CEB

CALIFORNIA BUSINESS LAW REPORTER

Volume 23 / Number 1 / July 2001

CONTENTS

FEATURING

Brown Act Basics for Business Lawyers, Part 1

Many business lawyers are unfamiliar with the Ralph M. Brown Act (Govt C §§54950–54962), which governs the procedures by which local governmental agencies conduct their business. Yet many business clients deal routinely with local agencies such as city councils, school boards, licensing boards, and planning commissions. This article, in two parts, provides helpful guidance for attorneys in successful use of the Brown Act when representing clients before local governmental units. Part 2 will appear in the next issue.

See p 4.

Brian Irion

Related Cases

Arbitration

Although employee signed acknowledgment of receipt of handbook containing arbitration agreement, no agreement to arbitrate existed, because arbitration agreement itself was unsigned and was separate and severable from benefits provisions of handbook.

Romo v Y-3 Holdings, Inc. 22

Family and Medical Leave Act

Undesignated, but otherwise qualifying, unpaid leave under the Family and Medical Leave Act does not alter employee's exempt status under the Fair Labor Standards Act.

Rowe v Laidlaw Transit, Inc. 23

Wrongful Termination

At-will provision in signed express written agreement cannot be overcome by proof of implied contrary understanding.

Starzynksi v Capital Pub. Radio, Inc. 23

Entertainment Law

Right of Publicity

Reproductions of original art that depicted an image of deceased celebrities are not entitled to First Amendment protection because the image was not sufficiently transformative.

Comedy III Prods. Inc. v Gary Saderup, Inc. 24

General Business

Sale of Business

Successor corporation succeeds as a matter of law to predecessor's right to claim insurance policy benefits already due to predecessor for unasserted claims arising from injury during policy period, even if policy itself was not assigned to successor.

Henkel Corp. v Hartford Accident & Indem. Co. 26

Brown Act Basics for Business Lawyers, Part 1

BRIAN IRION

Introduction

Your client wants to build a large office building in the heart of town and is about to appear before the Planning Commission. Or, your client has just been turned down for a business license by the City Council and Police Commission because of his past criminal record. Or, a community college teacher receives notice that she may be terminated because of an improper advance she allegedly made on a student and calls on you to represent her. In each of these instances, you may need to know about, and know how to use, the Ralph M. Brown Act (Brown Act) (Govt C §§54950–54962).

The Brown Act governs the procedures by which multi-member local governmental bodies conduct their business. From real estate purchases and sales, to local school curriculums, to business licenses, to termination of public employees, the Brown Act will likely be involved. Most business lawyers will have the need or opportunity to use the Brown Act several times in their careers. Some transactional lawyers may miss the chance to build a record for a successful litigation if the issue under consideration goes adversely. Some litigators may misconstrue the process of appearing before local agencies as adversarial from the outset, and become forced into litigation through failure to prepare for local agency meetings properly. Those lawyers who are intimately familiar not only with the Brown Act's provisions, but also with its history, purpose, and remedies, will better serve their clients.

This article will describe the Brown Act as it applies to most business lawyers, whether they are employment, real estate, or general business practitioners. Part 1 provides an overview of the Act, including its history and purpose. Part 2, which will appear in the next issue of the Reporter, will provide guidance on how an attorney can successfully use the law to a client's advantage.

History and Purpose of the Act

The overriding purpose of the Brown Act is to ensure that deliberations and actions of local agencies remain open and public so that the people "may retain control over the instruments they have created." Govt C

BRIAN IRION chairs the litigation department of Capstone Law Group LLP in Redwood Shores, California. His practice focuses on employment, real estate, and corporate governance matters.

The author gratefully acknowledges the input, guidance, and assistance of ***JAC A. CRAWFORD, ESQ.***, Assistant County Counsel for the County of San Luis Obispo, without whose contribution this article could not have been written.

§54950. "A major objective of the Brown Act is to facilitate public participation in all phases of local government decisionmaking and to curb misuse of democratic process by secret legislation by public bodies." *Cohan v City of Thousand Oaks* (1994) 30 CA4th 547, 555, 35 CR2d 782. See *Sacramento Newspapers Guild v Sacramento County Bd. of Supervisors* (1968) 263 CA2d 41, 50, 69 CR 480.

