



Fagen Friedman & Fulfroft LLP

The Brown Act and Board Governance

Benicia Unified School District
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F3law.com

When a man assumes a public trust, he should consider himself as public property

Thomas Jefferson

Source: *Life of Jefferson said to Baron Humboldt*



What We'll Cover . . .

1. Brown Act Overview
2. What is a Meeting?
3. Agenda Requirements
4. Closed Session Exceptions and Procedure
5. Violations of the California Open Meetings Law
6. Facilitating Public Participation & Access
7. Running Effective Meetings & Tips for Effective Communications



1. Overview of the Brown Act

Government Code Section 54950 et seq.



Intent of the California Open Meetings Law



Open and public deliberations

Meaningful public access



Who is subject to the California Open Meetings Law?

Legislative Bodies: School Boards, Sub-Boards & Commissions

One exception: Ad hoc advisory committees consisting of less than a quorum of Board members



Open Meeting Requirements



- ❑ All legislative body meetings **must be open to the public**, except for authorized closed sessions.
- ❑ Purpose of meeting: **To accomplish district business**
- ❑ **Provide public opportunities** for questions and comments
- ❑ **No secret ballots**



2. What Is A Meeting?



“Meeting” Defined

A meeting occurs whenever:

- Majority of Board members gather at same time and place . . .
- To hear, discuss, or deliberate . . .
- Upon any item within the subject matter jurisdiction of the Board or district.



Types of Lawful Meetings

- Regular
- Special
- Emergency



Serial Meetings Prohibited

Serial Meeting: Communications outside formal meeting, which involve less than a quorum, but collectively encompass a majority



A Word of Caution . . .

Board members should be wary of acquiring knowledge, outside of a noticed board meeting, of their peers' opinions or positions on matters to come before the Board



Personal Intermediaries

Separate conversations or communications with Board members, where the speaker answers questions or provides information to Board members regarding a matter that could come before the board, are not prohibited **if the person communicating with the Board members “does not communicate to [board] members ... the comments or position of *any other member or members.*”**



Meetings Do Not Include...

- Individual contact
- Public conferences
- Standing committees
- Other local agency meetings
- Community meetings
- Social gatherings



General Constraints

Majority of the Board members

- ❑ Cannot discuss school district business among themselves at “non-meetings”
- ❑ Can attend standing committee meetings, only as observers



The Virtual World

Technology with Brown Act implications include:

- Email
- Websites/blogs
- Texting
- Social media
- Do you tweet, blog, or have a Facebook page?



AB 992 – New Legislation

- Starting January 1, 2021 until January 1, 2026:
 - Board members **not prevented** from engaging in conversations/communications on social media to answer questions, provide information to the public, or solicit information from the public



AB 992 (cont'd)

■ Conditional!!

- Majority of the Board cannot use the social media platform to discuss business or items in their jurisdiction amongst themselves.
- Board members are NOT allowed to respond directly to communications or posts on social media on topics within their jurisdiction if the post or comment is created or shared by another Board member.



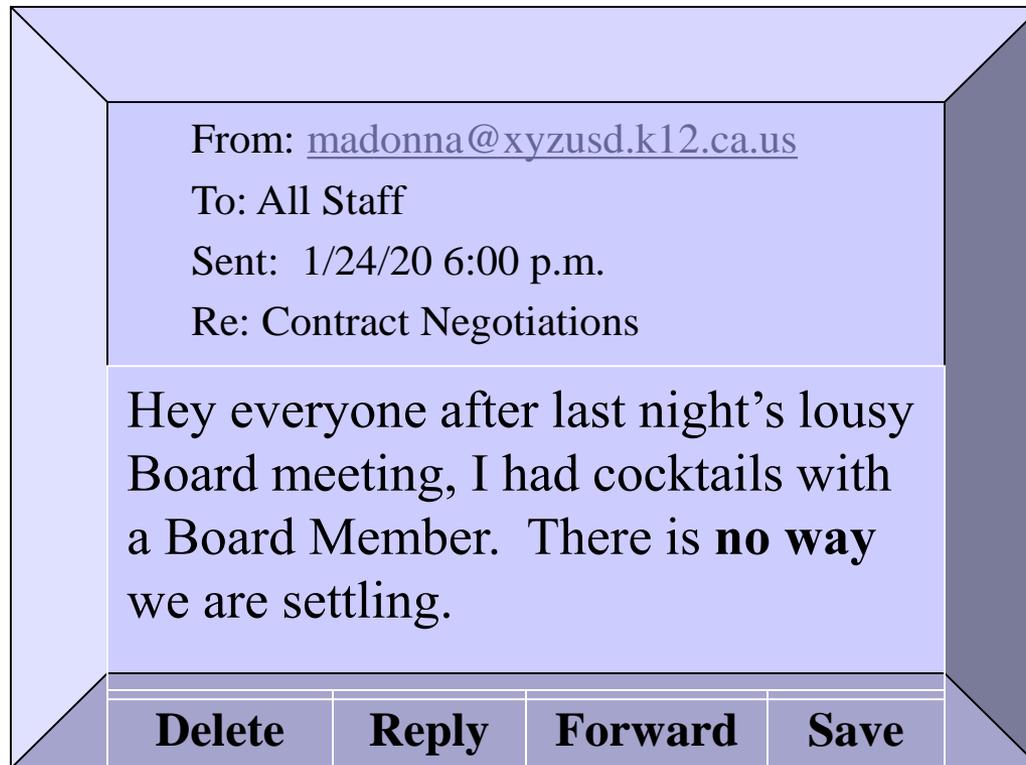
AB 992 (cont'd)

