



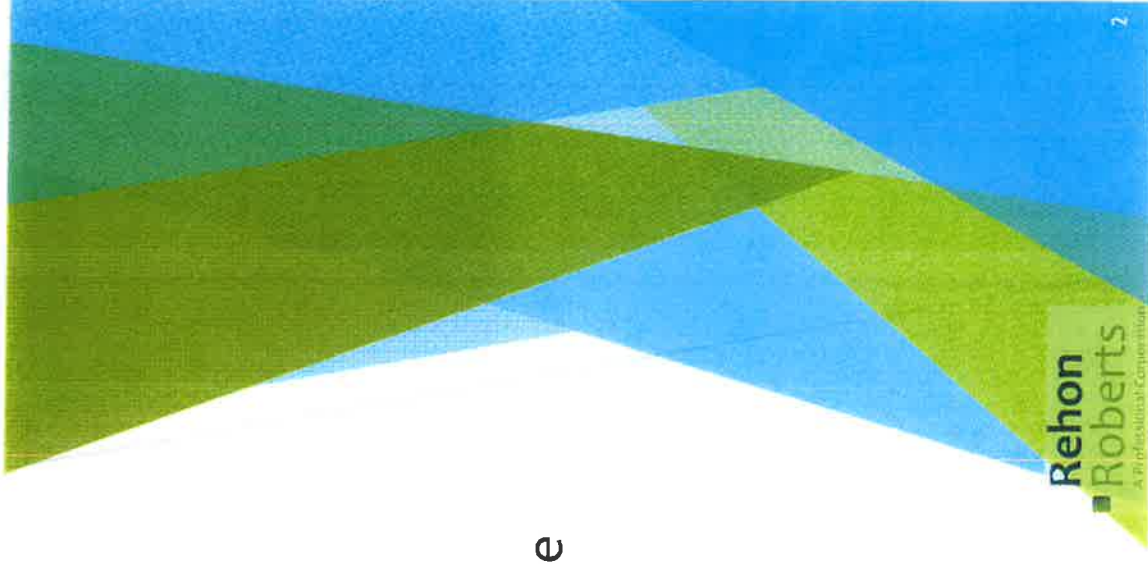
The Brown Act and Related Issues

Presented by Rogelio M. Ruíz, Esq.

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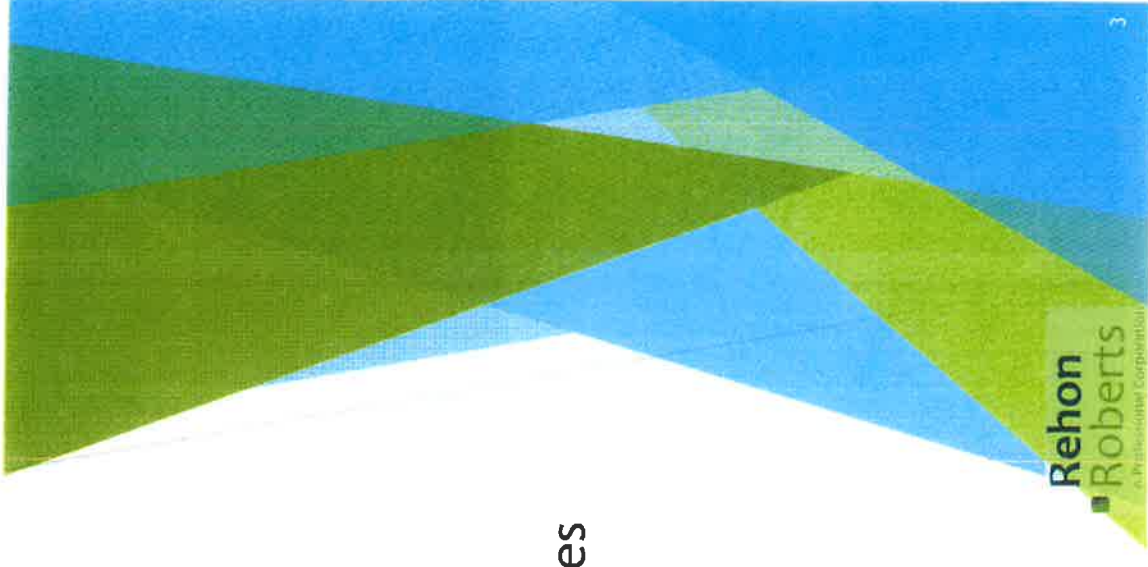
Goals and Understandings

1. This is a primer on the Brown Act.
2. This is intended to help you identify and spot issues.
3. Meet training recommendations and requirements (State Audit).
4. Increase and ensure transparency.
5. Limit potential liabilities from Board communications.



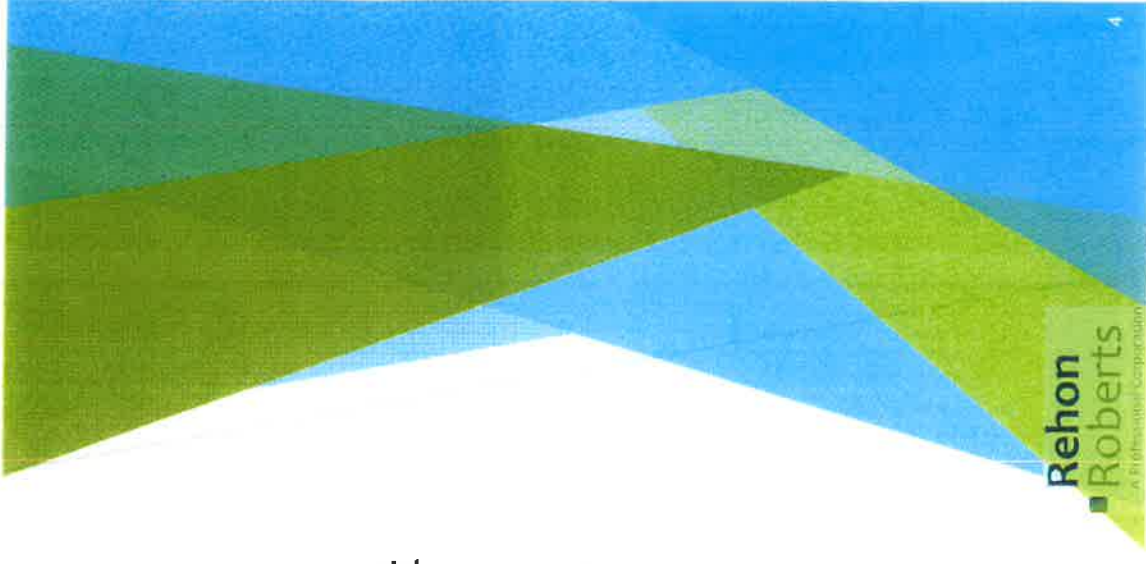
My Disclaimers

1. These materials are not intended as legal advice;
2. Real problems are fact specific & can be complex;
3. This area does not lend itself to “cookie-cutter” analyses and conclusions.



