session, must state general reason or reasons for closed session.	session, and disclosure must be "the item or items to be discussed." May merely refer to number or letter of agenda item. (New subd. (a), amended and subd. designation added by ch. 1137, § 15.)

- In closed session, may only consider matters covered in statement. (Designated as subd. (a) by ch. 1137, § 15.)

- Location

CURRENT LAW	LAW AS OF 4/1/94
No equivalent.	May be made at location of closed session, so long as public allowed to be present for purpose of hearing announcement. (New subd. (c), added by ch. 1137, § 15.)

- Privacy concerns

CURRENT LAW	LAW AS OF 4/1/94
Statement requirement does not "require or authorize the giving of names or other information which would constitute an invasion of privacy or otherwise unnecessarily divulge the particular facts concerning the closed session."	Rewrites to state that disclosure requirement does not "require or authorize a disclosure of information prohibited by state or federal law." (Subd. (a), amended and subd. designation added by ch. 1137, § 15.)

3. Reconvening into open session and reporting action taken

CURRENT LAW	LAW AS OF 4/1/94
No equivalent.	After any closed session, must reconvene into open session prior to adjournment. (§ 54957.7, subd. (b), added by ch. 1137, § 15.)
Must publicly report only certain personnel actions (see discussion under personnel below), and roll call vote thereon, if any. (§ 54957.1.)	Expands public report requirement to include certain formal or final actions under four other closed session topics (see discussion of individual topics below). Makes roll call vote mandatory for all specified actions, and public report must include vote. Also specifies that nothing in section to be construed to require legislative body to approve actions not otherwise subject to legislative body approval. (§ 54957.1, amended by ch. 1137, § 13.)

C. Authorized Closed Session Topics

1. License application

a. General rules (§ 54956.7)

- Closed session allowed only when applicant has criminal record and legislative body discussing whether applicant sufficiently rehabilitated to obtain license.

b. Agenda listing

CURRENT LAW	LAW AS OF 4/1/94
No equivalent.	Must list number of applicants. (New § 54954.5, subd. (a), added by ch. 1137, § 10.)

c. Oral announcement (§ 54957.7)

CURRENT LAW	LAW AS OF 4/1/94
Must state general reason.	If above information include on agenda, may simply refer to agenda item. (Subd. (a), amended and subd. designation added by ch. 1137, § 15.)

d. Report of action taken (§ 54956.7)

- May or may not report denial of license, depending on specified circumstances. Special rules for timing of report.

2. Real estate negotiations

a. General rules (§ 54956.8)

- May meet with board's negotiator prior to purchase, sale, exchange, or lease of real property, to instruct negotiator regarding price and terms of payment.

- Negotiator may be member of board.

- Eminent domain may be discussed under pending litigation exception.

b. Agenda listing

CURRENT LAW	LAW AS OF 4/1/94
No equivalent.	On agenda, must identify real property by street address, parcel number, or other unique reference; must identify negotiating party (not agent); and must list whether discussion will concern price, terms or both. (New § 54954.5, subd. (b), added by ch. 1137, § 10.)

c. Oral announcement

CURRENT LAW	LAW AS OF 4/1/94
Announcement must be prior to closed session and must identify real property and identity of person(s) with whom negotiator may negotiate. (§ 54956.8.)	No change to section 54956.8, but oral announcement prior to closed session may simply refer to item as listed on agenda. (§ 54957.7, subd. (a), amended by ch. 1137, § 15.)

d. Report of action taken

CURRENT LAW	LAW AS OF 4/1/94
No Brown Act requirements, but final agreements are generally public records.	Must report approval of agreement concluding negotiations after agreement is final.

606

VI. CLOSED SESSION

A. General Rules

- No closed session unless expressly authorized by statute. (§ 54962.)
- No "semi-closed" meeting; i.e., cannot admit certain members of public or news media while excluding remainder.

B. Procedural Requirements for Closed Session

1. Agenda listing

CURRENT LAW	LAW AS OF 4/1/94
Required only in notice for special adjourned, and continued meetings. May be limited to general reason or reasons for closed session. (§ 54957.7.)	Adds regular meetings. Also adds requirements for specific listings under general reasons. (See discussion of individual topics below.) If agenda includes at least these minimums, legislative body cannot be found in violation of agenda requirements. ((§ 54954.2, subd. (a), amended by ch. 1137, § 8; § 54954.5, added by ch. 1137, § 10.)

2. Oral announcement (§ 54957.7)

- Timing

CURRENT LAW	LAW AS OF 4/1/94
Prior to or after holding closed	Announcement must be prior to closed

allowed, unless item substantially changed since earlier hearing.	

2. Special meeting

CURRENT LAW	LAW AS OF 4/1/94
No equivalent.	Notice for special meeting at which action proposed to be taken on item must provide opportunity for public comment on that item prior to action. (Subd. (a), amended by ch. 1137, § 9.)

3. Regulations

- May adopt reasonable regulations to ensure public comment allowed, including time limits for particular items and for individual speakers. (Subd. (b).)

CURRENT LAW	LAW AS OF 4/1/94
No equivalent.	Forbids legislative body from prohibiting "public criticism of the policies, procedures, programs, or services of the agency, or of the acts or omissions of the legislative body." Specifies that new language does not confer any privilege or protection for expression beyond that otherwise provided by law. (New subd. (c), added by ch. 1137, § 9.)

608

by public agency is public record which must be made available for inspection and copying, if not yet erased.	agency. Authorizes destruction of record 30 days after taping or recording. Inspection must be provided without charge on recorder or player made available by local agency. (No prohibition against charging fees for copies.) (§ 54953.5, new subd. (b), added by ch. 1137, § 5.)

G. Participation (§ 54954.3)

1. Regular meeting (subd. (a))

- Agenda must provide opportunity for members of public to address legislative body on any item of interest to public, if within subject matter jurisdiction of legislative body. No action may be taken unless exceptions to agenda requirements apply.

- Agenda must also provide opportunity for public comments on all agenda items, before or during consideration of each item.

  - Exception

CURRENT LAW	LAW AS OF 4/1/94
City council need not allow public comment on item already considered by committee composed exclusively of members of city council, at prior public hearing at which public comment	Expands authority to <u>all</u> legislative bodies. (Amended by ch. 1137, § 9.)

609

Documents must be made available for inspection under Public Records Act prior to commencement of meeting. (Subd. (b).)	Documents must be made available for inspection under Public Records Act "without delay." (Moved to subd. (a) and amended by ch. 1137, § 14.)

b. During meeting

CURRENT LAW	LAW AS OF 4/1/94
Public records distributed during open session, but before discussion of agenda item commences, must be made available for inspection prior to and during discussion. (Subd. (c).) Public records distributed during discussion of agenda item in open session must be made available for public inspection immediately or as soon thereafter as practicable. (Subd. (d).)	Documents distributed during public meeting "shall be made available for public inspection at the meeting if prepared by the local agency or a member of its legislative body, or after the meeting if prepared by some other person." (Amended and moved to subd. (b) by ch. 1137, § 14.)

c. After meeting

- Tape or film record

CURRENT LAW	LAW AS OF 4/1/94
No statutory provisions. Under case law, audio recording made	Codifies case, and expands rule to cover any tape or film record made by public

F. Documents and Recordings (§ 54957.5)

1. In general

- Agendas and board packets are generally public records and usual provisions of Public Records Act (Gov. Code, § 6250 et seq.) apply. (I.e., inspection of nonconfidential documents at all times; copies provided "promptly" after payment of direct costs of duplication.)

- Brown Act not to be interpreted to limit public's rights under Public Records Act. (Currently subd. (e); moved to subd. (d) and amended by ch. 1137, § 14.)

- May charge fee for copies. (Currently subd. (e); moved to subdivision (c) by ch. 1137, § 14.)

2. Timing of public access

a. Before meeting

CURRENT LAW	LAW AS OF 4/1/94
Public Records Act applies only to documents distributed to all or majority of members of legislative body "by a member, officer, employee, or agent of such body for discussion or consideration at a public meeting of such body." Documents become public records when distributed. (Excludes documents exempt from public disclosure.) (Subd. (a).)	Makes Public Records Act applicable to documents distributed "by any person in connection with a matter subject to discussion or consideration at a public meeting of the body." Documents still become public only when distributed to all or majority of members of legislative body. (Subd. (a), amended by ch. 1137, § 14.)

	continue without noise, illumination, or obstruction of view that constitutes, or would constitute, a persistent disruption of the proceedings." (Subd. (a), amended and subd. designation added by ch. 1137, § 5.)

D. Broadcast

CURRENT LAW	LAW AS OF 4/1/94
No Brown Act provisions, but other statutes require "all state, county, and municipal administrative agencies" to allow broadcast of open session if equipment silent and no auxiliary lighting needed. (Gov. Code, §§ 6090, 6091.)	Bars any legislative body from prohibiting or restricting broadcast of proceedings "in the absence of a reasonable finding that the broadcast cannot be accomplished without noise, illumination, or obstruction of view that would constitute a persistent disruption of the proceedings." (New § 54953.6, added by ch. 1137, § 6.)

E. Avoiding Disruption (§ 54957.9)

- May remove individuals who are willfully disrupting meeting.
- If meeting cannot be rendered orderly by removing small group, may order all members of public removed except nondisruptive news media.

- May recover reasonable costs of meetings, hearings, and notices from proceeds of tax or assessment (if enacted).

V. PUBLIC'S RIGHTS WHILE ATTENDING A MEETING

A. In General

- "All meetings of the legislative body of a local agency shall be open and public, and all persons shall be permitted to attend any meeting of the legislative body of a local agency, except as otherwise provided in this chapter." (§ 54953.)

- Legislative bodies free to impose requirements upon themselves in addition to minimums specified by law; elected body may also impose additional requirements on appointed legislative bodies if appointed by it or under its authority. (§ 54953.7.)

B. Registration (§ 54953.3)

- Cannot require registration as condition of attendance.

- If registration document posted or circulated, must contain statement that completion of document is voluntary.

C. Recording (§ 54953.5)

CURRENT LAW	LAW AS OF 4/1/94
Tape recording of open session may not be prohibited absent reasonable finding that recording disrupts or would disrupt proceedings.	Expands recording right to "audio or video tape recorder or a still or motion picture camera." Reasonable finding limited to determination that "the recording cannot

least 24 hours before meeting to each person who has requested written notice of meeting. Requirement to establish regular meeting time, rules for adjourning meetings and continuing hearings, and requirements for notice of special meetings do not apply to advisory bodies. (§ 54952.3.)	

F. Meetings Regarding New or Increased General Tax or New or Increased Assessment (§ 54954.6, added in 1992, amended by Stats. 1993, ch. 1194, § 2, No. 12 West's Cal. Legis. Service, p. 5504, effective Oct. 11, 1993)

- Requires public meeting and notice in addition to notice and hearing requirements under statutes authorizing tax or assessment.
- Must allow public testimony at meeting.
- "New or increased assessment" does not include various fees and assessments, such as service fees.
- Public meeting must be at least 10 days after first publication of notice required by tax/assessment statutes and at least 7 days before hearing required by tax/assessment statutes.
- Published and/or mailed notice must include specified information.
- For most assessments must also mail notice to all property owners. (For tax, mailed notice required only on request.)
- If election required, section does not apply.

- Notice of meeting must also be posted at least 24 hours prior to meeting.
- Must mail notice under section 54954.1 (see (B)(4) above) if special meeting called at least one week before date set for meeting.

D. Emergency Meetings (§ 54956.5)

- Allowed only if prompt action necessary due to disruption or threatened disruption of public facilities.
- Narrowly defined:

  (1) Work stoppage or other activity which severely impairs public health, safety, or both.

  (2) Crippling disaster which severely impairs public health, safety or both.
- Notice to media at least one hour before meeting unless telephone service is not functioning.
- No closed session allowed.
- All special meeting requirements apply except 24-hour notice and posting requirements.
- Special rules for reports of meeting and minutes.

E. Advisory Committee Meetings

CURRENT LAW	LAW AS OF 4/1/94
If regular meetings established by bylaw or other rule (see discussion above), no other notice of regular meetings required. For special meetings, must merely deliver notice at	Repeals statute. (Ch. 1138, § 5.) Advisory bodies must now follow all rules applicable to other legislative bodies.

- Need determined by two-thirds vote, or unanimous vote if less than two-thirds present.

c. Continued matter (subd. (b)(3))

- Item previously posted in connection with meeting which occurred no more than five days prior to date of action, and at prior meeting item continued to meeting at which action being taken.

4. Additional notices (§ 54954.1)

- Must give mailed notice of every regular meeting to any person who has filed written request for that notice. Notice must be mailed at least one week prior to date set for meeting. Request valid for one year, must be renewed by April 1 each year. Legislative body may establish reasonable fee to cover costs of sending notices.

C. Special Meetings (§ 54956)

- May be called at any time by president or a majority.
- Requires written notice to each member of board and to all media requesting notice, delivered at least 24 hours before meeting.
- Notice must state time and place of and business to be transacted at meeting.
- No other business may be considered at meeting.
- Notice required even if meeting in closed session or if no action to be taken.
- Member of board may waive failure to receive notice by filing written waiver or by being present at meeting.

3. Exceptions to agenda requirements (subd. (b))

- May take action on items not on posted agenda under specified conditions.

CURRENT LAW	LAW AS OF 4/1/94
No equivalent.	Must publicly identify item to be discussed under these conditions prior to discussion. (Subd. (b), amended by ch. 1137, § 8.)

- Conditions:

a. Emergency situation (subd. (b)(1))

- Defined as "work stoppage or other activity . . . [or] [c]rippling disaster which severely impairs public health, safety, or both." (§ 54956.5.)

- Existence determined by majority vote.

b. Late-arising matter (subd. (b)(2))

CURRENT LAW	LAW AS OF 4/1/94
May add to agenda if "need to take action arose subsequent to the agenda being posted."	Rewrites to limit to situations in which "there is a need to take immediate action and . . . the need for action came to the attention of the local agency subsequent to the agenda being posted." (Amended by ch. 1137, § 8.)

- Must be posted in location freely accessible to public.

2. General rule for items not on agenda

CURRENT LAW	LAW AS OF 4/1/94
No "action" on any item not on posted agenda, except as described below. (Subd. (a).)	Expands prohibition to include "action or discussion." (Subd. (a), amended by ch. 1137, § 8.)

- Exclusions from definition of "action" or "discussion"

CURRENT LAW	LAW AS OF 4/1/94
No statutory provisions. Legal counsels generally advise that members of legislative body may initiate brief statements or respond briefly to public comments (e.g., asking questions, referring items to staff, or requesting agenda items for future meeting).	Codifies this advice: (1) Members of legislative body may briefly respond to public testimony, statements or questions. (2) Members of legislative body, on their own initiative or in response to questions posed by public, may ask question for clarification, refer person to staff or other resources, or request staff to report topic at later meeting. (3) Members of legislative body or body itself may direct staff to place matter on future agenda. (Subd. (a), amended by ch. 1137, § 8.)

to make a positive or a negative decision, or an actual vote by a majority of the members of a legislative body when sitting as a body or entity, upon a motion, proposal, resolution, order or ordinance." (§ 54952.6.)

- Secret ballots

CURRENT LAW	LAW AS OF 4/1/94
No equivalent.	Prohibits action by secret ballot, whether preliminary or final. (§ 54953, new subd. (c), added by ch. 1137, § 4.)

B. Regular Meetings

1. Agenda (§ 54954.2)

- Must be posted at least 72 hours before meeting.

- Must describe agenda items.

CURRENT LAW	LAW AS OF 4/1/94
"[B]rief general description of each item of business to be transacted <u>or discussed</u> at the meeting." (Subd. (a), emphasis added.)	Description (which generally need not exceed 20 words) must also include items to be discussed in closed session (see discussion of agenda listing requirements for individual closed session topics below). (Subd. (a), amended by ch. 1137, § 8.)

- Must specify time and location of meeting.

- Limited to public comment or testimony and to deliberations of legislative body.

- Must post agendas at all video teleconference locations and adopt reasonable regulations to protect rights of parties and public.

E. Adjournments and Continuances

1. Adjournment (§ 54955)

   - Usual parliamentary procedure rules (to any time and place specified; less than quorum may adjourn; if all members absent, secretary may adjourn).

   - Copy of order or notice of adjournment must be posted on or near door of place where adjourned meeting held, within 24 hours after adjournment.

   - If order of adjournment fails to specify hour for holding adjourned meeting, must meet at hour set for regular meetings (see discussion above).

2. Continuance (§ 54955.1)

   - Hearing may be continued in same manner as adjournment of meeting.

   - Exception: if hearing continued to time less than 24 hours after time specified in order or notice of hearing, notice of continuance must be posted immediately.

IV. NOTICE AND AGENDA REQUIREMENTS; TAKING ACTION

A. Action

- "Action" defined as "a collective decision made by a majority of the members of a legislative body, a collective commitment or promise by a majority of the members of a legislative body

3. Exception for emergencies (§ 54954)

CURRENT LAW	LAW AS OF 4/1/94
If unsafe to meet in designated place due to fire, flood, earthquake or other emergency, meetings may be held for duration of emergency at place designated by presiding officer of legislative body.	Amends to require presiding officer or designee to set location and to inform media as required by section 54956 (see discussion of notice and agenda requirements below). (Subd. (e), amended and subd. designation added by ch. 1137, § 7.)

C. Advisory Committee Meetings

CURRENT LAW	LAW AS OF 4/1/94
Meetings not requiring examination of facts and data outside territory of local agency must be held within territory of local agency. If advisory committee elects to hold regular meetings, must adopt bylaw or other rule designating time and place for holding regular meetings. (§ 54952.3.)	Repeals statute. (Ch. 1138, § 5.) Advisory committees now subject to general rules described above.

D. Video Teleconferences (§ 54953)

- Defined as system which provides for both audio and visual participation between all members of the legislative body and public attending meeting or hearing at any video teleconference location.
- May use for any meeting or proceeding authorized by law.

CURRENT LAW	LAW AS OF 4/1/94
No equivalent.	In addition to exceptions above, authorizes exceptions for school board to: (1) Attend conference on nonadversarial collective bargaining techniques. (2) Interview residents of another district regarding possible employment of that district's superintendent. (3) Interview potential employee from another district. (§ 54954, new subd. (c), added by ch. 1137, § 7.)
No equivalent.	Specifies that JPA may meet anywhere within territory of one member, or anywhere in state if statewide membership. (§ 54954, new subd. (d), added by ch. 1137, § 7.)
May not conduct meeting in facility that prohibits admittance of any person or persons on basis of race, religious creed, color, national origin, ancestry or sex. (§ 54961.)	Adds prohibition of meeting in facility inaccessible to disabled persons or where members of public may not be present without making payment or purchase. (§ 54961, amended by ch. 1138, § 9.)

CURRENT LAW	LAW AS OF 4/1/94
agency. (E.g., former Ed. Code, § 35148 (repealed 1987) required governing board of high school district to meet in high school building, if any.) (§ 54954.)	(1) Otherwise comply with state or federal law or court order. (2) Inspect real or personal property which cannot be conveniently brought within territory. (3) Participate in multiagency meeting or discussion; meeting must be within jurisdiction of one of agencies, and must be publicized by all agencies as meeting under Act. (4) Meet in closest facility if no facility within boundaries of territory, or at principal office of local agency if located outside territory. (5) Meet with federal or state officials when local meeting impractical, solely to discuss legislative or regulatory issue over which officials have jurisdiction. (6) Meet in or near facility owned by agency, so long as topics limited to items directly related to facility. (7) Visit office of agency's legal counsel for closed session on pending litigation, when to do so would reduce legal costs. (§ 54954, new subd. (b), added by ch. 1137, § 7.)

CURRENT LAW	LAW AS OF 4/1/94
	ceremonial occasion," provided no specific business discussed. (New § 54952.2, subd. (b), added by ch. 1137, § 2.)

- Act not to be construed to prohibit members of legislative body from testifying in private before grand jury either as individuals or as body. (§ 54953.1.)

B. Time and Place

1. Adoption of rule (§ 54954)

CURRENT LAW	LAW AS OF 4/1/94
Legislative body must provide (through ordinance, bylaw, or other rule for conduct of body's business) time for holding regular meetings.	Adds place. (Subd. (a), amended and subd. designation added by ch. 1137, § 7.)

2. Limitations on place

CURRENT LAW	LAW AS OF 4/1/94
Meetings of legislative body generally need not be held within boundaries of territory over which legal agency exercises jurisdiction. General rule can be changed by statutes for particular	Reverses rule, by generally requiring regular and special meetings of legislative body to be held within boundaries of territory over which local agency exercises jurisdiction. Exceptions to:

CURRENT LAW	LAW AS OF 4/1/94
	Statute also states what is not a meeting: (1) Individual contacts or conversations between member of legislative body and another person. (2) Attendance of majority of members of legislative body at conference or similar gathering open to public involving discussion of issues of general interest to public or to public agencies of type represented by legislative body, provided no specific business discussed. (Includes legislative intent statement that public not required to be admitted free to conference.) (3) Attendance of majority of members of legislative body at "open and publicized" local community meeting organized by person or organization other than local agency, provided no specific business discussed. (4) Attendance of majority of members of legislative body at "purely social or

III. WHAT IS A MEETING?

A. Definition

CURRENT LAW	LAW AS OF 4/1/94
No statutory definition. Attorney General summarized case law and prior opinions to define meeting as gathering of quorum of legislative body, no matter how informal, where business is discussed or transacted. Later case held that series of telephone calls to obtain concurrence on decision is "meeting." Finally, legal counsels generally advise that social and ceremonial occasions, informal gatherings, and conferences are not "meetings" unless official business is discussed.	More or less codifies case law, Attorney General opinions and general advice. "Meeting" defined to include: "(1) Any congregation of a majority of the members of a legislative body in the same time and place to hear, discuss, or deliberate upon any item that is within the subject matter jurisdiction of the legislative body or the local agency to which it pertains. "(2) Any use of direct communication, personal intermediaries, or technological devices that is employed by a majority of the members of a legislative body to develop a collective concurrence as to action to be taken on an item by the members of the legislative body." (New § 54952.2, subd. (a), added by ch. 1137, § 2.)

Court of Appeal held that standing committee does not qualify under this exception.	a quorum" exception. (§ 54952, new subd. (b), added by ch. 1138, § 3.)

C. Member of Legislative Body

- Definition

CURRENT LAW	LAW AS OF 4/1/94
No Brown Act provision. Act has always been construed to apply only to current members of legislative body.	Definition "includes, but is not limited to, any person elected to serve as a member of a legislative body who has not yet assumed the duties of office. That person shall conform his or her conduct to the requirements of this chapter and shall be treated for purposes of enforcement of this chapter as if he or she has already assumed office." (New § 54952.1, added by ch. 1137, § 1.)

- Copies of chapter (§ 54952.7)

CURRENT LAW	LAW AS OF 4/1/94
Legislative body may require that copy of chapter be given to each member of legislative body; elected legislative body may require copy to be given to each member of each legislative body appointed by or under authority of elected body.	Adds "any person elected to serve as a member of the legislative body who has not assumed the duties of office." (Amended by ch. 1138, § 7.)

Definitions include various boards, commissions and committees, including advisory bodies created by formal action of legislative body, bodies with delegated authority (such as planning commissions), and committees on which members of legislative body serve in official capacity, if supported by local agency funds. (§§ 54952, 54952.2, 54952.3 and 54952.5.)	Rewrites and consolidates into one statute without substantive change. (§ 54952, new subd. (b), added by ch. 1138, § 3; §§ 54952.2, 54952.3 and 54952.5 repealed by ch. 1138, §§ 4, 5, and 6.)
Definitions include governing body of private corporation if officers of local agency sit on board and corporation supported by public funds. (§ 54952.)	Rewrites slightly. (§ 54952, new subd. (c), added by ch. 1138, § 3.)
No equivalent.	Adds definition to include hospital lessee exercising authority delegated by legislative body of local agency. (§ 54952, new subd. (d), added by ch. 1138, § 3.)

- Definitions do not include committee composed solely of members of the legislative body which are less than a quorum of the legislative body. (Current § 54952.3; moved by ch. 1138, § 3, to § 54952, subd. (b).)

CURRENT LAW	LAW AS OF 4/1/94
Act does not specify whether standing committee of legislative body may fit under "less than a quorum" exception. In case pending before California Supreme Court,	Specifies that standing committee of legislative body with continuing subject matter jurisdiction or fixed meeting schedule does not qualify under "less than

II. TO WHOM DOES THE ACT APPLY?

- To all "members" of a "legislative body" of a "local agency."

A. Local Agency

- Broadly defined to include all local public agencies. (§§ 54951, 54958.)

CURRENT LAW	LAW AS OF 4/1/94
Additional definitions include certain private nonprofit organizations created under federal law and certain nonprofit public works corporations created by local agencies. (§§ 54951.1 and 54951.7.)	Repeals statutes (ch. 1138, §§ 2.3 and 2.5). Incorporates into definition of "legislative body." (See discussion below.) **NOTE:** all chapter references to new legislation are to Statutes of 1993, chapters 1137 and 1138, No. 11 West's California Legislative Service, pages 5141 and 5155, respectively.

B. Legislative Body

- Definition

CURRENT LAW	LAW AS OF 4/1/94
Definitions include governing body of local agency. (§ 54952.)	Rewrites slightly. (§ 54952, new subd. (a), amended and subd. designation added by ch. 1138, § 3.)

OPEN MEETINGS: THE BROWN ACT AND THE 1993 AMENDMENTS

I. INTRODUCTION

- The Ralph M. Brown Act

  Government Code section 54950 et seq. (All statutory references are to Gov. Code, unless otherwise specified.)

- Purpose and Scope

  To require multi-member local legislative bodies to conduct all aspects of the decision-making process, including discussion, debate, and the acquisition of information, in public.

- Legislative Intent

  "In enacting this chapter, the Legislature finds and declares that the public commissions, boards and councils and the other public agencies in this State exist to aid in the conduct of the people's business. It is the intent of the law that their actions be taken openly and that their deliberations be conducted openly.

  "The people of this State do not yield their sovereignty to the agencies which serve them. The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may retain control over the instruments they have created." (§ 54950.)

D. Broadcast 19
E. Avoiding Disruption 19
F. Documents and Recordings 20
G. Participation 22

VI. CLOSED SESSION

A. General Rules 24
B. Procedural Requirements for Closed Session 24
C. Authorized Closed Session Topics
1. License application 26
2. Real estate negotiations 27
3 Pending litigation
a. General rules 29
b. Specific circumstances
i. Formal litigation already initiated 31
ii. Anticipated litigation against local agency 32
iii. Possible litigation to be initiated by local agency 35
c. Report of action taken 35
4. Claim against joint powers agency for insurance 37
5. Threat to public facilities or services 38
6. Personnel 39
7. Labor negotiations 43
8. Joint powers agency for drug law enforcement 46
9. Special authorization for certain local agencies
a. School districts and community college districts 47
b. Public hospitals 47
D. Records Pertaining to Closed Session 48

VII. PENALTIES AND REMEDIES FOR VIOLATION

A. Criminal Penalties 50
B. Civil Remedies 50

TABLE OF CONTENTS

I. INTRODUCTION 1

II. TO WHOM DOES THE ACT APPLY?

A. Local Agency 2
B. Legislative Body 2
C. Member of a Legislative Body 4

III. WHAT IS A MEETING?

A. Definition 5
B. Time and Place 7
C. Advisory Committee Meetings 10
D. Video Teleconferences 10
E. Adjournments and Continuances 11

IV. NOTICE AND AGENDA REQUIREMENTS; TAKING ACTION

A. Action 11
B. Regular Meetings 12
C. Special Meetings 15
D. Emergency Meetings 16
E. Advisory Committee Meetings 16
F. Meetings Regarding New or Increased General Tax or New or Increased Assessment 17

V. PUBLIC'S RIGHTS WHILE ATTENDING A MEETING

A. In General 18
B. Registration 18
C. Recording 18

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THE BROWN ACT

AS OF APRIL 1, 1994

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EXHIBIT C

TABLE OF CONTENTS

§ 54950. Declaration, intent, sovereignty 1

§ 54950.5 Short title 1

§ 54951 Local agency, definition 1

§ 54952 Legislative body, definition 1

§ 54952.1 Member of a legislative body of a local agency 2

§ 54952.2 Meeting 2

§ 54952.6 Action taken, definition 3

§ 59452.7 Copies of chapter to members of legislative body of local agencies 3

§ 54953 Meetings to be open and public; attendance; video teleconferencing 3

§ 54953 Meetings to be open and public; attendance; operative date of section 4

§ 54953.1 Testimony of members before grand jury 4

§ 54953.3 Conditions to attendance 4

§ 54953.5 Right to record proceedings; conditions; tape or film records made by or under direction of local agencies 5

§ 54953.6 Prohibitions or restrictions on broadcasts of legislative body; reasonable findings 5

§ 54953.7 Allowance of greater access to meetings than minimal standards in this chapter 5

§ 54954 Time and place of regular meetings; special meetings; emergencies 5

§ 54954.1 Mailed notice to persons who filed written request; time; duration and renewal of requests; fee 6

§ 54954.2 Agenda; posting; action on other matters 7

§ 54954.3 Opportunity for public to address legislative body; adoption of regulations 8

§ 54954.4 Reimbursements to local agencies and school districts for costs 8

§ 54954.5 Closed session item descriptions 9

§ 54954.6 New or increased taxes or assessments; public meetings and public hearings; joint notice requirements 11

§ 54955 Adjournment; adjourned meetings 13

§ 54955.1 Continuance 14

§ 54956 Special meetings; call; notice 14

§ 54956.5 Emergency meetings in emergency situations 15

§ 54956.6 Fees 15

§ 54956.7 Closed sessions; license applications; rehabilitated criminals 16

§ 54956.8 Real property transactions; closed meeting with negotiator 16

§ 54956.9 Pending litigation; closed session; abrogation of privilege; notice 16

§ 54956.95 Closed sessions; insurance pooling; tort liability losses; public liability losses; workers' compensation liability 18

§ 54957 Closed sessions; exclusion of witnesses 18

§ 54957.1 Closed sessions; public report of action taken 19

§ 54957.2 Minute book record of closed sessions; inspection 21

§ 54957.5 Agendas and other writings distributed for discussion or consideration at public meetings; public records; inspection; closed sessions 21

§ 54957.6 Closed sessions; legislative body of local agencies; salaries, salary schedules or fringe benefits; mandatory subjects 21

§ 54957.7 Disclosure of items to be discussed in closed sessions 22

§ 54957.8 Closed sessions; legislative body of a multijurisdictional drug law enforcement agency 22

§ 54957.9 Disorderly conduct of general public during meeting; clearing of room 23

§ 54958 Application of chapter 23

§ 54959 Penalty for unlawful meeting 23

§ 54960 Actions to stop or prevent violations of meeting provisions; applicability of meeting provisions; validity of rules or actions on recording closed sessions 23

§ 54960.1 Unlawful action by legislative body; action for mandamus or injunction; prerequisites 24

§ 54960.5 Costs and attorney fees 26

§ 54961 Prohibitions on use of certain facilities; grounds; application to local agencies 26

§ 54962 Closed session by legislative body prohibited 26

GOVERNMENT CODE
TITLE 5. LOCAL AGENCIES
DIVISION 2. CITIES, COUNTIES, AND OTHER AGENCIES
PART 1. POWERS AND DUTIES COMMON TO CITIES AND COUNTIES, AND OTHER AGENCIES
CHAPTER 9. MEETINGS

§ 54950. Declaration, intent; sovereignty

In enacting this chapter, the Legislature finds and declares that the public commissions, boards and councils and the other public agencies in this State exist to aid in the conduct of the people's business. It is the intent of the law that their actions be taken openly and that their deliberations be conducted openly.

The people of this State do not yield their sovereignty to the agencies which serve them. The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may retain control over the instruments they have created.

(Added by Stats. 1953, c. 1588, p. 3270, § 1.)

§ 54950.5. Short title

This chapter shall be known as the Ralph M. Brown Act.

(Added by Stats. 1961, c. 115, p. 1127, § 1.)

§ 54951. Local agency, definition

As used in this chapter, "local agency" means a county, city, whether general law or chartered, city and county, town, school district, municipal corporation, district, political subdivision, or any board, commission or agency thereof, or other local public agency.

(Added by Stats. 1953, c. 1588, p. 3270, § 1. Amended by Stats. 1959, c. 1417, p. 3696, § 1.)

§ 54952. Legislative body, definition

As used in this chapter, "legislative body" means:

(a) The governing body of a local agency or any other local body created by state or federal statute.

(b) 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. However, advisory committees, composed solely of the members of the legislative body which are less than a quorum of the legislative body are not legislative bodies, except that standing committees of a legislative body, irrespective of their composition, which have a continuing subject matter jurisdiction, or a meeting schedule fixed by charter, ordinance, resolution, or formal action of a legislative body are legislative bodies for purposes of this chapter.

(c) A board, commission, committee, or other multimember body that governs a private corporation or entity that either:

(1) Is created by the elected legislative body in order to exercise authority that may lawfully be delegated by the elected governing body to a private corporation or entity.

(2) Receives funds from a local agency and the membership of whose governing body includes a member of the legislative body of the local agency appointed to that governing body by the legislative body of the local agency.

(d) The lessee of any hospital the whole or part of which is first leased pursuant to subdivision (p) of Section 32121 of the Health and Safety Code after January 1, 1994, where the lessee exercises any material authority of a legislative body of a local agency delegated to it by that legislative body whether the lessee is organized and operated by the local agency or by a delegated authority.

(Added by Stats. 1953, c. 1588, p. 3270, § 1. Amended by Stats. 1961, c. 1671, p. 3637, § 1; Stats. 1993, c. 1138 (S. B. 1140), § 3, operative April 1, 1994.)

§ 54952.1. **Member of a legislative body of a local agency**

As used in this chapter, "member of a legislative body of a local agency" includes, but is not limited to, any person elected to serve as a member of a legislative body who has not yet assumed the duties of office. That person shall conform his or her conduct to the requirements of this chapter and shall be treated for purposes of enforcement of this chapter as if he or she has already assumed office.

(Added by Stats. 1993, c. 1136 (A.B. 1426), § 1, operative April 1, 1994; Stats. 1993, c. 1137 (S.B. 36), § 1, operative April 1, 1994.)

§ 54952.2. **Meeting**

(a) As used in this chapter, "meeting" includes all of the following:

(1) Any congregation of a majority of the members of a legislative body in the same time and place to hear, discuss, or deliberate upon any item that is within the subject matter jurisdiction of the legislative body or the local agency to which it pertains.

(2) Any use of direct communication, personal intermediaries, or technological devices that is employed by a majority of the members of the legislative body to develop a collective concurrence as to action to be taken on an item by the members of the legislative body.

(b) Nothing in subdivision (a) shall impose the requirements of this chapter upon any of the following:

(1) Individual contacts or conversations between a member of a legislative body and any other person.

(2) The attendance of a majority of the members of a legislative body at a conference or similar gathering open to the public that involves a discussion of issues of general interest to the public or to public agencies of the type represented by the legislative body, provided that a majority of the members do not discuss among themselves business of a specific nature that is within the subject matter jurisdiction of the local agency. Nothing in this paragraph is intended to allow members of the public free admission

to a conference or similar gathering at which the organizers have required other participants or registrants to pay fees or charges as a condition of attendance.

(3) The attendance of a majority of the members of a legislative body at an open and publicized meeting organized to address a topic of local community concern by a person or organization other than the local agency, provided that a majority of the members do not discuss among themselves business of a specific nature that is within the subject matter jurisdiction of the legislative body of the local agency.

(4) The attendance of a majority of the members at a purely social or ceremonial occasion, provided that a majority of the members do not discuss among themselves business of a specific nature that is within the subject matter jurisdiction of the legislative body of the local agency.

(Added by Stats. 1993, c. 1136 (A.B. 1426), § 2, operative April 1, 1994; Stats. 1993, c. 1137 (S.B. 36), § 2, operative April 1, 1994.)

§ 54952.6. Action taken, definition

As used in this chapter, "action taken" means a collective decision made by a majority of the members of a legislative body, a collective commitment or promise by a majority of the members of a legislative body to make a positive or a negative decision, or an actual vote by a majority of the members of a legislative body when sitting as a body or entity, upon a motion, proposal, resolution, order or ordinance.

(Added by Stats. 1961, c. 1671, p. 3637, § 3.)

§ 54952.7. Copies of chapter to members of legislative body of local agencies

A legislative body of a local agency may require that a copy of this chapter be given to each member of the legislative body and any person elected to serve as a member of the legislative body who has not assumed the duties of office. An elected legislative body of a local agency may require that a copy of this chapter be given to each member of each legislative body all or a majority of whose members are appointed by or under the authority of the elected legislative body.

(Added by Stats. 1980, c. 1284, p. 4341, § 17. Amended by Stats. 1981, c. 968, § 27; Stats. 1993, c. 1136 (A.B. 1426), § 3, operative April 1, 1994; Stats. 1993, c. 1137 (S.B. 36), § 3, operative April 1, 1994; Stats. 1993, c. 1138 (S.B. 1140), § 7, operative April 1, 1994.)

§ 54953. Meetings to be open and public; attendance; video teleconferencing

(a) All meetings of the legislative body of a local agency shall be open and public, and all persons shall be permitted to attend any meeting of the legislative body of a local agency, except as otherwise provided in this chapter.

(b) Notwithstanding any other provision of law, the legislative body of a local agency may use video teleconferencing for the benefit of the public or the legislative body of a local agency in connection with any meeting or proceeding authorized by law. The use of video teleconferencing, as authorized by this chapter, shall be limited to the receipt of public comment or testimony by the legislative body and to deliberations of the legislative body. If the legislative body of a local agency elects to use video teleconferencing, it shall post agendas at all video teleconference locations and adopt reasonable regulations to adequately protect the statutory or constitutional rights of the parties or the public appearing

before the legislative body of a local agency. The term "video teleconference" shall mean a system which provides for both audio and visual participation between all members of the legislative body and the public attending a meeting or hearing at any video teleconference location.

(c) No legislative body shall take action by secret ballot, whether preliminary or final.

(Added by Stats. 1953, c. 1588, p. 3270, § 1. Amended by Stats. 1988, c. 399, § 1; Stats. 1993, c. 1136 (A.B. 1426), § 4, operative April 1, 1994; Stats. 1993, c. 1137 (S.B. 36), § 4, operative April 1, 1994.)

For text of section as added by Stats. 1988, c. 399, § 2, operative Jan. 1, 1994, see Government Code § 54953, post.

§ 54953. **Meetings to be open and public; attendance; operative date of section**

All meetings of the legislative body of a local agency shall be open and public, and all persons shall be permitted to attend any meeting of the legislative body of a local agency, except as otherwise provided in this chapter.

This section shall become operative January 1, 1994.

(Added by Stats. 1988, c. 399, § 2; operative Jan. 1, 1994.)

For text of section as amended by Stats. 1993, c. 1137, § 4, operative April 1, 1994, see Government Code § 54953, ante.

§ 54953.1. **Testimony of members before grand jury**

The provisions of this chapter shall not be construed to prohibit the members of the legislative body of a local agency from giving testimony in private before a grand jury, either as individuals or as a body.

(Added by Stats. 1979, c. 950, p. 3277, § 1.)

§ 54953.3. **Conditions to attendance**

A member of the public shall not be required, as a condition to attendance at a meeting of a legislative body of a local agency, to register his or her name, to provide other information, to complete a questionnaire, or otherwise to fulfill any condition precedent to his or her attendance.

If an attendance list, register, questionnaire, or other similar document is posted at or near the entrance to the room where the meeting is to be held, or is circulated to the persons present during the meeting, it shall state clearly that the signing, registering, or completion of the document is voluntary, and that all persons may attend the meeting regardless of whether a person signs, registers, or completes the document.

(Added by Stats. 1957, c. 85, p. 664, § 1. Amended by Stats. 1981, c. 968, § 28.)

§ 54953.5. **Right to record proceedings; conditions; tape or film records made by or under direction of local agencies**

(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 tape 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 tape or film record 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 taping or recording. Any inspection of a video or tape recording shall be provided without charge on a tape recorder made available by the local agency.

(Added by Stats. 1980, c. 1284, p. 4341, § 18. Amended by Stats. 1993, c. 1136 (A.B. 1426), § 5, operative April 1, 1994; Stats. 1993, c. 1137 (S.B. 36), § 5, operative April 1, 1994.)

§ 54953.6. **Prohibitions or restrictions on broadcasts of proceedings of legislative body; reasonable findings**

No legislative body shall prohibit or otherwise restrict the broadcast of its proceedings in the absence of a reasonable finding that the broadcast cannot be accomplished without noise, illumination, or obstruction of view that would constitute a persistent disruption of the proceedings.

(Added by Stats. 1993, c. 1136 (A.B. 1426), § 6, operative April 1, 1994; Stats. 1993, c. 1137 (S.B. 36), § 6, operative April 1, 1994.)

§ 54953.7. **Allowance of greater access to meetings than minimal standards in this chapter**

Notwithstanding any other provision of law, legislative bodies of local agencies may impose requirements upon themselves which allow greater access to their meetings than prescribed by the minimal standards set forth in this chapter. In addition thereto, an elected legislative body of a local agency may impose such requirements on those appointed legislative bodies of the local agency of which all or a majority of the members are appointed by or under the authority of the elected legislative body.

(Added by Stats. 1981, c. 968, § 29.)

§ 54954. **Time and place of regular meetings; special meetings; emergencies**

(a) The legislative body of a local agency shall provide, by ordinance, resolution, bylaws, or by whatever other rule is required for the conduct of business by that body, the time and place for holding regular meetings.

(b) Regular and special meetings of the legislative body shall be held within the boundaries of the territory over which the local agency exercises jurisdiction except to do any of the following:

(1) Otherwise comply with the state or federal law or court order,

(2) Inspect real or personal property which cannot be conveniently brought within the boundaries of the territory over which the local agency exercises jurisdiction.

(3) Participate in meetings or discussions of multiagency significance that are outside the boundaries of a local agency's jurisdiction. However, any meeting or discussion held pursuant to this subdivision shall take place within the jurisdiction of one of the participating local agencies and be noticed by all participating agencies as provided for in this chapter.

(4) Meet in the closest meeting facility if the local agency has no meeting facility within the boundaries of the territory over which the local agency exercises jurisdiction, or at the principal office of the local agency if that office is located outside the territory over which the agency exercises jurisdiction.

(5) Meet outside their immediate jurisdiction with elected or appointed officials of the United States or the State of California when a local meeting would be impractical, solely to discuss a legislative or regulatory issue affecting the local agency and over which the federal or state officials have jurisdiction.

(6) Meet outside their immediate jurisdiction if the meeting takes place in or nearby a facility owned by the agency, provided that the topic of the meeting is limited to items directly related to the facility.

(7) Visit the office of the local agency's legal counsel for a closed session on pending litigation held pursuant to Section 54956.9, when to do so would reduce legal fees or costs.

(c) Meetings of the governing board of a school district shall be held within the district except under the circumstances enumerated in subdivision (b), or to do either of the following:

(1) Attend a conference on nonadversarial collective bargaining techniques.

(2) Interview members of the public residing in another district with reference to the trustees' potential employment of the superintendent of that district.

(3) Interview a potential employee from another district.

(d) Meetings of a joint powers authority shall occur within the territory of at least one of its member agencies, or as provided in subdivision (b). However, a joint powers authority which has members throughout the state may meet at any facility in the state which complies with the requirements of Section 54961.

(e) If, by reason of fire, flood, earthquake, or other emergency, it shall be unsafe to meet in the place designated, the meetings shall be held for the duration of the emergency at the place designated by the presiding officer of the legislative body or his or her designee in a notice to the local media that have requested notice pursuant to Section 54956, by the most rapid means of communication available at the time.

(Added by Stats. 1953, c. 1588, p. 3270, § 1. Amended by Stats. 1993, c. 1136 (A.B. 1426), § 7, operative April 1, 1994; Stats. 1993, c. 1137 (S.B. 36), § 7, operative April 1, 1994.)

§ 54954.1. Mailed notice to persons who filed written request; time; duration and renewal of requests; fee

The legislative body which is subject to the provisions of this chapter shall give mailed notice of every regular meeting, and any special meeting which is called at least one week prior to the date set for the

meeting, to any person who has filed a written request for that notice with the legislative body. Any mailed notice required pursuant to this section shall be mailed at least one week prior to the date set for the meeting to which it applies except that the legislative body may give the notice as it deems practical of special meetings called less than seven days prior to the date set for the meeting.

Any request for notice filed pursuant to this section shall be valid for one year from the date on which it is filed unless a renewal request is filed. Renewal requests for notice shall be filed within 90 days after January 1 of each year.

The failure of any person to receive the notice given pursuant to this section shall not constitute grounds for any court to invalidate the actions of the legislative body for which the notice was given.

The legislative body may establish a reasonable annual fee for sending the notice based on the estimated cost of providing the service.

(Added by Stats. 1973, c. 1070, p. 2151, § 1. Amended by Stats. 1990, c. 1198 (A.B. 4065), § 1.)

§ 54954.2. Agenda; posting; action on other matters

(a) At least 72 hours before a regular meeting, the legislative body of the local agency, or its designee, shall post an agenda containing a brief general description of each item of business to be transacted or discussed at the meeting, including items to be discussed in closed session. A brief general description of an item generally need not exceed 20 words. The agenda shall specify the time and location of the regular meeting and shall be posted in a location that is freely accessible to members of the public.

No action or discussion shall be undertaken on any item not appearing on the posted agenda, except that members of a legislative body may briefly respond to statements made or questions posed by persons exercising their public testimony rights under Section 54954.3. In addition, on their own initiative, or in response to questions posed by the public, members of a legislative body may ask a question for clarification, provide a reference to staff or other resources for factual information, or request staff to report back to the body at a subsequent meeting concerning any matter. Furthermore, a member of a legislative body, or the body itself, may take action to direct staff to place a matter of business on a future agenda.

(b) Notwithstanding subdivision (a), the legislative body may take action on items of business not appearing on the posted agenda under any of the conditions stated below. Prior to discussing any item pursuant to this subdivision, the legislative body shall publicly identify the item.

(1) Upon a determination by a majority vote of the legislative body that an emergency situation exists, as defined in Section 54956.5.

(2) Upon a determination by a two-thirds vote of the legislative body, or, if less than two-thirds of the members are present, a unanimous vote of those members present, that there is a need to take immediate action and that the need for action came to the attention of the local agency subsequent to the agenda being posted as specified in subdivision (a).

(3) The item was posted pursuant to subdivision (a) for a prior meeting of the legislative body occurring not more than five calendar days prior to the date action is taken on the item, and at the prior meeting the item was continued to the meeting at which action is being taken.

(Added by Stats. 1986, c. 641, § 5. Amended by Stats. 1993, c. 1136 (A.B. 1426), § 8, operative April 1, 1994; Stats. 1993, c. 1137 (S.B. 36), § 8, operative April 1, 1994.)

§ 54954.3. Opportunity for public to address legislative body; adoption of regulations

(a) Every agenda for regular meetings shall provide an opportunity for members of the public to directly address the legislative body on any item of interest to the public, before or during the legislative body's consideration of the item, that is within the subject matter jurisdiction of the legislative body, provided that no action shall be taken on any item not appearing on the agenda unless the action is otherwise authorized by subdivision (b) of Section 54954.2. However, the agenda need not provide an opportunity for members of the public to address the legislative body on any item that has already been considered by a committee, composed exclusively of members of the legislative body, at a public meeting wherein all interested members of the public were afforded the opportunity to address the committee on the item, before or during the committee's consideration of the item, unless the item has been substantially changed since the committee heard the item, as determined by the legislative body. Every notice for a special meeting at which action is proposed to be taken on an item shall provide an opportunity for members of the public to directly address the legislative body concerning that item prior to action on the item.

(b) 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.

(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.

(Added by Stats. 1986, c. 641, § 6. Amended by Stats. 1991, c. 66 (S.B. 100), § 1; Stats. 1993, c. 1136 (A.B. 1426), § 9, operative April 1, 1994; Stats. 1993, c. 1137 (S.B. 36), § 9, operative April 1, 1994.)

§ 54954.4. Reimbursements to local agencies and school districts for costs

(a) The Legislature hereby finds and declares that Section 12 of Chapter 641 of the Statutes of 1986, authorizing reimbursement to local agencies and school districts for costs mandated by the state pursuant to that act, shall be interpreted strictly. The intent of the Legislature is to provide reimbursement for only those costs which are clearly and unequivocally incurred as the direct and necessary result of compliance with Chapter 641 of the Statutes of 1986.

(b) In this regard, the Legislature directs all state employees and officials involved in reviewing or authorizing claims for reimbursement, or otherwise participating in the reimbursement process, to rigorously review each claim and authorize only those claims, or parts thereof, which represent costs which are clearly and unequivocally incurred as the direct and necessary result of compliance with Chapter 641 of the Statutes of 1986 and for which complete documentation exists. For purposes of Section 54954.2, costs eligible for reimbursement shall only include the actual cost to post a single agenda for any one meeting.

(c) The Legislature hereby finds and declares that complete, faithful, and uninterrupted compliance with the Ralph M. Brown Act (Chapter 9 (commencing with Section 54950) of Part 1 of Division 2 of Title 5 of the Government Code) is a matter of overriding public importance. Unless specifically stated, no future Budget Act, or related budget enactments, shall, in any manner, be interpreted to suspend, eliminate, or otherwise modify the legal obligation and duty of local agencies to fully comply with Chapter 641 of the Statutes of 1986 in a complete, faithful, and uninterrupted manner.

(Added by Stats. 1991, c. 238 (A.B. 102), § 1.)

§ 54954.5. **Closed session item descriptions**

For purposes of describing closed session items pursuant to Section 54954.2, the agenda may describe closed sessions as provided below. No legislative body or elected official shall be in violation of Section 54954.2 if the closed session items were described in substantial compliance with this section. Substantial compliance is satisfied by including the information provided below, irrespective of its format.

(a) With respect to a closed session held pursuant to Section 54956.7:

LICENSE/PERMIT DETERMINATION

Applicant(s): (Specify number of applicants)

(b) With respect to every item of business to be discussed in closed session pursuant to Section 54956.8:

CONFERENCE WITH REAL PROPERTY NEGOTIATOR

Property: (Specify street address, or if no street address, the parcel number or other unique reference, of the real property under negotiation)

Negotiating parties: (Specify name of party (not agent))

Under negotiation: (Specify whether instruction to negotiator will concern price, terms of payment, or both)

(c) With respect to every item of business to be discussed in closed session pursuant to Section 54956.9:

CONFERENCE WITH LEGAL COUNSEL - EXISTING LITIGATION

Name of case: (Specify by reference to claimant's name, names of parties, case or claim numbers)

or

Case name unspecified: (Specify whether disclosure would jeopardize service of process or existing settlement negotiations)

CONFERENCE WITH LEGAL COUNSEL - ANTICIPATED LITIGATION

Significant exposure to litigation pursuant to subdivision (b) of Section 54956.9: (Specify number of potential cases)

Initiation of litigation pursuant to subdivision (c) of Section 54956.9: (Specify number of potential cases)

(d) With respect to every item of business to be discussed in closed session pursuant to Section 54956.95:

LIABILITY CLAIMS

Claimant: (Specify name unless unspecified pursuant to Section 54961)[1/]

Agency claimed against: (Specify name)

(e) With respect to every item of business to be discussed in closed session pursuant to Section 54957:

THREAT TO PUBLIC SERVICES OR FACILITIES

Consultation with: (Specify name of law enforcement agency and title of officer)

PUBLIC EMPLOYEE APPOINTMENT

Title: (Specify description of position to be filled)

PUBLIC EMPLOYMENT

Title: (Specify description of position to be filled)

PUBLIC EMPLOYEE PERFORMANCE EVALUATION

Title: (Specify position title of employee being reviewed)

PUBLIC EMPLOYEE DISCIPLINE/DISMISSAL/RELEASE

(No additional information is required in connection with a closed session to consider discipline, dismissal, or release)

(f) With respect to every item of business to be discussed in closed session pursuant to Section 54957.6:

CONFERENCE WITH LABOR NEGOTIATOR

Agency negotiator: (Specify name)

Employee organization: (Specify name of organization representing employee)

or

Unrepresented employee: (Specify position title of unrepresented employee who is the subject of the negotiations)

(g) With respect to closed sessions called pursuant to Section 54957.8:

CASE REVIEW/PLANNING

(h) With respect to every item of business discussed in closed session pursuant to Section 54962 and Sections 1461, 32106, and 32155 of the Health and Safety Code or Sections 37606 and 37624.3 of the Government Code:

1/ See Historical Note after § 54961.

REPORT INVOLVING TRADE SECRET

Discussion will concern: (Specify whether discussion will concern proposed new service, program, or facility)

Estimated date of public disclosure: (Specify month and year)

HEARINGS

Subject matter: (Specify whether testimony/deliberation will concern staff privileges, report of medical audit committee, or report of quality assurance committee)

(Added by Stats. 1993, c. 1136 (A.B. 1426), § 10, operative April 1, 1994; Stats. 1993, c. 1137 (S.B. 36), § 10, operative April 1, 1994.)

§ 54954.6. New or increased taxes or assessments; public meetings and public hearings; joint notice requirements

(a)(1) Before adopting any new or increased general tax or any new or increased assessment, the legislative body of a city, county, special district, or joint powers authority shall conduct at least one public meeting at which local officials must allow public testimony regarding the proposed new or increased general tax or new or increased assessment in addition to the noticed public hearing at which the legislative body proposes to enact or increase the general tax or assessment.

For purposes of this section, the term "new or increased assessment" does not include any of the following:

(A) A fee which does not exceed the reasonable cost of providing the services, facilities, or regulatory activity for which the fee is charged.

(B) A service charge or benefit charge, unless a special district's principal act requires service charges or benefit charges to conform to the requirements of this section.

(C) An ongoing annual assessment if it is imposed at the same or lower amount as any previous year.

(D) An assessment which does not exceed an assessment formula or range of assessments previously adopted by the agency or approved by the voters in the area where the assessment is imposed.

(E) Standby or immediate availability charges.

(2) The legislative body shall provide at least 45 days' public notice of the public hearing at which the legislative body proposes to enact or increase the general tax or assessment. The legislative body shall provide notice for the public meeting at the same time and in the same document as the notice for the public hearing, but the meeting shall occur prior to the hearing.

(b)(1) The joint notice of both the public meeting and the public hearing required by subdivision (a) with respect to a proposal for a new or increased general tax shall be accomplished by placing a display advertisement of at least one-eighth page in a newspaper of general circulation for three weeks pursuant to Section 6063 and by a first-class mailing to those interested parties who have filed a written request with the local agency for mailed notice of public meetings or hearings on new or increased general taxes. The public meeting pursuant to subdivision (a) shall take place no earlier than 10 days after the first

publication of the joint notice pursuant to this subdivision. The public hearing shall take place no earlier than seven days after the public meeting pursuant to this subdivision. Notwithstanding paragraph (2) of subdivision (a), the joint notice need not include notice of the public meeting after the meeting has taken place. The public hearing pursuant to subdivision (a) shall take place no earlier than 45 days after the first publication of the joint notice pursuant to this subdivision. The public hearing shall take place no earlier than seven days after the public meeting pursuant to this subdivision. Any written request for mailed notices shall be effective for one year from the date on which it is filed unless a renewal request is filed. Renewal requests for mailed notices shall be filed on or before April 1 of each year. The legislative body may establish a reasonable annual charge for sending notices based on the estimated cost of providing the service.

(2) The notice required by paragraph (1) of this subdivision shall include, but not be limited to, the following:

(A) The amount or rate of the tax. If the tax is proposed to be increased from any previous year, the joint notice shall separately state both the existing tax rate and the proposed tax rate increase.

(B) The activity to be taxed.

(C) The estimated amount of revenue to be raised by the tax annually.

(D) The method and frequency for collecting the tax.

(E) The dates, times, and locations of the public meeting and hearing described in subdivision (a).

(F) The phone number and address of an individual, office, or organization that interested persons may contact to receive additional information about the tax.

(c)(1) The joint notice of both the public meeting and the public hearing required by subdivision (a) with respect to a proposal for a new or increased assessment on real property shall be accomplished through a mailing, postage prepaid, in the United States mail and shall be deemed given when so deposited. The public meeting pursuant to subdivision (a) shall take place no earlier than 10 days after the joint mailing pursuant to this subdivision. The public hearing shall take place no earlier than seven days after the public meeting pursuant to this subdivision. The envelope or the cover of the mailing shall include the name of the local agency and the return address of the sender. This mailed notice shall be in at least 10-point type and shall be given to all property owners proposed to be subject to the new or increased assessment by a mailing by name to those persons whose names and addresses appear on the last equalized county assessment roll or the State Board of Equalization assessment roll, as the case may be.

(2) The joint notice required by paragraph (1) of this subdivision shall include, but not be limited to, the following:

(A) The estimated amount of the assessment per parcel. If the assessment is proposed to be increased from any previous year, the joint notice shall separately state both the amount of the existing assessment and the proposed assessment increase.

(B) A general description of the purpose or improvements that the assessment will fund.

(C) The address to which property owners may mail a protest against the assessment.

(D) The phone number and address of an individual, office, or organization that interested persons may contact to receive additional information about the assessment.

(E) A statement that a majority protest will cause the assessment to be abandoned if the assessment act used to levy the assessment so provides. Notice must also state the percentage of protests required to trigger an election, if applicable.

(F) The dates, times, and locations of the public meeting and hearing described in subdivision (a).

(3) Notwithstanding paragraph (1), in the case of an assessment which is proposed exclusively for operation and maintenance expenses for an entire city, county, or district, or operation and maintenance assessments proposed to be levied on 50,000 parcels or more, notice may be provided pursuant to paragraph (1) of subdivision (b) and shall include the information required by paragraph (2) of subdivision (c).

(4) Notwithstanding paragraph (1), in the case of an assessment proposed to be levied pursuant to Part 2 (commencing with Section 22500) of Division 2 of the Streets and Highways Code by a regional park district, regional park and open-space district, or regional open-space district formed pursuant to Article 3 (commencing with Section 5500) of Chapter 3 of Division 5 of, or pursuant to Division 26 (commencing with Section 35100) of, the Public Resources Code, notice may be provided pursuant to paragraph (1) of subdivision (b).

(d) The notice requirements imposed by this section shall be construed as additional to, and not to supersede, existing provisions of law, and shall be applied concurrently with the existing provisions so as to not delay or prolong the governmental decisionmaking process.

(e) This section shall not apply to any new or increased general tax or any new or increased assessment that requires an election of either of the following:

(1) The property owners subject to the assessment.

(2) The voters within the city, county, special district, or joint powers authority imposing the tax or assessment.

(f) Nothing in this section shall prohibit a local agency from holding a consolidated meeting or hearing at which the legislative body discusses multiple tax or assessment proposals.

(g) The local agency may recover the reasonable costs of public meetings, public hearings, and notice required by this section from the proceeds of the tax or assessment. The costs recovered for these purposes, whether recovered pursuant to this subdivision or any other provision of law, shall not exceed the reasonable costs of the public meetings, public hearings, and notice.

(Added by Stats. 1992, c. 1234 (S.B. 1977), § 2. Amended by Stats. 1993, c. 1194 (S.B. 376), § 2, effective October 11, 1993.)

§ 54955. Adjournment; adjourned meetings

The legislative body of a local agency may adjourn any regular, adjourned regular, special or adjourned special meeting to a time and place specified in the order of adjournment. Less than a quorum may so adjourn from time to time. If all members are absent from any regular or adjourned regular meeting the clerk or secretary of the legislative body may declare the meeting adjourned to a stated time

and place and he shall cause a written notice of the adjournment to be given in the same manner as provided in Section 54956 for special meetings, unless such notice is waived as provided for special meetings. A copy of the order or notice of adjournment shall be conspicuously posted on or near the door of the place where the regular, adjourned regular, special or adjourned special meeting was held within 24 hours after the time of the adjournment. When a regular or adjourned regular meeting is adjourned as provided in this section, the resulting adjourned regular meeting is a regular meeting for all purposes. When an order of adjournment of any meeting fails to state the hour at which the adjourned meeting is to be held, it shall be held at the hour specified for regular meetings by ordinance, resolution, by law, or other rule.

(Added by Stats. 1953, c. 1588, p. 3270, § 1. Amended by Stats. 1955, c. 760, p. 1254, § 1; Stats. 1959, c. 647, p. 2626, § 1.)

§ 54955.1. **Continuance**

Any hearing being held, or noticed or ordered to be held, by a legislative body of a local agency at any meeting may by order or notice of continuance be continued or recontinued to any subsequent meeting of the legislative body in the same manner and to the same extent set forth in Section 54955 for the adjournment of meetings; provided, that if the hearing is continued to a time less than 24 hours after the time specified in the order or notice of hearing, a copy of the order or notice of continuance of hearing shall be posted immediately following the meeting at which the order or declaration of continuance was adopted or made.

(Added by Stats. 1965, c. 469, p. 1775, § 1.)

§ 54956. **Special meetings; call; notice**

A special meeting may be called at any time by the presiding officer of the legislative body of a local agency, or by a majority of the members of the legislative body, by delivering personally or by mail written notice to each member of the legislative body and to each local newspaper of general circulation, radio or television station requesting notice in writing. The notice shall be delivered personally or by mail and shall be received at least 24 hours before the time of the meeting as specified in the notice. The call and notice shall specify the time and place of the special meeting and the business to be transacted. No other business shall be considered at these meetings by the legislative body. The written notice may be dispensed with as to any member who at or prior to the time the meeting convenes files with the clerk or secretary of the legislative body a written waiver of notice. The waiver may be given by telegram. The written notice may also be dispensed with as to any member who is actually present at the meeting at the time it convenes. Notice shall be required pursuant to this section regardless of whether any action is taken at the special meeting.

The call and notice shall be posted at least 24 hours prior to the special meeting in a location that is freely accessible to members of the public.

(Added by Stats. 1953, c. 1588, p. 3270, § 1. Amended by Stats. 1955, c. 760, p. 1255, § 2; Stats. 1980, c. 1284, p. 4342, § 19; Stats. 1986, c. 641, § 7.)

§ 54956.5. **Emergency meetings in emergency situations**

In the case of an emergency situation involving matters upon which prompt action is necessary due to the disruption or threatened disruption of public facilities, a legislative body may hold an emergency meeting without complying with either the 24-hour notice requirement or the 24-hour posting requirement of Section 54956 or both of the notice and posting requirements.

For purposes of this section, "emergency situation" means any of the following:

(a) Work stoppage or other activity which severely impairs public health, safety, or both, as determined by a majority of the members of the legislative body.

(b) Crippling disaster which severely impairs public health, safety, or both, as determined by a majority of the members of the legislative body.

However, each local newspaper of general circulation and radio or television station which has requested notice of special meetings pursuant to Section 54956 shall be notified by the presiding officer of the legislative body, or designee thereof, one hour prior to the emergency meeting by telephone and all telephone numbers provided in the most recent request of such newspaper or station for notification of special meetings shall be exhausted. In the event that telephone services are not functioning, the notice requirements of this section shall be deemed waived, and the legislative body, or designee of the legislative body, shall notify those newspapers, radio stations, or television stations of the fact of the holding of the emergency meeting, the purpose of the meeting, and any action taken at the meeting as soon after the meeting as possible.

Notwithstanding Section 54957, the legislative body shall not meet in closed session during a meeting called pursuant to this section.

All special meeting requirements, as prescribed in Section 54956 shall be applicable to a meeting called pursuant to this section, with the exception of the 24-hour notice requirement.

The minutes of a meeting called pursuant to this section, a list of persons who the presiding officer of the legislative body, or designee of the legislative body, notified or attempted to notify, a copy of the roll call vote, and any actions taken at the meeting shall be posted for a minimum of 10 days in a public place as soon after the meeting as possible.

(Added by Stats. 1979, c. 223, p. 476, § 1. Amended by Stats. 1981, c. 968, § 30; Stats. 1986, c. 641, § 8.)

§ 54956.6. **Fees**

No fees may be charged by the legislative body of a local agency for carrying out any provision of this chapter, except as specifically authorized by this chapter.

(Added by Stats. 1980, c. 1284, p. 4342, § 20.)

§ 54956.7. Closed sessions, license applications; rehabilitated criminals

Whenever a legislative body of a local agency determines that it is necessary to discuss and determine whether an applicant for a license or license renewal, who has a criminal record, is sufficiently rehabilitated to obtain the license, the legislative body may hold a closed session with the applicant and the applicant's attorney, if any, for the purpose of holding the discussion and making the determination. If the legislative body determines, as a result of the closed session, that the issuance or renewal of the license should be denied, the applicant shall be offered the opportunity to withdraw the application. If the applicant withdraws the application, no record shall be kept of the discussions or decisions made at the closed session and all matters relating to the closed session shall be confidential. If the applicant does not withdraw the application, the legislative body shall take action at the public meeting during which the closed session is held or at its next public meeting denying the application for the license but all matters relating to the closed session are confidential and shall not be disclosed without the consent of the applicant, except in an action by an applicant who has been denied a license challenging the denial of the license.

(Added by Stats. 1982, c. 298, § 1.)

§ 54956.8. Real property transactions; closed meeting with negotiator

Notwithstanding any other provision of this chapter, a legislative body of a local agency may hold a closed session with its negotiator prior to the purchase, sale, exchange, or lease of real property by or for the local agency to give instructions to its negotiator regarding the price and terms of payment for the purchase, sale, exchange, or lease.

However, prior to the closed session, the legislative body of the local agency shall hold an open and public session in which it identifies the real property or real properties which the negotiations may concern and the person or persons with whom its negotiator may negotiate.

For the purpose of this section, the negotiator may be a member of the legislative body of the local agency.

For purposes of this section, "lease" includes renewal or renegotiation of a lease.

Nothing in this section shall preclude a local agency from holding a closed session for discussions regarding eminent domain proceedings pursuant to Section 54956.9.

(Added by Stats. 1984, c. 1126, § 2.)

§ 54956.9. Pending litigation; closed session; abrogation of privilege; notice

Nothing in this chapter shall be construed to prevent a legislative body of a local agency, based on advice of its legal counsel, from holding a closed session to confer with, or receive advice from, its legal counsel regarding pending litigation when discussion in open session concerning those matters would prejudice the position of the local agency in the litigation.

For purposes of this chapter, all expressions of the lawyer-client privilege other than those provided in this section are hereby abrogated. This section is the exclusive expression of the lawyer-client privilege for purposes of conducting closed-session meetings pursuant to this chapter.

For purposes of this section, "litigation" includes any adjudicatory proceeding, including eminent domain, before a court, administrative body exercising its adjudicatory authority, hearing officer, or arbitrator.

For purposes of this section, litigation shall be considered pending when any of the following circumstances exist:

(a) Litigation, to which the local agency is a party, has been initiated formally.

(b)(1) A point has been reached where, in the opinion of the legislative body of the local agency on the advice of its legal counsel, based on existing facts and circumstances, there is a significant exposure to litigation against the local agency.

(2) Based on existing facts and circumstances, the legislative body of the local agency is meeting only to decide whether a closed session is authorized pursuant to paragraph (1) of this subdivision.

For purposes of paragraphs (1) and (2), "existing facts and circumstances" shall consist only of one of the following:

(A) Facts and circumstances that might result in litigation against the agency but which the agency believes are not yet known to a potential plaintiff or plaintiffs, which facts and circumstances need not be disclosed.

(B) Facts and circumstances, including, but not limited to, an accident, disaster, incident, or transactional occurrence that might result in litigation against the agency and that are known to a potential plaintiff or plaintiffs, which facts or circumstances shall be publicly stated on the agenda or announced.

(C) The receipt of a claim pursuant to the Tort Claims Act or some other written communication from a potential plaintiff threatening litigation, which claim or communication shall be available for public inspection pursuant to Section 54957.5.

(D) A statement made by a person in an open and public meeting threatening litigation on a specific matter within the responsibility of the legislative body.

(E) A statement threatening litigation made by a person outside an open and public meeting on a specific matter within the responsibility of the legislative body so long as the official or employee of the local agency receiving knowledge of the threat makes a contemporaneous or other record of the statement prior to the meeting, which record shall be available for public inspection pursuant to Section 54957.5. The records so created need not identify the alleged victim of unlawful or tortious sexual conduct or anyone making the threat on their behalf, or identify a public employee who is the alleged perpetrator of any unlawful or tortious conduct upon which a threat of litigation is based, unless the identity of the person has been publicly disclosed.

(F) Nothing in this section shall require disclosure of written communications that are privileged and not subject to disclosure pursuant to the California Public Records Act (Chapter 3.5 (commencing with Section 6250) of Division 7 of Title 1).

(c) Based on existing facts and circumstances, the legislative body of the local agency has decided to initiate or is deciding whether to initiate litigation.

Prior to holding a closed session pursuant to this section, the legislative body of the local agency shall state on the agenda or publicly announce the subdivision of this section that authorizes the closed

session. If the session is closed pursuant to subdivision (a), the body shall state the title of or otherwise specifically identify the litigation to be discussed, unless the body states that to do so would jeopardize the agency's ability to effectuate service of process upon one or more unserved parties, or that to do so would jeopardize its ability to conclude existing settlement negotiations to its advantage.

A local agency shall be considered to be a "party" or to have a "significant exposure to litigation" if an officer or employee of the local agency is a party or has significant exposure to litigation concerning prior or prospective activities or alleged activities during the course and scope of that office or employment, including litigation in which it is an issue whether an activity is outside the course and scope of the office or employment.

(Added by Stats. 1984, c. 1126, § 3. Amended by Stats. 1987, c. 1320, § 5; Stats. 1993, c. 1136 (A.B. 1426), § 11, operative April 1, 1994; Stats. 1993, c. 1137 (S.B. 36), § 11, operative April 1, 1994.)

§ 54956.95. Closed sessions; insurance pooling; tort liability losses; public liability losses; workers' compensation liability

(a) Nothing in this chapter shall be construed to prevent a joint powers agency formed pursuant to Article 1 (commencing with Section 6500) of Chapter 5 of Division 7 of Title 1, for purposes of insurance pooling, or a local agency member of the joint powers agency, from holding a closed session to discuss a claim for the payment of tort liability losses, public liability losses, or workers' compensation liability incurred by the joint powers agency or a local agency member of the joint powers agency.

(b) Nothing in this chapter shall be construed to prevent the Local Agency Self-Insurance Authority formed pursuant to Chapter 5.5 (commencing with Section 6599.01) of Division 7 of Title 1, or a local agency member of the authority, from holding a closed session to discuss a claim for the payment of tort liability losses, public liability losses, or workers' compensation liability incurred by the authority or a local agency member of the authority.

(c) Nothing in this section shall be construed to affect Section 54956.9 with respect to any other local agency.

(Added by Stats. 1989, c. 882, § 3.)

§ 54957. Closed sessions; exclusion of witnesses

Nothing contained in this chapter shall be construed to prevent the legislative body of a local agency from holding closed sessions with the Attorney General, district attorney, sheriff, or chief of police, or their respective deputies, on matters posing a threat to the security of public buildings or a threat to the public's right of access to public services or public facilities, or from holding closed sessions during a regular or special meeting to consider the appointment, employment, evaluation of performance, or dismissal of a public employee or to hear complaints or charges brought against the employee by another person or employee unless the employee requests a public session. As a condition to holding a closed session on specific complaints or charges brought against an employee by another person or employee, the employee shall be given written notice of his or her right to have the complaints or charges heard in an open session rather than a closed session, which notice shall be delivered to the employee personally or by mail at least 24 hours before the time for holding the session. If notice is not given, any disciplinary or other action taken by the legislative body against the employee based on the specific complaints or charges in the closed session shall be null and void. The legislative body also may exclude from that public or closed meeting, during the examination of a witness, any or all other witnesses in the matter

being investigated by the legislative body.

For the purposes of this section, the term "employee" shall include an officer or an independent contractor who functions as an officer or an employee but shall not include any elected official, member of a legislative body or other independent contractors. Nothing in this section shall limit local officials' ability to hold closed session meetings pursuant to Sections 1461, 32106, and 32155 of the Health and Safety Code or Sections 37606 and 37624.3 of the Government Code. Closed sessions held pursuant to this section shall not include discussions of a local agency's available funds, funding priorities, or budget.

