

**Mountain View Whisman School District
Measures G and T Citizens' Bond Oversight Committee**

October 9, 2020

The Brown Act

I. Purposes of the Brown Act

- A. To keep the public informed of the actions, debates and views of locally elected representatives; and
- B. To provide the procedural framework for local legislators to meet, debate, act and listen collectively to their constituents.

II. Applicability: Applies to a “member of the legislative body of a local agency” which includes “[a]ny person elected to serve as a member of a legislative body who has not yet assumed the duties of office...” Once elected, officials are expected to know the requirements of the Brown Act, even before taking office. (Government Code § 54952.1)

III. Legislative Body

- A. Includes any:
 - 1. Commission
 - 2. Committee
 - 3. Board
 - 4. Other body
 - 5. Also includes advisory committees that are standing committees that have continuing subject matter jurisdiction or fixed meeting schedules. (Government Code § 54952)
- B. Whether:
 - 1. Permanent or Temporary
 - 2. Decision-making or advisory
 - 3. Established by charter, ordinance, resolution, or *formal action of the Board*. (Government Code § 54952)

IV. Meetings

- A. Any congregation of a majority of the members of a legislative body at the same time and place to hear, discuss, or deliberate upon any item that is within the subject matter jurisdiction of the legislative body; or

- B. Any use of direct communication, personal intermediary, or technological devices that is employed by a majority of the members of the legislative body to develop a collective concurrence (Government Code § 54952.2), including:
1. Telephone, email, Facebook, Twitter, Instagram, blogs, etc.;
 2. Communication through an intermediary.
- C. **Meetings – substance v. procedure:** Communication limited to providing information (i.e., Superintendent’s weekly report) or procedural or administrative matters (scheduling meetings, determining agenda and time allotted to each of them) do not constitute meetings if they do not constitute *substantive* discussions of a topic within the subject matter of the Board/Committee.
- D. **Meetings – developing a collective concurrence:** Test: If discussion can potentially contribute to developing a collective concurrence, it is likely to constitute a “meeting” for Brown Act purposes. Even if a Board/Committee member does not participate in a discussion, the mere act of listening may contribute to developing a collective concurrence.
- E. **Common scenarios that ARE likely meetings:**
1. **Group Texts.** Text messages in which a majority of the Board/Committee is copied;
 2. **Hub of a Wheel.** Consecutive conversations through intermediary to poll the Board/Committee;
 3. **Daisy Chain.** Consecutive conversations from one person to another to poll the Board/Committee;
 4. **Internet/Blogs.** List-serves in which a majority of the Board/Committee may post comments and responses such that deliberations, discussions or opining can be viewed as a path to a “concurrence.”
- F. **Common scenarios that are likely NOT meetings:** The following scenarios are specifically identified in Government Code section 54952.2(c) as not being meetings, “*provided that a majority of the members do not discuss among themselves, other than as part of the scheduled program, business of a specific nature that is within the subject matter jurisdiction of the legislative body of the local agency.*”

[No Quorum] (1) *Individual contacts or conversations between a member of a legislative body and any other person...*

[General Meetings] (2) *The attendance of a majority of the members of a legislative body at a conference or similar gathering open to the public that involves a discussion of issues of general interest to the public or to public agencies of the type represented by the legislative body...*

[Community Meetings] (3) *The attendance of a majority of the members of a legislative body at an open and publicized meeting organized to address a topic of local community concern by a person or organization other than the local agency...*

[Public Entity Meetings] (4) *The attendance of a majority of the members of a legislative body at an open and noticed meeting of another body of the local agency, or at an open and noticed meeting of a legislative body of another local agency...*

[Parties] (5) *The attendance of a majority of the members of a legislative body at a purely social or ceremonial occasion...*

[District Meetings] (6) *The attendance of a majority of the members of a legislative body at an open and noticed meeting of a standing committee of that body, provided that the members of the legislative body who are not members of the standing committee attend only as observers.*

