



## Have You Noticed? Noticing and Agenda Descriptions Under the Brown Act

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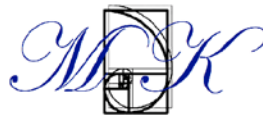
**“HAVE YOU NOTICED?”**

**NOTICING & AGENDA  
REQUIREMENTS UNDER  
THE BROWN ACT**

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Presented by the Martin D. Koczanowicz

Koczanowicz & Hale



# HAVE YOU NOTICED?



# **Notice and Agenda Requirements**

## **□ WHY DO WE NEED TO NOTICE**

Under the California Gov't Code<sup>1</sup> §§ 54950-54963 (Ralph M. Brown Act), meetings of public bodies must be open and public, decisions must be made in a public forum, and action taken in violation of open meeting laws may be voided. In addition, each meeting of a public body must be properly noticed and each agenda must contain sufficient information to inform the public of what actions will be taken by that legislative body.

The legislative intent in adoption of the Brown Act was well expressed in § 54950:

*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.*

Consequently, as a general rule, no action can be taken by the governing body on an item or a subject matter that is not properly noticed on a timely posted agenda.

## **□ WHO'S COVERED BY THE NOTICING REQUIREMENTS**

For our purposes, the noticing requirements apply to the City Councils and any board, commission, committee, task force or other advisory body created by the Council, whether permanent or temporary, decision making or advisory (§ 54952(b)). In addition, noticing requirements pertain to any standing committee of a covered board, regardless of number of members (§ 54952(b)) as well as governing bodies of non-profit corporations formed by a public agency or which includes a member of the City Council and received public money from that Council (§ 54952 (c)). Only advisory committees, composed solely of the members of the legislative body that are less than quorum and no continuing subject matter jurisdiction or fixed meeting schedule are exempt from the Brown Act (§ 54952(b)).

For a City Attorney, that means that the same level of attention given to the agenda posting, content and adherence to the Brown Act for the City Council meetings should be given to the Planning Commission meetings (far greater exposure to a challenge of a decision than City

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<sup>1</sup> All Code sections referenced refer to California Government Code unless otherwise noted.

Council) and all of the “minor” advisory commissions and committees that many cities have installed to assist Council on various issues.

As a practical matter, budgetary constraints for contract City Attorneys and time and staffing for in-house attorneys, at times may preclude such detailed review, or attendance at the actual meetings. It is important to provide good training on the noticing requirements and agenda content to attending staff on regular basis and to the “legislative bodies” annually.

## □ AGENDA REQUIREMENTS FOR REGULAR MEETINGS

Each legislative body (excluding advisory or standing committees) shall by some formal method (resolution, Ordinance, by-laws etc.) specify the date, time and place for its regular meetings (§ 54954(a)). In many jurisdictions the city council adopts a Resolution annually, setting the schedule for the regular meetings for the upcoming year. Some jurisdictions have certain set defaults for their regular meetings. For example, if a city council meets on Mondays, they can choose to skip the meeting on Mondays that are holidays, or to automatically meet on the Tuesday that follows. These “default rules” again should be established by formal action of the legislative body and be encompassed in the annually adopted schedule.

Every regular meeting of a legislative body of a local agency must be properly noticed by posting of an agenda that advises the public of the meeting and the matters or issues that the legislative body will be discussing and /or deliberating as action items. Some of the basic requirements are set out below:

- Agendas must be posted **at least** 72 hours before the regular meeting in a set location(s) freely accessible to the members of the public. (§§ 54954(a), 54954.2(a). There is no prohibition against posting of the agenda and distributing and making agenda packets available to the legislative body and the public earlier than three days before the meeting. In some instances, (annual budget document, large environmental impact report, disposition or development agreement) early distribution is preferred to provide sufficient time for review.
- Mail notice at least three (3) days before regular meeting to those who request it and provide the agenda packet at the same time as it is distributed to a majority of the legislative body. If requested, the agenda and documents in the agenda packet shall be made available in appropriate alternative formats to persons with a disability, as required by Section 202 of the Americans with Disabilities Act of 1990 (42 U.S.C. Sec. 12132), and the federal rules and regulations adopted in implementation thereof. (§ 54954.1);
- In the rare instance that a member of the legislative body is participating by phone, skype or other electronic means, the agenda must also be posted at the location from which the call is made, and the public must have access to that location (§54953(b)(1)).
- If a City maintains a website, the agenda must be posted on that website §54954.2(a)(1). The requirement is excused in the event that the website is down temporarily for maintenance and/or repairs.

