

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

**MEMORANDUM  
MS 59**

**(619) 236-6220**

**DATE:** January 14, 2011

**TO:** City Councilmembers

**FROM:** City Attorney

**SUBJECT:** Application of Ralph M. Brown Act to Five-Member Standing Council Committees and Conduct of Non-Committee Councilmembers Attending at Council Committee Meetings.

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**INTRODUCTION**

The Council has established five standing Council Committees, which hold hearings, ascertain facts, and make recommendations to the Council. San Diego Charter section 270(e); San Diego Municipal Code (SDMC) § 22.0101.5, Rules 6.11.1(b)-(e), 6.11.2(c)-(e), 6.11.3(c)-(e), 6.11.4(c)-(e), and 6.11.5(c). Two Committees are composed of five Councilmembers; three are composed of four members.<sup>1</sup> Each Committee agenda reflects the names of all Committee members, providing notice that either four or five members of the Council are expected to attend the meeting, and the agenda items under discussion. Five Councilmembers constitute a quorum (a majority) of the Council.

We review the appropriateness of standing Council Committees composed of a quorum of the City Council under the Ralph M. Brown Act (Cal. Gov't Code §§ 54950-54963)<sup>2</sup> (the Act), concluding that the Act does not prohibit such standing committees, and does not require those meetings to be separately noticed as Council meetings, so long as the Committee agenda provides notice that a quorum of Councilmembers meets as the Committee. We also review the level of participation the Act permits at Council Committee meetings for visiting

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<sup>1</sup> The five-member committees are the Committee on Rules, Open Government and Intergovernmental Relations (SDMC § 22.0101.5, Rule 6.11.1) and the Committee on Budget and Finance (Rule 6.11.5). The four-member committees are the Committee on Land Use and Housing (Rule 6.11.2), the Committee on Natural Resources and Culture (Rule 6.11.3), and the Committee on Public Safety and Neighborhood Services (Rule 6.11.4). We believe the first three-member Council Committee was established in 2005; four-member Committees were created later that year.

<sup>2</sup> Unless otherwise indicated, all future section references are to the California Government Code.

Councilmembers, concluding the level of participation depends on the size of the Committee. For example, at properly noticed meetings of Committees composed of a quorum of the Council, visiting Councilmembers may attend and participate as would any member of the public, and should sit with the public. At Committee meetings composed of less than a quorum of the Council, visiting Councilmembers may attend only as silent observers, when *their attendance creates a quorum*. When their attendance *does not create a quorum*, they may attend and participate as members of the public.

## DISCUSSION

### I. INTERPRETING THE ACT

By its notice and open meeting requirements, the “Act . . . serves to facilitate public participation in all phases of local government decisionmaking and to curb misuse of the democratic process by secret legislation of public bodies . . .” *Epstein v. Hollywood Entertainment District II*, 87 Cal. App. 4th 862, 868 (2001). Established case law and voter enactments require courts to interpret the Act 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).

### II. THE ACT PERMITS QUORUM OR LARGER STANDING COMMITTEES OF THE CITY COUNCIL

Both the City Council and Council Committees are considered “legislative bodies” for purposes of the Act. § 54952(a) and (b). “Ordinarily, a committee is composed of less than a quorum of the legislative body that has created it.” *Adler v. City Council*, 184 Cal. App. 2d 763, 771(1960). The concept of a less-than-quorum meeting exception to the Act’s requirements has been significant in the Act’s history. *See discussion, Freedom Newspapers v. Orange County Employees Retirement System*, 6 Cal. 4th 821, 829-834 (1993) (interpreting former § 54952.3, exempting less-than-quorum advisory committees from the Act); *also Henderson v. Los Angeles City Board of Education*, 78 Cal. App. 3d 875, 881-883 (1978).

Dealing with this historical norm, the Legislature amended section 54592, effective April 1, 1994, to clarify that sub-quorum *standing committees* of legislative bodies were included within Act requirements, although sub-quorum *temporary* advisory committees were exempt from Act requirements. *Freedom Newspapers*, 6 Cal. 4th at 832, n 11. Although this 1994 legislative change imposed the Act’s requirements upon sub-quorum standing committees of legislative bodies, the Act places no upper membership limit upon standing committees.

