

# ITEM 7B

## LOCAL GOVERNMENT FUNDAMENTALS

Open Meeting, Public Record, Conflict  
of Interest, and Other Laws Affecting  
Your Service as a Public Official

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## Program Order

- Laws To Ensure Openness and  
Transparency of Local Government
  - Open Meeting Laws
  - Public Record Laws
- Conflicts of Interest
- Due Process
- Other Issues/FAQs
- Recommended Resources

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## You are a Public Official

- Your service as a board member is fundamentally different from either your experience in the private sector or in the volunteer/non-profit sector, both of which use a corporate decision-making paradigm
- As a public official you have certain rights, powers, responsibilities, and obligations conferred upon you by the District and by State Law; you owe it to yourself and to the District to familiarize yourself with the rules governing your service

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## What's at Stake?

- Foster Good Government (decisions based on what best serves the public interest)
- Enhance Participatory Democracy
- Promote Confidence in Public Processes
- Avoid Criminal and Civil Penalties
- Avoid Technical and Process Grounds to Set Aside Board Decisions

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## FOUR KEY CONCEPTS

- Serial Meetings
  - Confidentiality of Closed Sessions
- Public Records After Voter Approval of
- 500/300 Foot Presumed Conflict Rule

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## The Brown Act

California's Open Meeting Law

- The law designed to guarantee the public's right to attend and participate in meetings of local public legislative bodies is the Ralph M. Brown Act

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## WHO IS SUBJECT TO THE BROWN ACT?

- Governing Bodies and their members (e.g. Board of Directors)
- Subsidiary Bodies and their Members (e.g., standing committees)
- Private Corporations (publicly created)
- Private Corporations funded by District and board member is appointed by Board of Directors
- Successful candidates and nominees to one of the above

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## SCOPE OF BROWN ACT

- What constitutes a “meeting”
- Notice Requirements for Meetings
- Agenda Requirements
- Public Participation at Meetings
- Recording of Meetings
- Disclosure of Written Materials
- Closed Sessions

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## What is a Meeting?

- Majority of members of board present
- Members present at same time and place to hear, discuss or deliberate
- Item of discussion within subject matter jurisdiction of Board
- Serial Meeting

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## KEY CONCEPT: SERIAL MEETING

- Use of consecutive or serial communications, each of which involves less than a quorum of the public body but which taken as a whole involve a majority of the body's members, either directly or indirectly through intermediaries, in person or by telephone, e-mail, or other electronic means, to develop collective concurrence or consensus on action to be taken
- Types: Hub-and-Spoke, Daisy Chain
- Think about social media, chat rooms and blogs as well

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## Individual Contact Distinguished

- A member of a legislative body may contact an individual including another member of the same legislative body without an illegal meeting occurring
- BUT there is always a risk that one participant in the communication will disclose the views of the other participant to a third member, creating the possibility of achieving collective concurrence outside a public meeting

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## Three Common Serial Meeting Scenarios

- Staff Briefings
- Constituent or Lobbyist as Intermediary
- Deal Making/Shuttle Diplomacy

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## COMMON PITFALLS Staff Briefings

- Staff can inadvertently become a conduit among a quorum of a legislative body in the course of providing briefings on items of local agency business.
- Case Law is now clear that staff may provide individual briefings to board members.
- Statutory Law requires that staff not use these briefings to reach a consensus.

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## Common Pitfalls Constituents/Lobbyists

- A constituent or lobbyist can inadvertently become an intermediary among a majority of a legislative body by sharing thoughts among a majority of members through a series of individual contacts.
- Constituents' unfamiliarity with the law often leads them to believe a board member should be able to commit to a position in a private conversation in advance of a meeting
- "State law prevents me from giving you a commitment outside a public meeting."

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## Common Pitfalls Private Deal Making

- The sort of serial, shuttle diplomacy common in the private sector and corporate world (and even in State and Federal legislatures!) to build consensus is illegal and prosecutable as a crime in the local agency public sector
- Horse-trading must be conducted in open public meetings.

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## An Ounce of Prevention!

- Virtually all serial meeting violations can be prevented by following two simple rules of conduct:
  - Avoid discussing District business with a quorum of the Board outside a public meeting
  - Avoid soliciting, communicating, or hearing the views of other board members outside a public meeting

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## WHAT'S NOT A MEETING SUBJECT TO BROWN ACT?

