

# Closed Session Training Program (Open Government Behind Closed Doors)

Thursday, May 9, 2019 General Session; 3:15 – 4:30 p.m.

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# OPEN MEETINGS BEHIND CLOSED DOORS (plus 10 bonus pro tips)

Dysfunction Junction City Council
Irregular Meeting
City Attorneys' Department
League of California Cities
May 2019

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## OPEN MEETINGS BEHIND CLOSED DOORS (plus 10 bonus pro tips)

As city attorneys we can play an important role in building and reinforcing the bonds of trust between local government and its citizenry. Our job is to promote the rule of law and to foster a culture of compliance. When we perform well, we can increase the confidence in local government and provide reassurance that the government is functioning within the confines of the law (as far as we know). One place where this source of reassurance is most useful is in closed session.

The Brown Act is a perfect host to American representative democracy. As is bluntly stated in the Act's express legislative intent, power is delegated to institutions and elected officials — delegated along with a healthy dose of skepticism:

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.

#### Government Code § 54950.

Leaning strongly in favor of open and public meetings, the Legislature — to which the Brown Act does not apply — still recognized that there are a narrow set of circumstances under which a public meeting is actually not in the best interests of the public. These are the matters where the members of a Brown Act body must represent the public interests outside of the public view — a circumstance not in natural harmony with the intent of the statute. Indeed, closed sessions are an exception to the state's strong policy that local governments' "actions be taken openly and that their deliberations be conducted openly." See Gov't Code §54962. Exceptions that permit closed sessions must be narrowly construed. See Cal. Const. art. 1 § 3 (a statute "...shall be broadly construed if it furthers the people's right of access, and narrowly construed if it limits the right of access.").

The best way to approach whether an item should be considered in closed session is to consider how the public would benefit from a closed session. Would it disadvantage the city (read: public/taxpayers) in litigation for opposing counsel to be privy to the city attorney's assessment of the case? Would the city be able to garner the best price for property if the seller's



representative attended the council's meeting with its negotiator when developing an offer? Would the city be able to recruit and retain top management employees if their performance reviews were held in public? Each of the circumstances under which the Brown Act authorizes a closed session supports the underlying policy that favors open meetings, except when it's to the specific detriment of the public.

Detriment to the public interest is not itself a basis for closed session. Instead, a Brown Act body may meet in closed session under the narrow exceptions — to the extent that discussion in open session would be detrimental to the public interest. For example, the general desire to avoid being sued over a controversial ordinance does not justify a closed session. Negotiation of a professional services agreement is not an express basis for a closed session and therefore discussions, including instruction to negotiators, must be done in open session. If discussion exceeds the scope of the exception that permits a closed session, the council is having an illegal meeting. While each councilmember is responsible for compliance with the law, as counsel to the city, whenever present in closed session, it is also the city attorney's job to keep the conversation in bounds.

The specific statutory exemption that authorizes the closed session must be stated on the agenda. Gov't Code §54954.2. The Brown Act provides closed session descriptions for each permitted exception and states "[n]o legislative body or elected official shall be in violation of Section 54954.2 or 54956 if the closed session items were described in substantial compliance with this section." Gov't Code § 54954.5; see *Castaic Lake Water Agency v. Newhall County Water Dist.* (2015) 238 Cal.App.4th 1196, 1205. These form descriptions provide "safe harbor."

All closed session meetings start in open session. There are two items of business that must take place in open session before holding a closed session: disclosure and public comment. The Brown Act requires that, before recessing to closed session, the city must publicly disclose the items to be discussed in closed session. This public announcement may be made by reference to the items by number or letter as they are listed on the agenda. Gov't Code §54957.7; see also Gov't Code §54956.9. The Brown Act also requires that each meeting provide an opportunity for public comment on agenda items before (or during) the Council's consideration of the item. Gov't Code §54954.3. The closed session agenda is no exception.

No minutes of closed session are required by the Brown Act (but it is obviously a good idea for someone to know exactly what happened in closed session). Some documentation of closed session action takes place in the public session. After the closed session, a written or oral report is required of certain actions. Gov't Code §54957.1.