What is The Brown Act?

- The Ralph M. Brown Act, codified California Government Code 54950 *et seq.*, is a State law passed in 1953 that guarantees and protects the public's right to attend and participate in meetings and decisions of local legislative bodies, including public school districts.



Related Laws

- The California Education Code

The California Education Code includes provisions “supplementing” the Brown Act relating to the conduct of school board meetings.

- The California Public Records Act

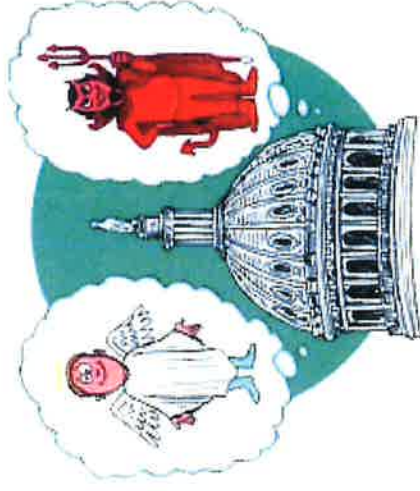
The California Public Records Act, codified in Government Code §§ 6250 through 6276.48, is a State law passed by the California State Legislature and signed by the governor in 1968 requiring inspection or disclosure of governmental records, including the records of school districts and, potentially, communications of Board Members, to the public upon request, unless exempted by law.

- California Proposition 59 (2004) (Cal. Const., Art. 3(b)(1))

“The people have the right of access to information concerning the conduct of the people's business, and, therefore, the meetings of public bodies and the writings of public officials and agencies shall be open to public scrutiny.”

THE BROWN ACT

The best solution is prevention.



The Brown Act - Overview and Purpose

"[T]he 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*

*All section references are to the Government Code unless otherwise indicated

The Brown Act - Who/what does it apply to?

“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, except as otherwise provided in this chapter.”

There are no secret ballots, ever, whether preliminary or final.

Section 54953(a)

The Brown Act - Who/what does it apply to?

- “Legislative body” means the governing body of a local agency and a committee, board, or other body of a local agency, whether permanent or temporary, decisionmaking or advisory, created by resolution, or formal action of a legislative body. However, advisory committees, composed solely of the members of the legislative body that are less than a quorum of the legislative body are not legislative bodies, except that standing committees of a legislative body, irrespective of their composition, which have a continuing subject matter jurisdiction, or a meeting schedule fixed by charter, ordinance, resolution, or formal action of a legislative body are legislative bodies for purposes of the Brown Act. (§ 54952(a) and (b).)
- “Local agency” means a county, city, whether general law or chartered, city and county, town, school district, municipal corporation, district, political subdivision, or any board, commission or agency thereof, or other local public agency. (§ 54951)

The Brown Act - Who/what does it apply to?

1. The Board of Trustees,
2. Board subcommittees composed of a quorum of the board (i.e., at least three members),
3. A Board **standing subcommittee** (irrespective of composition) that has continuing subject matter jurisdiction, and
4. A Board **standing subcommittee** (irrespective of composition) that has a **meeting schedule fixed** by formal action of the board.

Note: #3 and #4 are subject to the Brown Act even if the subcommittees are comprised of less than a quorum of the Board.

Section 54952(b)



Open Meeting Requirements on Other District Committees and Bodies

- Bond Oversight Committee (Educ. Code § 15280(b))
- LCAP Parent Advisory Committees (Educ. Code § 52063)*
- Districtwide Advisory Committee on Bilingual Education (Educ. Code § 52176)*
- Districtwide Advisory Committee on Compensatory Education Programs (Educ. Code § 54425(b))*
- Migrant Education Parent Advisory Council (Educ. Code § 54444.2)*
- Parent advisory committees and school site councils per Educ. Code § 62002.5*
- Schoolsite Councils (Educ. Code § 65000)*
- Committees formed pursuant to Education Code § 11503*

*See Education Code § 35147 for meeting requirements

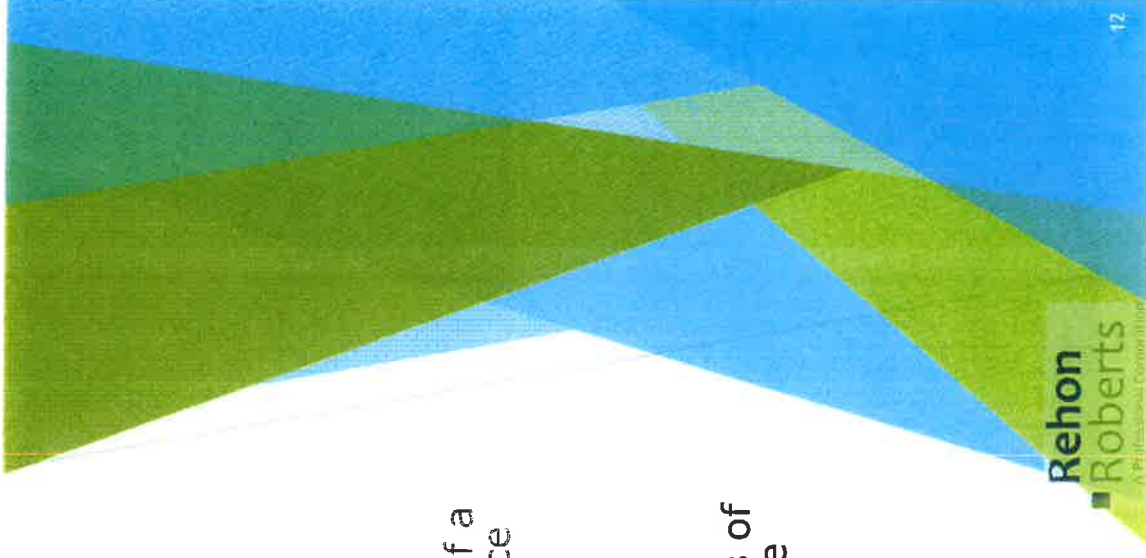
The Brown Act - “Meetings”

So, what is a “meeting”?

