

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

**MEMORANDUM
MS 59**

(619) 533-5800

DATE: September 27, 2017
TO: Honorable Mayor and Councilmembers
FROM: City Attorney
SUBJECT: Informational Items – Quorum Requirements and Permissible Motions

INTRODUCTION

San Diego City Council (Council) and Council Committee (Committee)¹ agendas occasionally include items identified as “information” or “information only.” These items may be reports from staff or, on occasion, from outside entities, educating the Council or Committee on a particular topic. This memorandum is provided to ensure best practices and to avoid confusion in the handling of informational items.

QUESTIONS PRESENTED

1. May the Council hear an informational report at a noticed meeting with less than a quorum present?
2. May the Council take action to accept, approve, adopt, or agree with an informational report?
3. May the Council vote on procedural motions, for example, to continue or refer an informational report?

SHORT ANSWERS

1. No. A majority (quorum) of members in attendance is required for a legal meeting of the body. No agenda items, including informational items, should be taken up until a majority is present.

¹ All references to Council in this memorandum include Committees. Committees includes both the standing Committees provided for in the Rules of Council and the Audit Committee established in San Diego Charter section 39.1. The Brown Act (defined herein) is equally applicable to City boards and commissions.

2. No. The Council may not move to accept, approve, adopt, or agree with an informational report. Such a motion could be construed as an “action” in violation of the Brown Act.

3. Yes. Council may vote on procedural motions in response to an informational report, including continuance, referral to staff for additional information and report, and referral to Committee or to a future Council agenda.

ANALYSIS

I. A MAJORITY IS REQUIRED TO HAVE A MEETING OF THE LEGISLATIVE BODY, INCLUDING TO HEAR INFORMATIONAL ITEMS.

The Ralph M. Brown Act² (Brown Act or Act) provides for transparency in attending to the public’s business. It requires legislative bodies to hold open and noticed meetings, provides to the public the right to participate in the meetings, and requires that meeting agendas be provided in advance.

The Act defines a meeting as a congregation of a majority³ of a legislative body at the same time and place to consider items within the body’s jurisdiction. Cal. Gov’t Code § 54952.2(a). For the Council, a “majority” means that five of the nine members are present. Until a majority is present, there is no “meeting” of the body under the Act. If a meeting is noticed but a quorum is not established, the only appropriate action is to adjourn the meeting. Cal. Gov’t Code § 54955. To take up agenda items, even informational items, with less than the legally required majority for a meeting to occur contravenes these rules.⁴

II. COUNCIL MAY NOT TAKE ACTION TO ACCEPT, APPROVE, ADOPT, OR AGREE WITH “INFORMATIONAL” REPORTS.

The Brown Act precludes the Council from discussing or acting on items not listed on the agenda. Cal. Gov’t Code § 54954.2. Courts interpret this requirement to mean that the agenda must list each “action” to be taken by the legislative body. *San Joaquin Raptor Rescue Ctr. v. County of Merced*, 216 Cal. App. 4th 1167 (2013) (finding the county violated the Brown Act by describing a development project to be considered, but not including reference to approval of a CEQA⁵ action necessary for project approval).

² California Government Code §§ 54950-54963.

³ For purposes of this memorandum, the terms “quorum” and “majority” are used interchangeably. A quorum is the minimum number of members of a body necessary for the body to transact business. Robert’s Rules of Order Newly Revised, § 3 at 21 (11th ed. 2011).

⁴ We recognize that there may be times when an advisory body has difficulty obtaining a quorum for a meeting. It would not violate the Act for less than a majority to receive an informational report outside a noticed meeting. However, we caution against such a practice, as it has the potential to lead to serial meetings in violation of the Act if the information in the report is communicated to additional members outside of a properly noticed meeting. *See* City Att’y MOL No. 2015-25 (Nov. 20, 2015).

⁵ California Environmental Quality Act, Cal. Pub. Res. Code §§ 21000-21189.57.