G. Meetings – conduct

1. Regular meetings at least monthly with fixed time and place (Not applicable to an Oversight Committee)
2. Meeting place must be within District boundaries, with limited exceptions (Government Code § 54954)
3. Meeting place must be accessible to public (nondiscriminatory, accessible to disabled, no payment or purchase required)
4. Teleconferencing: must be from publicly accessible location; at least quorum must be within the District boundaries
5. Any person attending may videotape, unless disruptive

V. Agenda Requirements (handled by District staff)

- A. 72 hours before regular meeting; 24 hours before special meeting
- B. Sufficient detail to allow public to determine whether to participate (“brief general description”)
- C. Exceptions to standard agenda requirements
 1. Emergency (majority vote);
 2. Need to take immediate action that arose after agenda posted (2/3 vote, unanimous if less than 2/3rds of Board/Committee present);
 3. Responding to questions;
 4. Asking for clarification;
 5. Making a brief announcement or brief report of activity.

VI. Closed Session – Likely Not Applicable to Oversight Committees

- A. Real Property Transactions
- B. Pending and Anticipated Litigation
- C. Tort Claims
- D. Threat to Public
- E. Personnel Actions – Appointment, Employment, Evaluation, Discipline/Dismissal/Release
- F. Hearing “Complaints or Charges” against employees require 24-hour notice of right to open session
- G. Negotiations with Represented Employees/Discussions with Unrepresented Employees
- H. Student Expulsion hearings

VII. Violations of the Brown Act

- A. Misdemeanor liability exists if there is “intent to deprive public”
- B. Public can sue to stop violation of Brown Act
- C. Require taping of closed session possible remedy
- D. Agency must be given opportunity to cure
- E. Nullification of action taken in violation

Exhibit 1

Example of an Email String that Violates the Brown Act (highlights added)

From: Facilities Secretary
To: [All CBOC Members]
Subject: CBOC Agenda for 2/8/14

Dear Committee Members,
Attached is the agenda packet for the February 8, 2014, meeting at ____ School.
Thanks, Facilities Secretary

From: [one member]
Sent: February 09, 2014 3:24 PM
To: Facilities Secretary; [All CBOC Members]
Subject: Re: CBOC Agenda for 2/8/14

When I reported our last meeting to the _____ Tax Payers Group, I had a question I could not answer. If someone on the CBOC committee could answer, or Facilities Secretary, maybe you could get a response from Facilities Director.

Question: When the list was presented for Measure ____ money to be spent, _____ does not remember the Administration building at _____ being on the list. How do we justify building this Administration Building using these funds?

I looked back through the list that was in the packet and I did not see it either. Would you please help me answer this question?

From: [another member]
Sent: February 09, 2014 3:45 PM
To: Facilities Secretary; [All CBOC Members]
Subject: RE: CBOC Agenda for 2/8/14

Hi Everyone,

As I understood the audit firms' presentation, the _____ Administration Building falls under the list category "Modernization/Renovation" and _____ was included in the list of schools slated in this category.

In terms of the actual ballot language, as I understood it, the _____ Administration Project falls under the ballot wording "...make essential health, safety and building repairs at aging school facilities....."

**On Thu, Feb 9, 2014 at 6:08 PM,
[yet another CBOC member wrote]:**

All,

Yes, I thought we had a good discussion on this very topic at our meeting yesterday.

My understanding is the ballot Measure contained language general enough to include a project like a new admin building at _____ .

The specific list of projects the school board approved separately before the election was an honest effort by the board at that time to provide a list of projects that would use the proposed Measure ___ funds, but that list was not actually voted on and thereby made binding as part of the ballot measure. The board retained the ability to modify the list later.

So, if a project is not on the list, that's not fatal; the board can add it. What the board can't do is add a project that doesn't meet the more general ballot measure language. It's a good thing for us to ask these questions and get answers, because there needs to be an answer. I don't recall we actually asked about the _____ admin building at the meeting. So we've asked it now. _____ has it right probably, but let's see what the District says. Facilities Director?

**On Feb 16, 2014, at 17:40,
Facilities Director wrote:**

CBOC Members:

Sorry for the delay in my response. It appears that I was unintentionally left off this email chain. _____ was kind enough to catch it and add me on the correspondence.