A “meeting” means any “congregation of a majority of the members of a legislative body at the same time and location, including teleconference location as permitted by [law], to hear, discuss, deliberate, or take action on any item that is within the subject matter jurisdiction of the legislative body.”

A meeting includes any use of direct communication, personal intermediaries, or technological devices (e.g., telephone, e-mail, smartphones, etc.) which are employed by a majority of the members of the legislative body to develop a collective concurrence on action to be taken by members of the legislative body.

Section 54952.2



The Brown Act - “Meetings”

“A **majority** of the members of a legislative body shall not, outside a meeting authorized by this chapter, **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.**”



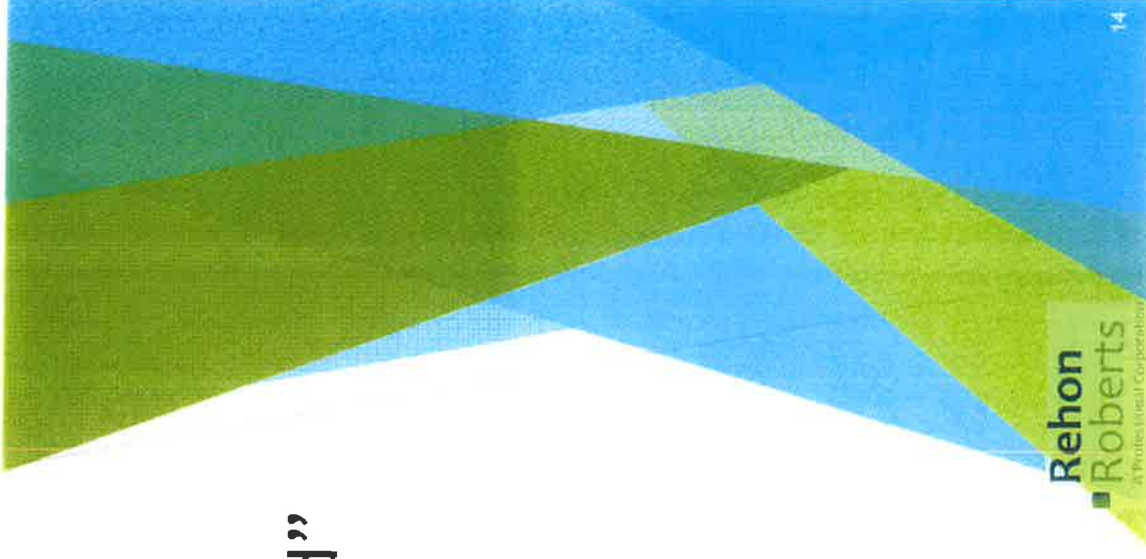
Section 54952.2(b)

The Brown Act - “Meetings”

Question #1: What is a “meeting authorized” by the Brown Act?

Answer #1: One that is noticed, agendized and held in accordance with the requirements of the Brown Act.

Question #2: Which communications “outside” a meeting violate the Brown Act?



Communications Outside a Meeting That Are NOT Authorized by the Brown Act

1. The Serial “Meeting”;
2. The Hub and Spoke “Meeting”; and
3. The Potluck© “Meeting” .

Think of the four key concepts:

1. “Hear”;
2. “Discuss”;
3. “Deliberate on”;
4. “Develop a collective concurrence on”; and
5. “Take action on” .

Avoid The Serial Meeting

If Board Member A contacts Board Member B, and B contacts Board Member C, and C contacts member D, and so on, until a quorum has been involved, this type of “serial meeting” may result in a violation of the Brown Act.

*Is every serial communication
a violation?*



Avoid the “Hub and Spoke” Problem

- ▶ An intermediary, such as a District administrator, community member, or the District’s attorney, contacts at least a quorum of the members to develop a collective concurrence on action to be taken by Board.



Avoid the “Potluck” Meeting

pot·luck

/ pät'lək/

noun

used in reference to a situation in which one must take a chance that whatever is available will prove to be good or acceptable.

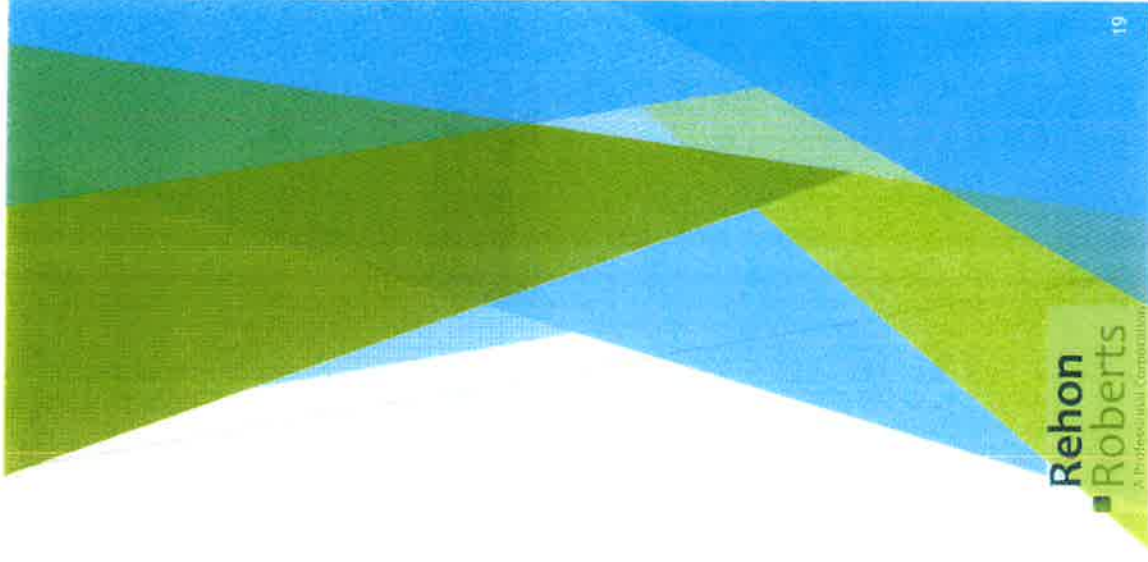
So what is the “potluck”?



