

**Office of
The City Attorney
City of San Diego**

**MEMORANDUM
MS 59**

(619) 236-6220

DATE: June 19, 2008

TO: Elizabeth Maland, City Clerk

FROM: City Attorney

SUBJECT: Implementation of Senate Bill 343: Public Access to Documents Distributed Less Than 72 hours Before Regular City Council Meetings

INTRODUCTION

In 2007, the Legislature amended a provision of the Ralph M. Brown Act (section 54957.5) in Senate Bill 343 [S.B. 343] to require local agencies to make late-filed documents related to regular meeting agendas (those received during the 72 hours after the agenda is posted and before the meeting begins) available for public inspection at the same time the late-filed documents are provided to a majority or more of the agency's legislative body. The change addressed concerns that the public lacked timely access to these late-filed documents that could influence the actions of the legislative body. The changes take effect July 1, 2008.

The City Clerk has asked this Office to review the requirements of the new law and to determine whether it requires the City Clerk to implement any new procedures related to City Council meetings. As we explain in more detail below, the new law will require the City Clerk: 1) to provide simultaneous public access to late-filed documents relating to agenda items distributed to a majority or more of City Councilmembers; and 2) list on each regular meeting agenda of the City Council the location where the late-filed documents may be viewed.

ANALYSIS

The Ralph M. Brown Act [The Act] (Cal. Gov't Code §§ 54950- 54963) requires the meetings of legislative bodies of local agencies be open and public. Cal. Gov't Code § 54953. The agendas of open and regular meetings must be posted 72 hours before the meetings. Cal. Gov't Code § 54954.2. Members of the public may request in advance that the agenda and supporting documents provided to the legislative body also be provided to them when the agenda is posted. Cal. Gov't Code §§ 54954.1, 54954.2 and 54957.5. The public may inspect *at the meeting* any documents prepared by the agency or a member of the legislative body given to the

legislative body *during* the meeting, and the public may access *after* the meeting documents given to the legislative body at the meeting by others. Cal. Gov't Code § 54957.5.

S.B. 343 amended section 54957.5 (b) to increase the transparency of local government by guaranteeing that last-minute distribution of public records made to a majority or more of a local agency's legislative body on an agenda matter would be made available for public inspection at the same time. *See* Assem. Com. on Local Gov't., Rep. on Sen. Bill No. 343 (2007-2008 Reg. Sess.) as amended June 21, 2007, p. 2.¹

As amended, section 54957.5 (b) provides the following:

(1) If a writing that is a public record under subdivision (a), and 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 paragraph (2) at the time the writing is distributed to all, or a majority of all, of the members of the body.

(2) A local agency shall make any writing described in paragraph (1) available for public inspection at a public office or location that the agency shall designate for this purpose. Each local agency shall list the address of this office or location on the agendas for all meetings of the legislative body of that agency. 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.

(3) This subdivision shall become operative on July 1, 2008.

1. What "Writings" Must be Made Available for Public Inspection.

The writings or documents regulated by section 54957.5(b) are only those relating to agenda items for *open* sessions of *regular* meetings of the legislative body of a local agency - in our case, *only* the City Council of the City of San Diego. The law does not apply to writings related to the agendas of special Council meetings or closed session agenda items or meetings. More particularly, the law applies *only* to writings related to an agenda item that are distributed to a majority or more of the legislative body *less than* 72 hours before a regular meeting.²

Section 54957.5(b)(1) defines the writing it regulates as one "that is a public record under subdivision (a)" Section 54957.5(a) broadly defines those records as " . . . agendas of

¹ Section 54957.5(a) was also amended to add to the list of records exempt from disclosure, and previous subdivisions (b) through (d) were re-lettered as (c) through (e) without substantive change. Those changes are not pertinent to this question.

² The public may still inspect writings prepared by the agency or a member of the legislative body that have been distributed *at* the meeting *during* the meeting. The public may still access documents prepared by others that are distributed at the meeting *after* the meeting. Cal. Gov't Code § 54957.5(c).

public meetings and any other writings, when distributed to all, or a majority of all, of the members of a legislative body of a local agency *by any person* in connection with a matter subject to discussion or consideration at an open meeting of the body” (emphasis added)

An analysis provided to the Senate Rules Committee last considering the matter on August 30, 2007, said the following: “This bill requires, on or after July 1, 2008, that *any* writing related to an agenda item for an open session of a regular meeting that is distributed within 72 hours of the meeting be made available for public inspection at the time it is distributed to members of the body.” (emphasis added) Sen. Rules Com., Off. of Sen. Floor Analyses, Sen. Bill No. 343 (2007-2008 Reg. Sess.) as amended June 21, 2007, p. 2. This is consistent with an interpretation of the phrase “distributed . . . by any person” in subsection (a) to include more than just documents distributed by staff to the legislative body. Terry Francke, *Open Meetings in California* 65 (2006 ed.). It is also consistent with the requirement that the Act’s language must be interpreted liberally in favor of openness in conducting public business. *Shapiro v. San Diego City Council*, 96 Cal. App. 4th 904, 917 (2002); Cal. Const. art. I, § 3(b)(2); San Diego Charter § 216.1(b)(2).

