

Open Public Meeting Requirements Under the Brown Act and California Education Code

April 7, 2021

Center Unified School District

PRESENTED BY:
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Overview of Topics

- Intent of the Brown Act
- What is a meeting?
- Social Media Use
- Legislative bodies and members
- Public meetings procedures and public participation
- COVID-19 Orders
- Closed session
- Enforcement

Intent of the Brown Act – Public Participation and Government Transparency

Intent of the Brown Act – Public Participation and Government Transparency

- Public agencies exist to aid in the conduct of the people's business. The intent of the law is that **actions** and **deliberations** be conducted openly.
- **People of this state do not yield their sovereignty to the agencies which serve them. The people insist on remaining informed so that they may retain control over the instruments they have created.**
 - Gov. Code § 54950

Intent of the Brown Act

- Facilitate public participation in local government and curb misuse of democratic process by secret legislation by public bodies.
- CA Constitution requires that meetings of public bodies and writings of public officials and agencies be open to the public.
- Brown Act has been liberally interpreted by the courts in favor of public participation and governmental transparency.

The “Rule”

- **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.**
 - Gov. Code § 54953

What is a Meeting?

What is a Meeting?



- “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 Section 54953*, to **hear, discuss, deliberate, or take action** on any item that is within the subject matter jurisdiction of the legislative body.
 - Gov. Code § 54952.2(a)
- “Deliberate” includes the collective acquisition and exchange of facts preliminary to an ultimate decision.
- “Action taken” means a collective decision by a majority of the members of the legislative body, a collective commitment or promise by a majority of the members of a legislative body to make a positive or a negative decision, or an actual vote of the body.

What is a “Serial Meeting”?

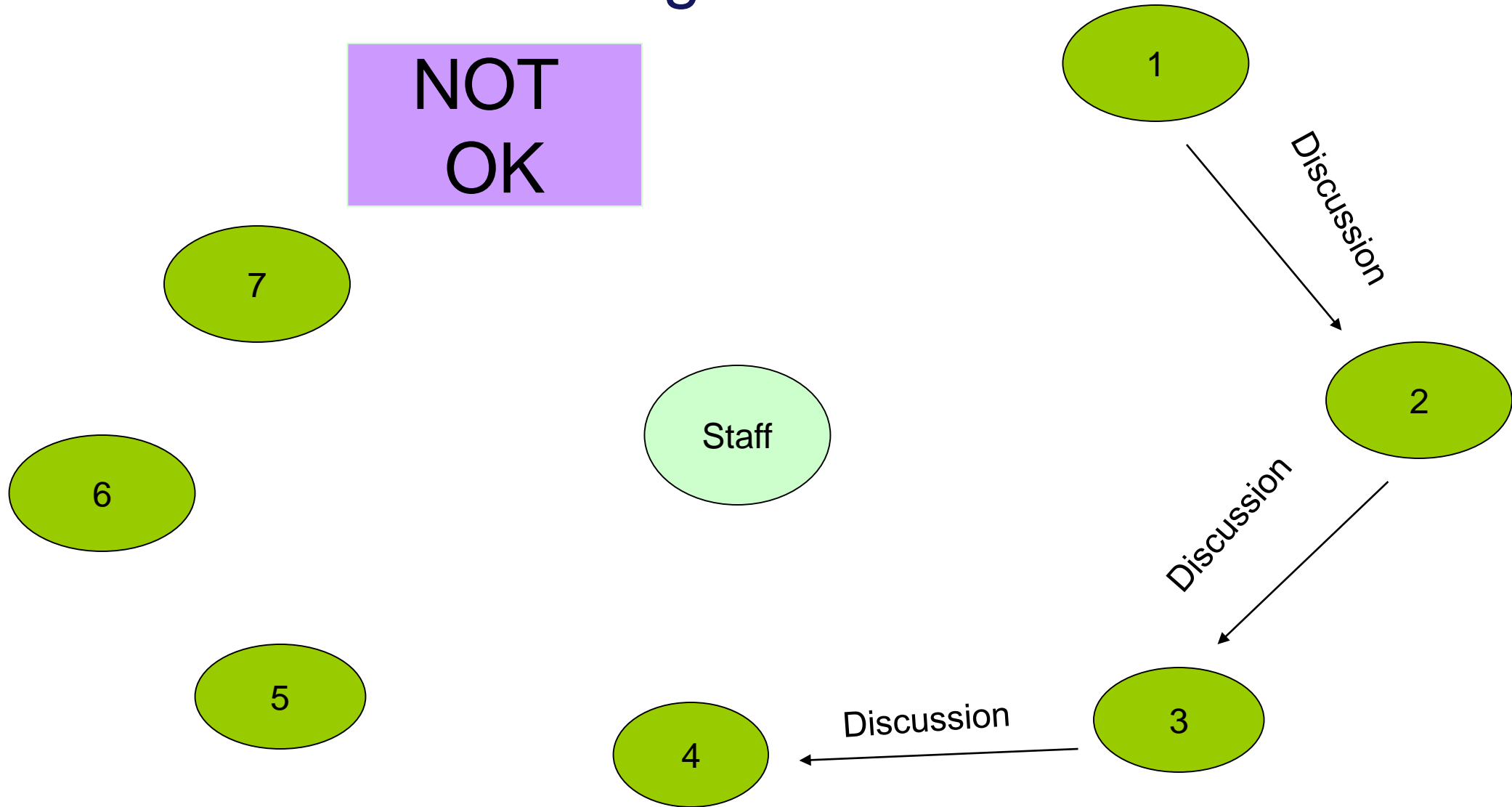
- A **majority of the members** of a legislative body shall not, **outside a meeting** authorized by this chapter, **use a series of communications** of any kind, directly or through intermediaries, **to discuss, deliberate, or take action on any item of business that is within the subject matter jurisdiction of the legislative body.**
 - Gov. Code §54952.2(b)(1)