(Added by Stats. 1953, c. 1588, p. 3271, § 1. Amended by Stats. 1957, c. 1314, p. 2633, § 1; Stats. 1959, c. 647, p. 2626, § 2; Stats. 1961, c. 1671, p. 3637, § 4; Stats. 1971, c. 567, p. 1160, § 1; Stats. 1975, c. 959, p. 2241, § 8; Stats. 1980, c. 1284, p. 4342, § 21; Stats. 1982, c. 298, § 2; Stats. 1993, c. 1136 (A.B. 1426), § 12, operative April 1, 1994; Stats. 1993, c. 1137 (S.B. 36), § 12, operative April 1, 1994.)

§ 54957.1. **Closed sessions; public report of action taken**

(a) The legislative body of any local agency shall publicly report any action taken in closed session and the vote or abstention of every member present thereon, as follows:

(1) Approval of an agreement concluding real estate negotiations pursuant to Section 54956.8 shall be reported after the agreement is final, as specified below:

(A) If its own approval renders the agreement final, the body shall report that approval and the substance of the agreement in open session at the public meeting during which the closed session is held.

(B) If final approval rests with the other party to the negotiations, the local agency shall disclose the fact of that approval and the substance of the agreement upon inquiry by any person, as soon as the other party or its agent has informed the local agency of its approval.

(2) Approval given to the body's legal counsel to defend, or seek or refrain from seeking appellate review or relief, or to enter as an amicus curiae in any form of litigation as the result of a consultation under Section 54956.9 shall be reported in open session at the public meeting during which the closed session is held[2/] The report shall identify, if known, the adverse party or parties and the substance of the litigation. In the case of approval given to initiate or intervene in an action, the announcement need not identify the action, the defendants, or other particulars, but shall specify that the direction to initiate or intervene in an action has been given and that the action, the defendants, and the other particulars shall, once formally commenced, be disclosed to any person upon inquiry, unless to do so would jeopardize the agency's ability to effectuate service of process on one or more unserved parties, or that to do so would jeopardize its ability to conclude existing settlement negotiations to its advantage.

(3) Approval given to the body's legal counsel of a settlement of pending litigation, as defined in Section 54956.9, at any stage prior to or during a judicial or quasi-judicial proceeding shall be reported after the settlement is final, as specified below:

[2/] Punctuation as in enrolled bill.

(A) If the body accepts a settlement offer signed by the opposing party, the body shall report its acceptance and identify the substance of the agreement in open session at the public meeting during which the closed session is held.

(B) If final approval rests with some other party to the litigation or with the court, then as soon as the settlement becomes final, and upon inquiry by any person, the local agency shall disclose the fact of that approval, and identify the substance of the agreement.

(4) Disposition reached as to claims discussed in closed session pursuant to Section 54956.95 shall be reported as soon as reached in a manner that identifies the name of the claimant, the name of the local agency claimed against, the substance of the claim, and any monetary amount approved for payment and agreed upon by the claimant.

(5) Action taken to appoint, employ, dismiss, accept the resignation of, or otherwise affect the employment status of a public employee in closed session pursuant to Section 54957 shall be reported at the public meeting during which the closed session is held. Any report required by this paragraph shall identify the title of the position and specify any change in compensation. The general requirement of this paragraph notwithstanding, the report of a dismissal or of the nonrenewal of an employment contract shall be deferred until the first public meeting following the exhaustion of administrative remedies, if any.

(6) Approval of an agreement concluding labor negotiations pursuant to Section 54957.6 shall be reported after the agreement is final and has been accepted or ratified by the other party. The report shall identify the item approved and the other party or parties to the negotiation.

(b) Reports that are required to be made pursuant to this section may be made orally or in writing. The legislative body shall provide to any person who has submitted a written request to the legislative body within 24 hours of the posting of the agenda, or to any person who has made a standing request for all documentation as part of a request for notice of meetings pursuant to Section 54954.1 or 54956, if the requester is present at the time the closed session ends, copies of any contracts, settlement agreements, or other documents that were finally approved or adopted in the closed session. If the action taken results in one or more substantive amendments to the related documents requiring retyping, the documents need not be released until the retyping is completed during normal business hours, provided that the presiding officer of the legislative body or his or her designee orally summarizes the substance of the amendments for the benefit of the document requester or any other person present and requesting the information.

(c) The documentation referred to in paragraph (b) shall be available to any person on the next business day following the meeting in which the action referred to is taken or, in the case of substantial amendments, when any necessary retyping is complete.

(d) Nothing in this section shall be construed to require that the legislative body approve actions not otherwise subject to legislative body approval.

(e) No action for injury to a reputation, liberty, or other personal interest may be commenced by or on behalf of any employee or former employee with respect to whom a disclosure is made by a legislative body in an effort to comply with this section.

(Added by Stats. 1975, c. 959, p. 2242, § 9. Amended by Stats. 1977, c. 89, p. 506, § 1; Stats. 1980, c. 181, p. 402, § 1; Stats. 1980, c. 1284, p. 4343, § 22; Stats. 1993, c. 1136 (A.B. 1426), § 13, operative April 1, 1994; Stats. 1993, c. 1137 (S.B. 36), § 13, operative April 1, 1994.)

§ 54957.2. **Minute book record of closed sessions; inspection**

(a) The legislative body of a local agency may, by ordinance or resolution, designate a clerk or other officer or employee of the local agency who shall then attend each closed session of the legislative body and keep and enter in a minute book a record of topics discussed and decisions made at the meeting. The minute book made pursuant to this section is not a public record subject to inspection pursuant to the California Public Records Act (Chapter 3.5 (commencing with Section 6250) of Division 7 of Title 1), and shall be kept confidential. The minute book shall be available only to members of the legislative body or, if a violation of this chapter is alleged to have occurred at a closed session, to a court of general jurisdiction wherein the local agency lies. Such minute book may, but need not, consist of a recording of the closed session.

(b) An elected legislative body of a local agency may require that each legislative body all or a majority of whose members are appointed by or under the authority of the elected legislative body keep a minute book as prescribed under subdivision (a).

(Added by Stats. 1976, c. 1363, p. 6207, § 1. Amended by Stats. 1980, c. 1284, p. 4343, § 23; Stats. 1981, c. 968, § 31.)

§ 54957.5. **Agendas and other writings distributed for discussion or consideration at public meetings; public records; inspection; closed sessions**

(a) Notwithstanding Section 6255 or any other provisions of law, agendas of public meetings and any other writings, when distributed to all, or a majority of all, of the members of a legislative body of a local agency by any person in connection with a matter subject to discussion or consideration at a public meeting of the body, are public records under the California Public Records Act (Chapter 3.5 (commencing with Section 6250) of Division 7 of Title 1), and shall be made available pursuant to Sections 6253 and 6256 without delay. However, this section shall not include any writing exempt from public disclosure under Section 6253.5, 6254, or 6254.7.

(b) Writings which are public records under subdivision (a) and which are distributed during a public meeting shall be made available for public inspection at the meeting if prepared by the local agency or a member of its legislative body, or after the meeting if prepared by some other person.

(c) Nothing in this chapter shall be construed to prevent the legislative body of a local agency from charging a fee or deposit for a copy of a public record pursuant to Section 6257.

(d) This section shall not be construed to limit or delay the public's right to inspect any record required to be disclosed under the requirements of the California Public Records Act (Chapter 3.5 (commencing with Section 6250) of Division 7 of Title 1). Nothing in this chapter shall be construed to require a legislative body of a local agency to place any paid advertisement or any other paid notice in any publication.

(Added by Stats. 1980, c. 1284, p. 4343, § 24. Amended by Stats. 1981, c. 968, § 32; Stats. 1993, c. 1136 (A.B. 1426), § 14, operative April 1, 1994; Stats. 1993, c. 1137 (S.B. 36), § 14, operative April 1, 1994.)

§ 54957.6. **Closed sessions; legislative body of local agencies; salaries, salary schedules or fringe benefits; mandatory subjects**

(a) Notwithstanding any other provision of law, a legislative body of a local agency may hold closed sessions with the local agency's designated representatives regarding the salaries, salary schedules, or

compensation paid in the form of fringe benefits of its represented and unrepresented employees, and, for represented employees, any other matter within the statutorily-provided scope of representation. Closed sessions of a legislative body of a local agency, as permitted in this section, shall be for the purpose of reviewing its position and instructing the local agency's designated representatives. Closed sessions, as permitted in this section, may take place prior to and during consultations and discussions with representatives of employee organizations and unrepresented employees.

For the purposes enumerated in this section, a legislative body of a local agency may also meet with a state conciliator who has intervened in the proceedings.

(b) For the purposes of this section, the term "employee" shall include an officer or an independent contractor who functions as an officer or an employee, but shall not include any elected official, member of a legislative body, or other independent contractors.

Closed sessions held pursuant to this section shall not include discussions of a local agency's available funds, funding priorities, or budget.

(Added by Stats. 1968, c. 1272, p. 2397, § 2. Amended by Stats. 1980, c. 1284, p. 4344, § 25; Stats. 1984, c. 62, § 1; Stats. 1985, c. 366, § 1; Stats. 1986, c. 248, § 97; Stats. 1993, c. 1138 (S.B. 1140), § 8, operative April 1, 1994.)

§ 54957.7. Disclosure of items to be discussed in closed sessions

(a) Prior to holding any closed session, the legislative body of the local agency shall disclose, in an open meeting, the item or items to be discussed in the closed session. The disclosure may take the form of a reference to the item or items as they are listed by number or letter on the agenda. In the closed session, the legislative body may consider only those matters covered in its statement. Nothing in this section shall require or authorize a disclosure of information prohibited by state or federal law.

(b) After any closed session, the legislative body shall reconvene into open session prior to adjournment and shall make any disclosures required by Section 54957.1 of action taken in the closed session.

(c) The announcements required to be made in open session pursuant to this section may be made at the location announced in the agenda for the closed session, as long as the public is allowed to be present at that location for the purpose of hearing the announcements.

(Added by Stats. 1980, c. 1284, p. 4344, § 26. Amended by Stats. 1981, c. 968, § 33; Stats. 1993, c. 1136 (A.B. 1426), § 15, operative April 1, 1994; Stats. 1993, c. 1137 (S.B. 36), § 15, operative April 1, 1994.)

§ 54957.8. Closed sessions; legislative body of a multijurisdictional drug law enforcement agency

Nothing contained in this chapter shall be construed to prevent the legislative body of a multijurisdictional drug law enforcement agency, or an advisory body of a multijurisdictional drug law enforcement agency, from holding closed sessions to discuss the case records of any ongoing criminal investigation of the multijurisdictional drug law enforcement agency or of any party to the joint powers agreement, to hear testimony from persons involved in the investigation, and to discuss courses of action in particular cases.

"Multijurisdictional drug law enforcement agency," for purposes of this section, means a joint powers entity formed pursuant to Article 1 (commencing with Section 6500) of Chapter 5 of Division 7 of Title 1, which provides drug law enforcement services for the parties to the joint powers agreement.

The Legislature finds and declares that this section is within the public interest, in that its provisions are necessary to prevent the impairment of ongoing law enforcement investigations, to protect witnesses and informants, and to permit the discussion of effective courses of action in particular cases.

(Added by Stats. 1988, c. 55, § 1.)

§ 54957.9. Disorderly conduct of general public during meeting; clearing of room

In the event that any meeting is willfully interrupted by a group or groups of persons so as to render the orderly conduct of such meeting unfeasible and order cannot be restored by the removal of individuals who are willfully interrupting the meeting, the members of the legislative body conducting the meeting may order the meeting room cleared and continue in session. Only matters appearing on the agenda may be considered in such a session. Representatives of the press or other news media, except those participating in the disturbance, shall be allowed to attend any session held pursuant to this section. Nothing in this section shall prohibit the legislative body from establishing a procedure for readmitting an individual or individuals not responsible for willfully disturbing the orderly conduct of the meeting.

(Added by Stats. 1970, c. 1610, p. 3386, § 2. Amended by Stats. 1981, c. 968, § 34.)

§ 54958. Application of chapter

The provisions of this chapter shall apply to the legislative body of every local agency notwithstanding the conflicting provisions of any other state law.

(Added by Stats. 1953, c. 1588, p. 3271, § 1.)

§ 54959. Penalty for unlawful meeting

Each member of a legislative body who attends a meeting of that legislative body where action is taken in violation of any provision of this chapter, with wrongful intent to deprive the public of information to which it is entitled under this chapter, is guilty of a misdemeanor.

(Added by Stats. 1961, c. 1671, p. 3638, § 5. Amended by Stats. 1993, c. 1136 (A.B. 1426), § 16, operative April 1, 1994; Stats. 1993, c. 1137 (S.B. 36), § 16, operative April 1, 1994.)

§ 54960. Actions to stop or prevent violations of meeting provisions; applicability of meeting provisions; validity of rules or actions on recording closed sessions

(a) The district attorney or any interested person may commence an action by mandamus, injunction or declaratory relief for the purpose of stopping or preventing violations or threatened violations of this chapter by members of the legislative body of a local agency or to determine the applicability of this chapter to actions or threatened future action of the legislative body, or to determine the validity under the laws of this state or of the United States of any rule or action by the legislative body to penalize or otherwise discourage the expression of one or more of its members, or to compel the legislative body to

tape record its closed sessions as hereinafter provided.

(b) The court in its discretion may, upon a judgment of a violation of Section 54956.7, 54956.8, 54956.9, 54956.95, 54957, or 54957.6, order the legislative body to tape record its closed sessions and preserve the tape recordings for the period and under the terms of security and confidentiality the court deems appropriate.

(c)(1) Each recording so kept shall be immediately labeled with the date of the closed session recorded and the title of the clerk or other officer who shall be custodian of the recording.

(2) The tapes shall be subject to the following discovery procedures:

(A) In any case in which discovery or disclosure of the tape is sought by either the district attorney or the plaintiff in a civil action pursuant to Section 54959, 54960, or 54960.1 alleging that a violation of this chapter has occurred in a closed session which has been recorded pursuant to this section, the party seeking discovery or disclosure shall file a written notice of motion with the appropriate court with notice to the governmental agency which has custody and control of the tape recording. The notice shall be given pursuant to subdivision (b) of Section 1005 of the Code of Civil Procedure.

(B) The notice shall include, in addition to the items required by Section 1010 of the Code of Civil Procedure, all of the following:

(i) Identification of the proceeding in which discovery or disclosure is sought, the party seeking discovery or disclosure, the date and time of the meeting recorded, and the governmental agency which has custody and control of the recording.

(ii) An affidavit which contains specific facts indicating that a violation of the act occurred in the closed session.

(3) If the court, following a review of the motion, finds that there is good cause to believe that a violation has occurred, the court may review, in camera, the recording of that portion of the closed session alleged to have violated the act.

(4) If, following the in camera review, the court concludes that disclosure of a portion of the recording would be likely to materially assist in the resolution of the litigation alleging violation of this chapter, the court shall, in its discretion, make a certified transcript of the portion of the recording a public exhibit in the proceeding.

(5) Nothing in this section shall permit discovery of communications which are protected by the attorney-client privilege.

(Added by Stats. 1961, c. 1671, p. 3638, § 6. Amended by Stats. 1969, c. 494, p. 1106, § 2; Stats. 1993, c. 1136 (A.B. 1426), § 17, operative April 1, 1994; Stats. 1993, c. 1137 (S.B. 36), § 17, operative April 1, 1994.)

§ 54960.1. Unlawful action by legislative body; action for mandamus or injunction; prerequisites

(a) The district attorney or any interested person may commence an action by mandamus or injunction for the purpose of obtaining a judicial determination that an action taken by a legislative body of a local agency in violation of Section 54953, 54954.2, 54954.5, 54954.6, or 54956 is null and void under this section. Nothing in this chapter shall be construed to prevent a legislative body from curing or correcting

an action challenged pursuant to this section.

(b) Prior to any action being commenced pursuant to subdivision (a), the district attorney or interested person shall make a demand of the legislative body to cure or correct the action alleged to have been taken in violation of Section 54953, 54954.2, 54954.5, 54954.6, or 54956. The demand shall be in writing and clearly describe the challenged action of the legislative body and nature of the alleged violation.

The written demand shall be made within 90 days from the date the action was taken unless the action was taken in an open session but in violation of Section 54954.2, in which case the written demand shall be made within 30 days from the date the action was taken. Within 30 days of receipt of the demand, the legislative body shall cure or correct the challenged action and inform the demanding party in writing of its actions to cure or correct or inform the demanding party in writing of its decision not to cure or correct the challenged action. If the legislative body takes no action within the 30-day period, the inaction shall be deemed a decision not to cure or correct the challenged action, and the 15-day period to commence the action described in subdivision (a) shall commence to run the day after the 30-day period to cure or correct expires. Within 15 days of receipt of the written notice of the legislative body's decision to cure or correct, or not to cure or correct, or within 15 days of the expiration of the 30-day period to cure or correct, whichever is earlier, the demanding party shall be required to commence the action pursuant to subdivision (a) or thereafter be barred from commencing the action.

(c) An action taken that is alleged to have been taken in violation of Sections 54953, 54954.2, 54954.5, 54954.6, and 54956 shall not be determined to be null and void if any of the following conditions exist:

(1) The action taken was in substantial compliance with Sections 54953, 54954.2, 54954.5, 54954.6, and 54956.

(2) The action taken was in connection with the sale or issuance of notes, bonds, or other evidences of indebtedness or any contract, instrument, or agreement thereto.

(3) The action taken gave rise to a contractual obligation, including a contract let by competitive bid other than compensation for services in the form of salary or fees for professional services, upon which a party has, in good faith and without notice of a challenge to the validity of the action, detrimentally relied.

(4) The action taken was in connection with the collection of any tax.

(5) Any person, city, city and county, county, district, or any agency or subdivision of the state alleging noncompliance with subdivision (a) of Section 54954.2, Section 54955, or Section 54956.5 because of any defect, error, irregularity, or omission in the notice given pursuant to those provisions had actual notice of the item of business at least 72 hours prior to the meeting at which the action was taken if the meeting was noticed pursuant to Section 54954.2, or 24 hours prior to the meeting at which the action was taken if the meeting was noticed pursuant to Section 54956, or prior to the meeting at which the action was taken if the meeting is held pursuant to Section 54956.5.

(d) During any action seeking a judicial determination pursuant to subdivision (a) if the court determines, pursuant to a showing by the legislative body that an action alleged to have been taken in violation of Section 54953, 54954.2, 54954.5, 54954.6, or 54956 has been cured or corrected by a subsequent action of the legislative body, the action filed pursuant to subdivision (a) shall be dismissed with prejudice.

(e) The fact that a legislative body takes a subsequent action to cure or correct an action taken pursuant to this section shall not be construed or admissible as evidence of a violation of this chapter.

(Added by Stats. 1986, c. 641, § 9. Amended by Stats. 1987, c. 1327, § 2; Stats. 1992, c. 1234 (S.B. 1977), § 3; Stats. 1993, c. 1136 (A.B. 1426), § 18, operative April 1, 1994; Stats. 1993, c. 1137 (S.B. 36), § 18, operative April 1, 1994.)

§ 54960.5. Costs and attorney fees

A court may award court costs and reasonable attorney fees to the plaintiff in an action brought pursuant to Section 54960 or 54960.1 where it is found that a legislative body of the local agency has violated this chapter. The costs and fees shall be paid by the local agency and shall not become a personal liability of any public officer or employee of the local agency.

A court may award court costs and reasonable attorney fees to a defendant in any action brought pursuant to Section 54960 or 54960.1 where the defendant has prevailed in a final determination of such action and the court finds that the action was clearly frivolous and totally lacking in merit.

(Added by Stats. 1975, c. 959, p. 2242, § 10. Amended by Stats. 1981, c. 968, § 35; Stats. 1986, c. 641, § 10.)

§ 54961. Prohibitions on use of certain facilities; grounds; application to local agencies

No legislative body of a local agency shall conduct any meeting in any facility that prohibits the admittance of any person, or persons, on the basis of race, religious creed, color, national origin, ancestry, or sex, or which is inaccessible to disabled persons, or where members of the public may not be present without making a payment or purchase. This section shall apply to every local agency as defined in Section 54951.

(Added by Stats. 1970, c. 383, p. 798, § 2. Amended by Stats. 1981, c. 968, § 36; Stats. 1993, c. 1136 (A.B. 1426), § 19, operative April 1, 1994; Stats. 1993, c. 1137 (S.B. 36), § 19, operative April 1, 1994; Stats. 1993, c. 1138 (S.B. 1140), § 9, operative April 1, 1994.)

Historical Note

Stats. 1993, chapters 1136, 1137, and 1138 all made amendments to § 54961. Pursuant to Government Code § 9605, the highest numbered chapter is the operative version set forth above. Stats. 1993, c. 1137 made the above text subdivision (a) and added subdivision (b) as follows:

"(b) No notice, agenda, announcement, or report required under this chapter need identify any victim or alleged victim of tortious sexual conduct or child abuse unless the identity of the person has been publicly disclosed."

§ 54962. Closed session by legislative body prohibited

Except as expressly authorized by this chapter, or by Sections 32106 and 32155 of the Health and Safety Code as they apply to hospital districts, or by any provision of the Education Code pertaining to school districts and community college districts, no closed session may be held by any legislative body of any local agency.

(Added by Stats. 1987, c. 1320, § 6. Amended by Stats. 1988, c. 1346, § 1, effective September 26, 1988;

Stats. 1993, c. 1136 (A.B. 1426), § 20, operative April 1, 1994; Stats. 1993, c. 1137 (S.B. 36), § 20, operative April 1, 1994; Stats. 1993, c. 1138 (S.B. 1140), § 10, operative April 1, 1994.)

A:BROWNACT.BS
Current through the 1993 portion of the 1993-94 legislative session. Downloaded and checked: 1/94

STATE OF CALIFORNIA

COMMISSION ON STATE MANDATES
980 NINTH STREET, SUITE 300
SACRAMENTO, CA 95814
PHONE: (916) 323-3562
(916) 445-0278
E-mail: csminfo@csm.ca.gov

EXHIBIT K

March 16, 2001

Mr. Glen Everroad, Revenue Manager
City of Newport Beach
Revenue Division
P. O. Box 1768
Newport Beach, CA 92658-8915

And Affected Parties and State Agencies (See Enclosed Mailing List)

Re: Draft Staff Analysis/Hearing Schedule
Test Claim: *Brown Act Reform*
CSM-4469
City of Newport Beach, Claimant
Government Code Sections 54952, 54954.2, 54957.1 and 54957.7
Statutes of 1993, Chapters 1136, 1137, and 1138
Statutes of 1994, Chapter 32

Dear Mr. Everroad:

The draft staff analysis of this test claim has been completed and is enclosed for your review and comment. If there are no objections, the hearing on this test claim has been scheduled for Thursday, May 24, 2001.

Written Comments

Any party or interested person may file written comments on the draft staff analysis by Friday, April 20, 2001. You are advised that the Commission's regulations require comments filed with the Commission to be simultaneously served on other interested parties (on the mailing list), and to be accompanied by a proof of service on those parties. If you would like to request an extension of time to file comments, please refer to section 1183.01 (c) of the Commission's regulations.

Pre-Hearing Conference

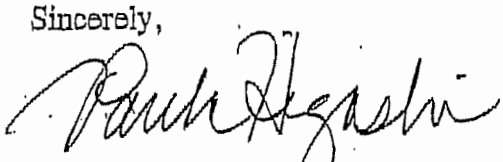
A pre-hearing conference may be scheduled if requested by any interested party. See Title 2, California Code of Regulations, section 1183.04 (the regulations).

Hearing

This test claim is tentatively set for hearing on Thursday, **May 24, 2001**, at 9:30 a.m. in Room 126 of the State Capitol, Sacramento, California. The final staff analysis will be issued on or about Friday, May 11, 2001. Please let us know in advance if you or a representative of your agency will testify at the hearing, and if other witnesses will also appear. If you would like to request postponement of the hearing, please refer to section 1183.01 (c) of the Commission's regulations.

An updated mailing list is attached. Please contact Ellen S. Fishman, Staff Counsel, at (916) 324-8224, if you have any questions regarding the above.

Sincerely,



PAULA HIGASHI
Executive Director

Encl. Draft Staff Analysis
Attachments (8)
Mailing List

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MAILED: 3/16/01 FAXED:
DATE: INITIAL: VS
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WORKING BINDER:

Hearing Date: May 24, 2001
File Number: CSM-4469
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Item #

Draft Staff Analysis (Dated March 15, 2001)

Government Code Section 54952, subdivisions (a) and (b)
Government Code Section 54954.2, subdivision (a)
Government Code Section 54957.1, subdivisions (a), (b), (c)
Government Code Section 54957.7, subdivisions (a), (b), (c)

Statutes of 1993, Chapters 1136 & 1137
Statutes of 1994, Chapter 32

City of Newport Beach, Claimant
Brown Act Reform

EXECUTIVE SUMMARY

STAFF WILL INSERT THE EXECUTIVE SUMMARY IN ITS FINAL ANALYSIS

Claimant
City of Newport Beach

Chronology

December 29, 1994	Test claim filed with the Commission on State Mandates (CSM) by County of Santa Clara.
May 26, 1995	Interested Party, Marin County Counsel submits comments in support of test claim.
June 1, 1995	Department of Finance submits comments in opposition to claim.
June 28, 1995	Claimant submits rebuttal to comments in opposition to claim.
October 5, 1995	Interested Parties, California Newspaper Publishers Assoc. and First Amendment Coalition submit comments in opposition to claim.
October 27, 1995	Senator Quentin Kopp submits comments in opposition to claim.
November 16, 1995	Claimant requests indefinite continuance (CSM approved 11/22/95).
September 9, 1998	Claimants (Kern High School District and County of Santa Clara) request that the portions of the test claim on *Brown Act Reform* (CSM–4469) addressing Government Code section 54952 specifically related to schoolsite councils be consolidated with the *School Site Councils* test claim (CSM-4501) and request that San Diego Unified School District be added as co-claimants to CSM-4501.
March 17, 2000	CSM notifies Claimant, County of Santa Clara, that test claim will be set for dismissal unless activated.
June 23, 2000	CSM notifies Claimant setting test claim for dismissal on 8/24/00.
August 7, 2000	City of Newport Beach requests substitution as test claimant in place of County of Santa Clara; requests hearing date.
September 25, 2000	Supplemental Filing by Claimant, City of Newport Beach.

Background

The test claim legislation, Government Code sections 54952, 54954.2, 54957.1 and 54957.7, requires the "legislative bodies" of local agencies[1] to comply with certain changes to the Ralph M. Brown Act (Gov. Code § 54950 et seq., hereafter referred to as the Brown Act or the Act).[2] Section 54952 clarifies and changes the definition of "legislative body"; section 54954.2 requires closed session items to be listed on the meeting agenda; section 54957.1 requires the reporting of closed session items after the closed session and the provision of closed session documents; and, section 54957.7 requires the disclosure of certain closed session items both prior to and after the closed session.

The California Legislature enacted the Brown Act in 1953 based on an Assembly Judiciary Committee Report regarding the "secret decisionmaking" of local governments. The Act

[1] As used in the Ralph M. Brown Act, "local agency" means a county, city, whether general law or chartered, city and county, town, school district, municipal corporation, district, political subdivision, or any board, commission, or agency thereof, or other local public agency. (Gov. Code, § 54951.)
[2] All further statutory references are to the California Government Code unless otherwise indicated.

declared the law's intent that deliberations as well as action of local agencies occur openly and publicly. It also represented the Legislature's determination of how the balance should be struck between public access to meetings of multi-member public bodies on the one hand and the need for confidential candor, debate, and information gathering on the other.[3] The underlying theme of the Brown Act recognizes that:

> The people [of this State], in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may retain control over the instruments they have created.[4]

Since the Brown Act was enacted, it has been amended regularly to expand the requirements of the Act and to clarify the "legislative bodies" to which the requirements of the Act apply. Numerous court cases and Attorney General Opinions have re-affirmed the Legislature's original intent to assure that deliberations and decisionmaking of local agencies be conducted in an open forum with full participation from the public.

Prior Test Claims

The Commission on State Mandates has previously determined two test claims on the Brown Act.

Open Meetings Act (CSM-4257)

On March 23, 1988, the Commission adopted the *Open Meetings Act* test claim that added Government Code sections 54954.2 and 54954.3 to the Brown Act.[5] Section 54954.2 required the "legislative bodies" of local agencies *for the first time* to prepare and post agendas for public meetings at least 72 hours prior to the scheduled meeting. In addition, the agenda was to contain a brief description of each item to be discussed. Local agencies were also prohibited from taking action on any item that was not on the agenda. Section 54954.3 required that each agenda provide the public with the opportunity to address the legislative body during the meeting.

Under CSM-4257, local agencies were eligible for reimbursement for the Brown Act requirements for the following types of legislative bodies: 1) the governing board, commission, directors or body of a local agency or any board or commission thereof, as well as any board, commission, committee, or other body on which officers of a local agency serve in their official capacity; 2) any board, commission, committee, or body which exercises authority delegated to it by the legislative body; and, 3) planning commissions, library boards, recreation commissions, and other *permanent* boards or commissions of a local agency composed of at least a quorum of the members of the legislative body. The Commission's Parameters and Guidelines for CSM-4257 specifically provided reimbursement for the

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[3] California Attorney General's Office, The Brown Act, Open Meetings for Local Legislative Bodies (1994)
[4] Government Code section 54950
[5] See Exhibit K, Statement of Decision, CSM-4257.

increased costs to prepare and post a single agenda 72 hours before a meeting of the legislative body of a local agency containing a brief general description of each item of business to be transacted or discussed.

School Site Councils and Brown Act Reform (CSM-4501)

The Brown Act came before the Commission again in test claim CSM-4501, *School Site Councils and Brown Act Reform*, filed by the Kern High School District, San Diego Unified School District, and the County of Santa Clara. This test claim was filed on Government Code section 54952 and Education Code section 35147 and addressed the application of the open meeting provisions of the Brown Act to specified schoolsite councils and advisory committees of school districts. On April 27, 2000, the Commission approved this test claim finding that Statutes of 1993, Chapter 1138 among other things, added Government Code section 54952, subdivision (a), which provided, in relevant part, that the term "legislative body" for purposes of the open meeting requirements of the Brown Act also included any local body created by state or federal statute.[6]

The Commission also found that Statutes of 1994, Chapter 239 removed certain school site councils and advisory committees from the full requirements of the Brown Act, but added Education Code section 35147, which imposed an abbreviated set of open meeting requirements on school site councils and advisory committees established as part of the following programs: School Improvement Program; Native American Indian Early Childhood Education Act; Chacon-Moscone Bilingual-Bicultural Education Act; School-Based Coordination Program; Compensatory Education Program; Migrant Education Program; Motivation and Maintenance Program; and the federal Indian Education Program.

The Commission's Parameters and Guidelines for CSM-4501 provided reimbursement for notice and agenda activities for school district's schoolsite councils and certain advisory committees.

Claimant's Contentions

The claimant contends that the test claim legislation imposes an increased level of service on local agencies.[7] The claimant asserts the following:

- Government Code section 54952, subdivisions (a), (b) and (c), as amended, impose a higher level of service on local agencies by expanding the definition of "legislative body" which is subject to the notice requirements of the Brown Act. The agenda preparation and posting requirements of section 54954.2 now apply to an increased number of entities such as standing committees, advisory bodies and other local bodies created by state or federal statute;

[6] See Exhibit L, Statement of Decision, CSM-4501 and portions of CSM-4469.
[7] See Exhibit A, page 10

- Government Code section 54954.2, subdivision (a), as amended, imposes a higher level of service on local agencies by expanding the notice requirements to include a description of each item to be discussed or transacted in closed session;

- Government Code sections 54957.1, subdivisions (a), (b) and (c) and 54957.7, subdivisions (a), (b) and (c), as amended, impose a higher level of service on local agencies by expanding the nature and extent of the required public reporting of action taken in closed sessions; and,

- These amendments require an increased level of service by local agencies, necessitating training for local agencies.[8]

Department of Finance Contentions

The Department of Finance (DOF) submitted comments on this test claim on June 1, 1995.[9] Their contention is that, while Chapters 1136 and 1137 (agenda and notice requirements and closed session requirements) may have resulted in reimbursable state-mandated costs pertaining to certain notification requirements, they may also have resulted in offsetting savings to local governments by specifying that agenda descriptions be restricted to 20 or less words. In addition, the DOF contends that the intent of Chapter 1138 (definition of legislative body) was to provide cost savings to local governments by simplifying and clarifying the Brown Act requirements. Finally, regarding Chapter 32, the DOF states that this is essentially clean-up legislation for the other three named chapters and does not affect the scope of the changes made by those chapters. Consequently, it is the DOF's belief that there are no reimbursable state-mandated costs in that legislation.[10]

Interested Party Contentions

The County Counsel of Marin County submitted comments in support of the test claim on May 30, 1995.[11] Their contention is that the 1993 and 1994 amendments to the Brown Act require local agencies to perform an increased level of service resulting in increased state mandated costs for reporting requirements, record keeping, and other County staff responsibilities. In addition, the County claims that these provisions have resulted in an increased level of service to advisory bodies, which are now subject to the Brown Act amendments.

Interested Person Contentions

Former Senator Quentin Kopp, author of the majority of the Brown Act legislation, submitted comments in opposition to the test claim.[12] His contention is that the amendments to the Brown

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[8] See Exhibit J

[9] See Exhibit B

[10] Regarding Chapter 32, the test claim submitted by claimant stated: "The provisions of Chapter 32, Statutes of 1994, did not effect the scope of the state mandated activities and costs described in this test claim."

[11] See Exhibit C

[12] See Exhibit F

Act were proposed to reduce the costs to local agencies for posting agendas, making oral statements regarding closed session items, and providing a description of the items on the agenda.

The California Newspaper Publishers Association submitted comments in opposition to the test claim.[13] Their contention is that the changes to the Brown Act do not create a state mandated local program because the amendments were intended by the legislature to be instructive, not to expand the open meeting requirements. In particular, the clarifying language "A brief general description of an item generally need not exceed 20 words" was added to radically reduce the costs of creating and posting agendas.

The First Amendment Coalition submitted comments in opposition to the test claim adopting the arguments and conclusion of the California Newspaper Publishers Association.[14]

Staff Analysis

In order for a statute, which is the subject of a test claim, to impose a reimbursable state mandated program under article XIII B, section 6 of the California Constitution and Government Code section 17514, the statutory language must direct or obligate an activity or task upon local governmental entities. If the statutory language does not mandate or require local agencies to perform a task, then compliance with the test claim statute is within the discretion of the local agency and a reimbursable state mandated program does not exist. Further, the required activity or task must be new or it must create an increased or higher level of service over the former required level of service. The California Supreme Court has defined the word "program," subject to article XIII B, section 6 of the California Constitution, as an activity that carries out the governmental function of providing a service to the public, or laws which, to implement a state policy, impose unique requirements on local governments and do not apply generally to all residents and entities in the state. To determine if the "program" is new or imposes a higher level of service, a comparison must be undertaken between the test claim legislation and the legal requirements in effect immediately before the enactment of the test claim legislation. Finally, the newly required activity or increased level of service must impose "costs mandated by the state."[15]

The test claim legislation requires the performance of certain activities related to public meetings by specified "legislative bodies" of local agencies. These local governmental bodies are carrying out a basic governmental function of making decisions regarding the operations of local agencies that provide services to the public. The mandatory compliance with the Brown Act is unique to local agencies; it is a peculiarly governmental function that does not apply to all residents and entities in the state. Therefore, staff finds that compliance by local agencies

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[13] See Exhibit E.

[14] See Exhibit E

[15] *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 56; *Carmel Valley Fire Protection Dist. v. State of California* (1987) 190 Cal.App.3d 521, 537; *City of Sacramento v. State of California* (1990) 50 Cal.3d 51, 66; *Lucia Mar Unified School Dist. v. Honig* (1988) 44 Cal.3d 830, 835; Government Code section 17514.

with the open meeting requirements of the test claim legislation constitutes a "program" within the meaning of article XIII B, section 6 of the California Constitution.

The Commission must continue its inquiry to determine if the test claim legislation constitutes a new program or higher level of service and imposes "costs mandated by the state" upon local agencies. Claimant contends that the test claim legislation imposes a higher level of service upon local agencies because the agenda preparation and posting requirements apply to an increased number of entities now defined as "legislative bodies" such as standing committees, advisory bodies and other local bodies created by state or federal statute. Claimant also contends that the test claim legislation requires new activities regarding the inclusion of closed session items on agendas and the reporting of closed session items both prior to and after the closed session. The analysis of these issues for the statutes at issue is discussed below.

Issue 1: Does the test claim legislation impose a new program or higher level of service upon local governmental bodies within the meaning of article XIII B, section 6 of the California Constitution?

Issue 1 is presented in two parts: Part One discusses the entities subject to the open session notice and agenda requirements and Part Two discusses the closed session requirements for all legislative bodies.

Part One: Entities Subject to Open Session Notice and Agenda Requirements

The notice and agenda provisions of the Brown Act are found in Government Code section 54954.2. Under the test claim legislation, this section requires the "legislative bodies" of local agencies to post a notice and agenda containing a brief general description of each item to be discussed at the meeting. Section 54954.2 states in relevant part the following:

> At least 72 hours before a regular meeting, the legislative body of a local agency, or its designee, shall post an agenda containing a brief general description of each item of business to be transacted or discussed at the meeting, including items to be discussed in closed session. A brief general description of an item generally need not exceed 20 words.

New Entities Subject to the Notice & Agenda Requirements

Government Code section 54952 describes the "legislative bodies" required to comply with the Brown Act. The test claim legislation substantially amended section 54952 to clarify and describe the "legislative bodies" in greater detail. Section 54952 now defines "legislative body" in relevant part as follows:

> (a) The governing body of a local agency or any other local body created by state or federal statute.
>
> (b) A 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. However, advisory committees,

composed solely of the members of the legislative body which are less than a quorum of the legislative body are not legislative bodies, except that standing committees of a legislative body, irrespective of their composition, which have a continuing subject matter jurisdiction, or a meeting schedule fixed by charter, ordinance, resolution, or formal action of a legislative body are legislative bodies for purposes of this chapter.

Thus, the "legislative bodies" required to comply with the Brown Act now include the following:

- The governing body of a local agency;
- A local body created by state or federal statute;
- A permanent decisionmaking body created by formal action;
- A temporary decisionmaking body created by formal action;
- A permanent advisory body created by formal action (except an advisory body with less than a quorum of the members);
- A temporary advisory body created by formal action (except an advisory body with less than a quorum of the members); and,
- Standing committees, irrespective of their composition with a continuing subject matter jurisdiction, or a meeting schedule fixed by formal action.

Under prior law, the "legislative body" of a local agency required to comply with the Brown Act was defined in several statutory provisions. Section 54952 defined the governing body of a local agency or any board or commission thereof, and any body on which officers of a local agency serve in their official capacity as members; section 54952.2 defined any multimember body with delegated authority of the legislative body; section 54952.3 defined any advisory body created by formal action and included both reduced notice requirements and an exemption from all Brown Act requirements for a committee composed solely of members of the governing body of a local agency which are less than a quorum of such governing body; and, section 54952.5 defined planning commissions, library boards, recreation commissions, and other permanent boards or commissions of a local agency as "legislative bodies."

While amending section 54952, the test claim legislation also repealed sections 54952.2, 54952.3 and 54952.5. Based on the following analysis, staff finds that the test claim legislation created the following two new "legislative bodies" required to comply with the provisions of the Brown Act including the notice and agenda requirements of section 54954.2:

- <u>Any local body created by state or federal statute</u>

This body was not identified as a "legislative body" in prior law. Thus, under the test claim legislation, it *is* a new body required to comply with the open session notice and agenda requirements imposed by Government Code section 54954.2; and,

- Standing committees with less than a quorum of the governing body which have a continuing subject matter jurisdiction, or a meeting schedule fixed by formal action.

The test claim legislation defines legislative body to include "standing committees of a legislative body, *irrespective of their composition*, which have a continuing subject matter jurisdiction, or a meeting schedule fixed by formal action." Historically, standing committees were permanent committees that met regularly and considered subjects of a particular class.[16] Their composition, however, varied depending on the body that created them.

Prior to the enactment of the test claim legislation, the various statutory provisions regarding the application of the Brown Act created much confusion as to whether committees, regardless of their composition, fell under the requirements of the Act. However, numerous judicial decisions and opinions of the Attorney General found that the Brown Act essentially governed *all* meetings of a *quorum* of the legislative body of a local agency when the public's business was discussed.[17]

In 1993, just prior to the passage of the test claim legislation, this issue was finally resolved in the *Freedom Newspaper* case.[18] In *Freedom*, a newspaper publisher sought a writ of mandate to compel a county employees retirement system board of directors to allow the public to attend meetings of the board's operations committee. The committee was advisory in nature and was composed of four members of the nine-member board. The Supreme Court held that since the operations committee was an advisory committee composed solely of board members *numbering less than a quorum of the board*, the committee was not a "legislative body" pursuant to the provisions of Government Code section 54952.3, and was therefore excluded from the open meeting requirements of the Brown Act. The *Freedom* Court agreed with a long-standing 1968 Attorney General Opinion that stated: "[w]e have consistently concluded that committees composed of *less than a quorum of the legislative body creating them and not established on a permanent basis for a continuing function are not subject to the open meeting requirements of that Act.*" (Emphasis supplied).[19]

Thus, while standing committees with less than a quorum of the members of the legislative body were exempt from the requirements of the Brown Act under prior law, the test claim legislation now defines "standing committees with less than a quorum of the members of the legislative body" as new bodies required to comply with the open session notice and agenda requirements imposed by section 54954.2.

Regarding the other five bodies identified in the test claim legislation, staff finds they are not new "legislative bodies" because they were identified in prior law as follows:

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[16] 79 Ops.Cal.Atty.Gen. 69, 72 (1996)
[17] Ibid., at page 69, fn 3
[18] *Freedom Newspapers, Inc., v. Orange County Employees Retirement System Board of Directors* (1993) 6 Cal.4th 821, 832-833
[19] Ibid, at page 828-829

- Governing body of a local agency

This body is identified as a "legislative body" in prior law and thus it is not a new body;

- Permanent decisionmaking committee or board created by formal action

This body is identified under prior law in section 54952.2 as: "...any board, commission, committee, or similar multimember body which exercises any authority of a legislative body of a local agency delegated to it by that legislative body." A body with delegated authority is empowered to make decisions on behalf of the full body. Thus, a permanent decisionmaking committee or board created by formal action is identical to a "permanent decisionmaking body" and therefore is not a new body;

- Temporary decisionmaking committee or board created by formal action

This body is also identified under prior law in section 54952.2 because this section states that *any* committee that exercises the authority of the legislative body is a "legislative body." A decisionmaking committee, even if temporary, operates as a body with delegated authority. Thus, a temporary decisionmaking committee or board created by formal action is a "legislative body" under prior law;

- Permanent advisory committee or board created by formal action (except less than a quorum of the members).

This body is identified under prior law in sections 54952.3 and 54952.5. Section 54952.3 defined "legislative body" as *any* advisory committee created by formal action. In addition, section 54952.3 provides an exception for any advisory committee composed solely of less than a quorum of the members of the legislative body. Section 54952.5 also defined "legislative body" to include permanent boards or commissions of a local agency. Thus, permanent advisory committees or boards created by formal action (except less than a quorum of the members) were "legislative bodies" under prior law;

- Temporary advisory committee or board created by formal action (except less than a quorum of the members)

This body is identified under prior law in section 54952.3 as discussed above, and thus, were "legislative bodies" under prior law; and,

- Standing committees comprised of a quorum of the members of the legislative body

These bodies are also defined as a "legislative body" under prior law. Standing committees, by definition, are permanent committees that regularly consider a particular subject matter. When comprised of a quorum of the members of the legislative body, these committees fall under the definition of a committee with delegated authority since they are empowered to make decisions on behalf of the legislative body.[20] In addition, standing committees comprised of a quorum of the members fall under the definition of "legislative body" in former Government Code sections 54952.3 and 54952.5 (i.e. permanent advisory committees of a local agency).

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[20] Former Government Code section 54952.2 stated in relevant part as follows:

> "...legislative body also means any board, commission, committee, or similar multimember body which exercises any authority of a legislative body of a local agency delegated to it by that legislative body."

Thus, standing committees composed of at least a quorum of the members of the legislative body are not new bodies under the test claim legislation. The chart below provides a summary of staff's findings:

Test Claim Legislation Section 54952	Prior Law Sections 54952, 54952.3, 54952.3, 54952.5
Governing body	§ 54952 Governing body
Local body created by state or federal statute	NEW
Permanent decisionmaking committee or board created by formal action	§ 54952.2 Any board, committee, body that exercises any authority of a legislative body *delegated* to it by the legislative body
Temporary decisionmaking committee or board created by formal action	§ 54952.2
Permanent advisory committee or board created by formal action (except less than a quorum of the members)	§ 54952.3 *Any* advisory committee created by formal action (except less than a quorum of the members) § 54952.5 Planning commissions, library boards, recreation commission, *and other permanent* boards or commissions of a local agency
Temporary advisory committee or board created by formal action (except less than a quorum of the members)	§ 54952.3
Standing committees, irrespective of their composition (i.e. even those with less than a quorum of the members of the legislative body) with a continuing subject matter jurisdiction, or a meeting schedule fixed by formal action	NEW - Standing committees with less than a quorum of the members. However, standing committees with a quorum of members of the legislative body are covered in prior law through §§ 54952.2, 54952.3 and 54952.5.

Based on the foregoing, staff finds that Government Code sections 54952 and 54954.2, subdivision (a) of the test claim legislation constitute a new program or higher level of service pursuant to article XIII B, section 6 of the California Constitution for two new bodies (local bodies created by state or federal statute and standing committees with less than a quorum of the members of the legislative body with a continuing subject matter jurisdiction, or a meeting schedule fixed by formal action) to prepare and post an agenda of their meetings 72 hours prior to the meeting which contains a brief general description of each item to be transacted or discussed at the meeting.

Advisory Bodies Subject to the Notice & Agenda Requirements

In the *Open Meetings Act* (CSM-4257) test claim, the Commission determined that Government Code section 54954.2 imposed a reimbursable state mandated program upon "all legislative bodies," as defined, to post a notice and agenda 72 hours prior to the meeting of a legislative body. That section also required that the notice and agenda contain a brief general description of all items to be discussed at the meeting. Government Code section 54954.2 was enacted in 1986 and applies to all legislative bodies, which by definition included advisory bodies before the enactment of the test claim legislation.

However, prior law (former Government Code section 54952.3, which was enacted in 1968) also *exempted* advisory bodies from the regular notice and agenda provisions of the Act and held them to significantly reduced notice requirements:

> Meetings of such advisory commissions, committees or bodies...shall be open and public, and notice thereof must be delivered personally or by mail at least 24 hours before the time of such meeting to each person who has requested, in writing, notice of such meeting.
>
> If the advisory commission, committee or body elects to provide for the holding of regular meetings, it shall provide by bylaws, or by whatever other rule is utilized by that advisory body for the conduct of its business, for the time and place for holding such regular meetings. *No other notice of regular meetings is required.* (Emphasis added.)

Thus, prior law, as specified in sections 54954.2 and 54952.3, imposed conflicting duties on advisory bodies. If an advisory body complied with section 54952.3 by not preparing and posting an agenda, did it violate section 54954.2? In other words, which statute constitutes prior law with respect to the duties imposed on advisory bodies?

Sutherland Statutory Construction, a treatise on statutory construction, explains that whenever the legislature enacts a provision, it has in mind previous statutes relating to the same subject matter. In the absence of any express repeal or amendment, the new provision is presumed to be in accord with the legislative policy embodied in those prior statutes. When a conflict exists, the more specific statute controls over the more general one.[21] However, where the conflict is irreconcilable, the statute that is the more recent of the two conflicting statutes prevails.[22]

In this case, staff finds the express language of section 54952.3 is more specific than the provisions of section 54954.2 and thus, prevails as prior law. Section 54952.3 *specifically* identified advisory commissions and committees as legislative bodies that were not required to prepare and post an agenda. They were only required to deliver notice of their meetings 24 hours prior to the meeting and to provide in their bylaws for the time and place of holding regular meetings. In contrast, section 54954.2 *generally* referred to "the legislative body of

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[21] See also *People v. Tanner* (1979) 24 Cal.3d 514, 521, where the California Supreme Court states that "[a] specific provision relating to a particular subject will govern a general provision, even though the general provision standing alone would be broad enough to include the subject to which the specific provision relates."

[22] 2B, Sutherland, Statutory Construction (5th Ed. 1994) § 51.02.

the local agency, or its designee," when describing the bodies to which the notice requirements applied. Thus, by the repeal of section 54952.3 by the test claim legislation, advisory bodies are now subject, for the first time, to the full notice and agenda requirements specified in section 54954.2, subdivision (a), of the Brown Act.

Therefore, staff finds that Government Code section 54954.2, subdivision (a), constitutes a new program or higher level of service pursuant to article XIII B, section 6 of the California Constitution for all permanent and temporary advisory bodies created by formal action (except less than a quorum of the members of the legislative body) to comply with the full notice and agenda requirements of the Brown Act by preparing and posting an agenda of their meetings 72 hours prior to the meeting which contains a brief general description of each item to be transacted or discussed at the meeting.

Part Two: Closed Session Requirements

Under prior law, the legislative body was required to state the reasons for a closed session either before or after the closed session and to publicly report the action and vote taken in closed session regarding the appointment, employment or dismissal of a public employee. The test claim legislation added four new closed session requirements that apply to all "legislative bodies" including those newly defined under the test claim legislation.

Notice and Agenda Requirements

The test claim legislation amended the notice and agenda provisions to include closed session items on the agenda. Section 54954.2 states, in relevant part, the following:

> At least 72 hours before a regular meeting, the legislative body of a local agency, or its designee, shall post an agenda containing a brief general description of each item of business to be transacted or discussed at the meeting, including items to be discussed in closed session. A brief general description of an item generally need not exceed 20 words. (Underlined portion indicates amendments to this section by the test claim legislation).

Under prior law, the legislative body was only required to state the general reason or reasons for the closed session either prior to or after holding the closed session and if desired, cite the statutory authority under which the session was being held.[23] The test claim legislation now requires a brief general description of closed session items to be included on the agenda for the meeting.

Thus, staff finds that Government Code section 54954.2, subdivision (a), of the test claim legislation constitutes a new program or higher level of service pursuant to article XIII B, section 6 of the California Constitution for all "legislative bodies" defined in Government Code section 54952 to provide a brief general description of all items to be discussed in closed session on the agenda of the meeting.

[23] Former Government Code section 54957.7

Prior Disclosure Requirements

Under prior law, section 54957.7 only required a legislative body, prior to *or* after the closed session, to state the general reason for the closed session and to include the appropriate statutory authority, if desired. The test claim legislation amended this section to provide, in relevant part, as follows:

> (a) Prior to holding any closed session, the legislative body of the local agency shall disclose, in an open meeting, the item or items to be discussed in the closed session. The disclosure may take the form of a reference to the item or items as they are listed by number or letter on the agenda.

The test claim legislation now requires all legislative bodies to disclose each item to be discussed in closed session prior to the start of the closed session.

Accordingly, staff finds that Government Code section 54957.7, subdivision (a), of the test claim legislation constitutes a new program or higher level of service pursuant to article XIII B, section 6 of the California Constitution for all "legislative bodies" as defined in Government Code section 54952 to disclose, prior to holding a closed session, each item to be discussed in closed session.

Subsequent Reporting Requirements

Subdivision (b) was added to section 54957.7 by the test claim legislation and provides as follows:

> (b) After any closed session, the legislative body shall reconvene into open session prior to adjournment and shall make any disclosures required by Section 54957.1 of action taken in the closed session.

The test claim legislation [Gov. Code § 54957.1, subdivision (a)] added an extensive list of items requiring the legislative body to publicly report, either orally or in writing,[24] the actions and votes taken in closed session for the following items:

"(1) Approval of an agreement concluding real estate negotiations pursuant to Section 54956.8 shall be reported after the agreement is final, as specified below:

> (A) If its own approval renders the agreement final, the body shall report that approval and the substance of the agreement in open session at the public meeting during which the closed session is held.
> (B) If final approval rests with the other party to the negotiations, the local agency shall disclose the fact of that approval and the substance of the agreement upon inquiry by any person, as soon as the other party or its agent has informed the local agency of its approval.

[24] Government Code section 54957.1(b) provides in relevant part the following:
"Reports that are required to be made pursuant to this section may be made orally or in writing."

(2) Approval given to its legal counsel to defend, or seek or refrain from seeking appellate review or relief, or to enter as an amicus curiae in any form of litigation as the result of a consultation under Section 54956.9 shall be reported in open session at the public meeting during which the closed session is held. The report shall identify, if known, the adverse party or parties and the substance of the litigation. In the case of approval given to initiate or intervene in an action, the announcement need not identify the action, the defendants, or other particulars, but shall specify that the direction to initiate or intervene in an action has been given and that the action, the defendants, and the other particulars shall, once formally commenced, be disclosed to any person upon inquiry, unless to do so would jeopardize the agency's ability to effectuate service of process on one or more unserved parties, or that to do so would jeopardize its ability to conclude existing settlement negotiations to its advantage.

(3) Approval given to its legal counsel of a settlement of pending litigation, as defined in Section 54956.9, at any stage prior to or during a judicial or quasi-judicial proceeding shall be reported after the settlement is final, as specified below:

(A) If the legislative body accepts a settlement offer signed by the opposing party, the body shall report its acceptance and identify the substance of the agreement in open session at the public meeting during which the closed session is held.
(B) If final approval rests with some other party to the litigation or with the court, then as soon as the settlement becomes final, and upon inquiry by any person, the local agency shall disclose the fact of that approval, and identify the substance of the agreement.

(4) Disposition reached as to claims discussed in closed session pursuant to Section 54956.95 shall be reported as soon as reached in a manner that identifies the name of the claimant, the name of the local agency claimed against, the substance of the claim, and any monetary amount approved for payment and agreed upon by the claimant.

(5) Action taken to appoint, employ, dismiss, accept the resignation of, or otherwise affect the employment status of a public employee in closed session pursuant to Section 54957 shall be reported at the public meeting during which the closed session is held. Any report required by this paragraph shall identify the title of the position. The general requirement of this paragraph notwithstanding, the report of a dismissal or of the nonrenewal of an employment contract shall be deferred until the first public meeting following the exhaustion of administrative remedies, if any.

(6) Approval of an agreement concluding labor negotiations with represented employees pursuant to Section 54957.6 shall be reported after the agreement is final and has been accepted or ratified by the other party. The report shall identify the item approved and the other party or parties to the negotiation."

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Under prior law, the sole reporting requirement for closed sessions under section 54957.1 was to report at the current or a subsequent meeting, any action taken and any roll call vote *to appoint, employ, or dismiss a public employee*.[25] Other issues that could be discussed in closed session such as licensing matters, real estate negotiations or pending litigation did not require any reporting in a public session.[26] The test claim legislation now requires the legislative body to reconvene into public, open session and report the actions and votes taken on the five new items listed above which were discussed in closed session.

Therefore, staff finds that Government Code sections 54957.7, subdivision (b), and 54957.1, subdivision (a), of the test claim legislation constitute a new program or higher level of service pursuant to article XIII B, section 6 of the California Constitution for all bodies defined as "legislative bodies" in Government Code section 54952 to reconvene in public session prior to adjournment and report the five items identified in section 54957.1, subdivision (a) (1-4, 6) which were discussed in closed session.

Documentation Requirements

Subdivisions (b) and (c) of section 54957.1 of the test claim legislation concern the provision of documentation from closed sessions to members of the public. This section provides, in relevant part, as follows:

> (b)...The legislative body shall provide to any person who has submitted a written request to the legislative body within 24 hours of the posting of the agenda, or to any person who has made a standing request for all documentation as part of a request for notice of meetings pursuant to Section 54954.1 or 54956, if the requester is present at the time the closed session ends, copies of any contracts, settlement agreements, or other documents that were finally approved or adopted in the closed session. If the action taken results in one or more substantive amendments to the related documents requiring retyping, the documents need not be released until the retyping is completed during normal business hours, provided that the presiding officer of the legislative body or his or her designee orally summarizes the substance of the amendment for the benefit of the document requester or any other person present and requesting the information.
>
> (c) The documentation referred to in paragraph (b) shall be available to any person on the next business day following the meeting in which the actions referred to is taken or, in the case of substantial amendments, when any necessary retyping is complete.

Prior to the test claim legislation, section 54957.1 did not address writings. The subject of 'writings' was addressed in section 54957.5 which provided for the inspection and distribution of certain writings that were public records under the California Public Records Act.

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[25] Former section 54957.1 stated the following:

> The legislative body of any local agency shall publicly report at the public meeting during which the closed session is held or at its next public meeting any action taken, and any roll call vote thereon, to appoint, employ, or dismiss a public employee arising out of any closed session of the legislative body.

[26] See Government Code sections 54956.7, 54956.8, 54956.9, 54957

However, subdivision (e) of section 54957.5 provided that, "(T)his section shall not be construed to be applicable to any writings solely because they are properly discussed in a closed session of a legislative body of a local agency...". Thus, while prior law provided for the inspection and provision of certain writings distributed to the legislative body, it did not require the distribution of documentation from closed sessions to members of the public.

Accordingly, staff finds that Government Code section 54957.1, subdivisions (b) and (c), of the test claim legislation constitutes a new program or higher level of service pursuant to article XIII B, section 6 of the California Constitution for all bodies defined as "legislative bodies" in Government Code section 54952 to provide copies of documentation from the closed session within the specified timelines.

Issue 2: **Does the test claim legislation impose costs mandated by the state pursuant to article XIII B, section 6 of the California Constitution and Government Code section 17514?**

The remaining issue is whether there are increased costs mandated by the state. Government Code section 17514 provides in relevant part the following:

> Costs mandated by the state" means any *increased costs* which a local agency or school district is required to incur after July 1, 1980, as a result of any statute enacted on or after January 1, 1975...which mandates a new program or higher level of service within the meaning of Section 6 of Article XIII B of the California Constitution. (Emphasis added.)

In addition, section 17556 provides in relevant part the following:

> The commission shall not find costs mandated by the state, as defined in Section 17514, in any claim submitted by a local agency or school district, if, after a hearing, the commission finds that:
>
> (e) The statute or executive order provides for offsetting savings to local agencies or school districts which result in no net costs to the local agencies or school districts, or includes additional revenue that was specifically intended to fund the costs of the state mandate in an amount sufficient to fund the cost of the state mandate.

Claimant has submitted a declaration to support their contention that the test claim legislation has resulted in an increase in costs incurred by several County departments. Steve Conrad, SB 90 Coordinator for the County of Santa Clara declared on December 28, 1994 that an additional $560 will be incurred per year by Santa Clara county to include closed session items on the agenda, and that an additional $2,200 will be incurred per year by Santa Clara county to record closed session discussions in order to report in open session the items discussed in closed session, and that an additional $6,300 will be incurred per year by Santa Clara county to prepare and post an agenda for the new bodies defined as "legislative bodies" in the test claim legislation.

The Department of Finance contends that while Chapters 1136 and 1137 may have resulted in reimbursable state-mandated activities pertaining to certain notification requirements, these chapters may also result in offsetting savings to local governments by specifying that agenda descriptions be restricted to 20 or less words. The Department also contends that the test claim legislations result in cost savings to local governments by simplifying and clarifying the Brown Act. The Department did not comment on the new closed session requirements of the test claim legislation.

In reviewing the language of the test claim legislation, there is no language that provides for offsetting savings resulting in *no* net costs to the claimants, nor does the test claim legislation include any additional revenue specifically intended to fund the mandate. While the Department of Finance contends that the test claim statutes may result in offsetting savings to the claimants by limiting the agenda descriptions to "20 words or less", staff finds that the language of the test claim legislation does not support this conclusion. Nor has the Department provided any documentary evidence to support their contention. Former Senator Kopp contends that the legislative intent of these amendments was to simplify and clarify the Brown Act. However, no documentary evidence has been provided to support this contention.

Therefore, staff finds that the test claim legislation, which requires the legislative bodies of local agencies to perform a number of additional activities in relation to the open meeting requirements of the Brown Act, imposes costs mandated by the state within the meaning of article XIII B, section 6 of the California Constitution and Government Code section 17514.

Conclusion

Based on the foregoing, staff concludes that the test claim legislation (Government Code sections 54952, 54954.2, 54957.1, and 54957.7) imposes a reimbursable state-mandated program upon local governments within the meaning of article XIII B, section 6 of the California Constitution and Government Code section 17514 for the following activities:

1) **Open Session Requirements**

Activity	Applies To
To prepare and post an agenda at least 72 hours before a regular meeting containing a brief general description which need not exceed 20 words, of each item of business to be transacted or discussed at the meeting. [Gov. Code § 54954.2, subd. (a)]	Local bodies created by state or federal statute. Standing Committees with less than a quorum of members of the legislative body that has a continuing subject matter jurisdiction or a meeting schedule fixed by formal action. Permanent & Temporary Advisory Bodies (except bodies of less than a quorum of the members of the legislative body).

2) Closed Session Requirements

Activity	Applies To
To include a brief general description on the agenda that need not exceed 20 words of all items to be discussed in closed session. [Gov. Code § 54954.2, subd. (a)]	All "legislative bodies"
To disclose in an open meeting, prior to holding any closed session, each item to be discussed in the closed session. [Gov. Code § 54957.7, subd. (a)]	All "legislative bodies"
To reconvene in open session prior to adjournment and report the actions and votes taken in closed session for the five items identified in Government Code section 54957.1; subdivision (a)(1-4, 6). [Gov. Code § 54957.7, subd. (b)]	All "legislative bodies"
To provide copies of closed session documents as required. [Gov. Code § 54957.1, Subd. (b) and (c)]	All "legislative bodies"

Staff further concludes that all other statutes and code sections included in this test claim do not constitute a reimbursable state-mandated program.[27]

Staff Recommendation

Therefore, staff recommends that the Commission approve this test claim as specified above.

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[27] In their Supplemental Filing, claimant (City of Newport Beach) discusses other statutes [Government Code §§ 54952.1, 54956.9, subdivision (c), 54957.6, subdivision (b), 54 954, subdivision (d)] that have not been identified in the original test claim filing and have not been amended in by the claimant. Therefore, staff has not analyzed these statutes in this Staff Analysis. Government Code section 17557 provides in relevant part the following:

> (c) A test claim shall be submitted on or before June 30 following a fiscal year in order to establish eligibility for reimbursement for that fiscal year. The claimant may thereafter amend the test claim at any time prior to a commission hearing on the claim without affecting the original filing date as long as the amendment substantially relates to the original test claim.

List Date: 03/16/2001 Mailing Information

Mailing List

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1136/93, 1137/93, 1138/93, 32/94

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im Number CSM-4469 Claimant County of Newport Beach

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1136/93, 1137/93, 1138/93, 32/94

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Claim Number CSM-4469 **Claimant** County of Newport Beach

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1136/93, 1137/93, 1138/93, 32/94
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im Number CSM-4469 Claimant County of Newport Beach

54952, 54954.2, 54957.1, and 54957.7

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4

Claim Number CSM-4469 **Claimant** County of Newport Beach

Subject 54952, 54954.2, 54957.1, and 54957.7
1136/93, 1137/93, 1138/93, 32/94
Brown Act Reform

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April 24, 2001

RECEIVED
APR 25 2001
COMMISSION ON
STATE MANDATES

Ms. Paula Higashi
Executive Director
Commission on State Mandates
980 Ninth Street, Suite 300
Sacramento, California 95814

Re: Comments on Draft Staff Analysis
Brown Act Reform, CSM 4469
City of Newport Beach, Claimant
Government Code Sections 54952, 54954.2, 54957.1, and 54957.7
Statutes of 1994, Chapter 32, et al.

Dear Ms. Higashi:

The Commission on State Mandates released its Draft Staff Analysis for the *Brown Act Reform* Test Claim filed by the City of Newport Beach on March 16, 2001. The Draft Staff Analysis finds that the test claim legislation has imposed numerous reimbursable state-mandated activities upon local government and "legislative bodies." The analysis breaks down the reimbursable activities as pertaining to "open" and "closed" session requirements. While my office agrees with the overall analysis and list of reimbursable activities, there are three points that need clarification.

Staff has identified five bodies as not being new legislative bodies under the test claim legislation and therefore excluded these bodies as claimable entities because "they were identified in prior law." We disagree with Staff's conclusion as it relates to "permanent decision making committees or boards created by formal action." Staff erroneously concludes that "a body with delegated authority is empowered to make decisions on behalf of the full body . . . thus, a permanent decision making committee or board created by formal action is identical to a "permanent decision making body" and therefore is not a new body." Staff's conclusion is predicated upon the assumption that the legislative body

of a local agency can only create a "permanent decision making board" which may exercise the authority of the body that created it. This assumption is incorrect. For example, when a school district approves a charter school (by formal action) it creates a permanent body with decision making body that exercises authority broader than that granted to the school district (a charter school is not controlled by the Education Code which circumscribes the actions of the school district that granted the charter). As such, we would argue that the Staff's analysis should be amended to recognize that both permanent and temporary decision making committees and boards created by formal action are "new legislative bodies" that are able to claim open meeting act costs if they follow the brown act.

Under the "Open Session Requirements" and "Closed Session Requirements" sections in the Conclusion, the first listed activity is unnecessarily narrow. Government Code section 54954.2, subdivision (a), cited as authority for these activities provides the following:

> "At least 72 hours before a regular meeting, the legislative body of the local agency, or its designee, shall post an agenda containing a brief general description of each item of business to be transacted or discussed at the meeting, including items to be discussed in closed session. A brief general description of an item *generally* need not exceed 20 words. . . ." (Emphasis added.)

Subdivision (a) does not limit the descriptor for an agenda item to 20 words or less as is outlined in the Conclusion section of the Draft Staff Analysis. Rather, the language provides that, *generally*, a brief description shall not exceed 20 words. However, there may be instances where more words are needed to provide the necessary description. Based on the language contained in subdivision (a), I suggest the following amendment to the activity listed in section 1) Open Session Requirements of the Conclusion:

> "To prepare and post an agenda at least 72 hours before a regular meeting containing a brief general description ~~which need not exceed 20 words,~~ of each item of business to be transacted or discussed at the meeting. <u>A brief general description generally need not exceed 20 words.</u> [Gov. Code, § 54954.2, subd. (a).]"

I also suggest the following amendment to the first activity listed in section 2) Closed Session Requirements of the Conclusion:

"To include a brief general description on the agenda ~~need not exceed 20 words~~ of all items to be discussed in closed session. A brief general description generally need not exceed 20 words." [Gov. Code, § 54954.2, subd. (a).]"

If you have any questions regarding these proposed amendments, please give me a call at (916) 646-1400.

Sincerely,

LAW OFFICES OF SPECTOR, MIDDLETON, YOUNG & MINNEY

Paul C. Minney (SSY)

PAUL C. MINNEY

C: Mailing List

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PROOF OF SERVICE

Test Claim Name: "Brown Act Reform"
Test Claim Number: CSM 4469

I, the undersigned, declare as follows:

I am employed in the County of Sacramento, State of California. I am 18 years of age or older and not a party to the within entitled cause; my business address is: 7 Park Center Drive, Sacramento, California 95825.

On **April 24, 2001**, I served the foregoing document(s) described as:

Comments on Draft Staff Analysis

on the following persons/parties in this action by placing a true and correct copy thereof enclosed in a sealed envelope(s) with postage thereon fully prepaid in the United States Mail as Sacramento, California:

Ms. Paula Higashi
Executive Director
Commission on State Mandates
980 Ninth Street, Suite 300
Sacramento, California 95814

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration was executed on April 24, 2001 at Sacramento, California.

Lisa L Yount
LISA E. YOUNT

TAB 1

THE BROWN ACT

OPEN MEETINGS FOR LOCAL LEGISLATIVE BODIES

1994

California Attorney General's Office

BEFORE THE
COMMISSION ON STATE MANDATES
STATE OF CALIFORNIA

Claim of: City of Los Angeles Claimant	No. CSM-4257 Chapter 641, Statutes of 1986 Government Code Sections 54954.2 and 54954.3 Open Meetings Act

DECISION

The attached Proposed Statement of Decision of the Commission on State Mandates is hereby adopted by the Commission on State Mandates as its decision in the above-entitled matter.

This Decision shall become effective on March 23, 1988.

IT IS SO ORDERED March 23, 1988.

Russell Gould, Chairperson
Commission on State Mandates

BEFORE THE
COMMISSION ON STATE MANDATES

Claim of: City of Los Angeles Claimant	No. CSM-4257 Government Code Sections 54954.2 and 54954.3 Chapter 641, Statutes of 1986 Open Meetings Act

PROPOSED DECISION

This claim was heard by the Commission on State Mandates (commission) on October 22, 1987, in Sacramento, California, during a regularly scheduled meeting. Louis Chappuie appeared on behalf of the City of Los Angeles. James Apps appeared on behalf of the Department of Finance. There were no other appearances.

Evidence both oral and documentary having been introduced, the matter submitted, and vote taken, the commission finds:

I.

NOTE

1. The finding of a reimbursable state mandate does not mean that all increased costs claimed will be reimbursed. Reimbursement, if any, is subject to commission approval of parameters and guidelines for reimbursement of the claim, and a statewide cost estimate; a specific appropriation by the Legislature for such purpose; a timely-filed claim for reimbursement; and subsequent review of the claim by the State Controller.

II.

FINDINGS AND CONCLUSIONS

1. The test claim of the City of Los Angeles was filed with the Commission on State Mandates on April 1, 1987.

2. The subject of the claim is Chapter 641, Statutes of 1986, Government Code Sections 54954.2 and 54954.3.

3. Chapter 641, Statutes of 1986 added Sections 54954.2 and 54954.3 to the Government Code to require the legislative body of a local agency to post an agenda containing a brief general description of each item of business to be transacted or discussed at a regular meeting, and would prohibit any action to be taken, as defined, on any item not appearing on the posted agenda. Additionally, this statute would require that every agenda for regular meetings provide an opportunity for members of the public to directly address the legislative body on items of interest to the public that are within the subject matter jurisdiction of the legislative body.

4. A higher level of service is now required of the legislative body of a local agency by Chapter 641, Statutes of 1986, Government Code Sections 54954.2 and 54954.3.

5. Government Code Section 17514 defines the term "costs mandated by the state" as "any increased costs which a local agency ... is required to incur after July 1, 1980, as a result of any statute enacted on or after January 1, 1975, ... which mandates ... a higher level of service of an existing program within the meaning of Section 6 of Article XIII B of the California Constitution."

6. The City of Los Angeles has demonstrated that it has incurred increased costs which are costs mandated by the state.

7. None of the requisites for denying a claim, specified in Government Code Section 17556, subdivision (a), were established.

III.

DETERMINATION OF ISSUES

1. The Commission has the authority to decide this claim under the provisions of Government Code Section 17551.

2. Chapter 641, Statutes of 1986 imposed a reimbursable state mandate on the legislative body of a local agency. The City of Los Angeles has established that this statute imposed a higher level of service of an existing program by requiring the legislative body of a local agency to post an agenda containing a brief general description of each item of business to be transacted or discussed at a regular meeting, and would prohibit any action to be taken, as defined, on any item not appearing on the posted agenda. Additionally, this statute would require that every agenda for regular meetings provide an opportunity for members of the public to directly address the legislative body on items of interest to the public that are within the subject matter jurisdiction of the legislative body.

BEFORE THE
COMMISSION ON STATE MANDATES
STATE OF CALIFORNIA

IN RE TEST CLAIM ON: Government Code Section 54952 Statutes of 1993, Chapter 1138 Education Code Section 35147 Statutes of 1994, Chapter 239 Filed on December 26 1995 By Kern High School District, Claimant, and Consolidated on September 9, 1998 with Portions of CSM 4469 By Kern High School District, the San Diego Unified School District, and County of Santa Clara, Claimants	No. CSM 4501 and Portions of CSM 4469 Relating to Government Code Section 54952 *School Site Councils and Brown Reform Act* STATEMENT OF DECISION PURSUANT TO GOVERNMENT CODE SECTION 17500 ET SEQ.; TITLE 2, CALIFORNIA CODE OF REGULATIONS, DIVISION 2, CHAPTER 2.5, ARTICLE 7 *(Adopted on April 27, 2000)*

STATEMENT OF DECISION

This test claim was heard by the Commission on State Mandates (Commission) on February 27, 1997, March 27, 1997, November 30, 1999 and March 30, 2000.