## □ CONTENT REQUIREMENTS OF AGENDA

The Agenda must include the time date and location of the meeting. In addition, the following apply:

- The agenda should contain a brief (20 words or less) general description of each item of business to be transacted or discussed at the meeting, including items to be discussed in closed session. (§54954.2) The purpose of the brief general description is to inform interested members of the public about the subject matter under consideration so that they can determine whether to monitor, attend or participate in the meeting of the body.
- Agenda description must not be misleading. The brief description of an item that the Council will consider or deliberate, cannot be ambiguous or misstate the item under discussion. An item on the agenda describing consideration of contract for Interim Finance Director, was not sufficient notice of actually considering the termination of the sitting Finance Director (*Moreno v. City of King* (2005) 127 Cal App 4th 17, 25 Cal Rptr 3d 29.)
- Agendas must have enough information to enable members of the public to determine the general nature of subject matter of each agenda item to be discussed. A description of each item generally need not exceed 20 words, although the description must be sufficient to provide interested persons with an understanding of the subject matter which will be considered. (*Carlson v. Paradise Unified School Dist.* (1971) 18 Cal.App.3d 196, 200).
- Agenda and any published notice must also include any recommendations forwarded from Planning Commission (or potentially other advisory bodies) to the City Council as it related to approval of development agreements and land use requirements. (*Rialto Citizens for Responsible Growth vs. City of Rialto* (4<sup>th</sup> Dist. 2012) 208 Cal App 4<sup>th</sup> 899)
- In any situation where an environmental determination will be considered and acted on, as part of the action taken by the Council or Planning Commission, that actual action needs to be specifically and separately identified on the agenda. So for example an agenda item which states: “Consideration and approval of Conditional Use Permit for Sports Arena and Football stadium and related approvals” would not be in compliance with noticing requirements if “the related approvals” included an action on an environmental determination or document. The agenda should also state: “and consideration of a Mitigated Negative Declaration related to the project”. (See also *San Joaquin Raptor Rescue Center v. County of Merced, et al.* (5th Dist. 2013) 216 Cal.App.4th 1167)

## □ OTHER RELATED NOTICE REQUIREMENTS

Though not directly on point for agenda noticing requirements under the Brown Act, other noticing obligations exist for various subjects or issues deliberated by City Councils. With regard to most land use entitlements or zoning decisions, 10-day noticing requirements are covered in §§65090-65096. For adoption of development impact fees 14-day noticing requirement is mandated by §66016. Lastly separate 45-day noticing requirements must be observed for hearings under Proposition 218.

## □ NO ACTION CAN BE TAKEN ON ITEMS THAT ARE NOT NOTICED

The Board cannot discuss or take action on any item that is not on the agenda. Council can respond or ask staff to briefly respond to questions from the public or other limited routine comments, but no action can be taken on any of those items. Council can however direct staff to agendize any of such item for a discussion at a future meeting.

### **Exceptions:**

- Council, after publicly identifying an item during the meeting, can take action on an item that was not agendized if such item was listed on an agenda for a meeting that took place less than five days before and was continued to the meeting at which the action is being taken (§54954.2(b)(3)).
- Council can, in an emergency situation (an emergency situation exists if the legislative body determines a work stoppage, crippling disaster, or other activity severely impairs public health, safety or both), deliberate and take action on an item that was not an agenda § 54954.2(b)(1).
- Council can take action on an item not on the agenda if Council determines that there exists an immediate need to take action and the need to take action was not known when the agenda was posted. § 54954.2(b)(2). This exception is used most frequently to “add” an item to the agenda during the meeting. Staff must be able to provide the Council, with the required information to make the necessary findings. Usually the item ends up being considered as there exists a deadline for the Council’s action that may not have been known at the time of agenda posting. Financial benefit to the City constitutes a need (i.e. grant application deadline or opportunity to realize some savings through an agreement with another jurisdiction or group of jurisdictions which came to staff’s attention). Also often approval of a letter in support or opposition that needs to be filed by a certain date causes this section to be invoked. The supporting facts need to be clearly enumerated and circumstances identified, before Council votes to place the item on the agenda. Also the reason why the item cannot wait till the next regular meeting should be clearly stated.