Although I appreciate the conversation and this is a very good discussion, I cannot provide an answer without creating an infraction. **This is a conversation that must occur in an open, public meeting of the CBOC since the Committee is bound by the restrictions of the Brown Act – California's Open Meeting Law.**

Let's discuss this at our next regularly scheduled meeting (May 9th at 4:30). I can provide an answer at that meeting and will bring all material to back up the answer. I am also going to schedule a short Brown Act presentation/training for that meeting so that we are all up to speed on our guidelines and restrictions.

Thanks and I am so sorry that I can't provide more information.

Facilities Director

From: [A 4th CBOC member]
Sent: February 16, 2014 7:51 PM
To: Facilities Director
Cc: All CBOC members
Subject: Re: CBOC Agenda for 2/8/14

As an individual taxpayer you have the right to ask for information from a public agency (the School district) and they are bound by the Federal Freedom Of Information Act to reply with requested information. The Brown Act is only relevant to quorum membership where an act of the public board (CBOC) has actionable power to influence public policy. If you direct any question to the school district and couch you request as a request per the FOIA, the District must supply an answer timely.

Please copy me with your request and any response that is received.

All the best,

_____ Private Citizen

From: CBOC Chair
Date: Feb 16, 2014 at 8:21 PM
Subject: Re: CBOC Agenda for 2/8/14
To: Facilities Director

Facilities Director,

I don't think anyone would mind if you dealt with _____ and _____ information request separately. How about if I tell that to the committee and close this off?

I understand what you're saying about the Brown Act. Technically we are in violation by having a meeting "online" with these emails, and you can't sanction that. But as I recall, the only penalty for such a violation—in addition the bad PR it might generate (not really an issue here)—is to rescind any action the CBOC has taken and require that it be discussed and reenacted in a public meeting. Because we're not taking any action, that would seem to be a moot penalty. As a practical matter, no one would care.

From: Facilities Director
Sent: February 17, 2014 2:51 PM
To: Philip J. Henderson
Subject: Fwd: CBOC Agenda for 2/8/14

<Forwarded email string>

From: Philip J. Henderson
Sent: February 17, 2014 4:42 PM
To: Facilities Director
Subject: Fwd: CBOC Agenda for 2/8/14
CONFIDENTIAL ATTORNEY/CLIENT PRIVILEGED COMMUNICATION

Facilities Director,
I know _____ is trying to help, but this is not helpful. See my comments in **BOLD/ALL CAPS/ITALIC** below.
Thanks. Phil.

Facilities Director,

I don't think anyone would mind if you dealt with _____ and _____ information request separately. How about if I tell that to the committee and close this off? **NO. PLEASE JUST LEAVE IT ALONE UNTIL THE NEXT MEETING.**

I understand what you're saying about the Brown Act. Technically we are in violation by having a meeting "online" with these emails, and you can't sanction that. But as I recall, the only penalty for such a violation—in addition the the bad PR it might generate (not really an issue here)—is to rescind any action the CAC has taken and require that it be discussed and reenacted in a public meeting. Because we're not taking any action, that would seem to be a moot penalty. As a practical matter, no one would care. **IF ONLY THAT WERE TRUE. MORE PEOPLE CARE THAN MR. _____ MIGHT BE AWARE. IMPROPER ACTION = IMPROPER ACTION, REGARDLESS OF THE "PENALTY" FOR THAT ACTION AND REGARDLESS OF WHETHER IT IS "TECHNICAL." CONTINUING TO POSSIBLY VIOLATE THE BROWN ACT IN HOPES OF STOPPING A POSSIBLE PREVIOUS VIOLATION IS COMPARABLE TO "TWO WRONGS DON'T MAKE A RIGHT."**

THERE ARE CRIMINAL PENALTIES FOR VIOLATION OF THE BROWN ACT. NOT LIKELY APPLICABLE IN THIS CONTEXT, BUT THIS NEEDS TO STOP. NOW.

Philip J. Henderson