

# CITY OF MILPITAS BROWN ACT TRAINING



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# Housekeeping – Public Comment

- Virtual public comments for this meeting may be submitted on a form from the City website
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  - or
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# **The Top Ten Things You Never Want to Hear Your City Attorney Say\***

**\*about the Brown Act.**



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# Overview

- Purpose of the Brown Act
- Application of the Brown Act
- Serial Meetings
- Rules Governing Meetings
- Violations
- Brown Act and COVID-19 Response
- Question and Answer



**TOP TEN THINGS YOU NEVER WANT TO  
HEAR  
YOUR CITY ATTORNEY SAY\***

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**10. “OF COURSE THAT  
WAS A BROWN ACT  
MEETING.”**

**\* (ABOUT THE BROWN ACT)**



# Purpose of Brown Act

To ensure that almost all aspects of the decision-making process of legislative bodies of local agencies are conducted in public and open to public scrutiny.

*“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.”*

(Gov. Code § 54950.)



## Milpitas Open Government Ordinance

- “All meetings of any policy body shall be open and public, and governed by the provisions of the Ralph M. Brown Act (Government Code Sections 54950 et. seq.) and of this chapter. In case of inconsistent requirements under the Brown Act and this chapter, the requirement which would result in greater or more expedited public access shall apply.” MMC § I-310-2.20



# Application

*To whom does the act apply?*

- “Meetings” of legislative bodies of local agencies
  - Including persons elected to legislative bodies, even prior to assuming office



# Application

- *Local Agency*
  - A city, county, city and county, town, school district, special district political subdivision, or any board, commission or agency thereof, or other local public agency
- *Legislative Body*
  1. Governing body
  2. Board, commission, committee created by formal action of the governing body (e.g., Citizens Advisory Committee)
- Milpitas Open Government Ordinance applies to all “*policy bodies*”
  - City Council,
  - standing subcommittees,
  - panels or ad hoc committees,
  - City-created task forces, and
  - all City Commissions or Boards



# The Key to the Brown Act

- All meetings shall be open and public except when the Brown Act authorizes otherwise
  - But, what is a meeting?
  - And when is it open and public?



# Application



- What is a meeting?
- When is a meeting not a “meeting”?



# Application

- *Meeting*
  - Any gathering of a majority of the members at the same time and place (even electronically) to **hear, discuss or deliberate** upon any matter under their jurisdiction
  - No action needs to be taken for a meeting to occur
  - Essentially, any collective concurrence of a quorum of the legislative body is a “meeting.”



# Application



- *Not a Meeting*
  - Individual contacts (less than a quorum), but beware of serial meetings.
  - Conferences and seminars
  - Community meetings
  - Purely social or ceremonial occasions
  - Attendance at standing committee meetings
  - Meetings of other legislative bodies – majority of body may attend as long as they do not discuss among themselves issues related to the agency



# TOP TEN THINGS YOU NEVER WANT TO HEAR YOUR CITY ATTORNEY SAY\*

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9. “THAT’S A BROWN  
ACT MEETING, TOO.”

\* (ABOUT THE BROWN ACT)



# Serial Meetings

- *Serial Meetings – Expressly Prohibited*
  - “Use of direct communication, personal intermediaries, or technological devices employed by a majority of the legislative body members in order to develop a collective concurrence as to action to be taken on an item by the legislative body is prohibited.”



# Serial Meetings

## *Elements of a Serial Meeting*

- Series of communications
- Between less than a quorum
- But taken as a whole involves the majority
- Concurrence is formed.



# Serial Meetings

## *Two types of Serial Meetings*

### 1. Chain

- Member A speaks to Member B who speaks with Member C about a particular matter and in the process they all form a collective concurrence on a matter

### 2. Hub and Spoke

- An intermediary acts as the hub of a wheel with members relaying information back and forth to each other through the hub, and in the process a majority of the legislative body develops a collective concurrence
  - Can occur with staff so staff should be wary.