“Potluck” Solutions

“If you don’t like potlucks, the solution to your problem is ‘don’t go to potlucks,’ not insist other people don’t have them.”

Mallory Ortberg

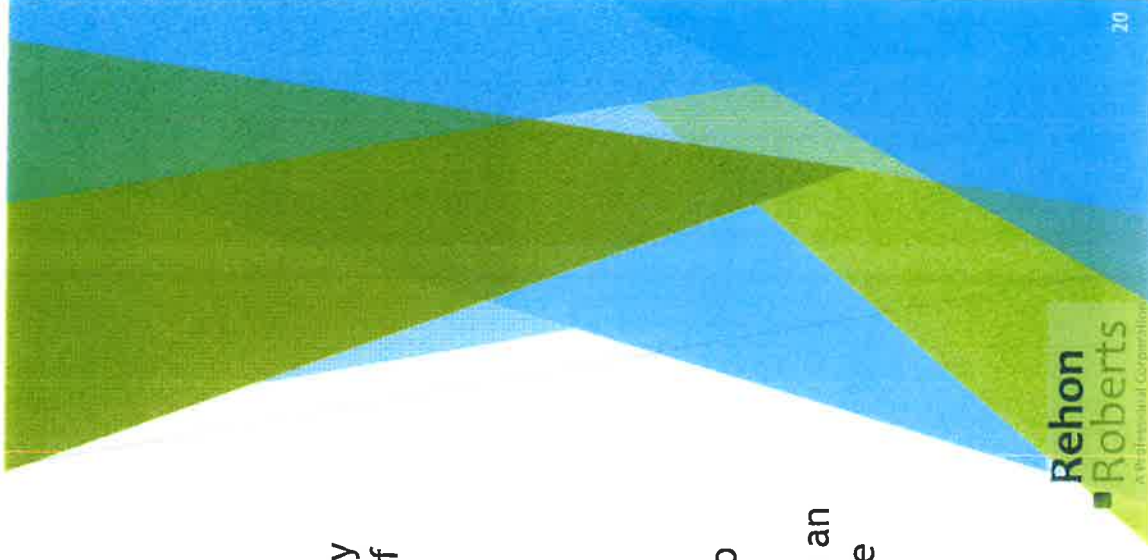


Let's Recap

“A majority of the members of a legislative body shall not, outside a meeting authorized by this chapter, 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.” (Section 54952.2(b))

- “A series of communications of any kind” is BROAD. It means e-mail, text messages, telephone calls, social media, intermediaries, etc.
- “To discuss, deliberate, or take action on . . .” should be construed to mean any exchange of facts and any exchanging of information “which advance or clarify a member’s understanding of an issue, or facilitate an agreement or compromise amongst members, or advance the ultimate resolution of an issue.”

(See, e.g., Opinion, California Attorney General, no. 00-906 (2001))



Consider the Public Records Act!

In *City of San Jose v. Superior Court (Smith)* (2017), the California Supreme Court ruled that emails and text messages sent or received on public officials' private devices may be subject to disclosure under the California Public Records Act. The Supreme Court noted that “in today’s environment, not all employment-related activity occurs during a conventional workday, or in an employer-maintained workplace”, and emphasized the crucial function of public access laws, noting that “openness in government is essential to the functioning of democracy.”

The Brown Act - What is NOT a Meeting?

- ▶ Individual contacts or conversations between a Board member and any other private individual that are not part of a “serial”, “hub and spoke”, or “potluck” communication.
- ▶ What about the “one-on-one”?
 - ▶ An employee or official of a local agency may engage in separate conversations or communications with members of the Board in order to answer questions or provide information regarding a matter that is within the subject matter jurisdiction of the local agency, 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.

(§ 54952.2(b)(2))

What else ISN'T a Meeting?

► Attendance by a majority of members at:

1. a conference open to the public that involves a discussion of issues of general interest to the public or school districts;
2. an open and publicized meeting organized to address a topic of local community concern by a person or organization other than the District;
3. an open and noticed meeting of another body of the local agency;
4. an open and noticed meeting of a legislative body of another local agency;
5. a purely social or ceremonial occasion; or
6. 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),

PROVIDED that a majority of the members do not discuss amongst themselves business of a specific nature that is within the subject matter jurisdiction of the District.
(§ 54952.2)

Regular Meetings versus Special Meetings

What is a “regular meeting”?

“Each legislative body of a local agency, except for advisory committees or standing committees, shall provide, by ordinance, resolution, bylaws, or by whatever other rule is required for the conduct of business by that body, the time and place for holding regular meetings.” (§§ 54954(a) and 54954.2)

What is the ARUESD Bylaw?

“The Board shall hold one regular meeting each month. Regular meetings shall be held at 5:30 p.m. on the 2nd Thursday at the district office. At least 72 hours prior to a regular meeting, the agenda shall be posted at one or more locations freely accessible to members of the public and on the district’s Internet web site.” (Board Bylaw 9320)

What is a Special Meeting?

- ▶ Who can call a special meeting?
 - ▶ The Board President or a majority of the Board may call a special meeting at any time.
- ▶ How is a special meeting called?
 - ▶ By delivering written notice to each Board member and to each local newspaper of general circulation and radio or television station requesting notice in writing, and posting a notice on the District's website.
- ▶ How much notice is required?
 - ▶ At least 24-hours written notice (by delivery and posting) before the time of the meeting.
- ▶ What may or may not be discussed at a special meeting?
 - ▶ Only the business set forth in the notice may be considered at the meeting. The "notice" effectively serves as the agenda. (§ 54956)
 - ▶ A special meeting cannot be called to discuss the salaries, salary schedules, or compensation paid in the form of fringe benefits, of a "local agency executive" (i.e., executive management).

(§54956; Educ. Code § 35144; Board Bylaw 9320)

Special Meeting - Special Problem?



At 3:00 pm on Tuesday, three Board members deliver a joint written notice to all Board members announcing that they are calling a special meeting for 4:00 pm the next day in the Boardroom with a single agenda item: "Approve the 'New Math' curriculum."

Is there a Brown Act problem?