The following parties appeared at the February 27, 1997 hearing: Mr. Ron Fontaine appeared on behalf of claimant, Kern High School District, Mr. Keith Petersen appeared on behalf of Education Mandated Cost Network, Mr. Leonard Kaye appeared on behalf of the County of Los Angeles, Mr. Allen Burdick appeared on behalf of California State Association of Counties, Ms. Marcia Faulkner appeared on behalf of the County of San Bernardino, Mr. James A. Cunningham appeared on behalf of San Diego Unified School District, Dr. Carol Berg appeared on behalf of Education Mandated Cost Network, Mr. James M. Apps appeared for the Department of Finance, and Mr. Frank Moore appeared on behalf of the Department of Finance, Education Systems Unit.

The following parties appeared at the March 27, 1997 hearing: Mr. Keith Petersen appeared on behalf of both claimant Kern High School District and Education Mandated Cost Network, Mr. Leonard Kaye appeared on behalf of the County of Los Angeles, Mr. Allen Burdick appeared on behalf of California State Association of Counties, Ms. Marcia Faulkner appeared on behalf of the County of San Bernardino, Mr. James A. Cunningham appeared on behalf of San Diego Unified School District, Dr. Carol Berg appeared on behalf of Education Mandated

Cost Network, Mr. James M. Apps appeared for the Department of Finance, and Mr. Tom Newton and Mr. James Ewert appeared on behalf of the California Newspaper Publishers' Association.

The following parties appeared at the November 30, 1999 hearing: Mr. Ron Fontaine appeared on behalf of the Kern High School District, Mr. Jim Cunningham appeared on behalf of co-claimant San Diego Unified School District, Dr. Carol Berg appeared on behalf of the Education Mandated Cost Network, Mr. Paul Minney of Girard and Vinson appeared on behalf of Mandated Cost Systems Inc., and Ms. Jeannie Oropeza and Mr. Pete Cervinka appeared on behalf of the Department of Finance.

At the March 30, 2000 hearing: Mr. Ron Fontaine appeared on behalf of the Kern County High School District, Mr. Jim Cunningham appeared on behalf of co-claimant San Diego Unified School District, Dr. Carol Berg appeared on behalf of the Education Mandated Cost Network, Mr. Paul Minney of Girard and Vinson appeared on behalf of Mandated Cost Systems, Inc., and Ms. Jeannie Oropeza and Ms. Leslie Lopez appeared on behalf of the Department of Finance.

The Commission heard and decided this test claim on March 30, 2000, during a regularly scheduled hearing.

The law applicable to the Commission's determination of a reimbursable state mandated program is Government Code section 17500 et seq., article XIII B, section 6 of the California Constitution and related case law.

The Commission, by a vote of 4-2, approved this test claim.

BACKGROUND AND FINDINGS OF FACT

The Test Claim Legislation

This test claim has been filed on two statutes. The first statute is Government Code section 54952. Section 54952 was amended in 1993, became operative on April 1, 1994, and clarifies the definition of "legislative body," for purposes of compliance with the Brown Act, as follows:

> "As used in this chapter, 'legislative body' means:
>
> "(a) The governing body of a local agency or any other local body created by state or federal statute.
>
> "(b) A 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. However, advisory committees, composed solely of members of the legislative body which are less than a quorum of the legislative body are not legislative bodies, except that standing committees of a legislative body, irrespective of their composition, which have continuing subject matter jurisdiction, or a meeting schedule *fixed by charter, ordinance,*

resolution, or formal action of a legislative body are legislative bodies for purposes of this chapter." (Emphasis added.)

The second test claim statute is Education Code section 35147, which was enacted as an urgency measure and became effective on July 21, 1994. The statute exempts eight (8) specified school site councils and advisory committees from the open meeting requirements established in the Brown Act, the Education Code, the Bagley-Keene Open Meeting Act and, instead, imposed an abbreviated set of open meeting requirements.

Education Code section 35147 provides, in relevant part, the following:

> "(a) Except as specified in this section, any meeting of the councils or committees specified in subdivision (b) is *exempt from the provisions of this article, the Bagley-Keene Open Meeting Act . . . , and the Ralph M. Brown Act . . .*
>
> "(b) The councils and school site advisory committees established pursuant to Sections 52012, 52065, 52176, and 52852, subdivision (b) of Section 54425, Sections 54444.2, 54724, and 62002.5, and committees formed pursuant to Section 11503 or Section 2604 of Title 25 of the United States Code, *are subject to this section.*
>
> "(c) Any meeting held by a council or committee specified in subdivision (b) shall be open to the public . . . [the] public shall be able to address the council or committee. . . . . Notice of the meeting shall be posted at the school site . . . 72 hours before the time set for the meeting . . . [and] shall specify the date, time, and location and contain an agenda describing each item of business . . . The council or committee may not take any action on any item of business unless that item appeared on the posted agenda.... If a council or committee violates the . . . requirements of this section . . . committee shall reconsider the item at its next meeting, after allowing for public input on the item.
>
> "(d) Any materials provided to a school site council shall be made available to any member of the public who requests the materials pursuant to the California Public Records Act. . . ." (Emphasis added.)

Thus, as of July 21, 1994, the specified school site councils and advisory committees were exempted from the full Brown Act provisions regarding special meetings, emergency meetings, closed sessions, and civil and criminal sanctions. However, these bodies are still required to perform the following activities for regular meetings:

- meetings must be open;
- any member of the public may address the council or committee;
- notice of the meeting must be posted 72 hours before the time set for the meeting;
- the notice must specify the date, time and location of the meeting and contain an agenda describing each item of business to be discussed or acted upon;

- the council or committee may not take action on any item of business unless that item appeared on the posted agenda;
- the council or committee must reconsider the item, after allowing for public input, if the procedural meeting requirements are violated; and
- all material provided to the council or committee shall be made available to the public.

Issue 1: Do Government Code Section 54952 and Education Code Section 35147 Impose a New Program or Higher Level of Service upon School Districts Pursuant to Article XIII B, Section 6 of the California Constitution?[1]

In order for a statute, which is the subject of a test claim, to impose a reimbursable state mandated program, the statutory language must direct or obligate an activity or task upon local governmental entities. Further, the required activity or task must be new or it must create an increased or higher level of service over the former required level of service. To determine if a required activity is new or imposes a higher level of service, a comparison must be undertaken between the test claim legislation and the legal requirements in effect immediately before the enactment of the test claim legislation. Finally, the newly required activity or increased level of service must be state mandated.[2]

As indicated above, the test claim statute requires the performance of open meeting activities by specified school site councils and advisory committees. School site councils and advisory committees are formed to advise school districts and governing boards on particular school programs or issues and, thus, carry out a basic governmental function by providing a service to the public. Such activities are not imposed on state residents generally. Accordingly, the Commission found the first requirement necessary to determine whether the Legislature has imposed a reimbursable state mandated program is satisfied.

The Commission continued its inquiry to determine if the test claim legislation constitutes a new program or higher level of service and imposes "costs mandated by the state" upon school districts. The claimants acknowledge that Education Code section 35147, as amended in 1994, relieves school site councils and advisory committees from the full set of Brown Act requirements. However, the claimants contend that Government Code section 54952, as amended in 1993, imposed a new program on school districts by defining, for the first time, school site councils and advisory committees as "legislative bodies" required to perform the open meeting activities prescribed in the Brown Act.

---

[1] Section 6 of article XIII B states: "Whenever the Legislature or any state agency mandates a new program or higher level of service on any local government, the state shall provide a subvention of funds to reimburse such local government for the costs of such program or increased level of service, except that the Legislature may, but need not, provide such subvention of funds for the following mandates: (a) Legislative mandates requested by the local agency affected; (b) Legislation defining a new crime or changing an existing definition of a crime; or (c) Legislative mandates enacted prior to January 1, 1975, or executive orders or regulations initially implementing legislation enacted prior to January 1, 1975."

[2] *County of Los Angeles* v. *State of California* (1987) 43 Cal.3d 46, 56; *Carmel Valley Fire Protection Dist.* v. *State of California* (1987) 190 Cal.App.3d 521, 537; *Lucia Mar Unified School Dist.* v. *Honig* (1988) 44 Cal.3d 830, 835.

Were school site councils and advisory committees required to comply with the Brown Act prior to 1993?

Prior to the enactment of the 1993 test claim legislation, "legislative body" of a local agency required to comply with the Brown Act was defined in several statutory provisions. Government Code section 54952.3 defined "legislative body" to include any advisory commission, advisory committee or advisory body of a local agency created by charter, ordinance, resolution, or any similar formal action of a local agency. Section 54952.3 provided in relevant part the following:

> "As used in this chapter 'legislative body' also includes any advisory commission, advisory committee or advisory body of a local agency, *created by charter, ordinance, resolution, or by any similar formal action of a legislative body or member of a legislative body of a local agency*."
>
> "....."
>
> " 'Legislative body' as defined in this section does not include a committee solely composed of members of the governing body of a local agency which are less than a quorum of such governing body." (Emphasis added.)[3, 4]

In addition, Government Code section 54952.5 defined "legislative body" to include planning commissions, library boards, recreation commissions, and other permanent boards or commissions of a local agency. That section stated the following:

> "As used in this chapter, 'legislative body' also includes, but is not limited to, planning commissions, library boards, recreation commissions, and other permanent boards or commissions of a local agency."[5]

According to the opinion of the Attorney General's Office, Government Code section 54952.5 was added by the Legislature in 1961 to repudiate the court's decision in *Adler* v. *Culver City Council,*[6] which held that the Brown Act was not meant to apply to planning commissions or other bodies of an "*advisory*" nature.[7] The Attorney General's Opinion states the following:

---

[3] Government Code section 54952.3 was added in 1968 (Stats. 1968, c. 1297), last amended in 1981 (Stats 1981, c. 968) and repealed in 1993 (Stats. 1993, c. 1138).

[4] The courts have construed the phrase "similar formal action" in former Government Code section 54952.3 broadly to prevent evasion. (*Joiner* v. *Sebastopol* (1981) 125 Cal.App.3d 799, 805, fn. 5; *Frazer* v. *Dixon Unified School District* (1993) 18 Cal.App.4th 781, 792. (Exhibit D of the Administrative Record, Bates pages 75 and 79.)

[5] Government Code section 54952.5 was added in 1961 (Stats. 1961, c. 1671) and repealed in 1993 (Stats. 1993, c. 1138).

[6] *Adler* v. *Culver City Council* (1960) 184 Cal.App.2d 763.

[7] 42 Opinions of the California Attorney General 61, 64-65 (1963). (Exhibit D of the Administrative Record, Draft Staff Analysis, Bates page 92.)

"We believe that there is little, if any, strength left to *Adler* v. *Culver City*. . . . Contrary to *Adler*, the law now specifically applies to *advisory* boards such as planning commissions."[8] (Emphasis added.)

The 1993 test claim legislation amended the Brown Act to consolidate the definitions of "legislative body" previously found in sections 54952.3 and 54952.5 into one section, Government Code section 54952. Government Code sections 54952.3 and 54952.5 were repealed. Government Code section 54952, subdivision (b), now provides the following:

"A commission, committee, board, or other body of a local agency, whether permanent or temporary, decisionmaking or advisory, created by charter, ordinance, resolution, of formal action of a legislative body. However, advisory committees, composed solely of the members of the legislative body which are less than a quorum of the legislative body are not legislative bodies, except that standing committees of a legislative body, irrespective of their composition, which have a continuing subject matter jurisdiction, or a meeting schedule fixed by charter, ordinance, resolution, or formal action of a legislative body are legislative bodies for purposes of this chapter."

More importantly, the test claim legislation also added subdivision (a) to section 54952, which provides that, for purposes of the Brown Act, the term "legislative body" includes:

"The governing body of a local agency *or any other local body created by state or federal statute*." (Emphasis added.)

The claimants contend that *all* of the school site councils and advisory committees specified in the test claim legislation are local bodies created by state or federal statute and, thus, became subject to the Brown Act when subdivision (a) was added to section 54952.

The Commission noted, however, that legislative history of the Brown Act reflects confusion regarding when these school site councils and advisory committees became subject to the open meeting requirements of the Brown Act. Some analysts agree with the claimants that school site councils and advisory committees became subject to the Brown Act with the test claim statute that amended Government Code section 54952. The Ways and Means Committee Analysis states that:

"As of April 1, 1994 [when section 54952 was amended by the test claim statute] school site councils have been subject to the state's open meetings laws."[9]

The claimants also cite a letter from the author of the test claim statute, Education Code section 35147, to Governor Wilson, which states that:

"California School Boards Association came to me earlier this year requesting language to correct an oversight in the new Brown Act laws which became

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[8] *Id.* at p. 67.

[9] Ways and Means Committee Analysis for Education Code section 35147 (See Exhibit E of the Administrative Record, Bates page 155, Claimants' response to Draft Staff Analysis).

effective April 1, 1994 [i.e., the amendments to Government Code section 54952]. The new law contained changes in the definition of 'legislative body' and unbeknownst to the education community when the Brown Act bills were moving through the Legislature in the summer of 1993, this *new* definition included school site councils." (Emphasis added.)[10]

Conversely, in 1994, the Assembly Committee on Local Government, in its bill analysis for Education Code 35147, questioned whether school site councils and advisory committees were subject to the Brown Act *prior* to the enactment of the test claim legislation amending Government Code section 54952. The bill analysis states, in relevant part, the following:

> "Major comprehensive revisions to the Ralph M. Brown Act were enacted last year by . . .Chapter 1138, Statutes of 1993. These revisions will be effective April 1, 1994, so that local governments have an opportunity to become familiar with them. . . . "
>
> "In revising the Act, there was interest in making it more understandable to the public and local governments. For example, the Act defines 'legislative body' to include a body on which local agency officers serve in their official capacity, a body exercising authority delegated by a legislative body, an advisory body, and permanent boards or commissions. [Citations omitted.] SB 1140 repealed the various definitions of 'legislative body', and clarified and consolidated them into a single section (Government Code section 54952). . . ."
>
> "Certain school groups now assert that this revision to the 'legislative body' definition affects school site councils and school site advisory committees, because the new definition includes 'the governing body of a local agency or any other local body created by state or statute', and wish to exempt these entities from the Ralph M. Brown Act and the Bagley-Keene Open Meeting Act. . . ."
>
> *"Provisions of the Ralph M. Brown Act effective until April 1, 1994 (which do not include the 1993-94 revisions)* [i.e., the law in effect prior to the test claim legislation*], provide that a 'legislative body' includes 'any advisory commission, advisory committee or advisory body of a local agency, created by charter, ordinance, resolution, or by any similar formal action of a legislative body of a local agency.'* Because the school advisory groups exempted by this bill were created by the local agency legislative body, one could argue that *these entities are covered under current law (without the 1993-94 amendments) and that districts have simply ignored open meeting laws for these advisory groups.*" (Emphasis added).[11]

The Commission agreed with claimant's position that school site councils and advisory committees, "*created* by state or federal law," first became subject to the Brown Act on April 1, 1994 when amended Government Code section 54952 became effective. Thus, the

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[10] Exhibit E of the Administrative Record, Bates page 159, Claimants' Response to Draft Staff Analysis.

[11] Exhibit D of the Administrative Record, Bates page 101.

Commission's next step was to determine whether the test claim school site councils and advisory committees were *"created* by state or federal statute."[12]

The school site councils and advisory committees at issue in this test claim were established as part of the following programs:

- School Improvement Program;
- Native American Indian Early Childhood;
- Chacon-Moscone Bilingual-Bicultural Education Act;
- School-Based Coordination Program;
- Compensatory Education Program;
- Migrant Education Program;
- Motivation and Maintenance Program; and
- Federal Indian Education Program.

School Site Councils for the School Improvement Program, Bilingual Education Program, School-Based Coordination Program, and the Motivation and Maintenance Program

The Commission found that the school site councils and advisory committees for the School Improvement Program, the Bilingual Education Program, the School-Based Coordination Program, and the Motivation and Maintenance Program were created by state statute and not by the action of the school district.

The Commission further found that under these programs, the state *requires* school districts to establish these bodies even if the district does not participate in the programs. For example, under the School Improvement Program, the governing board of each school district "*shall*" adopt policies to ensure that a school site council is established at each school site "to consider whether or not *it* wishes the local school to participate in the school improvement program."[13] The Commission found the same requirement is imposed on school districts under the School-Based Coordination Program[14] and the Motivation and Maintenance Program.[15]

In the case of the Bilingual Education Program, the Commission recognized that the law provides that each district with more than 50 pupils of limited English proficiency, and each

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[12] Staff notes that the issue of whether the school site councils and advisory committees are mandated by the state or federal government is *not* an issue before the Commission. Rather, the issue is whether the test claim legislation constitutes a new program or higher level of service mandated by the state on these school site councils and advisory committees.

[13] Education Code, section 52011, subdivision (b). (Exhibit G of the Administrative Record, Bates page 225.)

[14] Education Code, section 52852.5, subdivision (b). (Exhibit G of the Administrative Record, Bates page 230.)

[15] Education Code, section 54725. (Exhibit G of the Administrative Record, Bates page 229.)

school with more than 20 pupils of limited English proficiency, "*shall* establish a districtwide [or school level] advisory committee on bilingual education."[16, 17]

Based on the foregoing analysis, the Commission found that school site councils and advisory committees for the School Improvement Program, the Bilingual Education Program, the School-Based Coordination Program, and the Motivation and Maintenance Program were created by state statute. Thus, the Commission found that these local bodies first became subject to the open meeting requirements of the Brown Act when the Government Code section 54592 was amended. Accordingly, the Commission determined that Government Code section 54592 constitutes a new program for these local bodies.

The Advisory Committees for the Native American Indian Early Childhood Education Program, Migrant Education Program, the Compensatory Education Program, and the Federal Indian Education Program

The Commission found that the foregoing advisory committees and programs were created under either federal or state statutes. While the Commission noted that the enabling statutes for these advisory committees and programs were expressed in discretionary terms (i.e., with the use of the word "may", for example), the Commission found that a district's creation of an advisory committee or program is *required* by statute *as a condition of participation and receipt of funds*. For example:

Native American Indian Early Childhood Education Program

Under the Native American Indian Early Childhood Education Program, the Commission observed that while a governing board of specified school districts "may apply" to the Superintendent of Public Instruction for a project and receive funds,[18] the law provided that each school district and individual school receiving funds "shall" establish a district-wide or school parent advisory group.[19]

Migrant Education Program

Similarly, the Commission observed that under the Migrant Education Program, school districts are eligible to apply for funding to serve migrant pupils upon application.[20] However, the law provides that, as a condition of receiving funds under this program, the school district is required to comply with the rules and regulations adopted by the Superintendent of Public Instruction, which "*requir[es]* each operating agency receiving migrant education funds or

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[16] Education Code, section 52176, subdivisions (a) and (b). (Exhibit G of the Administrative Record, Bates page 233.)

[17] Although the School Improvement Program and the Bilingual Education Program sunsetted on June 30, 1987, Education Code section 62002.5 requires that the school site councils in existence as of January 1, 1979, continue subsequent to the termination of funding. (Exhibit G of the Administrative Record, Bates page 235.)

[18] Education Code, section 52063. (Exhibit G of the Administrative Record, Bates page 236.)

[19] Education Code, section 52065. (Exhibit G of the Administrative Record, Bates page 237.)

[20] Education Code, section 54443.1, subdivision (g). (Exhibit G of the Administrative Record, Bates page 238.)

services to actively solicit parental involvement in the planning, operation, and evaluation of its programs through the establishment of, and consultation with, a parent advisory council."[21]

Compensatory Education Program

The Commission noted that the Compensatory Education Program was enacted to guide local school districts in making applications for federal funds under the Elementary and Secondary Education Act of 1965 to improve the educational abilities of disadvantaged minors. The Commission observed that under the Federal Act,[22] a local educational agency may participate in the program and receive funds "only if" the agency implements programs, activities, and procedures *with the consultation and involvement of parents*. The Commission also noted that each local educational agency receiving funds is also required to *develop, jointly with parents*, a comprehensive compensatory education plan.[23] The Commission found that, consistent with these federal requirements, the state requires that "whenever" the comprehensive plan establishes a school advisory committee, the procedures adopted for the selection of the committee shall specify that parents constitute a majority of the membership.[24]

Federal Indian Education Program

Finally, the Commission observed that the Federal Indian Education Program provides grants to local educational agencies for Indian education. The Commission found that in order to receive the funds, the local educational agency is required to establish an advisory committee composed of at least half parents to develop and provide written approval of a program that substantially increases the educational opportunities of Indian children.[25]

Based on the foregoing analysis, the Commission found that these advisory committees and programs were created under federal, and in most cases state statutes, and as such, the Commission found that these local bodies first became subject to the open meeting requirements of the Brown Act when the Government Code section 54592 was amended. Accordingly, the Commission determined that Government Code section 54592 constitutes a new program for these advisory committees and programs.

Issue 2: Are the Advisory Committees for the Federal Indian Education Program and the Compensatory Education Program Mandated by Federal Law Rather than State Law?

The Department of Finance contended that federal law, rather than state law, mandates the advisory committee for the Federal Indian Education Program and the Compensatory Education Program. Accordingly, it is the Department's position that, pursuant to Government

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[21] Education Code, section 54444.2, subdivision (a)(1). (Exhibit G of the Administrative Record, Bates page 240.)

[22] Education Code, section 54420. (Exhibit G of the Administrative Record, Bates page 242.)

[23] Title 20, United States Code, section 6319. (Exhibit G of the Administrative Record, Bates page 244.)

[24] Education Code, section 54425, subdivision (b). (Exhibit G of the Administrative Record, Bates page 243.)

[25] Title 25, United States Code, section 2604. Staff notes that this program was repealed in 1994 and renumbered as Title 20, United States Code, section 7881. The requirement to establish an advisory committee can now be found in Title 20, United States Code, section 7814. (Exhibit G of the Administrative Record, Bates page 250.)

Code section 17556, subdivision (c), the Commission shall not find "costs mandated by the state" if "the statute or executive order implemented a federal law or regulation and resulted in costs mandated by the federal government, unless the statute or executive order mandates costs which exceed the mandate in that federal law or regulation."[26]

The Commission found that the Federal Indian Education Program and the Compensatory Education Program are advisory committees created by federal law which are required to comply with the Federal Advisory Committee Act.[27] However, in order to determine whether the open meeting requirements imposed by the test claim statute are the same, or exceed, the federal open meeting requirements under Government Code section 17556, subdivision (c), the Commission recognized that it must compare the requirements under the Federal Advisory Act with the Brown Act. The following table was prepared in order to assist the Commission in determining whether the requirements under the test claim legislation exceeded those required under the Federal Advisory Act:

Federal Advisory Committee Act Title 5, U.S.C., App.2, § 10	Brown Act, Education Code Section 35147
Each advisory committee meeting shall be open to the public.	Each meeting shall be open to the public.
Interested persons shall be permitted to attend, appear before, and file statements with the advisory committee.	Any member of the public shall be able to address the committee during the meeting.
Materials shall be made available for public inspection.	Materials shall be made available for public inspection.
Detailed minutes of each meeting shall be kept.	
An employee or officer of the Federal Government shall be designated to attend each meeting of the advisory committee.	
"Timely" notice of the meeting shall be published in the Federal Register.	Notice of the meeting shall be posted at the school site, or other appropriate place accessible to the public.
	Notice shall be posted at least 72 hours before the time set for the meeting.
	The notice shall specify the date, time, and location of the meeting.
	The notice shall contain an agenda describing each item of business to be discussed or acted upon.

[26] See also Government Code section 17513 defining "costs mandated by the federal government" as:

> "....any increased costs incurred by a local agency or school district after January 1, 1973, in order to comply with the requirements of a federal statute or regulation. "Costs mandated by the federal government" includes costs resulting from enactment of a state law or regulation where failure to enact that law or regulation to meet specific federal program or service requirements would result in substantial monetary penalties or loss of funds to public or private persons in the state. "Costs mandated by the federal government" does not include costs which are specifically reimbursed or funded by the federal or state government or programs or services which may be implemented at the option of the state, local agency, or school district."

[27] Title 5, United States Code, Appendix 2.

Based on its analysis of this comparison, the Commission found that the notice and agenda requirements imposed by the test claim statute are broader and exceed the requirements of the Federal Advisory Committee Act.[28] Accordingly, the Commission found that the activities of preparing and posting of the notice and agenda do *not* impose "costs mandated by the federal government" since these requirements exceed the mandate of the federal law.

CONCLUSION

Based on the foregoing analysis, the Commission concludes that the test claim legislation constitutes a reimbursable state mandated program for the following activities:

For the periods between April 1, 1994 through July 21, 1994

- the cost of preparing a single agenda containing a brief general description of each item on an agenda;
- the cost for posting that single agenda; and
- the costs necessary to provide the opportunity for the public to address the legislative body on items included on each agenda

for <u>all</u> meetings conducted by the test claim school site councils and advisory committees.

For the periods after July 21, 1994

- the cost of preparing a single agenda containing a brief general description of each item on an agenda;
- the cost for posting that single agenda; and
- the costs necessary to provide the opportunity for the public to address the legislative body on items included on each agenda

for <u>only general open meetings</u> conducted by the test claim school site councils and advisory committees.

[28] See Title 5, United States Code, Appendix 2, section 10. (Exhibit J of the Administrative Record.)

We conclude that school administrators may not require written parental permission before allowing members of the news media to interview students.

Opinion No. 95-614—June 10, 1996

Requested by: MEMBER OF THE CALIFORNIA ASSEMBLY

Opinion by: DANIEL E. LUNGREN, Attorney General
Maxine P. Cutler, Deputy

THE HONORABLE BRUCE McPHERSON, MEMBER OF THE CALIFORNIA STATE ASSEMBLY, has requested an opinion on the following questions:

1. Are the meetings of a standing committee composed of less than a quorum of the legislative body of a local public agency subject to the notice, agenda, and public participation requirements of the Ralph M. Brown Act, if the committee has the responsibility of providing advice concerning budgets, audits, contracts, and personnel matters to and upon request of the legislative body?

2. May a fourth member of a seven member legislative body of a local agency attend, as a member of the public, an open and noticed meeting of a less than a quorum advisory committee of that body, without violating the notice, agenda, and public participation requirements of the Ralph M. Brown Act applicable to meetings of the parent legislative body?

CONCLUSIONS

1. The meetings of a standing committee composed of less than a quorum of the legislative body of a local public agency are subject to the notice, agenda, and public participation requirements of the Ralph M. Brown Act, if the committee has the responsibility of providing advice concerning budgets, audits, contracts, and personnel matters to and upon request of the legislative body.

2. A fourth member of a seven member legislative body of a local agency may not attend, as a member of the public, an open and noticed meeting of a less than a quorum advisory committee of that body, without violating the notice, agenda, and public participation requirements of the Ralph M. Brown Act applicable to meetings of the parent legislative body.

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ANALYSIS

A public water district in Central California is governed by a seven member board of directors. The board has established a subcommittee of three members to advise the board on administrative matters as needed. The subcommittee has been in existence for several years and generally meets monthly, but it does not have a fixed meeting schedule and operates under the following rule:

> "The Administrative Committee shall consist of the three Directors appointed by the Chair and approved by the Board. *This committee shall not exercise continuing subject matter jurisdiction.* Its purpose shall be to advise the Board on administrative matters as appropriate. The Board of Directors shall not fix the meeting schedule of this committee. The committee may meet on the call of the chair or as decided by the members. Action taken by the Administrative Committee shall be subject to final Board approval." (Italics added.)

The two questions presented for resolution concern the circumstances and conditions under which the meetings of the board's subcommittee must be open to the public.

The Ralph M. Brown Act (Gov. Code, §§ 54950–54962; "Act")[1] provides that "[a]ll meetings of the legislative body of a local agency shall be open and public, and all persons shall be permitted to attend any meeting of a legislative body, except as otherwise provided in this chapter." (§ 54953, subd. (a).)[2] Unless otherwise authorized, notice must be given of each meeting to those who request it (§ 54954.1), an agenda must be posted (§ 54954.2), and the public must be provided an opportunity "to directly address the legislative body" (§ 54954.3).

The issues we are asked to address center upon the requirements, conditions, and limitations of sections 54952 and 54952.2. Section 54952 states:

> "As used in this chapter, 'legislative body' means:
>
> "(a) The governing body of a local agency or any other local body created by state or federal statute.
>
> "(b) A commission, committee, board, or other body of a local agency, whether permanent or temporary, decision making or

[1] Unless otherwise indicated, all section references hereafter are to the Government Code.

[2] Various subjects may be discussed in closed session, such as real estate acquisitions, pending litigation, liability issues, personnel issues, labor negotiations, and certain ongoing criminal investigations, if proper notice and disclosures are made. (See §§ 54954.5, 54956.7–54957.7.)

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advisory, created by charter, ordinance, resolution, or formal action of a legislative body. However, advisory committees, composed solely of the members of the legislative body which are less than a quorum of the legislative body are not legislative bodies, except that *standing committees of a legislative body, irrespective of their composition, which have continuing subject matter jurisdiction, or a meeting schedule fixed by charter, ordinance, resolution, or formal action of a legislative body are legislative bodies* for purposes of this chapter." (Italics added.)

Section 54952.2 states:

"(a) As used in this chapter, 'meeting' includes any congregation of a majority of the members of a legislative body at the same time and place to hear, discuss, or deliberate upon any item that is within the subject matter jurisdiction of the legislative body or the local agency to which it pertains.

. . . . . .

"(c) Nothing in this section shall impose the requirements of this chapter upon any of the following:

. . . . . .

"(4) *The attendance of a majority of the members of a legislative body at an open and noticed meeting of another body of the local agency*, provided that a majority of the members do not discuss among themselves, other than as part of the scheduled meeting, business of a specific nature that is within the subject matter jurisdiction of the legislative body of the local agency." (Italics added.)

Continuing Subject Matter Jurisdiction

The first question presented concerns whether a standing committee, composed of less than a quorum of the legislative body, has "continuing subject matter jurisdiction" for purposes of section 54952, subdivision (b), if it provides advice on budgets, audits, contracts, and personnel matters upon request of the legislative body. We conclude that the Act's requirements would be applicable to the subcommittee's meetings.

With respect to the application of the phrase "continuing subject matter jurisdiction" as used in section 54952, we are guided by well established principles of statutory construction. "When interpreting a statute our primary task is to determine the Legislature's intent." (*Freedom Newspapers, Inc. v. Orange County Employees Retirement System* (1993) 6 Cal.4th 821,

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826.) "To determine the intent of legislation, we first consult the words themselves, giving them their usual and ordinary meaning." (*Da Fonte v. Up-Right, Inc.* (1992) 2 Cal.4th 593, 601.) "In construing a statute the court will consider the purpose of the law and adopt a construction which will further that purpose." (*Robinson v. Fair Employment and Housing Com'n* (1992) 2 Cal.4th 226, 234.) "Consistent with the intent of the Legislature, a statute should be accorded a reasonable and common sense interpretation, avoiding absurd or impractical results." (*Dakin v. Department of Forestry & Fire Protection* (1993) 17 Cal.App.4th 681, 686.)

The general purposes of the Act are set forth in section 54950:

> "In enacting this chapter, the Legislature finds and declares that the public commissions, boards and councils and other public agencies in this State exist to aid in the conduct of the people's business. It is the intent of the law that their actions be taken openly and that their deliberations be conducted openly.
>
> "The people of this State do not yield their sovereignty to the agencies which serve them. The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may retain control over the instruments they have created."

The courts have liberally construed the terms of the Act so as to effectuate its purposes. (See *Rowan v. Santa Clara Unified School Dist.* (1981) 121 Cal.App.3d 231, 235; *Sacramento Newspaper Guild v. Sacramento County Bd. of Suprs.* (1968) 263 Cal.App.2d 41, 48.)

We note that a "standing committee" is commonly defined as "a committee to consider subjects of a particular class arising during a stated period; specif[ically] a permanent committee of a legislative body." (Webster's Third New Internat. Dict. (1971) p. 2224.) "Permanent" may be commonly defined as "to endure, remain." (*Id.*, at p. 1683.)

As for the phrase "continuing subject matter jurisdiction," we find that "continuing" means "needing no renewal" (Webster's, *supra*, at p. 493); "subject matter" means "matter presented for consideration" (*id.*, at p. 2276), and "jurisdiction" means "power, right, or authority to hear . . . a cause" (*id.*, at p. 1227).

Applying these common definitions in carrying out the Act's purposes, we believe that the subcommittee in question has the authority to hear and consider issues relating to budgets, audits, contracts, and personnel matters and that its authority needs no renewal. As such, it is a "legislative body"

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under the terms of section 54952, subdivision (b), and its meetings are subject to the Act's requirements of notice, a posted agenda, and public participation. Although under its local operating rule, the subcommittee "shall not exercise continuing subject matter jurisdiction," we do not find such rule provision to be determinative. The language of the local rule appears inconsistent at best and may not be used to thwart the purposes and requirements of the Act.

We thus follow function over form in carrying out the Legislature's purposes. In particular, this subcommittee does not have a limited term, and it is not an ad hoc committee charged with accomplishing a specific task in a short period of time. Further, it is irrelevant for purposes of section 54952 that the subcommittee is advisory rather than decision making, that its meetings are called by the chair of the subcommittee rather than by formal action of the legislative body, or that some, but not all, of the matters under its jurisdiction are referred to it. The purpose of the subcommittee is to advise the legislative body when requested on those matters within its continuing subject matter jurisdiction.

We conclude that the meetings of a standing committee composed of less than a quorum of a legislative body are subject to the notice, agenda, and public participation requirements of the Act, if the committee has the responsibility of providing advice on budgets, audits, contracts, and personnel matters upon request of the legislative body.

2. Presence of a Quorum

The second inquiry concerns whether a fourth member of a seven member legislative body of a local agency may attend, as a member of the public, a public meeting of a less than a quorum advisory committee of that body, without violating the notice, agenda, and public participation requirements applicable to meetings of the parent legislative body.

As quoted above, the term "meeting" is defined in section 54952.2, subdivision (a), to include "any congregation of a majority of the members of a legislative body at the same time and place to hear, discuss, or deliberate upon any item that is within the subject matter jurisdiction of the legislative body or the local agency to which it pertains."[3] Unless an exception applies, attendance by a fourth member of a seven member legislative body of a local agency at a less than a quorum subcommittee meeting would constitute

[3] The term "meeting" was not defined by the Legislature prior to the enactment of section 54952.2 (Stats. 1993, ch. 1136, § 2) operative April 1, 1994. Prior to that time numerous judicial decisions and opinions of this office determined that the Act essentially governed all meetings of a quorum of the legislative body when the public's business was discussed. (See *Frazer v. Dixon Unified School Dist.* (1993) 18 Cal.App.4th 781, 796–797.)

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a meeting of the legislative body itself and thus would result in a violation of the notice, agenda, and public participation requirements for meetings held by the parent legislative body.

Section 54952.2, subdivision (c)(4), however, provides an exception to the requirements of the Act for the

> ". . . attendance of a majority of the members of a legislative body *at an open and noticed meeting of another body of the local agency*, provided that a majority of the members do not discuss among themselves, other than as part of the scheduled meeting, business of a specific nature that is within the subject matter jurisdiction of the legislative body of the local agency." (Italics added.)

It has been suggested that since a subcommittee with continuing subject matter jurisdiction is itself a "legislative body" (§ 54952, subd. (b)) subject to the notice, agenda, and public participation requirements of the Act, such a subcommittee would be "another body" of the local agency for purposes of the section 54952.2, subdivision (c)(4) exception. Under this interpretation, a fourth member of the parent legislative body could attend, hear, and discuss, as a member of the public, items that are part of the scheduled subcommittee meeting. We reject this interpretation of section 54952.2, subdivision (c)(4), for several reasons.

"[I]f a statute is amenable to two alternative interpretations, the one that leads to the more reasonable result will be followed [citation]." (*Lungren* v. *Deukmejian* (1988) 45 Cal.3d 727, 735.) "In analyzing statutory language, we seek to give meaning to every word and phrase in the statute to accomplish a result consistent with the legislative purpose, i.e., the object to be achieved and the evil to be prevented by the legislation. [Citations.]" (*Harris* v. *Capital Growth Investors XIV* (1991) 52 Cal.3d 1142, 1159.)

As we explained in answer to the first question, the provisions of the Act are to be liberally construed to prevent subterfuge and evasion of the Legislature's purposes. The actions of public agencies are to be taken only after proper notice has been given to the public so that members of the public will have a meaningful opportunity to present their views while the decisions are still pending.

In *Stockton Newspapers, Inc.* v. *Redevelopment Agency* (1985) 171 Cal.App.3d 95, for example, the court determined that a series of telephone conversations between members of a legislative body constituted a "meeting" subject to the requirements of the Act. In discussing the exception

applicable for meetings of subcommittees composed of less than a quorum of the members, the court stated:

> " . . . [T]his exception contemplates that the part of the governing body constituting less than a quorum 'will report back to the parent body where there will *then* be a full opportunity for public discussion of matters not already considered by the full board or a quorum thereof.' [Citations.] Such is not the case where a number of the members sufficient to constitute a quorum of the legislative body has already been informed and deliberated, albeit serially, on a matter of public business by the time the matter reaches the stage of public discussion. [Citation.]" (*Id.*, at pp. 102–103.)

The courts will thus carefully scrutinize the particulars of each situation and invalidate an attempt to evade the purposes of the Act.

Here, items within the subject matter jurisdiction of a subcommittee will necessarily also be within the subject matter jurisdiction of the parent legislative body. If a majority of the legislative body is allowed to be present at a subcommittee meeting held to consider items that presumably will appear on a future agenda of the legislative body, proper notice and public participation cannot be assured. An item may be resolved at the subcommittee meeting by a quorum of the members, with the action later taken at the legislative body's own meeting constituting a mere "rubber stamp." Although the subcommittee meeting would be noticed and open to the public, the public would not anticipate that items will be resolved at that meeting due to the less than a quorum composition of the subcommittee. Members of the public wishing to present their views when the item is to be decided will attend the legislative body's meeting only to find that the decision has in effect already been made. The public will effectively be denied the right to present views prior to the legislative body's actual determination. Such result would undermine the Legislature's purposes in requiring notice, a posted agenda, and public participation prior to the resolution of a matter by a legislative body.

We believe that the section 54952.2, subdivision (c)(4) exception is intended to govern the situation where a majority of the members of a legislative body attend a meeting of another body of the local agency that is composed of persons different from the legislative body members themselves. For example, a majority of city council members may attend a meeting of the city's planning commission. The planning commission would be expected to take action with respect to the items on its published agenda, and the public would not expect the city council members to resolve

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any of the items at that time. Subdivision (c)(4) of section 54952.2 allows the entire city council to attend the planning commission meeting without it being considered a meeting of the city council, where the public will still have a meaningful opportunity to address the city council on any items referred to it by the commission. A contrary construction of section 54952.2 would allow a legislative body to conduct virtually all of its public business in subcommittee meetings without proper public notice or participation.

We conclude that a fourth member of a seven member legislative body of a local agency may not attend, as a member of the public, an open and noticed meeting of a less than a quorum advisory committee of that body, without violating the notice, agenda, and public participation requirements of the Act applicable to meetings of the parent legislative body.

Opinion No. 95-805—June 10, 1996

Requested by: MEMBER OF THE CALIFORNIA SENATE

Opinion by: DANIEL E. LUNGREN, Attorney General
Clayton P. Roche, Deputy

THE HONORABLE MILTON MARKS, MEMBER OF THE CALIFORNIA SENATE, has requested an opinion on the following questions:

1. Will the Department of Motor Vehicles be required to release "personal information" under provisions of the Driver's Privacy Protection Act of 1994?

2. Is existing California law more restrictive than the new federal requirements concerning the release of addresses contained in motor vehicle records?

3. With respect to the 14 categories of "permissive" disclosure contained in the new federal act, will access to the information be prohibited in California if the Legislature does not affirmatively authorize disclosure in the described circumstances?

4. When must the new federal requirements be fully implemented in California?

CONCLUSIONS

1. The Department of Motor Vehicles will be required to release "personal information" under provisions of the Driver's Privacy Protection Act of 1994 to anyone effectuating the purposes of the Automobile Information

(Matthew Bender & Co., Inc.)

6 Cal.4th 821
863 P.2d 218, 25 Cal.Rptr.2d 148
(Cite as: 6 Cal.4th 821)

FREEDOM NEWSPAPERS, INC., Plaintiff and Appellant,
v.
ORANGE COUNTY EMPLOYEES RETIREMENT SYSTEM BOARD OF DIRECTORS, Defendant and Respondent.

No. S029178.

Supreme Court of California

Dec 23, 1993.

SUMMARY

A newspaper publisher sought a writ of mandate to compel a county employees retirement system board of directors to allow the public to attend meetings of the board's operations committee. The committee was advisory in nature and was composed of four members of the nine-member board. The trial court denied the petition and entered judgment in favor of the board. (Superior Court of Orange County, No. 660703, Greer Stroud, Referee.) The Court of Appeal, Fourth Dist., Div. Three, No. G011490, reversed.

The Supreme Court reversed the judgment of the Court of Appeal. The court held that, since the operations committee was an advisory committee composed solely of board members numbering less than a quorum of the board, the committee was not a "legislative body" pursuant to the provisions of Gov. Code, § 54952.3, and was therefore excluded from the open meeting requirements of the Ralph M. Brown Act (Gov. Code, § 54950 et seq.). (Opinion by Panelli, J., with Lucas, C. J., Arabian, Baxter and George, JJ., concurring. Separate concurring and dissenting opinion by Mosk, J. Separate dissenting opinion by Kennard, J.)

HEADNOTES

Classified to California Digest of Official Reports

(1a, 1b) Counties § 1--Open Meeting Requirements--Advisory Committee of County Employees Retirement System Board--Committee Composed of Less Than Quorum of Board:Pensions and Retirement Systems § 3--Administration.

The trial court did not err in denying a petition for a writ of mandate brought by a newspaper publisher that was seeking to compel a county employees retirement system board of directors to allow the public to attend meetings of the *822 board's operations committee. The committee was advisory and was composed of four members of the nine-member board. Gov. Code, § 54952.3, exempts from the definition of "legislative bodies" that are subject to the open meeting requirements of the Ralph M. Brown Act (Gov. Code, § 54950 et seq.) advisory committees composed of less than a quorum of the governing body. Although Gov. Code, § 54952.3, could be read to mean that less-than-quorum committees are merely exempt from the formal requirements of that specific statute, the legislative history of the act, including the Legislature's response to court decisions, demonstrates an intent to exempt less-than-quorum advisory committees from all open meeting requirements. Since the committee was an advisory committee composed solely of board members numbering less than a quorum of the board, the committee was not a "legislative body" and was therefore excluded from the open meeting requirements of the act.

[Validity, construction, and application of statutes making public proceedings open to the public, note, 38 A.L.R.3d 1070. See also 7 Witkin, Summary of Cal. Law (9th ed. 1988) Constitutional Law, § 579.]

(2) State of California § 10--Attorney General--Opinions.

While the opinions of the Attorney General are not binding on the courts, they are entitled to great weight.

COUNSEL

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Thomas W. Newton, Renee C. Allison, Harold W. Fuson, Jr., Judith L. Fanshaw, Debra Foust Bruns, Pillsbury, Madison & Sutro, Edward P. Davis, Jr., Judy Alexander, Cooper, White & Cooper, James M. Wagstaffe and Martin Kassman as Amici Curiae on behalf of Plaintiff and Appellant.

Terry C. Andrus, County Counsel, and Donald H. Rubin, Deputy County Counsel, for Defendant and Respondent.

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Daniel E. Lungren, Attorney General, Robert L. Mukai, Chief Assistant Attorney General, John M. Huntington, Assistant Attorney General, Joel S. Primes, Denise Eaton-May and Ted Prim, Deputy Attorneys General, *823 Hatch & Parent, Peter N. Brown and Kelly G. McIntyre as Amici Curiae on behalf of Defendant and Respondent.

PANELLI, J.

The Ralph M. Brown Act (Stats. 1953, ch. 1588, § 1, p. 3269, codified as Gov. Code, § 54950 et seq. [hereafter the Brown Act or the Act]) [FN1] provides that all meetings of "the legislative body of a local agency shall be open and public," except as otherwise provided in the Act. (§ 54953.) At all times relevant to this case the Act contained four separate definitions of "legislative body." [FN2] We granted review to determine whether the Operations Committee of the Retirement Board of Orange County Employees Retirement System (hereafter Board) is a "legislative body" within the meaning of the Brown Act and, therefore, subject to the Act's *824 open meeting requirements. Because the Operations Committee is an advisory committee composed solely of Board members numbering less than a quorum of the Board, we hold that the committee is not a "legislative body" pursuant to the provisions of section 54952.3 and is thereby excluded from the open meeting requirements of the Act.

FN1 All statutory references are to the Government Code unless otherwise noted.

A new law changing the relevant provisions of the Government Code was enacted while this case was pending. (Sen. Bill No. 1140 (1993-1994 Reg. Sess.), Stats. 1993, ch. 1138, eff. Apr. 1, 1994.) The impact of the new law is addressed in footnote 11, post. Except in that footnote, all references to the Government Code in this opinion are to the current version, i.e., the law as it will be until Senate Bill No. 1140 takes effect on April 1, 1994.

FN2 Section 54952: "As used in this chapter, 'legislative body' means the governing board, commission, directors or body of a local agency, or any board or commission thereof, and shall include any board, commission, committee, or other body on which officers of a local agency serve in their official capacity as members and which is supported in whole or in part by funds provided by such agency, whether such board, commission, committee or other body is organized and operated by such local agency or by a private corporation." Section 54952.2: "As used in this chapter, 'legislative body' also means any board, commission, committee, or similar multimember body which exercises any authority of a legislative body of a local agency delegated to it by that legislative body."

Section 54952.3: "As used in this chapter[,] 'legislative body' also includes any advisory commission, advisory committee or advisory body of a local agency, created by charter, ordinance, resolution, or by any similar formal action of a legislative body or member of a legislative body of a local agency. [¶] Meetings of such advisory commissions, committees or bodies concerning subjects which do not require an examination of facts and data outside the territory of the local agency shall be held within the territory of the local agency and shall be open and public, and notice thereof must be delivered personally or by mail at least 24 hours before the time of such meeting to each person who has requested, in writing, notice of such meeting. [¶] If the advisory commission, committee or body elects to provide for the holding of regular meetings, it shall provide by bylaws, or by whatever other rule is utilized by that advisory body for the conduct of its business, for the time and place for holding such regular meetings. No other notice of regular meetings is required. [¶] 'Legislative body' as defined in this section does not include a committee composed solely of members of the governing body of a local agency which are less than a quorum of such governing body. [¶] The provisions of Sections 54954, 54955, 54955.1, and 54956 shall not apply to meetings under this section."

Section 54952.5: "As used in this chapter[,] 'legislative body' also includes, but is not limited to, planning commissions, library boards, recreation commissions, and other permanent boards or commissions of a local agency."

I. Facts

The Orange County Employees Retirement System is governed by a nine-member Board. Five members of the Board constitute a quorum. The Board is a "local agency" and a "legislative body" under sections 54951 and 54952 respectively. The Board is therefore subject to the open meeting requirements of the Brown Act. The chairman of the Board has created five advisory [FN3] committees- operations, benefit, investment, real estate, and liaison-each composed of four members of the Board. Some members serve on more than one committee. The committees' function is to review various matters

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related to the business of the Board and to make recommendations to the full Board for action. The Board considers the committees' recommendations in public meetings, at which time there is an opportunity for full public discussion and debate. The committees do not have any decisionmaking authority and act only in an "advisory" capacity. [FN4]

FN3 The parties do not dispute that these committees are properly described as "advisory."

FN4 The only evidence concerning the composition and function of the committees is a declaration by the administrator of the retirement system. The declaration states:
"[¶] 4. ... All of the committees of the Board of Retirement, including the Operations Committee, are comprised solely of members of the Board of Retirement. The Board of Retirement has nine members, and a quorum is five. However, none of the committees of the Board of Retirement are comprised of more than four members, and all committee members are also members of the Board of Retirement. ... [¶] 5. The function of such committees is to review various matters related to the business of the Board of Retirement, and make recommendations to the full Board for action. The committees have not been delegated any decision-making authority. The committees act in an advisory capacity, and make recommendations to the full Board of Retirement. The full Board considers those recommendations in public meetings, at which time there is an opportunity for full public discussion and debate on those recommendations. [¶] 6. The committees are formed by the Chairman of the Board of Retirement. The Chairman determines what committees shall operate, and which members of the Board of Retirement shall serve on such committees. The Chairman has the authority to form new committees, abolish existing committees, or combine existing committees. There is no Board rule or regulation which prescribes the number of Board committees, or the duties of any such committee; it is up to the Chairman of the Board of Retirement to decide what committees shall be formed, and who will serve on them."

On June 18, 1991, the Operations Committee met to formulate a list of recommended changes to the Board's travel policy. Freedom Newspapers sought to attend the meeting but the committee denied permission on the ground that it was not subject to the open meeting requirements of the *825 Brown Act. The next day, June 19, the full Board met in a public session at which the chairman of the Operations Committee read and explained the committee's recommendations. The press was in attendance, and there was public discussion among the Board's members about the recommendations. The Board ultimately voted eight to one in public session to accept the recommendations.

On the same day, Freedom Newspapers petitioned the trial court for a writ of mandate alleging that the Operations Committee is subject to the open meeting requirements of the Brown Act. The trial court denied the petition and entered judgment in favor of the Board. Freedom Newspapers appealed from that judgment, and the Court of Appeal reversed. We granted the Board's petition for review.

II. Discussion

The Brown Act was adopted to ensure the public's right to attend the meetings of public agencies. (§ 54950.) [FN5] 5 The Act provides that "[a]ll meetings of the legislative body of a local agency shall be open and public, and all persons shall be permitted to attend any meeting of the legislative body of a local agency, except as otherwise provided in this chapter." (§ 54953.) As already noted, "legislative body" is defined in four sections of the Act, two of which pertain to the case before us. (§§ 54952, 54952.3.) Section 54952 provides that any committee or body on which officers of a local agency serve in their official capacity and which is supported by its appointing local agency is a "legislative body." (§ 54952.) [FN6] 6 Section 54952.3 more specifically addresses "advisory" bodies: "As used in this chapter[,] 'legislative body' also includes any advisory commission, advisory committee or advisory body of a local agency, created by charter, ordinance, resolution, or by any similar formal action of a legislative body or member of a legislative body of a local agency. [¶] ... [¶] 'Legislative body' as defined in this section does not include a committee composed solely of members of the governing body of *826 a local agency which are less than a quorum of such governing body." (§ 54952.3, [FN7] 7 italics added.)

FN5 Section 54950 provides: "In enacting this chapter, the Legislature finds and declares that the public commissions, boards and councils and the other public agencies in this State exist to aid in

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the conduct of the people's business. It is the intent of the law that their actions be taken openly and that their deliberations be conducted openly. [¶] The people of this State do not yield their sovereignty to the agencies which serve them. The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may retain control over the instruments they have created."

FN6 For the full text of section 54952, see ante, footnote 2.

FN7 For the full text of section 54952.3, see ante, footnote 2.

(1a) The parties in this case disagree over the meaning of the explicit less-than-a-quorum exception contained in section 54952.3. The Board and its amici curiae, including the Attorney General, argue that an advisory committee that is excluded from the definition of "legislative body" under the exception is completely exempt from the open meeting requirements of the Act. [FN8]

FN8 Like the Brown Act, the 1972 Federal Advisory Committee Act generally subjects advisory committees to open meeting requirements. (86 Stat. 770, as amended, 5 U.S.C.S. Appen. §§ 1-15.) However, the same act, as amended, also specifically exempts "any [advisory] committee which is composed wholly of full-time officers or employees of the Federal Government" from the open meeting requirements. (5 U.S.C.S. Appen. § 3(2)(C)(iii).)

In opposition, Freedom Newspapers and its amici curiae contend that the less- than-a-quorum exception in section 54952.3 merely exempts less-than-a-quorum committees from the special, relaxed procedural requirements of section 54952.3. According to Freedom, such committees remain subject to the stricter open meeting requirements that are generally applicable to "legislative bodies" under section 54952.

When interpreting a statute our primary task is to determine the Legislature's intent. (Brown v. Kelly Broadcasting Co. (1989) 48 Cal.3d 711, 724 [257 Cal.Rptr. 708, 771 P.2d 406].) In doing so we turn first to the statutory language, since the words the Legislature chose are the best indicators of its intent. (Adoption of Kelsey S. (1992) 1 Cal.4th 816, 826 [4 Cal.Rptr.2d 615, 823 P.2d 1216].)

Each party asserts that the language of section 54952.3 supports its view. Freedom reasons that, had the Legislature intended to exempt less-than-a-quorum advisory committees from the Act's open meeting requirements, it would have used language such as this: " 'legislative bodies' as defined in this chapter shall not include a committee composed solely of members of the governing body of a local agency which are less than a quorum of such governing body." Because the Legislature used the words "in this section," instead of "in this chapter," the effect of the less-than-a-quorum exception, according to Freedom, is simply to exclude less-than-a-quorum committees from the terms of section 54952.3 rather than from other definitions of "legislative body" within the Act.

In contrast, the Board argues that, because section 54952.3 specifically refers to "any ... advisory committee," that section alone governs advisory *827 committees for the purposes of the Act. To support its interpretation the Board relies, in part, on the traditional rules of statutory construction that specific statutes govern general statutes (San Francisco Taxpayers Assn. v. Board of Supervisors (1992) 2 Cal.4th 571, 577 [7 Cal.Rptr.2d 245, 828 P.2d 147]; see also Yoffie v. Marin Hospital Dist. (1987) 193 Cal.App.3d 743, 750-753 [238 Cal.Rptr. 502]; Kennedy v. City of Ukiah (1977) 69 Cal.App.3d 545, 552 [138 Cal.Rptr. 207]) and that, to the extent a specific statute is inconsistent with a general statute potentially covering the same subject matter, the specific statute must be read as an exception to the more general statute. (Common Cause v. Board of Supervisors (1989) 49 Cal.3d 432, 443 [261 Cal.Rptr. 574, 777 P.2d 610]; Yoffie v. Marin Hospital Dist., supra, 193 Cal.App.3d at p. 751). According to the Board, an advisory committee that is excluded from the definition of "legislative body" contained in section 54952.3 is not subject to the Act's open meeting requirements, even if it might otherwise satisfy the more general definition of "legislative body" contained in section 54952.

The Board also argues that Freedom's interpretation of section 54952 would deprive sections 54952.2 and 54952.5, as well as the less-than-a-quorum exception in 54952.3, of meaning. To explain, sections 54952.2 and 54952.5 purport to include only certain bodies within the definition of

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"legislative body." For the Legislature to have enacted those statutes would have made no sense if the governmental bodies described therein had already been included in the more general definition of "legislative body" contained in section 54952.

To be sure, one could argue that section 54952.3 might still have some meaning under Freedom's interpretation. Because section 54952.3 gives certain advisory bodies the benefit of procedural requirements that are less stringent than the requirements applicable to "legislative bodies" under section 54952, under Freedom's interpretation the exception contained in section 54952.3 for less-than-a-quorum advisory committees would have the effect of subjecting such committees to the stricter, generally applicable procedural requirements.

But Freedom's interpretation of section 54952.3 would also result in absurdity. If we construed section 54952.3 merely as exempting less-than-a-quorum advisory committees from the less rigid procedural requirements in that section, even a temporary, ad hoc advisory committee composed solely of less than a quorum of the governing body would be subject to all of the Brown Act's generally applicable procedural requirements, including the requirement that committees hold "regular" meetings. (§ 54954.) Yet a *828 temporary, ad hoc committee, by definition, does not hold "regular" meetings. We will not give a statute an absurd interpretation. (Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization (1978) 22 Cal.3d 208, 245 [149 Cal.Rptr. 239, 583 P.2d 1281]; Gage v. Jordan (1944) 23 Cal.2d 794, 800 [147 P.2d 387]; Lynch v. State Bd. of Equalization (1985) 164 Cal.App.3d 94, 114 [210 Cal.Rptr. 335].)

Freedom attempts to avoid the absurdity by characterizing the Operations Committee as a standing committee. However, neither section 54952 nor section 54952.3 distinguishes between ad hoc advisory committees and standing advisory committees. We will not add to a statute a distinction that has been omitted. (Code Civ. Proc., § 1858; see, e.g., Security Pacific National Bank v. Wozab (1990) 51 Cal.3d 991, 998 [275 Cal.Rptr. 201, 800 P.2d 557].)

When a statute is ambiguous, as in this case, we typically consider evidence of the Legislature's intent beyond the words of the statute (Dyna-Med, Inc. v. Fair Employment & Housing Com. (1987) 43 Cal.3d 1379, 1387 [241 Cal.Rptr. 67, 743 P.2d 1323]) and look both to the legislative history of the statute and to the wider historical circumstances of its enactment (ibid.). An examination of the history of the Brown Act, both prior to and after the enactment of section 54952.3, shows that committees comprised of less than a quorum of the legislative body have generally been considered exempt from the Act's open meeting requirements.

In 1958 the Attorney General, interpreting the original version of section 54952, [FN9] concluded that "meetings of committees of local agencies where such committees consist of less than a quorum of the legislative body are not covered by the act." (Secret Meeting Law, 32 Ops.Cal.Atty.Gen. 240, 242 (1958).) The Attorney General reasoned that, "[i]n those cases the findings of such a committee have not been deliberated upon by a quorum of the legislative body and the necessity, as well as the opportunity, for full public deliberation by the legislative body still remains." (Ibid.)

FN9 In 1958 section 54952 provided: "As used in this chapter, 'legislative body' means the governing board, commission, directors or body of a local agency, or any board or commission thereof." (Stats. 1953, ch. 1588, § 1, p. 3270.)

Successive Attorneys General have consistently adhered to the view stated in the 1958 opinion. In 1968 the Attorney General wrote that "[w]e have consistently concluded that committees composed of less than a quorum of the legislative body creating them and not established on a permanent basis for a continuing function are not subject to the open meeting requirements of *829 that Act. In view of the lack of any pronouncements on the parts of either the courts or the Legislature which would compel a different conclusion, our opinion remains unchanged." (Cal. Atty. Gen., Indexed Letter No. IL 68-106 (Apr. 29, 1968).)

More specifically, since the enactment of section 54952.3 the Attorney General has continuously recognized that advisory committees falling within the express less-than-a-quorum exception in section 54952.3 are not "legislative bodies" within the meaning of the Brown Act. (See, e.g., Cal. Atty. Gen., Indexed Letter No. IL 69-131 (June 30, 1969); Secret Meetings Laws Applicable to Public Agencies (Cal.Atty.Gen., 1972) pp. 6-8; Closed

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Meetings, 63 Ops.Cal.Atty.Gen. 820, 823 (1980); Open Meeting Requirements, 64 Ops.Cal.Atty.Gen. 856, 857 (1981).) The Attorney General's brief in this case supports the long-standing view of his office. (2) While the Attorney General's views do not bind us (Unger v. Superior Court (1980) 102 Cal.App.3d 681, 688 [162 Cal.Rptr. 611]), they are entitled to considerable weight (Meyer v. Board of Trustees (1961) 195 Cal.App.2d 420, 431 [15 Cal.Rptr. 717]). (1b) This is especially true here since the Attorney General regularly advises many local agencies about the meaning of the Brown Act and publishes a manual designed to assist local governmental agencies in complying with the Act's open meeting requirements. (See, e.g., Open Meeting Laws (Cal.Atty.Gen., 1989).)

In 1961 the Legislature amended the Brown Act, not in response to the Attorney General's recognition of an implicit less-than-a-quorum exception, but in response to a judicial opinion that essentially eviscerated the Act by restrictively defining the terms "meeting" and "legislative body." The court in Adler v. City Council (1960) 184 Cal.App.2d 763 [7 Cal.Rptr. 805] (Adler) held that a city's planning commission did not violate the Brown Act when all but one of its members attended a dinner given a few days before the host's application to the commission for an amendment to the zoning law. The court held that "the Brown Act was not directed at anything less than a formal meeting of a city council or one of the city's subordinate agencies." (Id. at p. 770.) Misconstruing the Attorney General's 1958 opinion (Secret Meeting Law, supra, 32 Ops.Cal.Atty.Gen. 240), which addressed committees composed of less than a quorum of the governing body, the court also held that the Act did not apply to any committee of an advisory nature, whether or not composed of a quorum of the governing body. (Adler, supra, 184 Cal.App.2d at p. 771.)

In response to the Adler decision, the Legislature broadened the scope of the Brown Act the very next year. (Stats. 1961, ch. 1671, § 1, p. 3637, *830 amending §§ 54952 and 54957, and adding §§ 54952.5, 54952.6, and 54960.) Shortly after the 1961 amendments took effect, the Attorney General construed them as disapproving Adler on several points. (Secret Meeting Law, 42 Ops.Cal.Atty.Gen. 61 (1963).) Specifically, the Attorney General concluded that the 1961 amendments "disapproved Adler's restrictive interpretation of the word 'meeting' by recognizing that criminally prohibited legislative action may be taken at gatherings that fall far short of the ' " formal assemblages of the council sitting as a joint deliberative body " ' " and "repudiated that portion of the Adler decision which held that the act was not meant to apply to planning commissions or other bodies of an ' advisory' nature." (Secret Meeting Law, supra, 42 Ops.Cal.Atty.Gen., at pp. 64- 65.)

In addition to the history set out above, the history of the Brown Act in the Legislature reflects a recognition of the implicit less-than-a-quorum exception and, after the consistent failure of proposals to abolish it, the codification of a limited version of that exception.

A 1963 bill would have abolished the exception by providing that "[a]ll meetings of any committee or subcommittee of a legislative body, whether or not composed of a quorum of the members of the legislative body, shall be open and public, and all persons shall be permitted to attend any meeting of such committee or subcommittee, except during consideration of the matters set forth in Section 54957." (Assem. Bill No. 2334 (1963 Reg. Sess.) § 2, italics added.) The bill did not pass.

The legislative history of section 54952.3, the provision at issue in this case, reveals another unsuccessful attempt to abolish the implicit less-than-a- quorum exception. Section 54952.3, enacted in 1968 (Stats. 1968, ch. 1297, § 1, p. 2444), extended the coverage of the Brown Act to certain advisory committees that were not previously covered. However, at the same time the Legislature rejected an alternative bill that would have abolished the implicit less-than-a-quorum exception by making all advisory committees subject to the full procedural requirements applicable to governing bodies. (Sen. Bill No. 717 (1968 Reg. Sess.).) [FN10] The bill that did pass (Assem. Bill No. 202 (1968 Reg. Sess.), codified as § 54952.3) thus appears to be a compromise, incorporating into the open meeting requirements of the Brown *831 Act advisory committees that were not previously included within the Act, but relaxing the procedural requirements applicable to those committees and codifying a limited version of the implicit less-than-a-quorum exception.

FN10 Senate Bill No. 717 would have amended section 54952 by adding the italicized words: "As used in this chapter, 'legislative body' means the

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governing board, commission, directors or body of a local agency, or any board, commission, committee, advisory committee, or subcommittee thereof, and shall include any board, commission, committee, or other body on which officers of a local agency serve in their official capacity as members and which is supported in whole or in part by funds provided by such agency, whether such board, commission, committee or other body is organized and operated by such local agency or by a private corporation." (Sen. Bill No. 717 (1968 Reg. Sess.), italics in original.)

To support its view that the committees excluded from the definition of "legislative body" in section 54952.3 were included in another definition of "legislative body," Freedom Newspapers relies on a communication by Assemblyman Hayes to the members of the Assembly discussing his reasons for drafting the less-than-a-quorum exception. Assemblyman Hayes claimed that " '[t]he reason [for enacting the less-than-a-quorum exception in section 54952.3] was that such committees of the governing body of a local agency are covered by another section of the Ralph M. Brown Act, Government Code Sec. 54952.' " (4 Assem. J. (1968 Reg. Sess.) p. 7163.) However, these comments offer little assistance in the interpretation of section 54952.3 because they do not necessarily reflect the views of other members of the assembly who voted for section 54952.3. (Cf. Delaney v. Superior Court (1990) 50 Cal.3d 785, 801, fn. 12 [268 Cal.Rptr. 753, 789 P.2d 934]; see also California Teachers Assn. v. San Diego Community College Dist. (1981) 28 Cal.3d 692, 700-701 [170 Cal.Rptr. 817, 621 P.2d 856]; In re Marriage of Bouquet (1976) 16 Cal.3d 583, 589-590 [128 Cal.Rptr. 427, 546 P.2d 1371].)

Indeed, the Legislature's action in two respects since the 1968 enactment of section 54952.3 indicates its continuing understanding that advisory committees comprised solely of less than a quorum of the governing body are exempt from the open meeting requirements of the Act.

First, although legislative acquiescence is a weak indication of legislative intent (People v. Escobar (1992) 3 Cal.4th 740, 751 [12 Cal.Rptr.2d 586, 837 P.2d 1100]), we note that the Legislature has allowed the Court of Appeal's opinion in Henderson v. Board of Education (1978) 78 Cal.App.3d 875 [144 Cal.Rptr. 568] to govern meetings of less-than-a-quorum advisory committees for the past 14 years. The Henderson court squarely addressed the issue of whether an advisory committee consisting solely of governing board members, constituting less than a quorum of the board, was exempt from the open meeting requirements of the Act. (78 Cal.App.3d at pp. 880-883.) In Henderson, ad hoc advisory committees had been created for the purpose of advising the board of education about the qualifications of candidates for appointment to a vacant position. Each of the advisory committees was composed solely of members *832 of the governing body of the school district numbering less than a quorum of the governing body. The court considered whether the advisory committees had violated the Brown Act when they evaluated the candidates' qualifications and interviewed candidates in private sessions. (Id. at p. 877.) Finding that section 54952.3 provided an express exemption from the open meeting requirements of the Brown Act for advisory committees comprised solely of less than a quorum of the governing body, the Henderson court held that the advisory committees in that case were not subject to the Act. (78 Cal.App.3d at pp. 880-881.)

Secondly, and more importantly, the Legislature in 1992 attempted to extend the coverage of the Brown Act by limiting the coverage of the express less-than-a-quorum exception in section 54952.3 to ad hoc advisory committees. This legislation is the strongest indication that the current version of section 54952.3 excludes less-than-a-quorum advisory committees from the Act's open meeting requirements, rather than merely from the less-stringent procedural requirements in section 54952.3. On August 31, 1992, the California Legislature passed and sent to the Governor a bill amending the explicit less-than-a-quorum exception as follows: " 'Legislative body' as defined in this section does not include a limited duration ad hoc committee composed solely of members of the governing body of a local agency which are less than a quorum of the governing body but does include any standing committee of a governing body irrespective of its composition. For purposes of this section, 'standing committee' means a permanent body created by charter, ordinance, resolution, or by any similar formal action of a legislative body or member of a legislative body of a local agency and which holds regularly scheduled meetings." (Assem. Bill No. 3476 (1991-92 Reg. Sess.) § 3, italics added.) The Governor vetoed this bill, reasoning that its

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economic impact would be too great in view of the state's fiscal outlook. In his veto message the Governor stated: "This bill would make a number of changes in the Ralph M. Brown Act relating to open meetings. It would expand the number of local agencies subject to the law, and expand notice, recordation, and recordkeeping requirements.... [¶] I cannot approve mandating expensive new requirements while we are unable to afford the ones on the books today." (Governor's veto message to Assem. on Assem. Bill No. 3476 (Sept. 20, 1992) Recess J. No. 24 (1991-1992 Reg. Sess.) p. 10271, italics added.) [FN11]

FN11 On October 10, 1993, the Governor signed into law Senate Bill No. 1140 (Stats. 1993, ch. 1138), which changes, as of April 1, 1994, the Brown Act's definition of "legislative body." Among other things, the new law amends section 54952 and repeals sections 54952.2, 54952.3, and 54952.5.

The newly amended section 54952 codifies an exception for less-than-a- quorum advisory committees in these words: "[A]dvisory committees, composed solely of the members of the legislative body which are less than a quorum of the legislative body are not legislative bodies, except that standing committees of a legislative body, irrespective of their composition, which have a continuing subject matter jurisdiction, or a meeting schedule fixed by charter, ordinance, resolution, or formal action of a legislative body are legislative bodies for purposes of this chapter." (§ 54952, subd. (b), as amended by Sen. Bill No. 1140 (1993-1994 Reg. Sess.), 1993 Stats., ch. 1138, eff. Apr. 1, 1994.)

This case does not present the issue whether the Operations Committee would be a "legislative body" under the new law. Accordingly, we express no opinion on the issue.

The Legislature's adoption of subsequent amending legislation that is ultimately vetoed may be considered as evidence of the Legislature's understanding of the unamended, existing statute. (See Bu v. Chacon (1976) 16 *833 Cal.3d 465, 470 [128 Cal.Rptr. 1, 546 P.2d 289]; see also Irvine v. California Emp. Com. (1946) 27 Cal.2d 570, 578 [165 P.2d 908].) The 1992 legislation reflects the Legislature's understanding that the current version of the explicit less-than-a-quorum exception in section 54952.3 excludes advisory committees, whether ad hoc or standing, composed solely of less than a quorum of the members of the governing body from the open meeting requirements of the Act.

The 1992 legislation "would [have] exclude[d] a limited duration ad hoc committee from the definition of legislative body but would [have] include[d] any standing committee, as defined, of a governing body irrespective of its composition." (See Legislr Counsel's Dig., Assem. Bill No. 3476 (1991-1992 Reg. Sess.).) Because the 1992 legislation retained the "in this section" language (§ 54952.3) and made no amendment to the general language in section 54952, the legislation would only make sense if the Legislature gave the words "in this section" the same meaning that the Board attributes to them in the current statute. If the Legislature had intended "in this section" to be interpreted as narrowly as Freedom suggests, the 1992 legislation would have had this bizarre result: Limited duration, ad hoc, advisory committees would have been subject to the full set of procedural requirements applicable to governing bodies, including the requirement of holding "regular meetings," but standing advisory committees would have received the benefit of the relaxed procedural requirements described in section 54952.3. This clearly could not have been the intended effect of the 1992 bill.

In view of these considerations, we find it more consistent with the legislative intent to construe the less-than-a-quorum exception contained in section 54952.3 as an exception to the definition of "legislative body," and thus one of several exceptions to the Brown Act's open meeting requirements, [FN12] rather than merely as an exception to the special procedural requirements of section 54952.3. This interpretation is consistent with the Act's *834 purpose of ensuring that the "actions [of public agencies] be taken openly and that their deliberations be conducted openly." (§ 54950.) By definition, the exception applies only to an advisory committee that consists solely of members of the legislative body that created it but not enough members to constitute a quorum or, thus, to act as the legislative body. Accordingly, before any action can be taken on such a committee's recommendations the entire legislative body, which includes the members of the advisory committee, must conduct further, public deliberations. (§ 54952.) In this way the Act reasonably accommodates the practical needs of governmental organizations while still protecting the public's right to know.

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FN12 Compare section 54956.9 (legislative body may hold closed sessions to confer with legal counsel regarding pending litigation); section 54957 (legislative body may hold closed sessions to confer with Attorney General, district attorney, sheriff, chief of police, or their respective deputies, on matters posing a threat to the security of public buildings); section 54957.6 (legislative body may hold closed sessions to discuss matters related to employee compensation and collective bargaining).

III. Disposition

Since the Operations Committee is composed solely of members of the governing body of a local agency numbering less than a quorum of the governing body, the committee's meeting on June 18, 1991, was not subject to the open meeting requirements of the Brown Act. Accordingly, the judgment of the Court of Appeal is reversed.

Lucas, C. J., Arabian, J., Baxter, J., and George, J., concurred.

MOSK, J.,

Concurring and Dissenting.-Although I have no quarrel with the result reached by the majority, I find that virtually all their reasoning has been rendered moot by the enactment of the 1993 legislation quoted in footnote 11 of the majority opinion. (Stats. 1993, ch. 1138.)

That legislation answers the question we took this case to resolve, i.e., whether advisory committees composed solely of members of a legislative body are themselves "legislative bodies" for purposes of the Ralph M. Brown Act. (Gov. Code, § 54950 et seq.) The 1993 legislation plainly declares they are not, unless they qualify as "standing committees" therein defined.

In light of this development the majority opinion has become an anachronism; indeed, the 1993 legislation repeals the very statute discussed by the majority at length. (Gov. Code, § 54952.3.) Because it is not our responsibility to offer advisory opinions on repealed statutes, I would dismiss review in this case as improvidently granted. *835

KENNARD, J.

I dissent.