What is Not a “Serial Meeting”?

- An **employee or official** of a local agency may engage in **separate conversations or communications** outside of a meeting with members of a legislative body in order **to answer questions or provide information** regarding a matter within the jurisdiction of the 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.
 - Gov. Code § 54952.2(b)(2)

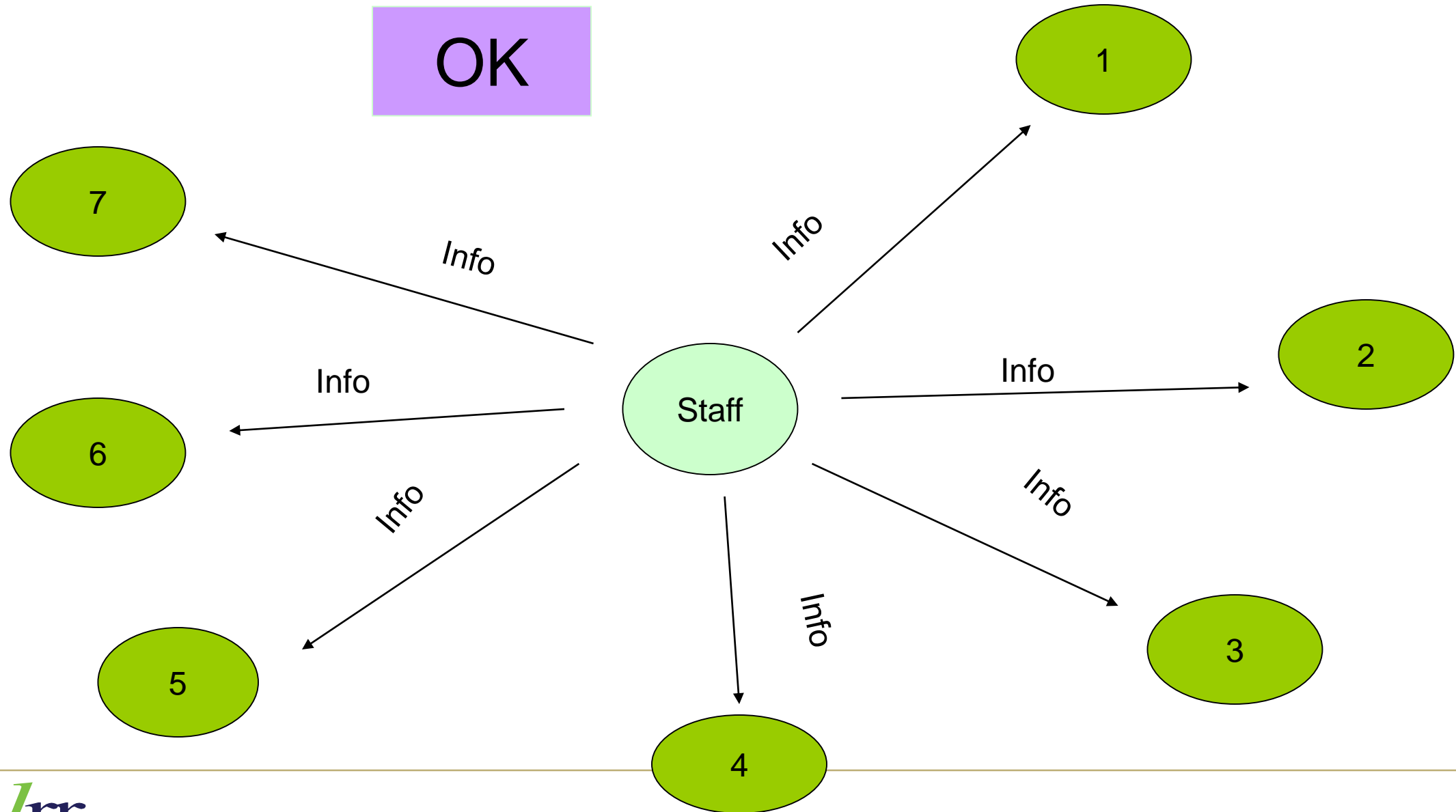
Prohibited Serial Meeting

NOT
OK



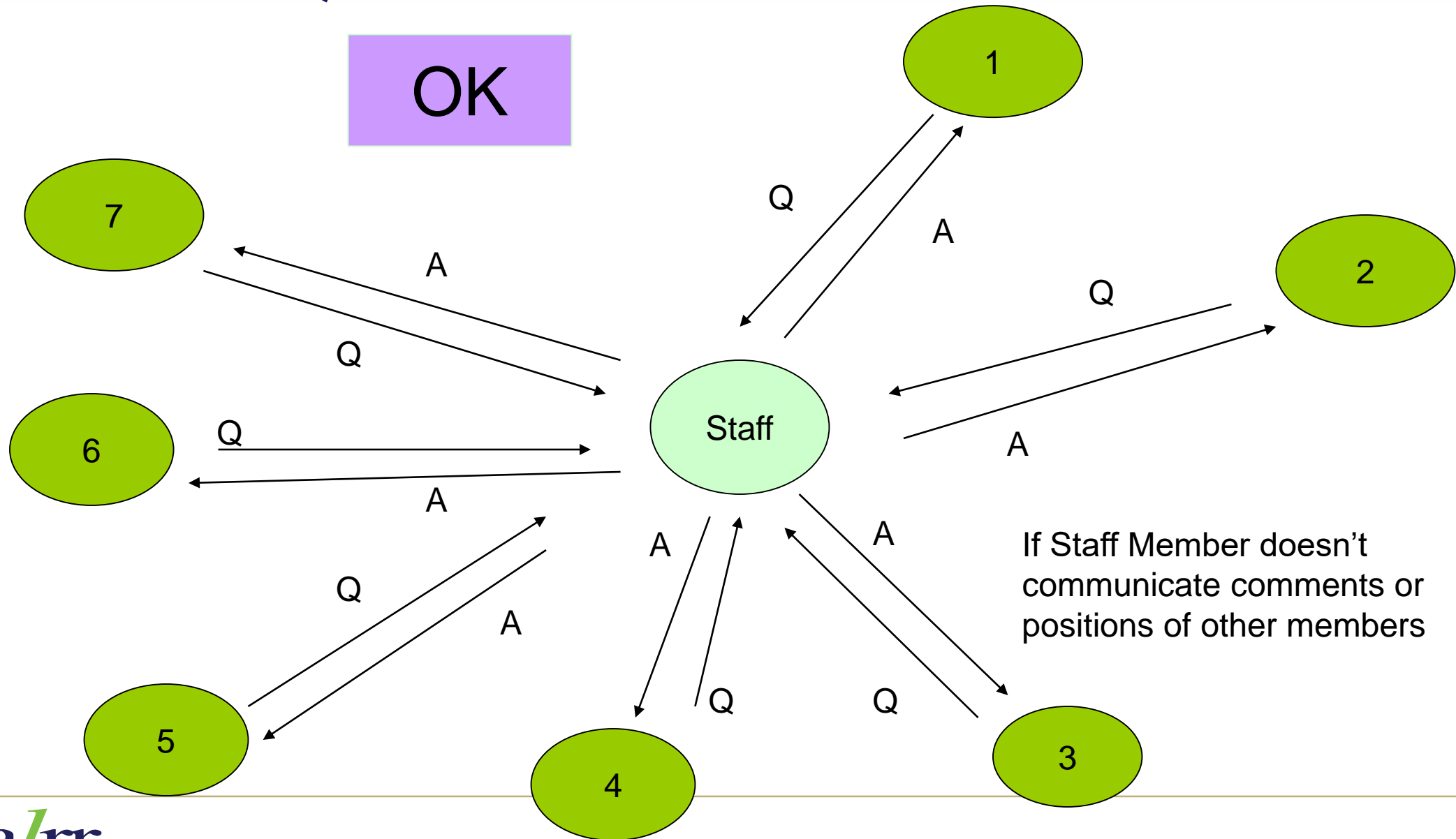
Permitted Distribution of Information

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Permitted Questions & Answers