Accordingly, we conclude that San Diego’s procedure of establishing some or all of its standing Council Committees with five Councilmembers is permissible under the Act.

### III. FIVE-MEMBER COUNCIL COMMITTEES NEED NOT SEPARATELY NOTICE MEETINGS AS CITY COUNCIL MEETINGS

Whether the Act requires the City Council's five-member Committees to provide separate notice that they are also meeting as the City Council requires a more complicated analysis. Under our facts, we believe it does not.

The Act itself exempts certain gatherings of majorities of legislative bodies from its notice requirements. In particular, section 54952.2(c)(4) exempts "the attendance of a majority of the members of a legislative body at an *open and noticed meeting of another body* of the local agency, . . . provided that a majority of the members do not discuss among themselves, *other than as part of the scheduled meeting*, business of a specific nature that is within the subject matter jurisdiction of the legislative body of the local agency." § 54952.2(c)(4) (emphasis added).

We are aware the California Attorney General (Attorney General) interpreted this section in a 1996 opinion, addressing *sub-quorum* standing committees, the historical norms under the Act. 79 Op. Cal. Att'y Gen. 69, 73-74 (1996)(1996 opinion). The Attorney General opined the section did *not* permit the attendance of a fourth member of a seven-member board at a meeting of a three-person standing committee of the board, reasoning that the presence of the additional non-member at the committee meeting *created* a quorum of the larger legislative body, without providing notice to the public of that meeting. "Such result would undermine the Legislature's purposes in requiring notice, a posted agenda, and public participation prior to the resolution of a matter by a legislative body." *Id.* at 75. A 1998 City Attorney Report concluded this analysis did "not directly apply to The City of San Diego, because standing committees are made up of a majority of Councilmembers. Thus, the attendance of an additional Council member at a fully attended committee meeting would not create a Council quorum." 1998 City Att'y Report 616, 617 (98-18; Sept. 3, 1998).

We agree with our 1998 Report's conclusion insofar as it applies to five-member Council Committee meetings. The meeting agendas for the five-member Council Committees, filed in advance as required, list the names of the five Councilmembers who compose the Committee. The public may participate fully at each Committee meeting. The five-member committees have existed since at least 1974, are codified in the Municipal Code, and Councilmembers are appointed annually by publicly-enacted Council resolutions. We believe the meeting notices for these five-member Council Committees provide ample notice to the public that a quorum of the City Council is meeting, allowing the public to attend and be heard, and alleviating concerns raised in the 1996 opinion on this subject.<sup>3</sup>

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<sup>3</sup>We part company with the 1996 opinion to the extent it inserts an additional requirement into the statutory language, not placed there by the legislature. The Attorney General also opined section 54952.2(c)(4) was "intended to govern the situation where a majority of the members of a legislative body attend a meeting of another body of the local agency *that is composed of persons different from the legislative body members themselves.*" *Id.* (emphasis added.) The Attorney General's interpretation that the "meeting of another body" *required* the other body to be composed of *different* persons from the legislative body members was supported by no citation to legislative history,

Moreover, we believe the plain language of section 54952.2(c)(4) applies to the five-member Council Committee meetings. That section exempts from the Act's notice and other requirements the attendance of a majority of the members of a legislative body "at an open and noticed meeting of another body of the local agency." A standing committee of the Council is "another body" of the local agency, and members of the legislative body are expected to "discuss among themselves, . . . as part of the scheduled meeting, business of a specific nature that is within the subject matter jurisdiction of the legislative body of the local agency."§ 54952.2(c)(4).

We have found no California case holding that noticed and open meetings of a *quorum or larger committee* of a legislative body must *also* notice the Committee meeting as a meeting of the parent body. However the Wisconsin Supreme Court, interpreting a similar open meeting law has indicated in dicta that a separate notice for such meeting would not be required. *State ex rel. Badke v. Village Board of the Village of Greendale*, 173 Wis. 2d 553, 578-579, 494 N.W.2d 408, 418 (1993) (separate notices for both bodies' meetings not required where quorum of one body constitutes the second governmental body.)