The Act defines “action taken” to include positive or negative decisions by a majority of the legislative body or an actual vote by a majority on a “motion, proposal, resolution, order or ordinance.” Cal. Gov’t Code § 54952.6.⁶ Motions to accept, approve, adopt, or agree with a report could be construed as “action taken” under the Act, because such motions imply that the legislative body has adopted the substance of the report. *See* Robert’s Rules of Order Newly Revised, § 51 at 508 (11th ed. 2011). Therefore, these motions are only appropriate for items properly listed as action items on the agenda.⁷

Denoting an item as “informational” implies that it is solely intended to provide information to the body, and not for the body to take any particular action. Such items, therefore, should not include a description of proposed action to be taken by the legislative body and the body should not take substantive action. Cal. Gov’t Code § 54954.2, City Att’y MS-2015-10 (July 8, 2015). It is not appropriate to address this by simply adding an “action,” such as an action to “accept a report,” to an informational item because this suggests that the body is doing something more than hearing information.⁸ When the Council wants to take an action on a report, it should not be agendized as an informational item. Rather, it can be agendized as a “report” with the desired action listed, such as “accept” or “adopt” the report and an accompanying resolution.⁹

III. REGARDING AN INFORMATIONAL ITEM, COUNCIL MAY REQUEST ADDITIONAL REPORTS OR REFER A PROPOSED ACTION TO COMMITTEE OR A FUTURE COUNCIL AGENDA.

While substantive motions are inappropriate on informational items, the Council can take limited procedural actions. For example, the Act authorizes members of the legislative body to ask questions and allows the body, subject to its own rules, to request further reports from staff or “take action” to direct staff to place a matter of business on a future agenda.¹⁰ In other words, the Council can take actions to the same extent as it may with an item not appearing on the agenda at all. *See* Cal. Gov’t Code § 54954.2.

⁶ Currently, the Council docket indicates an action will be taken under the category “Proposed Action.”

⁷ The acceptance of the report should be reflected in a resolution under Charter section 270, which requires all substantive actions of the Council to be adopted by ordinance or resolution.

⁸ *See* Attachment A for a guide provided for Council Committees on handling information items. A motion to “receive” the report is not legally required. Robert’s Rules describes this motion as unnecessary; the report has already been received. *Id.* Rather than entertain a motion after the report, the chair could simply announce, “We will now receive the informational report from XX regarding [subject matter.]”

⁹ For example, Council Policy 600-08 requires an annual report to Council. The Council agenda properly listed the item as a request for Council to “accept” the report with a resolution reflecting the acceptance. *See* Council Agenda item 332, City Council Meeting, Tuesday, September 12, 2017.

¹⁰ Under the Rules of Council and Robert’s Rules of Order, some procedural actions may be taken by the Chair alone (i.e., the Council President or Committee Chair could agree to place an item on a future agenda). Other actions must be made by the body as a whole, which requires a majority vote (i.e., a motion for a continuance or request for information). In some instances, city staff may voluntarily agree to provide information in response to an individual Councilmember’s request. *See* SDMC § 22.01018, Rules 2.6, 2.9, 6.

CONCLUSION

The Council may not vote to accept, approve, adopt, or agree with an informational report, as such actions are substantive and considered action taken. In order to take a substantive action on an item, it must be properly listed on the agenda for action, not for information only, with the recommended action listed on the agenda. The Council may, however, take certain procedural actions, such as voting to continue an information item or referring questions to staff, requesting a report, or putting the matter on a future agenda for action.

MARA W. ELLIOTT, CITY ATTORNEY

By /s/ Prescilla Dugard
Prescilla Dugard
Senior Chief Deputy City Attorney

PMD:jvg:sc

MS-2017-25

Doc. No.: 1580929

Attachment: Attachment A

cc: Elizabeth Maland, City Clerk

Erin Demorest, Director of Legislative Affairs for the Council President

Mary Ann Wallace, Council Administration

ATTACHMENT A

Council Committee Handbook
Excerpt on Information Items

D. Information/Discussion/Consent Items

No substantive vote (to adopt, approve, accept or agree) may be taken on information items. The item may be referred to staff for further review or to a future agenda for action. The following items should be scheduled as “discussion” (not on consent):

- Policy changes;
- Municipal Code amendments;
- Noticed hearings;
- Contracts greater than 5 years or \$5MM
or requiring Council Policy waiver;
- Ballot proposals.

H. Information Agenda:

After completion of the Consent agenda items moved for approval on consent, the Committee considers the items under the Information agenda section if applicable. Information Items do not require an action by the Committee; and may not be acted upon (no motion to approve, adopt, agree or accept) except to refer to staff for further review or a future agenda for action.

The Chair reads the item on the docket and states: **Please note that this is an informational item only. The Committee may take no action, but, if desired, may refer the item to staff to report back or to a future agenda for action. We will now receive the report from [department staff or presenting group] regarding [subject matter].**