- “Discuss among themselves”
 - includes the use of digital icons that express reactions to communications made by other members of the body (e.g., Facebook “likes” or emojis)
 - must be accessible to the public for free and in a forum where one cannot be blocked unless the social media platform blocks them for violating their rules
- Extreme Caution Recommended!



Reminder about Emails

- Consider the Public Records Act
- Don't let email tone control your image



3. Agenda Requirements

Agenda must be posted

- ❑ At least 72 hours prior to regular Board meeting
- ❑ At least 24 hours prior to special board meeting
- ❑ At a location freely accessible to the public
- ❑ On school district's web site



Agenda Description

Must contain a brief general description of each item of business to be transacted or discussed at the meeting, including closed session items

Generally, not to exceed 20 words



Items on Agenda

- Members of the public, including Board members, may ask to have a specific matter placed on a future agenda
- General process
 - Reviewed by Board President and Superintendent
 - If within subject matter of district
 - Decide whether open or closed session item
 - Decide whether information, consent or action item
- No right to demand that requested item be “action item”



Action and Discussion of Items

The Board may not discuss or take action on an item not appearing on the agenda except:

- ❑ To respond to statements or questions by the public during public comment – Be careful
- ❑ To ask questions of staff or the public for clarification



Action and Discussion of Items (cont'd)

- To ask staff to report on an item not on the agenda at a subsequent meeting
- To make a brief announcement
- When an emergency severely impairing the public health or safety exists
- When there is a need to take immediate action on an item that came to the attention of the agency after agenda was posted



Emergency Meetings

- Work stoppage, crippling activity, or severe threat public health or safety in District
- No agenda required
- Must attempt to contact media 1 hour before unless there is a “dire emergency”
- Closed session if super-majority approve
- Posting required after meeting



Dire Emergency Agenda

- In the case of a dire emergency, the presiding officer or designee must notify the media at the same time the members are notified of the meeting
- A dire emergency is a crippling disaster, mass destruction, terrorist act or threatened terrorist activity so significant that providing the one-hour notice may endanger the public

(Gov. Code § 54956.5(a)(2).)



4. Closed Session Procedure



Closed Session: Agenda Requirements

- Closed sessions must be identified on the agenda
- The California Open Meetings Law provides safe harbor language which automatically satisfies this requirement



Closed Sessions

- May be held only for purposes expressly authorized by the California Open Meetings Law or Education Code
- Board must disclose in open session (or via the agenda) the item(s) to be discussed in closed session
- Board may only consider those items covered in statement (or via the agenda)



Permissible Closed Sessions

1. Personnel Matters

To discuss appointment, employment, evaluation of performance, discipline or dismissal of a public employee



Permissible Closed Sessions (cont'd)

2. Pending Litigation

To receive advice from legal counsel

“Pending” defined as:

- ❑ Existing litigation against district
- ❑ Anticipated litigation against district where there are facts and circumstances to indicate a significant exposure to litigation
- ❑ Deciding whether to initiate litigation



Permissible Closed Sessions (cont'd)

3. **Student Matters**

Required if Board considering suspension of, disciplinary action against, or any other action against student when public hearing would violate student privacy right



Permissible Closed Sessions (cont'd)

4. **Negotiations/Collective Bargaining**

- ❑ Discuss negotiations and instruct district negotiators without complying with the California Open Meetings Law
- ❑ Additional exceptions to the California Open Meetings Law: meeting and negotiation discussions between district and union, mediation, meeting or investigation conducted by fact-finder or arbitrator