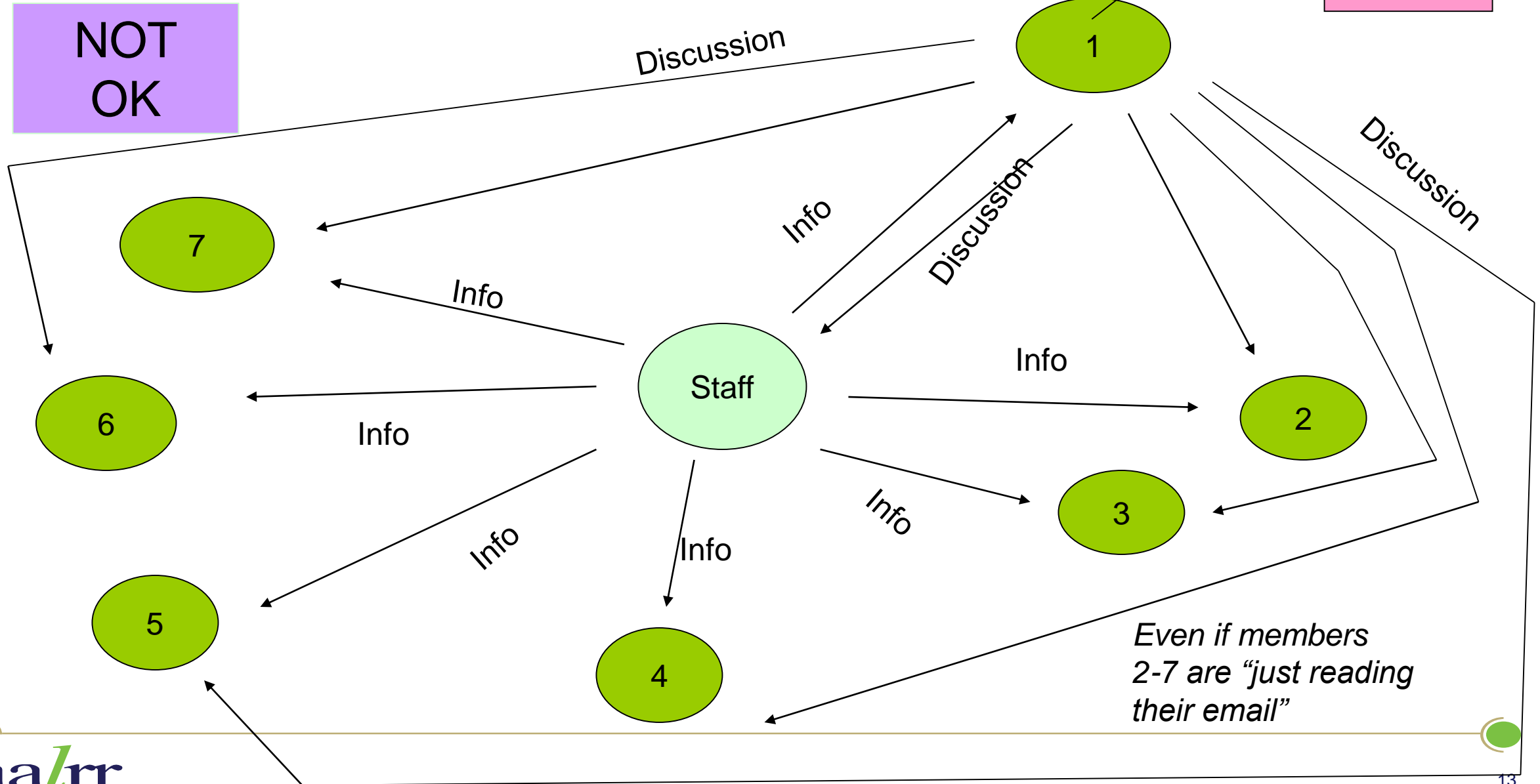
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Prohibited Meeting by Email

NOT
OK

Reply all



What is Not a “Meeting”?

- **Individual contacts or conversations** between a member of a legislative body and any other person.
 - Who is or is not any other person?
 - Gov. Code § 54952.2(c)(1)
- **Attendance of a majority** of members at a **conference** or similar gathering **open to the public** discussing **issues of general concern** to the public or agencies, provided members **do not discuss** among themselves, **other than as part of the meeting, business** of a specific nature that is within the jurisdiction of the local agency.
 - Gov. Code § 54952.2(c)(2)

What Else is Not a “Meeting”?

- **Attendance of a majority** of members at an **open and publicized** meeting to address a topic of local community concern by a **person or organization other than the agency**, provided members **do not discuss, other than as part of the meeting, business** of a specific nature within the jurisdiction of the legislative body.
 - Gov. Code § 54952.2(c)(3)

What Else is Not a “Meeting”?