Note that a separate “supermajority” vote is needed to consider hearing the item. Once that vote is taken in the affirmative, the item is then placed on the agenda and considered as a separate item with a normal voting process applicable to such items.

Caution should be given to prevent abuse of this process. There may be times when staff wishes to accommodate an applicant in a last minute addition, or to justify a delay in preparation of a staff report. Generally, these circumstances would not qualify for this exception. The use of this process should be limited to truly time urgent circumstances which cannot wait till the next meeting and which arose since the posting of the agenda.

## ☐ **NOTICE REQUIREMENTS FOR SPECIAL MEETINGS**

- Written notice must be send to each member of the legislative body and to each local newspaper of general circulation 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. (§ 54956; 53 Ops. Cal.Atty.Gen. 245, 246 (1970)). This usually also includes an agenda for that meeting.
- The notice must contain a brief general description of each item to be discussed or addressed, including closed session items.
- The notice must include the time and location of the meeting. A special meeting and all proceedings thereof are void where notice thereof is not given and one board member is absent. *Orange v. Clement* (1919, Cal App) 41 Cal App 497.
- Note that in a general law city no Ordinances may be adopted at a special meeting (§36934).

## ☐ **NOTICE REQUIREMENTS FOR EMERGENCY MEETINGS**

- Deliver notice of emergency meetings at least one (1) hour in advance to those who request it. (§§ 54956, 54956.5)
- Notify the media of special or emergency meetings, if requested one hour prior to the meeting (§ § 54956, 54956.5(b)(2)).
- The minutes, the list of people notified about the emergency meeting, a copy of a roll call vote and any action taken during the meeting, shall be posted in a public place as soon as possible after the meeting and remain posted for at least 10-day (§54956.5(e)).

## □ **ADJOURNMENT AND CONTINUANCES**

Regular and special meetings may be adjourned to a future date. (§ 54955). If the subsequent meeting is conducted within five (5) days of the original meeting, matters properly placed on the agenda for the original meeting may be considered at the subsequent meeting. (§ 54954.2(b)(3).) If the subsequent meeting is more than five (5) days from the original meeting, a new agenda must be prepared and posted pursuant to § 54954.2. Hearings continued pursuant to § 54955.1 are subject to the same procedure.

The process has been recognized and supported by the Courts. Council has the ability to continue the public comment on an item that is being continued to another meeting. § 54955.1 allows for any hearing by a legislative body of a local agency to be continued in the manner set forth in § 54955 of the Act, and a library commission and its commissioners did not violate § 54954.3(a) of the Act by allowing public comment only at a continued hearing on the same agenda. *Chaffee v. San Francisco Library Com.* (2004) 115 Cal App 4th 461, 9 Cal Rptr 3d 336

## □ **NOTICING FOR MEETINGS VIA TELECONFERENCES**

There are those rare occasions when a Council Member is away from the city but has a specific need or desire to participate in the Council meeting. Such participation can legally occur by electronic means. That could be telephone, SKYPE or video conferencing. § 54953(b)(1) permits the use of teleconferencing. Noticing a meeting which includes teleconferencing must comply with the following:

- Agenda posted no later than 24 hours prior to the special meeting and 72 hours prior to the regular meeting and posted **at all** teleconference location.
- Each teleconference location must be identified in the agenda.
- Each teleconference location must be open and accessible to the public.
- Notice must include the time and location of the meeting and identify the teleconference location(s).
- Must contain a brief description of each item to be discussed or addressed, including closed-session items.
- Must have a roll call vote on all items. (departure from normal meeting procedures, where only clarity on who voted in what manner is required)
- Quorum of the Council must participate in the usual meeting location within the Council's boundaries.