According to one publication, the genesis of the Brown Act was a six-week investigative effort by a San Francisco Chronicle reporter in 1951, which resulted in a ten-part series entitled "*Your Secret Government,*" published in 1952. That series in turn led to a bill drafted by counsel for the League of California Cities that was designed to create open meeting laws for local governmental agencies. The bill was sponsored by Assemblyman Ralph M. Brown and was enacted into law in 1953. In 1967, the Bagley-Keene Open Meeting Act (Govt C §§11120–11132), a parallel law applicable to California state public agencies, was passed. In 1976, Congress passed the Government in the Sunshine Act (5 USC §552b), a law applicable to federal agencies, with similar provisions, albeit to a lesser degree of openness. See generally, *Sacramento Newspapers Guild v Sacramento County Bd. of Supervisors* (1968) 263 CA2d 41, 49 n6, 69 CR 480 (tendencies toward secrecy in public affairs have been the subject of extensive criticism and comment).

When originally enacted in 1953, the Brown Act was significantly less detailed than it is now. Litigation ensued regarding the sufficiency of notices of public meetings and agendas, whether the attorney-client privilege permitted local agencies to meet in closed session and under what circumstances, and other matters. The law has since been amended nearly a dozen times to incorporate or otherwise account for the case law and other issues that have arisen since first enacted. Although it has been law for nearly a half century, many sections of the Brown Act remain untested by published appellate decisions. There are a number of Attorney General Opinions, but they constitute persuasive authority only (see *Lucas v Board of Trustees* (1971) 18 CA3d 988, 96 CR 431). Some sections of the Brown Act lack even that guidance.

Details of the Brown Act

The Brown Act repeatedly states its overriding rule: Unless specifically allowed otherwise, all meetings of a legislative body of a local agency are to be open and public, and all persons shall be permitted to attend any meeting of the legislative body of the local agency. Govt C §54953. Unless expressly authorized, no closed sessions of any legislative body of any local agency are allowed. Govt C §54962. The details of this mandate, however, are a little more complex. To whom does the Brown Act apply? What is a "meeting"? What types of notice must be given and how far in advance? And, of course, what are the exceptions and how are they typically used?

Legislative Bodies

A "local agency" is a "county, city, town, school district, municipal corporation, district, political subdivision, or any board, commission or agency thereof." Govt C §54951. A "legislative body" includes the governing body of the local agency, along with all commissions, committees, boards, or other permanent or temporary groups of the local agency that have decision-making or advisory power and that are created by action of the legislative body. An exception applies where the subbody is advisory and "ad hoc" (meaning temporary and for only a specific purpose), as opposed to "standing" (meaning ongoing), and consists of less than a quorum of the legislative body. Govt C §549524(a), (b). The expansive definition of "legislative body" is intended to avoid evasion of the open-meeting laws by creating subcommittees in which ultimate power can be vested by way of a quorum. See *Joiner v City of Sebastopol* (1981) 125 CA3d 799, 178 CR 299. The term also includes boards, commissions, and committees governing private companies that receive public funds (where a member of a legislative body is on the board of the private company) or that exercise authority delegated by the local agency. Govt C §54952(c). Finally, "legislative body" includes county or special district hospitals' governing boards where they exercise any "material authority" of a local agency's legislative body. Govt C §54952(d).

The Brown Act purports to apply to all legislative bodies of all local agencies "or any other local body created by state or federal statute." Govt C §54952(a). One case holds that when a state-created agency acts as a local agency, it can be subject to both the state Agency Open Meeting Act (Govt C §§11120–11132) and the Brown Act. *Torres v Board of Comm'rs* (1979) 89 CA3d 545, 152 CR 506. Despite the sweeping provisions of Govt C §54952(a), no reported decision holds that federal agencies are subject to the Brown Act. The Government in the Sunshine Act, which governs the open meeting procedures of many federal agencies, likely preempts the Brown Act, which is a state law principally aimed at curbing local governmental abuses.

Notably, the term "legislative body" has been held not to encompass individuals with decision-making authority. *Wilson v San Francisco Mun. Ry.* (1973) 29 CA3d 870, 105 CR 855. But see *Frazer v Dixon Unified Sch. Dist.* (1993) 18 CA4th 781, 792, 22 CR2d 641 (where school superintendent reported to school board that had ultimate authority to decide curriculum, Brown Act compliance was required).