California's Open Meeting Law [FN1] requires legislative bodies to give notice of the time and place of their meetings and to make such meetings open and accessible to the public. The stated purpose of this law is to assure that Californians can be fully informed about the legislative decisionmaking process of elected and appointed officials. Under the majority opinion, however, a legislative body is entirely free to conduct the public's business in private session, shielding its decisionmaking process from scrutiny by the press or public, simply by dividing itself into various "standing committees" whose membership does not comprise a quorum of the full legislative body. [FN2] The majority reaches this result by interpreting the Brown Act to exempt such committees from compliance with any of the Act's requirements. The majority's interpretation contorts the statutory language and contravenes the goal of this state's Open Meeting Law.

FN1 This law, which is codified in Government Code section 54950 et seq., is also known as the Ralph M. Brown Act, and will hereafter be referred to alternatively as the "Brown Act" or the "Act."

FN2 Of course, in the case of a "committee" whose members make up a quorum or more-than-a-quorum of the membership of the full governing body, the committee would not be a "committee" at all; it would be the governing body.

I

This case arose out of the June 18, 1991, meeting of the "Operations Committee" of the Board of Directors of the Orange County Employees Retirement System. The Board administers $1.5 billion, consisting of moneys derived from the county's general fund as well as those contributed by employees. The "Operations Committee" is one of five standing committees that report to the full Board. The membership of the Operations Committee (and of each of the other standing committees) consists of four of the nine Board members-one person less than a quorum of the Board.

The purpose of the June 18, 1991, meeting was to reevaluate the Board's travel policy-a policy that had engendered substantial controversy after it was reported that some Board members had used public funds to tour Europe, assertedly in connection with

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Board investments. A reporter for the Orange County Register, a daily newspaper, tried to attend the meeting but was refused entry.

The next day, the newspaper's parent company, Freedom Newspapers, Inc., petitioned the superior court for a writ of mandate, seeking access to future meetings of the Operations Committee. The superior court denied the *836 petition. The Court of Appeal reversed, however, concluding that the Operations Committee was a "legislative body of a local agency" whose meetings were consequently required by the Brown Act to be "open and public." (Gov. Code, § 54953.) [FN3]

FN3 Further undesignated statutory references are to the Government Code.

This court granted the Board's petition for review and now reverses the judgment of the Court of Appeal.

As I shall explain, the Court of Appeal reached the correct result.

II

In the preamble to the Brown Act, the Legislature expressed the intent underlying the Act: "[T]he Legislature finds and declares that the public commissions, boards and councils and the other public agencies in this State exist to aid in the conduct of the people's business. It is the intent of the law that their actions be taken openly and that their deliberations be conducted openly. [¶] The people of this State do not yield their sovereignty to the agencies which serve them. The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may retain control over the instruments they have created." (§ 54950.)

Consistent with this stated legislative intent, the Act requires that all meetings of legislative bodies of local agencies "be open and public" and that all persons "be permitted to attend" such meetings. (§ 54953.) The Act does, however, permit legislative bodies to discuss in "closed session" certain sensitive topics, such as pending litigation and personnel matters. [FN4]

FN4 The Act permits closed session meetings when an agency discusses a license application by someone with a criminal record (§ 54956.7), or meets with its negotiator regarding the price and terms acceptable to the agency in a real property transaction (§ 54956.8), or discusses pending litigation with legal counsel (§ 54956.9), or participates in a joint agency meeting about insurance pooling, tort liability losses, or workers' compensation liability (§ 54956.95), or discusses employee wages and benefits with its labor negotiator (§ 54957.6), or participates in meetings regarding multijurisdictional drug law enforcement (§ 54957.8).

The Act also requires "legislative bodies" to conduct "regular" meetings (§ 54954) and abide by certain rules pertaining to adjournment or continuance of such meetings (§§ 54955, 54955.1). Additional requirements are posting the agenda of each regular meeting, acting only on items listed on the posted agenda (§ 54954.2), and giving written notice one week before *837 each regular meeting to anyone requesting such notice (§ 54954.1). The Act does allow for special meetings, but only if they are preceded by a 24-hour written notice. (§ 54956.)

The Act defines "legislative bodies" broadly. The term includes "the governing board, commission, directors or body of a local agency, or any board or commission thereof" as well as "any board, commission, committee, or other body on which officers of a local agency serve in their official capacity as members and which is supported in whole or in part by funds provided by such agency ...." (§ 54952.) The term also applies to "any board, commission, committee, or similar multimember body which exercises any authority of a legislative body of a local agency" (§ 54952.2), as well as to "planning commissions, library boards, recreation commissions, and other permanent boards or commissions of a local agency" (§ 54952.5).

The "Operations Committee" of the Board of Directors of the Orange County Employees Retirement System, as a "committee ... on which officers of a local agency serve in their official capacity as members and which is supported in whole or in part by funds provided by such agency," qualifies as a "legislative body" within the meaning of section 54952, thus making it subject to the Brown Act's "open meeting" requirements. The issue in this case is whether the Operations Committee is exempted by another, more specific,

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provision of the Act, section 54952.3, from holding meetings open to the public.

Section 54952.3 provides for less stringent notice requirements for meetings of "any advisory commission, advisory committee or advisory body of a local agency, created by charter, ordinance, resolution, or by any similar formal action of a legislative body or member of a legislative body of a local agency." Under this section, an advisory commission, committee or body is a "legislative body" for purposes of the open meeting requirements of the Act. Such a legislative body can, however, elect between giving 24-hour written notice of its meetings or providing by rule or bylaw for its meetings to be held at a regular time; "[n]o other notice of regular meetings is required." (§ 54952.3.)

Section 54952.3 further provides that a " '[l]egislative body' as defined in this section does not include a committee composed solely of members of the governing body of a local agency which are less than a quorum of such governing body." (Italics added.) It is on this italicized phrase that the majority rests its conclusion that advisory committees made up only of members of the full governing body but "less than a quorum" of that body *838 are exempt from any of the requirements of the Brown Act. Thus, under the majority's interpretation, the Operations Committee was free to conduct its business in private.

I disagree with the majority's interpretation of section 54952.3's "less- than-a-quorum" provision. In my view, this provision by its express terms excludes those advisory committees composed solely of members of the full governing body of the local agency only from the "relaxed" notice requirements of section 54952.3, thereby making such advisory bodies subject to the more rigid requirements that govern legislative bodies generally.

My interpretation of the "less-than-a-quorum" provision is compelled by the plain language of section 54952.3, which must be the starting point for this statutory interpretation. (Adoption of Kelsey S. (1992) 1 Cal.4th 816, 826 [4 Cal.Rptr.2d 615, 823 P.2d 1216].) After specifying that advisory commissions or committees are "legislative bodies" for purposes of the Brown Act, section 54952.3 next describes the less stringent procedural requirements for the meetings of such advisory bodies. It then states that " '[l]egislative body' as defined in this section does not include a committee composed solely of members of the governing body of the local agency which are less than a quorum of such governing body." By the limiting language, "as defined in this section," the provision carves out an exception from section 54952.3's definition of "legislative body" (and thus from the section's less stringent notice requirements) for an advisory committee composed solely of members of the governing body of the local agency who comprise less than a quorum of the local agency's full membership.

Therefore, in this case the Operations Committee of the Board of Directors of the Orange County Employees Retirement System, as an advisory committee composed solely of members of the full governing body of the local agency (the Board), is not a "legislative body" for purposes of the relaxed notice requirements of section 54952.3. Rather, as I explained earlier, the Operations Committee meets section 54952's definition of "legislative body" as being a "committee ... on which officers of a local agency serve in their official capacity as members and which is supported in whole or in part by funds provided by such agency ...." As such, the Operations Committee is subject to the full force of the Brown Act. Most important, the committee must conduct its business in public.

To require an advisory committee that, as here, is comprised of individuals who are members of the governing body to which the committee reports to conduct public meetings would further the Legislature's stated intent that *839 "the people's business" be conducted openly, and that both the "actions" and the "deliberations" of government be open to the press and public. Even though the Operations Committee cannot itself bind the full Board by "actions" such as adopting a proposal or enacting a rule (which would require a majority vote of the full Board), it can and does "deliberate." "Deliberation" is defined as "the process ... of thoughtful and lengthy consideration" or as "formal discussion and debate on all sides of an issue." (American Heritage Dict. of the English Language (1980) p. 349.) Indeed, to best assure that government decisions follow thoughtful and lengthy consideration or debate of all sides of an issue, the Brown Act invites the public to witness that whole process.

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A standing committee's reconsideration of a significant policy that affects the public's trust and confidence in its government officials-such as the Board's travel policy here-necessarily involves deliberation. Yet, under the majority's interpretation of section 54952.3, this deliberation can take place in private session outside the scrutiny of the public. And when, as in this case, the makeup of the standing committee recommending a policy change is just one member short of a quorum of the full governing body, and only one additional vote is needed to make the recommended change, there may be little further debate or deliberation on the issue by the full Board. In that event, the public is deprived of its right to witness the deliberative processes of government. Indeed, under the majority's reading of section 54952.3, any local agency wishing to keep its deliberative processes from the public can effectively do so by referring controversial issues to standing committees comprised of one member less than a quorum.

The majority's interpretation of section 54952.3 rests first on its conclusion that construing section 54952.3 to exempt from the less stringent procedural requirements specified by that section all less-than-a-quorum advisory committees composed solely of members of the governing body would "result in absurdity" by making even temporary, ad hoc advisory committees subject to the Brown Act's "generally applicable procedural requirements," including that set out in section 54954 of holding "regular" meetings. (Maj. opn., ante, at p. 827.) But to require a temporary, ad hoc advisory committee to conduct its meetings at a regular time seems far less absurd than to permit, as the majority does here, a local agency to use standing committees to shield discussion and deliberation on controversial issues from public scrutiny. [FN5]

FN5 Fortunately, the majority's opinion, though misguided, will be short-lived. New legislation (Stats. 1993, ch. 1138), which changes the Brown Act's definition of "legislative body" effective April 1, 1994, draws a distinction between "ad hoc" and "standing" advisory committees, and specifies that the latter, to the extent they "have a continuing subject matter jurisdiction," are covered by the Brown Act's "open meeting" requirements. (§ 54942, subd. (b), as amended by Sen. Bill No. 1140 (1993-1994 Reg. Sess.), Stats. 1993, ch. 1138, § 3, eff. Apr. 1, 1994.)

The majority relies also on opinions by the Attorney General (which the majority admits do not bind this court) and on a series of failed legislative *840 efforts to amend the Brown Act. But we need not turn to unpassed or vetoed legislation to discern the Legislature's intent. The Legislature has made its intent plain in the preamble to the Brown Act, which expressly states that to ensure that Californians can remain informed and "retain control" over their own government, legislative deliberations must be conducted openly. "Vital" to the functioning of any democratic society is "an informed citizenry." (John Doe Agency v. John Doe Corp. (1989) 493 U.S. 146, 152 [107 L.Ed.2d 462, 110 S.Ct. 471].) Consistent with our Legislature's intent, I would affirm the Court of Appeal's judgment directing that the Board allow members of the press and the public to attend "its regular committee meetings," including those of its Operations Committee. *841

Cal. 1993.

Freedom Newspapers, Inc. v. Orange County Employees Retirement System Bd. of Directors

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H

MARYANN CARRISALES, Plaintiff and Appellant,
v.
DEPARTMENT OF CORRECTIONS et al., Defendants and Respondents.

No. S073601.

Supreme Court of California

Dec. 9, 1999.

*1132 SUMMARY

An employee brought an action for sexual harassment in violation of the California Fair Employment and Housing Act (FEHA) (Gov. Code, 12900 et seq.) against a coworker who she alleged repeatedly sexually harassed her. The trial court entered summary judgment for defendant. (Superior Court of San Bernardino County, No. RCV-14935, Ben T. Kayashima, Judge.) The Court of Appeal, Fourth Dist., Div. Two, No. E020163, affirmed.

The Supreme Court affirmed the judgment of the Court of Appeal. The court held that FEHA does not cover harassment short of an unlawful employment practice and thus does not apply to actions between coworkers not involving a supervisorial relationship. Although Gov. Code, 12940, subd. (h)(1), prohibits any person from harassing an employee, FEHA applies only to employment practices. It imposes on the employer the duty to take all reasonable steps to prevent harassment from occurring in the first place and to take immediate and appropriate action when it is or should be aware of the conduct. If the employer fails to take action and harassment occurs, any unlawful employment practice is by the employer, not the coworker. Plaintiff had remedies against the coworker, but none under FEHA. (Opinion by Chin, J., expressing the unanimous view of the court.)

HEADNOTES

Classified to California Digest of Official Reports

(1a, 1b) Civil Rights § 3.2--Employment--Fair Employment and Housing Act--Sexual Harassment--Liability of Nonsupervisory Coworker.

In a sexual harassment action under the California Fair Employment and Housing Act (FEHA) (Gov. Code, 12900 et seq.), *1133 brought by an employee against a coworker who plaintiff alleged repeatedly sexually harassed her, the trial court properly granted summary judgment for defendant. FEHA does not cover harassment short of an unlawful employment practice and thus does not apply to actions between coworkers not involving a supervisorial relationship. Although Gov. Code, 12940, subd. (h)(1), prohibits any person from harassing an employee, FEHA applies only to employment practices. It imposes on the employer the duty to take all reasonable steps to prevent harassment from occurring in the first place and to take immediate and appropriate action when it is or should be aware of the conduct. If the employer fails to take action and harassment occurs, any unlawful employment practice is by the employer, not the coworker. Plaintiff had remedies against the coworker, but none under FEHA.

[See 8 Witkin, Summary of Cal. Law (9th ed. 1988) Constitutional Law, 760.]

(2) Statutes § 39--Construction--Giving Effect to Statute--Conformation of Parts.
Courts must not view isolated statutory language out of context, but instead must interpret the statute as a whole, so as to make sense of the entire statutory scheme.

COUNSEL

Quackenbush and Quackenbush, William C. Quackenbush; Law Offices of Mark John Tundis and Mark John Tundis for Plaintiff and Appellant.

Bill Lockyer, Attorney General, Richard M. Frank, Chief Assistant Attorney General, Louis Verdugo, Jr., Assistant Attorney General, and Thomas P. Reilly, Deputy Attorney General, for the Fair Employment and Housing Commission as Amicus Curiae on behalf of Plaintiff and Appellant.

Law Offices of Patricia D. Barrett and Patricia D. Barrett for Defendants and Respondents Department of Corrections, Denise Powell and Rose Del Valle.

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Tuverson & Hillyard and Kathleen A. Stosuy for Defendant and Respondent Dave Selkirk.

Brobeck, Phleger & Harrison, Rebecca D. Eisen and Richard T. Marquez for the Employers Group as Amicus Curiae on behalf of Defendant and Respondent Dave Selkirk. *1134

CHIN, J.

The California Fair Employment and Housing Act (FEHA) (Gov. Code, 12900 et seq.) [FN1] declares certain kinds of discrimination and harassment in the workplace to be "unlawful employment practice[s]." (12940.) We must decide whether an employee may be personally liable to a coworker for sexual harassment under the FEHA. We conclude that the FEHA does not apply to actions between coworkers not involving a supervisorial relationship.

FN1 All further statutory references are to the Government Code unless otherwise indicated.

I. Procedural History

Plaintiff Maryann Carrisales, an employee of the Department of Corrections (Department) sued the Department, two of her supervisors, and a coworker, Dave Selkirk, for sexual harassment in violation of the FEHA. She alleged that Selkirk repeatedly sexually harassed her, and that the defendant supervisors knew of the sexual harassment but failed to take immediate and appropriate corrective action.

The trial court granted summary judgment in favor of each defendant. Plaintiff appealed. In an opinion authored by Justice Richli, the Court of Appeal reversed the grant of summary judgment as to the Department, finding a triable issue of fact regarding whether the Department and plaintiff's supervisors took immediate and appropriate corrective action. It affirmed the grant of summary judgment as to the supervisors, holding that they could not be held personally liable under the FEHA for sexual harassment that they neither assisted, encouraged, nor participated in themselves. These rulings are not before us on review, and we do not consider them.

The Court of Appeal also affirmed the grant of summary judgment in favor of Selkirk, holding that "a nonsupervisory coworker cannot be held liable for sexual harassment under FEHA." The court stressed that its ruling did not mean that sexual harassment is acceptable either legally or morally. The victim of harassment may have injunctive or tort remedies against the harasser depending on the precise facts of the case. It meant only that "the victim's legal remedy [against a coworker harasser] does not lie under FEHA."

We granted plaintiff's petition for review, which raised only the issue of the liability of a coworker for harassment under the FEHA.

II. Discussion

(1a) The sole issue before us is whether the FEHA makes a nonsupervisory employee personally liable to a coworker for sexual harassment. *1135 Resolution of the issue requires us to interpret section 12940, subdivision (h)(1) (section 12940(h)(1)), which states as relevant: "It shall be an unlawful employment practice ...: ... For an employer ... or any other person, because of ... sex, ... to harass an employee or applicant. Harassment of an employee or applicant by an employee other than an agent or supervisor shall be unlawful if the entity, or its agents or supervisors, knows or should have known of this conduct and fails to take immediate and appropriate corrective action. An entity shall take all reasonable steps to prevent harassment from occurring." [FN2]

FN2 Section 12940(h)(1) provides in its entirety: "It shall be an unlawful employment practice, unless based upon a bona fide occupational qualification, or, except where based upon applicable security regulations established by the United States or the State of California:
"(h)(1) For an employer, labor organization, employment agency, apprenticeship training program or any training program leading to employment, or any other person, because of race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, marital status, sex, or age, to harass an employee or applicant. Harassment of an employee or applicant by an employee other than an agent or supervisor shall be unlawful if the entity, or its agents or supervisors, knows or should have known of this conduct and fails to take immediate and appropriate corrective action. An entity shall take all reasonable steps to prevent harassment from occurring. Loss of tangible job benefits shall not be necessary in order to establish harassment."

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In urging that a coworker is personally liable for harassment under the FEHA, plaintiff relies primarily on the statutory reference to "any other person." This language is broad and certainly includes Selkirk; indeed, it includes everyone in the world. The FEHA defines a "person" as including "one or more individuals ...." (12925, subd. (d); see Reno v. Baird (1998) 18 Cal.4th 640, 644 [76 Cal.Rptr.2d 499, 957 P.2d 1333].) Plaintiff argues that, because the statute prohibits any person from committing harassment, it makes a coworker like Selkirk personally liable for harassing her. We disagree.

(2) We must not view isolated language out of context, but instead interpret the statute as a whole, so as to make sense of the entire statutory scheme. (People v. McCart (1982) 32 Cal.3d 338, 342-343 [185 Cal.Rptr. 284, 649 P.2d 926].) (1b) Section 12940 defines what is "an unlawful employment practice." (Italics added.) If there is no proscribed "employment practice," the FEHA does not apply. The second sentence of section 12940(h)(1) makes clear what is an unlawful employment practice in this context: "Harassment of an employee or applicant by an employee other than an agent or supervisor [i.e., by someone like Selkirk] shall be unlawful if the entity, or its agents or supervisors, knows or should have known of this conduct and fails to take immediate and appropriate corrective action." ***1136** (Italics added.) If an employee other than an agent or supervisor commits the harassment, and the employer takes immediate and appropriate corrective action when it becomes or reasonably should become aware of the conduct-for example, when the victim or someone else informs the employer-there simply is no "unlawful employment practice" that the FEHA governs. Additionally, like the Court of Appeal, "we do not believe the Legislature intended the harassing coworker's liability to turn on the employer's knowledge and failure to take action." If the employer takes appropriate action, no unlawful employment practice has occurred. If the employer fails to take such action, there may be an unlawful employment practice, but it is by the employer, not the coworker.

Plaintiff makes a number of arguments in favor of imposing individual liability under the FEHA on coworkers, none persuasive. She notes that the "Legislature has declared that the purpose of the FEHA is to provide effective remedies which will eliminate discriminatory practices," which include harassment. (Dyna-Med, Inc. v. Fair Employment & Housing Com. (1987) 43 Cal.3d 1379, 1387 [241 Cal.Rptr. 67, 743 P.2d 1323], citing 12920.) "In order to eliminate discrimination, it is necessary to provide effective remedies that will both prevent and deter unlawful employment practices and redress the adverse effects of those practices on aggrieved persons." (12920.5, italics added.) This legislatively declared purpose of providing effective remedies would be defeated, plaintiff argues, if she had no recourse against the harasser personally. We certainly do not "dispute that the prevention of sexual harassment in the workplace is of utmost importance." (Farmers Ins. Group v. County of Santa Clara (1995) 11 Cal.4th 992, 1015 [47 Cal.Rptr.2d 478, 906 P.2d 440].) But the FEHA proscribes and provides remedies for unlawful employment practices. Under that law, harassment by a nonsupervisor is not an unlawful employment practice if the employer takes immediate and appropriate corrective action when reasonably made aware of the conduct.

Moreover, as the Court of Appeal noted, our conclusion does not necessarily prevent a harasser from being personally liable to the victim under some other statute or theory of tort. All we hold is that the FEHA does not cover harassment short of an unlawful employment practice. The FEHA's noncoverage does not immunize anyone, including a coworker, from the consequences of conduct that is otherwise tortious. It is true that under our holding a victim of harassment might not receive monetary damages for all acts of harassment. Section 12940(h)(1) makes the employer strictly liable for harassment by an agent or supervisor, but liable for harassment by others only if the employer fails to take immediate and appropriate corrective ***1137** action when reasonably made aware of the conduct. (See generally, Fiol v. Doellstedt (1996) 50 Cal.App.4th 1318, 1328 [58 Cal.Rptr.2d 308], and cases cited.) Thus, circumstances could exist in which a plaintiff would not receive a monetary recovery. If a person who is neither a supervisor nor an agent commits acts of harassment not amounting to a tort outside of the FEHA, and the employer takes immediate and appropriate corrective action when it is or should be aware of the conduct (for example, when the victim or someone else informs the employer), the victim would have no recourse beyond the employer's corrective action. These circumstances leading to no monetary recovery are very narrow. We see no suggestion in the FEHA of

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an intent to involve the courts in coworker harassment cases when the employer does act immediately and appropriately.

"When the workplace is permeated with discriminatory intimidation, ridicule and insult that is ' "sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment," ' the law is violated." (Kelly-Zurian v. Wohl Shoe Co. (1994) 22 Cal.App.4th 397, 409 [27 Cal.Rptr.2d 457], quoting Harris v. Forklift Systems, Inc. (1993) 510 U.S. 17, 21 [114 S.Ct. 367, 370, 126 L.Ed.2d 295].) If the harasser is a nonsupervisor, and the employer takes immediate and appropriate corrective action when informed of the conduct, this standard is not met.

Contrary to plaintiff's argument, Reno v. Baird, supra, 18 Cal.4th 640, does not compel a contrary conclusion. That case involved solely the question of individual liability for discrimination. We expressed no opinion "regarding individuals' liability for harassment." (Id. at p. 645, fn. 2.) To support our conclusion that only the employer is liable for discrimination, we noted the difference in the statutory treatment of discrimination and harassment. (Id. at pp. 644-645.) Section 12940 does indeed treat the two differently, and for a reason. "Whatever similarities there may be between [discrimination and harassment], the employer ultimately does the former; coworkers and supervisors do the latter." (Reno v. Baird, supra, 18 Cal.4th at p. 657, original italics.) This differing statutory language means that our conclusion regarding discrimination does not compel a similar conclusion regarding harassment. It does not, however, compel a contrary conclusion either. It merely means that each question must be decided separately, considering the discrimination language to decide the discrimination issue, as we did in Reno v. Baird, and independently considering the harassment language to decide the harassment issue, as we do here.

Plaintiff notes that another provision of the FEHA that prohibits improper retaliation also extends the prohibition to any "person." (12940, subd. (f).) *1138 Some cases contain dicta suggesting that this language imposes personal liability on coworkers for retaliation. (Page v. Superior Court (1995) 31 Cal.App.4th 1206, 1213 [37 Cal.Rptr.2d 529]; Fisher v. San Pedro Peninsula Hospital (1989) 214 Cal.App.3d 590, 615-616 [262 Cal.Rptr. 842].) Plaintiff argues that the same rule should apply to harassment because of section 12940(h)(1)'s assertedly similar language. However, whatever rule might apply to retaliation (we express no opinion), the statutory language regarding retaliation contains no additional language comparable to the second sentence of section 12940(h)(1). We must construe section 12940(h)(1) in its entire context, not by reference to the quite different overall language of section 12940, subdivision (f).

Plaintiff and amicus curiae Fair Employment and Housing Commission (FEHC) on her behalf cite the FEHC's administrative decisions as supporting imposition of personal liability on coworkers. Indeed, the FEHC cites over 20 of its decisions. Most of these decisions, however, involve harassment by a supervisor and thus have no bearing on this question. [FN3] Only two precedential decisions-one rendered during the pendency of this appeal-impose personal liability for harassment on a nonsupervisorial coworker. (Dept. Fair Empl. & Hous. v. Lake County Dept. of Health Services (1998) No. 98-11, FEHC Precedential Decs. 1998-1999, CEB 1 (Lake County); Dept. Fair Empl. & Hous. v. Madera County (1990) No. 90-03, FEHC Precedential Decs. 1990-1991, CEB 1, pp. 27-28 (Madera County) [imposing liability on a supervisor for all harassing conduct including some committed when not a supervisor].) These decisions rely solely on section 12940(h)(1)'s "any other person" language. Only Lake County specifically considered whether to impose personal liability on a coworker as well as a supervisor. It cited cases holding supervisors liable, then stated, "While these cases decided individual liability only in the context of supervisor harassment, their logic-i.e., the use of the word ' person' in Government Code section 12940, subdivision (h)-applies equally to co-worker liability." (Lake County, supra, at p. 28.)

FN3 We express no opinion regarding the liability of a supervisor for harassment or any issue other than the one before us.

We find these FEHC decisions unconvincing. The first, Madera County, simply found the individual personally liable because he was a "person," without distinguishing between his roles as supervisor and as coworker. (Madera County, supra, No. 90-03, FEHC Precedential Decs. 1990-1991, CEB 1 at pp. 27-28.) The second, Lake County, at least mentions

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this issue, but it contains little analysis. (Lake County, supra, No. 98-11, FEHC Precedential Decs. 1998-1999, CEB 1 at p. 28.) It considered only the "any *1139 other person" language rather than the statute as a whole in imposing liability on coworkers as well as supervisors. Moreover, although a contemporaneous interpretation an administrative agency gives to the statutes under which it operates is entitled to great weight, Lake County was decided many years after the enactment of the statutory language it interprets. (See Dyna-Med. Inc. v. Fair Employment & Housing Com., supra, 43 Cal.3d at pp. 1388-1389.) "[U]ltimately[,] statutory interpretation is a question of law the courts must resolve." (Reno v. Baird, supra, 18 Cal.4th at p. 660.) We do so by considering all the relevant statutory language, not a single phrase in isolation.

Both parties invoke the legislative history of Assembly Bill No. 1985, 1981- 1982 Regular Session, the bill that codified the substance of current section 12940(h)(1), as supporting their respective positions. We have reviewed that legislative history and find it inconclusive. It provides little guidance beyond the language of the statute itself. Indeed, the most striking feature about the materials the parties have provided is the absence of any clearly stated legislative intent to impose personal liability on nonemployer individuals in addition to defining prohibited conduct for which employers may be liable. If anything, this circumstance supports Selkirk's position. But, on balance, we find the legislative history of little assistance either way.

Plaintiff argues that imposing personal liability on coworkers is necessary to deter harassment effectively. In Reno v. Baird, supra, 18 Cal.4th 640, we noted that because the employer would be liable for discrimination, employees are protected even if nonemployer individuals are not personally liable. "[E]mployers will not condone discriminatory acts by their supervisory employees, because the employers must ultimately pay. Furthermore, supervisors will not escape punishment.... Supervisors guilty of engag-ing in unlawful discrimination, and thus causing their employers to incur monetary liability, will often suffer demotion or unemployment." (Id. at p. 662.) Plaintiff argues that this reasoning has no application to harass-ment because an employer is not always liable for harassment by nonsupervisors. However, the Legislature has obligated the employer to take immediate and appropriate action when it is or should be aware of the harassment, for example, when the victim informs the employer. This obligation forces employers to control and, as necessary, discipline their employees. The statute deters coworker harassment with or without personal liability. Moreover, the statute also compels employers to "take all reasonable steps to prevent harassment from occurring." (12940(h)(1).) In light of these duties, employers should take a very dim view of all forms of harassment, whether by supervisors or others. *1140

Relying heavily on law review articles, plaintiff argues that this court "cannot rely upon employers to provide effective deterrence at the coworker level." This argument is best directed to the Legislature, which can study the various policy and factual questions and decide what rules are best for society. Our role here is to interpret the statute, not to establish policy. The latter role is for the Legislature. Under the current statutory language, it appears the Legislature relies primarily on the employer to take appropriate action and wants courts to become involved only if the harassment is by a supervisor or if the employer fails to fulfill its statutory duty. Whether such reliance on the employer is sufficiently effective is not for us to say. If the Legislature believes it necessary or desirable to impose individual liability on coworkers, it can do so. But we believe that had it already intended to do so, it would have used clearer language than that found in section 12940(h)(1).

We note also that federal law does not impose personal liability on individuals. As the Court of Appeal stated, "The federal appellate courts have unanimously held an individual employee-whether supervisory or nonsupervisory- cannot be personally liable for hostile work environment sexual harassment under title VII [of the Civil Rights Act of 1964 (42 U.S.C. 2000e et seq.)]." (E.g., Miller v. Maxwell's Intern, Inc. (9th Cir. 1993) 991 F.2d 583, 587-588; see generally, Reno v. Baird, supra, 18 Cal.4th at pp. 647- 650; Page v. Superior Court, supra, 31 Cal.App.4th at pp. 1215-1216.) The Court of Appeal also noted that these federal cases do not control our interpretation of the different statutory language of the FEHA: "For example, title VII imposes liability for sexual harassment on an 'employer' (42 U.S.C. 2000e-2(a)) .... Thus, title VII lacks the 'any other person' language on which

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Carrisales relies." However, the failure of title VII (42 U.S.C. 2000e et seq.), which generally has a similar intent and purpose as the FEHA (Reno v. Baird, supra, 18 Cal.4th at p. 659), to impose personal liability on individuals undercuts plaintiff's policy arguments.

We thus conclude that, although section 12940(h)(1) prohibits any "person" from harassing an employee, it imposes on the employer the duty to take all reasonable steps to prevent this harassment from occurring in the first place and to take immediate and appropriate action when it is or should be aware of the conduct. Consistent with the FEHA's primary concern with unlawful employment practices, it does not also impose personal liability for harassment on nonsupervisory coworkers. ***1141**

III. Conclusion

We affirm the judgment of the Court of Appeal.

George, C. J., Mosk, J., Kennard, J., Baxter, J., Werdegar, J., and Brown, J., concurred. ***1142**

Cal. 1999.

Carrisales v. Department of Corrections

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THE PEOPLE, Plaintiff and Appellant,
v.
HAROLD EMORY TANNER, Defendant and Respondent

Crim. No. 20075.

Supreme Court of California

June 14, 1979.

SUMMARY

A jury found defendant guilty of robbery, and also found that he had used a firearm in the commission of the offense. However, in contravention of Pen. Code, § 1203.06, prescribing a mandatory prison sentence for those who use a firearm in the commission of a robbery and certain other serious offenses, the trial court suspended the execution of sentence and placed defendant on probation for five years, on the condition he serve one year in county jail, by striking the use of firearm allegation in furtherance of justice pursuant to Pen. Code, § 1385. The trial court held that § 1203.06 was unconstitutional insofar as it purported to invade the judicial function of sentencing. The record indicated defendant was an employee of a company that provided security services, and that he committed the crime in an attempt to persuade the store owner to renew the recently discontinued security services of his employer. During the robbery, defendant used an unloaded hand gun and took $40 from the store clerk. While leaving, he told the clerk to sound an alarm and call the police. (Superior Court of San Mateo County, No. C 6054, Gerald E. Ragan, Judge.)

The Supreme Court held that in enacting Pen. Code, § 1203.06, the Legislature did not intend that its mandatory language be subject to the preexisting statutory language of Pen. Code, § 1385. Thus, the court held that when proper findings invoking the operation of § 1203.06 have been made, the mandatory provisions of that statute may not be avoided by employing § 1385 to strike either the allegations of the complaint or the findings of the jury. Hence, the court held that the trial court erred in striking the firearm use finding and sending defendant to county jail rather than to prison. However, the court held that since defendant had already complied with his conditions of probation, including one year's stay in county jail, and since the postconviction manner in which the issue *515 of judicial discretion had been presented and finally resolved was so unusual, it would be unfair to make defendant serve a second term. Accordingly, the Supreme Court affirmed. (Opinion by Clark, J., with Mosk, Richardson and Manuel, JJ., concurring. Separate concurring and dissenting opinion by Bird, C. J., Tobriner and Newman, JJ. Separate concurring and dissenting opinion by Tobriner, J., with Newman, J., concurring. Separate concurring opinion by Newman, J. Separate concurring and dissenting opinion by Bird, C. J.)

HEADNOTES

Classified to California Digest of Official Reports

(1a, 1b, 1c) Robbery § 15--Trial--Probation--Use of Firearm.
The Legislature in enacting Pen. Code, § 1203.06, prescribing a mandatory prison term for those who use a firearm in the commission of a robbery and certain other serious offenses, did not intend its mandatory language to be subject to the preexisting statutory language of Pen. Code, § 1385, providing that a court may, of its own motion and in the furtherance of justice, order an action to be dismissed. Thus, the trial court erred in suspending execution of a state prison sentence, following defendant's conviction of robbery, and placing him on probation by striking a use of firearm allegation, found to be true, pursuant to § 1385, on the condition he serve one year in county jail. The record indicated defendant used an unloaded gun in a sham robbery of a grocery store, designed to persuade the store owner to renew recently discontinued security services provided by defendant's employer.

[See Cal.Jur.3d, Criminal Law, § 2449; Am.Jur.2d, Robbery, § 44.]

(2) Criminal Law § 587--Appellate Review--Briefs and Assignments of Error-- Pointing Out Error--Abandonment.
On appeal in a robbery case, the People were deemed to have abandoned their argument challenging the ability of a court to use Pen. Code, § 1385, to strike in the furtherance of justice a firearm use allegation, found to be true by the jury under Pen. Code, § 12022.5, providing for enhancement of

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imprisonment for use of a firearm in the commission of particular crimes. The record indicated the People's notice of *516 appeal purported to make such an argument, but their brief did not raise it.

(3) Constitutional Law § 39--Distribution of Governmental Powers--Between Branches of Government--Legislative Power and Its Limits--Criminal Law--Authority in Fixing Sentences.
The courts are not inherently or constitutionally vested with ultimate authority in fixing sentences or imposing penalty enhancing factors for conduct made criminal by legislative enactment. Subject to the constitutional prohibition against cruel and unusual punishment, the power to define crimes and fix penalties is vested exclusively in the legislative branch. The legislative branch has the power to declare that, in certain cases, probation may not be granted. The exercise of such power in no way impairs, restricts, enlarges, or impinges on the jurisdiction of the judicial branch of the government. The function of the courts is to determine the guilt or innocence of an accused, and the disposition made thereafter by way of penalty is for the Legislature to determine. Thus, in a prosecution for robbery, the trial court erred in holding that Pen. Code, § 1203.06, prescribing a mandatory prison sentence for those who use a firearm in the commission of a robbery and certain other serious offenses, was unconstitutional insofar as it purported to invade the judicial function of sentencing.

(4) Criminal Law § 497--Probation--Discretion of Trial Court--Firearm Use Crimes.
The Legislature intended discretion could be exercised by the trial court in the case of crimes falling within Pen. Code, § 1203, denying probation following particular criminal conduct except in unusual cases where the interest of justice would be best served. However, the Legislature did not intend for discretion to be exercised by a trial court to grant probation in the case of crimes falling within Pen. Code, § 1203.06, prescribing a mandatory prison sentence for those who use a firearm in the commission of certain serious offenses.

(5) Statutes § 52--Construction--Codes--Conflicting Provisions--General and Specific Provisions.
A specific statutory provision relating to a particular subject will govern a general provision even though the general provision standing alone would be broad enough to include the subject to which the specific provision relates. *517

(6) Criminal Law § 653--Appellate Review--Harmless and Reversible Error--Particular Errors--Trial--Judgment and Sentence--Probation.
The trial court's error, following defendant's conviction of robbery, in striking a firearm use allegation, found to be true by the jury, and giving him probation on the condition he serve one year in county jail, rather than sending him to prison as required by Pen. Code, § 1203.06, prescribing a mandatory prison term for those who use a firearm in the commission of certain serious offenses, did not require under the circumstances, that defendant suffer a state prison term. The record indicated that the postconviction manner in which the issue of the discretion of the trial judge to strike a firearm use allegation under the statute had been presented and resolved by the appellate courts was unusual, and that defendant had already complied with his conditions of probation, including one year's stay in a county jail, making a second incarceration unjust.

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CLARK, J.

People appeal from order striking jury finding that defendant used a firearm during the commission of robbery. The order disregards mandatory language of Penal Code section 1203.06. [FN1] We conclude the trial court erred.

FN1 Section 1203.06 provides in pertinent part: "Notwithstanding the provisions of section 1203: (a) Probation shall not be granted to ...: (1) [a]ny person who uses a firearm during the commission ... of any of the following crimes: (iii) Robbery, in violation of Section 211 ...." (Italics added.)
After the use-finding was stricken sentencing was suspended and defendant was admitted to probation for a period of five years on condition, among others, that he serve one year in the county jail, beginning 9 July 1976.
Unless otherwise specified, all statutory references herein are to sections of the Penal Code.

(1a), (2)(See fn. 2.) This appeal involves a single issue: Did the Legislature in enacting section 1203.06 intend its mandatory language be subject to preexisting statutory language providing that a "court may ... of its own motion ... and in furtherance of justice, order an action to be dismissed"? [FN2] (§ 1385.) Section 1385 has been construed to provide judicial power to dismiss or strike - within the court's discretion - allegations which, if proven, would enhance punishment for alleged criminal conduct. (See People v. Burke (1956) 47 Cal.2d 45, 50-51, [301 P.2d 241].) This case arises because the Legislature in enacting section 1203.06 did not expressly state whether the mandatory provision of section 1203.06 would be subject to judicial discretion pursuant to section 1385

FN2 The People's notice of appeal purports to challenge striking the use- finding not only as to section 1203.06 but also as to section 12022.5. That section would increase the term of imprisonment for "using a firearm in the commission of particular crimes." However, the People have not briefed the issue as to section 12022.5, their argument being confined to section 1203.06 issues. We deem the People to have abandoned section 12022.5 issues.

The facts of this case lend themselves to discretionary action by the trial court - if the court possessed the power of such discretion. Defendant, having no prior criminal record, entered and robbed a retail store clerk of $40, using an unloaded handgun. Leaving, he instructed the clerk to sound an alarm and to notify police. Half an hour later, defendant was arrested in the vicinity of the store. At trial he explained he had committed the crime in an attempt to persuade the store owner to renew recently discontinued security services provided by defendant's employer. However, substantial evidence supports jury findings that defendant possessed requisite criminal intent to commit the crime and to use the firearm. *519

(3)(See fn. 3.) Because probation is a statutory creation (see Cal. Const., art. IV, § 1; Keeler v. Superior Court (1970) 2 Cal.3d 619, 631, [87 Cal.Rptr. 481, 470 P.2d 617, 40 A.L.R.3d 420]; People v. Sidener (1962) 58 Cal.2d 645, 653, [25 Cal.Rptr. 697, 375 P.2d 641]; In re Haines (1925) 195 Cal. 605, 622, [234 P. 883]; People v. Hess (1951) 104 Cal.App.2d 642, 685-686, [234 P.2d 45]), the issue confronting us is one of statutory purpose. [FN3] (1b) While the Legislature has not assisted us in discerning its intent, we must conclude that when proper findings invoking the operation of section 1203.06 have been made, the mandatory provisions of that section may not be avoided by employing section 1385 to strike either the allegations of the complaint or the findings of the jury.

FN3 We reject any contention that courts are inherently or constitutionally vested with ultimate authority in fixing sentences or imposing penalty enhancing factors for conduct made criminal by legislative enactment. "[S]ubject to the constitutional prohibition against cruel and unusual punishment, the power to define crimes and fix penalties is vested exclusively in the legislative branch." (Keeler v. Superior Court, supra, 2 Cal.3d 619, 631.) "[T]he legislative branch of the government has the power to declare that in certain ... cases, probation may not be granted. The exercise of such power in no way impinges upon the jurisdiction of the judicial branch of the government. It does not impair, restrict nor enlarge upon the jurisdiction of the courts. The function of the courts is to determine the guilt or innocence of an accused. What disposition may thereafter be made by way of penalty is for the Legislature to determine." (People v. Hess, supra, 104 Cal.App.2d 642, 685-686; see also, Stephens v. Toomey (1959) 51 Cal.2d 864, 869-870, [338 P.2d 182]; People v. Knowles (1950) 35 Cal.2d 175, 181, [217 P.2d 1

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]; People v. Perry (1964) 230 Cal.App.2d 258, 262-263, [40 Cal.Rptr. 829]; People v. Orrante (1962) 201 Cal.App.2d 553, 559-566 [20 Cal.Rptr. 480].)

In the instant case the trial court - in rejecting the People's contention that section 1203.06 precluded striking the use-finding - stated that if section 1203.06 were to be so construed it would constitute an unconstitutional invasion of the judicial sentencing function. The court erred in so concluding, leading to its further error in striking the use- finding.

History discloses a continuing legislative interest in limiting the privilege of probation for persons using firearms in committing serious crimes. Between 1923 and 1957 probation was unavailable to defendants using deadly weapons in specified crimes. (Stats. 1923, ch. 144, § 1, p. 291; Stats. 1927, ch. 770, § 1, p. 1493; Stats. 1931, ch. 786, § 1, p. 1633.) Between 1957 and 1975 the Legislature made certain exceptions to the unavailability of probation, allowing trial courts limited discretion. (Stats. 1957, ch. 2054, § 1, pp. 3649-3650; Stats. 1965, ch. 1720, § 1, pp. 3867-3870; see also, People v. Clay (1971) 18 Cal.App.3d 964, [96 Cal.Rptr. 213].) However, in 1975 the Legislature further limited trial court discretion to cases not falling within section 1203.06. (See Stats. 1975, ch. 1004, §§ 1, 2.) After the 1975 enactment, section 1203 operated to deny probation following particular criminal conduct "[e]xcept in unusual cases where the interests of justice would best be served." *520 (§ 1203, subd. (d).) The section 1203.06 prohibition against granting probation, however, goes even beyond that of section 1203, denying probation to criminals convicted of enumerated crimes, providing for no exception in the interest of justice or otherwise.

(4) We must therefore conclude the Legislature intends discretion may be exercised in the case of crimes falling within section 1203 but not within section 1203.06. Any other construction restores the pre-1975 law allowing a court to grant probation to any criminal if the court deems that to do so would be in the interest of justice. Such judicial resurrection renders the 1975 legislation a nullity. (See People v. Superior Court (Smith) (1969) 70 Cal.2d 123, 132, [74 Cal.Rptr. 294, 449 P.2d 230].) [FN4]

FN4 Illustrative of legislative intent, even as understood by opponents of the enactment, is the following excerpt from an 18 September 1975 letter from the American Civil Liberties Union addressed to the Governor: "The Legislature in enacting such legislation is presuming omniscience predicting that in no case will probation, even conditioned on jail time, ever be an acceptable alternative."

Our conclusion is supported by pertinent and timely expression of legislative intent existing when section 1203.06 was enacted. The Legislative Counsel's summary of the 1975 enactment states that trial court discretion to grant probation in unusual cases is eliminated so that "probation and suspension of sentence would be denied, without any exception in unusual cases in the interests of justice, to any person who uses a firearm during the commission of various felonies, including ... robbery ...." (Leg. Counsel's Dig. of Sen. Bill No. 278, 1 Stats. 1975 (Reg. Sess.) Summary Dig., ch. 1004, p. 262; italics added.) This statement is consistent with a staff memorandum prepared by the Senate Committee on the Judiciary stating that Senate Bill No. 278 (in which the 1975 amendments to §§ 1203 and 1203.06 were introduced), "Prohibits, without exception, the granting of probation to persons who have carried or used firearms in connection with certain crimes, for which probation may be obtained under existing law in unusual cases in the interests of justice." (Italics added.) Finally, there exists the executive statement of Governor Brown issued by press release in which he explained the effects of the legislation. He stated: "By signing this bill, I want to send a clear message to every person in this state that using a gun in the commission of a serious crime means a stiff prison sentence. Whatever the circumstances, however eloquent the lawyer, judges will no longer have discretion to grant probation even to first offenders." (Governor's Press Release No. 284 (Sept. 23, 1975), italics added.) *521

Finally, whereas section 1385 is general in nature, relating to the broad scope of dismissal, section 1203.06 is specific, relating to the limited power of dismissal for purposes of probation - the very matter at issue. Section 1203.06 is the later enactment, adopted by the Legislature in response to the particular problem at hand. A specific provision relating to a particular subject will govern a general provision, even though the general provision standing alone would be broad enough to include the subject to which the specific provision relates. (Rose v. State of California (1942) 19 Cal.2d 713, 723-724 [123 P.2d 505].)

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(1c) Because we conclude section 1385 is inapplicable when proper findings have been made invoking section 1203.06, it follows that the trial court erred in striking the use finding and sending defendant to county jail rather than to prison. (Cf. Stats. 1977, ch. 165, § 22.)

(6) However, given the unusual postconviction manner in which the issue of judicial discretion has been presented and finally resolved, it follows Mr. Tanner should not necessarily be committed to prison. The uncertainty arising from the rule of law resulting in the trial court's erroneous disposition, has created both an unusual burden on defendant and a dilemma for this court. Simply put, is it not unfair to require Mr. Tanner to now serve a second term for his criminal act?

While pertinent Penal Code provisions fairly warned Mr. Tanner of the penalty mandated for using a gun in the commission of robbery, we are concerned with the judicial ambivalence preceding final disposition of his case. In a highly similar case the United States Court of Appeals held that defendants, while receiving unauthorized probation for their crimes, should nevertheless not be resentenced to required life imprisonment or death because resentencing would "work a substantial hardship on the Defendants." (United States v. Denson (5th Cir. 1979) 588 F.2d 1112, 1132.) The court stated, among other things: "These Defendants have been told after such prosecutions and investigations that they would be subjected to one year's incarceration to be followed by five years supervision. They prepared to surrender for such incarceration. They have adjusted their lives to the punishment assessed. They have sought and secured employment opportunities consistent with the term of incarceration imposed. To withdraw the probation granted for which the Defendants and their families have prepared themselves would work a substantial hardship on the Defendants and their families." (Id., at p. 1132.) The substantial hardship was deemed to exist even though *522 defendants in Denson had not yet served the one- year incarceration imposed for a concurrent crime.

Mr. Tanner having complied with his conditions of probation - including one year's stay in county jail - we determine a second incarceration would be unjust.

The judgment is affirmed.

Mosk, J., Richardson, J., and Manuel, J., concurred.

BIRD, C. J., TOBRINER, J., and NEWMAN, J.,

Concurring and Dissenting.

We concur in the result reached in the majority opinion, which permits appellant Harold Tanner to be placed on probation despite the jury's finding that he had "used a firearm during the commission ... of ... [a] [r]obbery" within the meaning of Penal Code section 1203.06. We do not concur in the language of the majority opinion insofar as it suggests that the trial court had no power to strike the "use" finding in order to place appellant on probation. For reasons that each of us expresses more fully in separate opinions, we remain convinced that the trial court does have that power.

TOBRINER, J.,

Concurring and Dissenting.

I concur in the judgment of the court, which-it should be emphasized-affirms the trial court judgment placing defendant on probation. I do not agree, however, with the discussion in the lead opinion-technically dicta-which suggests that Penal Code section 1203.06 can properly be interpreted as abrogating a trial court's power to strike a use of a firearm finding under Penal Code section 1385. As I shall explain, the lead opinion's statutory interpretation directly conflicts with all of the prior California decisions which have construed similar sentencing statutes in relation to section 1385.

Moreover, the result reached by the lead opinion is plainly inconsistent with the opinion's purported statutory interpretation. Although the lead opinion suggests that the language of section 12036.06 is so clear and absolute as to preclude trial courts from exercising the discretion explicitly afforded them by section 1385, its holding, by contrast, reveals that the statutory language has not been construed to preclude this court from exercising a nonstatutory, presumably inherent, discretion so as to relieve a defendant who has used a gun of a mandatory prison sentence. *523 If section 1203.06's language does not prevent this court from exercising discretion in order to avoid "injustice" or "unfairness" in the case of Mr. Tanner, then clearly that same statutory

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language may not reasonably be construed as abrogating a trial court's statutorily authorized discretion under section 1385. The lead opinion thus represents a classic example of a court's action speaking louder than its words.

The numerous flaws in the lead opinion are apparent from the outset. After explicitly acknowledging that "[t]his case arises because the Legislature in enacting section 1203.06 did not expressly state whether the mandatory provision of section 1203.06 would be subject to judicial discretion pursuant to section 1385" (italics added) (ante, p. 518), the opinion replicates the legislative omission by completely failing either to apply, to distinguish, to overrule or, indeed, even to mention the numerous California decisions that have specifically dealt with this precise issue in prior cases. As I discuss below, for the past 20 years beginning with People v. Burke (1956) 47 Cal.2d 45 [301 P.2d 241]-California courts have repeatedly held that in light of the historically important role played by section 1385 in the sentencing process, an ostensibly "mandatory" sentencing statute will not be interpreted as abrogating the authority accorded by section 1385 in the absence of explicit statutory language curtailing such authority. In simply ignoring this line of controlling precedent, the lead opinion can only create uncertainty and confusion; lower courts, faced in the future with the responsibility of construing similar sentencing statutes, are provided no guidance whether to apply previously enunciated principles or the novel interpretation developed by the instant lead opinion.

Moreover, by closing its eyes to the prior authorities, the lead opinion ignores a fundamental canon of legislative interpretation which teaches that in construing a statute courts should properly presume that the Legislature was aware of existing judicial decisions interpreting similar provisions and drafted the statute in light of such decisions. When the Legislature enacted section 1203.06 in 1975, the controlling decisions made it clear that a sentencing statute would not be construed to abrogate a court's section 1385 power unless the statute specifically so declared; since the draftsmen of section 1203.06 did not include any language specifically repealing or abrogating section 1385, under traditional principles the statute should not be interpreted as eliminating that power.

Indeed, as discussed more fully below, the legislative omission in this case is brought into sharp focus when the terms of section 1203.06 are *524 compared with the provisions of Penal Code section 1203.08, a similar "no probation" statute, coauthored by one of the draftsmen of section 1203.06, and enacted just one year after section 1203.06. In section 1203.08, unlike section 1203.06, the Legislature specifically included a separate provision which, in cases falling within the ambit of section 1203.08, expressly limits a trial court's power to strike under section 1385. That legislative action, coming close on the heels of the enactment of section 1203.06, indicates a legislative awareness of the governing California authorities and demonstrates that the Legislature is quite capable of expressing itself clearly when it intends to eliminate a trial court's power to strike. In the face of the differing provisions of section 1203.08, this court cannot properly conclude that section 1203.06 evidences a clear abrogation of a trial court's section 1385 power.

Furthermore, contrary to the lead opinion's suggestion, by interpreting section 1203.06 in accordance with past authorities we would not be rendering the 1975 legislation a "nullity." Prior to 1975, section 1203-the general probation statute-included a provision specifically giving courts power to grant probation in an "unusual" gun use case; trial courts apparently accorded the "unusual case" provision of section 1203 a more expansive interpretation than the Legislature thought appropriate and in 1975 the Legislature eliminated the "unusual case" provision of section 1203 for such cases. That legislative action unquestionably evinced an intent to reduce the granting of probation in gun-use cases, a legislative policy decision that certainly has not been lost on trial courts and that has been and will continue to be reflected in a sharp decrease in the granting of probation in such cases. The legislative disapproval of the trial courts' pre-1975 probation practice, however, is by no means irreconcilable with a legislative decision to leave the trial courts' section 1385 power intact; the Legislature may well have desired to disapprove the trial courts' quite liberal pre-1975 probation practice without completely stripping such courts of their traditional power to strike allegations or findings in the truly extraordinary or exceptional case.

Indeed, the lead opinion's ultimate determination to relieve Tanner of a prison sentence is eloquent testimony to the strength of the traditional,

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underlying judicial policies in this area, recognizing that exceptional circumstances-unforeseen by the Legislature-may in rare cases warrant a departure from a generally appropriate sentence. As already noted, this holding demonstrates that the lead opinion has not, in fact, interpreted section 1203.06 as removing all judicial discretion; the disposition of this case with respect to the present defendant is clearly an exercise of just *525 such discretion. While I, of course, agree with the affirmance of the judgment, I fear that the inconsistency of the lead opinion's reasoning and result can only bring additional confusion to the lower courts; thus, for example, the opinion fails to illuminate whether its holding applies only to the present defendant, to all cases pending on appeal, or to all future cases in which a defendant is erroneously granted probation. The Legislature's schizophrenia in drafting probation statutes (compare §§ 1203.06, 1203.07 with §§ 1203.08, 1203.09) is now reflected in the lead opinion's parallel inconsistency in upholding probation for Tanner and casting into complete confusion the issue whether courts under facts like Tanner can grant probation at all.

Having reviewed the major deficiencies in the lead opinion, I explain the basis of my conclusion that the trial court judgment should be affirmed.

Because section 1203.06 does not in explicit terms restrict a trial court's power to strike under section 1385, the provision cannot be interpreted to preclude a trial court's exercise of such power in light of People v. Burke (1956) 47 Cal.2d 45 and its progeny.

From at least as early as 1850, trial courts in California have enjoyed broad authority to dismiss criminal actions in furtherance of the interests of justice. (Stats. 1850, ch. 119, p. 323; Stats. 1851, ch. 29, p. 279; see, e.g., People v. Tenorio (1970) 3 Cal.3d 89, 94 [89 Cal.Rptr. 249, 473 P.2d 993]; People v. Sidener (1962) 58 Cal.2d 645, 648-649, 658-663 [25 Cal.Rptr. 697, 375 P.2d 641].) For more than a century this judicial authority has been codified in section 1385 which provides in relevant part that "[t]he court may, either of its own motion or upon application of the prosecuting attorney, and in furtherance of justice, order an action to be dismissed."

Although section 1385's language refers explicitly to the dismissal of an entire criminal action, our court has long recognized that the section also authorizes a trial court to dismiss or "to strike" only a portion of the accusatory pleading, permitting the court, for example, to dismiss one or more counts of a multicount complaint or to strike allegations of prior convictions which may increase a defendant's punishment or restrict the nature of his sentence. (See, e.g., People v. Ruiz (1975) 14 Cal.3d 163, 166 [120 Cal.Rptr. 872, 534 P.2d 712]; People v. Navarro (1972) 7 Cal.3d 248, 257 [102 Cal.Rptr. 137, 497 P.2d 481]; In re Cortez (1971) 6 Cal.3d 78, *526 83-85 [98 Cal.Rptr. 307, 490 P.2d 819]; People v. Tenorio, supra, 3 Cal.3d 89, 94; People v. Burke, supra, 47 Cal.2d 45, 50-51.)

The relevant decisions additionally establish that a trial court may exercise its section 1385 power at the time of sentencing, as the trial court did here, and that a court may utilize this power to strike a count or an allegation even if the jury or court has found the defendant guilty of such count or has found the allegation to be true. As our court explained in People v. Burke, supra, 47 Cal.2d 45, 50-51: "The procedure of 'striking' or 'setting aside or dismissing, a charge of a prior conviction (or any of multiple counts or allegations of an indictment or information) at the time of sentence ... is commonly used in trial courts, not only where the prior conviction has not been legally established, but also where the fact of the conviction has been shown but the trial court has concluded that 'in the interest of justice' defendant should not be required to undergo a statutorily increased penalty which would follow from judicial determination of that fact. [Citations.]"

In the instant case, the trial court did not utilize its section 1385 power to strike an allegation of a prior conviction as in Burke or in many of our other cases, but instead utilized its authority to strike a use of a firearm allegation and finding. As the above quotation from Burke demonstrates, however, in that case we explicitly recognized that the authority to strike conferred by section 1385 extends beyond allegations of prior convictions to other "allegations of an indictment or information" (47 Cal.2d at p. 50) which might subject a defendant to increased punishment. In People v. Dorsey (1972) 28 Cal.App.3d 15 [104 Cal.Rptr. 326], the Court of Appeal specifically held that a trial court has authority under section 1385 to strike a use finding at the time of sentencing, at least for the purpose of avoiding the increased five-year punishment that would be otherwise mandated by section 12022.5.

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[FN1] Since the People in this case do not challenge the trial court's striking of the use allegation with regard to the application of section 12022.5, they apparently acknowledge that, at least in general, the power to strike conferred by section 1385 includes the power to strike a use allegation. [FN2] *527

FN1 At the time of Dorsey, section 12022.5 provided in relevant part: "Any person who uses a firearm in the commission or attempted commission of a robbery, assault with a deadly weapon, murder, rape, burglary, or kidnapping, upon conviction of such crime, shall, in addition to the punishment prescribed for the crime of which he has been convicted, be punished by imprisonment in the state prison for a period of not less than five years. Such additional period of imprisonment shall commence upon expiration or other termination of the sentence imposed for the crime of which he is convicted and shall not run concurrently with such sentence."

FN2 Subsequent to the trial court's ruling in this case, the Legislature amended section 12022.5 to effectively codify the Dorsey rule. (See Stats. 1976, ch. 1139, § 305, p. 5162.) Section 1170.1, subdivision (g), enacted in 1977 as part of the so-called "Boatwright Amendments" to the Uniform Determinate Sentencing Act of 1976, now provides: "Notwithstanding any other provision of law, the court may strike the additional punishment for the enhancements provided in ... [section] 12022.5 ... if it determines that there are circumstances in mitigation of the additional punishment and states on the record its reasons for striking the additional punishment."
While the recently enacted provisions of the Determinate Sentencing Act confirm the Dorsey result, the new legislation does not purport to affect the granting or denial of probation. Section 1170, subdivision (a)(2) (Stats. 1977, ch. 165, § 15, p. 647) provides in this regard that "[n]othing in this article shall affect any provision of law ... which authorizes or restricts the granting of probation or suspending the execution or imposition of sentence ..."

The People argue, however, that even if the trial court may exercise its power to strike a use finding for purposes of avoiding an increased sentence under section 12022.5, the court may not utilize this section 1385 power to render an otherwise ineligible defendant eligible for probation. [FN3] In the past, courts have utilized the section 1385 power to strike to achieve a number of purposes in the sentencing context: in some cases the power to strike has been utilized to render a defendant eligible for imprisonment in county jail rather than in state prison or to enable an otherwise ineligible defendant to participate in a narcotics rehabilitation program (see, e.g., People v. Burke, supra; People v. Navarro, supra, 7 Cal.3d 248, 258); in other cases section 1385 has been invoked to afford the defendant the benefit of a shorter minimum or maximum sentence (see, e.g., People v. Tenorio, supra, 3 Cal.3d 89, 95, fn. 1; People v. Dorsey, supra; see generally Burke, Striking Priors (1958) 33 State Bar J. 556); in still other cases, however, contrary to the implication of the People's argument, the section 1385 power to strike has been explicitly exercised to render an otherwise ineligible defendant eligible for probation. (See, e.g., People v. Ruiz, supra, 14 Cal.3d 163, 166; In re Cortez, supra, 6 Cal.3d 78, 85; In re Gomez (1973) 31 Cal.App.3d 728 [107 Cal.Rptr. 609].)

FN3 In this regard, the People assert that the striking of a use finding for purposes of section 12022.5 does not necessarily eliminate the use finding for purposes of section 1203.06. In this case, however, we have no occasion to decide whether the striking of a use finding (or a prior) to achieve one sentencing objective necessarily eliminates the finding for all sentencing purposes or whether a trial court retains discretion to limit the effect of such striking, for here the trial court made it clear that it was exercising its discretion to strike the use finding for purposes of both section 12022.5 and section 1203.06.

Indeed, in In re Cortez, supra, our court emphatically declared that "one of the paramount purposes of a motion to strike priors is to make the defendant eligible for probation. The thrust of the motion is to persuade the sentencing judge that, despite the existence of the prior, the petitioning [defendant] is a fit subject for probation." (Italics added.) (6 Cal.3d at p. 85.) Hence, the fact that the trial court undertook its action in *528 this case to render the defendant eligible for probation does not in any way indicate that the court did not appropriately exercise its power under section 1385.

The People additionally assert, however, that even if section 1385 authorizes a trial court to strike a use finding and even if, in general, section 1385 may be utilized to render an otherwise ineligible defendant eligible for probation, the trial court could not properly exercise such power for such a purpose in the instant case because of the specific provisions of

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section 1203.06. Section 1203.06, enacted in 1975, provides in part that "Notwithstanding the provisions of section 1203 [the general probation section] ... [p]robation shall not be granted to, nor shall the execution or imposition of sentence be suspended for ... any person who used a firearm during the commission or attempted commission of any of the following crimes. ... (iii) Robbery, in violation of Section 211." (Italics added.) Section 1203.06 goes on to define "used a firearm" to mean "to display a firearm in a menacing manner, to intentionally fire it, or to intentionally strike or hit a human being with it" (§ 1203.06, subd. (b)(3)), and also provides that in order to bar probation under the section the defendant's use of the firearm must be alleged in the information or indictment and either be admitted by the defendant or be found true by the jury or the court. (§ 1203.06, subd. (b)(1).) [FN4] *529

FN4 Section 1203.06 provides in full: "Notwithstanding the provisions of Section 1203:

"(a) Probation shall not be granted to, nor shall the execution or imposition of sentence be suspended for, any of the following persons:

"(1) Any person who used a firearm during the commission or attempted commission of any of the following crimes:

"(i) Murder.

"(ii) Assault with intent to commit murder in violation of Section 217.

"(iii) Robbery, in violation of Section 211.

"(iv) Kidnapping, in violation of Section 207.

"(v) Kidnapping for ransom, extortion, or robbery, in violation of Section 209.

"(vi) Burglary of the first degree, as defined in Section 460.

"(vii) Rape by force or violence, in violation of subdivision (2) of Section 261.

"(viii) Rape by threat of great and immediate bodily harm in violation of subdivision (3) of Section 261.

"(ix) Assault with intent to commit rape, the infamous crime against nature, or robbery, in violation of Section 220.

"(x) Escape, in violation of Section 4530, or Section 4532.

"(2) Any person previously convicted of a felony specified in subparagraphs (i) through (x) of paragraph (1), who is convicted of a subsequent felony and who was armed with a firearm at any time during its commission or attempted commission or was unlawfully armed with a firearm at the time of his arrest for the subsequent felony. "(b)(1) The existence of any fact which would make a person ineligible for probation under subdivision (a) shall be alleged in the information or indictment, and either admitted by the defendant in open court, or found to be true by the jury trying the issue of guilt or by the court where guilt is established by plea of guilty or nolo contendere or by trial by the court sitting without a jury.

"(2) This subdivision does not prohibit the adjournment of criminal proceedings pursuant to Division 3 (commencing with Section 3000) or Division 6 (commencing with Section 6000) of the Welfare and Institutions Code.

"(3) As used in subdivision (a) 'used a firearm' means to display a firearm in a menacing manner, to intentionally fire it, or to intentionally strike or hit a human being with it.

"(4) As used in subdivision (a) 'armed with a firearm' means to knowingly carry a firearm as a means of offense or defense."

The People argue that since the mandatory language of section 1203.06, emphasized above, denies probation without exception to any robber who has been found to have used a firearm in the commission of his offense, it must follow that the trial court in the instant case retained no power under section 1385 to strike the use finding so as to render the present defendant eligible for probation.

As noted at the outset of this opinion, our court faced a very similar contention in People v. Burke, supra, 47 Cal.2d 45. In Burke, the defendant was convicted of possession of marijuana, then a felony. The information had alleged that defendant had previously been convicted of a similar marijuana offense, and at arraignment defendant admitted the existence of the prior conviction. At that time, section 11712 of the Health and Safety Code provided that "[a]ny person convicted under this division for having in possession any narcotic [defined to include marijuana] ... shall be punished by imprisonment in the county jail for not more than one year, or in the state prison for not more than 10 years. ¶ If such person has been previously convicted of any offenses described in the division ... the previous conviction shall be charged in the indictment or information and if found to be true by the jury, upon a jury trial, or if found to be true by the court, upon a court trial, or [if] admitted by the defendant, he shall be imprisoned in the state prison for not less than two years nor more than 20 years." (Italics added.)

Notwithstanding section 11712, which ostensibly mandated a state prison sentence since defendant had

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admitted a prior marijuana conviction, the trial court at the time of sentencing struck the charge as to the prior conviction and sentenced the defendant to county jail. On appeal the People argued, as they do in the present case, that in light of the mandatory nature of section 11712's prescriptions, the trial court had no authority under section 1385 to strike the admitted prior for purposes of avoiding a state prison sentence. *530

In Burke, our court rejected the People's contention, observing that the statutory language on which the People relied "[d]oes not purport to divest the trial court (or to hold that the court constitutionally could be divested) of the power to control the proceedings before it insofar as the essentials of the judicial process are concerned; i.e., to find the defendant guilty or not guilty of any offense charged, or of a lesser included offense, or to dismiss the action in toto or to strike or dismiss as to any or all of multiple counts or charges of prior convictions." (47 Cal.2d at p. 52.) In the absence of an explicit statutory directive that the Legislature had intended to eliminate or restrict the trial court's general power to strike under section 1385, the Burke court concluded that the statute should not be so construed. Accordingly, Burke upheld the trial court's action in striking the prior conviction.

Subsequent decisions of this court have reaffirmed the Burke holding that, in the absence of an explicit legislative restriction of the trial court's power under section 1385, a restriction on that power will not generally be implied. (See, e.g., People v. Superior Court (Howard) (1969) 69 Cal.2d 491, 502 [72 Cal.Rptr. 330, 446 P.2d 138] ("the discretion of the judge [under section 1385] is absolute except where the Legislature has specifically curtailed it").) In People v. Dorsey, supra, 28 Cal.App.3d 15, the Court of Appeal reiterated this established principle in finding that the mandatory sentencing provisions of section 12022.5 (see fn. 4, ante) did not preclude a court's exercise of its section 1385 power to strike a use finding.

As the Dorsey court explained, in California "[the] imposition of sentence and the exercise of sentencing discretion" (28 Cal.App.3d at p. 18) have traditionally been viewed as "fundamentally judicial in nature" (see, e.g., People v. Tenorio, supra, 3 Cal.3d 89, 94; People v. Superior Court (On Tai Ho) (1974) 11 Cal.3d 59, 66 [113 Cal.Rptr. 21, 520 P.2d 405]), and section 1385 has long been recognized as an essential tool to enable a trial court "to properly individualize the treatment of the offender." (28 Cal.App.3d at p. 18; see generally Burke, Striking Priors (1958) 33 State Bar J. 556.) [FN5] Emphasizing the significance of the section 1385 power with respect to the court's fulfillment of its traditional judicial *531 responsibility in the sentencing context, the Dorsey court put the Legislature on notice that the judiciary would not infer a legislative intent to restrict a court's power to dismiss or to strike under section 1385 in the absence of an explicit legislative restriction of the section 1385 power. The Dorsey court stated in this regard: "If the Legislature intends that the provisions of Penal Code section 12022.5 not be subject to dismissal, it could and should so indicate." (Italics added.)

FN5 Recently, in Lockett v. Ohio (1978) 438 U.S. 586, 602 [57 L.Ed.2d 973, 988, 98 S.Ct. 2954, 2963-2964], Chief Justice Burger took note of a trial court's traditional authority to individualize sentences: "[T]he concept of individualized sentencing in criminal cases generally, although not constitutionally required, has long been accepted in this country. See Williams v. New York [(1949)] 337 U.S. [241], 247-248 ...; Pennsylvania ex rel. Sullivan v. Ashe [(1937)] 302 U.S. [51]. .... Consistent with that concept, sentencing judges have traditionally taken a wide variety of factors into account. ..."

The People concede that section 1203.06, enacted several years after the Burke, Howard and Dorsey decisions, contains no provision which purports expressly to eliminate or restrict a trial court's power to strike under section 1385. The People argue, however, that despite the absence of an explicit statutory restriction on the power to strike, the legislative history of section 1203.06 demonstrates that the Legislature generally intended to curtail trial courts' discretion in this area, and that, as a consequence, a limitation on a trial court's power to strike is necessarily implied in the legislative action. In this regard, the People point to a number of statements by both legislative and executive spokesmen to demonstrate that a principal purpose behind the enactment of section 1203.06 was the elimination of the limited discretion trial courts had previously enjoyed under section 1203 to grant probation in a case in which a gun was used in the commission of a serious offense. [FN6]

FN6 Prior to enactment of the 1975 legislation,

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section 1203 generally prohibited the granting of probation to a defendant who committed a serious offense while armed with a deadly weapon, but provided an exception for "unusual cases where the interests of justice demand" the granting of probation. (Former § 1203, enacted Stats. 1971, ch. 706, § 1, p. 1368.)

The 1975 legislation eliminated section 1203's "unusual case" exception in instances in which a defendant uses a firearm in the commission of a serious offense, but contrary to the arguments of the People and of the Governor's press release quoted in the lead opinion, the legislation did not guarantee that every person who uses a firearm in the commission of a serious felony would automatically be denied probation. As noted above, the denial of probation under section 1203.06 follows only if the use of the firearm is specifically alleged in the complaint; the section does not purport to preclude a prosecutor, in his discretion, from declining to plead such an allegation in "an unusual case" nor does it purport to forbid plea bargaining in appropriate cases to avoid ineligibility for probation. (Cf. People v. Flores (1971) 6 Cal.3d 305, 308-309 [98 Cal.Rptr. 822, 491 P.2d 406].) Consequently, the legislation does not have nearly as "automatic" an effect in denying probation as the People suggest.

The legislative history upon which the People rely unquestionably indicates-as indeed, does the introductory language of section 1203.06 itself-that one of the main purposes of the enactment of section 1203.06 was to curtail, in the specific instances enumerated in section 1203.06, the discretion to grant probation which had previously been accorded trial *532 courts under section 1203. None of the legislative materials to which the People refer, however, makes any mention of the specific question presented by this case, namely whether the provisions of section 1203.06 additionally purported to repeal a trial court's traditional section 1385 power to strike priors [FN7] or use allegations. [FN8] In this regard, it should be emphasized that unlike other recently enacted sentencing statutes limiting probation in designated circumstances, section 1203.06 declares only that its provisions are applicable "[n]otwithstanding the provisions of section 1203"; the section contains no language explicitly displacing all other relevant statutes. [FN9]

FN7 In addition to denying probation to anyone convicted of an enumerated offense who is found to have used a firearm, section 1203.06 also purports to deny probation to anyone who has suffered a prior conviction of one of the enumerated offenses and who is found to have been armed during the commission of a subsequent felony. (§ 1203.06, subd. (a)(2), quoted in fn. 4, ante.) Although the Legislature must have been aware, under prior decisions of this court (e.g., In re Cortez, supra), that a trial court possessed the power under section 1385 to avoid the denial of probation under subdivision (a)(2) by striking an allegation of such a prior conviction, the Legislature failed to include any statutory language to preclude such striking. This omission provides additional support for our conclusion that the trial court's power to strike is not affected by section 1203.06.

FN8 Significantly, although the Attorney General's office communicated with the legislative committees considering the 1975 legislation on several occasions, advocating the passage of the legislation to supplement, inter alia, the sentencing provisions of section 12022.5 (which, of course, had already been held to be subject to the trial court's power to strike (People v. Dorsey, supra)), at no time did the Attorney General or his staff indicate that the provisions of the proposed legislation would eliminate a trial court's power to strike under section 1385. Since the Attorney General's office had directly participated in all of the earlier litigation involving the section 1385 issue, the Attorney General surely would have suggested a modification of the legislation to specifically restrict a trial court's section 1385 power to strike had such a restriction been intended.