- ***Attendance of a majority*** 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***, provided members ***do not discuss, other than as part of the meeting, business*** of a specific nature that is within the jurisdiction of the legislative body.
 - Gov. Code § 54952.2(c)(4).

What Else is Not a “Meeting”?

- Attendance of a majority at a **purely social or ceremonial** occasion **provided the members do not discuss business within the jurisdiction of the legislative body.**
 - Gov. Code § 54952.2(c)(5).

Social Media Use

Social Media Use

AB 992 amends the Brown Act's prohibition of serial meetings to permit certain social media communications.



- Board members may communicate via social media:
 - *to answer questions,*
 - *provide information to the public, or*
 - *solicit information from the public* regarding a matter within the subject matter jurisdiction of the board.
 - Gov. Code § 54952.2(b)(3)

Social Media Use

- Per AB 992, Legislative body members ***may not*** use social media to “**discuss among themselves**” **official business**.
- “A member of the legislative body shall not respond directly to any communication on an internet-based social media platform regarding a matter that is within the subject matter jurisdiction of the legislative body that is **made, posted, or shared** by any other member of the legislative body.”
 - Gov. Code § 54952.2(b)(3)(A)

Social Media Use

- “Discuss among themselves” means communication made, posted, or shared on social media, including **comments or digital icons that express reactions**, aka “emojis,” to communications made by other board members.
 - Gov. Code § 54952.2(b)(3)(B)(i)



Legislative Bodies and Members

Legislative Bodies



- Commissions, committees, boards, or other bodies of a local agency, whether permanent or temporary, decision-making or advisory, ***created by resolution or some other formal action*** of a legislative body.
 - Gov. Code § 54952(b)

Non Legislative Bodies

- **Advisory** committees composed **solely** of the members of the legislative body which are less than a quorum of the legislative body.
 - Gov. Code § 54952(b)
- E.g., Ad hoc committee comprised solely of less than a quorum of the board created for the purpose of advising the full board on the qualifications of candidates for appointment to a vacant position is not a legislative body.
- Except: **Standing committees** of a legislative body, irrespective of their composition, which have a **continuing subject matter jurisdiction**, or a meeting schedule fixed by resolution or other formal action of a legislative body, **are legislative bodies** for purposes of the Brown Act.

Other Legislative Bodies

- Committees appointed by the superintendent, president or chancellor without any formal action by the board, are not covered by the Act. However, the board must not in any way “instigate” the formation of the committee; the concept of “formal action” is broadly construed. Frazer v. Dixon Unified School District (1993) 18 Cal.App.4th 781, 792-793.

Other Legislative Bodies

- Meetings between unions representing a community college district's employees and the district's joint labor/management benefits committee (JLMBC) were within the Educational Employment Relations Act (EERA) exception from Ralph M. Brown Act's open meeting requirements.
- Cal.Gov.Code §§ 3543.3, 3549.1(a,) and Californians Aware v. Joint Labor/Management Benefits Com., (2011) 200 Cal.App.4th 972.

Public Meeting Procedures and Public Participation

Meeting Material – Public Records

- Agendas of public meetings and any other writings, when distributed to all, or a majority of all, of the members of the Board by any person in connection with a matter subject to discussion or consideration at an open meeting of the body, are dis-closable public records under the California Public Records Act and shall be made available upon request without delay.
- This requirement does not apply to certain records made exempt from public disclosure by the Public Records Act.
 - Gov. Code § 54957.5(a).

Meeting Material – Public Records

- If a public record that relates to an agenda item for an open session of a regular meeting of the legislative body of a local agency is distributed less than 72-hours prior to that meeting, the writing shall be made available for public inspection pursuant to Section 54957.5(b)(2) at the time the writing is distributed to all, or a majority of all, of the members of the body.
 - Gov. Code § 54957.5(b)(1).
- The district must make any writing described above available for public inspection at a public office or location that the agency designates for this purpose.

Meeting Material – Public Records

- The local agency also may post the writing on the local agency's Internet Web site in a position and manner that makes it clear that the writing relates to an agenda item for an upcoming meeting.
- Documents prepared by the district must be made available for public inspection at the meeting; documents prepared by any other person must be made available after the meeting.
 - Gov. Code § 54957.5(c).

Notice of Meetings and Agendas

- The agenda for a regular meeting must be conspicuously posted at least 72-hours prior to the time of the meeting in a location freely accessible to members of the public.
 - Gov. Code § 54954.2(a).