In short, there are many circumstances in which it is questionable whether the Brown Act will apply to a particular decision involving local, state, or federal governmental action. Prudent local government lawyers will advise compliance with the Brown Act's open-meeting requirements when it is questionable whether that law applies, as the courts will deem compliance necessary in doubtful cases. See *International Longshoremen's & Warehousemen's Union v Los Angeles Export Terminal, Inc.* (1999) 69 CA4th 287, 81 CR2d 546. As noted below, the outcome of a legislative body's action may turn on whether the action is thrust into the limelight of press and public scrutiny.

Meetings

A "meeting" under the Brown Act means almost "any congregation of a majority of the members of the legislative body at the same time and place to hear, discuss, or deliberate upon any item within the subject-matter jurisdiction of the legislative body or its local agency." Govt C §54952.2(a).

This definition expressly includes serial communications used to develop a collective consensus, whether by letter, e-mail, personal intermediaries, or the like. Govt C §54952.2(b). See *Stockton Newspapers, Inc. v Redevelopment Agency of the City of Stockton* (1985) 171 CA3d 95, 214 CR 561 (series of one-to-one calls with agency's attorney designed to reach consensus was meeting" under the Brown Act). But see *Roberts v City of Palmdale* (1993) 5 C4th 363, 20 CR2d 330 (letter from city attorney to all city council members containing legal opinion but not seeking consensus was a protected communication and not a violation of open-meeting law). Ad hoc or informal luncheons at which the business of the local agency is discussed are just as much meetings as formal, noticed and scheduled meetings. *Sacramento Newspapers Guild v Sacramento County Bd. of Supervisors* (1968) 263 CA2d 41, 51, 69 CR 480.

This definition provides for certain exceptions without which members of local agency legislative bodies would likely attempt to avoid other members of the community. The most common exceptions include:

- Contacts between a member of a legislative body and a nonmember (Govt C §54952.2(c)(1));
- Attendance at conferences or meetings publicized and open to the public involving matters of interest to the public, provided that a majority of the members do not discuss amongst themselves, other than as part of a scheduled program, any business of the local agency (Govt C §54952.2(c)(2), (3));
- Attendance at a meeting of another legislative body of that or another local agency, provided that a majority of the members do not discuss amongst themselves, other than as part of a scheduled meeting, any business of the local agency (Govt C §54952.2(c)(4));
- Attendance at purely ceremonial or social occasions, provided that a majority of the members do not discuss amongst themselves any business of the local agency (Govt C §54952.2(c)(5)); and
- Attendance at an open and noticed meeting of a standing committee of the local agency, as long as the members attend only as observers (Govt C §54952.2(c)(6)).

Although there may be a gap between the permitted one-on-one contacts between the public and a member of a legislative body and the proscribed spontaneous meetings of a "majority" of the body (for example, a three-member meeting of a nine-member board is neither exempted nor included as a meeting of a majority of members), the appearance of a possible impropriety will in most instances dissuade most public officials subject to the Brown Act from attending such a meeting. Thus, as will be discussed in more detail in Part 2, lobbying efforts usually should not be directed at "minority of board" meetings.

Generally, meetings must occur within the territorial boundaries of the local agency. Govt C §54954. Certain exceptions necessarily exist, for example, to attend a judicial proceeding or to comply with a court order, to inspect real or personal property that cannot conveniently be brought into the territorial boundaries of the agency, to attend multi-agency meetings hosted by another agency in that agency's territory, or in emergencies. However, merely because a meeting takes place outside the boundaries the local agency's territory does not exempt the agency from the other requirements of an "open and public" meeting, set forth below. And, although teleconferencing and video-conferencing tools may be used in a meeting to allow public input or to assist in deliberations and votes among members of the local agency, a member attending the meeting by roving cell phone may not be able to vote, because agendas must be posted at all teleconference locations. Govt C §54953.

Open and Public: Notices and Agendas

As noted above, all meetings, unless specifically permitted otherwise, must be "open and public." Two overriding features characterize such a meeting: (1) reasonable notice of what will be discussed and when and where the discussion will occur; and (2) the right of the public and the press to attend and participate in the meeting before decisions are made.

There are three types of meetings under the Brown Act: regular, special, and emergency. Within meetings, sessions may be "open" or "closed."

