

# Memorandum

**TO:** CHARTER REVIEW  
COMMISSION

**FROM:** Mark Vanni  
Senior Deputy City Attorney

**SUBJECT:** The Brown Act and *Ad Hoc*  
Committees

**DATE:** June 7, 2021

As directed by the Charter Review Commission, this memorandum addresses questions raised at the May 17, 2021 meeting regarding how the Brown Act applies to the creation and conduct of *ad hoc* committees.

## **1. *Ad Hoc* Committees Are Permitted Under Government Code Section 52952(b).**

The Brown Act<sup>1</sup> is California's "sunshine law" and generally requires local government business to be conducted at public meetings.<sup>2</sup> The City also has its own "sunshine" law, implemented through its Consolidated Open Government and Ethics Resolution ("Sunshine Resolution")<sup>3</sup>, to augment the requirements of the Brown Act.

Except in certain situations, the Brown Act requires all meetings of a legislative body to be open and public. "Legislative bodies" is defined, under subsection (b) of Government Code Section 54952, to include any "commission, committee, board, or other body of a local agency, whether permanent or temporary, decisionmaking or advisory, created by charter, ordinance, resolution, or formal action of a legislative body." The Charter Review Commission, for example, is subject to the Brown Act under this definition as it is a temporary, advisory commission created by City Council resolution.

However, under Section 54952(b), "advisory committees, composed solely of the members of the legislative body that are less than a quorum of the legislative body are not legislative bodies" subject to the Brown Act. This "less than a quorum" exception is what permits *ad hoc* committees (e.g., temporary, advisory committees of a legislative body) to meet without following the Brown Act, provided they are composed solely of members of the legislative body and do not meet the criteria for a standing committee. Standing committees, which "have a continuing subject matter jurisdiction, or a meeting schedule fixed by charter, ordinance, resolution, or formal action of a legislative body,"

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<sup>1</sup> Beginning at Government Code section 54950.

<sup>2</sup> Gov. Code §54953(a).

<sup>3</sup> Reso No. 77135: <https://records.sanjoseca.gov/Resolutions/RES77135.PDF>.

must comply with the Brown Act “irrespective of their composition.”<sup>4</sup> For example, Council Committees, like the Rules and Open Government Committee or Transportation and Environment Committee, are subject to the Brown Act, even though comprised of less than a quorum of the Council, because they have continuing subject matter jurisdiction and were established by Council Resolution.

The City’s Sunshine Resolution allows *ad hoc* committees to be formed or used, for a period not to exceed six months, to address a specific or immediate problem.<sup>5</sup> The City’s Consolidated Policy Governing Boards and Commissions (Council Policy 0-4), applicable to Commissions appointed by the City Council pursuant to the Charter and Municipal Code, also permits *ad hoc* committees that may last no longer than six months for specific short-term tasks or projects with a narrow scope.<sup>6</sup> While Council Policy 0-4 does not apply to the Charter Review Commission, the Commission may decide to follow it. Council Policy 0-4 states that the purpose for the *ad hoc* committee must be defined and its scope must be within the functions, powers and duties of the commission as outlined in the Municipal Code and as approved by the Commission Secretary. These limits also avoid *ad hoc* committees acting, in fact, as standing committees. In contrast to *ad hoc* committees, standing committees are not permitted under Council Policy 0-4 unless approved by the Rules and Open Government Committee because they are Brown Act bodies, exist for longer than six months, and require additional staff support and budget for tasks like preparing agendas, arranging facilities and translation, managing public meetings, and recording minutes.<sup>7</sup>

## **2. Meetings Among a Majority of Members of A Legislative Body Must be Conducted in Accordance with All Requirements of the Brown Act and City’s Sunshine Resolution.**

Under the Brown Act, a “meeting” is “any congregation of a majority of the members of a legislative body at the same time and location to hear, discuss, deliberate, or take action on any item that is within the subject matter jurisdiction of the legislative body.”<sup>8</sup> Unless an exception applies, any meeting where a majority of members of a legislative body will be present and discussing an item of business must be held in accordance with the Brown Act and the Sunshine Resolution.

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<sup>4</sup> Gov. Code §54952(b).

<sup>5</sup> Reso No. 77135 §2.3.1.2.C.