# Serial Meetings

## *Serial Meeting Exceptions*

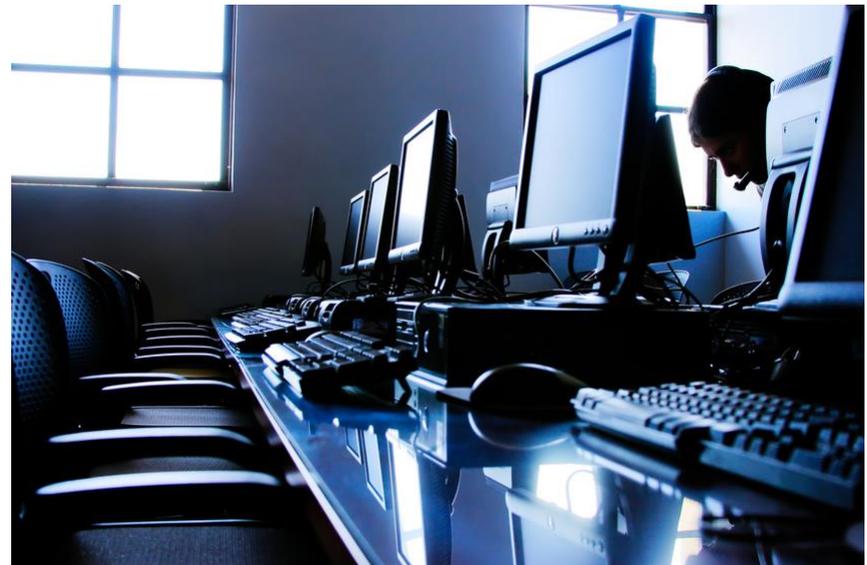
- While the Brown Act prohibits serial meetings, it explicitly allows one-on-one communications by a non-member (i.e., staff) with members of the legislative body
- But does NOT allow sharing of views, comments, concerns, etc. of different members



# Serial Meetings

## *Ways Serial Meetings Can Happen*

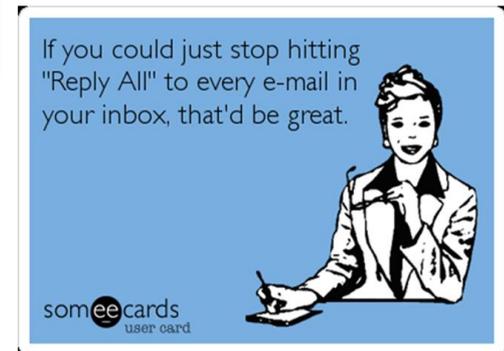
- Personal Meeting
- Telephone
- E-mail (especially “reply all”)
  - Work through staff liaison
- Written Correspondence - letters
- Social Networking Sites such as Facebook and Twitter



# Serial Meetings – Emails

## Email Tips

- Refrain from “reply all” in e-mails
- Ensure that any individual e-mails do not become a serial meeting
  - Risk of forwarding



# Serial Meetings – Emails – Best Practices

## Email Tips for Appointed and Electeds

- If a constituent sends an email to the full Council or Commission seeking something:
  - Send email to staff liaison or City Manager (if Council).
  - Reply (but not reply-all!) to the constituent thanking them but do not express opinions.
  - Staff should then circle back to the full Commission or Council indicating the outcome.

## Email Tips for Staff

- Do not add individual commission or councilmembers to emails responding to a constituent.
- If constituent adds individual commission members or councilmembers to an email, when replying, remove them but email them separately indicating outcome.



# Serial Meetings – Social Media



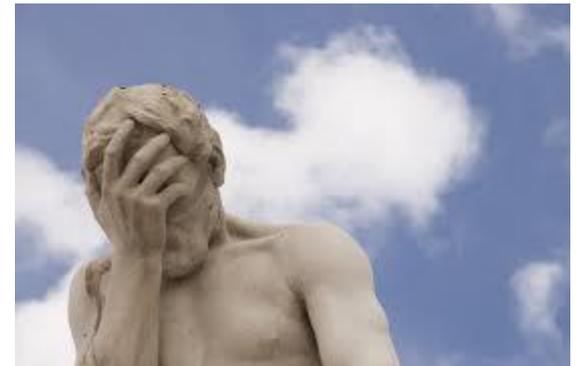
## Social Media Tips

- Beware of the comments section: Engaging in discussions using social media or the comments section of article, etc. can qualify as a meeting
- Example: A series of comments on a news article or Twitter or Facebook post may qualify as a meeting
- Take caution



# Serial Meeting Hypo – Text/Emails

- During a Commission meeting, 5 of 7 members frequently look down into their laps. In some instances, an audible bell is heard sounding like a notification from an iPhone.
  - A local reporter later asks if the Commissioners violated the Brown Act by sending texts or e-mails to each other about agency business.
- 
- Was the Brown Act violated?
  - Yes, if concerned public business



# Serial Meeting Hypo - Brown Act in Cyberspace



- Blog post: Agency seeking new GM
- Comment #1 (board member): We need someone with great communication skills.
- Comment #2 (board member): And with a high degree of technical knowledge
- Comment #3 (board member): Anyone will be better than the last guy
- Comment #4 (resident): Has the Brown Act just been violated?