Notice of Meetings and Agendas

- The agenda shall specify the time and location of the regular meeting.
- AB 2257 - For a meeting occurring on or after January 1, 2019, the legislative body of a... school district... that has an web site must provide an online posting of an agenda posted on the primary web site homepage of the entity that is accessible through **a prominent, direct link** to the current agenda, as specified, and must post in an open format the online posting of an agenda, including but not limited to, an agenda posted in an integrated agenda management platform.

Notice of Meetings and Agendas

- A regular meeting agenda may **not** be **changed** within the 72-hours preceding the meeting, **unless**:
 - A majority determines that an **emergency** exists pursuant to Gov. Code § 54956.5; **or**
 - Two-thirds of the board members present determine that there is a need for **immediate** action **and** the need to take action **came to the district's attention after** the posting of the agenda; **or**
 - The item was **previously posted** for a meeting occurring not more than **five days prior** and the **item was continued** to the next meeting.
 - Gov. Code § 54954.2(b).
 - If no exception applies, the board must either postpone consideration of the item for at least 72-hours, or call and notice a special meeting.

Notice of Meetings and Agendas

- The agenda must reasonably apprise the public of the matters to be considered in sufficient detail to allow the public to determine whether to participate at the meeting.
 - Carlson v. Paradise Unified School District (1971) 18 Cal.App.3d 196.
- The agenda must contain a brief general description of each item of business to be transacted or discussed at the meeting, including items to be discussed in closed session. **A “brief general description” of an item generally need not exceed 20 words.**

Notice of Meetings – Special Meetings

- Special Meetings – 24-Hour Notice
 - Gov. Code § 54956
 - May be called by either the president or by a majority of the board.
 - The board may only consider business specified in the notice.
 - The board may hold a closed session as part of a special meeting.
 - Public speakers must be heard, but only on items appearing on the agenda.
 - Gov. Code § 54954

Notice of Meetings – Special Meetings

- A special meeting may not be called regarding the **salaries, salary schedules, or compensation paid** in the form of fringe benefits, of a local agency executive, as defined in subdivision (d) of Section 3511.1.
- Notice of the special meeting must be mailed or delivered to the media and posted 24-hours in advance of the meeting. The notice must also be posted on the districts website.
 - Gov. Code § 54956

Notice of Meetings – Emergency Meetings

- Emergency Meetings:
 - Called by either the ***president or by a majority*** of the board.
 - At least ***one-hour notice to media***, except “dire emergency,” where notice may be made at or near the time the presiding officer notifies board members.
 - ***“Emergency”*** is: work stoppage, crippling activity, or other activity that severely impairs health or safety, as determined by a majority of the board.
 - ***“Dire emergency”*** is: crippling disaster, mass destruction, terrorist act, or threatened terrorist activity.
 - Board ***may meet in closed session upon 2/3 vote*** of the board or unanimous if less than 2/3 of members are present.

Public Participation and Meeting Practices



- Members of the public must be able to address the board regarding items on the agenda ***before or during the governing board's consideration*** of the item.
 - Gov. Code § 54954.3

Public Participation



- Every regular meeting agenda shall provide an opportunity for members of the public to address the board on any ***item of interest*** to the public, ***within the subject matter jurisdiction*** of the board.

Public Participation

- The board may adopt ***reasonable rules and regulations*** in order to ensure the proper functioning of the meeting.
- Establish clear maximum time limits subject to extension or reduction.
- “The legislative body . . . shall not prohibit public criticism of the policies, procedures, programs, or services of the agency, or of the acts or omissions of the legislative body.”
 - Gov. Code § 54954.3(c).

Public Participation – AS OF 2017

- AB 1787
- Government Code section 54954.3.
- Non-English speakers provided at least twice the allotted time to a member of the public who uses a translator when the legislative body limits time for public comment.
- Does not apply if the legislative body uses simultaneous translation equipment in a manner that allows the legislative body to hear the translated public testimony simultaneously.

Responses to Public Statements

- The Act limits board members' responses to public comments at any public meeting. Board members and staff may only:
 - Briefly respond to statements made or questions posed by persons making public comments;
 - Ask clarifying questions or make brief announcements;
 - Provide a reference to staff or other resources for factual information; and/or
 - Request staff to report back or place a matter on the agenda for a future meeting.
 - Gov. Code § 54954.2(a)(2)
 - Doing otherwise would be the discussion of a non-agendized topic.

Meeting Practices



- Minutes shall be taken recording all actions taken by the governing board. The minutes are public records. Ed. Code §§ 35145(a); 72121(a).
- No action may be taken by secret ballot. Gov. Code § 54953(c)(1).
- The board must publicly report any action taken and the vote or abstention on that action of each member present for the action for public session items. Gov. Code § 54953(c)(2).
- Any person attending a public meeting has the right to record the meeting by still or motion picture camera, or by video or audio tape, absent a finding by the board of persistent disruption of the proceedings. Gov. Code § 54953.5(a).