Agenda, Notice and Posting Requirements



- A written agenda must be prepared for each regular or adjourned regular meeting (and a “notice” for each special meeting).
- The agenda must be posted at least 72 hours in advance of a regular meeting, and the “notice” at least 24 hours in advance of a special meeting on the District’s website.
(§§ 54954.2 and 54956; Board Bylaw 9320)

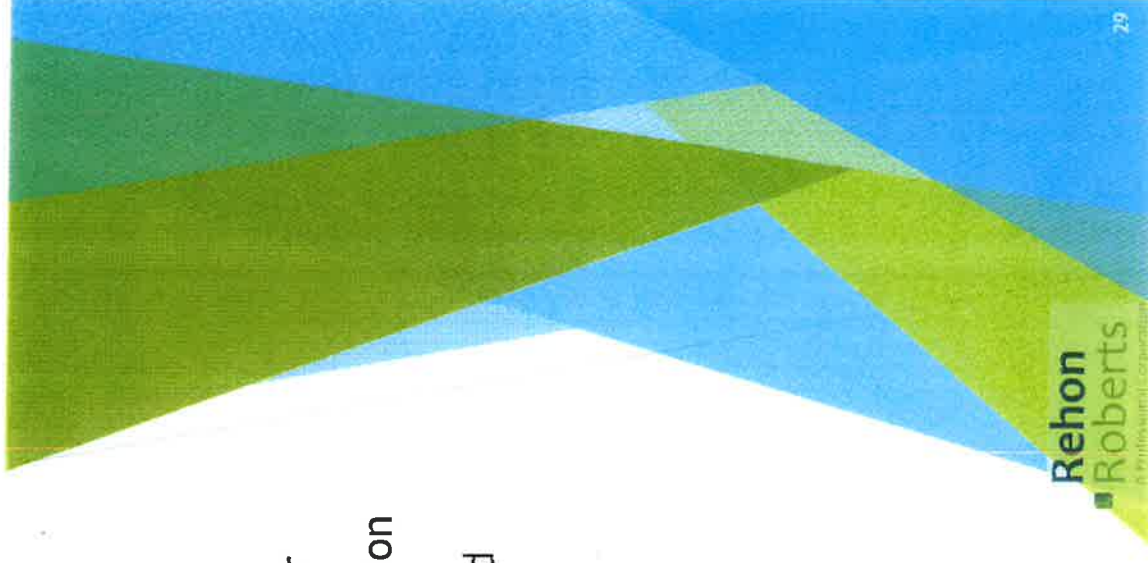
Agenda, Notice and Posting Requirements

- The agenda must contain a brief general description of each item of business to be transacted or discussed at the meeting, including any items to be discussed in closed session. (The general description of an item generally need not exceed 20 words.)
- The agenda must specify the time and location of the meeting.
- The agenda must be posted in a location that is freely accessible to members of the public.
- The agenda must be posted on the District's Internet website.
- If requested, the agenda must 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.

More Agenda, Notice and Posting Requirements

- Every agenda for regular meetings must provide an opportunity for members of the public to directly address the legislative body on any item of interest to the public, before or during the Board's consideration of the item.
- The agenda must include information regarding how, to whom, and when a request for disability-related modification or accommodation, including auxiliary aids or services, may be made by a person with a disability who requires a modification or accommodation in order to participate in the public meeting.

(Section 54954.2)



Teleconference Meetings Allowed?



“Teleconference” means a meeting of a legislative body, the members of which are in different locations, connected by electronic means, through either audio or video, or both.

(Section 54953)

Participating in a Meeting Via Teleconference

- The Brown Act provides that one or more Board Members may participate in a meeting via teleconference, but there are special requirements:
 - The Board must post agendas at all teleconference locations and conduct teleconference meetings in a manner that protects the statutory and constitutional rights of the parties or the public appearing before the Board;
 - Each teleconference location shall be identified in the notice and agenda of the meeting;
 - Each teleconference location shall be accessible to the public (see § 54953.2);
 - During the teleconference, at least a quorum of the members of the Board must participate from locations within the boundaries of the District jurisdiction; and
 - The agenda must provide in writing an opportunity for members of the public to address the legislative body directly at each teleconference location.

Conducting the Meeting - Where Must the Meeting Take Place?

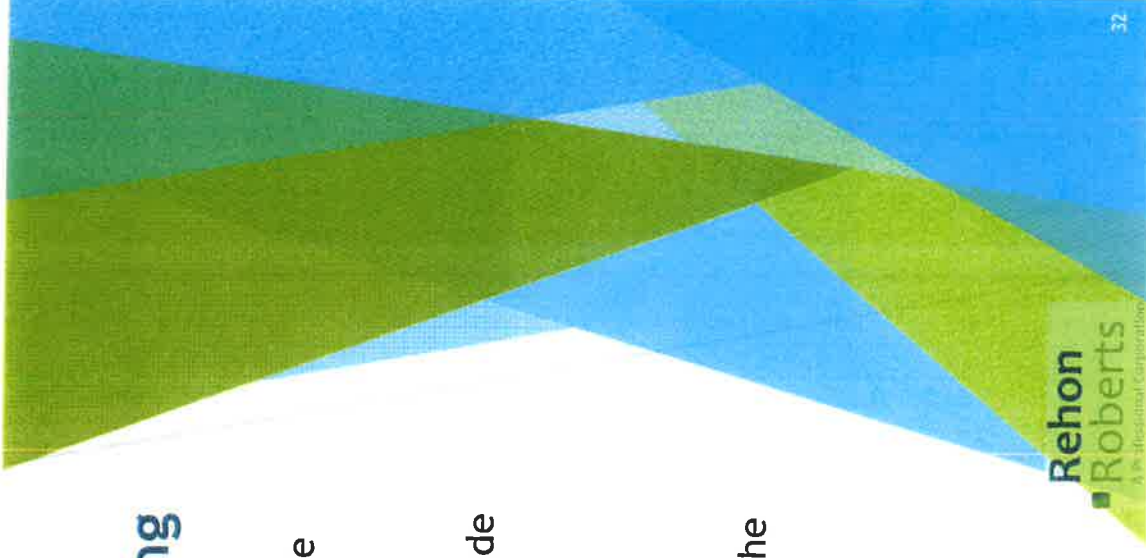
With limited exceptions, ALL regular and special meetings of the Board must be held within the boundaries of the District territory.

- Special application to school districts only:

→ Meetings of the governing board of a school district may be held outside the District to do any of the following:

- (1) Attend a conference on nonadversarial collective bargaining techniques.
- (2) Interview members of the public residing in another district with reference to the trustees' potential employment of an applicant for the position of the superintendent of the district.
- (3) Interview a potential employee from another district.