# Like

- City's Facebook post: Next budget workshop will examine long-term impacts of capital needs
- Board member 1 comments: Yes, this must be a priority. Please attend Tuesday's meeting!
- Board member 2: I agree. Top budget priority!
- Board member 3 replies: Me too.
- Board member 4 "likes" Board Member 1's post.
- Vendor: Please consider us for this work!
- Resident: We can't afford to pay for this. Our drought surcharged rates are already too high!



# TOP TEN THINGS YOU NEVER WANT TO HEAR YOUR CITY ATTORNEY SAY\*

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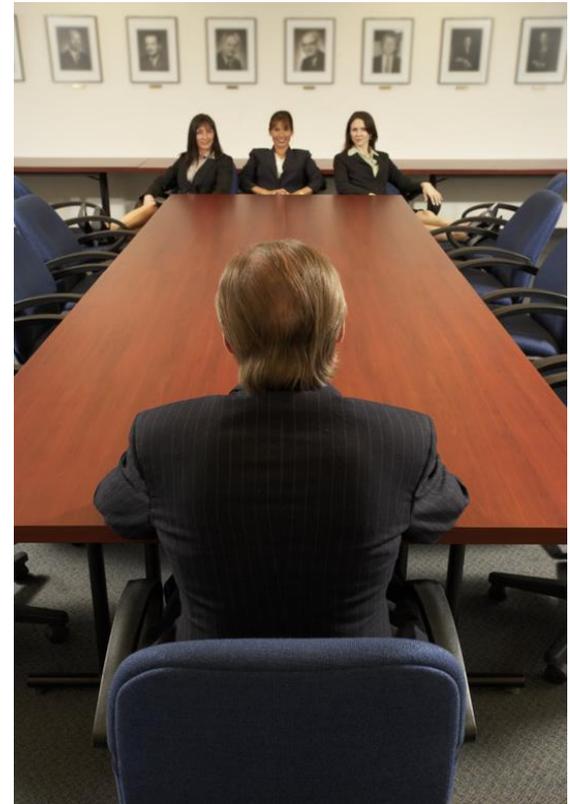
8. “THIS IS THE  
AGENDA?”

\* (ABOUT THE BROWN ACT)



# Rules Governing Meetings

- Regular meeting
- Special meeting
- Public's right to comment
- Closed sessions



# Rules Governing Meetings

## *REGULAR MEETINGS - Agenda Requirements:*

- Post 72 hours prior to the meeting
- Must include the time and location of the meeting
- Must contain a brief general description of each item to be discussed or addressed
- Must provide opportunity for comment on non-agenda items – general public comment period.
- Milpitas Open Government Ordinance requires a preliminary agenda in addition to final agenda



# Rules Governing Meetings

## *SPECIAL MEETINGS - Agenda Requirements:*

- Posted no later than 24 hours prior to the meeting
- Must include the time and location of the meeting
- Must contain a brief general description of each item to be discussed or addressed
- Only requires that we allow public comment on the items listed on the special meeting agenda – no need for general public comment period.



# Rules Governing Meetings

## *Distribution of Agenda Packet to Public*

- In addition to posting an agenda, local agency must also make the agenda packet available to the public when the materials are distributed to all or a majority of the legislative body.

## *Distribution of Late Materials*

- If within 72 hour window – make available for the public and post on the agency website.
- If at the meeting, ensure copies are available for the public at the meeting if City controlled, or after if public provided.



# TOP TEN THINGS YOU NEVER WANT TO HEAR YOUR CITY ATTORNEY SAY\*

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7. “YES, YOU HAVE TO  
LET THEM SAY THAT.”

\* (ABOUT THE BROWN ACT)



# Rules Governing Meetings

## *The Public's Right to Comment*

- At every regular meeting, members of the public have the right to directly address the body on any item under the jurisdiction of the body – general public comment
- For agenda items, the public must be given an opportunity to comment before or during the body's consideration of the item
- At special meetings, members of the public have the right to address the body about any item that is listed on the agenda



# TOP TEN THINGS YOU NEVER WANT TO HEAR YOUR CITY ATTORNEY SAY\*

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6. “OKAY, LET’S CLEAR  
THE ROOM!”