Meeting Practices

- A board may not prohibit or restrict the broadcast of its proceedings.
 - Gov. Code § 54953.6.
- Any recording made by or at the direction of the board shall be subject to inspection as a public record, but may be destroyed or erased 30-days after recording.
- Inspection of any video or audio recording shall be provided without charge on a machine made available by the district.
 - Gov. Code § 54953.5(b).

Teleconferencing



- The Act permits “teleconferencing,” for all purposes in connection with any meeting.
 - Gov. Code § 54953(b)
- “Teleconferencing” means a meeting of a legislative body, the members of which are in different locations, connected by electronic means, through audio or video, or both.

Teleconferencing Requirements

- Teleconference meetings must comply with all requirements of the Act.
- All votes taken during a teleconference meeting must be by roll call.
- Agendas must be posted at each teleconference location, identify each teleconference location, and each location must be accessible to the public.
- During the teleconference, at least a quorum of the members of the legislative body must participate from locations within the jurisdiction of the local agency.
- The agenda must provide an opportunity for members of the public to address the legislative body directly from each teleconference location.

COVID-19 Orders

COVID-19 Orders

- Brown Act changes pursuant to Governor Newsom's March 2020 COVID-19 Executive Orders:
 - A legislative body is authorized to hold public meetings via teleconference without having to provide a physical location from which members of the public may observe the meeting and offer public comment, as long as members of the public are allowed to observe and address the meeting telephonically or otherwise electronically.
 - Local agencies must ensure that they have complied with the ADA accessibility requirements and the Order's notice requirements.
 - Executive Order N-29-20

COVID-19 Orders

- Per Order N-29-20, notice of each member's teleconference location is not required.
- Agendas do not have to be posted at all teleconference locations.
- No requirement that at least a quorum of members of the legislative body participate from locations within the boundaries of the territory over which the body has jurisdiction during teleconference meetings.

COVID-19 Orders

- Legislative body must have and advertise each time meeting notice is given a procedure for receiving and swiftly resolving requests for reasonable accommodation.
- Legislative body must provide advance notice of the time of, and post the agenda for, each public meeting according to the timeframes prescribed by the Brown Act.
- Such notice must also include the means by which members of the public may observe the meeting and offer public comment.
 - Executive Order N-29-20

COVID-19 Orders

- Order N-35-20 allows all or more than a quorum of members of a legislative body to receive simultaneous informational updates from federal, state or local officials regarding COVID-19 without the requirement of an official board meeting.
- Members may ask questions of those federal, state, and local officials to stay apprised of emergency operations and the impact of the emergency on their communities.
 - Executive Order N-35-20

COVID-19 Orders

- The order does NOT authorize members to take any action or discuss amongst themselves any item of business that is within the subject matter jurisdiction of the legislative body without complying with applicable requirements of the Brown Act.

–Executive Order N-35-20

COVID-19 Orders

- The provisions of the Executive orders apply during the period in which state or local officials impose or recommend measures to promote social distancing, including limitations on public events.

Closed Session

Closed Session - Overview

- A public agency governing board may meet in closed session for six principal purposes:
 - Threats to public safety or security.
 - Gov. Code § 54957(a)
 - Personnel.
 - Gov. Code § 54957(b)
 - Confer with or receive advise of counsel.
 - Gov. Code § 54956.9
 - Labor negotiations.
 - Gov. Code § 54957.6
 - Real property transactions.
 - Gov. Code § 54956.8
 - Student discipline.
 - Ed. Code §§ 35146; 72122

Boards May Meet in Closed Session

- **Appointment, employment, evaluation of performance, discipline, or dismissal of an employee.**
 - Gov. Code § 54957(b)(1).
- A board may meet in closed session to confer with, or receive advice from, its legal counsel regarding **pending litigation** when discussion in open session would prejudice the position of the district in the litigation.
 - Gov. Code § 54956.9

Closed Sessions – Labor Negotiations

- A board may meet in closed session with its designated representative regarding salaries, salary schedules, fringe benefits, or any other matter within the scope of representation, ***for represented*** and ***unrepresented*** employees.
 - Gov. Code Section 54957.6
- Closed sessions for labor negotiations may include discussion of an agency's available funds and funding priorities.
- Closed sessions for labor negotiations shall not include final action on the proposed compensation of any employees.

Employment Contracts

- Pursuant to Gov. Code § 53262(a) all contracts of employment with a superintendent, deputy superintendent, assistant superintendent, associate superintendent,” “or other similar chief administrative officer or chief executive officer of a local agency” shall be **ratified** in an open session of the governing body which shall be reflected in the governing body's minutes.
- Pursuant to Section 53252(b) copies of any contracts of employment, as well as copies of the settlement agreements, shall be available to the public upon request.

