

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

**MEMORANDUM  
MS 59**

**(619) 533-5800**

**DATE:** July 8, 2015

**TO:** Herman Parker, Director, Park and Recreation Department

**FROM:** City Attorney

**SUBJECT:** The Brown Act Requirements Pertaining to Taking Action on an Informational Item

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**INTRODUCTION**

The City of San Diego owns and operates three public golf courses. The City has officially formed the Municipal Golf Committee (Committee) to advise the Park and Recreation Board, Mayor, and City Council on the acquisition, development, maintenance, and operation of the three City-owned and operated golf courses. San Diego Municipal Code § 26.30(d). The Committee consists of eleven members of the public, who are appointed by the Mayor and confirmed by the City Council. *Id.* The Committee has inquired about its ability to take action on items only noticed on the agenda as informational.

**QUESTION PRESENTED**

Under the Ralph M. Brown Act (Brown Act), can actions be taken on items that have only been noticed as informational items?

**SHORT ANSWER**

No. Generally, action cannot be taken on informational items that were not noticed as action items at least 72 hours before the regular meeting. Although the Brown Act allows items to be added to an agenda for action with less than 72 hours notice in limited circumstances, an informational item would likely not meet the criteria in the Brown Act.

## ANALYSIS

The Brown Act is California's "Open Meeting" Law for local legislative bodies. Cal. Gov't Code § 54953(a). The Brown Act applies to all legislative bodies of local agencies. Cal. Gov't Code §§ 54952-54953. A "legislative body," as defined in the Brown Act, includes a "commission, committee, board, or other body of a local agency, whether permanent or temporary, decision making or advisory, created by charter, ordinance, resolution, or formal action of a legislative body." Cal. Gov't Code § 54952(b). The Committee is a "legislative body" subject to the Brown Act because it is an advisory committee to the City's Park and Recreation Department, Mayor, and City Council, and was established by ordinance. San Diego Municipal Code § 26.30(d).

The purpose of the Brown Act is to assist public participation in local government decision-making processes and to protect against misuse of the democratic process by secret legislation by public bodies. *Cohan v. City of Thousand Oaks*, 30 Cal. App. 4th 547, 555 (1994). To that end, the Brown Act generally requires that all actions and deliberations by local legislative bodies be taken openly and in public. Cal. Gov't Code §§ 54950, 54953(a).

In furtherance of public participation, unless an exception applies, the Brown Act requires that an agenda be posted at least 72 hours before a regular meeting and prohibits action on any item not on the agenda. Cal. Gov't Code § 54954.2(a).<sup>1</sup> Each item on the agenda must contain "a brief general description of each item of business to be *transacted or discussed* at the meeting." Cal. Gov't Code § 54954.2(a)(1) (emphasis added). Agenda descriptions should give enough information to permit a person to make an informed decision about whether they want to attend or participate in a discussion on an issue. *See Carlson v. Paradise Unified School Dist.*, 18 Cal. App. 3d 196 (1971) (interpreting an Education Code section that required a list of items that constituted the school district agenda to be posted where parents and teachers could view it). More importantly, agenda descriptions should not be misleading. *Id.* at 200. An agenda may notice an item as only informational; however, if the legislative body then takes action on the informational item, the agenda failed to accurately reflect the "business to be transacted," and failed to provide the public with the opportunity for participation.

In certain limited situations, the Brown Act authorizes the legislative body to take action on items of business not appearing on the posted agenda where: (1) it determines by a majority vote that an emergency situation exists; (2) it determines by a two-thirds vote (or unanimous vote when less than two-thirds of the members are present) that the need to take action came to the attention of the local agency after the agenda was posted; or (3) an item appeared on the agenda and was continued from a meeting held not more than five days earlier. Cal. Gov't Code § 54954.2(b)(1)-(3).

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<sup>1</sup> An action is taken on an item when a collective decision is made by a majority of the members of the legislative body, a collective commitment or promise is made by a majority of the members of the legislative body to make a positive or negative decision, or there is an actual vote by a majority of the members of the legislative body upon a motion, proposal, resolution, order, or ordinance. Cal. Gov't Code § 54952.6.

The first exception, an “emergency situation,” exists for purposes of the Brown Act when there is: (1) “a work stoppage, crippling activity, or other activity that severely impairs public health, safety, or both” or (2) a “dire emergency” constituting a “crippling disaster, mass destruction, terrorist act, or threatened terrorist activity” that poses an immediate threat so that requiring notice may endanger the public health, safety, or both. Cal. Gov’t Code § 54956.5(a). If a majority of the members of the legislative body determines that an emergency situation exists, then the agenda is not required to be posted 24 hours in advance of the meeting, however, only the items noticed for the meeting may be discussed. Cal. Gov’t Code §§ 54956.5(b), 54956.

The second exception, a determination that a need to take immediate action came to the attention of the local agency after the agenda was posted, has been interpreted narrowly. A city council was found to have violated the Brown Act by voting to amend the agenda after it was posted to add an appeal of a planning commission decision. *Cohan*, 30 Cal. App. 4th at 555. The court found that there was no “urgency” situation; the city council was aware of the appeal deadlines prior to posting its agenda and the fact that the planning commission’s decision was unpopular did not create a need for the council to take action on an appeal after the agenda was posted. *Id.* The California Attorney General’s publication on the Brown Act notes that the exception requires the matter to have come to the attention of the “local agency” after the posting of the agenda, and not just the “legislative body”; the implication being that if staff knew of the situation before the agenda was posted, then this exception will not apply just because the legislative body was unaware. California Attorney General, Brown Act: Open Meetings for Local Legislative Bodies, 18 (2003). The League of California Cities guide to the Brown Act echoes this position. League of California Cities, Open & Public IV: A Guide to the Ralph M. Brown Act, 26. (2d ed. 2010). If this “urgency” exemption does not apply, then no action can be taken on items not on the agenda, which includes taking actions on items otherwise noticed as informational, and by definition, not action items. Cal. Gov’t Code § 54954.2; *Cohan*, 30 Cal. App. 4th at 555.

There are no facts suggesting that the third exception (applicable when an item has been continued from a properly noticed meeting held not more than five days earlier), is a situation requiring further guidance from this Office.

### CONCLUSION

The Brown Act generally requires local legislative bodies to post their agendas in advance, and to only take action on those items noticed on the agenda as an action item. Although there are some exceptions to this requirement, they are of limited applicability and are not likely to apply to those matters within the subject matter jurisdiction of the Committee. The Committee agenda must include a brief description of the matters to be discussed and the business to be transacted.

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Taking action on an item otherwise noticed as an informational item does not provide the public with notice of the Committee's business to be transacted, could be misleading, and is thus generally prohibited.

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