## □ **CLOSED SESSIONS**

Under the Brown Act, closed sessions must be expressly authorized by explicit statutory provisions. Prior to the enactment of § 54962 which prohibits any closed session that is not statutorily authorized by the Code, the courts had recognized impliedly authorized justifications for closed sessions. (*Sutter Sensible Planning, Inc. v. Board of Supervisors* (1981) 122 Cal.App.3d 813; *Sacramento Newspaper Guild v. Sacramento County Bd. Of Suprs.* (1968) 263 Cal.App.2d 41.) That legislation made it clear that closed sessions cannot be conducted unless

they are expressly authorized by statute. The attorney general has stated, "if a specific statutory exception authorizing a closed session cannot be found, the matter must be conducted in public regardless of its sensitivity." *Rowen v. Santa Clara Unified School District* (1981) 121 Cal.App.3d 231, 234; 68 Ops. Cal.Atty.Gen. 34, 41-42 (1985).

Items to be discussed in closed sessions must be included on the agenda and must be announced before going into closed session.

## □ NOTICING ITEMS FOR CLOSED SESSIONS

There are several statutorily permitted subjects which can be presented to the Council in Closed Session. The most common include: Tort Claims (§54956.95), Personnel (§ 54957(b)(1)), Pending/Potential Litigation (§ 54956.9), Labor Negotiations (§ 54957.6), Property Negotiations (§ 54956.8).

Though there are no mandatory descriptions or specific language for noticing closed sessions, Code provides for "safe harbor" provisions for each of the categories which contain the necessary information. They are set out in detail in § 54954.5. Use of these "safe harbor" descriptions will generally safeguard the Council Members and the city from potential noticing violations by providing substantial compliance with the Code.

## □ EMPLOYEE APPOINTMENT, DISCIPLINE AND EVALUATIONS

Council may meet in closed session to discuss the appointment, employment, performance, evaluation, discipline, complaints about or dismissal of an existing or potential employee (§ 54957(b)(1)). Instead of closed session, the employee may request a hearing in a public meeting on any charges or complaints against the employee, and must be noticed in writing 24 hours prior to the closed session of that option and that specific charges or complaints will be discussed by the Council.

Where plaintiff, former librarian of defendant community college, contended that defendant's Board of Trustees violated the Brown Act by taking action regarding plaintiff's employment in closed session rather than an open public meeting, plaintiff's argument that the Board mischaracterized the agenda item pursuant to which her employment was reviewed, thereby violating § 54954.5, which sets forth the posting requirements for describing closed session items was rejected by the Court. Plaintiff's assertion that the "public employee performance evaluation" agenda classification is inappropriate "for consideration of matters constituting charges and complaints against the employee and for which discipline and/or dismissal is contemplated," and that the appropriate agenda item was "Public employee discipline/dismissal/release was incorrect. § 54960.1 denies relief if the agenda item was in "substantial compliance" with §§ 54954.2 and 54954.5. (Gov C § 54960.1(d)(1)), and here, the Board was found to have been in substantial compliance with those statutes. *Furtado v. Sierra Community College* (1998, Cal App 3d Dist) 68 Cal App 4th 876. But also see *Moreno vs. City of King* pg.4 above for different facts resulting in a different ruling by the Court.

With regard to employment vs. appointment of an employee (may include contractors serving in the role of an employee, like a contract City Attorney) until an actual appointment is being deliberated, the noticing should reference “Public Employee Employment; Position: City Attorney”.

Please also note that §54957(b)(4) precludes discussion or action on proposed compensation, other than a reduction in pay which is a consequence of a disciplinary process. Consequently, city manager and/or city attorney contracts which include compensation need to be approved in open session and be agendized as a separate item.

## □ **PENDING/POTENTIAL LITIGATION**

Closed session pertaining to pending or potential litigation is permitted only if open discussion "would prejudice the position of the agency in the litigation." The litigation must be named on the posted agenda or announced in open session unless doing so would jeopardize the city's ability to service process on an unserved party or conclude existing settlement negotiations to its advantage. (§ 54956.9). As a practical matter it is inconceivable how an attorney would advise the client (City Council) regarding matter in litigation in a public meeting, without waiving the Attorney/Client communication privilege, thus prejudicing client's position in litigation. In my experience, other than a brief report of information that is already in the public domain, (appeal being filed, case being dismissed, date of an important hearing) all discussions pertaining to litigation are conducted in closed session.

To qualify for closed session regarding litigation, the subject must pertain to:

- Existing litigation (§ 54956.9(a));
- Threatened or anticipated litigation (§s 54956.9(d)(1), (d)(2));or
- Initiation of litigation (§ 54956.9(c)).