Employment Contracts – AS OF 2017

- SB 1436:
- Amended Government Code section 54953 requires a legislative body, prior to taking final action, to **orally report a summary** of a recommendation for a final action on the salaries, salary schedules, or compensation paid in the form of fringe benefits of a local agency executive during the open meeting in which the final action is to be taken.
- This section further states that it shall not affect the public's right under the California Public Records Act to inspect or copy records created or received in the process of developing the recommendation.

Examples of “Safe Harbor” Agenda Descriptions

- CONFERENCE WITH REAL PROPERTY NEGOTIATORS
 - Property: (address or parcel number)
 - Agency negotiator: (name of agent)
 - Negotiating parties: (name of other party)
 - Under negotiation: (price, terms, or both)
- PUBLIC EMPLOYEE DISCIPLINE, DISMISSAL, OR RELEASE

Examples of “Safe Harbor” Agenda Descriptions

- CONFERENCE WITH LEGAL COUNSEL – EXISTING LITIGATION
 - Name of case: (name or case number)
 - Case name unspecified: (indicate whether disclosure would jeopardize service of process or settlement negotiations)***
- *Fowler v. City of Lafayette*: Failure to identify the case or any facts or circumstances related to the threatened litigation in agenda packet was Brown Act violation where City Council discussed litigation threat in closed session.
 - Fowler v. City of Lafayette, 46 Cal. App. 5th 360, 258 Cal. Rptr. 3d 353 (2020), as modified on denial of reh'g (Mar. 11, 2020), review denied (July 22, 2020)

Prior to Closed Session

- Prior to closed session, the board must disclose ***in open session*** the items to be discussed in closed session.
- The announcement can either repeat all of the information already stated on the agenda, or it may simply refer to the items as they are listed on the agenda by number or letter.
 - Gov. Code § 54957.7

After Closed Session

- After closed session, the board must reconvene in open session (prior to adjournment) and report any action taken in closed session, including the vote or abstention of every member present.
 - Gov. Code § 54957.1
- The reports may be made either orally or in writing.
 - Gov. Code § 54957.1(b).
- Any documents referred to in a report of final action must be made available on the next business day following the meeting or, in the case of substantial amendments, when any necessary rewriting is complete.
 - Gov. Code § 54957.1(c)

Enforcement

Enforcement - Disclosures

- A **person** may not disclose confidential information that has been acquired by being present in an authorized closed session to a person not entitled to receive it.
 - Gov. Code § 54963
- An agency may not take any action nor shall it be deemed a violation for a person to:
 - Make a confidential report to a district attorney or grand jury concerning a perceived violation of law.
 - Express an opinion concerning the legality of actions taken in closed session.
 - Disclose information that is not confidential information.
 - Disclose information under the whistleblower statutes.
 - Labor Code § 1102.5

Enforcement – Civil Remedies

- Civil remedies such as injunction, mandamus or declaratory relief are available to prevent future or further violations of the Act, or to determine the applicability of the Act to action or threatened future action.
 - Gov. Code § 54960
- Violations of the meeting notice and agenda provisions may cause an action to be null and void. Such actions may be commenced by the district attorney or by ***any interested person***.
 - Gov. Code § 54960.1

Enforcement

- Prior to commencing an action for violation of the meeting notice and agenda provisions, the interested party, or DA, must demand in writing that the board “cure or correct” the alleged violation.
 - Within 90-days of the action, or 30-days if the action was taken in open session in violation of the agenda requirements.
- Any civil action must be commenced within 15-days of the board’s refusal to cure, or expiration of 30-days after the demand, whichever is earlier.
- A successful plaintiff is entitled to recover attorney’s fees.
 - Gov. Code § 54960.5
- A court may award court costs and reasonable attorney fees to a local agency defendant in an action only where the defendant has prevailed in a final determination of such action and the court finds that the action was clearly frivolous and totally lacking in merit.

Enforcement

Past Violations

- The Brown Act allows the district attorney or any interested person to file an action to determine whether a past action violated the Act.
 - However, a “cease and desist” letter must first be submitted to the board within nine (9) months of the alleged violation.
 - The legislative body has 30-days to respond to the “cease and desist” letter. Any action must be filed within 60-days of the expiration of this time period.
 - Thereafter, an action can only be filed if the legislative body does not respond, or if the legislative body’s response is not an unconditional commitment to “cease and desist” and not repeat the past action. Gov. Code, § 54960.2

Question & Answer Session

Thank You

For questions or comments, please contact:

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