<sup>6</sup> Council Policy 0-4 § III.C.2:

<https://www.sanjoseca.gov/home/showpublisheddocument/65751/637389688479070000>.

<sup>7</sup> *Id.* at §III.C.1.

<sup>8</sup> Gov. Code §54952.2(a).

Among other things, advance notice of the time and place of regular meetings through a posted agenda with a brief description of each item of business to be transacted or discussed at the meeting is required.<sup>9</sup> The City's Sunshine Resolution increases the Brown Act's 72 hour notice period for posting agendas to at least seven days before a City Commission's regular meeting and at least four days for special meetings.<sup>10</sup> In addition, public comment must be allowed on every item before or during consideration;<sup>11</sup> all votes taken must be publicly reported (e.g. no secret ballots);<sup>12</sup> and no action may be taken on any item not appearing on the agenda, unless certain exigency circumstances exist.<sup>13</sup> Finally, meetings must be accessible in conformance with the Americans with Disabilities Act<sup>14</sup> and all materials distributed to a majority of the body must be publicly maintained under the California Public Records Act.<sup>15</sup> For the Charter Review Commission, any meeting involving a total of twelve members must comply with the Brown Act.

### **3. The Brown Act Expressly Prohibits Serial Meetings, Which Can Occur Through a Series of Communications Through Intermediaries Outside of a Properly Noticed Public Meeting.**

The Brown Act prohibits a majority of members of a legislative body from using a series of communications of any kind, directly or through intermediaries, to discuss, deliberate or take action on any item of business within the subject matter jurisdiction of the body.<sup>16</sup> Referred to as a "serial meeting," such meetings can occur, even inadvertently, in two ways. The first is through a "daisy chain" where one member contacts another member, then that member contacts another member, and so on—like a game of telephone. The second is through a "hub and spoke," where a member, or through an intermediary, directly or indirectly contacts a majority of other members and facilitates a discussion about something within the body's subject matter jurisdiction.

Examples of prohibited serial meetings include:

- E-mails among a majority that discuss or argue a member's opinion or point of view.
- A series of communications with a person who then conveys to a majority of members the comments or positions of another member of the legislative body.

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<sup>9</sup> Gov. Code §54952.2(a).

<sup>10</sup> Reso No. 77135 §§2.3.2.4.A, 2.3.2.5.B.

<sup>11</sup> Gov. Code §54954.3.

<sup>12</sup> §54953(c)(1)(2).

<sup>13</sup> §54954.2(a)(3)

<sup>14</sup> §54953.2.

<sup>15</sup> §54957.5.

<sup>16</sup> §54952.2(a).

- A majority participating in an internet forum discussion or chat room where opinions or information are discussed on a matter that is within the commission's jurisdiction.
- Circulation of minutes or other documents for approval by the board outside of a public meeting.
- A member responding directly to another member's posting on a social media platform about a matter within the commission's jurisdiction.<sup>17</sup>

The possibility of a prohibited serial meeting is one concern with multiple *ad hoc* committees discussing matters within a legislative body's subject matter jurisdiction without fully complying the requirements of the Brown Act. Although the Brown Act allows for individual contacts between a member of a legislative body and any other person, like constituents, staff, consultants, or lobbyists, such contacts cannot facilitate a prohibited serial meeting.<sup>18</sup>

As a result of this concern, if the Commission wishes to use *ad hoc* committees, it should limit the topics each *ad hoc* committee may discuss, limit members to one committee, and not allow for public participation. These are best practices for *ad hoc* committees due to staffing, facility, and budget constraints. Public participation can occur at regular meetings of the Charter Review Commission, or at any other additional meetings that the Commission may call, where staffing is available and the whole body is present to discuss and act on the matter that has been referred by the *ad hoc* committee.

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<sup>17</sup> Gov. Code §54952.2(b)(3).

<sup>18</sup> *Id.* at (c).

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If the Commission desires public participation at an *ad hoc* committee meeting, then the requirements of the Brown Act and City Sunshine Resolution should be followed. Following the Brown Act and City's Sunshine Resolution will reduce the possibility of a serial meeting facilitated by another member of the Commission or another member of the public attending an *ad hoc* committee meeting. It will also provide the framework for conducting a public meeting to ensure the public is provided proper notice of when and where the meeting will occur, what will be discussed at the meeting, and facilitate orderly public comment.

/s/  
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cc: Toni Taber