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# California's Brown Act: Clearing the Smoke-Filled Room

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# CALIFORNIA'S BROWN ACT: CLEARING THE SMOKE-FILLED ROOM

ANNE RICHARDSON OAKES* AND JULIAN KILLINGLEY**

ABSTRACT

*For nearly seventy years, the Ralph M. Brown Act has assured Californians' right to require legislative bodies to hold certain meetings open to the public. This Article considers the extent to which that law has become internalized in government and normalized in Californians' expectations of government conduct. We discuss possible mechanisms for securing compliance with the Brown Act's requirements, including criminal sanctions, civil litigation, grand jury investigations, and self-policing. We examine in detail the identities of those who bring civil claims or invoke grand jury investigations, the implicated subject areas, the nature of the alleged violations of the Brown Act, and the eventual outcomes. After evaluating the extent to which each contributes to state compliance, we conclude that the government's own internal public law advisors have likely contributed most to ensuring transparency in decision making.*

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## INTRODUCTION

When Republican kingmakers met in Chicago's Blackstone Hotel on the evening of June 11, 1920, they could little have suspected their deliberations that night would be memorable. After four failed ballots earlier that day, they proceeded to select Senator Warren G. Harding as the Republican presidential candidate for the 1920 presidential election.[1] Harding went on to win the election but has consistently been ranked among America's six worst presidents.[2] Associated Press reporter Kirke L. Simpson memorialized the selection process as reported the next day: "Harding of Ohio was chosen by a group of men in a smoke-filled room early today as Republican candidate for President."[3] The phrase "men in a smoke-filled room" is now

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1. Merrill Fabry, *Now You Know: Where Was the Original 'Smoke-Filled Room'?*, TIME (May 17, 2016, 11:30 AM), https://time.com/4324031/smoke-filled-room-history/.

2. Numerous surveys of political scientists and historians have consistently ranked Harding among America's six worst presidents. *See, e.g.*, Elisha Fieldstadt, *Presidents Ranked From Worst to Best*, CBS NEWS (Apr. 22, 2021, 3:46 PM), https://www.cbsnews.com/pictures/presidents-ranked-worst-best/; *Presidential Historians Survey 2017*, C-SPAN, https://www.c-span.org/presidentsurvey2017/ (last visited Oct. 12, 2021); U.S. News Staff, *Ranking America's Worst Presidents*, U.S. NEWS & WORLD REP. (Nov. 6, 2019, 8:00 AM), https://www.usnews.com/news/special-reports/the-worst-presidents/articles/ranking-americas-worst-presidents.

3. *See generally* SAFIRE'S POLITICAL DICTIONARY 672 (Oxford University Press 2008) (1978) (giving a full account of the disputed origins of the phrase a "smoke-filled room").

synonymous with a room or place where secret decisions are made by a small group of powerful people.[4]

Justice Brandeis memorably observed that sunlight is "the best of disinfectants."[5] Open meeting laws—or sunshine laws—now mandate that the public have access to most meetings of federal and state government agencies and regulatory bodies, together with their decisions and records. State open meeting legislation can be traced back at least as far as 1898.[6] Congress enacted the Government in the Sunshine Act in 1976,[7] and by then every state in the union had similar requirements in place.[8] The Congressional Act requires that "every portion of every meeting of a [federal] agency shall be open to public observation"[9] and defines a meeting liberally to include any gathering of enough members of an agency as required to take action on behalf of the agency.[10] The legislative intent is clearly stated:

> The basic premise of the sunshine legislation is that, in the words of Federalist No. 49, "the people are the only legitimate foundation of power, and it is from them that the constitutional charter . . . is derived." Government is and should be the servant of the people, and it should be fully accountable to them for the actions which it supposedly takes on their behalf.[11]

Sunshine laws with open meeting mandates speak to a commitment to concepts of popular sovereignty and public engagement with the processes of democratic decision-making that we now recognize as

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4. *See generally* ELIZABETH WEBBER & MIKE FEINSILBER, MERRIAM-WEBSTER'S DICTIONARY OF ALLUSIONS 505 (1999) (defining "smoke-filled room").

5. LOUIS D. BRANDEIS, OTHER PEOPLE'S MONEY AND HOW THE BANKERS USE IT (Cosimo Classics 2009) (1914).

6. R. James Assaf, *Mr. Smith Comes Home: The Constitutional Presumption of Openness in Local Legislative Meetings*, 40 CASE W. RES. L. REV. 227, 229 (1990).

