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Questions and Answers



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Thank you again for attending our “Holding Public Meetings During the COVID-19 Pandemic” webinar. I hope that I get to meet all of you in person in the future.

Below are some short answers to questions submitted during the webinar. I do want to mention that the information provided below is intended for informational purposes only and should not be relied upon in reaching a conclusion in a particular area of law. Applicability of the legal principles discussed in this Q&A may differ substantially in individual situations. Receipt of this or any other AALRR presentation/publication does not create an attorney-client relationship and AALRR is not responsible for inadvertent errors that may occur in the publishing process.

- 1. Questions:** Interpretation in public meetings and public hearings is impossible for those who are calling in from their phone to a zoom webinar. How do agencies handle that? Basically, those who can only phone call into a meeting are precluded from using the interpreter services that we promised or are required to provide. Is this a violation?

How do you handle the need for multiple language platforms?

Answer: There is nothing specific about this in the Brown Act and, just from personal observation, I do not know of any agency handling translation.

I do want to point you to a couple of sections/laws that you may want to discuss with your General Counsel to see if/how they are applicable to your situation:

- Government Code section 54954.3(b)(1)-(3):

“(1) The legislative body of a local agency may adopt reasonable regulations to ensure that the intent of subdivision (a) is carried out, including, but not limited to, regulations limiting the total amount of time allocated for public testimony on particular issues and for each individual speaker.

(2) Notwithstanding paragraph (1), when the legislative body of a local agency limits time for public comment, the legislative body of a local agency shall provide at least twice the allotted time to a member of the public who utilizes a translator to ensure that non-English speakers receive the same opportunity to directly address the legislative body of a local agency.

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(3) Paragraph (2) shall not apply if the legislative body of a local agency utilizes translation equipment in a manner that allows the legislative body of a local agency to hear the translated public testimony simultaneously.” [emphasis added]

- Dymally-Alatorre Bilingual Services Act (Govt. Code §§ 7290 et seq.)/Government Code section 7293:

“Every local public agency, as defined in Section 54951, serving a substantial number of non-English-speaking people, shall employ a sufficient number of qualified bilingual persons in public contact positions or as interpreters to assist those in such positions, to ensure provision of information and services in the language of the non-English-speaking person. The determination of what constitutes a substantial number of non-English-speaking people and a sufficient number of qualified bilingual persons shall be made by the local agency.”

2. Question: Is it required to record a public meeting on Zoom? If a public person asks for a recording, is the District required to provide it?

Answer: The Brown Act does not require you to record a public meeting on Zoom. However, if you do record it, it does become subject to disclosure under the Public Records Act and may only be erased or destroyed 30 days after the recording. During the webinar, I mentioned the practice of recording meetings solely to prepare minutes and perhaps the recording would not be subject to disclosure under the Public Records Act “drafts” exemption, but Government Code section 54953.5 is on point:

“(a) Any person attending an open and public meeting of a legislative body of a local agency shall have the right to record the proceedings with an audio or video recorder or a still or motion picture camera in the absence of a reasonable finding by the legislative body of the local agency that the recording cannot continue without noise, illumination, or obstruction of view that constitutes, or would constitute, a persistent disruption of the proceedings.

(b) Any audio or video recording of an open and public meeting made for whatever purpose by or at the direction of the local agency shall be subject to inspection pursuant to the California Public Records Act (Chapter 3.5 (commencing with Section 6250) of Division 7 of Title 1), but, notwithstanding Section 34090, may be erased or destroyed 30 days after the recording. Any inspection of an audio or video recording shall be provided without charge on equipment made available by the local agency.”

3. Question: We do our meetings only via phone. What would you recommend as the "minimum" number of minutes to allow public comment per public person? For example, is 1 minute not enough?

Answer: The Brown Act does not set a specific time limit. The law recognizes that this will depend on a number of factors specific to each agency. The key is also Government Code section 54954.3(b)(1) which is included in Q&A # 1 above. The bottom line, in my opinion, is that the time limit has to be reasonable.

- 4. Question:** The pandemic has shifted much of the business to the digital environment. Here in Oakland California, my district's population in majority doesn't always have access to internet, mobile devices and the apps. This has become the main challenge for the communities who are disabled or don't have access to devices. I am specifically interested in learning how to meet the requirement in making the meetings accessible to all. Do you have any examples of agencies that are creative and handling these issues?

Answer: This is certainly a very challenging time. I think the best example I have found so far is the City of Walnut Creek, which was included in the presentation, due to the number of options they provide.

- 5. Questions:** When does executive order expire for a temporary Brown Act waiver?

What are the chances the Governor will continue these Brown Act waivers post COVID?

Answer: During the webinar I mentioned that I did not believe a specific date was set. Looking at it a bit further, although the Governor's Executive Order N-29-20 does not set a specific date, it does say that the new provisions will continue to "apply only during the period in which state or local public health officials have imposed or recommended social distancing measures."

As to the second question, my guess is that the public and agencies are getting used to some of these new procedures so that *may* lead to some of them becoming permanent. But that would require the Legislature to amend the Brown Act.

- 6. Question:** Can you explain Executive Order N-33-20?