\* (ABOUT THE BROWN ACT)



# Willful Interruptions

- Legislative body may remove persons from a meeting who willfully interrupt proceedings
- Ejection justified only when audience members *actually disrupt* the proceedings
  - i.e.: stop business
  - Agency may not prohibit “insolent” (rude, disparaging, defamatory, even profane) remarks by members of the public absent actual disruption



# Rules Governing Meetings

## *Public Recording of Meetings*

- Public is allowed to audio or video tape a meeting unless the agency can make a reasonable finding that the recording would constitute a persistent disruption of the proceedings
- Recordings of public meetings by the agency are public records
- Milpitas Open Government Ordinance requires recording of all regular, special and closed session meetings



# Rules Governing Meetings

*No action or discussion allowed for any item not listed on agenda except under rare circumstances:*

- Emergency situations
- Adding items by 2/3 vote because of need for “immediate action” that came to the agency’s attention after the agenda was posted



# Rules Governing Meetings

*No action or discussion allowed for any item not listed on agenda except:*

- Brief responses to statements or questions from public
- Questions to staff for clarification of matters based upon public comment
- Brief announcements or reports on member's or staff's activities
  - Tied to public comment time
- Providing references or information to staff
- Asking staff to report back at a future meeting



## Special Circumstances at Meetings

- For bilingual public speakers Brown Act requires that twice as much time to present during public comment
- Enough time to provide original statement in native language and translation
- Example: instead of 3 minutes, provide 6 minutes.



# TOP TEN THINGS YOU NEVER WANT TO HEAR YOUR CITY ATTORNEY SAY\*

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5. “YOU REALLY CAN’T  
DO THAT IN CLOSED  
SESSION.”

\* (ABOUT THE BROWN ACT)



# Closed Sessions

**CONFIDENTIAL**

- Must be expressly authorized by law
- Must be briefly described in agenda
- Must verbally announce items
- If action is taken, may need to report to the public



# Closed Sessions

- Real Property Transactions
- Litigation--Existing, Anticipated and Initiation
- Personnel Issues--Appointment, Performance, Evaluation, Discipline/Dismissal/Release
- Labor Negotiations
- Threats to Public Services of Facilities



## Closed Session

- Brown Act Agenda Safe Harbor Language
- Requires specific wording for each specific instance
- Consult with City Attorney for language requirements



# TOP TEN THINGS YOU NEVER WANT TO HEAR YOUR CITY ATTORNEY SAY\*

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4. “YOU CAN’T DO THAT IN CLOSED SESSION, EITHER.”

\* (ABOUT THE BROWN ACT)



# Common Closed Session Challenges

- Real Estate Negotiations – what does “Price and Terms of Payment” really mean?
- Human Relations and Personnel Traps for the Unwary: *Evaluating the Police Chief and Compensation of Chief Executive*
- Who can attend?



# The Confidentiality of Closed Session Discussions

- The Brown Act explicitly prohibits the unauthorized disclosure of confidential information acquired in a closed session by any person present, and offers various remedies to address breaches of confidentiality.
- Only the legislative body acting as a body may agree to divulge confidential closed session information; regarding attorney/client privileged communications, the entire body is the holder of the privilege and only the entire body can decide to waive the privilege.



# TOP TEN THINGS YOU NEVER WANT TO HEAR YOUR CITY ATTORNEY SAY\*

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## 3. “THE D.A. CALLED; WE NEED TO TALK

\* (ABOUT THE BROWN ACT)



## Remedies for Disclosure

- Employee
  - Disciplinary action against an employee who has willfully disclosed confidential information in violation of this section; up to dismissal
- Member of the Legislative Body
  - Referral of the member who willfully disclosed confidential information in violation of this section to the Grand Jury



# Remedies for Violations of the Brown Act

- Any interested person, including the district attorney, may seek to invalidate certain actions of a legislative body on the ground that they violate the Brown Act. Violations of the Brown Act, however, **cannot be invalidated** if they involve the following types of actions:
  - Those taken in substantial compliance with the law.
  - Those involving the sale or issuance of notes, bonds or other indebtedness, or any related contracts or agreements; ☐
  - Those creating a contractual obligation, including a contract awarded by competitive bid for other than compensation for professional services, upon which a party has in good faith relied to its detriment; ☐
  - Those connected with the collection of any tax; or ☐
  - Those in which the complaining party had actual notice at least 72 hours prior to the regular meeting or 24 hours prior to the special meeting, as the case may be, at which the action is taken.