Regular Meetings

All legislative bodies other than advisory or standing committees must, through bylaw or other rule, have a regular time and place for holding regular meetings. Govt C §54954(a). The reason for excepting advisory and standing committees is because such committees normally are comprised of volunteer citizens who may not be able to adhere to rigid schedules. A regular meeting of any legislative body (including advisory and standing committees) requires that a minimum of 72 hours' notice be given by posting an agenda in a publicly available location (Govt C §54954.2), usually at or near the location where the meeting will occur. The agenda must contain a brief discussion (20 words or less) of each topic to be addressed at the meeting (Govt C §54954.2(a)) and must also provide certain basic information regarding matters that will be discussed in a permitted closed session. Govt C §54954.5. When a new general tax or assessment is to be levied, additional time limitations and procedures apply. Govt C §54954.6.

With three exceptions, no business can be transacted and no matters discussed that are absent from the posted agenda of a regular meeting. The exceptions are:

(1) When there is an emergency situation (immediate disruption or threat of immediate disruption to public facilities that severely impairs public health, safety, or both) as determined by a majority of the legislative body (but see *Cohan v City of Thousand Oaks* (1994) 30 CA4th 547, 556, 35 CR2d 782 (council's desire to overturn unpopular action by planning commission is not an emergency situation));

(2) On a two-thirds vote of the present members of a need to take immediate action which was not known when the agenda was posted (Govt C §54954.2(b)(2)); or

(3) A matter that was previously posted and continued from a meeting held not more than five days' previously. Govt C §54954.2(b)(3).

Special Meetings

A special meeting can be called by the presiding officer or a majority of the other members of a legislative body. Govt C §54956. However, 24 hours' written notice must be posted and sent to newspapers and radio or television stations that have requested notice of meetings for meetings occurring in that calendar year, and the notice must specify the time and place of the special meeting and the business to be transacted in the meeting. No business other than that posted can be conducted at a special meeting. Govt C §§54956, 54954.1.

Emergency Meetings

Emergency meetings can be called when there is an immediate threat of disruption or threatened disruption of public facilities, such as a work stoppage or crippling disaster that severely impairs public health or safety, as determined by a majority of the legislative body, and one hour's notice must be given, unless telephone services are disrupted. Govt C §54956.5. Again, no business other than that noticed may be conducted. There are additional restrictions beyond the scope of this article.

Open and Public: Attendees' Rights

As noted above, the permissible location of meetings is limited to allow maximum public involvement, where possible. Further, meetings cannot be held in any facility that prohibits admission based on race, sex, disability, or other protected class status. Govt C §54961.

Notice of regular and most special meetings must be mailed to all persons who have made a written request for notice of meetings as soon as posted or sent to members of the legislative body, whichever occurs first. Govt C §54954.1. This usually includes newspapers, and radio and television stations, but can include any person.

Every person has a right to record open meetings by audio or video tape recorders or by still photographs, absent a reasonable finding that the proceeding will be disrupted by noise, illumination, or obstruction of view. Govt C §54953.5(a). See *Nevens v Chino* (1965) 233 CA2d 775, 778, 44 CR 50 (action of city council prohibiting newspaper reporter from taping meetings with silent tape recorder was arbitrary and capricious). The local agency can itself tape or direct that a tape be made of the proceedings. The tape must be made available to the public with a playing device, but can be destroyed after 30 days. Govt C §54953.5(b).

All persons attending regular or special meetings have a right to be heard regarding the matters under discussion before or during the local agency's deliberations. While a body may place reasonable limitations on time for public comment and decorum, it cannot prohibit public criticism of the actions, policies, procedures, programs, or services of the agency. Govt C §54954.3(c). See also *Leventhal v Vista Unified Sch. Dist.* (1997) 973 F Supp 951 (ban on criticism of public employees violated First Amendment); *White v Norwalk* (9th Cir 1990) 900 F2d 1421 (reasonable decorum limitations upheld). When a public disruption prohibits continued public participation, the room may be cleared of the disrupters, but press uninvolved in the disruption must be permitted to remain. Govt C §54957.9.

Finally, to ensure public accountability of legislative bodies, secret votes are strictly prohibited. Govt C §54953(c).

This broad prescription of giving the public notice of matters under consideration, allowing for public comment, and permitting extensive criticism of the agency and its actions and omissions, reflects the "open and public" theme of the Brown Act. As a result, most pub-

lic agencies permit far more input than any court would allow as relevant, probative, and noncumulative. As will be discussed in Part 2, the public-forum aspect of the Brown Act creates an arena with which most lawyers dealing with public entities should be, but are not, familiar.