Answer: As mentioned during the webinar, this was not a Brown Act order. It was the Governor's "Stay Home" Order. Colleagues at my firm wrote an alert about it as soon as the order was issued and the alert can be accessed here: <https://www.aalrr.com/newsroom-alerts-3639>

My firm also has additional COVID-19 related alerts at the following link: <https://www.aalrr.com/newsroom-alerts-COVID19>

- 7. Question:** Can a member of the public keep commenting multiple times during deliberations of an agenda item?

Answer: This question goes back to the earlier discussion regarding reasonable regulations. It is tough to say because every agency faces different situations. I think it is important to establish clear and reasonable rules and regulations.

You may want to review the following case which deals with the issue of a member of the public speaking at the beginning of a meeting and then being prevented from doing so later on. The court of appeal ruled that was acceptable, but you would probably want to review the specifics of this case and your particular situation with your General Counsel. The case is *Ribakoff v. City of Long Beach*, (2018) 27 Cal.App.5th 150.

8. Question: Does phone-in access for the public have to be free of charge?

Answer: This was a great question during the webinar. I did not have a clear answer at the time and unfortunately I still do not at this time. My opinion, and not necessarily a legal opinion, is the answer is “no” because if you had to make it free for phone I think the next question is “does internet access have to be free” or something similar. Again, it is a good question, but I am not quite sure. For practical purposes, assuming the cost to the agency is not tremendous, it seems the best course may be to not charge for phone access.

9. Questions: Should all comments received either via email or voicemail be added to the meeting minutes for public record?

What is your opinion as far as how much of the public comments should be included in the minutes? Can I do a summary or do I need to include verbatim minutes of the comment?

Answer: With the exception of some specific requirements for emergency meetings and closed sessions, nothing in the Brown Act requires minutes to be kept. In a lot of agencies, the minutes requirement is usually in bylaws or rules and regulations of the agency. As to how they are kept? There are many different ways. Some explain what happened during the meeting with a lot of detail and some just include a few lines on each item. Even before COVID-19, agencies typically did not include oral public comments verbatim in their minutes.

So, back to the questions, I think it again depends on each agency and how they handle minutes in general. It also depends on what you are telling the public. For example, a number of agencies are saying in their agendas that comments submitted via email will be included with the minutes.

A quick note that the emails/voicemails an agency receives are still likely public records subject to disclosure under the Public Records Act (unless protected from disclosure under the provisions therein).

10. Question: What would your recommendation be for Clerks who are reading emails into the record, and may be faced with the occasional email saying negative things about specific board members or staff. That puts the Clerk into a tough position having to read such comments aloud, but if you decline to read it aloud you risk appearing biased and like you are not treating all comments the same. I would be interested to hear your opinion on this.

Answer: Another interesting question. I think the best way to answer it is with an excerpt from page 38 of *Open & Public V: A Guide to the Ralph M. Brown Act*, published by the League of California Cities:

Q. May the presiding officer prohibit a member of the audience from publicly criticizing an agency employee by name during public comments?

A. No, as long as the criticism pertains to job performance.

I think the same approach would likely apply to the question regarding the emails because they are being treated like public comment. I would recommend reviewing the case cited in Question

7 above (*Ribakoff v. City of Long Beach*, (2018) 27 Cal.App.5th 150) and also keeping in mind Government Code section 54954.3(c):

“The legislative body of a local agency shall not prohibit public criticism of the policies, procedures, programs, or services of the agency, or of the acts or omissions of the legislative body. Nothing in this subdivision shall confer any privilege or protection for expression beyond that otherwise provided by law.”

- 11. Question:** I have our meetings streaming to Facebook through Zoom for public viewing. Can you put that public comments will not be received on the Facebook livestream but only through zoom live, email ahead or phone call ahead of the meeting (times posted on the Agenda).

Answer: This seems reasonable to me. During the webinar we talked a bit about what to include in an agenda regarding access/public comment options. I would recommend including clear instructions on how to submit public comment and also a note that comments in the Facebook livestream will not be addressed (I don't think I would call them “public comments” in the Facebook livestream because that might give the comments legal meeting – please check with your General Counsel on final agenda language).

One question for you on the technology side that may solve the issue – is it possible to turn off the comments feature in a Facebook livestream?

- 12. Question:** Can posting of the agenda be online only, or must it also be posted in a physical location?

Answer: The agenda should still be posted in a physical location because nothing in the Governor's Executive Orders has paused that requirement.

- 13. Question:** How do you set up TDD option for a hearing impaired person?

Answer: I am sorry, but I am unfamiliar with technical issues to set up TDD (perhaps your IT department or local phone company may be able to help). ADA compliance is definitely an important issue and the Governor's Executive Order N-29-20 specifically requires efforts to continue accessibility:

“Accessibility Requirements: If a local legislative body or state body holds a meeting via teleconferencing and allows members of the public to observe and address the meeting telephonically or otherwise electronically, the body shall also:

(i) Implement a procedure for receiving and swiftly resolving requests for reasonable modification or accommodation from individuals with disabilities, consistent with the Americans with Disabilities Act and resolving any doubt whatsoever in favor of accessibility; and

(ii) Advertise that procedure each time notice is given of the means by which members of the public may observe the meeting and offer public comment, pursuant to subparagraph (ii) of the Notice Requirements below.”

THANK YOU