# Brown Act Cure

- The remedy is available to “[t]he district attorney or any interested person” who must first mail or fax a “cease and desist letter” “to the clerk or secretary of the legislative body being accused of the violation” “clearly describing the past action of the legislative body and nature of the alleged violation.”
- Such a demand must be made within nine months of an alleged violation.
- The legislative body has 30 days to respond to a cease-and-desist letter although a later response may still obviate subsequent suit, but will oblige the agency for the plaintiff’s attorneys’ fees and costs.
- Such a response may be “an unconditional commitment to cease, desist from, and not repeat the past action that is alleged to violate this chapter” in substantially the form specified in section 54960.2, subdivision (c)(1)
- Such an unconditional commitment “shall be approved by the legislative body in open session at a regular or special meeting as a separate item of business, and not on its consent agenda.”



# Remedies for Violations

- For violations, Court may:
  - Enjoin action
  - Invalidate action
  - Mandate correction
- Court costs & attorney fees are recoverable
- Individuals who intentionally violate may be guilty of a misdemeanor



# TOP TEN THINGS YOU NEVER WANT TO HEAR YOUR CITY ATTORNEY SAY\*

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## 2. “DO WE REALLY HAVE TO GO OVER THIS AGAIN?”

\* (ABOUT THE BROWN ACT)



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# Enshrined in Statute and Quoted by Justices

*“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.”*



# TOP TEN THINGS YOU NEVER WANT TO HEAR YOUR CITY ATTORNEY SAY\*

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1. “THE GOVERNOR  
CALLED; THERE’S A  
PANDEMIC.”

\* (ABOUT THE BROWN ACT)



# Impact of COVID-19 on Brown Act

- Executive Order N-35-20 (Mar. 21, 2020) expands the exception for unilateral staff briefings to individual councilmembers.
- This order allows those non-meeting briefings to include simultaneous conversations with the entire Council but only to address (1) emergency operations and (2) the impacts of the emergency on the City's constituents.
- No limit on the length or frequency of these briefings.
- They are not "meetings," so they do not require public notice or minutes.



# Impact of COVID-19 on Brown Act

- **March 17, 2020:** Governor Newsom issues Executive Order N-29-20 suspending certain provisions in the teleconferencing provision in the Brown Act.
- **Prior law:** City Council allowed to use teleconferencing but subject to four requirements as follows:
  1. Meeting agenda to list all teleconference locations;
  2. Posted agenda at each teleconference location;
  3. Teleconference location must be publicly accessible; and
  4. Quorum in the jurisdiction



# Impact of COVID-19 on Brown Act

- **Executive Order N-29-20:** Waived the four requirements. Now City Council can use teleconferencing and:
  1. Need not identify the teleconference locations on the agenda;
  2. Need not post an agenda at each teleconference location;
  3. Teleconference location can be closed/private; and
  4. No need for a quorum to be within the jurisdiction.
- This means we can conduct the City Council meeting in a complete virtual format.



# Teleconference Hypo

- A Committee member is on vacation and wants to call in to a meeting from his cell phone while driving in scenic North Dakota. Ok?
  - Pre-COVID: No, the member may not participate or vote because he is not in a noticed and posted teleconference location open to the public.
  - Post-COVID: Yes.



# Virtual Public Meetings and Public Comment

*Executive Order N-29-20*

*Requirements for Teleconference/Electronic Meetings:*

1. Public can “observe and address” legislative body
2. Agenda is timely posted (72 hours for regular meetings)
3. Notice says how public can observe and comment
4. Implement and advertise a procedure for “receiving and swiftly resolving” ADA accommodation requests
5. Make reasonable efforts to adhere to Brown Act as closely as possible to maximize transparency



# Virtual Public Meetings and Public Comment

- **Public Comment:**

- Executive Order was silent on how to handle public comment in a virtual format.
- Due to risk of loss of control with oral comments, some cities have gone to a written comment format.
- Emailed to clerk either during or in advance of the meeting with numerical limit.
- Some criticism of cities for going to this format.
- Goal is still transparency and all written comments become part of the meeting record



# Virtual Public Meetings – Best Practices



- **Potential Pitfalls to Avoid and Best Practices:**
  - Virtual communication during meeting
    - Avoid serial meetings: Do NOT text, chat, or email during the meeting.
    - Public has a right to hear all of the people's business.
  - Ensure public comment is heard
    - Ask clerk for any public comments at each agenda item.
    - Without a live audience, it can be easy to forget the public is watching.



# Questions?