(Section 54954; Board Bylaw 9320)



What can be considered and discussed at a meeting?

- Only properly agendized items.

- No action or discussion shall be undertaken on any item not appearing on the posted agenda.

But there are exceptions:

- Board members or staff may briefly respond to statements made or questions posed by persons during the public comment portion of the agenda.
- A Board member may ask a question for clarification, make a brief announcement, or make a brief report on his or her own activities.

(Section 54954.2(a)(3))



Special Issue: Non-Agenda Items - Emergencies (NARROW EXCEPTION)

- If a Board majority determines by vote that an “emergency” situation exists, then the Board may act on an item not on the agenda.
- An “emergency situation” means both of the following:
 - (1) A work stoppage, crippling activity, or other activity that severely impairs public health, safety, or both, as determined by a Board majority.
 - (2) A “dire emergency”, which means a crippling disaster, mass destruction, terrorist act, or threatened terrorist activity that poses peril so immediate and significant that requiring a Board to provide one-hour notice before holding an emergency meeting may endanger the public health, safety, or both, as determined by a majority of the Board.

(Section 54956.5)

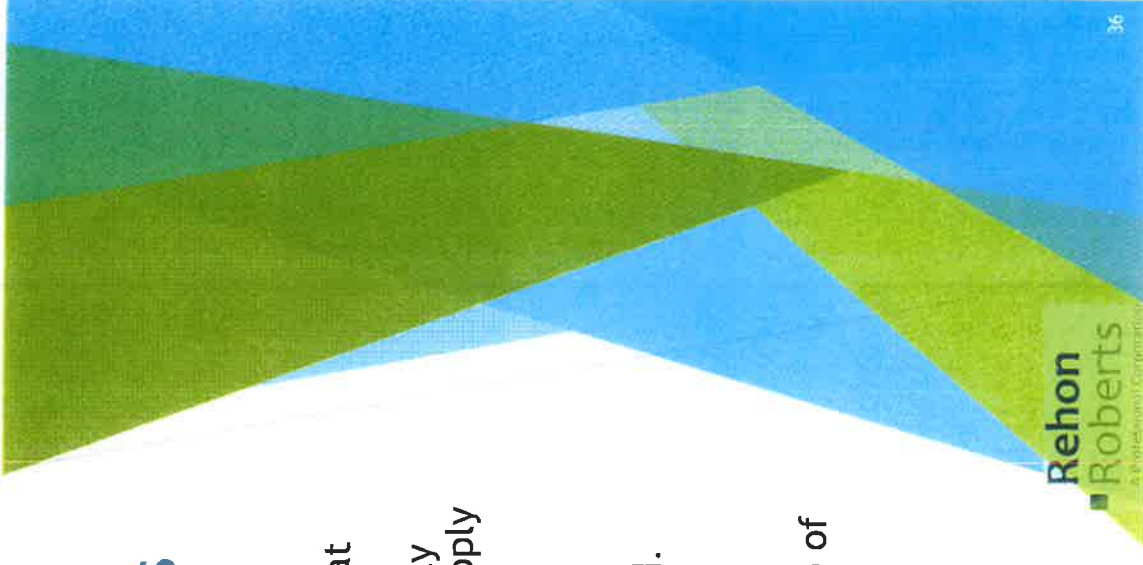
Special Issue: Non-Agenda Items - Need for Immediate Action

- Upon a determination by a two-thirds vote of the members of the Board present at the meeting (i.e., 4 Board members), or, if less than two-thirds of the members are present, a unanimous vote of those members present, that:
 - (1) there is a need to take immediate action, and
 - (2) the need for action came to the attention of the District subsequent to the agenda being posted as otherwise required.

Conduct of the Meeting - The Public's Rights to Participate and Observe

- If the Board limits time for public comment, then the Board must provide at least twice the allotted time to a member of the public who utilizes a translator to ensure that non-English speakers receive the same opportunity to directly address the legislative body of a local agency. (This does not apply if the Board utilizes simultaneous translation equipment in a manner that allows the Board to hear the translated public testimony simultaneously.)
- The Board cannot prohibit public criticism of the policies, procedures, programs, or services of the Board, or of the acts or omissions of the Board.
- Any person has the right to record a Board meeting with an audio or video recorder or a still or motion picture camera.
- The Board cannot prohibit or otherwise restrict the broadcast (live stream) of its open and public meetings.

(Section 54954.3)



Conduct of the Meeting - The Public's Rights to Participate and Observe

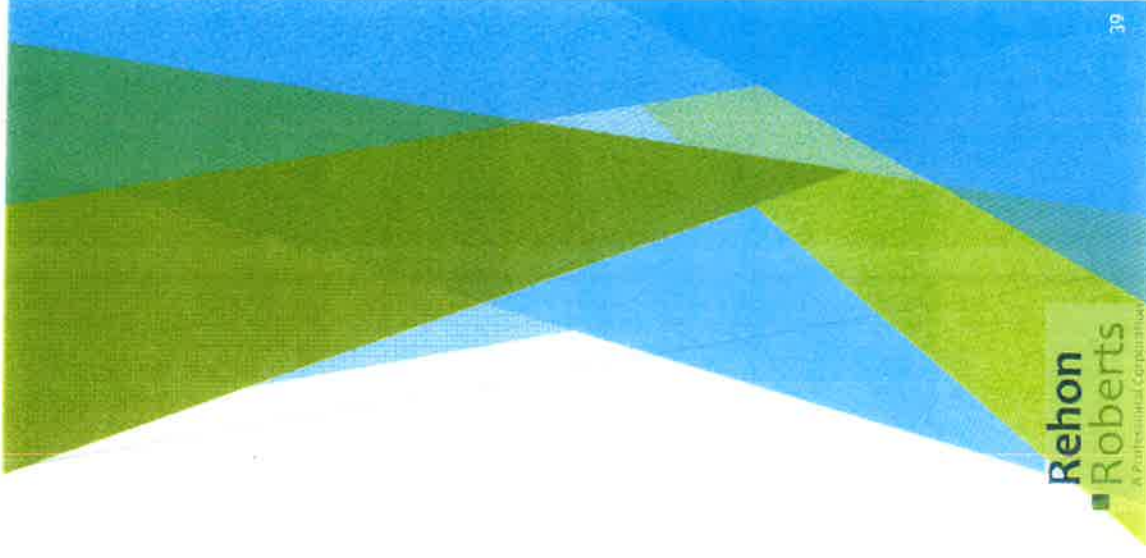
- Regular Meetings: Members of the public shall be provided an opportunity to directly address the Board on any item of interest to the public, before or during the Board's consideration of the item, that is within the subject matter jurisdiction of the Board. (Section 54954.3)
- Special Meetings: The public must be provided an opportunity to address the Board on any item described in the notice.