This appears to be a reasonable and logical interpretation, and entirely consistent with the language of section 54952.2(c)(4) as applied to quorum-or-larger standing committees. Accordingly, we conclude that so long as they meet the Act's other requirements, five-member (or larger) standing Committee meetings of the City Council are exempt from the requirement they also be separately noticed as City Council meetings.

#### **IV. THE CONDUCT OF VISITING COUNCILMEMBERS AT COMMITTEE MEETINGS DEPENDS ON THE SIZE OF THE STANDING COMMITTEE**

The Legislature acted swiftly after the Attorney General's 1996 opinion, enacting section 54952.2(c)(6). The intent of section 54952.2(c)(6) was "to permit non-members to attend committee meetings but not participate." Sen. Bill 138 Senate Floor Bill Analysis, May 22, 1997. Section 54952.2(c)(6) exempts from the Act's requirements:

The attendance of a majority of the members of a legislative body at an open and noticed meeting of a standing committee of that body, provided that the members of the legislative body who are not members of the standing committee attend only as observers.

The Attorney General reviewed section 54952.2(a)(6) in 1998, interpreting the limits of an observer's behavior at a standing committee meeting. 81 Op. Cal. Att'y Gen. 156 (1998) (1998

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statutory construction analysis, or case authority. Moreover, the function of a court in construing any statute, including the Act, 'is simply to ascertain and declare what is in terms or in substance contained therein, *not to insert what has been omitted*, or to omit what has been inserted.' Cal Code Civil Proc. § 1858; *Shapiro v. Board of Directors of Centre City Development Corp.*, 134 Cal. App. 4th 170, 180 (2005) (emphasis added). No court has ruled on the correctness of this 1996 interpretation, yet it is repeated as a general proposition, without further analysis. See the Attorney General's 2003 Brown Act Guide, at 10 ("This exception, which is contained in section 54952.2(c)(4), does not apply when a majority of the members of a parent legislative body attend a meeting of a standing committee of the parent body.")

opinion). The Attorney General concluded “that members of the legislative body of a local public agency may not ask questions or make statements while attending a meeting of a standing committee of the legislative body ‘as observers.’ Attendance is . . . restricted to watching and listening.” *Id.* at 159. The Attorney General recognized that such “observers” have even fewer rights than members of the general public attending the meetings, since as observers they may make no statements or ask questions. That Office also concluded “that members of the legislative body of a local public agency may not sit in special chairs on the dais while attending a meeting of a standing committee of the legislative body ‘as observers.’” *Id.* at 160.

**A. Section 54952.2(c)(6) Applies to Councilmembers Attending Sub-quorum Committee Meetings When Their Attendance Creates a Quorum of the City Council.**

Despite the broad language of section 54952.2(c)(6), which seems to apply to *all* standing committees regardless of size, we believe the section’s restrictions are intended to apply only to sub-quorum standing committees, which is consistent with historical norms under the Act. In addition, the restrictions only apply when the presence of a member of a parent body *creates* a quorum of the parent body at the committee meeting. This belief is supported by the legislative history of the section, which was specifically enacted to correct the Attorney General’s 1996 opinion interpreting section 54952.2(c)(4). *See* Sen. Bill 138 Senate Floor Bill Analysis, May 22, 1997. That 1996 opinion was factually limited though, precluding the attendance of legislative body members *only* at *sub-quorum* meetings of a standing committee, when that attendance *created a quorum* of the legislative body.

The 1998 opinion acknowledges that “without the special exemption for ‘observers,’ the mere attendance at the meeting by a quorum of the legislative body would constitute a violation of the Act.” *Id.* at 159. It also acknowledges that if attendees wish a greater degree of participation, they may accomplish that by having the meeting noticed as a meeting of the full legislative body. *Id.* at 158 n 2. While not binding as legal precedent, the opinions of the California Attorney General often carry great weight with the courts, particularly when they interpret the Act and are well-reasoned. *Freedom Newspapers*, 6 Cal. 4th at 829.