- Individual contacts (unless serial)
- Conferences
- Community meetings
- Another body of agency (but don't participate)
- Social or ceremonial events

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## NOTICE REQUIREMENTS

- Notice must include time, place and business to be discussed
- Regular Meetings: notice and agenda posted at least 72 hours in advance
- Special Meetings: notice and agenda posted at least 24 hours in advance
- Emergency Meetings

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## MEETING AGENDAS

- Post in freely accessible location
- Brief description of each item to be discussed or transacted
- **NO ACTION OR DISCUSSION ON SUBJECT OR ITEM NOT DESCRIBED IN AGENDA (w/very limited exceptions)**

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## PUBLIC PARTICIPATION

- **General Rule:** At regular meetings members of the public must be given an opportunity to address Board on any item within subject matter jurisdiction of Board, whether on the agenda or not, and, if on the agenda, whether demarcated a public hearing or not, and whether on the regular or closed portion of the agenda

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## CLOSED SESSIONS

- **If no specific basis exists under Brown Act to conduct a closed session, session must be open to public**
- Common grounds for closed session are:
  - Real property negotiations
  - Litigation
  - Performance evaluation and/or discipline of public employee
  - Labor Negotiations

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## KEY CONCEPT: CONFIDENTIALITY OF CLOSED SESSIONS

- **ABSOLUTE UNQUALIFIED PROHIBITION ON DISCLOSURE OF CONFIDENTIAL INFORMATION**
  - Disclosure of confidential information acquired at a closed session is prohibited, unless the legislative body authorizes disclosure. Cal. Gov't Code § 54963(a).
  - Information is limited to those properly in attendance at closed session unless Board specifically acts to authorize disclosure to someone else.
  - **NO EXCEPTIONS** (absent authorization, no disclosure: not to absent board members, not to District staff, not to your spouse).

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## Remedies for Violation of Confidentiality

- In addition to misdemeanor remedy, the local agency may enforce this prohibition by seeking injunctive relief to prevent disclosure, disciplinary action against an employee who has willfully disclosed confidential information, or referral of a member of the legislative body who has disclosed confidential information to the grand jury. Cal. Gov't. Code § 54963(c).

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## OTHER BROWN ACT ISSUES

- Public has near-absolute right to record meetings
- Recordings of meetings by public agency are public records
- Written materials distributed to all or a majority of Board are, subject to very narrow exceptions, public records and must be made available for inspection and copying

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## Remedies for Violation of the Brown Act

- Criminal
  - Misdemeanor (fine of not more than \$1000 and/or imprisonment of not more than 1 year)
  - Specific Intent Required: member must have intended to deprive public of information or right to participate
- Civil
  - Action by DA or by other interested party to invalidate action at improper meeting, costs, and attorneys' fees
  - Potential to infect decisions by other boards/councils

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## Public Records Act as applied to Board Members

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Can they have anything they want?

No – there are certain exemptions

We will go through the three that will most often apply to you as Board Members.

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## 1. Attorney-Client Records

- Communications between you and the Office of the District Counsel are confidential
- Do not share with anyone written communications to or from the District's Attorney

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## 2. Deliberative Process

- Records which impair the deliberative process by revealing the thought process of government decision makers, if public interest warrants withholding
- Calendars and appointment books usually fall into this exemption

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## 3. Preliminary Drafts

- Preliminary drafts, notes and memos may be withheld if they are not retained in the ordinary course of business, and public interest warrants withholding
- If it is not your normal practice to retain drafts of letters or memos, destroy them as soon as you no longer need them.
- Email. Best practice is not to use private email for district business. Current best practice is not to delete district email for two years.

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## What do you do if a request is made for your records?

- Don't destroy or delete anything!
- Gather all of your records relating to the subject matter of the request and provide them to the General Manager or District Counsel, as directed
- Bring to the attention of the District Counsel any documents you feel may be problematic or any questions you may have

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## CONFLICTS OF INTEREST

- Sources of Law on Conflicts
  - Political Reform Act (financial conflicts)
  - Common Law Rules (bias or prejudice)
  - Govt Code Section 1090 (contractual conflict)
- Purpose: Ensure District's decisions are based solely on what best serves the Public's interest by eliminating bias and prejudice from public decision-making AND contributing to Public's perception of process as both fair and legitimate

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## IMPORTANT THINGS TO REMEMBER ABOUT CONFLICTS

- Conflicts of interest are not loathsome diseases, everyone has them from time to time
- If someone has a conflict of interest, it doesn't mean they have done anything wrong, only that they shouldn't participate in making the decision
- 1090 violations are criminal, so may be loathsome

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## DISCLOSURE REMINDER

- Form 700: Annual, Assuming Office, and Leaving Office Filings Required
- Failure to File Could Expose You Individually to Civil and/or Criminal Penalties
- Failure to File Could Infect Council Proceedings With Error Causing an Action to be Invalidated
- **Your** Responsibility

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## How Do You Know If You Have A Conflict?