Exceptions

There are certain exceptions to the obligation of the legislative body to hold all meetings in open and public. If an exception applies, the legislative body may go into a "closed session" to consider certain matters, enumerated in Govt C §§54956.7–54957.8. The exceptions include (but are not limited to) the following:

License Issuance or Renewal to Criminals (Govt C §54956.7): A legislative body may meet in closed session to evaluate whether an applicant with a criminal record is sufficiently "rehabilitated" to be issued a license. The applicant and his attorney can attend, although others may be excluded. If the application is denied, the application may be withdrawn, thereby eliminating any need for the agency to make a public report on the application.

Real Estate Negotiations (Govt C §54956.8): A legislative body may hold a closed session with its negotiator before the purchase, sale, exchange, or lease of real property, provided that the agency first holds an open session identifying the property or properties in question, the negotiator, and the person with whom the negotiator may negotiate. The purpose of this exception is to permit the public agency to negotiate on an equal footing with the other party without the loss of bargaining power that would result if the other party along with the rest of the public were informed in advance of the negotiating strategy to be pursued by the legislative body. See *Kleitman v Superior Court* (1999) 74 CA4th 324, 87 CR2d 813.

Pending Litigation and Attorney-Client Privileged Communications (Govt C §54956.9): On advice of its legal counsel, a legislative body may hold a closed session to confer with counsel regarding pending litigation if discussion in an open session would prejudice the agency's position. "Pending litigation" includes any adjudicatory proceeding before a court or administrative body, and further includes threatened litigation, an agency's likely exposure to litigation, receipt of a claim under the Tort Claims Act (Govt C §§810–996.6), and a decision to intervene in litigation. Govt C §54956.9. Before holding the closed session, however, an announcement must be made that includes identification of the litigation if it has already been filed, unless doing so would jeopardize the ability to effect service of process or to conclude existing settlement negotiations to the agency's advantage. As was noted by the court in *Sacramento Newspapers Guild v Sacramento County Bd. of Supervisors* (1968) 263 CA2d 41, 56, 69 CR 480:

> [i]f the public's "right to know" compelled admission of an audience, the ringside seats would be occupied by the government's adversary, delighted to capitalize on every revelation of weakness.

Employee Evaluations, Complaints, and Labor Negotiations (Govt C §54957): A legislative body may conduct a closed session to consider the appointment, employment, evaluation of performance, discipline, or dismissal of a public employee. Discussions with a local agency's negotiator regarding labor negotiations with represented and unrepresented employees may also be in closed session, once an open meeting is held that identifies the agency's negotiator. Govt C §54957.6. Additional closed-session provisions apply to school district boards. See Ed C §35146.

A legislative body may also conduct a closed session to hear complaints or charges brought against an employee, unless the employee requests a public hearing. In this case, the employee must be given 24 hours' notice of his or her right to have the charges heard in an open and public meeting or any action based on such charge is void. In either a closed session or open meeting involving a hearing on charges against a public employee, the legislative body has the power to sequester other witnesses from the examination. Govt C §54957.

Under this section, an "employee" includes employees and independent contractors acting as employees, but does not include true independent contractors, elected officials, or a member of the legislative body. Govt C §54957.6. See also *Rowen v Santa Clara Unified Sch. Dist.* (1981) 121 CA3d 231, 175 CR 292 (real estate specialists who met with school board in closed session to discuss their ability to assist board in disposing of surplus real property were independent contractors; therefore, board violated open-meeting requirement of Brown Act under prior version of law).

Notice of Closed Session Matters and Reports on Conclusion of Closed Session (Govt C §§54954.5, 54957.1): To alleviate claims of insufficient notice, §54954.5 provides a safe-harbor description that may be placed in agendas and will conclusively be deemed adequate as an announcement of an upcoming closed session in each of the above situations. Further, although not specifically required, many government lawyers recommend that public comment be permitted after a legislative body announces, and before it conducts, a closed session on any permitted topic, again out of respect for the overriding purpose of the Brown Act.

Once action is taken in a closed session, a public report must be made of the action by the legislative body. Govt C §54957.1. In most situations, the notice of action taken occurs immediately after the action if it is final, or immediately after it becomes final.