Indeed, at oral argument the Attorney General conceded that nothing in section 1203.06 prevents a trial court-upon motion of a district attorney-from striking a use finding under section 1385 if the district attorney determines, in the exercise of his discretionary judgment, that the evidence is insufficient to support the use allegation. (Under People v. Tenorio, supra, 3 Cal.3d 89, of course, a trial court could similarly strike a use allegation or finding for insufficient evidence on its own motion, without the concurrence of the district attorney.) Having conceded that the trial court retains such a power to strike a use finding under section 1385 notwithstanding section 1203.06, the Attorney General fails to explain why a trial court cannot exercise all of its traditional section 1385 power in such a case. Section 1203.06, of course, contains no provision which purports to permit a trial court to exercise only a portion of its authority under section 1385.

FN9 By contrast, the introductory clauses of sections 1203.08 and 1203.09 provide that those

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sections are applicable "[n]otwithstanding any other provision of law." (Italics added.)

It is well settled in this state, of course, that "[r]epeals by implication are not favored ...." (See, e.g., Rextrew v. City of Huntington Park (1942) 20 Cal.2d 630, 634 [128 P.2d 23].) Furthermore, as we have seen, at the time of the enactment of section 1203.06 in 1975, the Burke, Howard *533 and Dorsey decisions had made it quite clear that no matter how "mandatory" the terms of a sentencing provision appear, such a provision would not be interpreted to curtail a trial court's power under section 1385 to strike in the absence of explicit statutory language that specifically and unambiguously restricted such power. A cardinal principle of statutory interpretation proclaims, of course, that "in adopting legislation the Legislature is presumed to have had knowledge of existing domestic judicial decisions and to have enacted and amended statutes in the light of such decisions as have a direct bearing on them." (Fn. omitted.) (Buckley v. Chadwick (1955) 45 Cal.2d 183, 200 [288 P.2d 12, 289 P.2d 242]; see, e.g., In re Phyle (1947) 30 Cal.2d 838, 845 [186 P.2d 134].) Accordingly, inasmuch as section 1203.06 contains no provision purporting to restrict a trial court's section 1385 power to strike, we must assume that the Legislature recognized that the statute would not be interpreted as eliminating such power. (See Vogan, Penal Code Section 12022.5 Circa 1977 (1977) 52 L.A. Bar. J. 462, 469; cf. Uelman, California's New Marijuana Law (1976) 51 State Bar J. 27, 82.)

Other sentencing provisions, enacted in the same legislative session as section 1203.06, make it quite clear that the Legislature has no difficulty explicitly restricting a trial court's power to strike when it intends to do so. (See Veh. Code, § 23102, subd. (g) enacted Stats. 1975, ch. 385, § 1, p. 859.) [FN10] Indeed, in 1976, just a year after the enactment of section 1203.06, the Legislature in apparent recognition of the Burke-Dorsey line of decisions expressly included a separate subdivision which does limit a trial court's power to strike or dismiss when it enacted section 1203.08 of the Penal Code, [FN11] an analogous "no probation" statute which, in other respects, is generally patterned after section 1203.06. [FN12] *534

FN10 Section 23102 subdivision (g) provides: "Except in unusual cases where the interests of justice demand an exception, the court shall not strike a prior [drunk driving] conviction ... for purposes of sentencing in order to avoid imposing as part of the sentence or term of probation the minimum time in confinement in the county jail [48 hours], and the minimum fine [$250] as provided in subdivision (f)." (Italics added.)

FN11 There are currently two provisions of the Penal Code which the Legislature has designated Penal Code section 1203.08. The provision referred to in the present context was enacted as section 1203.11 by Statutes of 1976, chapter 1135, section 1, page 5052, and was renumbered and amended by Statutes of 1977, chapter 735, section 1, page 2325. All references to "section 1203.08" are to that provision.
The additional section 1203.08 was enacted by Statutes of 1977, chapter 1153, section 1, page 3700. References to that statute will be designated "section 1203.08 (1977)."

FN12 Section 1203.08 (see fn. 11, ante) reads in full:
"(a) Notwithstanding any other provision of law, probation shall not be granted to, nor shall the execution or imposition of sentence be suspended for, any adult person convicted of a designated felony who has been previously convicted as an adult under charges separately brought and tried two or more times of any designated felony or in any other place of a public offense which, if committed in this state, would have been punishable as a designated felony, if all the convictions occurred within a 10-year period. Such 10-year period shall be calculated exclusive of any period of time during which the person has been confined in a state or federal prison.
"(b) (1) The existence of any fact which would make a person ineligible for probation under subdivision (a) shall be alleged in the information or indictment, and either admitted by the defendant in open court or found to be true by the jury trying the issue of guilt or by the court where guilt is established by plea of guilty or nolo contendere or by trial by the court sitting without a jury.
"(2) Except where the existence of such fact was not admitted or found to be true pursuant to paragraph (1), or the court finds that a prior conviction was invalid, the court shall not strike or dismiss any prior convictions alleged in the information or indictment.
"(3) This subdivision does not prohibit the adjournment of criminal proceedings pursuant to Division 3 (commencing with Section 3000) or Division 6 (commencing with Section 6000) of the Welfare and Institutions Code.

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"(c) As used in this section, 'designated felony' means any felony specified in Section 187, 192, 207, 209, 211, 217, 245, 288, or subdivision (2), (3), or (4) of Section 261, subdivision 1 of Section 460, or when great bodily injury occurs in perpetration of an assault to commit robbery, mayhem, or rape, as defined in Section 220." (Italics added.)

The legislative history of section 1203.08, moreover, demonstrates quite clearly that the inclusion of this separate subdivision, subdivision (b)(2), was by no means inadvertent. As originally introduced on April 7, 1976, the bill which ultimately was enacted as section 1203.08 did not contain this subdivision. (Sen. Bill No. 2137 (1975-1976 Reg. Sess.).) On June 1, 1976, however, the bill was amended in the Senate to add subdivision (b)(2). On the same date, Senator Robbins, a coauthor of section 1203.06, was added as a coauthor of section 1203.08. Thus, the legislative draftsmen of section 1203.08, obviously aware of the language of section 1203.06, evidently recognized the necessity of including additional language in section 1203.08 to restrict a trial court's power to strike or dismiss allegations under Penal Code section 1385.

Inasmuch as section 1203.06, unlike section 1203.08, contained no language expressly restricting a trial court's power to strike, at least some legislators may have been willing to accede to the seemingly inflexible provisions of section 1203.06 precisely because of their awareness that the section did not remove all "safety valves" to further the ends of justice in a particular case, either through a trial court's exercise of the section 1385 power or by virtue of a prosecutor's exercise of his traditional discretion. (See fn. 6, ante.) [FN13] In accepting the Attorney General's proposed *535 interpretation of section 1203.06, the lead opinion in essence concludes that the Legislature was both totally ignorant of the controlling decisions of this court and the Court of Appeal when it enacted section 1203.06 in 1975, and then engaged in a meaningless and idle act when it added subdivision (b)(2) to section 1203.08 the following year.

FN13 In Rockwell v. Superior Court (1976) 18 Cal.3d 420, 441-445 [134 Cal.Rptr. 650, 556 P.2d 1101], we held that the Legislature had not intended to permit trial courts to exercise discretion under section 1385 in sentencing defendants under a death penalty statute enacted subsequent to the United States Supreme Court decision in Furman v. Georgia (1972) 408 U.S. 238 [33 L.Ed.2d 346, 92 S.Ct. 2726], but in reaching that conclusion we relied heavily on pervasive indications that the Legislature had believed that any such sentencing discretion would have rendered the statute unconstitutional under Furman. No similar evidence suggests that in enacting section 1203.06 the Legislature thought that removal of all discretion from the trial courts was necessary to sustain the constitutionality of the enactment.

Although the People make much of the fact that the legislative history of section 1203.06 demonstrates that the Legislature enacted the section for the purpose of curtailing discretion previously enjoyed by trial courts, this circumstance in no way distinguishes the present case from the situation prevailing in People v. Burke, supra. As we have seen, in Burke our court held that the provisions of Health and Safety Code section 11712, which prescribed a mandatory state prison sentence for anyone convicted of a narcotics offense who had been previously convicted of a similar narcotics offense, did not prohibit a trial court from striking the prior conviction and sentencing the defendant to county jail. As the Burke court noted (47 Cal.2d at p. 51), section 11712 derived from a statute first enacted in 1929. (Stats. 1929, ch. 216, § 7, p. 385.) As initially enacted, the section provided that a first offender could be confined in county jail or state prison for not more than six years, and that one convicted of a second or subsequent offense could be confined in county jail or state prison from six months to ten years. [FN14] Thus, this initial version explicitly afforded a trial judge discretion to sentence a defendant with a prior to either county jail or state prison.

FN14 The 1929 legislation provided: "Any person convicted under this act for having in possession any of the drugs ... mentioned in section 1 [including marijuana] ... shall upon conviction for the first offense be punished by imprisonment in the county jail or in the State prison for not more than six years, for the second and each subsequent offense of which said person so convicted shall be found guilty, said person shall be punished by imprisonment in the county jail or in the State prison for not less than six months nor more than 10 years."

In 1935, the statute was amended to provide, inter alia, that a second or subsequent offender "shall be

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imprisoned in the State prison for not less than six months nor more than 10 years" (italics added) (Stats. 1935, ch. 813, § 5c, p. 2208), [FN15] and it was this version that ultimately became *536 Health and Safety Code section 11712. Although the 1935 amendment, like the enactment of section 1203.06, appears to have been specifically intended to eliminate the trial court's prior discretion to sentence a second offender to county jail, our Burke decision made clear that such a revision, without an explicit restriction of the section 1385 power to strike, would not preclude a trial court from striking the prior conviction. Accordingly, the Burke decision cannot be distinguished from the instant case. [FN16]

FN15 The 1935 legislation provided: "Any person convicted under this act for having in possession any of the drugs or substances mentioned in section 1 ... shall upon conviction be punished by imprisonment in the county jail or in the State prison for not more than six years; provided, however, that any such person convicted under this act ... shall be imprisoned in the State prison for not less than six months nor more than ten years if such person has been previously convicted of a felony ..., and such previous conviction of a felony is charged in the indictment or information and found to be true by the jury, upon a jury trial, or found to be true by the court, upon a court trial, or is admitted by the defendant."

FN16 Although the People contend that section 1203.06 is a "specific" statute which should take precedence over the more "general" terms of section 1385, it is not at all clear in this context which statute is "specific" and which "general." While section 1203.06 deals directly with the question of probation, as we have seen that section does not address the question of a trial court's power to strike. Thus, with respect to the narrow class of cases which may properly invoke the court's traditional power to strike, section 1385 may constitute the more "specific" statute, and section 1203.06 may be viewed as the provision dealing with the more "general" rule. In any event, the provisions of section 1203.06 are clearly no more "specific" than the provisions of Health and Safety Code section 11712 at issue in Burke, or the provisions of section 12022.5 at issue in Dorsey, or, indeed, the provisions of any of the other mandatory sentencing provisions which, in the past, have not been found to work a repeal of section 1385.

In essence, the People maintain that section 1203.06 presents a "special case" in which a trial court's section 1385 power should be curtailed because of the assertedly clear legislative intent to remove all trial court discretion in granting probation. In reality, however, acceptance of the People's argument in this case would logically preclude a trial court from striking priors or other allegations for purposes of sentencing in most of the circumstances in which the section 1385 power has traditionally been invoked.

As already noted, our decisions in Ruiz, Navarro, Cortez, Tenorio and Burke establish that "one of the paramount purposes" of a trial court's authority to strike is to enable the court in exceptional or extraordinary circumstances to render a defendant eligible for probation or for county jail or for a less severe prison sentence, notwithstanding some other statutory sentencing provision that, standing alone, would bar such a disposition. If section 1203.06's limitation on trial court discretion impliedly eliminates the court's power to strike either a use finding or a prior for purposes of granting probation, a similar unstated implication would logically flow from all other mandatory sentencing provisions and *537 would virtually eliminate the traditionally important role played by section 1385 in the sentencing context. [FN17]

FN17 For example, in People v. Ruiz, supra, we held that a trial court could strike a prior narcotics conviction so as to render a defendant eligible for probation, notwithstanding Health and Safety Code section 11370, which at that time provided that "[a]ny person convicted of violating [designated narcotics offenses] shall not, in any case, be granted probation by the trial court or have the execution of sentence imposed upon him suspended by the court, if he has been previously convicted of [designated narcotic offenses]." (Italics added.) Under the People's analysis, the Ruiz case would have unquestionably been decided differently.

As discussed above, we explicitly refused in People v. Burke, supra, to draw such a broad inference from similar statutory language, and instead indicated that if the Legislature intended to restrict a court's section 1385 power it should do so with unmistakable clarity. Inasmuch as section 1203.06 contains no such explicit restriction on a trial court's section 1385 power, I conclude that the trial court in the instant case retained authority to strike the use finding and to place defendant on probation

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notwithstanding the provisions of section 1203.06.

In sum, past California decisions have established that in light of the historically important role played by section 1385 in the sentencing process, a sentencing statute will not be interpreted as abrogating the authority accorded by section 1385 in the absence of explicit statutory language mandating that result. The Legislature, presumably aware of this well- established line of California authority, enacted section 1203.06 but failed specifically to provide that a trial court's traditional authority under section 1385 was to be eliminated in this context. Consistent with past decisions, I can only conclude that the enactment does not eliminate the trial court's power to strike under section 1385.

If the Legislature had meant to strip the courts of the powers set forth in section 1385 it should have specifically so declared. A myriad of interpretations of section 1203.06 cannot substitute for a single legislative statement that the latter section should overcome the former. Such a legislative statement is lacking, and I do not believe that we should supply or construct it, thereby arbitrarily removing a time-honored judicial function, long and universally recognized by the decisions.

Newman, J., concurred. *538

NEWMAN, J.,

Concurring.

I agree with Justice Tobriner as to the disregard for precedential cases that seems to inhere in Justice Clark's opinion. My aim in concurring separately is to explain why, even apart from those cases, the majority opinion should be regarded as sui generis, likely to evanish as a "legislative history" precedent affecting California's jurisprudence.

The overriding issue in this case cannot be analyzed facilely. The statutes before us are technical and complex; the legislative histories of several of them are intricate. "How To Interpret Statutes Correctly" is a subject dealt with in a million and more pages, many of them penned by first-rate jurists.

One lesson learned from those writings is that conscientious judges glean only minimal aid from so-called canons of construction; e.g., "A specific provision relating to a particular subject will govern a general provision ...." (See p. 521 of the maj. opn., ante; cf. fn. 16 of Justice Tobriner's opn.; Llewellyn, Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are To Be Construed (1950) 3 Vand.L.Rev. 395, 401.)

Valid and reliable rules of statutory interpretation do exist. Three of them ought to be stressed here. First, in the words of Learned Hand: "When we ask what Congress [or another legislature] 'intended', usually there can be no answer, if what we mean is what any person or group of persons actually had in mind. Flinch as we may, what we do, and must do, is to project ourselves, as best we can, into the position of those who uttered the words, and to impute to them how they would have dealt with the concrete occasion." (United States v. Klinger (2d Cir. 1952) 199 F.2d 645, 648.) The distinguished justice added, "He who supposes that he can be certain of the result, is the least fitted for the attempt." [FN1]

FN1 In subsequent pages, on the basis of the record in this case, I outline what appears to have happened to Mr. Deukmejian's bill in Sacramento during the spring and summer of 1975. Via oral argument and correspondence he and other counsel were urged to help accumulate a record that would enable us to articulate as complete a narrative as possible. The scantiness of the record still, however, forfends all feeling of certainty.

Second, a judge should approach all legislative histories and related extrinsic aids with observable caution and care. They are data. They also are shards, too fragmented most of the time to tell us much about the whole urn or the deeds of those who helped craft it. *539

Third, authentic interpretation requires that complete laws be examined. To use snippets from laws is perilous. "When an attorney begins to analyze possible ambiguities without a complete list of all statutory words that affect his inquiry, he is as vulnerable as the engineer who in his calculations relies on an incomplete formula. Sentences, sections, and whole statutes must be read from beginning to end." [FN2]

FN2 Newman & Surrey on Legislation (1955) page 645; cf. Frankfurter, Some Reflections on the Reading of Statutes (1947) 47 Colum.L.Rev. 527, 543: "Spurious use of legislative history

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> must not swallow the legislation so as to give point to the quip that only when legislative history is doubtful do you go to the statute."

Here we are specially concerned with words that appear in chapter 1004 of laws the California Legislature enacted in 1975. That chapter is labeled "An act to amend Section 1203 of, and to add Section 1203.06 to, the Penal Code, relating to probation." Both those code sections are set forth verbatim; § 1203 in 107 lines; § 1203.06, 43 lines.

Section 1203.06 is the basic statute we must construe. It begins, "Notwithstanding the provisions of Section 1203 ... [p]robation shall not be granted to ... [a]ny person who used a firearm [etc.]." (The italics are mine. Justice Tobriner has set forth the full text in his fn. 4.)

The precise issue in this appeal from the trial court is whether the Legislature - even though its drafters wrote "Notwithstanding the provisions of Section 1203" - really meant to say, instead, "Notwithstanding any other provision of law". The issue arises because the Legislature has placed many probation statutes that are analogous to § 1203 and § 1203.06 in chapter 1, title 8, part 2 of the Penal Code, where § 1203 and § 1203.06 also appear. Yet most of those statutes do not mention § 1203. They rather provide that, in certain kinds of cases (not including this case), probation may not be granted "Notwithstanding any other provision of law ...."

Illustrating the Legislature's having distinguished between "Notwithstanding the provisions of Section 1203" and other, more comprehensive phrases is this short summary of several statutes pertaining to our analyses here:

(A) With § 1203.06 and § 1203.07 (both enacted in 1975), which begin "Notwithstanding the provisions of Section 1203", we must compare the adjoining § 1203.08 (enacted in 1976) and § 1203.09 (enacted in 1977), which begin "Notwithstanding any other provision of law ...." (See too Justice Tobriner's comments re § 1203.08 on pp. 533-535 of his opinion.) *540

(B) With § 1202.5, which deals with theft and probation, which was enacted in 1978, and which reads "[¶] Notwithstanding the provisions of Section 1203" and "[¶2] Notwithstanding Section 1203.1", we must compare § 1170.1(g) (enacted in 1977); § 1203.14 (enacted in 1973), § 1203c (enacted in 1935), § 1208(a) [2d ¶] (enacted in 1972), and § 2601 (enacted in 1975), each of which provides "Notwithstanding any other provision of law ...." See too § 12032 ("Notwithstanding any provision of law or of any local ordinance to the contrary").

(C) Generally for words that in effect do seem parallel to "Notwithstanding any other provision of law" we must consider laws such as § 264.2 ("Probation shall not be granted [no exceptions]"); § 12311 ("No person ... shall be granted probation"); § 337a.6 (a) and (b) and also Health and Safety Code § 11550 ("In no event does the court have the power"; cf. People v. Ruiz (1975) 14 Cal.3d 163, 166 [120 Cal.Rptr. 872, 534 P.2d 712]); and Senate Bill No. 278 (which in 1975 amended § 1203 and added § 1203.06) as it read when introduced by Senators Deukmejian and Presley on January 23, 1975. Their original § 1203(d), which allegedly allowed no exceptions, was of course changed by the Assembly's amendment of August 28, 1975, discussed below.

Enlightenment flows also from Penal Code § 4. It declares that all the code's provisions are to be "construed according to the fair import of their terms, with a view to effect its objects and to promote justice." In truth, what seems to be the fair import of "Notwithstanding the provisions of Section 1203"? Is it not that the words of § 1203.06 are to apply regardless of what the Legislature has pronounced in § 1203? To conclude that those quoted words ("Notwithstanding the provisions of Section 1203"), still unamended, import also that § 1203.06 is to override laws other than § 1203 (e.g., § 1385) seems to distort plain meaning, to extend the words so that they voice not what the drafters intended but rather what some people now think those drafters should have intended.

None of the opinions written by my colleagues in this case suggests that the interpretation I thus propose, limiting § 1203.06's exclusion to § 1203, would in any way obstruct the "objects" of the Penal Code or the goal of promoting "justice". Accordingly the specific tests prescribed by § 4 of that code, on how we are to construe it, have been met.

Justice Clark's Extrinsic Aids

Justice Clark's opinion suggests that his and his

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majority colleagues' conclusion as to the meaning of "Notwithstanding the provisions of *541 Section 1203" is supported "by pertinent and timely expression of legislative intent existing when section 1203.06 was enacted" (p. 520 of the maj. opn.). He cites three documents; a Legislative Counsel "summary", a Senate committee staff memo, and a press release issued by the Governor's office. The Legislative Counsel document reads as follows:

"Existing law provides, except in unusual cases in the interest of justice, for denial of probation to a person convicted of robbery, burglary or arson who unlawfully was armed with a deadly weapon at the time of arrest or perpetration of the crime, or to a person previously convicted of any felony.

"Existing law also provides, except in unusual cases in the interest of justice, for the denial of probation to a person who is convicted of other specified felonies while unlawfully armed with a deadly weapon, or convicted of a crime in which a deadly weapon is used or attempted to be used or in which great bodily injury is inflicted or convicted, or who has been twice previously convicted of felonies, and for various other crimes.

"This bill would revise these provisions so that (1) probation and suspension of sentence would be denied, without any exception in unusual cases in the interest of justice, to any person who uses a firearm during the commission of various felonies, including murder, robbery, first degree burglary, prison escape, and various assaults, rapes and kidnappings, but probation would not be denied in such cases solely on the ground of being unlawfully armed with a firearm in the absence of use as specified above; (2) probation and suspension of sentence would be denied, without any exception in unusual cases in the interest of justice, to any person who is previously convicted of such felonies while armed during the commission of any subsequent felony or unlawfully armed at the time of arrest instead of being denied on the ground of a previous conviction of any felony; and (3) this bill would retain the provisions for denial of probation, except in unusual cases in the interests of justice, but would limit the application of such provisions as they presently relate to using, attempting to use, or being unlawfully armed with deadly weapons, in cases other than where a person was previously convicted once of any felony, to deadly weapons other than firearms.

"This bill would also delete an existing provision, which is inoperative, relative to the requirement of the concurrence of the district attorney for the grant of probation in certain cases." (Italics added.) *542

Those four paragraphs were printed with the bill when it was introduced on January 23, 1975. Not one word was altered or added by the Legislative Counsel when the bill was amended in the Senate on May 13 and again, in the Assembly, on August 28. The phrase that concerns us, "Notwithstanding the provisions of Section 1203", was not included in the bill until the Assembly passed its August 28th amendment.

Why did the Legislative Counsel not revise his summary after the August 28th amendment? Possibly he and his staff were much too busy during the final, hectic days of that legislative session. A juridical explanation, however, is that no revision was appropriate. Why not? Because the four paragraphs quoted above suggest that the Legislative Counsel, from January 23 on, regarded the bill as nothing more than an amendment to § 1203. Why is that so? Because both the January 23 and the May 13 versions of the bill were labeled "An act to amend Section 1203 of the Penal Code, relating to probation"; and when words of the proposed amendment were, on August 28, removed from § 1203 and utilized to create § 1203.06, the only pertinent change was to add, at the beginning of § 1203.06, "Notwithstanding the provisions of Section 1203 ...."

What did the Legislative Counsel mean when he said "without any exception in unusual cases in the interest of justice"? (See the words italicized in parts (1) and (2) of his third paragraph quoted above.) Apparently what he meant was that the exclusion from § 1203 of "unusual cases in the interest of justice" would not apply. (See the words italicized in paragraphs 1 and 2 quoted above, and also part (3) of the third paragraph.) His phrase "[e]xisting law", in paragraphs 1 and 2, refers to § 1203 only. It does not refer to § 1385 or to the line of cases discussed in Justice Tobriner's opinion.

The Senate Committee Staff Memo

Justice Clark says that the Legislative Counsel's paragraphs are consistent with a staff memo stating that the bill (apparently as introduced on Jan. 23)

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"Prohibits, without exception, the granting of probation to persons who have carried or used firearms in connection with certain crimes, for which probation may be obtained under existing law in unusual cases in the interests of justice." Unfortunately that quotation has been bobtailed. The memo appears in appendix B of the Attorney General's brief filed on October 8, 1976. As therein set forth its opening paragraph reads: "Prohibits, without exception, the granting of *543 probation to persons who have carried or used firearms, in connection with certain crimes, for which probation may be obtained under existing law in unusual cases in the interests of justice (paras. (1) & (2), subd. (d), Sec. 1203, Pen. C.)."

What is the significance of that closing citation "(paras. (1) & (2), subd. (d), Sec. 1203, Pen. C.)", which is not mentioned in the majority opinion? It tells us that the writer of the Senate committee memo, like the Legislative Counsel, was concerned with § 1203 only. His reference was to the existing § 1203(d) and its exclusion of "unusual cases in the interest of justice". Nothing in the six-page memo or in any other document suggests that the writer or the Senate committee ever considered the impact of the August 28th amendment on § 1385 or on the cases stressed by Justice Tobriner. (See the memo's full text in annex A, infra. The words "without exception" in comment 2 on page 553 clearly involve the reference in comment 1 on page 552 to § 1203(d)'s exclusion ("Except in 'unusual cases' where probation would serve 'the interests of justice"'). No words in the memo express or imply any knowledge of or concern with any other Penal Code section. [FN3])

FN3 Justice Clark's fourth footnote quotes one sentence from an American Civil Liberties Union letter of September 18, 1975 to the Governor. A reading of the entire letter (see annex C, infra) discloses that its writer, like the Senate memo's writer, was discussing § 1203 only. (See, e.g., the ACLU letter's fifth paragraph.) Also of interest is that the ACLU merited no mention in the "History" paragraph that introduces the Senate memo as follows: "Source: Attorney General "Prior Legislation: SB 237 (1973) - held in Assembly Committee on Criminal Justice "Support: Calif. D.A.'s & P.O.'s Ass'n; Huenene Bay Republican Women, Federated; Irate Taxpayers Committee "Opposition: Calif. Probation, Parole, & Correctional Ass'n; Chief Probation Officers Ass'n. of Calif.; Calif. Public Defenders Ass'n."

The Governor's Press Release

The press release from which Justice Clark quotes appears in appendix A of the Attorney General's brief filed on October 8, 1976. (It is also in annex B, infra.) It indicates that the Governor with some vehemence did declare his views on "those who use guns to commit crimes". Yet none of its words indicates that the Governor or his advisers had any knowledge regarding legislative intention with respect to the crucial phrase "Notwithstanding the provisions of Section 1203". The press release, like the Legislative Counsel document and the Senate committee memo, *544 evidences no official concern whatsoever that affects the August 28th amendment or § 1385 or Justice Tobriner's cases. (See too the second paragraph of Justice Tobriner's fn. 6.)

Other Extrinsic Aids

Counsel have referred us to a congeries of other documents, some of which merit comment. Consider, for instance, the Attorney General's letter of March 14, 1979, which reads in part: "[W]e invite the court's attention to the view of Alan Sieroty, Chairman of the Assembly Committee on Criminal Justice in a colloquy with Louis Katz, an attorney from San Diego, representing the Criminal Defense Lawyers (see attachment - excerpts from hearing, supra). This makes it clear that the chairman of the committee understood that the discretion of the court to strike the allegation had been eliminated. This is consistent with all of the legislative history presented to the court, and although it is a view expressed subsequent to the passage of the legislation, it may be considered."

That is a puzzling inference. The paraphrased colloquy was reported as follows (italics added): "Chairman Sieroty: An armed robbery case, Mr. Katz, is kind of interesting. Under our law now, the judge would have no discretion to grant them probation.

"Mr. Katz: That's right; under SB 42.

"Chairman Sieroty: No, under 287, was it? 278. That man would go to prison. He would not have any opportunity for probation. The only opportunity would be that you could convince the district attorney, as to what to say, and he might change the

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charge, or something else.

"Mr. Katz: Well, if they strike the allegation ...

"Chairman Sieroty: Strike the allegation of utilization of a weapon in robbery. Then there would be a different situation. So what that bill has done is to change who exercises the discretion?

"Mr. Katz: The district attorney instead of the judge.

"Chairman Sieroty: That's right. That is what I see happening in this process. *545

"Mr. Katz: And that's what really concerns me that the charging authority, the district attorney, will have the power to decide who does, or doesn't, go to prison. Without the benefit of the Judicial System, the district attorney relies on the police report, and true, he has, maybe, the man's past record, but then about how he charges the defendant is deciding either he goes to trial, or how the man is going to be sentenced, because if they charge an allegation of being armed, the judge has no discretion, and this is the thing we're concerned about. ..."

What exactly was meant by the chairman's words, "Strike the allegation of utilization of a weapon in robbery. Then there would be a different situation."? The only justifiable inferences, I submit, are (1) that both the chairman and Mr. Katz indeed did know about the § 1385 exception; and (2) that the chairman regarded "strike" cases as "different", relevant generally perhaps but nonetheless beyond the scope of his on-going inquiry into Senate Bill No. 278, § 1203, and § 1203.06.

There are also letters from the Attorney General to the Assembly and its committee, to the Senate committee, and to the Governor. I have appended them here (as annexes D, E, F, G) first, because starkly they decorate footnote 8 in Justice Tobriner's opinion; [FN4] and second, because it will be seen that none of them contains any hint that its author's concerns in any way extended beyond "... the provisions of Section 1203".

FN4 Also supplementing Justice Tobriner's opinion, albeit informally and not warrantably, are these comments reported in the Metropolitan News of April 19, 1979 (p. 2): "Deputy Dist. Atty. Maurice Oppenheim, who argued the case the first go-around for the District Attorneys Assn. (as amicus curiae), said that Atty. Gen. George Deukmejian showed 'unsurpassed ineptness as a state senator in drafting the 'use a gun, go to prison' law. [¶] He said that Deukmejian, though 'the 'foremost expert on criminal law' in the Legislature and a 'card-carrying lawyer,' had 'ignored all the prior cases' on judicial powers in drafting the bill." (Italics added.)
A letter of September 22, 1977 to this court from Mr. Maurice Oppenheim states, with respect to a brief he had filed, "[T]he sentence reads, ' Purity is not often an impediment of successful legislation.' It should be corrected to read, 'Purity is not always an ingredient of successful legislation."'

"Subsequent" Legislative History

Readers may recall that the excerpt above from the Attorney General's letter of March 14, 1979 recounts "a view expressed subsequent to the passage of the legislation". Among many views like that one which might have affected our holding, most were expressed and commented upon during recent months - on TV and radio, in dispatches, editorials, letters to the editor, in tavern and town. The politicization of this proceeding *546 after the summer of 1978 became phantasmagoric. A shrill, clamorous campaign - inspired and nurtured by experienced, well-financed, ambitious, and posse-like "hard on crime" advocates - has had a still incalculable but dismal impact on the judicial process in California.

As first presented to the Court of Appeal and then to us, this case might have been a useful vehicle for a much-needed examination of questions involving subsequent legislative history and its proper use by courts. In our letter of February 20, 1979 to counsel we sought comment on "the advisability of utilizing post hoc legislative declarations in litigation generally". (See annex H, infra.)

Regrettably that needed examination will have to be postponed. Its essential focus has been caricatured, somewhat bizarrely, in several briefs and other statements made before, during, and after oral argument on rehearing here. Thus it is not timely yet for us to reweigh this oft-quoted dictum in Hilder v. Dexter (1902) A.C. 474, 477: "My Lords, I have more than once had occasion to say that in construing a statute I believe the worst person to construe it is the person who is responsible for its

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drafting. He is very much disposed to confuse what he intended to do with the effect of the language which in fact has been employed." [FN5] See part II of the State Public Defenders's amicus brief filed on March 2, 1979 ("The statement in the Condit and Hanelt brief regarding legislative intent is unreliable and irrelevant to this case and should not be considered by this court"); Final Report of the Subcommittee on Legislative Intent of the Assembly Committee on Rules (1963) seriatim; Forsyth, Declaratory Legislation in California (1948) 36 Cal.L.Rev. 634; Dickerson, The Interpretation and Application of Statutes (1975) page 181: "[T]he court's general duty of deference to the legislature would in many cases be better served by acting consistently with the enacted will of the Legislature than by acting consistently with the unenacted later will, despite the fact that the unenacted expression of intent was the more recent legislative expression." *547

FN5. Cf. the Attorney General's "remarks ... prepared for delivery.... at oral argument" in the Metropolitan News, March 8, 1979; also his Should the Court Lift Its "Use a Gun, Go to Prison" Ruling? Yes: Judicial Leniency Is Rampant, Los Angeles Times (Mar. 4, 1979) part V, paragraph 1: "My colleagues and I obviously intended to take away the discretion of the judges ... because of the history of judicial abuse associated with them."

That last reminiscence should be contrasted with the following quotation from the Assembly File Analysis supplied to the Office of the Attorney General by the Legislative Counsel on March 13, 1979: "The [predecessor] Attorney General admitted there is no statistical evidence that judges have abused discretion in granting probation in those cases covered by AB 289 [a companion bill to Mr. Deukmejian's bill]. This was confirmed by the Bureau of Criminal Statistics."

See too State Bar Rules of Professional Conduct, rule 7-105(1): "A member of the State Bar shall refrain from asserting his personal knowledge of the facts at issue, except when testifying as a witness." Cf. Lascher at Large in 54 State Bar J. (1979) page 172, column 3.

Finally, because in years ahead the chroniclers of this rehearing and of the whole melancholy tale may lack awareness of pertinent events and diverse pressures that have become so tangled, I think that I should review briefly some of the November 1978 to June 1979 developments regarding § 1203.06.

The trial court's critical action here was during July 1976. On July 21, 1977, after the Court of Appeal had reversed that action, we granted a hearing; and oral argument was heard on February 6, 1978. Tutored and harsh comment began to appear at least as early as June 1978. (See Nicholson, People v. Tanner: An Update, L.A. Daily J. Rep. (Jan. 24, 1979) p. 4, at p. 6; cf. Nicholson & Condit, The Ultimate Human Right, Met. News (May 23, 1978) p. 2.)

During 1977 and 1978 the Legislature could of course have amended the law. In § 1203.06 the phrase "Notwithstanding the provisions of Section 1203" could have been replaced by "Notwithstanding any other provision of law", "With no exceptions", or similar words. Except for a perplexing attack by the Republican gubernatorial candidate on October 10 and 11, 1978, however, the hullabaloo did not begin till November 1978. "If the State Supreme Court throws out California's law mandating prison terms for criminals who use guns, Governor Brown said ... he will lead a fight to reinstate that law. 'We will have mandatory prison sentences if I have to write the new law or a new amendment to the Constitution,' Brown said." (S. F. Chronicle, Nov. 9, 1978.) In early December, "Attorney General-elect George Deukmejian pledged to lead the fight to reinstate mandatory prison sentencing laws if they are overturned by the state Supreme Court." (L. A. Daily J., Dec. 5, 1978.) "A freshman Assemblyman ... proposed a constitutional amendment in anticipation of a controversial Supreme Court decision that may overturn a state sentencing law." (The Recorder, Dec. 13, 1978.)

This court's initial opinions were filed on December 22. "In Sacramento, Governor Brown reacted sharply ... [B]oth Brown and ... Deukmejian promised to push for reinstatement of the mandatory prison penalty for gun-wielding criminals ...." (This World, Dec. 31, 1978.) The San Francisco Chronicle editorialized: "This law ... must be *548 re-enacted. ... And it must be drawn in such a way that the California Supreme Court will have no leg to stand on if it should set out again to override the undoubted will of the people." (Sunday Punch, Dec. 31, 1978.) "Sen. Jerry Smith ... said he saw no or little resistance to passage of the measure, since "all legislators feel strongly about this."' Also, "[t]o help expedite matters Smith ... received permission by a unanimous vote of the upper house to hold a hearing on the measure ... next Tuesday [Jan. 9]". (S. F.

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Examiner, Jan. 3, 1979.)

By that time the Governor seemingly had found that other matters were for him more pressing. "The leadoff witness in favor of the measure was newly inaugurated Republican Atty. Gen. George Deukmejian", and the committee endorsed the bill unanimously. (L. A. Times, Jan. 10, 1979.) Two days later it passed the Senate unanimously. [FN6]

FN6 In its lead story regarding happenings on the Senate floor the San Francisco Chronicle, January 12, 1979, page 1, reported: "'Perhaps we can tattoo it across the forehead of the court,' snarled conservative Senator H. L. Richardson, R-Arcadia." Cf. Nugent, Removal of Judges by Legislative Action (1979) 6 J.Legis. 140, 142, fn. 24: "In 1786, the Superior Court of Rhode Island ruled a statute unconstitutional .... In a fit of legislative pique, the lawmakers attempted to impeach the court. The impeachment effort failed, but the judges of the court somehow failed re-election at the next session."

Meanwhile, back at the Assembly committee where doubts had been expressed at a first meeting on January 8, the inquiry attracted notably fewer media people than did the Senate proceedings. Yet the questions raised there did seem more penetrating and perceptive, and several editorialists began to pronounce their second thoughts. See, e.g., page 6 of part II of the January 11th Los Angeles Times: "Now that the controversy over the Supreme Court's decision has abated somewhat, the Legislature should take the time required to carefully debate a new statute. The ... law must be just, and must have some flexibility to provide for the 'extraordinary cases' cited by Tobriner."

Committee action eventually was postponed, and the prospect of new legislation is blurred. See the San Francisco Banner's Assembly to bypass all sentencing bills ..., May 4, 1979 ("labeled a 'death wish' by Michael Rushford, director of the California Chamber of Commerce Anti-Crime Department"); also the related dispatch from Sacramento in The Recorder, May 10, 1979 ("the Assembly Criminal Justice Committee yesterday approved two moderate measures on dangerous mentally ill offenders, but killed other, tougher sentencing proposals"). Concerning the views of "George Nicholson, a former Alameda County prosecutor who lobbies for the California District Attorneys Association, and Rod *549 Blonien, chief legislative lobbyist for Attorney General George Deukmejian," the San Francisco Examiner had earlier reported (Feb. 7, p. 5) that "their hope for an omnibus blanket for all mandatory terms is bogging down, as a legislative staff review of these laws begins to turn up inconsistencies and anomalies." [FN7]

FN7 Cf. Prison crowding shadows sentencing conditions (May 1979), State Bar Rep. Instructive as to how, if votes have been corralled, the whole Legislature can respond immediately and without ruffles and flourishes is Senate Bill No. 1476, which on August 21 and August 25, 1978, respectively, passed the Assembly and Senate after this court's four-to-three decision on July 31, 1978 in People v. Peters, 21 Cal.3d 749, [147 Cal.Rptr. 646, 581 P.2d 651]. (At the end of September, interestingly it was vetoed by the Governor.)

As noted above, all that seemed needed during the months that have followed December 22, 1978 was a simple amendment that replaced "Notwithstanding the provisions of Section 1203" with "Notwithstanding any other provision of law" or an equivalent phrase. To date, the Assembly's representatives have chosen not to observe the many ex cathedra edicts typified by the quote on my preceeding pages 547-548 from the San Francisco Chronicle, as well as these words from the San Francisco Examiner (Dec. 27, 1978): "The Legislature should make its intent so clear on this law that that issue never again could be raised by this court. And it should make achievement of the goal Act I as it assembles to face the tasks of the New Year."

Conclusion

The incumbent Attorney General has advised as to what he and his colleagues "obviously intended". Justice Clark's opinion pronounces that "the Legislature has not assisted us in discerning its intent".

With greater perception Justice Tobriner states, "The legislative disapproval of the trial court's pre-1975 probation practice ... is by no means irreconcilable with a legislative decision to leave the trial courts' section 1385 power intact; the Legislature may well have desired to disapprove the trial courts' quite liberal pre-1975 probation practice without completely stripping such courts of their

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traditional power to strike allegations or findings in the truly extraordinary or exceptional case. [¶] Indeed, the lead opinion's ultimate determination to relieve Tanner of a prison sentence is eloquent testimony to the strength of the traditional, underlying judicial policies in this area, recognizing that exceptional circumstances - unforeseen by the Legislature - may in rare cases warrant a departure from a generally appropriate sentence." *550

I share those views, and that four colleagues have not felt impelled to explain fully their reasons for disagreement is saddening. My own discussion has converged on evidence regarding the Assembly's crucial amendment of August 28, 1975. That evidence, I believe, supports a finding that influential legislators who helped guide the final vote desired to restrict the discretion conferred by § 1203 but to retain the discretion conferred by § 1385. At first glance the former section's stress on "the interests of justice" seems like the latter's requirement that trial court action be "in furtherance of justice". Analysis of the legislative and judicial histories helps prove, though, that the aims as well as the applications of the two sections have differed significantly. *551

Annex A
SENATE COMMITTEE ON JUDICIARY 1975-76 REGULAR SESSION

SB 278 (Deukmejian)

As introduced

Penal Code

DENIAL OF PROBATION

-USE OF FIREARMS-

HISTORY

Source: Attorney General

Prior Legislation: SB 237 (1973) - held in Assembly Committee on Criminal Justice

Support: Calif. D.A.'s & P.O.'s Ass'n; Hueneme Bay Republican Women, Federated; Irate Taxpayers Committee

Opposition: Calif. Probation, Parole, & Correctional Ass'n; Chief Probation Officers Ass'n. of Calif; Calif. Public Defenders Ass'n.

DIGEST

Firearms

Prohibits, without exception, the granting of probation to persons who have carried or used firearms, in connection with certain crimes, for which probation may be obtained under existing law in unusual cases in the interests of justice (paras. (1) & (2), subd. (d), Sec. 1203, Pen. C.).

Requires that such facts as would make a person ineligible for probation under this bill must be alleged in the indictment or information, and either admitted by the defendant in court or found to be true by the jury or, in certain cases, by the judge (para. (1), subd. (e), Sec. 1203, Pen. C.).

Defines "used a firearm" and "armed with a firearm," for the purposes of this bill (¶ (2) & (3), subd. (e), Sec. 1203, Pen. C.). *552

SB 278 (Deukmejian)

Page Two

Other Laws

Requires that, when a court grants probation in a case in which it is ordinarily denied, on the statutory grounds that it would serve "the interests of justice," the court specify on the record the circumstances indicating that the interests of justice would best be served by the granting of probation (para. (8), subd. (f), Sec. 1203, Pen. C.).

Deletes an existing provision, which has been held to be unconstitutional, relating to the requirement of the concurrence of the district attorney for the granting of probation in certain cases (subd. (e), Sec. 1203, Pen. C.).

PURPOSE

Prohibit, without exception, the granting of probation to persons who use or carry firearms in the perpetration of certain crimes.

Require documentation of the grounds for granting probation in certain other cases.

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COMMENT

1. Except in "unusual cases" where probation would serve "the interests of justice," Section 1203 of the Penal Code presently prohibits the granting of probation to the following persons:

(a) Persons unlawfully armed with a deadly weapon at the time of the perpetration of, or arrest for, any of the following crimes:

(1) Robbery.

(2) Burglary.

(3) Arson.

(4) Burglary with explosives.

(5) Rape with force or violence.

(6) Murder. *553

SB 278 (Deukmejian)

Page Three

(7) Assault with intent to commit murder.

(8) Attempt to commit murder.

(9) Trainwrecking.

(10) Kidnapping.

(11) Escape from state prison.

(12) Conspiracy to commit any of the offenses listed above.

(b) Persons who used or attempted to use a deadly weapon in connection with the perpetration of any crime.

(c) Persons with any previous felony convictions.

(d) Persons who willfully inflict great bodily injury or torture in the perpetration of any crime.

(e) Public officials taking part in bribery, embezzlement, or extortion.

2. This bill would prohibit the granting of probation, without exception, to any of the following persons:

(a) Any person armed with a firearm at the time of the perpetration of, or arrest for, any crime, and who had been previously convicted of any of the following offenses:

(1) Murder.

(2) Assault with intent to commit murder.

(3) Robbery. *554

SB 278 (Deukmejian)

Page Four

(4) Kidnapping.

(5) Burglary of the first degree.

(6) Certain rape offenses.

(7) Assault with intent to commit rape, sodomy, or robbery.

(8) Escape.

(b) Any person using or attempting to use a firearm in the perpetration of any of the offenses listed above.

3. To conform to the changes it makes with respect to firearms, this bill has limited the applicability of existing provisions concerning deadly weapons to deadly weapons other than firearms. In doing so, it seems to inadvertently remove some crimes altogether from any provision limiting or prohibiting probation. Examples follow:

(a) Under existing law, any person who uses any deadly weapon in the perpetration of any crime may not be granted probation except in unusual cases.

Under this bill, a person who used a firearm in the perpetration of any crime other than those specifically enumerated in the bill would not come within any provision limiting or prohibiting probation.

(b) Under existing law, a person who is armed with any deadly weapon at the time of the commission of

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arson or trainwrecking may not be granted probation except in unusual cases. *555

SB 278 (Deukmejian)

Page Five

Under this bill, a person who is armed with a firearm at the time of the commission of arson or trainwrecking would not come within any provision limiting or prohibiting probation.

4. According to a study of 3 counties (Alameda, San Francisco, and part of Los Angeles) by the Bureau of Criminal Statistics in the first half of 1973, 27% of those persons who had used or been armed with firearms in connection with the commission of violent crimes received straight probation; 33% received probation and jail.

Other findings from the study included the following:

(a) The incidence of firearm involvement in 6 major crime categories:

(1) Homicide: 57%

(2) Robbery: 54%

(3) Assault: 41%

(4) Burglary: 21%

(5) Grand theft: 21%

(6) Forcible rape: 9%

(b) Disposition, by crime, of cases involving firearms: *556

SB 278 (Deukmejian)

Page Six

			PROBATION	
RIME	PRISON	TOTAL	STRAIGHT	PROB+JAIL
omicide	62.3%	37.7%	13.0%	24.7%
obbery	60.6%	39.4%	11.9%	27.5%
ssault	17.9%	82.1%	42.1%	40.0%
urglary	33.3%	66.7%		66.7%
rand theft-person	5.3%	94.7%	42.1%	52.6%
orcible rape	33.3%	66.7%	33.4%	33.3%

6. In its present form, Section 1203 requires the concurrence of the district attorney before a court can grant probation to persons convicted of certain crimes. This provision has been held invalid as an unconstitutional violation of separation of powers.

This bill would delete this provision, and a related provision which is now superfluous.

7. Technical Amendment On page 6, line 32, strike out "(8)" and insert "(g)"

On page 6, line 33, strike out "this subdivision" and insert "subdivision (f)"

On page 6, line 36, strike out "(g)" and insert "(h)"

On page 7, line 4, strike out "(h)" and insert "(i)" *557

Annex B

[Sept. 23, 1975]

"Gov. Edmund G. Brown Jr. signed legislation today imposing mandatory prison sentences for using a firearm in the commission of crimes ranging from robbery to attempted murder.

"The governor also signed a bill increasing the waiting period from five to 15 days before a person purchasing a handgun can take delivery of the weapon.

"In a statement on the mandatory sentence bill, Brown said, 'By signing this bill, I want to send a clear message to every person in this state that using a gun in the commission of a serious crime means a stiff prison sentence.

"'Whatever the circumstances, however eloquent

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the lawyer, judges will no longer have discretion to grant probation even to first offenders. This may not rehabilitate nor get at the underlying causes but it will punish those who deserve it. The philosophy of this bill is based not on sociology or Freudian theory, but on simple justice.

"'Recent events underscore the appropriateness of swift and sure punishment for those who use guns to commit crimes.'

"Enactment of the legislation gives California its first mandatory sentence law in 10 years.

"The bill (SB 278) by Sen. George Deukmejian, R-Long Beach, requires mandatory prison terms for the use of firearms in the following crimes:

"Murder; assault with intent to commit murder; robbery; kidnaping; kidnaping for ransom, extortion or robbery; *558 first degree burglary; rape by force or violence; rape by threat of great and immediate harm; assault with intent to commit rape or robbery or prison or jail escapes.

"The measure defines use of a firearm as displaying a firearm in a menacing manner, intentionally firing it or intentionally striking a person with it.

"The new law is supported by Attorney General Evelle Younger, and the California Peace Officers' and District Attorneys' Associations.

"It passed the Senate on a 31-3 vote and the Assembly on a 68-9 vote. The last mandatory sentence law in California also involved the commission of crimes with firearms ...." *559

Annex C

american civil liberties union of northern california

1220 "H" street, suite 103, sacramento, ca. 95814
916/442-1036

September 18, 1975

LEGISLATIVE OFFICE

BRENT A. BARNHART, LEGISLATIVE REPRESENTATIVE

Paul N. Halvonik

Assistant to the Governor for Legislative Affairs

State Capitol

Sacramento CA 95814

Re: SB 278

Dear Paul:

We wish to register a strong dissent to the enactment of SB 278. Like all other citizens of the state, we are aware of the serious problems which the expanding use of firearms poses in California. However, we think that SB 278, as well as other efforts to create mandatory sentences, poses an unacceptable solution.

The Legislature in enacting such legislation is presuming omniscience: predicting that in no case will probation, even conditioned on jail time, ever be an acceptable alternative. Thus not even a very old person or one afflicted with a fatal disease or in need of regular treatment such as kidney dialysis would be eligible for probation.

Due process does not end upon conviction. The proper situs for determination of a convicted person's sentence is at the trial court, not in Sacramento; essential fairness requires that sentence be based on teh facts and circumstances of the case submitted to the court and on the person's own merit or lack of merit.

Mandatory sentences represent another facet of depersonalization by overreaching government - of legislative machinery applying superficial solutions to problems of real depth and complexity.

Existing law already provides that in cases involving specified crimes, no probation shall be granted "except in unusual circumstances where the interests of justice demand it." Proponents of mandatory sentencing claim that this has not stopped judges from being soft on criminals, and so probation must be precluded altogether. The other conclusion - that the presumption of no probation has had no effect whatsoever in stopping violent crime - does not seem to have occurred to proponents of mandatory sentencing. *560

Paul N. Halvonik Page 2 September 18, 1975

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It is our position that SB 278 will do nothing to halt the increase in violent crimes in which firearms are used, but it will do significant harm to the rights of the criminally accused. We understand that there is strong public pressure to sign SB 278, but we would submit that good sense and a rational perspective place this measure outside the acceptable alternatives of a wise government.

Very truly yours,

Brent A. Barnhart

Legislative Representative

BAB: MWI

cc: Hon. George Deukmejian

Hon. Alfred H. Song

Hon. Alan Sieroty *561

Annex D

STATE OF CALIFORNIA

OFFICE OF THE ATTORNEY GENERAL

Department of Justice

555 CAPITOL MALL, SUITE 550
SACRAMENTO 95814

March 25, 1975

Sent to Senate Judiciary Committee Members

This is to ask that you support Senate Bill 278 (Deukmejian) which will be heard before the Senate Judiciary Committee on April 8.

Senate Bill 278 mandates that persons convicted of certain violent crimes in which they used or were armed with a firearm actually be committed to state prison. It does this by removing the trial court's authority to grant probation in such cases.

We believe that Senate Bill 278 is needed because:

1. Under existing law probation is too often granted to persons who used or were armed with firearms during the course of such violent crimes as murder, robbery, and rape. A Bureau of Criminal Statistics special study which surveyed the Counties of Alameda, San Francisco, and Los Angeles found that an average of 60.8% of those persons convicted of serious crimes involving the use of firearms were granted probation or probation plus county jail time. A detailed summary of the study is enclosed for your information. *562

2. The granting of probation in cases in which the felon has seriously endangered the lives of others by using a firearm substantially weakens our ability to deter criminal use of firearms. The deterrent effect of such laws as Penal Code section 12022 and Penal Code section 12022.5 is nil when the convicted felon knows that he has a 6 out of 10 chance of avoiding an actual prison term.

We believe that the certainty of punishment is a significant deterrent to certain criminal acts. We believe this is especially true when a person weighs the option of using a firearm during a planned robbery or other serious felony. We urge that you approve SB 278 and establish a standard of strict liability for those who care so little about the lives of others that they are prepared to endanger them at the point of a gun.

Very truly yours,

EVELLE J. YOUNGER

Attorney General

MICHAEL FRANCHETTI

Deputy Attorney General

cc: Senator George Deukmejian

ds *563

Annex E

STATE OF CALIFORNIA

OFFICE OF THE ATTORNEY GENERAL

Department of Justice

555 CAPITOL MALL, SUITE 550
SACRAMENTO 95814

August 7, 1975

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To Members & Consultant, Assembly Criminal Justice Committee

This is to ask that you support Senate Bill 278 (Deukmejian) which was passed by the Senate by a vote of 31-3.

Senate Bill 278 mandates that persons convicted of certain violent crimes in which they use or were armed with a firearm actually be committed to state prison. It does this by removing the trial court's authority to grant probation in such cases.

We believe that Senate Bill 278 is needed because:

1. Under existing law probation is too often granted to persons who used or were armed with firearms during the course of such violent crimes as homicides, robbery, and rape. A Bureau of Criminal Statistics study recently surveyed the counties of Alameda, San Francisco, and Los Angeles. It found that an average of 60.8% of those persons convicted of serious crimes involving the use of firearms were granted probation or probation plus county jail time. A detailed summary of the study is enclosed for your information.

2. The granting of probation in cases in which a felon has seriously endangered the lives of others by using a firearm substantially weakens our ability to deter criminal use of firearms. The deterrent effect of *564 such laws as Penal Code section 12022 and Penal Code section 12022.5 (which require additional prison time if firearms are used) is nil when the convicted felon knows he has a good chance of avoiding an actual prison term.

We believe that certainty of punishment is a significant deterrent to certain criminal acts. We believe this is especially true when a person waives the option of using a firearm during a planned robbery or other serious felony. We urge that you approve SB 278 and establish a standard of strict liability for those who care so little about the lives of others that they are prepared to endanger them at the point of a gun.

Very truly yours,

EVELLE J. YOUNGER

Attorney General

MICHAEL FRANCHETTI

Deputy Attorney General

Enclosure

cc: Senator Deukmejian

ds Tom Clarke, Consultant, C.J. Comm.

bcc: Stevens, McBrien, Gates *565

Annex F

STATE OF CALIFORNIA

OFFICE OF THE ATTORNEY GENERAL

Department of Justice

555 CAPITOL MALL, SUITE 550
SACRAMENTO 95814

August 26, 1975

TO: Members, State Assembly

This is to ask that you support Senate Bill 278 (Deukmejian) which was passed by the Senate on a vote of 31-3, and which was approved by the Assembly Criminal Justice Committee.

Senate Bill 278 mandates that persons convicted of certain violent crimes in which they used a firearm actually be committed to state prison. It does this by removing the trial court's authority to grant probation in such cases.

We believe that Senate Bill 278 is needed because:

1. Under existing law probation is too often granted to persons who used firearms during the course of such violent crimes as homicide, robbery and rape. A Bureau of Criminal Statistics study recently surveyed the Counties of Alameda, San Francisco and Los Angeles. It found that an average of 60.8% of those persons convicted of serious crimes involving the use of firearms were granted probation or probation plus county jail time. A detailed summary of the study is enclosed for your information. *566

2. The granting of probation in cases in which a felon has seriously endangered the lives of others by

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using a firearm substantially weakens our ability to deter the illegal use of firearms. The deterrent effect of such laws as Penal Code section 12022 and Penal Code section 12022.5 (which require additional prison time if firearms are used) is nil when the convicted felon knows he has a good chance of avoiding an actual prison term.

We believe that certainty of punishment is a significant deterrent to certain criminal acts. We believe this is especially true when a person considers the option of using a firearm during a planned robbery or other serious felony. We urge that you approve Senate Bill 278 and establish a standard of strict liability for those who care so little about the lives of others that they are prepared to endanger them at the point of a gun.

Very truly yours,

EVELLE J. YOUNGER

Attorney General

MICHAEL FRANCHETTI

Deputy Attorney General

Enclosure

cc: Senator George Deukmejian

ds *567

Annex G

STATE OF CALIFORNIA

OFFICE OF THE ATTORNEY GENERAL

Department of Justice

555 CAPITOL MALL, SUITE 550
SACRAMENTO 95814

SEP 10, 1975

The Honorable Edmund G. Brown, Jr. Governor, State of California State Capitol Sacramento, California 95814

Dear Governor Brown:

This is to ask that you sign into law Senate Bill 278 (Deukmejian) which was recently passed by the Legislature. Senate Bill 278 mandates actual prison time for persons who use a firearm during the course of certain felonies. It also mandates prison time for certain ex-felons who are armed with a firearm during a subsequent felony.

The law enforcement community is united in its belief that the enactment of Senate Bill 278 will significantly reduce the criminal use of firearms in California. Under existing practices (see the attached study) the deterrent effect of our laws is diminished by the liberal granting of some form of probation to persons who rob and kill at the point of a gun. The firm and certain punishment envisioned by Senate Bill 278 will remove dangerous criminals from the streets. It will so raise the cost to the criminal of using a firearm that some who might otherwise use firearms will decide not to carry them.

We anticipate that SB 278 will increase the prison population by approximately 2,000 dangerous criminals per year. Given current sentencing practices which have reduced the prison population, and given savings from reductions in probation subsidy allocations, we do not believe that SB 278 will impose undue cost on the people of this state. Whatever the cost, however, we are certain that it will be more than offset by the lives that will be saved and the pain and anguish which will be prevented.

Very truly yours,

EVELLE J. YOUNGER

Attorney General

Enc. *568

Annex H

February 20, 1979

Edward P. O'Brien, Esq. Assistant Attorney General State Building San Francisco, California 94102

Thomas Nolan, esq. 600 University Avenue Palo Alto, California 94301

Re: Crim. 20075 - People v. Tanner

Gentlemen:

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As you are aware, the above appeal is calendared for oral argument in Sacramento on Wednesday, March 7, 1979, at 2:00 P.M.

The next-to-last sentence of the amicus curiae brief dated January 26, 1979, submitted by Condit & Hanelt, contains a declaration regarding legislative intent.

By supplementary brief and/or oral argument, counsel are requested to discuss (1) the relevance to this case of that declaration and related statements in the Condit & Hanelt brief, and (2) the advisability of utilizing post hoc legislative declarations in litigation generally.

The court is familiar with the recent articles by James Delahanty ("Super Legislators: One Person Amendment of Statutes in California", L.A. Daily J. Rep., No. 78-18, pp. 4-15) and Steven Smith ("Legislative Intent: In Search of the Holy Grail", Ca. S.B.J. Sept.-Oct. 1978, pp. 294-301), and also with footnote 4 on pages 20-21 of the amicus curiae brief of the Los Angeles Public Defender, filed on July 27, 1977.

Very truly yours,

G. B. BISHEL

Clerk of the Supreme Court

GEB: ct

cc: Messrs. Condit & Hanelt

District Attorney, Los Angeles

George C. Martinez, Esq.

Messrs. Monroe & Hansen

Public Defender, Los Angeles

State Public Defender

Rec.

Reg.

Cal.

Bl cc: Bird, C.J., Tobriner, J.,

Mosk, J., Clark, J.,

Richardson, J., Manuel, J.

Newman, J. *569

BIRD, C. J.,

Concurring and Dissenting.

I agree with my colleague, Justice Newman, that this case and its rehearing present a "melancholy tale." As he so succinctly points out, "[t]he politicization of this proceeding after the summer of 1978 became phantasmagoric. A shrill, clamorous campaign - inspired and nurtured by experienced, well-financed, ambitious, and posse-like 'hard on crime' advocates - has had a still incalculable but dismal impact on the judicial process in California." (Conc. opn. of Newman, J., ante, at pp. 545-546.)

The original decision in this case was filed on December 22, 1978, and at that time the position advocated by today's majority did not prevail. (See 151 Cal.Rptr. 299.) Nothing new has come before us other than some additional work on legislative history compiled by Justices Newman and Tobriner. Today's majority does not make any attempt to deal with this new material.

Moreover, the result reached by this new majority is contrary to the results that three of them so strenuously urged just a few months ago. This is nothing more than an attempt to carve a compromise of expediency. The law has been twisted out of shape to achieve their unique result. To avoid criticism that they have made the defendant a pawn in this process, the majority exempt him from the very standard that will be applied to all other defendants. And what is most discouraging, the majority give short shrift to the difficult issues of legislative intent and constitutional validity in a headlong rush to find a popular solution for an unpopular case.

Have we forgotten that justice is not a matter of expediency? It is not a cloak in which we can wrap ourselves when we find its protection most convenient. It is, rather, a matter of principle, plain and simple. If we hope to maintain a legal system characterized by justice, we cannot defer its application as to even a single case that comes

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before us.

The challenging points on legislative history and constitutional validity deserve careful consideration. Yet the majority's discussion deals with these issues primarily by silence. It would appear that each justice on this court agrees on certain basic principles relating to the separation of powers clause of our Constitution. (Art. III, § 3.) As Justice Clark has stated in this case, "[t]here has never been any doubt that the courts are exclusively vested under the separation of powers doctrine to make adjudication of any issue affecting the penalty to be imposed in a criminal proceeding." (151 Cal.Rptr. at p. 321, italics added [former dis. opn.].) Yet my colleagues honor this principle only in its breach. *570

The exercise of this adjudicatory power in no way invades any legislative power to fix the range of possible punishments for a crime. The imposition of a legislatively prescribed sentence on a defendant does not come about until after all the issues and factors relative to guilt and to punishment have been finally adjudicated. After the adjudication process is completed, the trial court pronounces judgment [FN*] within the limits of the options provided by the Legislature and the other provisions of the Constitution (see, e.g., In re Lynch (1972) 8 Cal.3d 410, 414-415 [105 Cal.Rptr. 217, 503 P.2d 921]). Thus, the legal power and duty of the court to impose a sentence or render a judgment within those limits are distinct from its legal power to adjudicate "any issue affecting the penalty to be imposed."

FN* "[J]udgment is synonymous with the imposition of sentence [citation] ...." (People v. Warner (1978) 20 Cal.3d 678, 682, fn. 1 [143 Cal.Rptr. 885, 574 P.2d 1237].)

Only the latter "adjudicatory" power of the court is involved in the present case. Before any sentence or judgment could have been imposed on Mr. Tanner by the trial judge, the allegation that Tanner had used a firearm within the meaning of Penal Code section 1203.06 had to be finally adjudicated. (Post, at pp. 558-559.) The adjudicatory process was not completed at the time the jury rendered its verdict. It was not completed until the trial judge ruled on Tanner's motion to strike the use of a firearm. (See cases collected, post, at p. 559, fn. 5, and accompanying text.) Since it is clear that the courts are vested under the separation of powers doctrine with the responsibility for the adjudication of any issue affecting a criminal penalty to be imposed, that constitutional principle was violated when the Legislature attempted to arrogate to itself both the adjudicatory as well as the sentencing function.

Since nothing has changed since this court's initial decision was filed on December 22d, my original concurring and dissenting opinion is set out below. [FN<<dagger>>]

FN<<dagger>> Some of the citations in my original opinion, as it is set forth in the pages which follow, refer to the previous opinions filed in this case. (151 Cal.Rptr. 299.)

This court should not substitute its judgment for that of the Legislature when an issue of statutory interpretation is involved. We "must give full weight" to the intent of the Legislature. (People v. Caudillo (1978) 21 Cal.3d 562, 589 [146 Cal.Rptr. 859, 580 P.2d 274] (conc. opn. of Bird, C. J.).) After consideration of the legislative history of Penal Code section 1203.06, I agree with my colleagues, Justices Manuel, Richardson, and Clark, that the Legislature intended to remove from courts the power to give probation when an individual is convicted of one of the felonies enumerated in that section and a gun is displayed. *571

However, this does not end our inquiry, for this case involves more than statutory interpretation. As judges, we have taken an oath of office to uphold the Constitution of this state. Thus, when a legislative enactment contravenes the Constitution, this court cannot defer to the Legislature and remain true to its constitutional mandate. However controversial the question, the court cannot avoid an issue which goes to "the very core of our judicial responsibility." (People v. Anderson (1972) 6 Cal.3d 628, 640 [100 Cal.Rptr. 152, 493 P.2d 880]; see also Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization (1978) 22 Cal.3d 208, 248-249, 256-257 [149 Cal.Rptr. 239, 583 P.2d 1281] (conc. and dis. opn. of Bird, C. J.).) If we were to shrink from the obligations of our oath, the Declaration of Rights would become meaningless. To decide cases based on what is most popular at the moment will ultimately destroy the judiciary as a third branch of government.

This case presents an issue that goes to the heart of our existence as an independent and coequal partner in government. Article III, section 3 of the

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California Constitution requires that the legislative, executive, and judicial powers be separately exercised by the three branches of government. If we are to remain faithful to that section of the Constitution, we must affirm the judgment of the trial court.

I

This court must perform the difficult task of removing itself from the politics of the moment without isolating itself from the realities of the day. No one condones the use of a firearm to secure an illegal end. As judges, we share with all citizens the sense of outrage at those who would take the life or property of another at gunpoint. Justice and respect for human life demand nothing less from us. Such actions not only injure individuals, they inevitably tear at the fabric of our society. But just as every human life is irreplaceable, every human being is unique and each situation must be judged individually.

The actual issue before us has been obscured by a number of myths. One such myth is that a defendant who is granted felony probation avoids incarceration. In fact, an individual who is placed on probation for a felony may receive up to one year in the county jail for each offense he has committed. That is exactly what happened in the present case.

That is not the only myth surrounding this case. The slogan "Use a gun, go to prison" has been portrayed as an accurate description of Penal Code section 1203.06. As is often the case with slogans, their simplicity is only exceeded by their inaccuracy. If a person uses a gun in the commission of an offense, he is not necessarily denied probation nor *572 required to go to state prison. Section 1203.06 does not cover many serious crimes. For example, if an individual commits an assault with a deadly weapon (Pen. Code, § 245, subd. (a)), and he shoots and wounds his victim, he is eligible for probation. Nor does section 1203.06 apply to other dangerous felonies such as assault or battery on a peace officer (Pen. Code, §§ 241, 243), assault with a deadly weapon on a peace officer (Pen. Code, § 245, subd. (b)), battery resulting in a serious bodily injury (Pen. Code, § 243), arson (Pen. Code, § 447a), child molestation (Pen. Code, § 288), lynching (Pen. Code, § 405a), mayhem (Pen. Code, § 203), forcible sodomy (Pen. Code, § 286), and forcible oral copulation (Pen. Code, § 288a). Similarly, felonies such as second degree burglary (Pen. Code, §§ 459, 460) with the use of a firearm are excluded from the scope of section 1203.06.

Further, the prosecutor has complete discretion as to whether to invoke section 1203.06 in those cases where it applies. He may decide not to allege a firearm has been used even when it has. Even after the use of a firearm has been alleged, the prosecutor may move to have the allegation stricken. (See Pen. Code, § 1385.) The prosecutor may agree to dismiss the firearm allegation in exchange for a guilty plea to the underlying offense during plea bargaining. If the Prosecutor agrees to a "charge-bargain," he may allow a defendant to plead guilty to an offense which is not covered by section 1203.06. [FN1]

FN1 Further, under certain circumstances section 1203.06 may preclude probation, but it does not require a commitment to state prison. An offender may be sentenced to the California Youth Authority if under 21 years old; to the California Rehabilitation Center if a narcotics addict or in imminent danger of becoming a narcotics addict; to a state hospital or "an appropriate public or private mental health facility" if the offender is a mentally disordered sex offender who could benefit from such treatment; or to a state hospital if the offender is a mentally retarded person who is a danger to himself or others.

The point in all these cases is that even though a firearm may have been used, the offender is not automatically stripped of his eligibility for probation and sentenced to state prison. The so-called mandatory gun law is not mandatory at all. In section 1203.06, the Legislature has in effect vested in the representative of the executive branch, the prosecutor, all discretion as to a local disposition (probation with a county jail sentence) and withdrawn such discretion totally from the judicial branch.

Historically, sentencing has been considered an inherently judicial function since it requires a neutral magistrate who will fairly consider both sides of a question. In enacting Penal Code section 1203.06, the Legislature apparently intended to remove from the court the power to grant probation when an individual is found to have displayed a gun while committing one of the felonies enumerated in that section. After *573 much thought, I am convinced that such a legislative fiat violates the express provisions of article III, section 3 of the California

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Constitution. By dictating to judges what they can and cannot do in adjudicating with respect to a penalty enhancement factor, the Legislature has violated basic principles of separation of powers and taken away from judges their historic power to match the judgment to the facts of the individual case.

Consider the facts now before us. An experienced trial judge, who handled this matter, found it to be a "very, very rare case." The nature of the offense was described as "bizarre." (151 Cal.Rptr. 299, 301-302 [former maj. opn.].) The investigating detective from the sheriff's office recommended that Mr. Tanner "be placed on probation with a short county jail sentence." The detective did "not feel that the defendant is a candidate for State Prison." He felt that Mr. Tanner's "good report up to the present offense" was an important factor to consider and that "the defendant ha[d] learned a lesson."

The trial judge concluded that Mr. Tanner had a "clean background" and that the firearm was unloaded at all relevant times with "no real intent to use [the] weapon as such" being demonstrated. Mr. Tanner had been honorably discharged from the Army after service in Korea. Formerly he had been the manager of a large department store's branch in the East Bay. Following a divorce, he slipped into a long period of depression. He had no prior criminal record. The trial judge concluded that in this unusual case he would incarcerate Mr. Tanner for one year in the county jail, and require five years of probation with a suspended state prison sentence. The question once again is posited. Does the Legislature have the power to preclude a judge from considering this punishment when a penalty enhancement factor is present? The legal question is ultimately one of the separation of constitutional powers.

II

It is the constitutional duty of this court to ensure that the essential functions of the judicial branch of government are safeguarded from encroachment by the coequal legislative or executive branches. (Cal.Const., art. III, § 3.) Three times in this decade this court has unanimously held that sentencing courts alone have the power to determine whether a penalty should be enhanced. (People v. Tenorio (1970) 3 Cal.3d 89 [89 Cal.Rptr. 249, 473 P.2d 993]; In re Cortez (1971) 6 Cal.3d 78 [98 Cal.Rptr. 307, 490 P.2d 819]; People v. Ruiz (1975) 14 Cal.3d 163 [120 Cal.Rptr. 872, 534 P.2d 712].) The constitutional principles outlined in these decisions clearly control this case. *574

Article III, section 3 of the California Constitution provides that "[t]he powers of state government are legislative, executive, and judicial." The judicial power of state government is vested by the Constitution in the courts alone. (Cal. Const., art. VI, § 1; cf. Cal. Const., art. IV, § 1 ["The legislative power of this State is vested in the California Legislature ...."]; Cal. Const., art. V, § 1 ["The supreme executive power of this State is vested in the Governor."].)

The Constitution further provides that "[p]ersons charged with the exercise of one power [of state government] may not exercise either of the others except as permitted by this Constitution." (Cal.Const., art. III, § 3.) Thus, because of this requirement of separation of powers, "the exercise of a judicial power may not be conditioned upon the approval of either the executive or legislative branches of government ...." (Esteybar v. Municipal Court (1971) 5 Cal.3d 119, 127 [95 Cal.Rptr. 524, 485 P.2d 1140].) "The judicial power must be independent, and a judge should never be required to pay for its exercise." (People v. Tenorio, supra, 3 Cal.3d at p. 94.)

This court suggested more than 20 years ago that "in respect to constitutionally vested judicial power" the adjudication and determination of penalty enhancement factors are "inherently and essentially the province of the court." (People v. Burke (1956) 47 Cal.2d 45, 52 [301 P.2d 241].) The court reasoned that a trial judge has inherent constitutional power under the separation of powers clause to "control the proceedings before it insofar as the essentials of the judicial process are concerned ...." and that among such "essentials of the judicial process" is the power "to strike or dismiss as to any or all of multiple counts or charges of prior conviction." (Ibid.) As Justice Schauer later explained in his noted dissent in People v. Sidener (1962) 58 Cal.2d 645, 665-666 [25 Cal.Rptr. 697, 375 P.2d 641], "A charge of prior conviction which is found to be true now has serious and far reaching effects on the punishment of the offender ...." Thus, he concluded, the power to hear and determine "the important question of dismissing such a charge ... must ... be deemed an essential part of the judicial process [and] ... an implied constitutional power of

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the courts of this state." (Id., at p. 666, fn. omitted.)

Justice Schauer's dissent in Sidener was approved by this court, and the principles of Burke were applied, in People v. Tenorio, supra, 3 Cal.3d 89. In Tenorio, the Legislature had promulgated a statute which forbade a sentencing judge from exercising at sentencing the "judicial power to grant a motion to strike priors" without the consent of the prosecutor. (3 Cal.3d at p. 93.) This court held that "the power to strike priors is an essential part of the judicial power" (ibid.) vested by the Constitution *575 exclusively in the courts. Therefore, the exercise of that power could not be overruled or curtailed by a representative of another branch of government. The basic premise of Tenorio was clearly consistent with Burke: "When the decision to prosecute has been made, the process which leads to acquittal or to sentencing is fundamentally judicial in nature." (Tenorio, supra, 3 Cal.3d at p. 94.)