Closed Session

- The Board is allowed to meet in closed session only to the extent expressly authorized by the Brown Act or other law.
 - The Brown Act is interpreted liberally in favor of openness and transparency. Thus, any statutory exceptions allowing closed session discussions are narrowly construed by the courts.
 - The exceptions allowing closed session discussions are generally designed to protect confidentiality (i.e., to not prejudice the District's position in litigation or negotiations or compromise the privacy interests of employees and others).
 - If there is no closed session exception, then the item must be considered in public.
 - Prior to holding any closed session, the Board must disclose, in an open meeting, the item or items to be discussed in the closed session. The disclosure may be by reference to the item or items as they are listed by number or letter on the agenda. (Section 54957.7)

Key Permissible Closed Session Discussion Items

- Pending Litigation. (Section 54956.9)
- Real Estate Negotiations. (Section 54956.8)
- Public Employment: (Section 54957(b))
- Labor Negotiations. (Section 54957.6)
- Student Expulsions. (Education Code section 48918)
- State Audit Reports. Consideration and Response to a confidential draft State Audit Report. (54956.75)



Closed Session - Pending Litigation

- Includes existing litigation, anticipated or threatened litigation, and the initiation of litigation.
- Allows the Board to meet with legal counsel and necessary support staff regarding the pending litigation.
- According to an opinion of the California Attorney General, if the attorney is not a participant in the closed session, then the closed session cannot be held.
- Before holding the closed session the agenda must identify whether the matter involves “existing litigation”, “anticipated litigation” or “initiation of litigation.”
- The pending litigation exception does not permit the Board to use closed session to conduct settlement or other communications with the adverse party and a mediator.

Closed Session - Real Estate Negotiations

- The Board may meet in closed session to discuss the purchase, sale, exchange, or lease of real property by or for the District, including price and terms.
- Prior to the closed session, the Board must hold an open and public session in which it identifies its negotiators, the real property or real properties which the negotiations may concern, and the person or persons with whom its negotiators may negotiate.
- The District's negotiator may be a Board member.

(Section 54956.8)

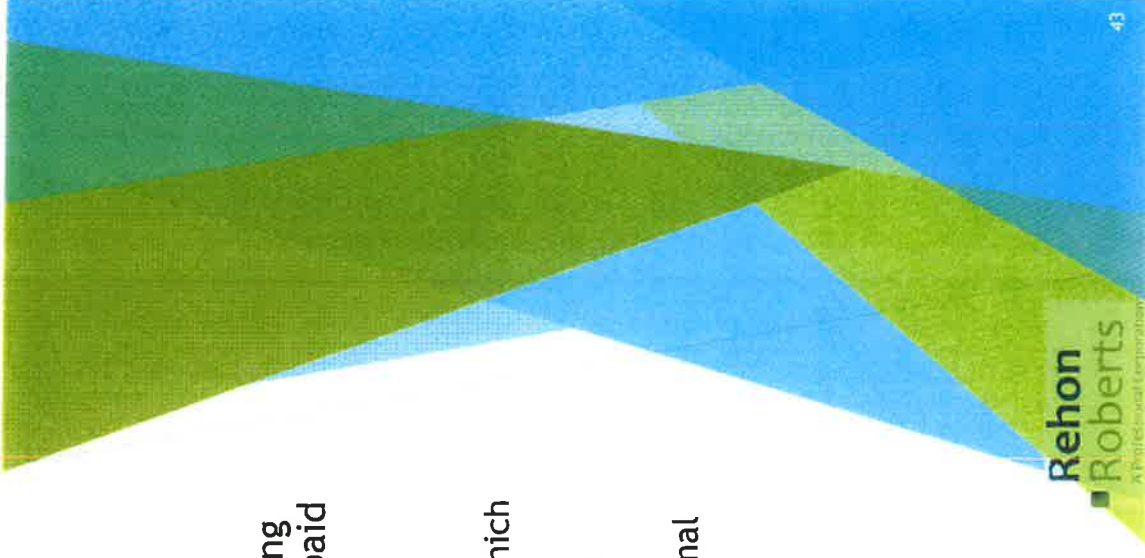
Closed Session - Public Employment

- The Board may hold a closed session to consider the appointment, employment, evaluation of performance, discipline, or dismissal of a public employee or to hear complaints or charges brought against the employee by another person or employee unless the employee requests a public session.
 - Primary purpose for closed session is to preserve individual confidentiality.
 - The Board is allowed to discuss individual matters, not general personnel policies.
 - An affected employee must be given at least 24 hours written notice of any closed session being convened to hear specific complaints or charges against her/him.
 - Correct and clear agenda language is critical to ensure the proper scope of closed session consideration of the personnel matter.
 - There can be no closed session consideration or discussion or action on proposed compensation, except for disciplinary reduction in pay under this exception.
 - Any action to appoint, employ, dismiss, accept the resignation of, or otherwise affect the employment status of a public employee must be "reported out" of closed session at the meeting where the action is taken. The report must identify the position, but not the name of the employee.
 - Generally, however, a report of an action to dismiss an employee is deferred until the employee has exhausted all of her/his administrative remedies.

Closed Session - Labor Negotiations

- The Board may hold a closed session with the District's designated bargaining representatives regarding the salaries, salary schedules, or compensation paid in the form of fringe benefits of its represented and unrepresented employees, and, for represented employees, any other matter within the statutorily provided scope of representation.
- Prior to the closed session, the Board shall hold an open and public session in which it identifies its designated bargaining representatives.
- The closed session discussion shall be for the purpose of reviewing the District's position and instructing the District's bargaining representatives.
- With respect to unrepresented employees the closed session shall not include final action on the proposed compensation of one or more unrepresented employees (i.e., administration, management and confidential employees). That must take place in open session.