Accordingly, this Office concludes that the public must be provided access to *any writing* (public or staff-prepared) qualifying as a public record, which is distributed *by any person* to a majority or more of the legislative body within the 72 hours preceding the meeting and after the agenda is posted.

2. When the Writings Must Be Made Available for Public Inspection.

Section 54957.5(b)(1) plainly requires that writings subject to its provisions must “be made available for public inspection pursuant to paragraph (2) *at the time* the writing is distributed to all, or a majority of all, of the members of the body.” (emphasis added). The 72 hours preceding a regular San Diego City Council Meeting scheduled for 2 p.m. Monday begins at 2:01 p.m. on the preceding Friday. We note that the new law does not limit its requirements to normal business hours. Accordingly, we conclude that any writing distributed to a majority or more of the City Council for a regular meeting *between 2:01 pm of Friday and 2:00 pm on Monday* fits within the section’s requirements and must be made available for public inspection at the same time the writing is distributed to a majority or more of the City Councilmembers.

3. How the Writings Must Be Made Available for Public Inspection.

Section 54957.5(b)(2) requires the City make these writings “available for public inspection at a public office or location that the agency shall designate for this purpose.” It also provides that the City “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.” *Ibid.*

We interpret the word “may” as used in the latter part of subsection (b)(2) to give the City the right, but not the obligation, to meet the section’s requirements by posting these writings on its website. See *Howard Jarvis Taxpayers Assn. v. City of San Diego*, 120 Cal. App. 4th 374,

386 (2004) [“May” indicates the existence of a right, but not an obligation.] Accordingly, we conclude that the City may meet its obligations in either of the two manners provided by subsection (b)(2): namely, by simultaneously posting the writings on the City’s website, when they are provided to Councilmembers; or simultaneously making them available at some office or other designated location where the public has the same access to the distributed materials as do the Councilmembers.³

4. Other Requirements of S.B. 343.

Section 54957.5(b)(2) also requires the City to list the address or location of these late-distributed writings “on the agendas for all meetings of the legislative body of that agency.”

Once the City makes a decision which method it will use to provide simultaneous public access to these late-distributed documents, the agendas for all open and regular City Council meetings must provide notice of that location. If the City chooses a physical location, the Clerk could include that address location on the agenda under the current topic “City Records and Public Records Requests.” If the City chooses to use the City’s website, the Clerk could include the notice of the *exact* web address of the late-filed documents, such as a specified folder or subfolder location, on the agenda under the current topic City Records Via the Internet.” Such notices might provide as follows:

Physical location: “Any agenda-related materials distributed to the City Council within 72 hours before the regular meeting may be inspected at the following location; e.g. the breezeway at City Hall [insert address]”

Website: “Any agenda-related materials distributed to the City Council within 72 hours before the regular meeting may be inspected at the City’s website [www. etc. insert full address, including named folder or subfolder].”

RECOMMENDATIONS

Effective July 1, 2008, section 54957.5 requires the City to make available for simultaneous public inspection, at some public location the City designates for this purpose, or on the City’s website, any public documents distributed by any person to a majority or more of the City’s legislative body during the 72 hours before a regular meeting convenes. It also requires the City to list the location where these late-distributed records may be inspected on every agenda of a regular meeting of the City Council.

In the City of San Diego the new law encompasses any open agenda-related writing distributed by any person after 2 p.m. on a Friday for a regular Council meeting beginning at 2 p.m. on a Monday. When the City Clerk distributes the late materials, the Clerk may use either

³ This interpretation is also consistent with the last legislative analysis provided to the Senate Rules Committee at the August 30, 2007 hearing in which the bill was passed. Sen. Rules Com., Off. of Sen. Floor Analyses, Sen. Bill No. 343 (2007-2008 Reg. Sess.) as amended June 21, 2007, pp. 2-3.

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method provided by the statute for public inspections, so long as the inspection is offered at the same time the writings are provided to the City Council. Accordingly, if a distribution by the City Clerk to the City Council occurs *after* normal business hours, offices may have to remain open to accommodate the simultaneous inspection, or an employee must be available to place the documents in the designated public physical, or website, location whenever distribution to the Council occurs.

We recommend the City decide as soon as possible how it will provide public access, either by a physical location and provision of hard copies to the public, or on its website. We also suggest the Clerk consider time and date stamping when late materials are distributed to the City Council and made available for public inspection.

We note that problems may arise under this new law. For example, it is unclear how the City may comply with the section if members of the public, or other public officials, distribute writings electronically or in hard copy directly to a majority or more of Councilmembers, without first submitting them to a central department like the City Clerk's Office. This Office will keep you apprised of any further law changes and how other jurisdictions implement this new law as that information becomes available.

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By

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cc: Mayor and City Councilmembers
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