Tenorio was followed one year later by In re Cortez, supra, 6 Cal.3d 78, which involved a defendant who had been convicted of selling or offering to sell heroin [FN2] with a prior felony narcotic conviction. At the time the defendant was to be sentenced, former Health and Safety Code section 11715.6 provided that "[i]n no case shall any person convicted of [selling or offering to sell narcotics] be granted probation by the trial court, nor shall the execution of the sentence imposed upon such person be suspended by the court, if such person has been previously convicted of any felony offense described in this division ...." (Stats. 1961, ch. 274, § 12, p. 1308.) Although the statute "flatly prohibit[ed] probation" to an individual who had a prior narcotic felony conviction (

FN2 When the defendant in Cortez committed his offenses, selling or offering to sell heroin was proscribed by former Health and Safety Code section 11501 (see now, Health & Saf. Code, § 11352). In re Cortez, supra, 6 Cal.3d at p. 85), this court held that article III and article VI, section 1 of the California Constitution permitted the trial court to strike the prior conviction in order to make the defendant eligible for probation.

In People v. Ruiz, supra, 14 Cal.3d 163, this court reiterated and applied the separation of powers principles in a case legally indistinguishable from the present case. In Ruiz, the defendant had been convicted at trial of possession for sale of heroin with a prior felony conviction for possession of narcotics. On appeal, the possession for sale conviction was reduced to simple possession. The case was remanded for resentencing, even though the defendant was still "technically ineligible for probation." (Id., at p. 166.) Health and Safety Code section 11370, subdivision (a) [FN3] provided that "[a]ny person convicted of [possession of heroin] shall not, in any case, be granted probation by the trial court or have the execution of the sentence imposed upon him suspended by the court, if he has been previously convicted of [possession of narcotics]." (Emphasis added.)

FN3 Health and Safety Code section 11370 was a recodification of former Health and Safety Code section 11715.6, which had been the statute involved in In re Cortez, supra, 6 Cal.3d 78. (Stats. 1972, ch. 1407, § 2, p. 2987; Stats. 1972, ch. 1407, § 3, p. 3020.)

The Ruiz court, with my colleague Justice Clark concurring, held that the trial court could strike the prior conviction in order to place the defendant on probation. Despite the language of section 11370, the defendant was held to be "entitled to a new probation hearing wherein *576 the court may make a new judgment relative to his fitness for probation in light of the crime of which he now stands convicted." (People v. Ruiz, supra, 14 Cal.3d at p. 167, italics added.) The constitutional origin of this holding was reemphasized by the court's reference to the "comprehensive range of the [sentencing court's] constitutional discretion." (Ibid., italics added.)

The statute involved in the present appeal is in all relevant respects identical to the statutes discussed in Cortez and Ruiz. (See 151 Cal.Rptr. at p. 305, fn. 7 [former maj. opn.].) All three statutes purport to deny probation to defendants when certain penalty-enhancing factors have been found to be true. Since the trial court could strike the enhancing factors in order to find Mr. Cortez and Mr. Ruiz eligible for probation, the lower court in this case had that same power.

The dissent by my colleague, Justice Clark, shows a basic misunderstanding of the constitutional issue presented. That dissent concedes that "the courts are exclusively vested under the separation of powers doctrine to make adjudication of any issue affecting the penalty to be imposed in a criminal proceeding."

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(151 Cal.Rptr. at p. 321 [former dis. opn.].) However, it is urged that "that is not the issue here. Our concern is with the penalty to be imposed once the adjudication has been made by the court." (Ibid.)

With all due respect, the issue the dissent concedes is precisely the issue before this court. [FN4] A judge's ruling on a motion to strike a penalty *577 enhancement factor for purposes of sentencing is itself part of the adjudication process; the imposition of a sentence required or permitted by statute follows this adjudication.

FN4 This concession contradicts the dissent's contention elsewhere that the judicial power to strike a penalty enhancement factor is not "constitutionally vested" but rather "is dependent upon legislative enactments" authorizing such action. (151 Cal.Rptr. at p. 320 [former dis. opn.].)
In any event, this contention is without merit. "[T]he power to strike priors is an essential part of the judicial power" (People v. Tenorio, supra, 3 Cal.3d at p. 93) and therefore is vested in the judiciary alone by the separation of powers clause of our Constitution. Statutes such as Penal Code section 1385 or former Health and Safety Code section 11718, which refer to the court's power to strike, are merely "evidential of" that power. (People v. Valenti (1957) 49 Cal.2d 199, 206 [316 P.2d 633].)
"Certain of [the court's] implied powers have received legislative definition; but in each instance the enactment neither created nor circumscribed the powers thus defined. Thus, ... Penal Code section 1385 ... is not a grant of jurisdiction to dispose in a particular way of the actions pending before it. The court, by virtue of the constitutional provisions above mentioned, already has the complete power to fully adjudicate and, subject only to judicial review, finally dispose of, all causes encompassed in the constitutional grant." (People v. Sidener, supra, 58 Cal.2d at pp. 656-657 (dis. opn. of Schauer, J., fn. omitted, emphasis in original); see also People v. Valenti, supra, 49 Cal.2d at p. 206; People v. Burke, supra, 47 Cal.2d at p. 52; Bates v. Superior Court (1951) 107 Cal.App.2d 656, 658 [237 P.2d 544].)
The dissent seriously asserts that this court in Cortez found that Penal Code section 1203 provided legislative authorization for the trial court's power to strike the prior conviction in that case. (151 Cal.Rptr. at p. 320 [former dis. opn.].) That assertion is mistaken. At no time has Penal Code section 1203 dealt with - or even mentioned - a court's power to strike a penalty enhancement factor.

The court in Cortez did not refer to section 1203 for the reason ascribed to it by the dissent. Rather, it mentioned that section during its examination of "the purposes underlying a motion to strike prior convictions." (Ibid.) The court relied on section 1203 solely to show that if the prior conviction were stricken, then the statute which otherwise prohibited probation in Cortez' case (i.e., Health & Saf. Code, § 11715.6) no longer would apply to him and he would be eligible for probation within the terms of section 1203. This court did not even remotely suggest that section 1203 itself authorized the striking of the enhancement.

This is apparent from numerous prior decisions of this court, some of which are cited in Justice Clark's dissent. For example, in People v. Burke, supra, 47 Cal.2d at page 52, this court stated that judicial determination of a motion to strike a penalty enhancement factor at sentencing is "inherently and essentially the province of the court even as the punishment which may or must follow the offense adjudicated, either with or without a punishment augmentation factor, is essentially for the Legislature ...." (Emphasis added.) Subsequently, Justice Schauer, in his dissent in People v. Sidener, supra, 58 Cal.2d at page 653, noted that a motion to strike a prior conviction for sentencing purposes is "a motion made prior to entry of judgment in a felony criminal action, the ruling on which will affect the substantial rights of the defendant under the judgment to follow." (Emphasis added.) As the dissent in the present case recognizes (151 Cal.Rptr. at p. 320, fn. 6 [former dis. opn.]), Justice Schauer's opinion in Sidener was subsequently approved by this court. (People v. Tenorio, supra, 3 Cal.3d at p. 95; see also People v. Navarro (1972) 7 Cal.3d 248, 259 [102 Cal.Rptr. 137, 497 P.2d 481]; People v. Clay (1971) 18 Cal.App.3d 964, 968 [96 Cal.Rptr. 213].) [FN5] *578

FN5 I do not understand the dissent by Justice Clark to contend that the adjudication process as to a penalty enhancement factor is complete simply when a defendant has admitted the enhancement or a judge or a jury has found it to be true. Such a contention would, of course, be meritless. (See generally, People v. Burke, supra, 47 Cal.2d at pp. 50, 51 [discussing the court's power to strike or dismiss a prior conviction "regardless of whether [the prior conviction] has or has not been admitted or established by evidence"]; People v. Sidener, supra, 58 Cal.2d at pp. 665-666 (dis. opn. by Schauer, J.) [the power

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to hear and determine the question of dismissing "a charge of prior conviction which is found to be true" is an implied constitutional power of the courts of this state].) An unbroken line of decisions by the appellate courts of this state - including an opinion by Justice Clark - authorizes a trial court judge to strike a penalty enhancement factor even after it has been admitted by the defendant (see, e.g., People v. Mesa (1975) 14 Cal.3d 466, 470-472 [121 Cal.Rptr. 473, 535 P.2d 337] (opn. by Clark, J.); People v. Ruiz, supra, 14 Cal.3d at pp. 166-168; People v. Navarro, supra, 7 Cal.3d at p. 257; People v. Tenorio, supra, 3 Cal.3d 89; People v. Hartsell (1973) 34 Cal.App.3d 8, 12-15 [109 Cal.Rptr. 627]) or has been found true by a judge or jury (see, e.g., People v. Prater (1977) 71 Cal.App.3d 695, 700-703 [139 Cal.Rptr. 566]; People v. Dorsey (1972) 28 Cal.App.3d 15 [104 Cal.Rptr. 326]).

Since a court's ruling on a motion to strike is part of the adjudication process, Burke, Cortez, and Ruiz compel the conclusion that the power to strike the penalty enhancement factor in this case is exclusively reserved to the judiciary. Continued adherence to Burke, Cortez and Ruiz is not a judicial usurpation of the Legislature's prerogative. Rather, it is a constitutional protection of the judicial function from legislative usurpation. These cases simply represent a traditional protection of the judiciary's constitutionally reserved functions as neutral arbiters in the sentencing process.

In the present case the trial court correctly understood that its responsibility for determining whether to strike the penalty enhancement was of constitutional dimension. Unless this court overrules Burke, Cortez, and Ruiz, and rewrites article III, section 3 of the state Constitution, the decision of the trial court must be upheld. *579

Cal., 1979.

People v. Tanner

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PUBLIC HEARING

COMMISSION ON STATE MANDATES

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MAY 3 1 2001
COMMISSION ON
STATE MANDATES

TIME: 9:30 a.m.

DATE: May 24, 2001

PLACE: State Capitol, Room 126
Sacramento, California

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REPORTER'S TRANSCRIPT OF PROCEEDINGS

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Reported By: YVONNE K. FENNER, CSR License #10909, RPR

1 A P P E A R A N C E S

2

COMMISSION MEMBERS

3

ANNETTE PORINI, Chairperson
4 Representative of B. Timothy Gage, Director
State Department of Finance

5

ALBERT P. "AL" BELTRAMI
6 Public Member

7 JOHN HARRIGAN
Representative of Kathleen Connell
8 State Controller

9 WILLIAM SHERWOOD
Representative of Philip Angelides
10 State Treasurer

11 JOANN E. STEINMEIER
School Board Member
12 Arcadia Unified School District

13 SHERRY WILLIAMS
Representative for Steven Nissen, Director
14 Office of Planning and Research

15

16 COMMISSION STAFF

17 PAULA HIGASHI, Executive Director

18 CAMILLE SHELTON, Staff Counsel

19 SEAN P. AVALOS, Staff Counsel

20 ELLEN FISHMAN, Staff Counsel

21 CATHY CRUZ, Staff Analyst

22

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AGENDA INDEX

AGENDA ITEM		PAGE
1	Approval of Minutes, April 26, 2001	7
2	Hearing and Decision, Test Claim, Brown Act Reform	9
3	Hearing and Decision, Incorrect Reduction Claims, Graduation Requirements	39
4	Hearing and Decision, Adoption of Proposed Statement of Decision - Incorrect Reduction Claim, Graduation Requirements	7
5	Informational Hearing, Adoption of Proposed Parameters and Guidelines, County Treasury Oversight Committees (Postponed)	9
6	Informational Hearing, Adoption of Proposed Parameters and Guidelines, Mentally Disordered Offenders' Extended Commitment Proceedings	7
7	Informational Hearing, Adoption of Proposed Parameters and Guidelines, Extended Commitment, Youth Authority	7
8	Informational Hearing, Adoption of Proposed Parameters and Guidelines, Elder Abuse, Law Enforcement Training	7
9	Adoption of Proposed Statewide Cost Estimate, Seriously Emotionally Disturbed (SED) Pupils	7
10	Executive Director's Report	50

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there any items off calendar?

MS. HIGASHI: Yes. We have postponed item 5, proposed parameters and guidelines for County Treasury Oversight Committees, and this item was postponed on the request of the County of San Bernardino, the claimant.

CHAIRPERSON PORINI: All right. So item 5 is removed from the calendar for this month, and we'll see it next month.

MS. HIGASHI: Our first hearing item is item 2, the test claim on the Brown Act Reform. This test claim will be presented by Ellen Fishman.

MS. FISHMAN: Good morning.

This test claim addresses four sections of the Government Code, sections 54952, 54954.2, 54957.1, and 54957.7, that relate to the open meeting provisions of the Brown Act as they apply to local agencies and school districts.

Staff finds that section 54952 has created two new legislative bodies which are required to comply with all provisions of the Brown Act. One is local bodies created by state or federal statute, and, two, standing committees with less than a quorum of the members of the legislative body that has a continuing subject matter jurisdiction or a meeting schedule fixed by formal action.

1 Staff also finds that permanent and temporary
2 advisory bodies, except bodies composed solely of less
3 than a quorum of the members of the legislative body,
4 are now required to comply with the full notice and
5 agenda requirements of the Act. Under prior law,
6 advisory bodies were only required to provide the time
7 and place of their regular meetings in their bylaws; no
8 other notice was required.
9 The test claim legislation also added new closed
10 session requirements as listed on page 3 of the final
11 staff analysis. Section 54954.2 now requires all
12 legislative bodies to prepare and post an agenda which
13 includes a brief general description of each item to be
14 discussed in closed session.
15 Section 54957.7 requires the legislative body to
16 disclose in open meeting prior to holding any closed
17 session each item to be discussed in the closed session.
18 In addition, this section requires the legislative body
19 to reconvene in open session prior to adjournment and
20 report the actions and votes taken in closed session for
21 five new items identified in section 54957.1.
22 Section 54957.1 also requires the legislative body
23 provide copies of all closed session documents to the
24 public under certain circumstances.
25 Staff finds these four sections constitute a new

1 program or higher level of service under article XIII B,
2 section 6, of the California Constitution and imposes a
3 reimbursable state-mandated program on the legislative
4 bodies of local agencies and school districts as defined
5 for the activities listed on page 3 of the final staff
6 analysis.
7 Will the parties and witnesses please state your
8 name for the record.
9 MR. BURDICK: Allan Burdick on behalf of the
10 California State Association of Counties.
11 MS. STONE: Pamela Stone, here on behalf of City
12 of Newport Beach.
13 MR. EVERROAD: Glen Everroad, City of Newport
14 Beach.
15 MR. ZEMITIS: Cedrik Zemitis, Department of
16 Finance.
17 MR. LOMBARD: Jim Lombard, Department of
18 Finance.
19 MS. HIGASHI: Would all of you please raise your
20 right hands. Do you solemnly swear or affirm that the
21 testimony which you are about to give is true and
22 correct based upon your personal knowledge, information,
23 or belief?
24 MULTIPLE SPEAKERS: (Various affirmative
25 responses.)

1 CHAIRPERSON PORINI: All right. Would the
2 claimants want to begin?
3 MS. STONE: Yes, please. Good morning,
4 Commissioners and Madame Chair.
5 I think that the staff has done a yeoman's job
6 in performing the analysis of this very complicated
7 matter. When Brown Act Reform was initiated, it was in
8 response to a substantial amount of confusion, I
9 believe, on behalf of local government as to what
10 boards, commissions, et cetera, were or were not covered
11 by the Brown Act and also in light of the legislative --
12 in light of Senator Kopp's desire to -- who was the
13 proponent of the legislation -- to have more access to
14 the public.
15 We are in concurrence with the draft staff
16 analysis and -- or with the final staff analysis which
17 has been presented to you, and we would like to make one
18 comment. And that is, as we both stressed in the
19 supplemental filing filed by the City of Newport Beach,
20 which is on page 335 of your documents as well as in
21 some of the materials that were provided, because of the
22 technical changes that were made, which were extremely
23 technical as you can tell from the boxed analysis by
24 your staff member, Ms. Fishman, it was incumbent to
25 provide training to board members, advisory committee

1 members, commission members, on the changes in the Brown
2 Act.
3 Because, as you folks are aware from the Open
4 Meetings Act, in the event that you take any action
5 which is not properly before the board or commission,
6 advisory board, commission, and not properly
7 encapsulated in the brief statement, which sometimes
8 unfortunately cannot be as brief as one would want, any
9 actions taken thereupon are void, and therefore in order
10 to avoid litigation and to explain the technicalities in
11 the changes basically statewide, there were substantial
12 trainings both at city level, county level,
13 organizational levels.
14 So due to the fact that there had been some
15 differences between claimants and the Commission
16 regarding the items which are not contained within the
17 statement of decision, we would like your Commission to
18 understand that we will be asking for a training
19 component as part of the initial reimbursement,
20 particularly with the transition.
21 And we will be happy to respond to any
22 statements made by the Department of Finance or any
23 questions your Commission may have.
24 CHAIRPERSON PORINI: All right. Do the rest of
25 the witnesses for the claimants want to make statements?

1 MR. BURDICK: I'm just here to answer questions.
2 CHAIRPERSON PORINI: All right.
3 MR. EVERROAD: Likewise here for questions.
4 CHAIRPERSON PORINI: Okay. Mr. Zemitis.
5 MR. ZEMITIS: Thank you.
6 Cedrik Zemitis, Department of Finance.
7 The staff analysis does not change our position
8 as we described in our 1995 submittal because we believe
9 the test claim statutes primarily clarify existing law,
10 No. 2, were a local request and, three, local government
11 representatives at the time reported savings and no new
12 costs as a result of the statutes.
13 First, regarding clarifying existing law, we
14 believe that the notice and agenda requirements simply
15 clarify the law prior to the test claim statute,
16 specifically, existing law required the posting of an
17 agenda containing a brief description of each item to be
18 discussed at the meeting, including items to be
19 discussed in closed session, does not require any new
20 activities from prior law, which already required the
21 posting of each item to be discussed at the meeting.
22 Because closed session items are discussed at the
23 meetings, this would not be an additional requirement in
24 our opinion.
25 Second, local request, we would note that at the

1 time the test claim statute was considered by the
2 legislature, it was clear that these bills were
3 introduced at the behest of local governments. The
4 author of most of the bills stated for the record at the
5 time that existing law was amended specifically at the
6 request of local agencies. Indeed, numerous legislative
7 committee analyses support the author.
8 Third, local governments report savings and no
9 new costs. Regarding the agenda descriptions,
10 amendments were taken at the request of local government
11 to limit the brief description already required to not
12 exceed 20 words, which was reported to result in
13 savings. And on cost and savings in general, I quote
14 from the Assembly Ways and Means Committee at the time:
15 "The League of California Cities states
16 that this bill would provide savings to local
17 governments by simplifying and clarifying the
18 provisions of the Brown Act," end quote.
19 In addition, the California School Boards
20 Association at the time stated that clarification of the
21 existing Brown Act will not create additional costs to
22 local government. In addition, the California State
23 Association of Counties and numerous other local
24 entities all officially supported the legislation
25 because it would simplify and clarify the Brown Act with

1 no additional costs.

2 While we do not have resolutions from all of the

3 affected local entities, which would be in the thousands

4 literally, representatives of those entities clearly

5 sponsored the legislation as well as reported savings

6 and no new costs. Therefore we believe any mandate

7 would not be reimbursable.

8 CHAIRPERSON PORINI: All right. Mr. Lombard?

9 MR. LOMBARD: Jim Lombard, Depart of Finance.

10 Just reiterating Mr. Zemitis' testimony, it was

11 our understanding when the legislation went through that

12 it would result, as reported by the representatives of

13 local entities, in some cost savings. And to the extent

14 the Commission adopts the staff recommendation, we would

15 request that you consider providing something in the

16 analysis to provide for offsetting savings as we

17 understood when the legislation was passed.

18 CHAIRPERSON PORINI: All right. Questions from

19 Members?

20 MR. BELTRAMI: Madame Chairman?

21 CHAIRPERSON PORINI: Yes.

22 MR. BELTRAMI: I thought it was interesting that

23 that newspaper publishers are interested in this case.

24 CHAIRPERSON PORINI: Always.

25 MR. BELTRAMI: Since they normally are so

1 supportive of the Brown Act in general. But Senator
2 Kopp, now Judge Kopp, indicates that he introduced this
3 because of requests by local agencies. Mr. Burdick,
4 you're speaking on behalf of CSAC.
5 MR. BURDICK: I think, Commissioner Beltrami and
6 Members -- Allan Burdick, representing the California
7 State Association of Counties -- this legislation really
8 emanated, I think, from two acts. One is actually the
9 mandate that was adopted by this Commission on the Brown
10 Act.
11 And as you know, that was a very controversial
12 issue as to what is or what was not reimbursable. And
13 one of the big issues that was in that was, you know,
14 what is a brief written statement and what is really
15 required by the 1986 amendment in which this Commission
16 found that to be a reimbursable state mandate.
17 And so I think generally Mr. Kopp got the
18 parties together and said let's all try and see if we
19 can't come to some type of an agreement on what is
20 currently covered as well as there was some interest,
21 particularly by some of the other parties, to deal with
22 executive session items and clarifying certain other
23 things such as serial meetings and so forth, whether
24 they were covered.
25 So this was actually, you know, a very lengthy

1 series of discussions and meetings between the newspaper
2 publishers, the California Taxpayers Association, who
3 normally are the two groups who are particularly
4 interested in seeing a more open process and so forth,
5 and the local government representatives. And really it
6 was kind of in a sense facilitated by the Attorney
7 General and Ted Prim, who I think many of you may know
8 who's been one of the leading experts relating to Open
9 Meeting Act issues.
10 I think as a result of this there was general
11 agreement that this did a variety of things. One, it
12 did bring about a lot of clarifications. It did provide
13 for some expansions in other areas. And in some areas
14 it defined things that some attorneys felt may have been
15 covered under the Brown Act and others did not. And as
16 you know, when you have 58 county counsels and attorneys
17 representing 460 or 70 cities and people, you know,
18 commenting at the school boards, there was a lot of
19 disagreement about what is and what is not. And so the
20 real intent was to provide as much clarification as
21 possible to that particular act.
22 I think that one of the things that you might
23 note is that actually in the claiming instructions for
24 the Brown Act mandate, which is now reimbursable, the
25 Controller did add to that the 20-word description of

1 what is intended to be a brief written statement, that
2 it -- that is set as kind of a guideline to give people
3 what is a feeling for what you do mean by a brief
4 written statement. Because there was a lot of
5 disagreement by attorneys out there whether, you know,
6 what -- what did that mean? Is that a half a page? Is
7 that a page, you know, in terms of what does it take to
8 adequately describe something.
9 And so that was placed as a guideline. And
10 subsequently, even though it is in this legislation, it
11 was actually put into the claiming instructions for the
12 current Brown Act mandate.
13 What this really does is I think it clarifies
14 everything, but I think it is clear that in some areas
15 it does expand upon what is in the current Brown Act.
16 If this is then now eventually hopefully brought
17 together in one set of parameters and guidelines with
18 the existing Brown Act, there will be some clarification
19 and there possibly will be some areas where agencies in
20 the past, their attorneys have told them that that
21 committee was under the Brown Act would no longer be,
22 that they may no longer be claiming costs associated
23 with those particular meetings.
24 So it was very -- this is one of those issues
25 where it was always difficult to look at. This is not a

1 high-priced mandate. This is essentially some kind of
2 tinkering with the process. But I think clearly there
3 are additional requirements.
4 And on the training component, as you know, this
5 is an extremely important law for elected officials,
6 city clerks, county counsel, city attorneys. And the
7 Attorney General, along with some others, did conduct a
8 number of training sessions for both local attorneys as
9 well as local elected officials and clerks on this
10 process to help them understand the differences and try
11 to clarify this particular law.
12 In addition, there was another publication that
13 was developed by many of the parties under the
14 leadership of the League of California Cities, which
15 attempted to go out -- it was like in a magazine form,
16 in a sense, and clarify exactly now what the changes
17 were and how people were now interpreting the Ralph M.
18 Brown Act.
19 So I think in response to the question, I think
20 that there was just agreement by everybody that there
21 would be -- this would be a good thing. Senator Kopp
22 was very interested in doing it. And I think at that
23 point that the local agencies did not want to appear to
24 be obstructionists but indicated they would be willing
25 to work in good faith with everybody else in doing it.

1 I don't think that any local agency specifically
2 asked the Senator -- then Senator Quentin Kopp to
3 introduce this legislation. I think at that point in
4 time, they probably would have been just as happy if
5 Mr. Kopp had focused his attention in other areas.
6 CHAIRPERSON PORINI: Other questions?
7 MS. STEINMEIER: Yeah. I have some, a couple
8 things.
9 CHAIRPERSON PORINI: Ms. Steinmeier.
10 MS. STEINMEIER: Two thoughts, one to Ms. Stone.
11 The training component?
12 MS. STONE: Yes, ma'am.
13 MS. STEINMEIER: I believe that's proper for Ps
14 and Gs because there's nothing specifically in the bill
15 that mentions training, although it naturally flows from
16 the mandate. It should be by the mandate. So I think
17 you can -- pretty consistently in the last several --
18 the last year or two, we've done that, the training
19 falls in the Ps and Gs, so --
20 MS. STONE: I will concur with you. I just wish
21 to raise the issue now so that should it arise at the P
22 and G level that we can remember that we did, in fact,
23 raise this in the test claim process as an activity.
24 MS. STEINMEIER: Okay. As long as we understand
25 that, because --

1 MS. STONE: That's correct.

2 MS. STEINMEIER: -- I think any training would

3 flow into the Ps and Gs.

4 Secondly, on this issue that Mr. Beltrami --

5 follow-up on Mr. Beltrami's question, because I was on a

6 school board before and after this change. So I can

7 tell you, yeah, there really was a change. And part of

8 it -- part of it was the way you look at the Brown Act,

9 but also it did necessitate more work on the part of the

10 people who prepared the agenda.

11 More time was spent in making sure that that

12 brief statement was very accurate. Because we could be

13 challenged if we didn't -- we weren't descriptive enough

14 of the item, both the closed session and open session

15 items, but I think particularly the closed session,

16 which is what Mr. Kopp and the newspaper industry was

17 very concerned about at the time. Those were the

18 issues.

19 And as far as the School Boards Association is

20 concerned, they may have said they didn't anticipate any

21 costs, but there was a lot of opposition to parts of it.

22 It was pretty draconian in its original form and was

23 eventually modified down to -- to its final form.

24 Yes, clarification was helpful, but I think it

25 went beyond clarification of the existing Brown Act, and

1 that's my own personal experience having sat on a school
2 board before and after the, you know -- this change came
3 about. So I generally support the staff analysis and
4 would like to hear from everybody else.
5 CHAIRPERSON PORINI: All right. Mr. Harrigan.
6 MR. HARRIGAN: I do have a question for the
7 claimants. The Department of Finance provided an
8 additional condition as far as not just, you know, what
9 the staff analysis recommended, but also looking at the
10 costs that you may have saved.
11 MS. STONE: Mr. --
12 MR. HARRIGAN: Do you have any response to that?
13 MS. STONE: Yes, Mr. Harrigan. I also was -- in
14 a prior incarnation I was in the county counsel's office
15 in the county of Fresno where I was there both prior to
16 and subsequent to the amendments to the Brown Act.
17 I can tell you without question that up until
18 the time I departed that office approximately three
19 years ago, that the requirements of having to do, for
20 example, let's just take the board of supervisors
21 agenda, the necessity for compliance particularly with
22 the closed session agenda with which I was unfortunately
23 well too familiar on a number of occasions, it was just
24 a substantial issue on what information had to be
25 disclosed, how to be able to preserve your posture in

1 litigation and other matters, yet being able to disclose
2 the information that was requisite under the Brown Act.
3 Furthermore, because of the Brown Act
4 amendments, I also was involved with a number of
5 advisory boards and commissions. And after the
6 implementation of this particular legislation, informal
7 agendas were no longer the rule because it was very
8 clear that they were now covered within the parameters
9 of the Brown Act, and therefore they were being sent to
10 counsel for review, whereas prior to that point in time
11 they had been done by a departmental secretary with
12 maybe review by the department head or division head
13 that was responsible for serving as staff to that
14 particular committee.
15 So my particular experience was that from a
16 situation where other than with the regular agenda for
17 the board of supervisors or the Planning Commission, you
18 now had a substantially greater legal review of all
19 boards, commissions, committees, by counsel, substantial
20 issues with regard to closed session. That was probably
21 one of the biggest issues, is having a closed session.
22 I would have liked to have seen cost savings,
23 but unfortunately I have not seen any documentation of
24 any cost savings. The desire to have or the averment
25 that a 20-word brief summary would result in cost

1 savings I don't think is accurate because a lot of times
2 you have agenda items that have a number of actions to
3 be taken. And there is no way that all of the actions
4 that are to be taken on a particular article or issue
5 can be described in 20 words and yet still be valid
6 under the Brown Act.
7 Because the desire, of course, is not to have
8 any legislative action, were it actually taken, be
9 determined void in the court for failure to have had an
10 adequate description. So although I know from local
11 government's perspective you're always hunting for a
12 cost savings, unfortunately this one did not bring about
13 any.
14 MR. HARRIGAN: Thank you.
15 CHAIRPERSON PORINI: Further questions?
16 Mr. Beltrami.
17 MR. BELTRAMI: Ms. Stone, doesn't it bring about
18 a savings if your counsel doesn't have to struggle with
19 an interpretation if it's been clarified?
20 MS. STONE: There is no longer a struggle with
21 regard to what departments -- pardon me, what advisory
22 boards, commissions, committees, et cetera, come within
23 the Brown Act. That is clearly no struggle.
24 However, what is a struggle then is that you
25 have to review more agendas for more committees,

1 commissions, et cetera. And if you will note that
2 neither under the Open Meetings Act nor under this
3 particular test claim have we claimed for the costs
4 involved in determining whether or not any particular
5 board, commission, or committee falls within or without
6 the parameters of the Brown Act.
7 So that is basically where the big -- if there
8 were to be a savings, it would have been in determining
9 that you don't have -- if, for example, Advisory Board A
10 is not within the Brown Act, you don't have to comply
11 with all the notification requirements. And that
12 struggle adventitia is what determines whether or not
13 it's in or out. But no one has ever claimed that that
14 particular activity, determining whether or not
15 something falls within the parameters of the Open
16 Meetings Act or Brown Act, is a reimbursable mandate.
17 MR. BELTRAMI: I have no -- I have no question
18 that there's added cost. I think that's pretty clear,
19 but I get the feeling that you folks thought this was a
20 wonderful thing at the time.
21 MS. STONE: I don't think so.
22 MR. BELTRAMI: No. So Senator Kopp is wrong in
23 your statement to me?
24 MS. STONE: I would say he's --
25 MR. BELTRAMI: He specifically says on one point

1 that it was asked for, section 54954.2 was amended
2 specifically at the request of local agencies --
3 MS. STONE: I think he's --
4 MR. BELTRAMI: -- to reduce the costs of any
5 posting agendas.
6 MS. STONE: I think he was optimistic.
7 MR. BELTRAMI: Well --
8 MR. BURDICK: Well, I think that --
9 MR. BELTRAMI: -- I don't know if he was
10 optimistic or --
11 MR. BURDICK: I think -- Commissioner Beltrami,
12 I think the statement is that it would reduce -- you
13 know, if you look at some agencies, there may have been
14 some agencies who were confused who may have suggested
15 to him that they would like to see some clarification.
16 And clearly there were, I think, differences of
17 opinion amongst the attorneys out there that represent,
18 particularly many of those firms who represent cities
19 and also amongst county counsels, as how to interpret
20 some of those items, although they clearly would
21 interpret it one way or the other for their agency. I
22 mean, I don't think they had a problem saying this is --
23 this is how we interpret it. This is how we're going to
24 do it for our agency. I think what this brought was
25 consistency.

1 I think on the savings side, the only area that,
2 you know, possibly might do some savings is possibly
3 some reductions in the costs of other mandate that you
4 have related to Open Meetings and the fact that some
5 people now may be saying that we're not going to be
6 telling those agencies they have to post an agenda and
7 claim costs associated with that, because it is now
8 clear that they -- that those particularly advisory
9 bodies do not qualify as an open meeting.
10 MS. STONE: Yes, they do.
11 MR. BURDICK: And so I know in some cases there
12 were areas where they were saying that some agencies who
13 had interpreted the law possibly wrong in the first
14 place of saying, yeah, that is subject to the Brown Act,
15 may now be saying -- telling their local agency it is
16 not subject to the Brown Act.
17 MR. BELTRAMI: The newspaper publishers indicate
18 that the legislation was sponsored by virtually every
19 lobbying organization representing local government. Is
20 that incorrect?
21 MR. BURDICK: I think the final analysis was --
22 I would come to a little bit of a conclusion that the
23 Commission talked to this morning, that sometimes I
24 think at the end everybody felt we will buy this
25 particular package. I think it was commented on by

1 Member Steinmeier that the initial bill went far beyond
2 what it was, and I think everybody agreed that this
3 final bill was a reasonable compromise, that everybody
4 in this particular case was giving something up, and
5 therefore I think everybody agreed to support it.
6 But I do not think that if -- if the bill had
7 been introduced and there was a vote taken on that bill
8 at that point in time that you would have had the
9 support then. This essentially was a negotiated
10 agreement that in the final analysis everybody felt,
11 given the situation and the fact there was going to
12 probably be a bill to expand and deal with the scope of
13 the Open Meetings Act, that that was a reasonable
14 proposal.
15 MR. EVERROAD: Chairperson Porini and Member
16 Beltrami, the City of Newport Beach did not sponsor the
17 Kopp bill; however, we did find significant relief in
18 the clarification that was provided by that bill. Our
19 attorney had erred in deciding which committees and
20 boards that had been established were subject to this
21 requirement, the agenda requirement.
22 MR. BELTRAMI: Did the League?
23 MR. EVERROAD: I can't speak for the League.
24 MR. BELTRAMI: And you're members of the League,
25 aren't you?

1 MR. EVERROAD: I am. Newport is, yes.

2 The legal fees, the legal costs that we had in

3 our attorney's review of these boards and commissions is

4 now relieved. But as Counsel Stone related, we had

5 never claimed for that.

6 However, every study session agenda now is

7 reviewed by our city attorney, and every report from the

8 results of that study session or closed session are now

9 prepared by our city attorney's office to be read by our

10 mayor. So we have far more involvement in the City of

11 Newport Beach with our legal office in the reporting

12 from these closed sessions that didn't exist prior to

13 the legislation.

14 CHAIRPERSON PORINI: Further questions or

15 comments?

16 MS. STEINMEIER: Do you want a motion -- or

17 Department of Finance needs to respond to that, right?

18 CHAIRPERSON PORINI: No. I was just looking at

19 page 1 -- 281 and 282, the analysis provided in SB 1140

20 that would seem to contradict that, but would like

21 comments from staff on that, either -- Ellen, if you

22 have any comments, at the bottom of the page.

23 MS. FISHMAN: Regarding the supporters of the

24 bill?

25 CHAIRPERSON PORINI: Yes. And the statement

1 that's made in the last paragraph of the analysis.

2 MS. STONE: If I may speak to that just very

3 briefly, Madame Chairman. We believe there is a

4 substantial difference between support and sponsored.

5 And obviously local government has the ability to

6 support or oppose any legislation which is pending

7 before the California legislature, and that is not a

8 basis for denying a mandate.

9 The issue under 17556 of the Government Code is

10 whether or not a particular governmental entity has

11 sponsored the legislation, and therein lies the

12 difference. And so therefore I believe that the issue

13 that it was supported by local government really has no

14 bearing upon whether or not this is a test claim. The

15 issue is whether or not any local governmental entity

16 sponsored the legislation. And there has been no

17 evidence whatsoever that any local governmental agency

18 sponsored the legislation in question, and that is the

19 difference.

20 MR. SHERWOOD: Madame Chair.

21 CHAIRPERSON PORINI: Yes, Mr. Sherwood.

22 MR. SHERWOOD: May I ask staff to comment on

23 that.

24 MS. SHELTON: Let me just clarify. In

25 Government Code section 17556, that's the statute that

1 gives all the exceptions to costs mandated by the State,
2 and one of the sections -- this is under
3 subdivision (a), which says that there are no costs
4 mandated by the State when a local agency or school
5 district requests legislative authority for the statute.
6 But in order to show that they have sponsored the
7 legislation, there has to be evidence of a resolution
8 from the board of supervisors, the school board, or the
9 governing body. And there's no evidence of a resolution
10 from any of these local bodies for this legislation.
11 CHAIRPERSON PORINI: Yes.
12 MR. BURDICK: I just wanted to comment if I
13 could on the rest of that sentence on 282. If you look
14 at that where they supported it without creating giant
15 new state-mandated costs, I think what kind of the
16 general feeling of everybody was that this was a
17 relatively modest change. This wasn't large or major
18 that -- I don't think it says there are -- it was
19 intended to say there are no. I think it was intended
20 to say that there probably are some minor costs
21 associated with bringing this into place, but that was
22 one of the major issues of the whole legislation,
23 because it is -- there was an earlier bill that was
24 actually vetoed by then Governor Wilson because of the
25 mandated costs. And they wanted to make sure that the

1 bill did not contain major substantial costs. And I
2 think most people felt that these costs -- and I think
3 the proponents here today would agree that what we're
4 talking about are relatively minor costs associated with
5 this particular mandate.
6 What we're really -- the original intent when
7 this mandate was filed initially by the County of Santa
8 Clara some years ago, it was filed in an attempt to
9 clarify the parameters and guidelines, to bring them up
10 to date. They were challenged that they were seeking
11 major changes or reform and simply, if you will, kind of
12 the accusations and the possible political ramifications
13 of that brought them to the point of actually asking
14 somebody else to pick this up. Because it was clearly
15 only their intent to say, look, we have a new law. We
16 have an existing mandate. We think the two should be
17 harmonized into one so that we're clearly dealing with
18 what the current law is.
19 And that's why this issue, because it has been
20 such a sensitive issue and because we had all of the
21 other discussion going on relative to the Brown Act up
22 until last fall, that this -- this proposal sat in limbo
23 for a number of years. I don't know if Paula could --
24 your executive director could probably tell when it was
25 filed, but I think it was filed about five years ago or

1 more. But it was really intended to be simply kind of a
2 clarification of the old -- of the existing mandate.
3 MR. BELTRAMI: I'm --
4 CHAIRPERSON PORINI: Mr. Beltrami.
5 MR. BELTRAMI: I'm disappointed, Madame Chair,
6 that the newspaper folks aren't here, since they
7 specifically say it's sponsored in their letter of '95.
8 And I suppose we can't subpena Judge Kopp to come, so I
9 guess we have to rely on the testimony here.
10 But that's my -- as I say, there's no question
11 in my mind that there are costs, obviously, and that it
12 was really sort of -- in some ways I thought this was
13 not a very good piece of legislation from the local
14 government's perspective, but that's neither here nor
15 there.
16 But it's just this issue of whether -- who --
17 who asked for this. And I'm sure it was sort of a joint
18 homogenation of it since it started.
19 MR. BURDICK: Just a final comment to
20 Commissioner Beltrami. I think that this was one of
21 Senator Kopp's particular areas of interest. And I
22 don't think -- I think the sponsor of this bill is
23 Senator Quentin Kopp.
24 I think that he made it clear he, in fact,
25 carved this out as one of the areas that he wanted to be

1 the leader on and that therefore he was going to be the
2 one to carry legislation. Whether other people stepped
3 up and said, you know, we'll serve as the sponsoring
4 agency if you want, I find that a little -- knowing
5 Quentin almost probably as well as you do, Mr. Beltrami,
6 know that his ego probably would not prevent him saying,
7 yes, this is my bill. I sponsored this particular
8 legislation.
9 And I say that in the best of terms to my good
10 friend Quentin Kopp.
11 CHAIRPERSON PORINI: All right. Any further
12 comment or questions?
13 MS. STEINMEIER: Well, was Paula going to answer
14 the question?
15 MS. HIGASHI: I was just going to refer you to
16 page 4 of the staff analysis where we have a chronology.
17 And any questions you have about dates would be answered
18 there.
19 MS. STEINMEIER: Thank you.
20 CHAIRPERSON PORINI: Ms. Steinmeier.
21 MS. STEINMEIER: I wanted to answer your
22 question. I think this is a matter of timing. By the
23 time these organizations and particularly the California
24 School Boards Association was in support, this was near
25 the end of the process. They initially were in

1 opposition unless it was amended. So it was one of
2 those things there's this horrible draconian bill and if
3 we can make it workable for us, then eventually they
4 were put in the support category. But they wouldn't
5 have been initially in support. I know that's not true
6 for the School Boards Association.
7 CHAIRPERSON PORINI: Well -- and my comment is
8 that that may well be true, but in the legislative
9 process they still have the option of opposing it the
10 entire way through. They must have felt that the bill
11 was acceptable to them when they put their name on the
12 analysis that they were in support, so.
13 MS. STEINMEIER: At the end of the process.
14 CHAIRPERSON PORINI: Well, anyplace in the
15 process is my point. It doesn't make any difference.
16 MS. STEINMEIER: Supporting and sponsoring the
17 bill really are two different things.
18 CHAIRPERSON PORINI: Supporting and sponsoring
19 are two different things, and unfortunately we don't
20 have access to the letters that were actually sent to
21 Senator Kopp.
22 MS. STEINMEIER: Right.
23 CHAIRPERSON PORINI: But -- yes.
24 MS. STEINMEIER: That's a missing piece of the
25 record.

1 CHAIRPERSON PORINI: Right.

2 MS. STEINMEIER: Thank you. Can I make a

3 motion?

4 CHAIRPERSON PORINI: Mr. Beltrami.

5 MR. BELTRAMI: Just one more question of staff,

6 Madame Chairman.

7 Do -- when we work on the Ps and Gs, we'll be

8 looking at both sides, possible savings as well as cost

9 implication?

10 MS. HIGASHI: The normal process is that the

11 claimant -- if this test claim were to be approved, the

12 claimant would submit proposed parameters and

13 guidelines. Once those proposed parameters and

14 guidelines come in, they would be sent out for comment

15 and review and we would look at the entire package.

16 CHAIRPERSON PORINI: Mr. Beltrami, were you

17 asking staff the question if they need to

18 specifically -- the staff's recommendation needs to talk

19 about offsetting savings? Was that --

20 MR. BELTRAMI: I thought it did, actually,

21 somewhere in there. But since the test claim here, I

22 want to make sure that that's covered as well.

23 MS. SHELTON: Mr. Beltrami, I may be able to

24 answer too. Also in Ps and Gs the claimants are only

25 entitled to claim their increased costs. So if there

1 were, indeed, any cost savings, you know, because of the
2 clarifications provided, they wouldn't be eligible for
3 reimbursement for that.
4 MS. HIGASHI: But let me just add, it is a
5 standard paragraph.
6 MR. BELTRAMI: In there?
7 MS. HIGASHI: In the parameters and guidelines.
8 CHAIRPERSON PORINI: All right. Any further
9 questions or comments from members? Ms. Steinmeier.
10 MS. STEINMEIER: Oh, I'd like to move approval
11 of the staff analysis.
12 MR. BELTRAMI: Second.
13 CHAIRPERSON PORINI: We have a motion by
14 Ms. Steinmeier and a second by Mr. Beltrami. Any
15 further discussion? Roll call, please.
16 MS. HIGASHI: Mr. Beltrami.
17 MR. BELTRAMI: Yes.
18 MS. HIGASHI: Mr. Harrigan.
19 MR. HARRIGAN: Yes.
20 MS. HIGASHI: Mr. Sherwood.
21 MR. SHERWOOD: Yes.
22 MS. HIGASHI: Ms. Steinmeier.
23 MS. STEINMEIER: Aye.
24 MS. HIGASHI: Ms. Williams.
25 MS. WILLIAMS: No.

1 MS. HIGASHI: Ms. Porini.

2 CHAIRPERSON PORINI: No.

3 MS. HIGASHI: Motion carries.

4 MS. STONE: Thank you very much, Commission

5 Members.

6 CHAIRPERSON PORINI: All right. Next item.

7 MS. HIGASHI: Item 3, incorrect reduction claims

8 on Graduation Requirements. Cathy Cruz will present

9 this item, and Sean Avalos will respond to any

10 questions.

11 MS. CRUZ: Good morning.

12 The staff analysis addresses the incorrect

13 reduction claims filed by eight school districts on the

14 Graduation Requirements program. The claimants are

15 Palos Verdes Peninsula Unified School District,

16 Sweetwater Union High School District, Vista Unified

17 School District, San Luis Coastal Unified School

18 District, Lompoc Unified School District, Huntington

19 Beach Unified School District, Fresno Unified School

20 District, and Santa Monica-Malibu Unified School

21 District.

22 Section 1185(c) of the Commission's regulations

23 permit analyses of IRCs from different local entities to

24 be combined if the claims contain similar issues. Here

25 all eight claimants allege that the State Controller's

REPORTER'S CERTIFICATE

I hereby certify the foregoing hearing was held at the time and place therein named; that the proceedings were reported by me, a duly certified shorthand reporter and a disinterested person, and was thereafter transcribed into typewriting.

In witness whereof, I have hereunto set my hand this 31st day of May, 2001.

Yvonne K. Fenner

Yvonne K. Fenner
Certified Shorthand Reporter
License No. 10909

MINUTES

COMMISSION ON STATE MANDATES

State Capitol, Room 126
Sacramento, California
May 24, 2001

Present: Chairperson Annette Porini
Representative of the Director of the Department of Finance
Member William Sherwood
Representative of the State Treasurer
Member Sherry Williams
Representative of the Director of the Office of Planning and Research
Member John Harrigan
Representative of the State Controller
Member Albert Beltrami
Public Member
Member Joann Steinmeier
School Board Member

Absent: Member John Lazar
City Council Member

CALL TO ORDER AND ROLL CALL

Chairperson Porini called the meeting to order at 9:32 a.m. Member Lazar was absent due to City business.

APPROVAL OF MINUTES

Item 1 April 26, 2001

Upon motion by Member Steinmeier and second by Member Sherwood, the minutes were unanimously approved.

PROPOSED CONSENT CALENDAR

HEARINGS AND DECISIONS, PURSUANT TO CALIFORNIA CODE OF REGULATIONS, TITLE 2, CHAPTER 2.5, ARTICLE 7

ADOPTION OF PROPOSED STATEMENT OF DECISION - INCORRECT REDUCTION CLAIM

Item 4 *Graduation Requirements*, CSM 4435-I-04
San Jose Unified School District, Claimant
Education Code Section 51225.3, Statutes of 1983, Chapter 498

INFORMATIONAL HEARING PURSUANT TO CALIFORNIA CODE OF REGULATIONS, TITLE 2, CHAPTER 2.5, ARTICLE 8

ADOPTION OF PROPOSED PARAMETERS AND GUIDELINES

Item 6 *Mentally Disordered Offenders' Extended Commitment Proceedings*
98-TC-09
County of Los Angeles, Claimant
Penal Code Section 2970
Statutes of 1985, Chapter 1418; Statutes of 1986, Chapter 858; Statutes of 1988, Chapters 657 and 658; Statutes of 1989, Chapter 228; Statutes of 1991, Chapter 435, Statutes of 2000, Chapter 324.

Item 7 *Extended Commitment, Youth Authority* - 98-TC-13
County of Alameda, Claimant
Statutes of 1984, Chapter 546; Statutes of 1998, Chapter 267

Item 8 *Elder Abuse, Law Enforcement Training* - 98-TC-12
City of Newport Beach, Claimant
Penal Code Section 13515
Statutes of 1997, Chapter 444

ADOPTION OF PROPOSED STATEWIDE COST ESTIMATE

Item 9 *Seriously Emotionally Disturbed (SED) Pupils: Out-of-State Mental Health Services* - 97-TC-05 (tentative)
County of Los Angeles, Claimant
Government Code Section 7576
Statutes of 1996, Chapter 654
California Code of Regulations, Title 2, Division 9, Chapter 1, Sections 60000-60610
California Department of Mental Health Information Notice Number 86-29

Upon motion by Member Beltrami and second by Member Sherwood, the consent calendar, consisting of items 4, 6, 7, 8 and 9, was unanimously adopted. Member Steinmeier commended staff for their effort on the consent items.

HEARINGS AND DECISIONS, PURSUANT TO CALIFORNIA CODE OF REGULATIONS, TITLE 2, CHAPTER 2.5, ARTICLE 7

TEST CLAIMS

Item 2 *Brown Act Reform* - CSM-4469
City of Newport Beach, Claimant
Statutes of 1993, Chapter 1136, 1137, and 1138
Statutes of 1994, Chapter 32

Ellen Fishman of the Commission staff presented this item. She noted that staff found that Government Code section 54952 created two new legislative bodies, which are required to

comply with all provisions of the Brown Act. Staff further found that permanent and temporary advisory bodies, except bodies composed solely of less than a quorum of the members of the legislative body, are now required to comply with the full notice and agenda requirements of the Act. Ms. Fishman explained that the test claim legislation also added new closed session requirements, as listed in staff's analysis.

Parties were represented as follows: Allan Burdick, for California State Association of Counties; Pamela Stone and Glen Everroad, for the City of Newport Beach; and Cedrik Zemitis and Jim Lombard, for the Department of Finance. Ms. Higashi swore in the witnesses.

Ms. Stone complimented staff's effort and indicated her agreement with the staff analysis. She noted the extremely technical changes to the requirements and the need for substantial training at the city level, county level and organizational levels. Ms. Stone explained that she would be asking for a training component as part of the initial reimbursement.

Mr. Zemitis argued that the test claim statutes clarify existing law regarding notice and agenda requirements and that the bills were introduced at the behest of local governments. Mr. Zemitis further argued that local governments report savings and that the legislation was widely supported because it was intended to simplify and clarify the Brown Act with no additional costs. For these reasons, Mr. Zemitis contended that the mandate is not reimbursable.

Mr. Lombard added that it was the Department of Finance's understanding when the legislation went through that it would result in some cost savings, as reported by representatives of local entities. To the extent the Commission adopts the staff recommendation, he requested they consider providing for offsetting savings in the analysis.

Member Beltrami noted that Senator Kopp, now Judge Kopp, indicates that he introduced this bill because of requests by local agencies.

Mr. Burdick argued that the legislation offers many clarifications, but also expands upon the Brown Act. He concurred that there was general agreement by everyone that this bill was a good thing. Mr. Burdick submitted that locals did not specifically ask the Senator to introduce the legislation, but indicated that they would be willing to work in good faith to comply with it.

Member Steinmeier submitted that it was appropriate for Ms. Stone to request the training component during the parameters and guidelines phase, since it is not specifically mentioned in the bill, but naturally flows from the mandate. Member Steinmeier also noted that, in her experience on a school board, this legislation did necessitate more work on the part of the people preparing the agenda to make sure the brief description was accurate so they were not challenged. She added that the California School Boards Association might not have anticipated costs, but they had opposed parts of it. Member Steinmeier agreed that the clarification was helpful, but submitted that it went beyond clarification of the Brown Act. She supported staff's analysis.

Mr. Harrigan asked for the claimant to comment on the Department of Finance's request for language regarding cost savings. Ms. Stone replied that, in her experience with this legislation

in the county counsel's office in the County of Fresno, the legislation did not result in any cost savings.

Member Beltrami asked if it would bring about cost savings if the counsel did not have to struggle with an interpretation if it had been clarified. Ms. Stone replied that there was no longer a struggle to determine what entities come within the Brown Act, but that they had to review more agendas for more entities. She added that the costs of that determination had never been claimed, and that is where the cost savings would have been realized.

Member Beltrami agreed that there are added costs, but added that he thought the locals considered the legislation was a good thing at the time. Ms. Stone disagreed. Member Beltrami noted that the newspaper publishers indicate that the legislation was sponsored by virtually every lobbying organization representing local government. Mr. Burdick replied that everyone agreed that the final bill was a reasonable compromise in that everyone was giving something up.

Mr. Everroad noted that the City of Newport Beach did not sponsor the bill, but did find significant relief in the clarification since their attorney had erred in determining which entities were subject to the Act. Member Beltrami asked if the League sponsored the bill. Mr. Everroad said he could not respond for the League. He added that the legal costs for the determination were relieved, but those costs had never been claimed, and that the preparation and review of agendas had increased.

Ms. Stone argued that there is a substantial difference between supporting and sponsoring a bill, and that the issue under Government Code section 17556 relates to sponsoring a bill, which the locals did not.

Member Sherwood asked for staff's comment. Ms. Shelton clarified that section 17556, subdivision (a), provides that there are no costs mandated by the state when a local agency or school district requests legislative authority for the statute. She noted that there must be evidence of a resolution from the governing body to show the entity has sponsored the legislation and that such evidence does not exist for this legislation.

Mr. Burdick submitted that most people thought this was a relatively modest change that would result in minor costs. Member Beltrami noted that the issue was who asked for the legislation. He guessed it was a joint effort. Mr. Burdick replied that he thought this was one of Senator Kopp's areas of interest and that he actually was the sponsor of the bill.

Member Steinmeier said that it was a matter of timing, and that by the time the organizations, particularly the California School Boards Association, were in support, this was near the end of the process. She added that they were initially opposed unless the bill was amended and that they eventually supported the bill when it was amended. Chairperson Porini noted that, in the legislative process, they had the option of opposing the bill the entire way though, so they must have felt the bill was acceptable when they put their name on the analysis that they were in support. Member Steinmeier reiterated the fact that supporting and sponsoring are different. The Chair agreed they were, and added that, unfortunately, the letters sent to Senator Kopp were not available.

Member Beltrami asked staff if they would be looking at both cost implication and cost savings when working on the parameters and guidelines. Ms. Higashi noted that the normal process is for the claimant to submit proposed parameters and guidelines, which are distributed for comment. She added that staff reviews the entire package. Chairperson Porini asked if Member Beltrami was asking if the staff recommendation should talk about offsetting savings. Member Beltrami thought that it did, but wanted to make sure it was covered. Ms. Shelton replied that, in the parameters and guidelines, claimants are only entitled to claim increased costs, so if there were cost savings because of the clarifications provided, they would not be eligible for reimbursement for that. Ms. Higashi added that the offsetting savings language is included in a standard paragraph that is in all parameters and guidelines.

Member Steinmeier moved approval of staff's recommendation. Member Beltrami seconded the motion. The motion carried 4-2, with Chairperson Porini and Member Williams voting "No."

INCORRECT REDUCTION CLAIMS

Item 3 *Graduation Requirements* – CSM - 4435-I-03, 4435-I-05, 4435-I-07 to 12
Palos Verdes Peninsula Unified School District, Sweetwater Union High School District, Vista Unified School District, San Luis Coastal Unified School District, Lompoc Unified School District, Huntington Beach Unified School District, Fresno Unified School District, Santa Monica-Malibu Unified School District, Claimants
Education Code Section 51225.3, Statutes of 1983, Chapter 498

Cathy Cruz of the Commission staff presented this item. She noted that the staff analysis addresses the incorrect reduction claims (IRCs) filed by eight school districts on the Graduation Requirements program. Ms. Cruz noted that the State Controller's Office (SCO) asserted that it adjusted the subject reimbursement claims based on the Commission's parameters and guidelines and that the Department of Finance agreed with the SCO.

Ms. Cruz outlined the five issues for the Commission's consideration:

1. Did the SCO exercise its audit authority in accordance with state law when it reduced the reimbursement claims? Staff found SCO did exercise its audit authority in accordance with state law.

2. Did the SCO establish a standard of general application without the benefits of law or the due process of rulemaking? Staff found that the Commission does not have specific or implied authority to make this determination.

3. Did the SCO reduce the reimbursement claims based on the Commission's parameters and guidelines and the claiming instructions? Staff found that the SCO did perform the reductions in accordance with both the claiming instructions and the parameters and guidelines.

4. Does SCO's payment of teachers' salaries on 38 other claims have a bearing on these IRCs? Staff found this argument does not have bearing on these IRCs.

5. Does the SCO have the burden of proof to demonstrate that the claimants are ineligible for reimbursement? Staff found that the SCO does not have the burden of proof.

Ms. Cruz noted that staff therefore found that the SCO did not incorrectly reduce the claimants' reimbursement claims and that staff recommended the Commission deny these IRCs.

Parties were represented as follows: Dr. Carol Berg, for the Education Mandated Cost Network; and Ginny Brummels and Shawn Silva, for the SCO. Ms. Higashi swore in the witnesses.

Dr. Berg commented that this claim is very old and has been discussed at length. She refuted staff's analysis and submitted the following:

- The SCO did a desk review and not an audit; there are no documents supporting the positions or decisions of the SCO.
- Although the Commission does not have the authority to determine whether a rule of general application was applied, it is the parties' obligation to inform the Commission that, possibly inadvertently, that has happened.
- Staff cannot point to anything in the subject statute that requires a local board of education to reduce an elective program because the statute requires a new mandated course.
- The 38 other claims were only cited to refer to the fact that the SCO auditors doing desk reviews created a formula that was acceptable and that only 38 claimants had access to that information.
- The SCO does have the burden to prove, via audit working papers, the rationale and arithmetic used in order to reduce the claim.

Mr. Silva contended that the issues here are exactly those as raised in the San Jose and San Diego claims. He submitted that the analysis found in those cases as well as the recommendations and analysis of staff in this case are correct. Mr. Silva argued that staff had previously addressed the 38 paid claims and demonstrated why they were realistic payments.

Member Beltrami asked Mr. Silva to respond to Dr. Berg's point that the law does not say there should be a staff offset. Mr. Silva replied that the offset is not specifically derived from the test claim statute, however, it is found within the statutes governing state mandates. Mr. Silva contended that a cost must be incurred to impose a reimbursable state mandate. He further argued that, within the bill creating the requirement for the additional year of science instruction was also a provision giving the authority and power for the local school agencies to lay off teachers if state requirements forced them to adjust their curriculum. Mr. Silva submitted that if districts did not lay off teachers to offset costs, then it is an optional cost and therefore not reimbursable.

Member Steinmeier commented that, unfortunately, it seems to be the failure of school districts to produce documentation showing a cost savings or increase. She asked Dr. Berg why districts had not been able to produce such documentation. Dr. Berg explained that, in 1983, districts were told not to do anything differently and now the staff working in those districts

are gone, so producing documentation is impossible at this point. She added that, with one exception, the eight claimants were small districts. Member Steinmeier figured that no one had the foresight to hang on to this documentation because no one thought the claim would drag on this long. Dr. Berg agreed.

On motion by Member Beltrami and second by Member Sherwood, staff's recommendation was unanimously adopted.

INFORMATIONAL HEARING PURSUANT TO CALIFORNIA CODE OF REGULATIONS, TITLE 2, CHAPTER 2.5, ARTICLE 8

ADOPTION OF PROPOSED PARAMETERS AND GUIDELINES

Item 5 *County Treasury Oversight Committees* - 96-365-03
County of San Bernardino, Claimant
Government Code Sections 27130 et seq.
Statutes of 1995, Chapter 784; Statutes of 1996, Chapter 156

This item was postponed.

EXECUTIVE DIRECTOR'S REPORT

Item 10 Workload, Legislation, Next Agenda

Paula Higashi, Executive Director, reported the following:

- *Regulation Workshop*. Following today's hearing, staff will hold a workshop on development of regulations to implement AB 1679.
- *Workload*. A workload report is included in the agenda binders.
- *Regulations*. The regulations are all in print and copies have been provided to the public.
- *Budget*. The Commission's budget was approved last week by the Assembly subcommittee and will now go to conference.
- *Legislation*.
  - The local government claims bill, AB 348, is set for hearing today in the Senate Appropriations Committee. Senator Kuehl is carrying the bill. Staff will request amendments to the bill to include all Statewide Cost Estimates adopted through May 2001.
  - The *Special Education* Settlement Bill [SB 982] was approved by the Senate and is now in the Assembly.
  - The Mandate Reform Bill, AB 745 (Cox), is in the [Assembly Appropriations Committee]suspense file.
  - The Department of Education's budget item on the *School Bus Safety II* mandate will be a Conference Committee issue.

- *Deficiencies*: The State Controller's Office issued its deficiency letter on May 10, 2001. The Department of Finance approved the requested transfers, and a deficiency of $242,755,148 remains.

Member Sherwood noticed the significant progress on incorrect reduction claims, but questioned why the progress on test claims had slowed in recent months. Ms. Higashi replied that many test claims are in progress. She explained that many test claims had been postponed at the request of the parties, but also that the Commission is down two staff positions, including Chief Legal Counsel. Ms. Higashi added that the Commission also has a substantial litigation workload, which is listed on the closed agenda. Member Sherwood asked if the requests for postponements were from both the claimants and the Department of Finance. Ms. Higashi confirmed that they were. She noted that the DOF typically requests postponements due to the budget or litigation processes, and that many of the claimants have experienced turnover in staff.

Member Sherwood asked Ms. Higashi if she had a sense of urgency from the claimants as to the process. Dr. Carol Berg replied that the process is understandable and mutual and they are being patient as well.

Member Beltrami noted that one of today's items dated back to 1983 and asked if many more antiquated claims exist. Ms. Higashi replied that there are a few, but not quite that old. She reminded the Commission that, last year, many of the older inactive items were set for dismissal and some of those were taken over by new claimants. Ms. Higashi stated that staff is working diligently through the claims. She also noted that there are many pending test claims with complex legal issues.

CLOSED EXECUTIVE SESSION PURSUANT TO GOVERNMENT CODE SECTIONS 11126 and 17526.

PENDING LITIGATION

To confer with and receive advice from legal counsel, for consideration and action, as necessary and appropriate, upon the following matters pursuant to Government Code section 11126, subdivision (e)(1):

1. *Carmel Valley Fire Protection Dist. v. State of California, et al.*, Case Number S078828, California Supreme Court.
2. *County of San Bernardino v. State of California, et al.*, Case Number B140704 in the Appellate Court of California, Second Appellate District, Division 2.
3. *San Diego Unified School District v. Commission on State Mandates, et al.*, Case Number GIC 737638, in the Superior Court of the State of California, County of San Diego.
4. *Department of Finance v. Commission on State Mandates, et al.*, Case Number 00CS01446, in the Superior Court of the State of California, County of Sacramento.
5. *Long Beach Unified School District v. Commission on State Mandates,* Case Number BS061159, in the Superior Court of the State of California, County of Los Angeles.

6. *San Diego Unified School District and San Juan Unified School District v. Commission on State Mandates, et al,* Case Number 00CS00810, in the Superior Court of the State of California, County of Sacramento.

7. *State of California, Department of Finance v. Commission on State Mandates, Kern Union High School District; San Diego Unified School District, County of Santa Clara,* Case Number C037645, in the Court of Appeal, Third Appellate District.

8. *City of San Diego v. Commission on State Mandates, et al.* Case Number GIC751187, in the Superior Court of the State of California, County of San Diego.

9. *County of Los Angeles v. Commission on State Mandates, et al.,* Case Number BS064497, in the Superior Court of the State of California, County of Los Angeles.

10. *County of San Bernardino v. Commission on State Mandates, et al.* Case Number SCVSS69731, in the Superior Court of the State of California, County of San Bernardino.

11. *County of San Bernardino v. Joann E. Steinmeier, et al., Commission on State Mandates of the State of California et al.*, Case Number SCVSS72444, in the Superior Court of the State of California, County of San Bernardino.

12. *County of San Diego v. Commission on State Mandates, et al.,* Case Number GIC762953, in the Superior Court of the State of California, County of San Diego.

To confer with and receive advice from legal counsel, for consideration and action, as necessary and appropriate, upon the following matter pursuant to Government Code section 11126, subdivision (e)(2):

- Based on existing facts and circumstances, there is a specific matter which presents a significant exposure to litigation against the Commission on State Mandates, its members and/or staff (Gov. Code, § 11126, subd. (e)(2)(B)(i).)

PERSONNEL

To confer on personnel matters pursuant to Government Code sections 11126, subdivision (a) and 17526.

Discussion and action, if appropriate, on report from the Personnel Sub-Committee on the selection and appointment of the Chief Legal Counsel (C.E.A. 3) pursuant to Government Code sections 17529 and 19889 et seq. and the evaluation of the Executive Director.

Chairperson Porini announced that the Commission would meet in closed executive session pursuant to Government Code section 11126, subdivision (e), to confer with and receive advice from legal counsel for consideration and action, as necessary and appropriate, upon the pending litigation listed on the published notice and agenda and Government Code sections 11126, subdivision (a) and 17526, to confer on personnel matters listed on the published notice and agenda.

REPORT FROM CLOSED EXECUTIVE SESSION

Chairperson Porini reported that the Commission met in closed executive session pursuant to Government Code section 11126, subdivision (e), to confer with and receive advice from legal counsel for consideration and action, as necessary and appropriate, upon the pending litigation listed on the published notice and agenda and Government Code sections 11126, subdivision (a) and 17526, to confer on personnel matters listed on the published notice and agenda.

ADJOURNMENT

With no further business, the Chair adjourned the meeting at 11:46 a.m.

Paula Higashi

PAULA HIGASHI
Executive Director

f:/meetings/minutes/2001/052401

COMMISSION ON STATE MANDATES

CORRECTED NOTICE AND AGENDA [1]
State Capitol, Room 126
Sacramento, California

June 28, 2001

9:30 A.M. - PUBLIC SESSION

I. CALL TO ORDER AND ROLL CALL

II. APPROVAL OF MINUTES

Item 1 May 24, 2001

III. PROPOSED CONSENT CALENDAR (action)

Note: If there are no objections to any of the following action items, the Executive Director will include it on the Proposed Consent Calendar that will be presented at the hearing. The Commission will determine which items will remain on the Consent Calendar.

IV. HEARINGS AND DECISIONS, PURSUANT TO CALIFORNIA CODE OF REGULATIONS, TITLE 2, CHAPTER 2.5, ARTICLE 7 (action)

Note: Witnesses will be sworn in en masse before consideration of Items 2-5

A. TEST CLAIMS

Item 2 *Comprehensive School Safety Plans*, 98-TC-01 and 99-TC-10
Kern High School District, Claimant
Education Code Sections 35294.1, 35294.2, 35294.6 and 35294.8
Statutes of 1997, Chapter 736, Statutes of 1999, Chapter 996

Item 3 *Cal-Voter Program* – 98-TC-15
County of Tehama, Claimant
Elections Code Section 2168
Statutes of 1995, Chapter 913

B. PROPOSED STATEMENT OF DECISION – TEST CLAIM

Item 4 *Brown Act Reform* - CSM-4469
City of Newport Beach, Claimant
Statutes of 1993, Chapter 1136, 1137, and 1138
Statutes of 1994, Chapter 32

[1] http://www.csm.ca.gov

C. PROPOSED STATEMENTS OF DECISION: INCORRECT REDUCTION CLAIMS

Item 5 *Graduation Requirements* – CSM - 4435-I-03, 4435-I-05, 4435-I-07 to 12
Education Code Section 51225.3, Statutes of 1983, Chapter 498

A. Palos Verdes Peninsula Unified School District, Claimant

B. Sweetwater Union High School District, Claimant

C. Vista Unified School District, Claimant

D. San Luis Coastal Unified School District, Claimant

E. Lompoc Unified School District, Claimant

F. Huntington Beach Unified School District, Claimant

G. Fresno Unified School District, Claimant

H. Santa Monica-Malibu Unified School District, Claimant

V. INFORMATIONAL HEARING PURSUANT TO CALIFORNIA CODE OF REGULATIONS, TITLE 2, CHAPTER 2.5, ARTICLE 8 (action)

A. ADOPTION OF PROPOSED PARAMETERS AND GUIDELINES

Item 6 *School District Fiscal Accountability Reporting* - 97-TC-19 (Formerly known as, Budget Process Financial Statements, and County Oversight)
Alameda County Office of Education, Claimant
Education Code Sections 42100, 42127, 42127.5, 42127.6, 42128, 42131, and Government Code Section 3540.2
Statutes of 1981, Chapter 100; Statutes of 1985, Chapter 185; Statutes of 1986, Chapter 1150; Statutes of 1987, Chapters 917 and 1452; Statutes of 1988, Chapters 1461 and 1462; Statutes of 1990, Chapter 525; Statutes of 1991, Chapter 1213; Statutes of 1992, Chapter 323; Statutes of 1993, Chapters 923 and 924; Statutes of 1994, Chapter 650 and 1002; and Statutes of 1995, Chapter 525

Item 7 *County Office Budget Process and Financial Statements* - 97-TC-20
Alameda County Office of Education, Claimant
Education Code Sections 1040, 1240, 1240.2, 1620, 1621, 1622, 1623, 1624, 1625, 1626, 1628, 1630, 14050, 33127, 33128, 33129, 33132, 42120, 42129, and 42133
Statutes of 1975, Chapter 125; Statutes of 1977, Chapter 843; Statutes of 1979, Chapters 10 and 221; Statutes of 1983, Chapter 1276; Statutes of 1985, Chapter 741; Statutes of 1986, Chapter 1150; Statutes of 1987, Chapters 917 and 1452; Statutes of 1988, Chapters 1461 and 1462; Statutes of 1989, Chapter 1256; Statutes of 1990, Chapter 1372; Statutes of 1991, Chapter 1213; Statutes of 1992, Chapter 323; Statutes of 1993, Chapters 923 and 924; Statutes of 1994, Chapters 650 and 1002; Statutes of 1995, Chapter 525
California Code of Regulations Title 5 Sections 15467-15493

Item 8 *Employee Benefits Disclosure* - CSM-4502, 98-TC-03
Clovis Unified School District, Claimant
Education Code Sections 42140 and 42142

Statutes of 1994, Chapter 650; Statutes of 1995, Chapter 525; Statutes of 1996, Chapter 1158

~~Item 9~~ ~~*Photographic Record of Evidence* 98-TC-07 (tentative)~~
~~Penal Code Section 1417.3~~
~~Statutes of 1985, Chapter 875; Statutes of 1986, Chapter 734~~
~~Statutes of 1990, Chapter 382~~

POSTPONED.

VI. EXECUTIVE DIRECTOR'S REPORT (info)

Item 10 Workload, Legislation, Next Agenda

VII. PUBLIC COMMENT

VIII. CLOSED EXECUTIVE SESSION PURSUANT TO GOVERNMENT CODE SECTIONS 11126 and 17526. (Closed Executive Session may begin at this time or may begin earlier on this day and reconvene at the end of the meeting.)

A. PENDING LITIGATION

To confer with and receive advice from legal counsel, for consideration and action, as necessary and appropriate, upon the following matters pursuant to Government Code section 11126, subdivision (e)(1):

1. *County of San Bernardino v. State of California, et al.,* Case Number B140704 in the Appellate Court of California, Second Appellate District, Division 2.
2. *San Diego Unified School District v. Commission on State Mandates, et al.,* Case Number D038027, in the Appellate Court of California, Fourth Appellate District, Division 1.
3. *Department of Finance v. Commission on State Mandates, et al.*, Case Number 00CS01446, in the Superior Court of the State of California, County of Sacramento.
4. *Long Beach Unified School District v. Commission on State Mandates,* Case Number BS061159, in the Superior Court of the State of California, County of Los Angeles.
5. *San Diego Unified School District and San Juan Unified School District v. Commission on State Mandates, et al,* Case Number 00CS00810, in the Superior Court of the State of California, County of Sacramento.
6. *State of California, Department of Finance v. Commission on State Mandates, Kern Union High School District; San Diego Unified School District, County of Santa Clara,* Case Number C037645, in the Court of Appeal, Third Appellate District.
7. *City of San Diego v. Commission on State Mandates, et al.* Case Number GIC751187, in the Superior Court of the State of California, County of San Diego.
8. *County of Los Angeles v. Commission on State Mandates, et al.,* Case Number BS064497, in the Superior Court of the State of California, County of Los Angeles.
9. *County of San Bernardino v. Commission on State Mandates, et al,.* Case Number BS06911, in the Superior Court of the State of California, County of Los Angeles.

10. *County of San Bernardino v Commission on State Mandates of the State of California et al.*, Case Number SCVSS72444, in the Superior Court of the State of California, County of San Bernardino.

11. *County of San Diego v. Commission on State Mandates, et al.*, Case Number GIC762953, in the Superior Court of the State of California, County of San Diego.