Ten *Pro Tips* for closed sessions:

#### 1. Closed session is a choice.

The Brown Act authorizes closed sessions under narrowly defined circumstances but it does not require them. For example, if a developer has sued a city to challenge a land use decision, the city council may discuss settlement of the pending litigation in closed session. Specifically, "based on advice of legal counsel" when the city council determines "discussion in



open session concerning those matters would prejudice the position of the local agency in the litigation." However, because the proposed development may impact neighbors who are not a party to the lawsuit, the city council may be better served by a public discussion of any proposed settlement. Before advising that a matter should be discussed in closed session, the city attorney should make a conscientious assessment of the particular facts of the matter.

#### 2. The public interest is the reason for closed session.

In determining whether to advise that a matter be held in closed session, only the best interests of the public should drive the advice.

A closed session cannot be used to advise the council of the legal vulnerabilities of an ordinance because someone *might* sue over it. The city attorney may convey confidential legal advice in writing, but cannot convene a closed session to convey the advice. See *Roberts v. City of Palmdale* (1993) 5 Cal.4th 363.

A closed session cannot be used for "team building" among the councilmembers or between the council and the staff, even if no "city business" will be discussed. The public is entitled to observe the manner in which the council conducts itself as well as the deliberations on substance. In other words, developing mechanisms to get along with one another is "city business."

#### 3. Safe harbor descriptions require specific information

Government Code §54956.9(g) requires the city to announce the subparagraph under paragraph (d) that authorizes a closed session for litigation matters. If the basis of the closed session is to discuss a lawsuit that has been filed, the name of the case must be on the agenda (or announced publicly) unless to do so would jeopardize the city's ability to effect service or to conclude settlement negotiations to its advantage.

If the council is meeting to discuss initiation of litigation or exposure to litigation, additional information beyond the safe harbor language [Gov't Code §54954.5] may be required on the agenda (or announced publicly) to satisfy the Brown Act. The agenda should influence reference to the "facts and circumstances," as defined by the Brown Act, that authorize the closed session. Usually this will be a reference to a letter threatening litigation, description of a claim that has been filed with the city, or a brief description of the "accident, disaster, incident, or transactional occurrence that might result in litigation" against the city. Gov't Code §54956.9 (e)(2)-(5). This additional information is not required where it would reveal facts to otherwise unaware plaintiffs subjecting the city to potential liability or reveal the identity of a victim or alleged employee perpetrator of unlawful sexual conduct.

#### 4. A performance evaluation is not a council goal setting session

The Brown Act allows the city council to conduct a performance evaluation of its direct appointees, usually that will include at least the city manager and the city attorney. Gov't Code §54957. The purpose of the exception is to protect the employees' privacy (and prevent any lawsuits against the city for violating any privacy rights), create an environment for candid



feedback in furtherance of a well-functioning city hall, and to to attract and retain good employees by handling performance evaluations in a professional and effective manner.

Sometimes city councils are tempted to use the privacy of the employee evaluation to address new goals of the city or dynamics among the councilmembers unrelated to the manager's performance. The attempt to introduce topics of broader city policy or council functioning is generally made with an obviously-too-broad scope of the manager's responsibility. This can take the form of deciding to set goals for the manager like "identify sites for new city hall" or "initiate business license amendments that will regulate commercial cannabis businesses." If the council has already in its public sessions decided to build a new city hall or regulate commercial cannabis businesses, then the evaluation may be focused on setting timelines or expectations for status updates. But if these topics have not been discussed in public, the city manager's performance evaluation is not the place for the council to deliberate about whether to start committing resources to exploring property for a new city hall or whether to regulate commercial cannabis businesses. Another possible detour from the permissible scope of the discussion is where the council's real interest is in discussing their criticisms of the police chief or other department head hired by the manager. While the effectiveness of the manager's supervision and staff development is certainly fair ground for a performance evaluation, detailed discussion of the performance of others is usually beyond the scope of the manager's performance.