Permissible Closed Sessions (cont'd)

5. **Security Matters**

- ❑ To meet with law enforcement or security expert
- ❑ To discuss a threat to building security, or to essential public services (water, drinking water, wastewater treatment, natural gas service, and electric service) or public's right of access to public services or public facilities



Permissible Closed Sessions (cont'd)

6. Real Property Negotiations

- ❑ To instruct negotiators on price and terms for purchase or sale of identified real property
- ❑ May not provide general briefings on area land use issues, environmental impacts, site design and related issues
- ❑ After negotiations are concluded, any agreements and approval of the agreement must be reported in open session



Closed Session: Reporting Out Requirements



- Board must publicly report actions taken unless final approval rests with another party or disclosure would hamper the initiation or defense of litigation



Confidentiality of Closed Sessions

- Board members are prohibited from disclosing information obtained during a closed session except to persons entitled to receive that information
- Unauthorized disclosure **could waive attorney-client privilege**, violate privacy rights of students or employees, or impact collective bargaining
- The prohibition on disclosing confidential information learned in closed session applies to **both** current and former Board members



5. Violations of the California Open Meetings Law



Violations

- ❑ **Misdemeanor:** For Board member to attend a Board meeting where action is taken in violation of the California Open Meetings Law, where the member intends to deprive public of information which the member knows the public is entitled to receive
- ❑ The District Attorney, or any interested person, may bring a civil action to stop or prevent violations or to have Board action taken in violation declared null and void



Cure and Correct Demands

- ❑ Before bringing the action, Board must be given notice and an opportunity to correct the violation
- ❑ Prevailing plaintiff **may be entitled to costs and attorney's fees**
- ❑ For closed session violations, court can order Board to tape record all closed sessions



6. Facilitating Public Participation & Access



Public Participation and Comment

- Regular meetings: (1) agenda items, & (2) items in subject matter jurisdiction of Board
- Special meetings: agenda items only
- Before or during consideration of item
- Subject to Reasonable Regulation
 - Based in order and efficiency
 - Neutrally applied (view-point)
 - Time limits



Public Participation and Comment (cont'd)



The Board may not prohibit public criticism of the policies, procedures, programs, or services of the agency, or the acts or omissions of the Board



Board Responses

- Rule: No action or discussion on matters not on agenda
- But...Board members may:
 - Refer the matter to staff for handling
 - Ask staff to place the matter on a future meeting agenda and/or report back
 - Ask a question for clarification
 - Make a brief announcement
 - Make a brief report of his/her own activities



Public Records

- All agendas and other documents distributed at a Board Meeting in connection with an agenda item
- Any document a Board member brings to a Board meeting to share



Public Records (cont'd)

- Documents distributed to the Board less than 72 hours prior to an open public meeting shall be made available for public inspection when distributed to the Board
- Need to list on the agenda the location of where item can be viewed or can post on website.



7. Running Effective Meetings & Tips for Effective Communications

- Call the meeting to order at the appointed time
- Announce the business to come before the Board in its proper order
- Enforce the Board's policies relating to the conduct of meetings and help ensure compliance with the Brown Act



Running Effective Meetings (cont'd)

- Recognize persons who desire to speak, and protect the speaker who has the floor from disturbance or interference
- Explain what the effect of a motion would be if it is not clear to every member
- Restrict discussion to the question when a motion is before the Board



Running Effective Meetings (cont'd)

- Rule on issues of parliamentary procedure
- Put motions to a vote, and state clearly the results of the votes
- Be responsible for the orderly conduct of all Board meetings
- Always be aware of the dynamics of the Board, audience and staff



Tips For Effective Communications With The Public

- Be respectful
- Discuss items with the public rather than debating them
- Allow the District spokesperson to field public questions, and be prepared to refer such questions to the spokesperson or the Superintendent as appropriate



Tips For Effective Communications With The Public

- If you speak to members of the public outside of a Board meeting and without Board approval on matters of District business, make clear that you are stating your personal opinion, rather than the Board's opinion or position
- Do not release confidential information
- Be patient with members of the public; they often do not understand the procedure or the substance of what is being discussed



Tips For Effective Communications Between Board Members

- Be respectful; every member will have an opportunity to speak at an appropriate time
- Disagreement and respectful debate between Board members at Board meetings is appropriate; open disagreement outside of meetings can be divisive and damaging to the District



Tips For Effective Communications Between Board Members



- Remember that you and every other Board member represents the entire District, not any area or constituency, and generally owe a duty to act in the best interest of the entire District
- If you have a point that you wish to make to one or more Board members, address the point to the entire Board



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