To confer with and receive advice from legal counsel, for consideration and action, as necessary and appropriate, upon the following matter pursuant to Government Code section 11126, subdivision (e)(2):

- Based on existing facts and circumstances, there is a specific matter which presents a significant exposure to litigation against the Commission on State Mandates, its members and/or staff (Gov. Code, § 11126, subd. (e)(2)(B)(i).)

B. PERSONNEL

To confer on personnel matters pursuant to Government Code sections 11126, subdivision (a) and 17526.

Discussion and action, if appropriate, on report from the Personnel Sub-Committee on the selection and appointment of the Chief Legal Counsel pursuant to Government Code sections 17529 and 19889 et seq.

IX. REPORT FROM CLOSED EXECUTIVE SESSION

ADJOURNMENT

For information, contact Paula Higashi, Executive Director, at (916) 323-3562.

Hearing Date: June 28, 2001
f:\mandates\csm4000\4469\proposedSOD

ITEM 4

PROPOSED STATEMENT OF DECISION

Government Code Section 54952, subdivisions (a) and (b)
Government Code Section 54954.2, subdivision (a)
Government Code Section 54957.1, subdivisions (a), (b) and (c)
Government Code Section 54957.7, subdivisions (a), (b) and (c)

Statutes of 1993, Chapters 1136, 1137 & 1138
Statutes of 1994, Chapter 32

City of Newport Beach, Claimant

Brown Act Reform

Executive Summary

The Commission on State Mandates heard this test claim on May 24, 2001. The test claim legislation changes the notice and agenda requirements for local agencies required to comply with the Brown Act (Open Meetings Law). The Commission, by a vote of 4 to 2, approved this test claim.

The Commission concluded that Government Code sections 54952, 54954.2, 54957.1 and 54957.7 impose a reimbursable state-mandated program upon local agencies and school districts within the meaning of article XIII B, section 6 of the California Constitution and Government Code section 17514 for the following activities performed by legislative bodies of local agencies:

Open Session Requirements

Activity	Applies To
To prepare and post an agenda at least 72 hours before a regular meeting containing a brief general description of each item of business to be transacted or discussed at the meeting. A brief general description of an item generally need not exceed 20 words. [Gov. Code § 54954.2, subd. (a)]	Local Bodies created by state or federal statute. Standing Committees with less than a quorum of members of the legislative body that has a continuing subject matter jurisdiction or a meeting schedule fixed by formal action. Permanent & Temporary Advisory Bodies (except bodies of less than a quorum of the members of the legislative body).

Closed Session Requirements

Activity	Applies To
To include a brief general description on the agenda of all items to be discussed in closed session. A brief general description of an item generally need not exceed 20 words. [Gov. Code § 54954.2, subd. (a)]	All "legislative bodies"
To disclose in an open meeting, prior to holding any closed session, each item to be discussed in the closed session. [Gov. Code § 54957.7, subd. (a)]	All "legislative bodies"
To reconvene in open session prior to adjournment and report the actions and votes taken in closed session for the five items identified in Government Code section 54957.1, subdivision (a)(1-4, 6). [Gov. Code § 54957.7, subd. (b)]	All "legislative bodies"
To provide copies of closed session documents as required. [Gov. Code § 54957.1, Subd. (b) and (c)]	All "legislative bodies"

The sole issue before the Commission is whether the Proposed Statement of Decision accurately reflects the vote of the Commission.[1]

Staff Recommendation

Staff recommends that the Commission adopt the Proposed Statement of Decision (beginning on page 3), which accurately reflects the Commission's decision.

[1] Title 2, California Code of Regulations, section 1188.1, subdivision (g).

BEFORE THE
COMMISSION ON STATE MANDATES
STATE OF CALIFORNIA

IN RE TEST CLAIM ON:	No. CSM 4469
Government Code sections 54952, 54954.2, 54957.1, and 54957.7 as amended by Statutes of 1993, Chapters 1136, 1137, 1138 and Statutes of 1994, Chapter 32; Filed on December 29, 1994 and amended on August 7, 2000; By the City of Newport Beach, Claimant.	*Brown Act Reform* PROPOSED STATEMENT OF DECISION PURSUANT TO GOVERNMENT CODE SECTION 17500 ET SEQ.; TITLE 2, CALIFORNIA CODE OF REGULATIONS, DIVISION 2, CHAPTER 2.5, ARTICLE 7 *(Presented on June 28, 2001)*

PROPOSED STATEMENT OF DECISION

The Commission on State Mandates (Commission) heard and decided this test claim on May 24, 2001 during a regularly scheduled hearing. Mr. Glen Everroad and Ms. Pamela Stone appeared on behalf of the City of Newport Beach. Mr. Allan Burdick appeared on behalf of the California State Association of Counties. Mr. Cedrik Zemitis and Mr. Jim Lombard appeared for the Department of Finance.

The law applicable to the Commission's determination of a reimbursable state mandated program is Government Code section 17500 et seq., article XIII B, section 6 of the California Constitution and related case law.

The Commission, by a vote of 4 to 2, approved this test claim.

BACKGROUND AND FINDINGS

The test claim legislation, Government Code sections 54952, 54954.2, 54957.1 and 54957.7, requires the "legislative bodies" of local agencies[2] to comply with certain changes to the Ralph M. Brown Act (Gov. Code § 54950 et seq., hereafter referred to as the Brown Act or the Act).[3] Section 54952 clarifies and changes the definition of "legislative body"; section 54954.2 requires closed session items to be listed on the meeting agenda; section 54957.1 requires the reporting of closed session items after the closed session and the provision of closed session documents; and, section 54957.7 requires the disclosure of certain closed session items both prior to and after the closed session.

[2] As used in the Ralph M. Brown Act, "local agency" means a county, city, whether general law or chartered, city and county, town, school district, municipal corporation, district, political subdivision, or any board, commission, or agency thereof, or other local public agency. (Gov. Code, § 54951.)

[3] All further statutory references are to the California Government Code unless otherwise indicated.

The California Legislature enacted the Brown Act in 1953 based on an Assembly Judiciary Committee Report regarding the "secret decisionmaking" of local governments. The Act declared the law's intent that deliberations as well as action of local agencies occur openly and publicly. It also represented the Legislature's determination of how the balance should be struck between public access to meetings of multi-member public bodies on the one hand and the need for confidential candor, debate, and information gathering on the other.[4] The underlying theme of the Brown Act recognizes that:

> The people [of this State], in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may retain control over the instruments they have created.[5]

Since the Brown Act was enacted, it has been amended regularly to expand the requirements of the Act and to clarify the "legislative bodies" to which the requirements of the Act apply. Numerous court cases and Attorney General Opinions have re-affirmed the Legislature's original intent to ensure that deliberations and decisionmaking of local agencies be conducted in an open forum with full participation from the public.

Prior Test Claims

The Commission on State Mandates has previously determined two test claims on the Brown Act.

Open Meetings Act (CSM-4257)

On March 23, 1988, the Commission adopted the *Open Meetings Act* test claim that added Government Code sections 54954.2 and 54954.3 to the Brown Act. Section 54954.2 required the "legislative bodies" of local agencies *for the first time* to prepare and post agendas for public meetings at least 72 hours prior to the scheduled meeting. In addition, the agenda was to contain a brief description of each item to be discussed. Local agencies were also prohibited from taking action on any item that was not on the agenda. Section 54954.3 required that each agenda provide the public with the opportunity to address the legislative body during the meeting.

Under CSM-4257, local agencies were eligible for reimbursement for the Brown Act requirements for the following types of legislative bodies: 1) the governing board, commission, directors or body of a local agency or any board or commission thereof, as well as any board, commission, committee, or other body on which officers of a local agency serve in their official capacity; 2) any board, commission, committee, or body which exercises authority delegated to it by the legislative body; and, 3) planning commissions, library boards, recreation commissions, and other *permanent* boards or commissions of a local agency composed of at least a quorum of the members of the legislative body. The Commission's Parameters and Guidelines for CSM-4257 specifically provided reimbursement for the increased costs to prepare and post a single agenda 72 hours before a meeting of the legislative

[4] California Attorney General's Office, The Brown Act, Open Meetings for Local Legislative Bodies (1994).
[5] Government Code section 54950.

body of a local agency containing a brief general description of each item of business to be transacted or discussed.

School Site Councils and Brown Act Reform (CSM-4501)

The Brown Act came before the Commission again in test claim CSM-4501, *School Site Councils and Brown Act Reform*, filed by the Kern High School District, San Diego Unified School District, and the County of Santa Clara. This test claim was filed on Government Code section 54952 and Education Code section 35147 and addressed the application of the open meeting provisions of the Brown Act to specified schoolsite councils and advisory committees of school districts. On April 27, 2000, the Commission approved this test claim finding that Statutes of 1993, chapter 1138 among other things, added Government Code section 54952, subdivision (a), which provided, in relevant part, that the term "legislative body" for purposes of the open meeting requirements of the Brown Act also included any local body created by state or federal statute.

The Commission also found that Statutes of 1994, chapter 239 removed certain school site councils and advisory committees from the full requirements of the Brown Act, but added Education Code section 35147, which imposed an abbreviated set of open meeting requirements on school site councils and advisory committees established as part of the following programs: School Improvement Program; Native American Indian Early Childhood Education Act; Chacon-Moscone Bilingual-Bicultural Education Act; School-Based Coordination Program; Compensatory Education Program; Migrant Education Program; Motivation and Maintenance Program; and the federal Indian Education Program.

The Commission's Parameters and Guidelines for CSM-4501 provided reimbursement for notice and agenda activities for school district's schoolsite councils and certain advisory committees.

Claimant's Contentions

In their test claim, claimant contends that the test claim legislation imposes an increased level of service on local agencies. The claimant asserts the following:

- Government Code section 54952, subdivisions (a), (b) and (c), as amended, impose a higher level of service on local agencies by expanding the definition of "legislative body" which is subject to the notice requirements of the Brown Act. The agenda preparation and posting requirements of section 54954.2 now apply to an increased number of entities such as standing committees, advisory bodies and other local bodies created by state or federal statute;

- Government Code section 54954.2, subdivision (a), as amended, imposes a higher level of service on local agencies by expanding the notice requirements to include a description of each item to be discussed or transacted in closed session;

- Government Code sections 54957.1, subdivisions (a), (b) and (c) and 54957.7, subdivisions (a), (b) and (c), as amended, impose a higher level of service on local

agencies by expanding the nature and extent of the required public reporting of action taken in closed sessions; and,

- These amendments require an increased level of service by local agencies, necessitating training for local agencies.

Department of Finance Contentions

The Department of Finance (DOF) submitted comments on this test claim on June 1, 1995. Their contention is that while chapters 1136 and 1137 (agenda and notice requirements and closed session requirements) may have resulted in reimbursable state-mandated costs pertaining to certain notification requirements, they may also have resulted in offsetting savings to local governments by specifying that agenda descriptions be restricted to 20 or less words. In addition, the DOF contends that the intent of chapter 1138 (definition of legislative body) was to provide cost savings to local governments by simplifying and clarifying the Brown Act requirements. Finally, regarding chapter 32, the DOF states that this is essentially clean-up legislation for the other three named chapters and does not affect the scope of the changes made by those chapters. Consequently, it is the DOF's belief that there are no reimbursable state-mandated costs in that legislation.[6]

At the hearing, the DOF argued that local agencies requested the enactment of the test claim legislation, and therefore, there are no costs mandated by the state.

Interested Party Contentions

The County Counsel of Marin County submitted comments in support of the test claim on May 30, 1995. Their contention is that the 1993 and 1994 amendments to the Brown Act require local agencies to perform an increased level of service resulting in increased state mandated costs for reporting requirements, record keeping, and other County staff responsibilities. In addition, the County claims that these provisions have resulted in an increased level of service to advisory bodies, which are now subject to the Brown Act amendments.

Interested Persons Contentions

Former Senator Quentin Kopp, author of the majority of the Brown Act legislation, submitted comments in opposition to the test claim. His contention is that the amendments to the Brown Act were proposed to reduce the costs to local agencies for posting agendas, making oral statements regarding closed session items, and providing a description of the items on the agenda.

The California Newspaper Publishers Association submitted comments in opposition to the test claim. Their contention is that the changes to the Brown Act do not create a state mandated

[6] Regarding chapter 32, the test claim submitted by claimant stated: "The provisions of Chapter 32, Statutes of 1994, did not effect the scope of the state mandated activities and costs described in this test claim."

local program because the amendments were intended by the legislature to be instructive, not to expand the open meeting requirements. In particular, the clarifying language "A brief general description of an item generally need not exceed 20 words" was added to radically reduce the costs of creating and posting agendas. The First Amendment Coalition submitted comments in opposition to the test claim adopting the arguments and conclusion of the California Newspaper Publishers Association.

Paul C. Minney of Spector, Middleton, Young & Minney, LLP submitted comments on the Draft Staff Analysis. His contention is that both permanent and temporary decisionmaking committees or boards created by formal action are "new legislative bodies" under the test claim statute because these bodies can exercise authority broader than that granted to the legislative body.

COMMISSION FINDINGS

In order for a statute, which is the subject of a test claim, to impose a reimbursable state mandated program under article XIII B, section 6 of the California Constitution and Government Code section 17514, the statutory language must direct or obligate an activity or task upon local governmental entities. If the statutory language does not mandate or require local agencies to perform a task, then compliance with the test claim statute is within the discretion of the local agency and a reimbursable state mandated program does not exist.

Further, the required activity or task must be new or it must create an increased or higher level of service over the former required level of service. The California Supreme Court has defined the word "program," subject to article XIII B, section 6 of the California Constitution, as an activity that carries out the governmental function of providing a service to the public, or laws which, to implement a state policy, impose unique requirements on local governments and do not apply generally to all residents and entities in the state. To determine if the "program" is new or imposes a higher level of service, a comparison must be undertaken between the test claim legislation and the legal requirements in effect immediately before the enactment of the test claim legislation. Finally, the newly required activity or increased level of service must impose "costs mandated by the state,"[7]

The test claim legislation requires the performance of certain activities related to public meetings by specified "legislative bodies" of local agencies. These local governmental bodies are carrying out a basic governmental function of making decisions regarding the operations of local agencies that provide services to the public. The mandatory compliance with the Brown Act is unique to local agencies; it is a peculiarly governmental function that does not apply to all residents and entities in the state. Therefore, the Commission finds that compliance by local agencies with the open meeting requirements of the test claim legislation constitutes a "program" within the meaning of article XIII B, section 6 of the California Constitution.

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[7] *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 56; *Carmel Valley Fire Protection Dist. v. State of California* (1987) 190 Cal.App.3d 521, 537; *City of Sacramento v. State of California* (1990) 50 Cal.3d 51, 66; *Lucia Mar Unified School Dist. v. Honig* (1988) 44 Cal.3d 830, 835; Government Code section 17514.

The Commission continued its inquiry to determine if the test claim legislation constitutes a new program or higher level of service and imposes "costs mandated by the state" upon local agencies. Claimant contends that the test claim legislation imposes a higher level of service upon local agencies because the agenda preparation and posting requirements apply to an increased number of entities now defined as "legislative bodies" such as standing committees, advisory bodies and other local bodies created by state or federal statute. Claimant also contends that the test claim legislation requires new activities regarding the inclusion of closed session items on agendas and the reporting of closed session items both prior to and after the closed session. The analysis of these issues for the statutes at issue is discussed below.

Issue 1: Does the test claim legislation impose a new program or higher level of service upon local governmental bodies within the meaning of article XIII B, section 6 of the California Constitution?

Issue 1 is presented in two parts: Part One discusses the entities subject to the open session notice and agenda requirements and Part Two discusses the closed session requirements for all legislative bodies.

Part One: Entities Subject to Open Session Notice and Agenda Requirements

The notice and agenda provisions of the Brown Act are found in Government Code section 54954.2. Under the test claim legislation, this section requires the "legislative bodies" of local agencies to post a notice and agenda containing a brief general description of each item to be discussed at the meeting. Section 54954.2 states in relevant part the following:

> At least 72 hours before a regular meeting, the legislative body of a local agency, or its designee, shall post an agenda containing a brief general description of each item of business to be transacted or discussed at the meeting, including items to be discussed in closed session. A brief general description of an item generally need not exceed 20 words.

New Entities Subject to the Notice & Agenda Requirements

Government Code section 54952 describes the "legislative bodies" required to comply with the Brown Act. The test claim legislation substantially amended section 54952 to clarify and describe the "legislative bodies" in greater detail. Section 54952 now defines "legislative body" in relevant part as follows:

> (a) The governing body of a local agency or any other local body created by state or federal statute.
>
> (b) A 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. However, advisory committees, composed solely of the members of the legislative body which are less than a quorum of the legislative body are not legislative bodies, except that standing committees of a legislative body, irrespective of their

composition, which have a continuing subject matter jurisdiction, or a meeting schedule fixed by charter, ordinance, resolution, or formal action of a legislative body are legislative bodies for purposes of this chapter.

Thus, the "legislative bodies" required to comply with the Brown Act now include the following:

- The governing body of a local agency;
- A local body created by state or federal statute;
- A permanent decisionmaking body created by formal action;
- A temporary decisionmaking body created by formal action;
- A permanent advisory body created by formal action (except an advisory body with less than a quorum of the members);
- A temporary advisory body created by formal action (except an advisory body with less than a quorum of the members); and,
- Standing committees, irrespective of their composition with a continuing subject matter jurisdiction, or a meeting schedule fixed by formal action.

Under prior law, the "legislative body" of a local agency required to comply with the Brown Act was defined in several statutory provisions. Section 54952 defined the governing body of a local agency or any board or commission thereof, and any body on which officers of a local agency serve in their official capacity as members; section 54952.2 defined any multimember body with delegated authority of the legislative body; section 54952.3 defined any advisory body created by formal action and included both reduced notice requirements and an exemption from all Brown Act requirements for a committee composed solely of members of the governing body of a local agency which are less than a quorum of such governing body; and, section 54952.5 defined planning commissions, library boards, recreation commissions, and other permanent boards or commissions of a local agency as "legislative bodies."

While amending section 54952, the test claim legislation also repealed sections 54952.2, 54952.3 and 54952.5. Based on the following analysis, the Commission finds that the test claim legislation created the following two new "legislative bodies" required to comply with the provisions of the Brown Act including the notice and agenda requirements of section 54954.2:

- <u>Any local body created by state or federal statute</u>

This body was not identified as a "legislative body" in prior law. Thus, the Commission finds that under the test claim legislation, it *is* a new body required to comply with the open session notice and agenda requirements imposed by Government Code section 54954.2; and,

- <u>Standing committees with less than a quorum of the governing body which have a continuing subject matter jurisdiction, or a meeting schedule fixed by formal action</u>

The test claim legislation defines legislative body to include "standing committees of a legislative body, *irrespective of their composition*, which have a continuing subject matter

jurisdiction, or a meeting schedule fixed by formal action." Historically, standing committees were permanent committees that met regularly and considered subjects of a particular class.[8] Their composition, however, varied depending on the body that created them.

Prior to the enactment of the test claim legislation, the various statutory provisions regarding the application of the Brown Act created much confusion as to whether committees, regardless of their composition, fell under the requirements of the Act. However, numerous judicial decisions and opinions of the Attorney General found that the Brown Act essentially governed *all* meetings of a *quorum* of the legislative body of a local agency when the public's business was discussed.[9]

In 1993, just prior to the passage of the test claim legislation, this issue was finally resolved in the *Freedom Newspaper* case.[10] In *Freedom*, a newspaper publisher sought a writ of mandate to compel a county employees retirement system board of directors to allow the public to attend meetings of the board's operations committee. The committee was advisory in nature and was composed of four members of the nine-member board. The Supreme Court held that since the operations committee was an advisory committee composed solely of board members *numbering less than a quorum of the board*, the committee was not a "legislative body" pursuant to the provisions of Government Code section 54952.3, and was therefore excluded from the open meeting requirements of the Brown Act. The *Freedom* Court agreed with a long-standing 1968 Attorney General Opinion that stated: "[w]e have consistently concluded that committees composed of *less than a quorum of the legislative body creating them and not established on a permanent basis for a continuing function are not subject to the open meeting requirements of that Act.*" (Emphasis supplied).[11]

Thus, the Commission finds that while standing committees with less than a quorum of the members of the legislative body were exempt from the requirements of the Brown Act under prior law, the test claim legislation now defines "standing committees, *irrespective of their composition*" as new bodies required to comply with the open session notice and agenda requirements imposed by section 54954.2.

Regarding the other five bodies identified in the test claim legislation, the Commission finds they are not new "legislative bodies" because they were identified in prior law as follows:

- <u>Governing body of a local agency</u>

This body is identified as a "legislative body" in prior law in section 54952 and thus it is not a new body.

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[8] 79 Ops.Cal.Atty.Gen. 69, 72 (1996).
[9] *Id.*, at page 69, fn 3.
[10] *Freedom Newspapers, Inc., v. Orange County Employees Retirement System Board of Directors* (1993) 6 Cal.4th 821, 832-833.
[11] *Id.*, at pages 828-829.

- Permanent decisionmaking committee or board created by formal action

Interested Person, Paul C. Minney, contends that permanent decisionmaking committees created by formal action were not subject to the Brown Act before the enactment of the test claim legislation. In his comments, he states:

> Staff's conclusion [in the draft staff analysis] is predicated upon the assumption that the legislative body of a local agency can only create a "permanent decision making board" which may exercise the authority of the body that created it. This assumption is incorrect. For example, when a school district approves a charter school (by formal action) it creates a permanent body with decision making body [sic] that exercises authority broader than that granted to the school district...

The Commission disagrees. Under prior law, section 54952.2 stated:

> As used in this chapter, "legislative body" also means *any* board, commission, committee, or similar multimember body which exercises *any authority* of a legislative body of a local agency *delegated* to it by that legislative body. (Emphasis added.)

Also, under prior law, section 54952.5 specifically included permanent boards and commissions of local agencies within the coverage of the Brown Act. That section stated:

> As used in this chapter, 'legislative body' also includes, but is not limited to, planning commissions, library boards, recreation commissions, *and other permanent boards or commissions* of a local agency. (Emphasis added.)

When determining the intent of a statute, the first step is to look at the statute's words and give them their plain and ordinary meaning. Where the words of the statute are not ambiguous, they must be applied as written and may not be altered in any way.[12] The plain language of former sections 54952.2 and 54952.5 include permanent boards and commissions as legislative bodies and any board or commission that exercises any authority delegated to it; i.e. decisionmaking authority.

Moreover, in their 1989 booklet, *Open Meeting Laws*, the Attorney General's Office determined that decisionmaking bodies were required to comply with the Brown Act before the enactment of the test claim legislation. In the booklet, the Attorney General's Office states:

> *Under current law, decision-making bodies would primarily be covered under section 54952 or 54952.2* and advisory committees under section 54952.3. However, section 54952.5 was invoked by this office to apply to a hearing board of an air pollution control district. (71 Ops.Cal.Atty.Gen. 96 (1988).) Although there is not a published opinion or indexed letter precisely on point, we think that permanent committees (e.g., budget or finance committees) comprised solely of less than a quorum of the members of a board or commission were not intended to be covered by section 54952.5. (See

[12] *City of Merced* v. *State of California* (1984) 153 Cal.App.3d 777; *Carrisales* v. *Department of Corrections* (1999) 21 Cal.4th 1132.

discussion of less than a quorum exception in section C(6) at page 20 in this pamphlet.) *However, if such committees "exercise" enough "authority" "delegated" to them by a legislative body, they might be covered by section 54952.2 as a decision-making body rather than an advisory body.*

While the Attorney General's views do not bind the Commission, they are entitled to considerable weight. This is especially true here since the Attorney General regularly advises many local agencies about the meaning of the Brown Act and publishes a manual designed to assist local governmental agencies in complying with the Act's open meeting requirements.[13]

Accordingly, the Commission finds that permanent decisionmaking bodies created by formal action were subject to the Brown Act before the enactment of the test claim legislation and, thus, are not new.

- Temporary decisionmaking committee or board created by formal action

This body is also identified as a "legislative body" in prior law under section 54952.2 as discussed above. Section 54952.2 stated:

> As used in this chapter, "legislative body" also means *any* board, commission, committee, or similar multimember body which exercises any authority of a legislative body of a local agency delegated to it by that legislative body. (Emphasis added.)

For the same reasons discussed under the section analyzing permanent decisionmaking bodies, the Commission finds that temporary decisionmaking bodies created by formal action were subject to the Brown Act before the enactment of the test claim legislation and, thus, are not new.

- Permanent advisory committee or board created by formal action (except less than a quorum of the members)

This body is identified under prior law in sections 54952.3 and 54952.5. Section 54952.3 defined "legislative body" as *any* advisory committee created by formal action. In addition, section 54952.3 provides an exception for any advisory committee composed solely of less than a quorum of the members of the legislative body. Section 54952.5 also defined "legislative body" to include permanent boards or commissions of a local agency. Thus, the Commission finds that permanent advisory committees or boards created by formal action (except less than a quorum of the members) were "legislative bodies" under prior law.

- Temporary advisory committee or board created by formal action (except less than a quorum of the members)

This body is identified under prior law in section 54952.3 as discussed above, and thus, the Commission finds that this body was a "legislative body" under prior law.

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[13] *Freedom Newspapers, Inc. v. Orange County Employees Retirement System Board of Directors*, *supra*, 6 Cal.4th at p. 829.

- Standing committees comprised of a quorum of the members of the legislative body

These bodies are also defined as a "legislative body" under prior law. Standing committees, by definition, are permanent committees that regularly consider a particular subject matter. When comprised of a quorum of the members of the legislative body, these committees fall under the definition of a committee with delegated authority since they are empowered to make decisions on behalf of the legislative body.[14] In addition, standing committees comprised of a quorum of the members fall under the definition of "legislative body" in former Government Code sections 54952.3 and 54952.5 (i.e. permanent advisory committees of a local agency). Thus, the Commission finds that standing committees composed of at least a quorum of the members of the legislative body are not new bodies under the test claim legislation.

The chart below provides a summary of the Commission's findings:

Test Claim Legislation Section 54952	**Prior Law Sections 54952, 54952.3, 54952.3, 54952.5**
Governing body	§ 54952 Governing body
Local body created by state or federal statute	**NEW**
Permanent decisionmaking committee or board created by formal action	§ 54952.2 Any board, committee, body that exercises any authority of a legislative body *delegated* to it by the legislative body § 54952.5 Planning commissions, library boards, recreation commissions, and other *permanent* boards or commissions of a local agency
Temporary decisionmaking committee or board created by formal action	§ 54952.2
Permanent advisory committee or board created by formal action (except less than a quorum of the members)	§ 54952.3 *Any* advisory committee created by formal action (except less than a quorum of the members) § 54952.5 Planning commissions, library boards, recreation commission, *and other permanent* boards or commissions of a local agency
Temporary advisory committee or board created by formal action (except less than a quorum of the members)	§ 54952.3
Standing committees, irrespective of their composition (i.e. even those with less than a quorum of the members of the legislative body) with a continuing subject matter jurisdiction, or a meeting schedule fixed by formal action	**NEW--Standing committees with less than a quorum of the members** However, standing committees with a quorum of members of the legislative body are covered in prior law through §§ 54952.2, 54952.3 and 54952.5.

[14] Former Government Code section 54952.2 stated in relevant part as follows:

> "...legislative body also means any board, commission, committee, or similar multimember body which exercises any authority of a legislative body of a local agency delegated to it by that legislative body."

Based on the foregoing, the Commission finds that Government Code sections 54952 and 54954.2, subdivision (a), of the test claim legislation constitute a new program or higher level of service pursuant to article XIII B, section 6 of the California Constitution for two new bodies (local bodies created by state or federal statute and standing committees with less than a quorum of the members of the legislative body with a continuing subject matter jurisdiction, or a meeting schedule fixed by formal action) to prepare and post an agenda of their meetings 72 hours prior to the meeting which contains a brief general description of each item to be transacted or discussed at the meeting.

Advisory Bodies Subject to the Notice & Agenda Requirements

In the *Open Meetings Act* (CSM-4257) test claim, the Commission determined that Government Code section 54954.2 imposed a reimbursable state mandated program upon "all legislative bodies," as defined, to post a notice and agenda 72 hours prior to the meeting of a legislative body. That section also required that the notice and agenda contain a brief general description of all items to be discussed at the meeting. Section 54954.2 was enacted in 1986 and applied to all legislative bodies, which by definition included advisory bodies before the enactment of the test claim legislation.

However, prior law (former Government Code section 54952.3, which was enacted in 1968) also *exempted* advisory bodies from the regular notice and agenda provisions of the Act and held them to significantly reduced notice requirements:

> Meetings of such advisory commissions, committees or bodies...shall be open and public, and notice thereof must be delivered personally or by mail at least 24 hours before the time of such meeting to each person who has requested, in writing, notice of such meeting.
>
> If the advisory commission, committee or body elects to provide for the holding of regular meetings, it shall provide by bylaws, or by whatever other rule is utilized by that advisory body for the conduct of its business, for the time and place for holding such regular meetings. *No other notice of regular meetings is required.* (Emphasis added.)

Thus, prior law, as specified in sections 54954.2 and 54952.3, imposed conflicting duties on advisory bodies. If an advisory body complied with section 54952.3 by not preparing and posting an agenda, did it violate section 54954.2? In other words, which statute constitutes prior law with respect to the duties imposed on advisory bodies?

Sutherland Statutory Construction, a treatise on statutory construction, explains that whenever the legislature enacts a provision, it has in mind previous statutes relating to the same subject matter. In the absence of any express repeal or amendment, the new provision is presumed to be in accord with the legislative policy embodied in those prior statutes. When a conflict exists, the more specific statute controls over the more general one.[15] However, where the

[15] *People v. Tanner* (1979) 24 Cal.3d 514, 521, where the California Supreme Court states that "[a] specific provision relating to a particular subject will govern a general provision, even though the general provision standing alone would be broad enough to include the subject to which the specific provision relates."

conflict is irreconcilable, the statute that is the more recent of the two conflicting statutes prevails.[16]

In this case, the Commission finds the express language of section 54952.3 is more specific than the provisions of section 54954.2 and thus, prevails as prior law. Section 54952.3 *specifically* identified advisory commissions and committees as legislative bodies that were not required to prepare and post an agenda. They were only required to deliver notice of their meetings 24-hours prior to the meeting and to provide in their bylaws for the time and place of holding regular meetings. In contrast, section 54954.2 *generally* referred to "the legislative body of the local agency, or its designee," when describing the bodies to which the notice requirements applied. Thus, by the repeal of section 54952.3 by the test claim legislation, advisory bodies are now subject, for the first time, to the full notice and agenda requirements specified in section 54954.2, subdivision (a), of the Brown Act.

Therefore, the Commission finds that Government Code section 54954.2, subdivision (a), constitutes a new program or higher level of service pursuant to article XIII B, section 6 of the California Constitution for all permanent and temporary advisory bodies created by formal action (except less than a quorum of the members of the legislative body) to comply with the full notice and agenda requirements of the Brown Act by preparing and posting an agenda of their meetings 72 hours prior to the meeting which contains a brief general description of each item to be transacted or discussed at the meeting.

Part Two: Closed Session Requirements

Under prior law, the legislative body was required to state the reasons for a closed session either before or after the closed session and to publicly report the action and vote taken in closed session regarding the appointment, employment or dismissal of a public employee. The test claim legislation added four new closed session requirements that apply to all "legislative bodies" including those newly defined under the test claim legislation.

Notice and Agenda Requirements

The test claim legislation amended the notice and agenda provisions to include closed session items on the agenda. Section 54954.2 states, in relevant part, the following:

> At least 72 hours before a regular meeting, the legislative body of a local agency, or its designee, shall post an agenda containing a brief general description of each item of business to be transacted or discussed at the meeting, <u>including items to be discussed in closed session. A brief general description of an item generally need not exceed 20 words</u>. (Underlined portion indicates amendments to this section by the test claim legislation).

Under prior law, the legislative body was only required to state the general reason or reasons for the closed session either prior to or after holding the closed session and if desired, cite the

[16] 2B, Sutherland, Statutory Construction (5th Ed. 1994) § 51.02.

statutory authority under which the session was being held.[17] The test claim legislation now requires a brief general description of closed session items to be included on the agenda for the meeting.

Thus, the Commission finds that Government Code section 54954.2, subdivision (a), of the test claim legislation constitutes a new program or higher level of service pursuant to article XIII B, section 6 of the California Constitution for all "legislative bodies" defined in Government Code section 54952 to provide a brief general description of all items to be discussed in closed session on the agenda of the meeting.

Prior Disclosure Requirements

Under prior law, section 54957.7 only required a legislative body, prior to *or* after the closed session, to state the general reason for the closed session and to include the appropriate statutory authority, if desired. The test claim legislation amended this section to provide, in relevant part, as follows:

> (a) Prior to holding any closed session, the legislative body of the local agency shall disclose, in an open meeting, the item or items to be discussed in the closed session. The disclosure may take the form of a reference to the item or items as they are listed by number or letter on the agenda.

The test claim legislation now requires all legislative bodies to disclose each item to be discussed in closed session prior to the start of the closed session.

Accordingly, the Commission finds that Government Code section 54957.7, subdivision (a), of the test claim legislation constitutes a new program or higher level of service pursuant to article XIII B, section 6 of the California Constitution for all "legislative bodies" as defined in Government Code section 54952 to disclose, prior to holding a closed session, each item to be discussed in closed session.

Subsequent Reporting Requirements

Subdivision (b) was added to section 54957.7 by the test claim legislation and provides as follows:

> (b) After any closed session, the legislative body shall reconvene into open session prior to adjournment and shall make any disclosures required by Section 54957.1 of action taken in the closed session.

Section 54957.1, subdivision (a) of the test claim legislation added an extensive list of items requiring the legislative body to publicly report, either orally or in writing,[18] the actions and votes taken in closed session for the following items:

---

[17] Former Government Code section 54957.7.

[18] Government Code section 54957.1(b) provides in relevant part the following:

> "Reports that are required to be made pursuant to this section may be made orally or in writing."

(1) Approval of an agreement concluding real estate negotiations pursuant to Section 54956.8 shall be reported after the agreement is final, as specified below:

(A) If its own approval renders the agreement final, the body shall report that approval and the substance of the agreement in open session at the public meeting during which the closed session is held.
(B) If final approval rests with the other party to the negotiations, the local agency shall disclose the fact of that approval and the substance of the agreement upon inquiry by any person, as soon as the other party or its agent has informed the local agency of its approval.

(2) Approval given to its legal counsel to defend, or seek or refrain from seeking appellate review or relief, or to enter as an amicus curiae in any form of litigation as the result of a consultation under Section 54956.9 shall be reported in open session at the public meeting during which the closed session is held. The report shall identify, if known, the adverse party or parties and the substance of the litigation. In the case of approval given to initiate or intervene in an action, the announcement need not identify the action, the defendants, or other particulars, but shall specify that the direction to initiate or intervene in an action has been given and that the action, the defendants, and the other particulars shall, once formally commenced, be disclosed to any person upon inquiry, unless to do so would jeopardize the agency's ability to effectuate service of process on one or more unserved parties, or that to do so would jeopardize its ability to conclude existing settlement negotiations to its advantage.

(3) Approval given to its legal counsel of a settlement of pending litigation, as defined in Section 54956.9, at any stage prior to or during a judicial or quasi-judicial proceeding shall be reported after the settlement is final, as specified below:

(A) If the legislative body accepts a settlement offer signed by the opposing party, the body shall report its acceptance and identify the substance of the agreement in open session at the public meeting during which the closed session is held.
(B) If final approval rests with some other party to the litigation or with the court, then as soon as the settlement becomes final, and upon inquiry by any person, the local agency shall disclose the fact of that approval, and identify the substance of the agreement.

(4) Disposition reached as to claims discussed in closed session pursuant to Section 54956.95 shall be reported as soon as reached in a manner that identifies the name of the claimant, the name of the local agency claimed against, the substance of the claim, and any monetary amount approved for payment and agreed upon by the claimant.

(5) Action taken to appoint, employ, dismiss, accept the resignation of, or otherwise affect the employment status of a public employee in closed session pursuant to Section 54957 shall be reported at the public meeting during which the closed session is held. Any report required by this paragraph shall identify the title of the position. The general requirement of this paragraph notwithstanding, the report of a dismissal or of the nonrenewal of an employment contract shall be deferred until the first public meeting following the exhaustion of administrative remedies, if any.

(6) Approval of an agreement concluding labor negotiations with represented employees pursuant to Section 54957.6 shall be reported after the agreement is final and has been accepted or ratified by the other party. The report shall identify the item approved and the other party or parties to the negotiation.

Under prior law, the sole reporting requirement for closed sessions under section 54957.1 was to report at the current or a subsequent meeting, any action taken and any roll call vote *to appoint, employ, or dismiss a public employee*.[19] Other issues that could be discussed in closed session such as licensing matters, real estate negotiations or pending litigation did not require any reporting in a public session.[20] The test claim legislation now requires the legislative body to reconvene into public, open session and report the actions and votes taken on the five new items listed above which were discussed in closed session.

Therefore, the Commission finds that Government Code sections 54957.7, subdivision (b), and 54957.1, subdivision (a), of the test claim legislation constitute a new program or higher level of service pursuant to article XIII B, section 6 of the California Constitution for all bodies defined as "legislative bodies" in Government Code section 54952 to reconvene in public session prior to adjournment and report the five items identified in section 54957.1, subdivision (a) (1-4, 6) which were discussed in closed session.

Documentation Requirements

Subdivisions (b) and (c) of section 54957.1 of the test claim legislation concern the provision of documentation from closed sessions to members of the public. This section provides, in relevant part, as follows:

(b)...The legislative body shall provide to any person who has submitted a written request to the legislative body within 24 hours of the posting of the agenda, or to any person who has made a standing request for all documentation as part of a request for notice of meetings pursuant to Section 54954.1 or 54956, if the requester is present at the time the closed session ends, copies of any contracts, settlement agreements, or other documents that were finally approved or adopted in the closed session. If the action taken results in one or

---

[19] Former section 54957.1 stated the following:

"The legislative body of any local agency shall publicly report at the public meeting during which the closed session is held or at its next public meeting any action taken, and any roll call vote thereon, to appoint, employ, or dismiss a public employee arising out of any closed session of the legislative body."

[20] Government Code sections 54956.7, 54956.8, 54956.9, 54957.

more substantive amendments to the related documents requiring retyping, the documents need not be released until the retyping is completed during normal business hours, provided that the presiding officer of the legislative body or his or her designee orally summarizes the substance of the amendment for the benefit of the document requester or any other person present and requesting the information.

(c) The documentation referred to in paragraph (b) shall be available to any person on the next business day following the meeting in which the actions referred to is taken or, in the case of substantial amendments, when any necessary retyping is complete.

Prior to the test claim legislation, section 54957.1 did not address writings. The subject of 'writings' was addressed in section 54957.5 which provided for the inspection and distribution of certain writings that were public records under the California Public Records Act. However, subdivision (e) of section 54957.5 provided that, "(T)his section shall not be construed to be applicable to any writings solely because they are properly discussed in a closed session of a legislative body of a local agency...". Thus, while prior law provided for the inspection and provision of certain writings distributed to the legislative body, it did not require the distribution of documentation from closed sessions to members of the public.

Accordingly, the Commission finds that Government Code section 54957.1, subdivisions (b) and (c), of the test claim legislation constitutes a new program or higher level of service pursuant to article XIII B, section 6 of the California Constitution for all bodies defined as "legislative bodies" in Government Code section 54952 to provide copies of documentation from the closed session within the specified timelines.

Issue 2: Does the test claim legislation impose costs mandated by the state pursuant to article XIII B, section 6 of the California Constitution and Government Code section 17514?

The remaining issue is whether there are increased costs mandated by the state. Government Code section 17514 provides in relevant part the following:

> Costs mandated by the state" means any *increased costs* which a local agency or school district is required to incur after July 1, 1980, as a result of any statute enacted on or after January 1, 1975...which mandates a new program or higher level of service within the meaning of Section 6 of Article XIII B of the California Constitution. (Emphasis added.)

In addition, section 17556 provides in relevant part the following:

> The commission shall not find costs mandated by the state, as defined in Section 17514, in any claim submitted by a local agency or school district, if, after a hearing, the commission finds that:

(a) The claim is submitted by a local agency or school district which requested legislative authority for that local agency or school district to implement the program specified in the statute, and that statute imposes costs upon that local agency or school district requesting the legislative authority. A resolution from the governing body or a letter from a delegated representative of the governing body of a local agency or school district which requests authorization for that local agency or school district to implement a given program shall constitute a request within the meaning of this paragraph.

At the May 24, 2001 hearing, the Department of Finance contended that local agencies requested the enactment of the test claim legislation and, thus, there are no costs mandated by the state. Mr. Cedrik Zemitis testified on behalf of the Department of Finance as follows:

> MR. ZEMITIS: Second, local request, we would note that at the time the test claim statute was considered by the legislature, it was clear that these bills were introduced at the behest of local governments. The author of most of the bills stated for the record at the time that existing law was amended specifically at the request of local agencies. Indeed, numerous legislative committee analyses support the author.
>
> In addition, the California School Boards Association at the time stated that clarification of the existing Brown Act will not create additional costs to local government. In addition, the California State Association of Counties and numerous other local entities all officially supported the legislation because it would simplify and clarify the Brown Act with no additional costs.
>
> While we do not have resolutions from all of the affected local entities, which would be in the thousands literally, representatives of those entities clearly sponsored the legislation as well as reported savings and no new costs. Therefore we believe any mandate would not be reimbursable.[21]

In response, the claimant testified that the City of Newport Beach did not request legislative authority to implement the program nor did they sponsor the test claim legislation.[22] In addition, there is no evidence in the record of a resolution from any governing body of a local agency requesting authorization to implement the test claim legislation. Therefore, the Commission finds that Government Code section 17556, subdivision (a) does not apply in this test claim.

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[21] Hearing Transcript, May 24, 2001 Commission on State Mandates Hearing, page 14, line 25; page 15, lines 1-25; page 16, lines 1-7.

[22] Hearing Transcript, May 24, 2001 Commission on State Mandates Hearing, page 29, lines 15-21.

Further, section 17556, subdivision (e) provides that the commission shall not find costs mandated by the state, as defined in Section 17514, in any claim submitted by a local agency or school district, if, after a hearing, the commission finds that:

> (e) The statute or executive order provides for offsetting savings to local agencies or school districts which result in no net costs to the local agencies or school districts, or includes additional revenue that was specifically intended to fund the costs of the state mandate in an amount sufficient to fund the cost of the state mandate.

The Department of Finance contends that while chapters 1136 and 1137 may have resulted in reimbursable state-mandated activities pertaining to certain notification requirements, these chapters may also result in offsetting savings to local governments by specifying that agenda descriptions be restricted to 20 or less words. The Department also contends that the test claim legislation results in cost savings to local governments by simplifying and clarifying the Brown Act. The Department did not comment on the new closed session requirements of the test claim legislation.

The original claimant, the County of Santa Clara, submitted a declaration to support their contention that the test claim legislation resulted in an increase in costs incurred by several County departments. Steve Conrad, SB 90 Coordinator for the County of Santa Clara declared on December 28, 1994 that an additional $560 will be incurred per year by Santa Clara county to include closed session items on the agenda, and that an additional $2,200 will be incurred per year by Santa Clara county to record closed session discussions in order to report in open session the items discussed in closed session, and that an additional $6,300 will be incurred per year by Santa Clara county to prepare and post an agenda for the new bodies defined as "legislative bodies" in the test claim legislation.

In reviewing the language of the test claim legislation, there is no language that provides for offsetting savings resulting in *no* net costs to the claimants, nor does the test claim legislation include any additional revenue specifically intended to fund the mandate. While the Department of Finance contends that the test claim statutes may result in offsetting savings to the claimants by limiting the agenda descriptions to "20 words or less", the Commission finds that the language of the test claim legislation does not support this conclusion. Nor has the Department provided any documentary evidence to support their contention. Former Senator Kopp contends that the legislative intent of these amendments was to simplify and clarify the Brown Act. However, no documentary evidence has been provided to support this contention. Thus, the Commission finds that Government Code section 17556, subdivision (e) does not apply in this test claim.

Therefore, the Commission finds that the test claim legislation, which requires the legislative bodies of local agencies to perform a number of additional activities in relation to the open meeting requirements of the Brown Act, imposes costs mandated by the state within the meaning of article XIII B, section 6 of the California Constitution and Government Code section 17514.

CONCLUSION

Based on the foregoing, the Commission concludes that the test claim legislation (Government Code sections 54952, 54954.2, 54957.1, and 54957.7) imposes a reimbursable state-mandated program upon local governments within the meaning of article XIII B, section 6 of the California Constitution and Government Code section 17514 for the following activities:

Open Session Requirements

Activity	Applies To
To prepare and post an agenda at least 72 hours before a regular meeting containing a brief general description of each item of business to be transacted or discussed at the meeting. A brief general description of an item generally need not exceed 20 words. [Gov. Code § 54954.2, subd. (a)]	Local Bodies created by state or federal statute. Standing Committees with less than a quorum of members of the legislative body that has a continuing subject matter jurisdiction or a meeting schedule fixed by formal action. Permanent & Temporary Advisory Bodies (except bodies of less than a quorum of the members of the legislative body).

Closed Session Requirements

Activity	Applies To
To include a brief general description on the agenda of all items to be discussed in closed session. A brief general description of an item generally need not exceed 20 words. [Gov. Code § 54954.2, subd. (a)]	All "legislative bodies"
To disclose in an open meeting, prior to holding any closed session, each item to be discussed in the closed session. [Gov. Code § 54957.7, subd. (a)]	All "legislative bodies"
To reconvene in open session prior to adjournment and report the actions and votes taken in closed session for the five items identified in Government Code section 54957.1, subdivision (a)(1-4, 6). [Gov. Code § 54957.7, subd. (b)]	All "legislative bodies"
To provide copies of closed session documents as required. [Gov. Code § 54957.1, Subd. (b) and (c)]	All "legislative bodies"

The Commission further concludes that all other statutes and code sections included in this test claim do not constitute a reimbursable state-mandated program.

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1 PUBLIC HEARING

2 COMMISSION ON STATE MANDATES

3

4 ORIGINAL

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RECEIVED
MAY 3 1 2001
COMMISSION ON
STATE MANDATES

8 TIME: 9:30 a.m.

9 DATE: May 24, 2001

10 PLACE: State Capitol, Room 126
Sacramento, California

11

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14 --o0o--

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17 REPORTER'S TRANSCRIPT OF PROCEEDINGS

18

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25 Reported By: YVONNE K. FENNER, CSR License #10909, RPR

1 A P P E A R A N C E S

2

COMMISSION MEMBERS

3

ANNETTE PORINI, Chairperson
4 Representative of B. Timothy Gage, Director
State Department of Finance

5

ALBERT P. "AL" BELTRAMI
6 Public Member

7 JOHN HARRIGAN
Representative of Kathleen Connell
8 State Controller

9 WILLIAM SHERWOOD
Representative of Philip Angelides
10 State Treasurer

11 JOANN E. STEINMEIER
School Board Member
12 Arcadia Unified School District

13 SHERRY WILLIAMS
Representative for Steven Nissen, Director
14 Office of Planning and Research

15

16 COMMISSION STAFF

17 PAULA HIGASHI, Executive Director

18 CAMILLE SHELTON, Staff Counsel

19 SEAN P. AVALOS, Staff Counsel

20 ELLEN FISHMAN, Staff Counsel

21 CATHY CRUZ, Staff Analyst

22

23 --o0o--

24

25

1 PUBLIC PRESENTATIONS

2 CAROL A. BERG, Ph.D., Executive Vice President
School Services of California, Inc. for
3 Education Mandated Cost Network

4 ALLAN BURDICK, Director
California State Association of Counties
5
GINNY BRUMMELS, Section Manager
6 Local Reimbursement Section
Division of Accounting and Reporting
7 State Controller's Office

8 GLEN EVERROAD, Revenue Manager
City of Newport Beach
9
JIM LOMBARD
10 Department of Finance

11 SHAWN D. SILVA, Staff Counsel
State Controller's Office
12
PAMELA A. STONE, Senior Manager/Legal Counsel
13 DMG Maximus, on behalf of
City of Newport Beach
14
CEDRIK ZEMITIS, Principal Program Budget Analyst
15 Department of Finance

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AGENDA INDEX

AGENDA ITEM		PAGE
1	Approval of Minutes, April 26, 2001	7
2	Hearing and Decision, Test Claim, Brown Act Reform	9
3	Hearing and Decision, Incorrect Reduction Claims, Graduation Requirements	39
4	Hearing and Decision, Adoption of Proposed Statement of Decision - Incorrect Reduction Claim, Graduation Requirements	7
5	Informational Hearing, Adoption of Proposed Parameters and Guidelines, County Treasury Oversight Committees (Postponed)	9
6	Informational Hearing, Adoption of Proposed Parameters and Guidelines, Mentally Disordered Offenders' Extended Commitment Proceedings	7
7	Informational Hearing, Adoption of Proposed Parameters and Guidelines, Extended Commitment, Youth Authority	7
8	Informational Hearing, Adoption of Proposed Parameters and Guidelines, Elder Abuse, Law Enforcement Training	7
9	Adoption of Proposed Statewide Cost Estimate, Seriously Emotionally Disturbed (SED) Pupils	7
10	Executive Director's Report	50

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1 BE IT REMEMBERED that on Thursday, the 24th
2 day of May, 2001, commencing at the hour of
3 9:32 a.m., thereof, at the State Capitol, Room 126,
4 Sacramento, California, before me, Yvonne K. Fenner,
5 a Certified Shorthand Reporter in the State of
6 California, the following proceedings were had:
7 --o0o--
8 CHAIRPERSON PORINI: All right. We will go
9 ahead and call to order the meeting of the Commission on
10 State Mandates for May 24th. May I have roll call.
11 MS. HIGASHI: Mr. Beltrami.
12 MR. BELTRAMI: Here.
13 MS. HIGASHI: Mr. Harrigan.
14 MR. HARRIGAN: Here.
15 MS. HIGASHI: Mr. Lazar is absent due to City
16 business.
17 Mr. Sherwood.
18 MR. SHERWOOD: Here.
19 MS. HIGASHI: Ms. Steinmeier.
20 MS. STEINMEIER: Here.
21 MS. HIGASHI: Ms. Williams.
22 MS. WILLIAMS: Here.
23 MS. HIGASHI: Ms. Porini.
24 CHAIRPERSON PORINI: Here.
25 All right. We have a quorum.

1 there any items off calendar?

2 MS. HIGASHI: Yes. We have postponed item 5,

3 proposed parameters and guidelines for County Treasury

4 Oversight Committees, and this item was postponed on the

5 request of the County of San Bernardino, the claimant.

6 CHAIRPERSON PORINI: All right. So item 5 is

7 removed from the calendar for this month, and we'll see

8 it next month.

9 MS. HIGASHI: Our first hearing item is item 2,

10 the test claim on the Brown Act Reform. This test claim

11 will be presented by Ellen Fishman.

12 MS. FISHMAN: Good morning.

13 This test claim addresses four sections of the

14 Government Code, sections 54952, 54954.2, 54957.1, and

15 54957.7, that relate to the open meeting provisions of

16 the Brown Act as they apply to local agencies and school

17 districts.

18 Staff finds that section 54952 has created two

19 new legislative bodies which are required to comply with

20 all provisions of the Brown Act. One is local bodies

21 created by state or federal statute, and, two, standing

22 committees with less than a quorum of the members of the

23 legislative body that has a continuing subject matter

24 jurisdiction or a meeting schedule fixed by formal

25 action.

1 Staff also finds that permanent and temporary
2 advisory bodies, except bodies composed solely of less
3 than a quorum of the members of the legislative body,
4 are now required to comply with the full notice and
5 agenda requirements of the Act. Under prior law,
6 advisory bodies were only required to provide the time
7 and place of their regular meetings in their bylaws; no
8 other notice was required.
9 The test claim legislation also added new closed
10 session requirements as listed on page 3 of the final
11 staff analysis. Section 54954.2 now requires all
12 legislative bodies to prepare and post an agenda which
13 includes a brief general description of each item to be
14 discussed in closed session.
15 Section 54957.7 requires the legislative body to
16 disclose in open meeting prior to holding any closed
17 session each item to be discussed in the closed session.
18 In addition, this section requires the legislative body
19 to reconvene in open session prior to adjournment and
20 report the actions and votes taken in closed session for
21 five new items identified in section 54957.1.
22 Section 54957.1 also requires the legislative body
23 provide copies of all closed session documents to the
24 public under certain circumstances.
25 Staff finds these four sections constitute a new

1 program or higher level of service under article XIII B,
2 section 6, of the California Constitution and imposes a
3 reimbursable state-mandated program on the legislative
4 bodies of local agencies and school districts as defined
5 for the activities listed on page 3 of the final staff
6 analysis.
7 Will the parties and witnesses please state your
8 name for the record.
9 MR. BURDICK: Allan Burdick on behalf of the
10 California State Association of Counties.
11 MS. STONE: Pamela Stone, here on behalf of City
12 of Newport Beach.
13 MR. EVERROAD: Glen Everroad, City of Newport
14 Beach.
15 MR. ZEMITIS: Cedrik Zemitis, Department of
16 Finance.
17 MR. LOMBARD: Jim Lombard, Department of
18 Finance.
19 MS. HIGASHI: Would all of you please raise your
20 right hands. Do you solemnly swear or affirm that the
21 testimony which you are about to give is true and
22 correct based upon your personal knowledge, information,
23 or belief?
24 MULTIPLE SPEAKERS: (Various affirmative
25 responses.)

1 CHAIRPERSON PORINI: All right. Would the
2 claimants want to begin?
3 MS. STONE: Yes, please. Good morning,
4 Commissioners and Madame Chair.
5 I think that the staff has done a yeoman's job
6 in performing the analysis of this very complicated
7 matter. When Brown Act Reform was initiated, it was in
8 response to a substantial amount of confusion, I
9 believe, on behalf of local government as to what
10 boards, commissions, et cetera, were or were not covered
11 by the Brown Act and also in light of the legislative --
12 in light of Senator Kopp's desire to -- who was the
13 proponent of the legislation -- to have more access to
14 the public.
15 We are in concurrence with the draft staff
16 analysis and -- or with the final staff analysis which
17 has been presented to you, and we would like to make one
18 comment. And that is, as we both stressed in the
19 supplemental filing filed by the City of Newport Beach,
20 which is on page 335 of your documents as well as in
21 some of the materials that were provided, because of the
22 technical changes that were made, which were extremely
23 technical as you can tell from the boxed analysis by
24 your staff member, Ms. Fishman, it was incumbent to
25 provide training to board members, advisory committee

1 members, commission members, on the changes in the Brown
2 Act.
3 Because, as you folks are aware from the Open
4 Meetings Act, in the event that you take any action
5 which is not properly before the board or commission,
6 advisory board, commission, and not properly
7 encapsulated in the brief statement, which sometimes
8 unfortunately cannot be as brief as one would want, any
9 actions taken thereupon are void, and therefore in order
10 to avoid litigation and to explain the technicalities in
11 the changes basically statewide, there were substantial
12 trainings both at city level, county level,
13 organizational levels.
14 So due to the fact that there had been some
15 differences between claimants and the Commission
16 regarding the items which are not contained within the
17 statement of decision, we would like your Commission to
18 understand that we will be asking for a training
19 component as part of the initial reimbursement,
20 particularly with the transition.
21 And we will be happy to respond to any
22 statements made by the Department of Finance or any
23 questions your Commission may have.
24 CHAIRPERSON PORINI: All right. Do the rest of
25 the witnesses for the claimants want to make statements?

1 MR. BURDICK: I'm just here to answer questions.
2 CHAIRPERSON PORINI: All right.
3 MR. EVERROAD: Likewise here for questions.
4 CHAIRPERSON PORINI: Okay. Mr. Zemitis.
5 MR. ZEMITIS: Thank you.
6 Cedrik Zemitis, Department of Finance.
7 The staff analysis does not change our position
8 as we described in our 1995 submittal because we believe
9 the test claim statutes primarily clarify existing law,
10 No. 2, were a local request and, three, local government
11 representatives at the time reported savings and no new
12 costs as a result of the statutes.
13 First, regarding clarifying existing law, we
14 believe that the notice and agenda requirements simply
15 clarify the law prior to the test claim statute,
16 specifically, existing law required the posting of an
17 agenda containing a brief description of each item to be
18 discussed at the meeting, including items to be
19 discussed in closed session, does not require any new
20 activities from prior law, which already required the
21 posting of each item to be discussed at the meeting.
22 Because closed session items are discussed at the
23 meetings, this would not be an additional requirement in
24 our opinion.
25 Second, local request, we would note that at the

1 time the test claim statute was considered by the
2 legislature, it was clear that these bills were
3 introduced at the behest of local governments. The
4 author of most of the bills stated for the record at the
5 time that existing law was amended specifically at the
6 request of local agencies. Indeed, numerous legislative
7 committee analyses support the author.
8 Third, local governments report savings and no
9 new costs. Regarding the agenda descriptions,
10 amendments were taken at the request of local government
11 to limit the brief description already required to not
12 exceed 20 words, which was reported to result in
13 savings. And on cost and savings in general, I quote
14 from the Assembly Ways and Means Committee at the time:
15 "The League of California Cities states
16 that this bill would provide savings to local
17 governments by simplifying and clarifying the
18 provisions of the Brown Act," end quote.
19 In addition, the California School Boards
20 Association at the time stated that clarification of the
21 existing Brown Act will not create additional costs to
22 local government. In addition, the California State
23 Association of Counties and numerous other local
24 entities all officially supported the legislation
25 because it would simplify and clarify the Brown Act with

1 no additional costs.

2 While we do not have resolutions from all of the

3 affected local entities, which would be in the thousands

4 literally, representatives of those entities clearly

5 sponsored the legislation as well as reported savings

6 and no new costs. Therefore we believe any mandate

7 would not be reimbursable.

8 CHAIRPERSON PORINI: All right. Mr. Lombard?

9 MR. LOMBARD: Jim Lombard, Depart of Finance.

10 Just reiterating Mr. Zemitis' testimony, it was

11 our understanding when the legislation went through that

12 it would result, as reported by the representatives of

13 local entities, in some cost savings. And to the extent

14 the Commission adopts the staff recommendation, we would

15 request that you consider providing something in the

16 analysis to provide for offsetting savings as we

17 understood when the legislation was passed.

18 CHAIRPERSON PORINI: All right. Questions from

19 Members?

20 MR. BELTRAMI: Madame Chairman?

21 CHAIRPERSON PORINI: Yes.

22 MR. BELTRAMI: I thought it was interesting that

23 that newspaper publishers are interested in this case.

24 CHAIRPERSON PORINI: Always.

25 MR. BELTRAMI: Since they normally are so

1 supportive of the Brown Act in general. But Senator
2 Kopp, now Judge Kopp, indicates that he introduced this
3 because of requests by local agencies. Mr. Burdick,
4 you're speaking on behalf of CSAC.
5 MR. BURDICK: I think, Commissioner Beltrami and
6 Members -- Allan Burdick, representing the California
7 State Association of Counties -- this legislation really
8 emanated, I think, from two acts. One is actually the
9 mandate that was adopted by this Commission on the Brown
10 Act.
11 And as you know, that was a very controversial
12 issue as to what is or what was not reimbursable. And
13 one of the big issues that was in that was, you know,
14 what is a brief written statement and what is really
15 required by the 1986 amendment in which this Commission
16 found that to be a reimbursable state mandate.
17 And so I think generally Mr. Kopp got the
18 parties together and said let's all try and see if we
19 can't come to some type of an agreement on what is
20 currently covered as well as there was some interest,
21 particularly by some of the other parties, to deal with
22 executive session items and clarifying certain other
23 things such as serial meetings and so forth, whether
24 they were covered.
25 So this was actually, you know, a very lengthy

1 series of discussions and meetings between the newspaper
2 publishers, the California Taxpayers Association, who
3 normally are the two groups who are particularly
4 interested in seeing a more open process and so forth,
5 and the local government representatives. And really it
6 was kind of in a sense facilitated by the Attorney
7 General and Ted Prim, who I think many of you may know
8 who's been one of the leading experts relating to Open
9 Meeting Act issues.
10 I think as a result of this there was general
11 agreement that this did a variety of things. One, it
12 did bring about a lot of clarifications. It did provide
13 for some expansions in other areas. And in some areas
14 it defined things that some attorneys felt may have been
15 covered under the Brown Act and others did not. And as
16 you know, when you have 58 county counsels and attorneys
17 representing 460 or 70 cities and people, you know,
18 commenting at the school boards, there was a lot of
19 disagreement about what is and what is not. And so the
20 real intent was to provide as much clarification as
21 possible to that particular act.
22 I think that one of the things that you might
23 note is that actually in the claiming instructions for
24 the Brown Act mandate, which is now reimbursable, the
25 Controller did add to that the 20-word description of

1 what is intended to be a brief written statement, that
2 it -- that is set as kind of a guideline to give people
3 what is a feeling for what you do mean by a brief
4 written statement. Because there was a lot of
5 disagreement by attorneys out there whether, you know,
6 what -- what did that mean? Is that a half a page? Is
7 that a page, you know, in terms of what does it take to
8 adequately describe something.
9 And so that was placed as a guideline. And
10 subsequently, even though it is in this legislation, it
11 was actually put into the claiming instructions for the
12 current Brown Act mandate.
13 What this really does is I think it clarifies
14 everything, but I think it is clear that in some areas
15 it does expand upon what is in the current Brown Act.
16 If this is then now eventually hopefully brought
17 together in one set of parameters and guidelines with
18 the existing Brown Act, there will be some clarification
19 and there possibly will be some areas where agencies in
20 the past, their attorneys have told them that that
21 committee was under the Brown Act would no longer be,
22 that they may no longer be claiming costs associated
23 with those particular meetings.
24 So it was very -- this is one of those issues
25 where it was always difficult to look at. This is not a

1 high-priced mandate. This is essentially some kind of
2 tinkering with the process. But I think clearly there
3 are additional requirements.
4 And on the training component, as you know, this
5 is an extremely important law for elected officials,
6 city clerks, county counsel, city attorneys. And the
7 Attorney General, along with some others, did conduct a
8 number of training sessions for both local attorneys as
9 well as local elected officials and clerks on this
10 process to help them understand the differences and try
11 to clarify this particular law.
12 In addition, there was another publication that
13 was developed by many of the parties under the
14 leadership of the League of California Cities, which
15 attempted to go out -- it was like in a magazine form,
16 in a sense, and clarify exactly now what the changes
17 were and how people were now interpreting the Ralph M.
18 Brown Act.
19 So I think in response to the question, I think
20 that there was just agreement by everybody that there
21 would be -- this would be a good thing. Senator Kopp
22 was very interested in doing it. And I think at that
23 point that the local agencies did not want to appear to
24 be obstructionists but indicated they would be willing
25 to work in good faith with everybody else in doing it.

1 I don't think that any local agency specifically
2 asked the Senator -- then Senator Quentin Kopp to
3 introduce this legislation. I think at that point in
4 time, they probably would have been just as happy if
5 Mr. Kopp had focused his attention in other areas.
6 CHAIRPERSON PORINI: Other questions?
7 MS. STEINMEIER: Yeah. I have some, a couple
8 things.
9 CHAIRPERSON PORINI: Ms. Steinmeier.
10 MS. STEINMEIER: Two thoughts, one to Ms. Stone.
11 The training component?
12 MS. STONE: Yes, ma'am.
13 MS. STEINMEIER: I believe that's proper for Ps
14 and Gs because there's nothing specifically in the bill
15 that mentions training, although it naturally flows from
16 the mandate. It should be by the mandate. So I think
17 you can -- pretty consistently in the last several --
18 the last year or two, we've done that, the training
19 falls in the Ps and Gs, so --
20 MS. STONE: I will concur with you. I just wish
21 to raise the issue now so that should it arise at the P
22 and G level that we can remember that we did, in fact,
23 raise this in the test claim process as an activity.
24 MS. STEINMEIER: Okay. As long as we understand
25 that, because --

1 MS. STONE: That's correct.

2 MS. STEINMEIER: -- I think any training would

3 flow into the Ps and Gs.

4 Secondly, on this issue that Mr. Beltrami --

5 follow-up on Mr. Beltrami's question, because I was on a

6 school board before and after this change. So I can

7 tell you, yeah, there really was a change. And part of

8 it -- part of it was the way you look at the Brown Act,

9 but also it did necessitate more work on the part of the

10 people who prepared the agenda.

11 More time was spent in making sure that that

12 brief statement was very accurate. Because we could be

13 challenged if we didn't -- we weren't descriptive enough

14 of the item, both the closed session and open session

15 items, but I think particularly the closed session,

16 which is what Mr. Kopp and the newspaper industry was

17 very concerned about at the time. Those were the

18 issues.

19 And as far as the School Boards Association is

20 concerned, they may have said they didn't anticipate any

21 costs, but there was a lot of opposition to parts of it.

22 It was pretty draconian in its original form and was

23 eventually modified down to -- to its final form.

24 Yes, clarification was helpful, but I think it

25 went beyond clarification of the existing Brown Act, and

1 that's my own personal experience having sat on a school
2 board before and after the, you know -- this change came
3 about. So I generally support the staff analysis and
4 would like to hear from everybody else.
5 CHAIRPERSON PORINI: All right. Mr. Harrigan.
6 MR. HARRIGAN: I do have a question for the
7 claimants. The Department of Finance provided an
8 additional condition as far as not just, you know, what
9 the staff analysis recommended, but also looking at the
10 costs that you may have saved.
11 MS. STONE: Mr. --
12 MR. HARRIGAN: Do you have any response to that?
13 MS. STONE: Yes, Mr. Harrigan. I also was -- in
14 a prior incarnation I was in the county counsel's office
15 in the county of Fresno where I was there both prior to
16 and subsequent to the amendments to the Brown Act.
17 I can tell you without question that up until
18 the time I departed that office approximately three
19 years ago, that the requirements of having to do, for
20 example, let's just take the board of supervisors
21 agenda, the necessity for compliance particularly with
22 the closed session agenda with which I was unfortunately
23 well too familiar on a number of occasions, it was just
24 a substantial issue on what information had to be
25 disclosed, how to be able to preserve your posture in

1 litigation and other matters, yet being able to disclose
2 the information that was requisite under the Brown Act.
3 Furthermore, because of the Brown Act
4 amendments, I also was involved with a number of
5 advisory boards and commissions. And after the
6 implementation of this particular legislation, informal
7 agendas were no longer the rule because it was very
8 clear that they were now covered within the parameters
9 of the Brown Act, and therefore they were being sent to
10 counsel for review, whereas prior to that point in time
11 they had been done by a departmental secretary with
12 maybe review by the department head or division head
13 that was responsible for serving as staff to that
14 particular committee.
15 So my particular experience was that from a
16 situation where other than with the regular agenda for
17 the board of supervisors or the Planning Commission, you
18 now had a substantially greater legal review of all
19 boards, commissions, committees, by counsel, substantial
20 issues with regard to closed session. That was probably
21 one of the biggest issues, is having a closed session.
22 I would have liked to have seen cost savings,
23 but unfortunately I have not seen any documentation of
24 any cost savings. The desire to have or the averment
25 that a 20-word brief summary would result in cost

1 savings I don't think is accurate because a lot of times
2 you have agenda items that have a number of actions to
3 be taken. And there is no way that all of the actions
4 that are to be taken on a particular article or issue
5 can be described in 20 words and yet still be valid
6 under the Brown Act.
7 Because the desire, of course, is not to have
8 any legislative action, were it actually taken, be
9 determined void in the court for failure to have had an
10 adequate description. So although I know from local
11 government's perspective you're always hunting for a
12 cost savings, unfortunately this one did not bring about
13 any.
14 MR. HARRIGAN: Thank you.
15 CHAIRPERSON PORINI: Further questions?
16 Mr. Beltrami.
17 MR. BELTRAMI: Ms. Stone, doesn't it bring about
18 a savings if your counsel doesn't have to struggle with
19 an interpretation if it's been clarified?
20 MS. STONE: There is no longer a struggle with
21 regard to what departments -- pardon me, what advisory
22 boards, commissions, committees, et cetera, come within
23 the Brown Act. That is clearly no struggle.
24 However, what is a struggle then is that you
25 have to review more agendas for more committees,

1 commissions, et cetera. And if you will note that
2 neither under the Open Meetings Act nor under this
3 particular test claim have we claimed for the costs
4 involved in determining whether or not any particular
5 board, commission, or committee falls within or without
6 the parameters of the Brown Act.
7 So that is basically where the big -- if there
8 were to be a savings, it would have been in determining
9 that you don't have -- if, for example, Advisory Board A
10 is not within the Brown Act, you don't have to comply
11 with all the notification requirements. And that
12 struggle adventitia is what determines whether or not
13 it's in or out. But no one has ever claimed that that
14 particular activity, determining whether or not
15 something falls within the parameters of the Open
16 Meetings Act or Brown Act, is a reimbursable mandate.
17 MR. BELTRAMI: I have no -- I have no question
18 that there's added cost. I think that's pretty clear,
19 but I get the feeling that you folks thought this was a
20 wonderful thing at the time.
21 MS. STONE: I don't think so.
22 MR. BELTRAMI: No. So Senator Kopp is wrong in
23 your statement to me?
24 MS. STONE: I would say he's --
25 MR. BELTRAMI: He specifically says on one point

1 that it was asked for, section 54954.2 was amended
2 specifically at the request of local agencies --
3 MS. STONE: I think he's --
4 MR. BELTRAMI: -- to reduce the costs of any
5 posting agendas.
6 MS. STONE: I think he was optimistic.
7 MR. BELTRAMI: Well --
8 MR. BURDICK: Well, I think that --
9 MR. BELTRAMI: -- I don't know if he was
10 optimistic or --
11 MR. BURDICK: I think -- Commissioner Beltrami,
12 I think the statement is that it would reduce -- you
13 know, if you look at some agencies, there may have been
14 some agencies who were confused who may have suggested
15 to him that they would like to see some clarification.
16 And clearly there were, I think, differences of
17 opinion amongst the attorneys out there that represent,
18 particularly many of those firms who represent cities
19 and also amongst county counsels, as how to interpret
20 some of those items, although they clearly would
21 interpret it one way or the other for their agency. I
22 mean, I don't think they had a problem saying this is --
23 this is how we interpret it. This is how we're going to
24 do it for our agency. I think what this brought was
25 consistency.

1 I think on the savings side, the only area that,
2 you know, possibly might do some savings is possibly
3 some reductions in the costs of other mandate that you
4 have related to Open Meetings and the fact that some
5 people now may be saying that we're not going to be
6 telling those agencies they have to post an agenda and
7 claim costs associated with that, because it is now
8 clear that they -- that those particularly advisory
9 bodies do not qualify as an open meeting.
10 MS. STONE: Yes, they do.
11 MR. BURDICK: And so I know in some cases there
12 were areas where they were saying that some agencies who
13 had interpreted the law possibly wrong in the first
14 place of saying, yeah, that is subject to the Brown Act,
15 may now be saying -- telling their local agency it is
16 not subject to the Brown Act.
17 MR. BELTRAMI: The newspaper publishers indicate
18 that the legislation was sponsored by virtually every
19 lobbying organization representing local government. Is
20 that incorrect?
21 MR. BURDICK: I think the final analysis was --
22 I would come to a little bit of a conclusion that the
23 Commission talked to this morning, that sometimes I
24 think at the end everybody felt we will buy this
25 particular package. I think it was commented on by

1 Member Steinmeier that the initial bill went far beyond
2 what it was, and I think everybody agreed that this
3 final bill was a reasonable compromise, that everybody
4 in this particular case was giving something up, and
5 therefore I think everybody agreed to support it.
6 But I do not think that if -- if the bill had
7 been introduced and there was a vote taken on that bill
8 at that point in time that you would have had the
9 support then. This essentially was a negotiated
10 agreement that in the final analysis everybody felt,
11 given the situation and the fact there was going to
12 probably be a bill to expand and deal with the scope of
13 the Open Meetings Act, that that was a reasonable
14 proposal.
15 MR. EVERROAD: Chairperson Porini and Member
16 Beltrami, the City of Newport Beach did not sponsor the
17 Kopp bill; however, we did find significant relief in
18 the clarification that was provided by that bill. Our
19 attorney had erred in deciding which committees and
20 boards that had been established were subject to this
21 requirement, the agenda requirement.
22 MR. BELTRAMI: Did the League?
23 MR. EVERROAD: I can't speak for the League.
24 MR. BELTRAMI: And you're members of the League,
25 aren't you?