CEB

CALIFORNIA BUSINESS LAW REPORTER

Reporter ONLINE! www.ceb.com

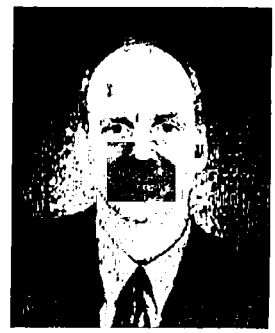
Volume 23 / Number 3 / November 2001

FEATURING

Brown Act Basics for Business Lawyers, Part 2

The Ralph M. Brown Act (Govt C §§54950–54962), governs the procedures by which local governmental agencies conduct their business. Many business clients deal routinely with local agencies such as city councils, school boards, licensing boards, and planning commissions. This article provides helpful guidance for attorneys in successful use of the Brown Act when representing clients before local governmental units. Part 1 of this article appeared in the July 2001 issue of the reporter.

See p 59.



Brion Irion

Brown Act Basics for Business Lawyers, Part 2

BRIAN IRION

Remedies for Failure To Adhere to Brown Act

Many business lawyers believe that a mistake by a legislative body in taking an action subject to the Brown Act renders the action void. Except for disciplinary action taken against an employee based on charges or complaints, nothing could be further from the truth. Ordinarily, acts of a legislative body in violation of the Brown Act are not invalid; they merely subject the member of the governing body to criminal penalties. *Bollinger v San Diego Civil Serv. Comm'n* (1999) 71 CA4th 568, 84 CR2d 27. See also *Griswold v Mount Diablo Unified Sch. Dist.* (1976) 63 CA3d 648, 657, 134 CR 3. Moreover, there are no published opinions regarding any successful criminal prosecutions of any public official for willful violation of the Brown Act, which is a misdemeanor. Govt C §54959. Further, before filing suit to invalidate a legislative body's action, a potential plaintiff must make a demand to the legislative body to cure or correct the action. Govt C §54960.1. If corrected, no action will lie.

Actions may also be filed to stop or prevent continuing or threatened violations of the Brown Act or to determine its application to a particular situation, for an order requiring the recording of closed sessions on a determination of a prior violation of the Brown Act, or for discovery of such closed session minutes. Govt C §54960. See *Ingram v Flippo* (1999) 74 CA4th 1280, 89 CR2d 60.

In any action under the Brown Act, a prevailing plaintiff is entitled to attorney fees and costs in most situations. Govt C §54960.5. See *Common Cause v Stirling* (1983) 147 CA3d 518, 195 CR 163.

Application of the Brown Act to Business Situations

Lobbying Efforts and Administrative Hearings

The dynamics of a public hearing before members of a legislative body are more akin to an interactive play between the performers and the audience than to a courtroom trial involving an impartial judge, an adversary, and uninvolved spectators.

The real participants in any Brown Act meeting are the public, the press, and the political officials. The applicant seeking rights to commence a business, develop land, or provide goods and services to a municipality must find a way to obtain approval from these interest groups without violating the Brown Act, or else expect to incur the time and expense of litigation efforts. Because there are few proscriptions with respect to public marketing efforts or approaches to newspaper and local broadcast groups, securing approval of the public and the press must be considered and implemented if possible long before any public hearing occurs.

The applicant might seek to garner approval of individual managers whose recommendations would be relied on by legislative body members. For example, a recommendation by a municipal aquarium's curator to a park district's members to purchase a more expensive but higher grade of synthetic sea salt might be useful in securing approval of the transaction from the park district.

In considering lobbying efforts directed at members of legislative bodies, the applicant should take care not to alienate the members accidentally by inviting them to functions that could be viewed as violating the open-meeting laws of the Brown Act. Closed luncheons involving a majority of the board members are not allowed. See *Sacramento Newspapers Guild v Sacramento County Bd. of Supervisors* (1968) 263 CA2d 41, 69 CR 480. One-on-one discussions with individual board members are expressly permitted, although the circumstances of the meetings should be considered. For example, inviting a board member to a weekend on the applicant's yacht could be viewed with skepticism by the press and the public unless a long-standing nonpolitical relationship previously existed between the applicant and the board member. See Govt C §1090. See also the Political Reform Act (Govt C §81000–91014). The fact that a board member has received gifts from an applicant or an opponent of the applicant, however, does not create a bias that would prevent the board or committee member from voting on a topic involving either the applicant or the opponent. For example, in *BreakZone Billiards v City of Torrance* (2000) 81 CA4th 1205, 97 CR2d 467, a youth billiards operator sought a conditional use permit to alter the nature of the business to cater to adults and serve alcoholic beverages. The city council denied the permit and the applicant sought a writ of mandate. In affirming the denial, the court of appeal held that the receipt of political donations by four of the five council members did not taint the process or deny plaintiff a fair hearing.