Using an evaluation form (the League has several samples) is one way to assist the council in focusing on appropriate factors and limiting the scope of the discussion to comply with the Brown Act. More importantly, a city attorney should not sit quietly while a council veers off-topic. When present in closed session, whatever else the city attorney may be there for, the public should be able to count on the city attorney to speak up if the council discussion exceeds the scope of the permissible closed session.

Note that the Brown Act specifically prohibits discussion of employee compensation, except in context of labor negotiations. No closed session convened for a performance evaluation of a city manager may include a discussion between the manager and the council about compensation in closed session.

#### 5. An agenda is no place for misdirection

The Brown Act agenda requirement is the way that the city communicates to the public in advance what will be on the agenda so the members of the public may make informed decisions about whether to attend the public portion of the council meeting. The public's right to attend and especially the public's ability to participate in local agency meetings is protected by the California Constitution and the Brown Act. Obviously, the agenda must include any item of business that the council will discuss in closed session. Some agencies list all pending litigation items on every agenda so that they *may* discuss them, even if they don't intend to (have any need to) at the time the agenda is posted. While certainly a practice to the convenience of the agency and arguably compliant with the letter of the law, the practice imposes a disadvantage to the public in that one could not discern from the agenda what matters will be discussed. That fact alone makes the practice suspect, but also consider that items listed routinely that do not meet the



standard ("based on advice of legal counsel" "discussion in open session concerning those matters would prejudice the position of the local agency in the litigation") are not proper subject matters for closed session, even if litigation has been filed.

The better practice (by far) is to list the closed session items that the council has a statutory basis and need to discuss in closed session on the agenda. If the council runs short on time or doesn't take up an item posted for whatever reason, when making the closed session announcement simply state that. Here is an example:

"The council met in closed session and tonight discussed the first item listed on the closed session agenda, performance evaluation of the city manager, but did not have time to discuss the second item listed on the closed session agenda, the litigation matter. The litigation matter will be placed on next meeting's agenda for council consideration at that time."

#### 6. Agency negotiator has to be designated in public session

Here is a sometimes overlooked passage of the Brown Act: with respect to labor negotiations, "...prior to the closed session, the legislative body of the local agency shall hold an open and public session in which it identifies its designated representatives." This is *in addition* to the requirement that the agency's designated representative be listed on the agenda (safe harbor language).

#### 7. Real estate decisions often require an open session discussion

The only aspect of a real estate transaction authorized for closed session is "price and terms of payment." Gov't Code §54956.8. The use of the property and site design are matters for the public session. Any topic involving the purpose of the transaction is for public session; closed session is limited to price and terms of payment to avoid disadvantage given the city (read taxpayer) in the monetary negotiation. See *Shapiro v. San Diego City Council* (2002) 96 Cal.App.4th 904.

#### 8. Legislative findings based on legal advice should satisfy the statute

Under Section 54956.9(d), "based on legal advice," the council may convene a closed session to discuss litigation "when discussion in open session concerning those matters would prejudice the position of the local agency in the litigation." As discussed above, the city attorney must be deliberate in assessing the need for a closed session. However, once that determination is made by the legislative body, judicial review should be limited to whether the appropriate findings were made on appropriate facts. To wit, if the city attorney advised a closed session and the litigation qualifies under the appropriate test, a court should uphold the conclusion without second-guessing the legislative decision. Because a litigant in Malibu is aggressively pursuing his legal theory that the council must establish in the open session the evidentiary basis for, among other things, the city attorney's advice that discussion of a particular litigation matter in open session would prejudice the city in the litigation, I feel duty bound to mention this issue.



#### 9. Reportable is the floor

The Brown Act provides a list of specific actions that must be reported in public. The report includes both the action taken and how each councilmember voted. And there are plenty of points of discussion, direction to negotiators, requests for information, and intermediary decisions that should not be reported in order to maintain the integrity of the closed session matter. That said, there are plenty of circumstances where more information than required will not adversely impact the council's handling of a closed session matter but will aid in reinforcing public confidence. For example, if the city manager is up for a raise made controversial because of budget restraints or performance complaints, at the end of a closed session involving a conference with the labor negotiator, it may be prudent to explain the rules. Here is an example:

"As announced at the outset of this meeting, the city council met in closed session tonight to confer with its labor negotiator involving the terms of the city manager's contract, including salary. I want to mention for the public's benefit that the city manager is not permitted in the closed session during those discussions and was not in the closed session for that item. No reportable action was taken in the closed session on that item. Again for the public's benefit, let me add that, in order to take action, the matter will be on an open session agenda and the public will be afforded an opportunity to comment."

