense. Any person may make a permanent request to receive these materials, in which event the request must be renewed annually. Failure to receive the agenda does not constitute grounds to invalidate any action taken at a meeting.

Notice of Special Meetings

The former law required mail or personal delivery of special meeting notice to each Commission member. Recent amendments allow special meeting notice to be given by "any means," which at a minimum includes fax and e-mail transmission in addition to mailing and personal delivery, as long as it is received 24 hours prior to the meeting.

Issues of Local Concern

There have been some questions raised recently over the balance between the public's right to speak during the public comment section of meetings and basic rules of decorum. Questions have arisen in situations when a member of the public refuses to abide by standard decorum and becomes unruly or uses the public comments section as a forum to personally attack city staff or officials.

Under the Brown Act, the public has a right to address the Commission at any meeting on any topic that is within the Commission's subject matter jurisdiction. However, a planning commission meeting is considered a "limited public forum." As such, the Commission has the authority to limit speech through the imposition of agendas and rules of order and decorum. The regulations on public comment must be reasonable. Any restrictions upon public comment at Commission meetings must not be too broad and must not constitute prior restraints. A legislative body may prohibit a member of the public from speaking on a matter which is not within the legislative body's subject matter jurisdiction. Some other forms of permissible regulation are as follows:

- **Request to Speak Requirements:** The Commission may require members of the public wishing to address the Commission to fill out a speaker's card and submit it to the City Clerk.
- **Time Limits:** The Commission may regulate the total amount of time on particular issues and for each individual speaker, subject to the requirements of due process. Time limits of one to five minutes are not unusual for individual speakers.
- **Repetitious or Irrelevant Comments:** Irrespective of any time limits, the Commission may regulate a speaker who is speaking too long by being unduly repetitious or by extended discussion of irrelevancies. A moderator is vested with a great deal of discretion to determine at which point speech becomes unduly repetitious or irrelevant. Attacks against the character or motive of any person may be ruled out of order.
- **Spokesperson for Groups:** The right to limit testimony on a given subject implies the right to request a spokesperson be chosen for a group and/or limit the number of such persons addressing the Commission whenever a group of persons wishes to address the Commission on the same subject matter.
- **Enforcement:** The Commission may rule speakers out-of-order for cause. A speaker may not be ruled out-of-order, however, due to the substance of the comments, unless they are irrelevant to the subject at hand, beyond the subject matter jurisdiction of the Commission and/or unduly repetitious.

Related Issues

Discussing Items Not On The Agenda: While the Brown Act generally prohibits acting on or

discussing items not on the posted agenda, it allows the Commission to do any of the following:

- Briefly respond to statements made or questions posed by persons exercising their public testimony rights.
- Ask a question for clarification.
- Make a brief announcement.
- Make a brief report on his or her own activities.
- Provide a reference to staff for factual information.
- Request staff to report back to the Commission on any matter.
- Take action to direct staff to place a matter of business on a future agenda.

While neither the legislature nor the courts have provided guidance on what a "brief" statement, comment, announcement or report may be, discretion would seem to dictate that they be able to be completed within one minute.

Discussion of Agenda Items Prior to Public Comment: Pursuant to the provisions of the Brown Act, the public is afforded an opportunity to speak on virtually any item on the agenda *prior* to its being acted upon by the Commission. Hence, it would be appropriate for members of the public to be afforded the opportunity to present evidence and testimony on an item prior to members of the Commission discussing their concerns, opinions and positions.

Technological Communications and Serial Meetings: The Brown Act applies to all meetings of the legislative body. One of the most frequently asked questions about the Brown Act involves serial meetings. The serial meeting may be a "daisy-chain" style meeting in which one member contacts another member and that member contacts a third member who then contacts a fourth member, etc., until a quorum and collective concurrence has been reached. Another type of serial meeting is the hub-and-spoke meeting in which one member contacts all other members. It is also possible for staff to become conduits, creating serial meetings. If the purpose of the communication (or series of communications) is to develop a consensus and a quorum has participated, then the communication is a serial meeting in violation of the Brown Act.

The popularity of e-mail and the presence of the computer has provided another avenue for potential Brown Act violations. If e-mail is used to build a consensus by a quorum of the legislative body, there is a Brown Act violation. One way that this may inadvertently arise is through use of the "Reply to All" function in responding to an e-mail.

Closed Sessions: Consistent with the strong policy in favor of open public meetings, the Brown Act requires that the Commission must discuss its matters in public, unless specific authority exists

in the Brown Act for a closed session. The exception that would most frequently apply for Commission matters is the exception for pending litigation, which includes both existing and anticipated or threatened litigation. Anticipated litigation means that there is significant exposure to litigation based on existing facts and circumstances. The legal authority for a closed session must be included on the posted agenda.

Remedies for Brown Act Violations: The District Attorney or any interested person can file a civil action to compel a local agency to comply with the Brown Act. Persons who wish to invoke the Brown Act's civil remedies must first provide the legislative body the opportunity to cure its actions. An interested person who successfully invalidates a legislative body's action can recover attorney's fees and costs from the local agency (not the individual members). However, a violation of the Brown Act by a member of the legislative body who acts with improper intent is punishable as a misdemeanor. The member must intend to deprive the public of information to which the member knows or has reason to know the public is entitled in order to be found guilty of a misdemeanor.

Recommended by:


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Approved by:


Michael O'Toole, City Attorney