License Applications

The section of the Brown Act allowing local agencies discretion to deny licenses based on past criminal record

and a determination that the applicant has not been sufficiently rehabilitated (Govt C §54956.7) lacks case law guidance. However, a number of cases address when and whether a local government can use the business license process as a method to determine who has the right to engage in a business that may be covered by a comprehensive state law. Generally, business licenses are viewed as a way to tax and impose legitimate regulations regarding the conduct and location of, rather than existence of, businesses. *Oakland Raiders v City of Berkeley* (1979) 65 CA3d 623, 137 CR 648. A number of cases have held that when a city or county attempts to deny businesses permits or licenses to conduct business in a profession comprehensively regulated by state general laws, the locality exceeds its powers. See *Desert Turf Club v Board of Supervisors of Riverside County* (1956) 141 CA2d 446, 296 P2d 882 (horse racing); *Willingham Bus Lines, Inc. v Municipal Court* (1967) 66 C2d 893, 59 CR 618 (bus lines); *Malish v City of San Diego* (2000) 84 CA4th 725, 101 CR2d 18 (pawn broker license restrictions overbroad). See generally, Bus & P C §§5000–9998.8 (list of professions requiring licensure by state).

Employment

The area of the Brown Act that has received perhaps the most attention recently involves the discharge of public employees. Ostensibly, the policy underlying the ability to have a closed session regarding job performance or evaluation of employees is to prevent unnecessary embarrassment of employees and to permit free and candid discussion of employees' performance by a governmental body. *Bollinger v San Diego Civil Serv. Comm'n* (1999) 71 CA4th 568, 84 CR2d 27. In practice, however, it is often the employee who seeks the public meeting and the governmental body that seeks a closed session.

There may be several reasons for this apparent strategy. First, terminating a person is often more difficult when the action is thrust into the forum of an open meeting. Second, because closed sessions do not generally require records or minutes, all presumptions would operate in favor of the termination in any subsequent judicial review, and the burden would fall on the employee to build an adequate record for review under administrative mandamus where one would not otherwise exist. Third, if a record of a public meeting would reflect a pretextual termination that might evidence discrimination against a protected class, the potential defenses of a governmental entity in any ensuing lawsuit under the Fair Employment and Housing Act (FEHA) (C C §§12900–12996) might be limited if the stated grounds are the subject of a public record. Conversely, discharged plaintiffs claiming discrimination under the FEHA may be required to make a record of the grounds for termination and seek administrative mandamus or else risk losing their cause of action entirely. See *Johnson v City of Loma Linda* (2000) 24 C4th 61, 99 CR2d 316 (plaintiff must seek administrative mandamus review of discharge to keep FEHA, but not Title VII, remedies under doctrine of administrative remedies exhaustion).

A number of recent cases have addressed the question of whether an employee subject to termination or nonrenewal of an employment contract is entitled to an open meeting. From these cases has evolved the rule that personnel performance evaluations are not the same as accusations or complaints against the employee; while an employee may force the latter into an open discussion, the former may not be required to be the subject of an open meeting. *Bollinger v San Diego Civil Serv. Comm'n* (1999) 71 CA4th 568, 84 CR2d 27; *Furtado v Sierra Community College* (1998) 68 CA4th 876, 80 CR2d 589. But see *Bell v Vista Unified Sch. Dist.* (2000) 82 CA4th 672, 98 CR2d 263 (high school football coach was entitled to 24 hours' notice for previous hearing focused not on alleged misconduct but on eligibility of student to play interschool sports).

The employment-related battlefield is likely to expand in light of the Supreme Court's recent holding in *Johnson v City of Loma Linda* (2000) 24 C4th 61, 99 CR2d 316. When a lawyer represents an employee whose imminent discharge might be challenged as discrimination against a protected class, the attorney should seek whenever possible to ensure that the termination occurs in an open meeting rather than a closed session.