1 MR. EVERROAD: I am. Newport is, yes.

2 The legal fees, the legal costs that we had in

3 our attorney's review of these boards and commissions is

4 now relieved. But as Counsel Stone related, we had

5 never claimed for that.

6 However, every study session agenda now is

7 reviewed by our city attorney, and every report from the

8 results of that study session or closed session are now

9 prepared by our city attorney's office to be read by our

10 mayor. So we have far more involvement in the City of

11 Newport Beach with our legal office in the reporting

12 from these closed sessions that didn't exist prior to

13 the legislation.

14 CHAIRPERSON PORINI: Further questions or

15 comments?

16 MS. STEINMEIER: Do you want a motion -- or

17 Department of Finance needs to respond to that, right?

18 CHAIRPERSON PORINI: No. I was just looking at

19 page 1 -- 281 and 282, the analysis provided in SB 1140

20 that would seem to contradict that, but would like

21 comments from staff on that, either -- Ellen, if you

22 have any comments, at the bottom of the page.

23 MS. FISHMAN: Regarding the supporters of the

24 bill?

25 CHAIRPERSON PORINI: Yes. And the statement

1 that's made in the last paragraph of the analysis.

2 MS. STONE: If I may speak to that just very

3 briefly, Madame Chairman. We believe there is a

4 substantial difference between support and sponsored.

5 And obviously local government has the ability to

6 support or oppose any legislation which is pending

7 before the California legislature, and that is not a

8 basis for denying a mandate.

9 The issue under 17556 of the Government Code is

10 whether or not a particular governmental entity has

11 sponsored the legislation, and therein lies the

12 difference. And so therefore I believe that the issue

13 that it was supported by local government really has no

14 bearing upon whether or not this is a test claim. The

15 issue is whether or not any local governmental entity

16 sponsored the legislation. And there has been no

17 evidence whatsoever that any local governmental agency

18 sponsored the legislation in question, and that is the

19 difference.

20 MR. SHERWOOD: Madame Chair.

21 CHAIRPERSON PORINI: Yes, Mr. Sherwood.

22 MR. SHERWOOD: May I ask staff to comment on

23 that.

24 MS. SHELTON: Let me just clarify. In

25 Government Code section 17556, that's the statute that

1 gives all the exceptions to costs mandated by the State,
2 and one of the sections -- this is under
3 subdivision (a), which says that there are no costs
4 mandated by the State when a local agency or school
5 district requests legislative authority for the statute.
6 But in order to show that they have sponsored the
7 legislation, there has to be evidence of a resolution
8 from the board of supervisors, the school board, or the
9 governing body. And there's no evidence of a resolution
10 from any of these local bodies for this legislation.
11 CHAIRPERSON PORINI: Yes.
12 MR. BURDICK: I just wanted to comment if I
13 could on the rest of that sentence on 282. If you look
14 at that where they supported it without creating giant
15 new state-mandated costs, I think what kind of the
16 general feeling of everybody was that this was a
17 relatively modest change. This wasn't large or major
18 that -- I don't think it says there are -- it was
19 intended to say there are no. I think it was intended
20 to say that there probably are some minor costs
21 associated with bringing this into place, but that was
22 one of the major issues of the whole legislation,
23 because it is -- there was an earlier bill that was
24 actually vetoed by then Governor Wilson because of the
25 mandated costs. And they wanted to make sure that the

1 bill did not contain major substantial costs. And I
2 think most people felt that these costs -- and I think
3 the proponents here today would agree that what we're
4 talking about are relatively minor costs associated with
5 this particular mandate.
6 What we're really -- the original intent when
7 this mandate was filed initially by the County of Santa
8 Clara some years ago, it was filed in an attempt to
9 clarify the parameters and guidelines, to bring them up
10 to date. They were challenged that they were seeking
11 major changes or reform and simply, if you will, kind of
12 the accusations and the possible political ramifications
13 of that brought them to the point of actually asking
14 somebody else to pick this up. Because it was clearly
15 only their intent to say, look, we have a new law. We
16 have an existing mandate. We think the two should be
17 harmonized into one so that we're clearly dealing with
18 what the current law is.
19 And that's why this issue, because it has been
20 such a sensitive issue and because we had all of the
21 other discussion going on relative to the Brown Act up
22 until last fall, that this -- this proposal sat in limbo
23 for a number of years. I don't know if Paula could --
24 your executive director could probably tell when it was
25 filed, but I think it was filed about five years ago or

1 more. But it was really intended to be simply kind of a
2 clarification of the old -- of the existing mandate.
3 MR. BELTRAMI: I'm --
4 CHAIRPERSON PORINI: Mr. Beltrami.
5 MR. BELTRAMI: I'm disappointed, Madame Chair,
6 that the newspaper folks aren't here, since they
7 specifically say it's sponsored in their letter of '95.
8 And I suppose we can't subpena Judge Kopp to come, so I
9 guess we have to rely on the testimony here.
10 But that's my -- as I say, there's no question
11 in my mind that there are costs, obviously, and that it
12 was really sort of -- in some ways I thought this was
13 not a very good piece of legislation from the local
14 government's perspective, but that's neither here nor
15 there.
16 But it's just this issue of whether -- who --
17 who asked for this. And I'm sure it was sort of a joint
18 homogenation of it since it started.
19 MR. BURDICK: Just a final comment to
20 Commissioner Beltrami. I think that this was one of
21 Senator Kopp's particular areas of interest. And I
22 don't think -- I think the sponsor of this bill is
23 Senator Quentin Kopp.
24 I think that he made it clear he, in fact,
25 carved this out as one of the areas that he wanted to be

1 the leader on and that therefore he was going to be the
2 one to carry legislation. Whether other people stepped
3 up and said, you know, we'll serve as the sponsoring
4 agency if you want, I find that a little -- knowing
5 Quentin almost probably as well as you do, Mr. Beltrami,
6 know that his ego probably would not prevent him saying,
7 yes, this is my bill. I sponsored this particular
8 legislation.
9 And I say that in the best of terms to my good
10 friend Quentin Kopp.
11 CHAIRPERSON PORINI: All right. Any further
12 comment or questions?
13 MS. STEINMEIER: Well, was Paula going to answer
14 the question?
15 MS. HIGASHI: I was just going to refer you to
16 page 4 of the staff analysis where we have a chronology.
17 And any questions you have about dates would be answered
18 there.
19 MS. STEINMEIER: Thank you.
20 CHAIRPERSON PORINI: Ms. Steinmeier.
21 MS. STEINMEIER: I wanted to answer your
22 question. I think this is a matter of timing. By the
23 time these organizations and particularly the California
24 School Boards Association was in support, this was near
25 the end of the process. They initially were in

1 opposition unless it was amended. So it was one of
2 those things there's this horrible draconian bill and if
3 we can make it workable for us, then eventually they
4 were put in the support category. But they wouldn't
5 have been initially in support. I know that's not true
6 for the School Boards Association.
7 CHAIRPERSON PORINI: Well -- and my comment is
8 that that may well be true, but in the legislative
9 process they still have the option of opposing it the
10 entire way through. They must have felt that the bill
11 was acceptable to them when they put their name on the
12 analysis that they were in support, so.
13 MS. STEINMEIER: At the end of the process.
14 CHAIRPERSON PORINI: Well, anyplace in the
15 process is my point. It doesn't make any difference.
16 MS. STEINMEIER: Supporting and sponsoring the
17 bill really are two different things.
18 CHAIRPERSON PORINI: Supporting and sponsoring
19 are two different things, and unfortunately we don't
20 have access to the letters that were actually sent to
21 Senator Kopp.
22 MS. STEINMEIER: Right.
23 CHAIRPERSON PORINI: But -- yes.
24 MS. STEINMEIER: That's a missing piece of the
25 record.

1 CHAIRPERSON PORINI: Right.

2 MS. STEINMEIER: Thank you. Can I make a

3 motion?

4 CHAIRPERSON PORINI: Mr. Beltrami.

5 MR. BELTRAMI: Just one more question of staff,

6 Madame Chairman.

7 Do -- when we work on the Ps and Gs, we'll be

8 looking at both sides, possible savings as well as cost

9 implication?

10 MS. HIGASHI: The normal process is that the

11 claimant -- if this test claim were to be approved, the

12 claimant would submit proposed parameters and

13 guidelines. Once those proposed parameters and

14 guidelines come in, they would be sent out for comment

15 and review and we would look at the entire package.

16 CHAIRPERSON PORINI: Mr. Beltrami, were you

17 asking staff the question if they need to

18 specifically -- the staff's recommendation needs to talk

19 about offsetting savings? Was that --

20 MR. BELTRAMI: I thought it did, actually,

21 somewhere in there. But since the test claim here, I

22 want to make sure that that's covered as well.

23 MS. SHELTON: Mr. Beltrami, I may be able to

24 answer too. Also in Ps and Gs the claimants are only

25 entitled to claim their increased costs. So if there

1 were, indeed, any cost savings, you know, because of the
2 clarifications provided, they wouldn't be eligible for
3 reimbursement for that.
4 MS. HIGASHI: But let me just add, it is a
5 standard paragraph.
6 MR. BELTRAMI: In there?
7 MS. HIGASHI: In the parameters and guidelines.
8 CHAIRPERSON PORINI: All right. Any further
9 questions or comments from members? Ms. Steinmeier.
10 MS. STEINMEIER: Oh, I'd like to move approval
11 of the staff analysis.
12 MR. BELTRAMI: Second.
13 CHAIRPERSON PORINI: We have a motion by
14 Ms. Steinmeier and a second by Mr. Beltrami. Any
15 further discussion? Roll call, please.
16 MS. HIGASHI: Mr. Beltrami.
17 MR. BELTRAMI: Yes.
18 MS. HIGASHI: Mr. Harrigan.
19 MR. HARRIGAN: Yes.
20 MS. HIGASHI: Mr. Sherwood.
21 MR. SHERWOOD: Yes.
22 MS. HIGASHI: Ms. Steinmeier.
23 MS. STEINMEIER: Aye.
24 MS. HIGASHI: Ms. Williams.
25 MS. WILLIAMS: No.

1 MS. HIGASHI: Ms. Porini.

2 CHAIRPERSON PORINI: No.

3 MS. HIGASHI: Motion carries.

4 MS. STONE: Thank you very much, Commission

5 Members.

6 CHAIRPERSON PORINI: All right. Next item.

7 MS. HIGASHI: Item 3, incorrect reduction claims

8 on Graduation Requirements. Cathy Cruz will present

9 this item, and Sean Avalos will respond to any

10 questions.

11 MS. CRUZ: Good morning.

12 The staff analysis addresses the incorrect

13 reduction claims filed by eight school districts on the

14 Graduation Requirements program. The claimants are

15 Palos Verdes Peninsula Unified School District,

16 Sweetwater Union High School District, Vista Unified

17 School District, San Luis Coastal Unified School

18 District, Lompoc Unified School District, Huntington

19 Beach Unified School District, Fresno Unified School

20 District, and Santa Monica-Malibu Unified School

21 District.

22 Section 1185(c) of the Commission's regulations

23 permit analyses of IRCs from different local entities to

24 be combined if the claims contain similar issues. Here

25 all eight claimants allege that the State Controller's

REPORTER'S CERTIFICATE

I hereby certify the foregoing hearing was held at the time and place therein named; that the proceedings were reported by me, a duly certified shorthand reporter and a disinterested person, and was thereafter transcribed into typewriting.

In witness whereof, I have hereunto set my hand this 31st day of May, 2001.

Yvonne K. Fenner

Yvonne K. Fenner
Certified Shorthand Reporter
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STATE MANDATES

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ORIGINAL

TIME: 9:30 a.m.

DATE: June 28, 2001

PLACE: State Capitol, Room 126
Sacramento, California

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REPORTER'S TRANSCRIPT OF PROCEEDINGS

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Reported By: YVONNE K. FENNER, CSR License #10909, RPR

1 A P P E A R A N C E S

2 COMMISSION MEMBERS

3 ANNETTE PORINI, Chairperson
4 Representative of B. Timothy Gage, Director
State Department of Finance

5 ALBERT P. "AL" BELTRAMI
6 Public Member

7 JOHN HARRIGAN
Representative of Kathleen Connell
8 State Controller

9 JOHN S. LAZAR
City Council Member
10 Turlock City Council

11 WILLIAM SHERWOOD
Representative of Philip Angelides
12 State Treasurer

13 JOANN E. STEINMEIER
School Board Member
14 Arcadia Unified School District

15 SHERRY WILLIAMS
Representative of Steven Nissen, Director
16 Office of Planning and Research

17

18 COMMISSION STAFF

19 PAULA HIGASHI, Executive Director

20 CAMILLE SHELTON, Staff Counsel

21 SEAN P. AVALOS, Staff Counsel

22 KATHY LYNCH, Staff Counsel

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AGENDA INDEX

AGENDA ITEM		PAGE
1	Approval of Minutes, May 24, 2001	7
2	Hearing and Decision, Test Claim, Comprehensive School Safety Plans	10
3	Hearing and Decision, Test Claim, Cal-Voter Program	40
4	Hearing and Decision, Proposed Statement of Decision, Test Claim, Brown Act Reform	7
5	Hearing and Decision, Proposed Statement of Decision, Incorrect Reduction Claims, Graduation Requirements	7
6	Informational Hearing, Adoption of Proposed Parameters and Guidelines, School District Fiscal Accountability Reporting (Postponed)	9
7	Informational Hearing, Adoption of Proposed Parameters and Guidelines, County Office Budget Process and Financial Statements (Postponed)	9
8	Informational Hearing, Adoption of Proposed Parameters and Guidelines, Employee Benefits Disclosure (Postponed)	9
9	Informational Hearing, Adoption of Proposed Parameters and Guidelines, Photographic Record of Evidence (Postponed)	9
10	Executive Director's Report	83

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1 That takes us to our first item of business. Do
2 you want to announce our consent calendar, items pulled
3 off?
4 MS. HIGASHI: Sure. Why don't we -- why don't
5 we go through item 1 first. Item 1 is the adoption of
6 the proposed minutes.
7 CHAIRPERSON PORINI: All right. We have the
8 minutes before us. Any corrections, changes, questions?
9 MS. STEINMEIER: Move approval.
10 CHAIRPERSON PORINI: We have a motion by
11 Ms. Steinmeier.
12 MR. SHERWOOD: Second.
13 CHAIRPERSON PORINI: A second by Mr. Sherwood.
14 All those in favor indicate with "aye."
15 MULTIPLE SPEAKERS: Aye.
16 CHAIRPERSON PORINI: Opposed?
17 Minutes carry.
18 MR. LAZAR: Abstain.
19 CHAIRPERSON PORINI: Mr. Lazar abstains.
20 MS. HIGASHI: The proposed consent calendar is
21 printed on blue paper. You should all have a copy of
22 it. It includes item 4, proposed statement of decision
23 on the Brown Act Reform test claim, and item 5, proposed
24 statements of decision on the incorrect reduction claims
25 for Graduation Requirements. In your binders you have

1 Exhibits A, B, C, D, E, F, G, and H. For today's
2 consent calendar, we would like to omit Exhibit E at the
3 request of the claimant on that matter.
4 So the proposed consent calendar includes item 4
5 and everything under item 5 except for Exhibit E, and
6 that is the Lompoc Unified School District.
7 CHAIRPERSON PORINI: All right.
8 MS. HIGASHI: Staff recommends approval.
9 CHAIRPERSON PORINI: Okay. Questions or
10 comments from Members on the consent calendar?
11 MR. BELTRAMI: What's the reason for E?
12 MS. HIGASHI: The claimants requested that it be
13 pulled because additional documentation was being
14 evaluated by the Controller's Office.
15 CHAIRPERSON PORINI: Okay. Do I have a motion
16 to adopt the consent calendar?
17 MR. BELTRAMI: So moved, Madame Chair.
18 CHAIRPERSON PORINI: Mr. Beltrami moves.
19 MR. HARRIGAN: Second.
20 CHAIRPERSON PORINI: Mr. Harrigan seconds. So
21 all those in favor indicate with aye.
22 MULTIPLE SPEAKERS: Aye.
23 CHAIRPERSON PORINI: Opposed?
24 Consent calendar is adopted.
25 MS. HIGASHI: All of the proposed parameters and

REPORTER'S CERTIFICATE

I hereby certify the foregoing hearing was held at the time and place therein named; that the proceedings were reported by me, a duly certified shorthand reporter and a disinterested person, and was thereafter transcribed into typewriting.

In witness whereof, I have hereunto set my hand this 5th day of July, 2001.

Yvonne K. Fenner

Yvonne K. Fenner
Certified Shorthand Reporter
License No. 10909

MINUTES

COMMISSION ON STATE MANDATES

State Capitol, Room 126
Sacramento, California
June 28, 2001

Present: Chairperson Annette Porini
Representative of the Director of the Department of Finance
Member William Sherwood
Representative of the State Treasurer
Member Sherry Williams
Representative of the Director of the Office of Planning and Research
Member John Harrigan
Representative of the State Controller
Member Albert Beltrami
Public Member
Member Joann Steinmeier
School Board Member
Member John Lazar
City Council Member

CALL TO ORDER AND ROLL CALL

Chairperson Porini called the meeting to order at 9:33 a.m. All members were present.

APPROVAL OF MINUTES

Item 1 May 24, 2001

Upon motion by Member Steinmeier and second by Member Sherwood, the minutes were adopted. Member Lazar abstained.

PROPOSED CONSENT CALENDAR

HEARINGS AND DECISIONS, PURSUANT TO CALIFORNIA CODE OF REGULATIONS, TITLE 2, CHAPTER 2.5, ARTICLE 7

PROPOSED STATEMENT OF DECISION – TEST CLAIM

Item 4 *Brown Act Reform* - CSM-4469
City of Newport Beach, Claimant
Statutes of 1993, Chapter 1136, 1137, and 1138
Statutes of 1994, Chapter 32

PROPOSED STATEMENTS OF DECISION: INCORRECT REDUCTION CLAIMS

Item 5 *Graduation Requirements* – CSM - 4435-I-03, 4435-I-05, 4435-I-07 to 12
Education Code Section 51225.3, Statutes of 1983, Chapter 498

A. Palos Verdes Peninsula Unified School District, Claimant

B. Sweetwater Union High School District, Claimant

C. Vista Unified School District, Claimant

D. San Luis Coastal Unified School District, Claimant

F. Huntington Beach Unified School District, Claimant

G. Fresno Unified School District, Claimant

H. Santa Monica-Malibu Unified School District, Claimant

The consent calendar consisted of Items 4 and 5. Ms. Higashi noted that Exhibit E of Item 5 was omitted at the request of the claimant because the Controller's Office was evaluating additional documentation. Member Beltrami moved for adoption of the consent calendar. With a second by Member Harrigan, the consent calendar was unanimously adopted.

HEARINGS AND DECISIONS, PURSUANT TO CALIFORNIA CODE OF REGULATIONS, TITLE 2, CHAPTER 2.5, ARTICLE 7

TEST CLAIMS

Item 2 *Comprehensive School Safety Plans*, 98-TC-01 and 99-TC-10
Kern High School District, Claimant
Education Code Sections 35294.1, 35294.2, 35294.6 and 35294.8
Statutes of 1997, Chapter 736, Statutes of 1999, Chapter 996

Sean Avalos, Staff Counsel, introduced this item. He noted that the test claim legislation deals with the prevention of crime and violence in the state's public schools. It makes school districts and county offices of education responsible for the overall development of safety plans and requires each school site to write and develop a comprehensive school safety plan.

Mr. Avalos noted that the Department of Finance submitted that grants are available to pay for the costs of the legislation and that the legislative intent requires school sites to write and develop the plans using existing resources. Staff found that grants and existing resources are not sufficient to offset the entire cost of the mandated program.

Mr. Avalos further noted that Mandated Cost Systems contended the test claim legislation requires school sites and districts to implement their safety plans. Based on legislative intent, staff found the Legislature only intended for sites to write and develop the plans.

Staff concluded that the test claim legislation imposes a reimbursable state mandated program and recommended the Commission adopt staff's analysis.

Parties were represented as follows: Keith Petersen for the test claimant; Paul Minney for Mandated Cost Systems; and Cheryl Black for the Department of Finance.

Mr. Petersen recognized that the staff recommendation is consistent with current policies and practices of the Commission. He noted for the record that the claimant had alleged additional

activities, found in a footnote of staff's analysis, which were not analyzed by staff because they were not specifically required under the test claim legislation. Mr. Petersen explained that staff had decided to address these activities in the parameters and guidelines.

Citing Education Code section 35294.2, subdivisions (e) then (c), Mr. Minney submitted that the Legislature intended the safety plans to be implemented and recognized grants are available to assist implementation. He disagreed with staff's finding that implementation is not required and submitted that, although implementation is not mentioned in one section, it is included in many other sections of the act. Mr. Minney questioned why the Legislature would require plans to be developed but not implemented. Mr. Minney further asked staff to clarify if it meant that the costs recognized in staff's recommendation would be offset by costs allowed under the *Emergency Procedures, Earthquake and Disasters* program.

Mr. Avalos submitted that the plain meaning of the language does not require implementation. He explained that, historically, writing and developing the plans was voluntary and implementation grants were an incentive. Now writing and developing is required, but the grant section has remained unchanged—the grants are still an incentive to implement the plan.

Regarding *Emergency Procedures, Earthquake and Disasters (CSM-4241)*, Mr. Avalos noted that staff found the parameters and guidelines for that mandate included all emergency disasters and not just earthquakes, with the exception of routine disasters which staff found to be reimbursable in this analysis. Mr. Minney asked staff if the existing *Emergency Procedures, Earthquake and Disasters* program would allow reimbursement for earthquake and disaster procedures so you could claim under that program or this, but not both. Mr. Avalos said yes.

As to implementation, Mr. Minney stated that although the grants were provided when the program was voluntary, he thought that in part it was recognized that once the plan was developed, it was meant to be implemented. He submitted that, though the Legislature did not want to mandate the plans at the time, they wanted to provide money to offset the costs of implementation. Therefore, he argued that the grants did not change the mandatory nature of implementing the plan once adopted, or the whole exercise would be pointless.

Mr. Petersen clarified that his reading of the statute is essentially that which is not included in *Emergency Procedures, Earthquake and Disasters* is included under the scope of this mandate.

Ms. Black concurred with staff that certain activities are reimbursable, but disagreed with staff on two issues. She argued that the development of procedures for reporting child abuse should not be reimbursable under this test claim because the Penal Code requirement identifying school personnel as mandated reporters has been in place since 1963 and so it is reasonable to expect those procedures have already been developed. Ms. Black further argued that, consistent with the legislation's stated intent that the plans be developed using existing resources, no reimbursements should be made for activities otherwise fundable through existing state, federal, or private funding. She submitted that the current $87 million in school safety block grant funding in the pending budget should be considered an existing resource. She requested the Commission find that claimants are eligible for reimbursement only after all other existing resources have been fully exhausted.

Regarding child abuse reporting, Member Steinmeier understood that the onus was on the individual and not the district. She submitted that this legislation represents a change because it gives the district responsibility to include child abuse reporting in the plan. Regarding

implementation, Member Steinmeier concurred with Mr. Minney that a reasonable person would agree one would implement plans created. She suggested it might be a parameters and guidelines issue.

Mr. Avalos replied that, if staff's current recommendation were adopted, it would bar the Commission from addressing it in the parameters and guidelines unless that section was withdrawn from the analysis.

Mr. Harrigan commented that a vehicle exists today to apply for grants for the implementation costs. Member Steinmeier countered that the money was for new school sites and is limited, but agreed it would be an offset if a district received a grant. Mr. Harrigan asked if there was sufficient funding. Mr. Avalos said that the funding was competitive, and limited to a certain amount per school, and thus the funding was not sufficient. He added that, if the Commission found implementation to be a mandate, the state would have to pay for the increased costs.

Chairperson Porini asked Ms. Black how the grant money was distributed. Ms. Black replied that it was for middle and high schools, but not grammar schools.

Mr. Petersen argued that grant money that can be used for any purpose is not the same as grant money specifically intended for a mandate. He argued that staff's analysis indicates that none of the grants apply to the planning and procedure manual, but only to implementation.
Mr. Petersen agreed that, if districts did use grant money for planning, they would have to offset it, but the grants are not required to be used for those activities.

Member Beltrami asked for an example of an implementation plan. Mr. Minney explained that the requirement for districts to have a procedure for child abuse reporting is new, and so even if a district had a procedure, it would not be precluded for reimbursement under the Government Code. He added that the main implementation costs would be for training and dissemination of the program.

Camille Shelton, Staff Counsel, added that the implementation costs for each school would be different because the test claim statute requires the plan be individualized for each school's needs. Member Beltrami asked if the response to a school incident would be reimbursed five years later after the plan is adopted. Mr. Petersen replied that the plan says you have to have a response to it. Then, he clarified that he was not suggesting that the response, or the plan having a response, is reimbursable. He added that there is not enough grant money out there, and that some of it requires matching funds, which reduces the offset.

Mr. Minney noted that both the development of the plan and the implementation in the School Bus Safety Plan was recently approved.

Member Sherwood tended to agree with staff's analysis regarding implementation. He thought it would be difficult to put this issue off to the parameters and guidelines. Member Sherwood then asked why the dress code was part of the mandate if it was voluntary. Mr. Avalos replied that the mandate does not require a dress code, but requires schools to define gang-related apparel for their dress code. So the development and implementation of the dress code policy is separate from, and not reimbursable under, this mandate. If schools opt to have a dress code, they can insert the definition of gang apparel into it. Member Sherwood did not want these activities connected. Mr. Avalos confirmed that they were not.

Member Steinmeier moved for approval of eliminating any references to implementation. Ms. Shelton clarified that the motion would remove the implementation paragraph from the staff analysis so the statement of decision would be the staff analysis without that paragraph and there would be no finding on implementation. Member Steinmeier agreed that was her intention. In response to Member Harrigan, Member Steinmeier added that she wanted to leave the door open to discuss the implementation issue in the parameters and guidelines.

Ms. Shelton explained that, under the Commission's regulations for parameters and guidelines, the Commission could include activities reasonably necessary to comply with the required activities in the statute. The staff analysis, as written, would preclude that discussion because the Commission would be finding implementation is not required and not a part of this program.

Member Harrigan asked Member Sherwood to clarify an earlier comment, that he was not sure this could be accomplished in the parameters and guidelines. Member Sherwood replied that he thought it should not be done in the parameters and guidelines, but could be if the Commission wished to.

Member Beltrami seconded Member Steinmeier's motion. The motion failed 3-4, with Members Harrigan, Sherwood, Williams, and Porini voting "No."

Member Sherwood moved approval of staff's recommendation as it stood. Member Harrigan seconded the motion. The motion failed 3-4, with Members Steinmeier, Williams, Beltrami, and Porini voting "No."

Member Steinmeier moved approval of staff's analysis. Member Sherwood seconded the motion. The motion carried 6-1, with Chairperson Porini voting "No."

Item 3 *Cal-Voter Program* – 98-TC-15
County of Tehama, Claimant
Elections Code Section 2168
Statutes of 1995, Chapter 913

Kathy Lynch, Staff Counsel, introduced this item. Ms. Lynch noted that the test claim legislation requires the Secretary of State (SOS) to establish a statewide voter registration system, known as the Cal-Voter Project, to eliminate duplicate or erroneous registrations, to facilitate the reporting of election results and to enhance election administration. Staff found that the legislation requires the SOS and not counties to establish the statewide system and that counties provided no documentation showing they were required to participate in the Project. Therefore, staff found the legislation did not impose a reimbursable state mandate upon counties and recommended that the Commission deny the test claim.

Parties were represented as follows: Pamela Stone and Beverly Ross for the County of Tehama; Allan Burdick for the California State Association of Counties; Jim Lombard for the Department of Finance; and Kathy DaRosa and Melissa Warren for the SOS.

Ms. Stone argued that a statewide system could not be obtained without the cooperation of the counties. She noted that the SOS recognizes that each county has its own voter registration system. Therefore, she submitted, to implement the Cal-Voter Project mandate, the SOS must require each county to participate in the system.

Ms. Stone submitted that the SOS has never informed the counties that this is a voluntary system. She added that the SOS is also requiring election night reporting to be submitted only through the Cal-Voter system. She argued that, if it were truly a voluntary system, the SOS would accept the information in any form.

Ms. Ross explained that, after the Cal-Voter legislation, Tehama County contacted its vendor to develop a program compatible with the SOS system. She noted that the County used to fax election night reporting data, but now must key it because its format is not compatible with the SOS system. They also must key reports of registrations onto the system. Ms. Ross submitted that the system benefits statewide elections, but not local elections.

Mr. Burdick contended that the test claim legislation imposes requirements on the SOS and that counties, as legal subdivisions of the state, have the responsibility to comply with the test claim legislation. He added that this process is designed for statewide elections. Mr. Burdick argued that the SOS placed requirements on the counties and that Mr. John Mott-Smith, the state's Chief Elections Official, agrees that this is a mandated system and told locals they would be reimbursed for the cost.

Mr. Lombard argued that participation in the program by counties is voluntary and that the program would result in significant county savings by purging duplicate voter registrations. He concurred with the staff analysis that the test claim legislation does not impose any requirements on counties.

Ms. Lynch agreed that the mandate is on the SOS. She noted that there are no documents, memos, or executive orders from the SOS to counties requiring participation in the program. Ms. Lynch added that one county is not participating. Further, staff does not know to what level the counties are participating because there is no level, or requirement, established by the SOS. Ms. Lynch explained that the Memorandums of Understanding (MOUs) sent out by the SOS do not specify whether the program is voluntary or required, rather, they explain the policies and procedures once counties have the system. She noted that the counties received incentives, such as the computer system, printers, training, and tools to clean up their systems that may ultimately result in costs savings. Ms. Lynch added that other provisions in the Elections Code explain how the information can be reported to the SOS. Regarding Mr. Mott-Smith's letters, Ms. Lynch argued that they do not discuss the mandate. She submitted that he defers the issue of whether it is a mandate to the Commission. Ms. Lynch contended that the SOS did not require counties to participate, rather, they voluntarily participated.

Member Lazar asked if there was a penalty for not participating. Ms. Lynch did not know of any penalty other than that counties would not have as much access to statewide voter information.

Member Lazar asked if there were any reforms in response to the problems in Florida in the last national election. Ms. Lynch thought that might be addressed in Phase II of the Project.

Member Beltrami noted one comment by Mr. Mott-Smith that the SOS believed the requirement for the system includes a requirement for counties to be compatible with that system. He submitted that, because the Legislature just named the SOS, there must be a follow-up to that; counties must provide the SOS with the information.

Ms. Stone argued that the documentation she submitted specifies in detail what information must be provided to the state, in what format, and how to provide it. She agreed with Ms. Lynch that a date for compliance was not specified, but argued that, nonetheless, it was a mandate.

Member Harrigan commented that he would like to hear from the SOS. Ms. DaRosa noted Bill Jones' support of the claimant. Member Sherwood asked if she was indicating the SOS feels this is a mandate. Ms. DaRosa replied that the SOS cannot say it is a mandate because it is not legislatively mandated, but does submit that counties have incurred costs that should be reimbursed and that this is the proper avenue. Ms. Warren added that there was definitely a mandate on the SOS, but that the SOS system could not operate without the participation of the counties.

Member Sherwood suggested that possibly the costs should come through the SOS to do what they need to get this program in place. He recognized that funding through the SOS or the Commission would both come from the General Fund. Member Sherwood did not think the SOS had the authority to tell counties it was their mandate, though the SOS needed the counties' participation to carry out the mandate imposed on it.

Member Steinmeier stated that it was logical that the SOS must have county support and agreed with Member Sherwood about who pays for this program. She mentioned the loan made to the SOS for the program. Ms. Warren said the $3.5 million loan had been expended. She added that, as of March of this year, all 58 counties were participating and Phase I was complete.

Member Steinmeier submitted that the MOUs were like mini-contracts the counties voluntarily signed with the SOS, which is in their best interests because they needed to clean up their voter registration files and because they received incentives such as computers and training.

Member Beltrami asked what the $3.5 million was used for. Ms. Warren replied that the SOS used the money to purchase a canned application that was modified to meet the state's requirements and to establish a closed wide area network. She confirmed that no direct payment was made to counties, although $100,000 was allocated to help counties without sufficient automation and five counties took advantage of the $10,000 available to each. Member Beltrami asked if counties were usually voluntary in dealing with the SOS on elections. Ms. Warren responded that they were not. Member Beltrami asked if the counties could tell the SOS that they were going to run their own program. Ms. DaRosa replied that the SOS has a direct working relationship with counties in conducting sound statewide elections and that the focus and mission of the SOS today is to assure the state does not experience the post-Florida chaos. Member Beltrami understood there was cooperation, but asked if the SOS has authority. Ms. DaRosa said counties look to the SOS as an authority. Member Beltrami asked if the SOS could tell counties how to run the election. Ms. DaRosa replied that it depends on the type of election – they could not on local elections but could on statewide elections. Ms. Warren noted that the mandate upon the SOS is to maintain voter registration at the highest possible levels and they must depend on the counties to do that. Member Beltrami asked if the SOS would go to the Legislature and say there are local costs for this program, but not a mandate. Ms. DaRosa said she could not answer.

Member Harrigan asked if the $100,000 grant mentioned earlier was expended. Ms. Warren replied the money was set aside from its appropriations and $50,000 was expended and the remainder was spent on other Cal-Voter related costs.

Member Harrigan recognized that the counties could have incurred costs, but questioned why they did not come to the SOS and ask for reimbursement out of funds legislatively appropriated through the budget. If the appropriation was insufficient, then the SOS on behalf of the counties could have asked for additional funds. Ms. Warren explained that decision was not made within

the Project and said she would have to get back. Member Harrigan was concerned that the money that was available was not all used as originally intended—a process was established to get reimbursed. Ms. Warren explained that any county with a functioning voter registration system was not eligible for that money.

Ms. Lynch submitted that mandates law requires there to be a requirement imposed by the SOS on counties, which does not exist in any documentation submitted to the Commission in this case. She stated that the documents, policies and procedures, do not come into effect until the counties voluntarily agree to participate. Ms. Lynch concluded that there was never an executive order telling counties what to do and to do it within a certain time frame.

Member Beltrami asked the SOS representatives if they could issue an executive order requiring the counties to participate. Ms. DaRosa replied that the SOS sends out all-county letters, but did not know if that was done in this case.

Camille Shelton, Staff Counsel, clarified that reimbursement is only required under Government Code section 17514 when a statute or executive order mandates a new program or higher level of service. She explained that "executive order" is defined in section 17516 as any order, plan, requirement, rule, or regulation issued by a state agency; so an executive order is a written document issued by a state agency to the counties requiring they do something. Ms. Shelton submitted that this record does not have any documentation from the SOS requiring the counties do something.

Ms. Stone said it was her understanding that the manuals and documentation set forth by the SOS including policies and procedures constitutes an executive order. She argued that the MOUs were signed to get a free computer terminal or printer that they agreed not to use for any other purpose, but did not mean the county was voluntarily participating in the Cal-Voter Project.

Ms. Warren added that the MOU applied only to the workstation and said that the equipment belongs to the SOS and not the county and therefore could not be used for any other purpose.

Member Beltrami revisited the Mr. Mott-Smith comment he referenced earlier. Ms. Lynch responded that the comment was in response to a draft staff analysis and there was nothing in the record at the time the program was being implemented telling counties they must participate.

Member Lazar moved to approve the test claim and find a reimbursable state mandate. Member Beltrami seconded the motion. The motion failed 2-5.

Member Williams moved to approve staff's recommendation to deny the test claim. Chairperson Porini seconded the motion. The motion carried 5-2, with Members Beltrami and Lazar voting "No."

POSTPONED

ADOPTION OF PROPOSED PARAMETERS AND GUIDELINES

Item 6 *School District Fiscal Accountability Reporting* - 97-TC-19 (Formerly known as, Budget Process Financial Statements, and County Oversight)
Alameda County Office of Education, Claimant
Education Code Sections 42100, 42127, 42127.5, 42127.6, 42128, 42131, and Government Code Section 3540.2
Statutes of 1981, Chapter 100; Statutes of 1985, Chapter 185; Statutes of 1986, Chapter 1150; Statutes of 1987, Chapters 917 and 1452; Statutes of

1988, Chapters 1461 and 1462; Statutes of 1990, Chapter 525; Statutes of 1991, Chapter 1213; Statutes of 1992, Chapter 323; Statutes of 1993, Chapters 923 and 924; Statutes of 1994, Chapter 650 and 1002; and Statutes of 1995, Chapter 525

Item 7 *County Office Budget Process and Financial Statements* - 97-TC-20
Alameda County Office of Education, Claimant
Education Code Sections 1040, 1240, 1240.2, 1620, 1621, 1622, 1623, 1624, 1625, 1626, 1628, 1630, 14050, 33127, 33128, 33129, 33132, 42120, 42129, and 42133
Statutes of 1975, Chapter 125; Statutes of 1977, Chapter 843; Statutes of 1979, Chapters 10 and 221; Statutes of 1983, Chapter 1276; Statutes of 1985, Chapter 741; Statutes of 1986, Chapter 1150; Statutes of 1987, Chapters 917 and 1452; Statutes of 1988, Chapters 1461 and 1462; Statutes of 1989, Chapter 1256; Statutes of 1990, Chapter 1372; Statutes of 1991, Chapter 1213; Statutes of 1992, Chapter 323; Statutes of 1993, Chapters 923 and 924; Statutes of 1994, Chapters 650 and 1002; Statutes of 1995, Chapter 525
California Code of Regulations Title 5 Sections 15467-15493

Item 8 *Employee Benefits Disclosure* - CSM-4502, 98-TC-03
Clovis Unified School District, Claimant
Education Code Sections 42140 and 42142
Statutes of 1994, Chapter 650; Statutes of 1995, Chapter 525; Statutes of 1996, Chapter 1158

Item 9 *Photographic Record of Evidence* – 98-TC-07 (tentative)
Penal Code Section 1417.3
Statutes of 1985, Chapter 875; Statutes of 1986, Chapter 734
Statutes of 1990, Chapter 382

Ms. Higashi noted that Items 6, 7, 8, were postponed at the request of the claimants and that Item 9 was postponed because staff is waiting for an additional claimant filing.

EXECUTIVE DIRECTOR'S REPORT

Item 10 Workload, Legislation, Next Agenda

Ms. Higashi noted the following:

- *Workload.* The Commission's incoming workload has been stable, but is expected to increase before the June 30 deadline for filing test claims.
- *Legislation.*

  Special Education. The settlement legislation is on third reading in the assembly today.

  Local Claims Bill. SB 348 is being held pending adoption of the budget.

  Mandate Reform Bill. The cost implications in AB 745 have been reduced substantially by the deletion of the amendment to costs mandated by the state.
- *Future Hearings.* Tentative agendas are included in the hearing binders.

To confer with and receive advice from legal counsel, for consideration and action, as necessary and appropriate, upon the following matter pursuant to Government Code section 11126, subdivision (e)(2):

- Based on existing facts and circumstances, there is a specific matter which presents a significant exposure to litigation against the Commission on State Mandates, its members and/or staff (Gov. Code, § 11126, subd. (e)(2)(B)(i).)

PERSONNEL

To confer on personnel matters pursuant to Government Code sections 11126, subdivision (a) and 17526.

Discussion and action, if appropriate, on report from the Personnel Sub-Committee on the selection and appointment of the Chief Legal Counsel pursuant to Government Code sections 17529 and 19889 et seq.

Chairperson Porini announced that the Commission would meet in closed executive session pursuant to Government Code section 11126, subdivision (e), to confer with and receive advice from legal counsel for consideration and action, as necessary and appropriate, upon the pending litigation listed on the published notice and agenda and Government Code sections 11126, subdivision (a) and 17526, to confer on personnel matters listed on the published notice and agenda.

REPORT FROM CLOSED EXECUTIVE SESSION

Chairperson Porini reported that the Commission met in closed executive session pursuant to Government Code section 11126, subdivision (e), to confer with and receive advice from legal counsel for consideration and action, as necessary and appropriate, upon the pending litigation listed on the published notice and agenda and Government Code sections 11126, subdivision (a) and 17526, to confer on personnel matters listed on the published notice and agenda.

ADJOURNMENT

Member Harrigan moved to adjourn the meeting. Member Beltrami seconded the motion. Hearing no further business, Chairperson Porini adjourned the meeting at 11:33 a.m.

Paula Higashi

PAULA HIGASHI
Executive Director

f:/meetings/minutes/2001/062801

STATE OF CALIFORNIA GRAY DAVIS, *Governor*

COMMISSION ON STATE MANDATES
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June 29, 2001

Mr. Glen Everroad, Revenue Manager
City of Newport Beach
3300 Newport Blvd.
Newport Beach, CA 92658

Mr. Glen Haas, Bureau Chief
State Controller's Office
Division of Accounting & Reporting
3301 C Street, Suite 500
Sacramento, CA 95816

State Agencies and Interested Parties (See Attached Mailing List)

RE: Adopted Statement of Decision
Brown Act Reform, CSM 4469
City of Newport Beach, Claimant
Government Code Sections 54952, 54954.2, 54957.1, and 54957.7
Statutes of 1993, Chapters 1136, 1137 & 1138
Statutes of 1994, Chapter 32

Dear Mr. Everroad and Mr. Haas:

The Commission on State Mandates adopted the attached Statement of Decision on June 28, 2001. This decision is effective on June 29, 2001.

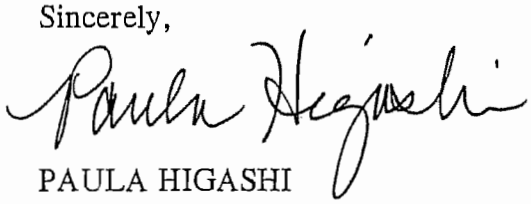
State law provides that reimbursement, if any, is subject to Commission approval of parameters and guidelines for reimbursement of the mandated program; approval of a statewide cost estimate; a specific legislative appropriation for such purpose; a timely-filed claim for reimbursement; and subsequent review of the claim by the State Controller's Office. Following is a description of the responsibilities of all parties and the Commission during the parameters and guidelines phase.

- **Claimant's Submission of Proposed Parameters and Guidelines.** Pursuant to Government Code 17557 and Title 2, CCR sections 1183.1 et seq. (the regulations), the claimant is responsible for submitting proposed parameters and guidelines by July 30, 2001. See Government Code section 17557 and Title 2, CCR sections 1183.1 et seq. for guidance in preparing and filing a timely submission.
- **Review of Proposed Parameters and Guidelines.** Within ten days of receipt of completed proposed parameters and guidelines, the Commission will send copies to the Department of Finance, Office of the State Controller, affected state agencies, and interested parties who are on the enclosed mailing list. All recipients will be given an opportunity to provide written comments or recommendations to the Commission within 15 days of service. The claimant and other interested parties may submit written rebuttals. See CCR section 1183.11.

- **Adoption of Parameters and Guidelines.** After review of the proposed parameters and guidelines and all comments, Commission staff will recommend the adoption of the claimant's proposed parameters and guidelines or adoption of an amended, modified, or supplemented version of the claimant's original submission. See CCR section 1183.12.

Please contact Nancy Patton at (916) 323-3562 if you have any questions.

Sincerely,



PAULA HIGASHI
Executive Director

Enclosure: Adopted Statement of Decision

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BEFORE THE

COMMISSION ON STATE MANDATES

STATE OF CALIFORNIA

IN RE TEST CLAIM ON:	No. CSM 4469
Government Code sections 54952, 54954.2, 54957.1, and 54957.7 as amended by Statutes of 1993, Chapters 1136, 1137, 1138 and Statutes of 1994, Chapter 32; Filed on December 29, 1994 and amended on August 7, 2000; By the City of Newport Beach, Claimant.	*Brown Act Reform* STATEMENT OF DECISION PURSUANT TO GOVERNMENT CODE SECTION 17500 ET SEQ.; TITLE 2, CALIFORNIA CODE OF REGULATIONS, DIVISION 2, CHAPTER 2.5, ARTICLE 7 *(Adopted on June 28, 2001)*

STATEMENT OF DECISION

The attached Statement of Decision of the Commission on State Mandates is hereby adopted in the above-entitled matter.

This Decision shall become effective on June 29, 2001.

Paula Higashi

Paula Higashi, Executive Director

BEFORE THE
COMMISSION ON STATE MANDATES
STATE OF CALIFORNIA

IN RE TEST CLAIM ON:	No. CSM 4469
Government Code sections 54952, 54954.2, 54957.1, and 54957.7 as amended by Statutes of 1993, Chapters 1136, 1137, 1138 and Statutes of 1994, Chapter 32; Filed on December 29, 1994 and amended on August 7, 2000; By the City of Newport Beach, Claimant.	*Brown Act Reform* STATEMENT OF DECISION PURSUANT TO GOVERNMENT CODE SECTION 17500 ET SEQ.; TITLE 2, CALIFORNIA CODE OF REGULATIONS, DIVISION 2, CHAPTER 2.5, ARTICLE 7 *(Adopted on June 28, 2001)*

STATEMENT OF DECISION

The Commission on State Mandates (Commission) heard and decided this test claim on May 24, 2001 during a regularly scheduled hearing. Mr. Glen Everroad and Ms. Pamela Stone appeared on behalf of the City of Newport Beach. Mr. Allan Burdick appeared on behalf of the California State Association of Counties. Mr. Cedrik Zemitis and Mr. Jim Lombard appeared for the Department of Finance.

The law applicable to the Commission's determination of a reimbursable state mandated program is Government Code section 17500 et seq., article XIII B, section 6 of the California Constitution and related case law.

The Commission, by a vote of 4 to 2, approved this test claim.

BACKGROUND AND FINDINGS

The test claim legislation, Government Code sections 54952, 54954.2, 54957.1 and 54957.7, requires the "legislative bodies" of local agencies[1] to comply with certain changes to the Ralph M. Brown Act (Gov. Code § 54950 et seq., hereafter referred to as the Brown Act or the Act).[2] Section 54952 clarifies and changes the definition of "legislative body"; section 54954.2 requires closed session items to be listed on the meeting agenda; section 54957.1 requires the reporting of closed session items after the closed session and the provision of closed session documents; and, section 54957.7 requires the disclosure of certain closed session items both prior to and after the closed session.

[1] As used in the Ralph M. Brown Act, "local agency" means a county, city, whether general law or chartered, city and county, town, school district, municipal corporation, district, political subdivision, or any board, commission, or agency thereof, or other local public agency. (Gov. Code, § 54951.)

[2] All further statutory references are to the California Government Code unless otherwise indicated.

The California Legislature enacted the Brown Act in 1953 based on an Assembly Judiciary Committee Report regarding the "secret decisionmaking" of local governments. The Act declared the law's intent that deliberations as well as action of local agencies occur openly and publicly. It also represented the Legislature's determination of how the balance should be struck between public access to meetings of multi-member public bodies on the one hand and the need for confidential candor, debate, and information gathering on the other.[3] The underlying theme of the Brown Act recognizes that:

> The people [of this State], in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may retain control over the instruments they have created.[4]

Since the Brown Act was enacted, it has been amended regularly to expand the requirements of the Act and to clarify the "legislative bodies" to which the requirements of the Act apply. Numerous court cases and Attorney General Opinions have re-affirmed the Legislature's original intent to ensure that deliberations and decisionmaking of local agencies be conducted in an open forum with full participation from the public.

Prior Test Claims

The Commission on State Mandates has previously determined two test claims on the Brown Act.

Open Meetings Act (CSM-4257)

On March 23, 1988, the Commission adopted the *Open Meetings Act* test claim that added Government Code sections 54954.2 and 54954.3 to the Brown Act. Section 54954.2 required the "legislative bodies" of local agencies *for the first time* to prepare and post agendas for public meetings at least 72 hours prior to the scheduled meeting. In addition, the agenda was to contain a brief description of each item to be discussed. Local agencies were also prohibited from taking action on any item that was not on the agenda. Section 54954.3 required that each agenda provide the public with the opportunity to address the legislative body during the meeting.

Under CSM-4257, local agencies were eligible for reimbursement for the Brown Act requirements for the following types of legislative bodies: 1) the governing board, commission, directors or body of a local agency or any board or commission thereof, as well as any board, commission, committee, or other body on which officers of a local agency serve in their official capacity; 2) any board, commission, committee, or body which exercises authority delegated to it by the legislative body; and, 3) planning commissions, library boards, recreation commissions, and other *permanent* boards or commissions of a local agency composed of at least a quorum of the members of the legislative body. The Commission's Parameters and Guidelines for CSM-4257 specifically provided reimbursement for the increased costs to prepare and post a single agenda 72 hours before a meeting of the legislative

[3] California Attorney General's Office, The Brown Act, Open Meetings for Local Legislative Bodies (1994)..
[4] Government Code section 54950.

body of a local agency containing a brief general description of each item of business to be transacted or discussed.

School Site Councils and Brown Act Reform (CSM-4501)

The Brown Act came before the Commission again in test claim CSM-4501, *School Site Councils and Brown Act Reform*, filed by the Kern High School District, San Diego Unified School District, and the County of Santa Clara. This test claim was filed on Government Code section 54952 and Education Code section 35147 and addressed the application of the open meeting provisions of the Brown Act to specified schoolsite councils and advisory committees of school districts. On April 27, 2000, the Commission approved this test claim finding that Statutes of 1993, chapter 1138 among other things, added Government Code section 54952, subdivision (a), which provided, in relevant part, that the term "legislative body" for purposes of the open meeting requirements of the Brown Act also included any local body created by state or federal statute.

The Commission also found that Statutes of 1994, chapter 239 removed certain school site councils and advisory committees from the full requirements of the Brown Act, but added Education Code section 35147, which imposed an abbreviated set of open meeting requirements on school site councils and advisory committees established as part of the following programs: School Improvement Program; Native American Indian Early Childhood Education Act; Chacon-Moscone Bilingual-Bicultural Education Act; School-Based Coordination Program; Compensatory Education Program; Migrant Education Program; Motivation and Maintenance Program; and the federal Indian Education Program.

The Commission's Parameters and Guidelines for CSM-4501 provided reimbursement for notice and agenda activities for school district's schoolsite councils and certain advisory committees.

Claimant's Contentions

In their test claim, claimant contends that the test claim legislation imposes an increased level of service on local agencies. The claimant asserts the following:

- Government Code section 54952, subdivisions (a), (b) and (c), as amended, impose a higher level of service on local agencies by expanding the definition of "legislative body" which is subject to the notice requirements of the Brown Act. The agenda preparation and posting requirements of section 54954.2 now apply to an increased number of entities such as standing committees, advisory bodies and other local bodies created by state or federal statute;

- Government Code section 54954.2, subdivision (a), as amended, imposes a higher level of service on local agencies by expanding the notice requirements to include a description of each item to be discussed or transacted in closed session;

- Government Code sections 54957.1, subdivisions (a), (b) and (c) and 54957.7, subdivisions (a), (b) and (c), as amended, impose a higher level of service on local agencies by expanding the nature and extent of the required public reporting of action taken in closed sessions; and,

- These amendments require an increased level of service by local agencies, necessitating training for local agencies.

Department of Finance Contentions

The Department of Finance (DOF) submitted comments on this test claim on June 1, 1995. Their contention is that while chapters 1136 and 1137 (agenda and notice requirements and closed session requirements) may have resulted in reimbursable state-mandated costs pertaining to certain notification requirements, they may also have resulted in offsetting savings to local governments by specifying that agenda descriptions be restricted to 20 or less words. In addition, the DOF contends that the intent of chapter 1138 (definition of legislative body) was to provide cost savings to local governments by simplifying and clarifying the Brown Act requirements. Finally, regarding chapter 32, the DOF states that this is essentially clean-up legislation for the other three named chapters and does not affect the scope of the changes made by those chapters. Consequently, it is the DOF's belief that there are no reimbursable state-mandated costs in that legislation.[5]

At the hearing, the DOF argued that local agencies requested the enactment of the test claim legislation, and therefore, there are no costs mandated by the state.

Interested Party Contentions

The County Counsel of Marin County submitted comments in support of the test claim on May 30, 1995. Their contention is that the 1993 and 1994 amendments to the Brown Act require local agencies to perform an increased level of service resulting in increased state mandated costs for reporting requirements, record keeping, and other County staff responsibilities. In addition, the County claims that these provisions have resulted in an increased level of service to advisory bodies, which are now subject to the Brown Act amendments.

Interested Persons Contentions

Former Senator Quentin Kopp, author of the majority of the Brown Act legislation, submitted comments in opposition to the test claim. His contention is that the amendments to the Brown Act were proposed to reduce the costs to local agencies for posting agendas, making oral statements regarding closed session items, and providing a description of the items on the agenda.

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[5] Regarding chapter 32, the test claim submitted by claimant stated: "The provisions of Chapter 32, Statutes of 1994, did not effect the scope of the state mandated activities and costs described in this test claim."

The California Newspaper Publishers Association submitted comments in opposition to the test claim. Their contention is that the changes to the Brown Act do not create a state mandated local program because the amendments were intended by the legislature to be instructive, not to expand the open meeting requirements. In particular, the clarifying language "A brief general description of an item generally need not exceed 20 words" was added to radically reduce the costs of creating and posting agendas. The First Amendment Coalition submitted comments in opposition to the test claim adopting the arguments and conclusion of the California Newspaper Publishers Association.

Paul C. Minney of Spector, Middleton, Young & Minney, LLP submitted comments on the Draft Staff Analysis. His contention is that both permanent and temporary decisionmaking committees or boards created by formal action are "new legislative bodies" under the test claim statute because these bodies can exercise authority broader than that granted to the legislative body.

COMMISSION FINDINGS

In order for a statute, which is the subject of a test claim, to impose a reimbursable state mandated program under article XIII B, section 6 of the California Constitution and Government Code section 17514, the statutory language must direct or obligate an activity or task upon local governmental entities. If the statutory language does not mandate or require local agencies to perform a task, then compliance with the test claim statute is within the discretion of the local agency and a reimbursable state mandated program does not exist.

Further, the required activity or task must be new or it must create an increased or higher level of service over the former required level of service. The California Supreme Court has defined the word "program," subject to article XIII B, section 6 of the California Constitution, as an activity that carries out the governmental function of providing a service to the public, or laws which, to implement a state policy, impose unique requirements on local governments and do not apply generally to all residents and entities in the state. To determine if the "program" is new or imposes a higher level of service, a comparison must be undertaken between the test claim legislation and the legal requirements in effect immediately before the enactment of the test claim legislation. Finally, the newly required activity or increased level of service must impose "costs mandated by the state."[6]

The test claim legislation requires the performance of certain activities related to public meetings by specified "legislative bodies" of local agencies. These local governmental bodies are carrying out a basic governmental function of making decisions regarding the operations of local agencies that provide services to the public. The mandatory compliance with the Brown Act is unique to local agencies; it is a peculiarly governmental function that does not apply to all residents and entities in the state. Therefore, the Commission finds that compliance by

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[6] *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 56; *Carmel Valley Fire Protection Dist. v. State of California* (1987) 190 Cal.App.3d 521, 537; *City of Sacramento v. State of California* (1990) 50 Cal.3d 51, 66; *Lucia Mar Unified School Dist. v. Honig* (1988) 44 Cal.3d 830, 835; Government Code section 17514.

local agencies with the open meeting requirements of the test claim legislation constitutes a "program" within the meaning of article XIII B, section 6 of the California Constitution.

The Commission continued its inquiry to determine if the test claim legislation constitutes a new program or higher level of service and imposes "costs mandated by the state" upon local agencies. Claimant contends that the test claim legislation imposes a higher level of service upon local agencies because the agenda preparation and posting requirements apply to an increased number of entities now defined as "legislative bodies" such as standing committees, advisory bodies and other local bodies created by state or federal statute. Claimant also contends that the test claim legislation requires new activities regarding the inclusion of closed session items on agendas and the reporting of closed session items both prior to and after the closed session. The analysis of these issues for the statutes at issue is discussed below.

Issue 1: Does the test claim legislation impose a new program or higher level of service upon local governmental bodies within the meaning of article XIII B, section 6 of the California Constitution?

Issue 1 is presented in two parts: Part One discusses the entities subject to the open session notice and agenda requirements and Part Two discusses the closed session requirements for all legislative bodies.

Part One: Entities Subject to Open Session Notice and Agenda Requirements

The notice and agenda provisions of the Brown Act are found in Government Code section 54954.2. Under the test claim legislation, this section requires the "legislative bodies" of local agencies to post a notice and agenda containing a brief general description of each item to be discussed at the meeting. Section 54954.2 states in relevant part the following:

> At least 72 hours before a regular meeting, the legislative body of a local agency, or its designee, shall post an agenda containing a brief general description of each item of business to be transacted or discussed at the meeting, including items to be discussed in closed session. A brief general description of an item generally need not exceed 20 words.

New Entities Subject to the Notice & Agenda Requirements

Government Code section 54952 describes the "legislative bodies" required to comply with the Brown Act. The test claim legislation substantially amended section 54952 to clarify and describe the "legislative bodies" in greater detail. Section 54952 now defines "legislative body" in relevant part as follows:

> (a) The governing body of a local agency or any other local body created by state or federal statute.
>
> (b) A 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. However,

advisory committees, composed solely of the members of the legislative body which are less than a quorum of the legislative body are not legislative bodies, except that standing committees of a legislative body, irrespective of their composition, which have a continuing subject matter jurisdiction, or a meeting schedule fixed by charter, ordinance, resolution, or formal action of a legislative body are legislative bodies for purposes of this chapter.

Thus, the "legislative bodies" required to comply with the Brown Act now include the following:

- The governing body of a local agency;
- A local body created by state or federal statute;
- A permanent decisionmaking body created by formal action;
- A temporary decisionmaking body created by formal action;
- A permanent advisory body created by formal action (except an advisory body with less than a quorum of the members);
- A temporary advisory body created by formal action (except an advisory body with less than a quorum of the members); and,
- Standing committees, irrespective of their composition with a continuing subject matter jurisdiction, or a meeting schedule fixed by formal action.

Under prior law, the "legislative body" of a local agency required to comply with the Brown Act was defined in several statutory provisions. Section 54952 defined the governing body of a local agency or any board or commission thereof, and any body on which officers of a local agency serve in their official capacity as members; section 54952.2 defined any multimember body with delegated authority of the legislative body; section 54952.3 defined any advisory body created by formal action and included both reduced notice requirements and an exemption from all Brown Act requirements for a committee composed solely of members of the governing body of a local agency which are less than a quorum of such governing body; and, section 54952.5 defined planning commissions, library boards, recreation commissions, and other permanent boards or commissions of a local agency as "legislative bodies."

While amending section 54952, the test claim legislation also repealed sections 54952.2, 54952.3 and 54952.5. Based on the following analysis, the Commission finds that the test claim legislation created the following two new "legislative bodies" required to comply with the provisions of the Brown Act including the notice and agenda requirements of section 54954.2:

- <u>Any local body created by state or federal statute</u>

This body was not identified as a "legislative body" in prior law. Thus, the Commission finds that under the test claim legislation, it *is* a new body required to comply with the open session notice and agenda requirements imposed by Government Code section 54954.2; and,

- Standing committees with less than a quorum of the governing body which have a continuing subject matter jurisdiction, or a meeting schedule fixed by formal action

The test claim legislation defines legislative body to include "standing committees of a legislative body, *irrespective of their composition*, which have a continuing subject matter jurisdiction, or a meeting schedule fixed by formal action." Historically, standing committees were permanent committees that met regularly and considered subjects of a particular class.[7] Their composition, however, varied depending on the body that created them.

Prior to the enactment of the test claim legislation, the various statutory provisions regarding the application of the Brown Act created much confusion as to whether committees, regardless of their composition, fell under the requirements of the Act. However, numerous judicial decisions and opinions of the Attorney General found that the Brown Act essentially governed *all* meetings of a *quorum* of the legislative body of a local agency when the public's business was discussed.[8]

In 1993, just prior to the passage of the test claim legislation, this issue was finally resolved in the *Freedom Newspaper* case.[9] In *Freedom*, a newspaper publisher sought a writ of mandate to compel a county employees retirement system board of directors to allow the public to attend meetings of the board's operations committee. The committee was advisory in nature and was composed of four members of the nine-member board. The Supreme Court held that since the operations committee was an advisory committee composed solely of board members *numbering less than a quorum of the board*, the committee was not a "legislative body" pursuant to the provisions of Government Code section 54952.3, and was therefore excluded from the open meeting requirements of the Brown Act. The *Freedom* Court agreed with a long-standing 1968 Attorney General Opinion that stated: "[w]e have consistently concluded that committees composed of *less than a quorum of the legislative body creating them and not established on a permanent basis for a continuing function are not subject to the open meeting requirements of that Act.*" (Emphasis supplied).[10]

Thus, the Commission finds that while standing committees with less than a quorum of the members of the legislative body were exempt from the requirements of the Brown Act under prior law, the test claim legislation now defines "standing committees, *irrespective of their composition*" as new bodies required to comply with the open session notice and agenda requirements imposed by section 54954.2.

Regarding the other five bodies identified in the test claim legislation, the Commission finds they are not new "legislative bodies" because they were identified in prior law as follows:

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[7] 79 Ops.Cal.Atty.Gen. 69, 72 (1996).

[8] *Id.*, at page 69, fn 3.

[9] *Freedom Newspapers, Inc., v. Orange County Employees Retirement System Board of Directors* (1993) Cal.4th 821, 832-833.

[10] *Id.*, at pages 828-829.

- Governing body of a local agency

This body is identified as a "legislative body" in prior law in section 54952 and thus it is not a new body.

- Permanent decisionmaking committee or board created by formal action

Interested Person, Paul C. Minney, contends that permanent decisionmaking committees created by formal action were not subject to the Brown Act before the enactment of the test claim legislation. In his comments, he states:

> Staff's conclusion [in the draft staff analysis] is predicated upon the assumption that the legislative body of a local agency can only create a "permanent decision making board" which may exercise the authority of the body that created it. This assumption is incorrect. For example, when a school district approves a charter school (by formal action) it creates a permanent body with decision making body [sic] that exercises authority broader than that granted to the school district...

The Commission disagrees. Under prior law, section 54952.2 stated:

> As used in this chapter, "legislative body" also means *any* board, commission, committee, or similar multimember body which exercises *any authority* of a legislative body of a local agency *delegated* to it by that legislative body. (Emphasis added.)

Also, under prior law, section 54952.5 specifically included permanent boards and commissions of local agencies within the coverage of the Brown Act. That section stated:

> As used in this chapter, 'legislative body' also includes, but is not limited to, planning commissions, library boards, recreation commissions, *and other permanent boards or commissions* of a local agency. (Emphasis added.)

When determining the intent of a statute, the first step is to look at the statute's words and give them their plain and ordinary meaning. Where the words of the statute are not ambiguous, they must be applied as written and may not be altered in any way.[11] The plain language of former sections 54952.2 and 54952.5 include permanent boards and commissions as legislative bodies and any board or commission that exercises any authority delegated to it; i.e. decisionmaking authority.

Moreover, in their 1989 booklet, *Open Meeting Laws*, the Attorney General's Office determined that decisionmaking bodies were required to comply with the Brown Act before the enactment of the test claim legislation. In the booklet, the Attorney General's Office states:

> *Under current law, decision-making bodies would primarily be covered under section 54952 or 54952.2* and advisory committees under section 54952.3. However, section 54952.5 was invoked by this office to apply to a hearing

[11] *City of Merced* v. *State of California* (1984) 153 Cal.App.3d 777; *Carrisales* v. *Department of Corrections* (1999) 21 Cal.4th 1132.

> board of an air pollution control district. (71 Ops.Cal.Atty.Gen. 96 (1988).) Although there is not a published opinion or indexed letter precisely on point, we think that permanent committees (e.g., budget or finance committees) comprised solely of less than a quorum of the members of a board or commission were not intended to be covered by section 54952.5. (See discussion of less than a quorum exception in section C(6) at page 20 in this pamphlet.) *However, if such committees "exercise" enough "authority" "delegated" to them by a legislative body, they might be covered by section 54952.2 as a decision-making body rather than an advisory body.*

While the Attorney General's views do not bind the Commission, they are entitled to considerable weight. This is especially true here since the Attorney General regularly advises many local agencies about the meaning of the Brown Act and publishes a manual designed to assist local governmental agencies in complying with the Act's open meeting requirements.[12]

Accordingly, the Commission finds that permanent decisionmaking bodies created by formal action were subject to the Brown Act before the enactment of the test claim legislation and, thus, are not new.

- Temporary decisionmaking committee or board created by formal action

This body is also identified as a "legislative body" in prior law under section 54952.2 as discussed above. Section 54952.2 stated:

> As used in this chapter, "legislative body" also means *any* board, commission, committee, or similar multimember body which exercises any authority of a legislative body of a local agency delegated to it by that legislative body. (Emphasis added.)

For the same reasons discussed under the section analyzing permanent decisionmaking bodies, the Commission finds that temporary decisionmaking bodies created by formal action were subject to the Brown Act before the enactment of the test claim legislation and, thus, are not new.

- Permanent advisory committee or board created by formal action (except less than a quorum of the members)

This body is identified under prior law in sections 54952.3 and 54952.5. Section 54952.3 defined "legislative body" as *any* advisory committee created by formal action. In addition, section 54952.3 provides an exception for any advisory committee composed solely of less than a quorum of the members of the legislative body. Section 54952.5 also defined "legislative body" to include permanent boards or commissions of a local agency. Thus, the Commission finds that permanent advisory committees or boards created by formal action (except less than a quorum of the members) were "legislative bodies" under prior law.

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[12] *Freedom Newspapers, Inc. v. Orange County Employees Retirement System Board of Directors*, *supra*, 6 Cal.4th at p. 829.

- Temporary advisory committee or board created by formal action (except less than a quorum of the members)

This body is identified under prior law in section 54952.3 as discussed above, and thus, the Commission finds that this body was a "legislative body" under prior law.

- Standing committees comprised of a quorum of the members of the legislative body

These bodies are also defined as a "legislative body" under prior law. Standing committees, by definition, are permanent committees that regularly consider a particular subject matter. When comprised of a quorum of the members of the legislative body, these committees fall under the definition of a committee with delegated authority since they are empowered to make decisions on behalf of the legislative body.[13] In addition, standing committees comprised of a quorum of the members fall under the definition of "legislative body" in former Government Code sections 54952.3 and 54952.5 (i.e. permanent advisory committees of a local agency). Thus, the Commission finds that standing committees composed of at least a quorum of the members of the legislative body are not new bodies under the test claim legislation.

The chart below provides a summary of the Commission's findings:

Test Claim Legislation Section 54952	**Prior Law Sections 54952, 54952.3, 54952.3, 54952.5**
Governing body	§ 54952 Governing body
Local body created by state or federal statute	NEW
Permanent decisionmaking committee or board created by formal action	§ 54952.2 Any board, committee, body that exercises any authority of a legislative body *delegated* to it by the legislative body § 54952.5 Planning commissions, library boards, recreation commissions, and other *permanent* boards or commissions of a local agency
Temporary decisionmaking committee or board created by formal action	§ 54952.2
Permanent advisory committee or board created by formal action (except less than a quorum of the members)	§ 54952.3 *Any* advisory committee created by formal action (except less than a quorum of the members) § 54952.5 Planning commissions, library boards, recreation commission, *and other permanent* boards or commissions of a local agency
Temporary advisory committee or board created by formal action (except less than a quorum of the members)	§ 54952.3

[13] Former Government Code section 54952.2 stated in relevant part as follows:

> "...legislative body also means any board, commission, committee, or similar multimember body which exercises any authority of a legislative body of a local agency delegated to it by that legislative body."

Standing committees, irrespective of their composition (i.e. even those with less than a quorum of the members of the legislative body) with a continuing subject matter jurisdiction, or a meeting schedule fixed by formal action	**NEW--Standing committees with less than a quorum of the members** However, standing committees with a quorum of members of the legislative body are covered in prior law through §§ 54952.2, 54952.3 and 54952.5

Based on the foregoing, the Commission finds that Government Code sections 54952 and 54954.2, subdivision (a), of the test claim legislation constitute a new program or higher level of service pursuant to article XIII B, section 6 of the California Constitution for two new bodies (local bodies created by state or federal statute and standing committees with less than a quorum of the members of the legislative body with a continuing subject matter jurisdiction, or a meeting schedule fixed by formal action) to prepare and post an agenda of their meetings 72 hours prior to the meeting which contains a brief general description of each item to be transacted or discussed at the meeting.

Advisory Bodies Subject to the Notice & Agenda Requirements

In the *Open Meetings Act* (CSM-4257) test claim, the Commission determined that Government Code section 54954.2 imposed a reimbursable state mandated program upon "all legislative bodies," as defined, to post a notice and agenda 72 hours prior to the meeting of a legislative body. That section also required that the notice and agenda contain a brief general description of all items to be discussed at the meeting. Section 54954.2 was enacted in 1986 and applied to all legislative bodies, which by definition included advisory bodies before the enactment of the test claim legislation.

However, prior law (former Government Code section 54952.3, which was enacted in 1968) also *exempted* advisory bodies from the regular notice and agenda provisions of the Act and held them to significantly reduced notice requirements:

> Meetings of such advisory commissions, committees or bodies...shall be open and public, and notice thereof must be delivered personally or by mail at least 24 hours before the time of such meeting to each person who has requested, in writing, notice of such meeting.
>
> If the advisory commission, committee or body elects to provide for the holding of regular meetings, it shall provide by bylaws, or by whatever other rule is utilized by that advisory body for the conduct of its business, for the time and place for holding such regular meetings. *No other notice of regular meetings is required.* (Emphasis added.)

Thus, prior law, as specified in sections 54954.2 and 54952.3, imposed conflicting duties on advisory bodies. If an advisory body complied with section 54952.3 by not preparing and posting an agenda, did it violate section 54954.2? In other words, which statute constitutes prior law with respect to the duties imposed on advisory bodies?

Sutherland Statutory Construction, a treatise on statutory construction, explains that whenever the legislature enacts a provision, it has in mind previous statutes relating to the same subject matter. In the absence of any express repeal or amendment, the new provision is presumed to be in accord with the legislative policy embodied in those prior statutes. When a conflict

exists, the more specific statute controls over the more general one.[14] However, where the conflict is irreconcilable, the statute that is the more recent of the two conflicting statutes prevails.[15]

In this case, the Commission finds the express language of section 54952.3 is more specific than the provisions of section 54954.2 and thus, prevails as prior law. Section 54952.3 *specifically* identified advisory commissions and committees as legislative bodies that were not required to prepare and post an agenda. They were only required to deliver notice of their meetings 24-hours prior to the meeting and to provide in their bylaws for the time and place of holding regular meetings. In contrast, section 54954.2 *generally* referred to "the legislative body of the local agency, or its designee," when describing the bodies to which the notice requirements applied. Thus, by the repeal of section 54952.3 by the test claim legislation, advisory bodies are now subject, for the first time, to the full notice and agenda requirements specified in section 54954.2, subdivision (a), of the Brown Act.

Therefore, the Commission finds that Government Code section 54954.2, subdivision (a), constitutes a new program or higher level of service pursuant to article XIII B, section 6 of the California Constitution for all permanent and temporary advisory bodies created by formal action (except less than a quorum of the members of the legislative body) to comply with the full notice and agenda requirements of the Brown Act by preparing and posting an agenda of their meetings 72 hours prior to the meeting which contains a brief general description of each item to be transacted or discussed at the meeting.

Part Two: Closed Session Requirements

Under prior law, the legislative body was required to state the reasons for a closed session either before or after the closed session and to publicly report the action and vote taken in closed session regarding the appointment, employment or dismissal of a public employee. The test claim legislation added four new closed session requirements that apply to all "legislative bodies" including those newly defined under the test claim legislation.

Notice and Agenda Requirements

The test claim legislation amended the notice and agenda provisions to include closed session items on the agenda. Section 54954.2 states, in relevant part, the following:

> At least 72 hours before a regular meeting, the legislative body of a local agency, or its designee, shall post an agenda containing a brief general description of each item of business to be transacted or discussed at the meeting, <u>including items to be discussed in closed session. A brief general description of an item generally need not exceed 20 words</u>. (Underlined portion indicates amendments to this section by the test claim legislation).

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[14] *People v. Tanner* (1979) 24 Cal.3d 514, 521, where the California Supreme Court states that "[a] specific provision relating to a particular subject will govern a general provision, even though the general provision standing alone would be broad enough to include the subject to which the specific provision relates."
[15] 2B, Sutherland, Statutory Construction (5th Ed. 1994) § 51.02.