(Section 54957.6)



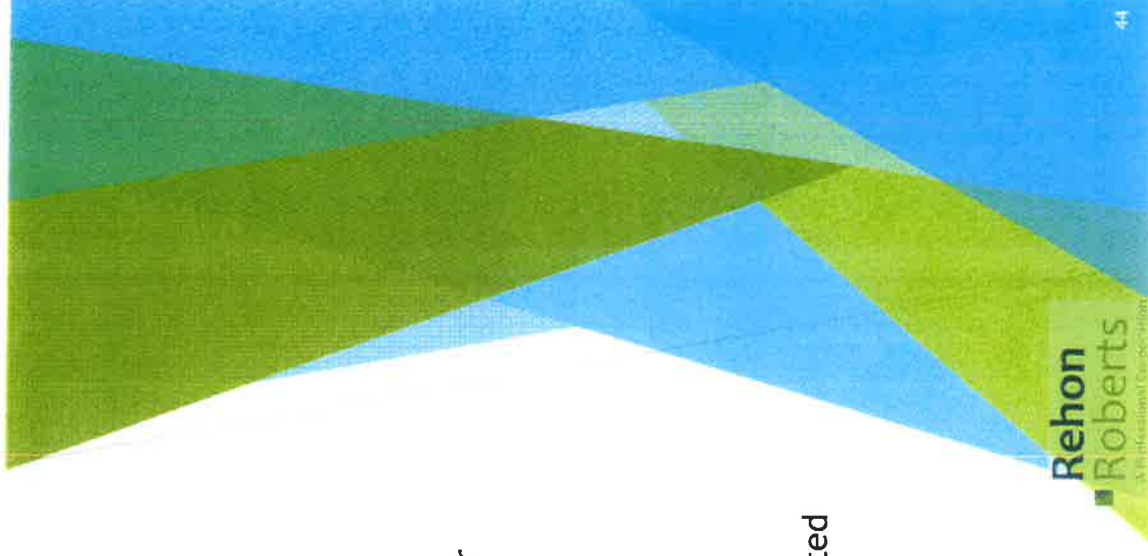
Closed Session - Labor Negotiations (2)

Special Exception from the Brown Act for School Districts:

Under the Educational Employment Relations Act, there are four types of meetings relating to labor negotiations that are exempt from the Brown Act:

- (a) Any meeting and negotiating discussion between the District and a recognized or certified employee organization.
- (b) Any meeting of a mediator with either party or both parties to the meeting and negotiating process.
- (c) Any hearing, meeting, or investigation conducted by a factfinder or arbitrator.
- (d) Any executive session of the District's Board or between the Board and its designated bargaining representative for the purpose of discussing its position regarding any matter within the scope of representation and instructing its designated representatives.

(Government Code section 3549.1)

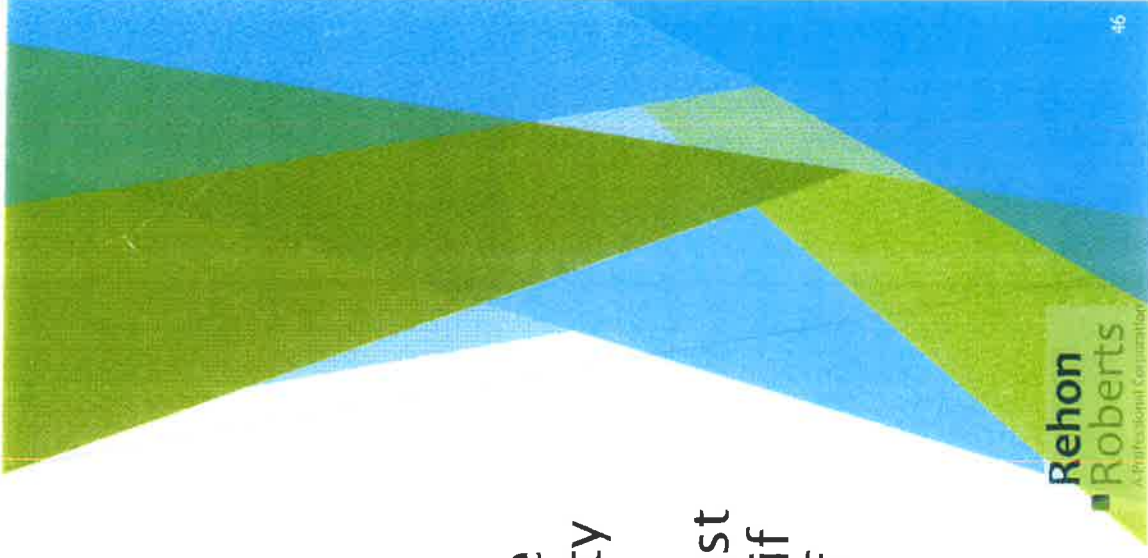


Closed Session - Confidentiality and Other Requirements

- How are Closed Session Actions Reported?
 - After any closed session, the Board must reconvene into open session prior to adjournment and shall report any actions taken in the closed session as required by law, which must specify the vote of each Board member.
 - Not all actions are immediately reportable, e.g., initiation of litigation, certain disciplinary actions, approval of terms of settlement, etc.
- Who may attend closed session meetings?
 - Closed sessions may involve only the Board Members, the District's Legal Counsel, and the District's management and support staff necessary for consideration of the matter. This is narrowly construed.
- No person may disclose confidential information that has been acquired by being present in a closed session to a person not entitled to receive it, unless the legislative body authorizes disclosure of that confidential information.

Meeting Records

- ▶ If a writing that is a public record that relates to an agenda item for an open session of a regular meeting of the Board is distributed less than 72 hours prior to that meeting, the writing shall be made available for public inspection at the same time the writing is distributed to all, or a majority of all, of the members of the body
- ▶ Writings distributed during a public meeting must be made available to the public at that meeting if they are prepared by the agency or a member of its legislative body.
(Section 54957.5)



Consequences for Brown Act Violations

- Unauthorized disclosures of closed session communications could:
 - (1) waive attorney-client privileges,
 - (2) violate privacy rights of students or employees and expose the District to liability, or
 - (3) negatively impact collective bargaining, settlement negotiations or other confidential matters.
- Potential Criminal Liability: “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.” (Section 54959)
- The District Attorney or other interested person may bring a civil action to stop or prevent violations or to have the Board’s action declared null and void or to obtain a court order compelling the Board to audio record its closed session meetings. (Sections 54960 and 54960.1)



QUESTIONS?

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