Making a Record for Litigation

In a number of cases, as a result of enormous public pressure, a local agency has taken action that may clearly be improper or in violation of the Brown Act. Examples include *Desert Turf Club v Board of Supervisors of Riverside County* (1956) 141 CA2d 446, 296 P2d 882 (local citizens successfully prevented a horse-racing facility from obtaining a use permit based on local mores, even though the topic of horse racing had been preempted by a comprehensive state law), and *Cohan v City of Thousand Oaks* (1994) 30 CA4th 547, 35 CR2d 782 (city council agreed under public pressure to hear an appeal of a decision of the city planning commission approving a development unpopular with local residents).

Counsel in similar circumstances should consider making or obtaining a recording of the hearing, and obtaining copies of all agendas, records, and documents submitted to the board before any recordings are destroyed. Should the hearing outcome not be favorable, an appeal to a supervising board, and perhaps a writ of mandate or administrative mandamus, will be necessary.

In each case, the court's record may be confined to the administrative record. See CCP §§1085, 1094.5.

Litigation

If it appears that litigation is unavoidable, a lawyer should consider using the Brown Act as well as the Public Records Act (Govt C §§6250–6276.48). See also the Freedom of Information Act (5 USC §552) as a vehicle for formal and informal discovery. While validly conducted closed sessions without accompanying minutes or other records will remain behind the proverbial "closed door," documents from improperly conducted closed sessions may be open to discovery. See *Kleitman v Superior Court* (1999) 74 CA4th 324, 84 CR2d 813. See also *Register Div. of Freedom Newspapers, Inc. v Orange County* (1984) 158 CA3d 893, 205 CR 92.

There may be additional documents in the form of prior litigation files and work product that are no longer protected from discovery because the litigation has been settled. Govt C §§6254, 6254.5. See also *County of Los Angeles v Superior Court (Axelrad)* (2000) 82 CA4th 819, 98 CR2d 564 (previous deposition transcripts); *Poway Unified Sch. Dist. v Superior Court* (1998) 62 CA4th 1496, 73 CR2d 777 (Tort Claims Act (Govt C §§910–915.4) forms).

Conclusion

The Brown Act provides both opportunities for savvy transactional lawyers and litigators and traps for those who are unwary. Lawyers who know the law and how to use it to their benefit may secure a home-field advantage in the game of doing business with local governmental bodies. Those who are not familiar with the details of the Brown Act enter a playing field without a baseball or a bat.

CORPORATIONS

Mergers

Surviving corporation no longer needs to obtain certificate of satisfaction from California Franchise Tax Board as precondition to Secretary of State's filing of agreement of merger.

Stats 2001, ch 50 (SB 324–Ackerman)

Effective January 1, 2002, the surviving corporation of a merger, if it is either a domestic corporation or a foreign corporation qualified to do business in California, is no longer required to obtain a certificate of satisfaction from the Franchise Tax Board (FTB) before the Secretary of State can file the agreement of merger. Corp C §1107.5. The surviving corporation assumes the liability of a domestic disappearing corporation to file tax returns and pay the tax due. The Secretary of State shall file the merger without the certificate of satisfaction and shall notify the Franchise Tax Board of the merger.

Previously, the only mergers for which the Secretary of State could file an agreement of merger without a certificate of satisfaction were those involving domestic disappearing corporations that filed articles of incorporation with the Secretary of State less than 60 days from the date of filing the agreement of merger.

CORPORATIONS COMMISSIONER ACTIONS

KEITH W. MCBRIDE

Insider Trading

Commissioner adopts permanent regulation mirroring federal affirmative defense to insider trading.

10 Cal Code Regs §260.402

On July 30, 2001, the Commissioner of Corporations permanently adopted 10 Cal Code Regs §260.402 (Purchases and Sales). This rule was initially adopted as an emergency measure, and the prior rule was discussed in this author's column at 23 CEB CBLR 11 (July 2001).

To avoid uncertainty over whether California's prohibition on insider trading recognizes the "affirmative defense" provided by new SEC Rule 10b5–1, the Commissioner determined that adoption of a regulation extending the same defense to issuers and insiders under the California Corporate Securities Law of 1968 (CSL) (Corp C §§25000–25707) will preserve public peace and welfare and avoid an adverse impact on the entire secu-

---

KEITH W. MCBRIDE of the Diepenbrock Law Firm, Sacramento, received his B.A. and M.A. degrees from the University of California (Davis) and his J.D. from the School of Law, University of California (Davis). He practices securities law and is a contributing editor to the Reporter in the area of Corporations Commissioner Actions.