- **Four Step Analysis**
- **Each Member has a copy of the test**
- **Practical Test:**
  - Is it reasonably foreseeable that the decision will have a material financial effect on you, your spouse, dependent children, or your business that is distinguishable from its effect on the public generally?

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## **What to do if you have a conflict?**

- The FPPC has adopted a "checklist" which board members should use whenever they attend a meeting and have a potential conflict of interest in an item that will be considered.

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### FPPC Checklist (continued)

- State that you have a conflict of interest in the item once it is called on the agenda.
- Unless the item is set for closed session, identify details about your interest:
  - If an investment, name the business entity;
  - If a business position, name the business and what it does;
  - If real property, state the address; if the property is a residence, state “residence.”
  - If income or gifts, name the person who is your source;
  - If a personal financial effect, identify the expense, liability, asset or income affected.

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### FPPC Checklist (More)

- For a consent calendar item, state that you are recusing yourself from discussing or voting on the matter. You may vote on the rest of the consent calendar.
- For a non-consent-calendar item, leave the room until after discussion and action on the item has concluded.

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### FPPC Checklist (End)

- To speak as a member of the public:
- The item must relate to your personal interests, such as:
  - A real property interest you or immediate family owns;
  - A business entity you or your immediate family owns;
  - A business entity over which you, or you and your spouse, exercise sole direction and control.
- Leave the dais and speak from the same area as members of the public. You may remain with members of the public while the item is being discussed.

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### CONSEQUENCES OF VIOLATION OF PRA

- Action can be rescinded
- Willful violations can lead to civil penalties up to \$5000 and criminal penalties

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### WHAT TO DO IF YOU HAVE CONFLICT QUESTIONS

- Informal advice from FPPC (1-866-ASK-FPPC)
- Formal Advice from FPPC
- General advice from District Counsel
- Advice from your own lawyer
- Self-Help (see recommended resources at end of presentation)

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### CONFLICT AVOIDANCE: Parting Advice

- Conflicts happen
- Get advice early
- Obtain formal opinion of FPPC on close calls whenever possible
- Don't accept travel, honoraria, or abnormal gifts from persons interested or likely to be interested in District subject matter

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## Modes of Taking Action

- Direction to Staff
- Minute Orders (majority of quorum)
- Resolutions (require 3 affirmative votes)
- Ordinances (require 3 affirmative votes)

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## RECOMMENDED RESOURCES

- **OPEN MEETINGS/THE BROWN ACT**
  - *Open and Public V: The User's Guide to the Ralph M. Brown Act*, League of California Cities [Available in print version from the League's CityBooks service (\$15) or on-line at [www.cacities.org](http://www.cacities.org) [search "Brown Act"]]
  - *The Brown Act - Open Meetings for Local Legislative Bodies 2003*, CA Atty General [available on-line at [www.caag.state.ca.us/publications/2003\\_Intro\\_BrownAct.pdf](http://www.caag.state.ca.us/publications/2003_Intro_BrownAct.pdf)]
  - *The Ralph M. Brown Act*, Government Code Sections 54950 *et seq.* [available on-line at [www.leginfo.ca.gov/calaw.html](http://www.leginfo.ca.gov/calaw.html) and [www.caag.state.ca.us](http://www.caag.state.ca.us)]

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## RESOURCES- Public Records

- **PUBLIC RECORDS**
  - *Summary of the California Public Records Act 2004*, CA Atty General [available on-line at [www.caag.state.ca.us/publications/summary\\_public\\_records\\_act.pdf](http://www.caag.state.ca.us/publications/summary_public_records_act.pdf)]
  - *The Public Records Act*, Government Code Sections 6250 *et seq.* [available on-line at [www.leginfo.ca.gov/calaw.html](http://www.leginfo.ca.gov/calaw.html)]

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## RESOURCES - Conflicts

- **CONFLICTS OF INTEREST**
  - *A Local Official's Guide to Ethics Laws*, Institute for Local Self Government [Available from League's CityBooks service or on line at [www.ilsg.org](http://www.ilsg.org)]
  - *Fair Political Practices Commission*, 1.866.ASK.FPPC [toll free advice line]
  - *Conflicts of Interest (2004)*, CA Attorney General [available on-line at [www.caag.state.ca.us/publications/conflicts\\_of\\_interest.pdf](http://www.caag.state.ca.us/publications/conflicts_of_interest.pdf)]

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## Resources (Cont.)

- **CONFLICTS OF INTEREST (Cont.)**
  - *California Political Reform Act*, Government Code Sections 81000 *et seq.* [available on-line at [www.leginfo.ca.gov/calaw.html](http://www.leginfo.ca.gov/calaw.html)]
  - *Government Code Section 1090* [available on-line at [www.leginfo.ca.gov/calaw.html](http://www.leginfo.ca.gov/calaw.html)]

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