Using closed session announcements to restate the rules of closed session will convey to the skeptical resident that there are rules, that you know the rules, and that someone (city attorney!) is looking out for the public.

#### 10. Confidentiality

Some councils leak and others do not. Unauthorized disclosure of confidential information obtained in a closed session is a violation of the Brown Act and the Act contains remedies (injunctions, referral to grand jury) and exceptions (whistleblowing). Gov't Code §54963. The Brown Act's provisions are meant to deter all leaks and address a specific leak. For city attorneys, the thornier issue is managing a leaky ship. Often councilmembers have a "kitchen cabinet" (an informal group of confidants with whom ideas are vetted) and sometimes it is difficult to convince such councilmembers that the confidentiality rules really extend to their trusted allies. Sometimes the manager or head of HR has close relationships with other employees or commissioners and they gossip in a way they would describe as discrete and inconsequential. Some councils are sharply divided and members may be on the active hunt for things that would embarrass their colleagues, whether in open session, outside a meeting, or in closed session. In those and the myriad of permutations of these situations, the city attorney should think through practices that best serve her client, *the city itself*.

Does it make sense to distribute closed session materials by email? In advance at all? Should closed session materials be collected at the end of the closed session? Are Councilmembers using electronic devises in closed session and is the city attorney able to address that matter? Is the matter something that could just as well be discussed in open session (and eliminate the issue altogether)?



The confidentiality of closed session is important. An excellent way to preserve it is to favor open session over closed and restate at the outset — in public or just for the council's benefit in closed session — the limited purpose for the closed session and the reason that the exception to the law is permitted.

The session will be a practical application of the Brown Act's rules on closed session. You will find these *pro tips* handy. And now you are ready to provide legal counsel to the Dysfunction Junction City Council. Here is today's meeting agenda:

AGENDA
IRREGULAR MEETING
CITY COUNCIL
CITY OF DYSFUNCTION JUNCTION
MAY 9, 2019 1:00AM
COUNCIL CHAMBERS, CITY HALL
666 MAGA ROAD

#### To the members of the City Council of the City of Dysfunction Junction:

NOTICE IS HEREBY GIVEN that the Mayor has called a Special Meeting of the City Council of the City of Dysfunction Junction to be held at City Hall, 666 Maga Road, Dysfunction Junction, California, at 1:00 p.m. on Thursday, May 9, 2019, for the purpose of convening a closed session.

- 1. CALL TO ORDER (Mayor)
- 2. ROLL CALL
- 3. PUBLIC COMMENT ON CLOSED SESSION ITEMS
- 4. CLOSED SESSION AGENDA
  - A. EMPLOYEE PERFORMANCE EVALUATION Title: City Manager
  - B. PUBLIC EMPLOYEE DISCIPLINE/DISMISSAL/RELEASE
  - C. CONFERENCE WITH LABOR NEGOTIATORS
    Agency designated representative: City Attorney or her designee
    Employee organization: all of them



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#### D. CONFERENCE WITH REAL PROPERTY NEGOTIATORS

Property: APN No. 33-426-010

Agency negotiator: Dudley Doright, Mounties Realty

Negotiating parties: Snidely Whiplash

Under Negotiation: Price & Terms of Payment

#### E. CONFERENCE WITH LEGAL COUNCIL — EXISTING LITIGATION

Pursuant to Government Code 54956.9(d)(1)

Disgruntled Residents of Dysfunction Junction v. City of Dysfunction Junction

LACSC Case No. BS2018

#### F. CONFERENCE WITH LEGAL COUNCIL — ANTICIPATED LITIGATION

Number of cases: one

#### 5. RECONVENE IN OPEN SESSION

#### 6. CLOSED SESSION ANNOUNCEMENT

#### 7. ADJOURNMENT