Note that in the instance of threatened or anticipated litigation Council needs to identify the facts and circumstances which give rise to the anticipated litigation unless the potential plaintiff or defendant is unaware of those facts or circumstances and disclosure would prejudice city's position. If the city receives a written claim or threat of litigation the City has an obligation to make the writing available for public inspection upon demand and/or state the circumstances giving rise to the potential litigation.

The purpose of § 54956.9 is to permit the body to receive legal advice and make litigation decisions only; it is not to be used as a subterfuge to reach non-litigation oriented policy decisions.” *Trancas Property Owners Assn. v. City of Malibu*, 138 Cal. App. 4th 172, 184-84, 41 Cal. Rptr. 3d 200 "Pending litigation" also includes taking action upon the settlement of a lawsuit. 75 Ops. Cal. Att'y Gen. 14 (1992). Advisory committees may also meet with legal counsel in a closed session to discuss pending litigation. 67 Ops. Cal. Att'y Gen. 111 (1984), though the scope of such meeting would be very narrow and limited to issues which would be under the advisory's body purview.

Closed session item would not include meeting with an adversary and his or her counsel to settle potential litigation. *Page v. Miracosta Community College Dist.*, (2009)180 Cal. App. 4th 471. Nor would legal counsel include in a closed session a mediator with whom members of a legislative body conferred with during a mediation with an adversary to settle potential litigation. *Id.* at 504. Neither of those scenarios would fit into the overall exception for litigation closed session being allowed “only if discussion in public would prejudice the city’s position in the litigation”.

During the public meeting in which the closed session is held, the legislative body shall report any action taken in closed session regarding approval given to its legal counsel to initiate, intervene or defend a lawsuit, or approval to settle pending litigation. § 54957.1(a)(2) and (a)(3). The body must report the adverse parties and the substance of the litigation. However, in the case of approval given to initiate or intervene in an action, the announcement need not identify the action, the defendant or other particulars, but shall specify that the direction to initiate or intervene in an action has been given and that the action, defendants and the other particulars shall, once formally commenced, be disclosed to any person upon inquiry, unless disclosure would jeopardize service of process on a party or affect settlement negotiations. § 54957.1(a)(2).

#### **□ PERMISSIBLE SCOPE OF DISCUSSION IN REAL ESTATE NEGOTIATIONS**

Closed Session is permitted with the Council to discuss, with an agency's identified bargaining agent, the negotiating strategy, price or payment terms. The parcel, negotiators and the prospective seller or purchaser must be on the agenda. (§ 54956.8) Final price and payment terms must be disclosed when the actual lease or contract is brought for approval. Reportable action is required when Council’s action in closed session renders the agreement completed (§54957.1(a)(1)(A)).

#### **□ PERMISSIBLE SCOPE OF DISCUSSION IN LABOR NEGOTIATIONS**

Council can meet in closed session with its negotiators to receive updates and instruct the agency's identified negotiator on negotiating strategy, compensation issues and any other matter within the statutorily provided scope of representation (§ 54957.6). Again agenda needs to identify the negotiating team and the bargaining group which is being discussed.

#### **□ HOW TO FIX NOTICING PROBLEMS IF IMPROPERLY NOTICED**

§54960.1 provides for the process of challenging and curing any violations of the open meeting laws. City has 30 days from the receipt of the written demand to cure, to correct the challenged action and advise the requesting party of the correction. The most common way to correct the error or mistake in noticing process is to void the challenged action and to re-notice and rehear the item. Code provides for several exceptions and other detailed processes and should be carefully consulted in the event your agency receives a written demand for correction or similar notice of alleged violation of the Brown Act. Time is of the essence in dealing with such

corrections and deadlines need to be strictly followed to preserve your city's ability to effectively defend or respond to such notice.

## □ **CONCLUSION**

Generally speaking, it is better to be "over-noticing" than "under-noticing" the actions and deliberations of the governing body. In my experience the issues arise when the client tries to straddle the line in order to accomplish some "needed" outcome or due to time crunches some last minute item is added to the agenda.

Even though the corrective process is not complicated or burdensome if an error is made, the negative publicity surrounding the Council decision which was made "in violation of open meeting laws" and had to be voided and redone, will have a lasting effect which is likely to be brought up again and again by the vocal minority during public comment. It is best to err on the side of conservative advice on these items and keep everyone "on notice"!