Accordingly, we concur in the Attorney General’s 1998 opinion to the extent it applies to attendance of visiting Councilmembers at four-member standing Council Committee meetings, when their attendance creates a quorum of the City Council. Visiting Councilmembers at such Committee meetings may only watch and listen, and may not sit with the Committee members.

However, when the attendance of a Councilmembers at a sub-quorum Committee meeting does *not* create a quorum, for example, if one of the Committee members does not attend the meeting, section 54952.2(c)(6) has no application. On such rare occasions, we recommend the attending Councilmember be given the same rights as the public, and to avoid confusion, to limit his or her actions to those we suggest below may be appropriate for attendance at Committee meetings composed of a quorum of the Council.

**B. Section 54952.2(c)(6) Does Not Apply to Councilmembers Attending Committee Meetings Already Composed of a Quorum of the City Council.**

In 1998, this Office disagreed with the limitations the Attorney General's 1998 opinion placed on the behavior of visiting Councilmembers attending Council Committee meetings, which then all consisted of five-member Committees. 1998 City Att'y Report at 617. We concluded that "Council members who are not members of the committee should be permitted to comment on a pending matter as would members of the public." *Id.* (footnote omitted). To avoid any confusion about whether the Committee meeting was a meeting of the Council, we recommended that the visiting Councilmembers not sit with the Committee, or participate in the discussion and deliberation of the Committee item. *Id.* at 618.

Albeit for different reasons, we still believe those recommendations are valid for visitors to standing Council Committees composed of a quorum or more of Councilmembers. The notice for each five-member Committee meeting tells the public that a quorum of the City Council is gathering at the meeting. The public is free to attend and participate. The presence of additional Councilmembers at these Committee meetings does not create a quorum without notice to the public, which was a principal concern of the 1998 opinion. Accordingly, we recommend visiting Councilmembers to five-member Council Committee meetings comply with the recommendations in that 1998 report.<sup>4</sup>

### CONCLUSION

We conclude that the Ralph M. Brown Act does not prohibit quorum or larger standing Council Committees, and does not require those meetings to be separately noticed as Council meetings, so long as the Committee meeting notice and agenda indicates that a quorum of Councilmembers meets as those Committees.

The level of participation the Act permits visiting Councilmembers at Council Committee meetings is complicated because the City's standing committees are composed of less than a quorum, and a quorum, of Councilmembers. We conclude the Act would likely support the following levels of participation at the different Committee meetings as follows:

1. At duly noticed five-member Committee meetings, visiting Councilmembers may attend so long as they sit with the general public and may participate as would a member of the general public.
2. At duly noticed four-member Committee meetings, where the presence of a visiting Councilmember *does not create a quorum* of the City Council, for example, when a Committee member is absent, visiting Councilmembers may attend, so long as they sit with the general public, and may participate as would a member of the general public.

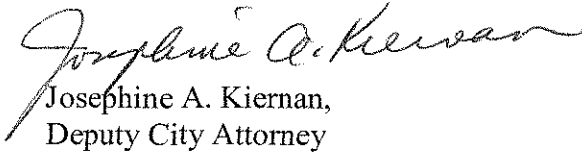
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<sup>4</sup> Limiting the participation of visiting Councilmembers to the same behavior as the public at these meetings is also consistent with Council rules prohibiting non-Committee members at any Committee meeting from voting or counting towards the Committee quorum necessary to conduct business. See SDMC § 21.0101.5, Rules 6.4, 6.8 and 6.10.

3. At duly noticed four-member Committee meetings, where the presence of a visiting Councilmember *creates a quorum* of the City Council, visiting Councilmembers may attend, so long as they sit with the general public and attend only as silent observers.

We believe the conclusions in this memorandum are legally supportable. But they have not been tested by a court. The Council may wish to consider making all its Committee the same size, or to adopt a consistent rule for the behavior of visiting Councilmembers at *all* Committee meetings regardless of Committee size that would meet Act requirements. Such a rule could be that visiting Councilmembers may attend any Committee meetings, so long as they sit with the general public and attend only as silent observers. This Office will be happy to assist with any changes needed to conform Committee meeting agendas to the legal principles discussed in this memorandum.

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JAK:als  
MS-2011-1  
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