7. Pub. L. No. 94-409, 90 Stat. 1241 (1976).

8. *Id.*; *see* Alex Aichinger, *Open Meeting Laws and Freedom of Speech*, THE FIRST AMEND. ENCYCLOPEDIA, https://www.mtsu.edu/first-amendment/article/1214/-open-meeting-laws-and-freedom-of-speech (last visited Oct. 13, 2021); *State Open Meeting Laws*, BALLOTPEDIA, https://ballotpedia.org/State_open_meetings_laws (last visited Oct. 13, 2021), for a convenient collection of these laws.

9. 5 U.S.C. § 552b.

10. *Id.*

11. H.R. REP. NO. 94-880(I), at 2 (1976), *reprinted in* 1976 U.S.C.C.A.N. 2183, 2186.

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central to American public life. However, this has not always been the case; as constitutional historians point out, one of the first acts of the Constitutional Convention of 1787 was to prohibit copying, printing, or publishing any journal entries or anything spoken in the House, without leave of the House.[12]

As Professor John P. Kaminski points out, this level of secrecy was normal eighteenth-century practice inherited from the English Parliament.[13] The previous Continental and Confederation Congresses had also met in secret, albeit allowing their journals to be published regularly.[14] The reasons are not difficult to understand. As Virginia delegate to the 1787 Convention George Mason explained in a letter to his son:

> All communications of the proceedings are forbidden during the sitting of the Convention; this I think was a necessary precaution to prevent misrepresentations or mistakes; there being a material difference between the appearance of a subject in its first crude and undigested shape, and after it shall have been properly matured and arranged.[15]

James Madison had a similar view: "[T]he rule was a prudent one not only as it will effectually secure the requisite freedom of discussion, but as it will save both the Convention and the Community from a thousand erroneous and perhaps mischievous reports."[16] He further opined that "no Constitution would ever have been adopted by the convention if the debates had been public."[17]

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12. JOHN P. KAMINSKI, SECRECY AND THE CONSTITUTIONAL CONVENTION 7 (2005).

13. *See generally id.* at 7–8 (noting that the English Parliament had allowed free speech in its secret debates since 1688, but only in 1771 did the House of Commons allow some of its debates to be published).

14. *Id.* at 8.

15. George Mason, *Letter from George Mason to George Mason, Jr. (June 1, 1787)*, *in* 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 33 (Max Farrand ed., 1911).

16. James Madison, *Letter from James Madison to James Monroe (June 10, 1787)*, *in* SUPPLEMENT TO MAX FARRAND'S THE RECORDS OF THE FEDERAL CONVENTION OF 1787 67 (James H. Hutson ed., 1987).

17. HERBERT B. ADAMS, 1 LIFE AND WRITINGS OF JARED SPARKS 560–64 (1893).

These views, suggests former Shelby County Tennessee commissioner Professor Steven J. Mulroy, are as likely to be current today as they were more than 200 years ago: broadly worded open meeting laws that inhibit deliberations and prevent compromises empower unelected staff and lobbyists and promote recourse to informal business interactions, thereby, whether by accident or design, turning elected officials into casual lawbreakers.[18] As Professor Alex Aichinger points out:

> Violations [range] from conducting public business during innocent chance meetings to purposely bypassing the public notification requirement by using serial telephone calls or e-mails to speak with fellow board or agency members. In either case, technically the attendance requirement that triggers an open meeting is not present under most state laws, but the intent or spirit of the law is being ignored.[19]

It is possibly for this reason that, as Professor Mulroy suggests, state legislatures prefer to pass open meeting laws that apply to local government bodies but not to themselves.[20] This Article presents the findings of an empirical study of the operation of one such local government open meeting sunshine law adopted by the California State Legislature in 1953. For nearly seventy years, the Ralph M. Brown Act ("Brown Act") has assured to Californians the right to require that legislative bodies hold certain meetings openly. The Brown Act has received comparatively little attention in the academic literature, an omission which this Article seeks to address.[21]

The context for the enactment of the Brown Act in California was a series of articles written by investigative reporter Michael Harris and

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18. Steven J. Mulroy, *Sunlight's Glare: How Overbroad Open Government Laws Chill Free Speech and Hamper Effective Government*, 78 TENN. L. REV. 309, 314 (2011).

19. Aichinger, *supra* note 8.

20. Mulroy, *supra* note 18, at 311–12.

21. We are aware of only the following two articles which specifically focus on the Brown Act as opposed to mentioning it in passing: Oona Mallett, *Who's Afraid of the Big, Bad Wolfe? A Call for A Legislative Response to the Judicial Interpretation of the Brown Act*, 39 MCGEORGE L. REV. 1073 (2008); 4. Alexandra B. Andreen, *The Cost of Sunshine: The Threat to Public Employee Privacy Posed by the California Public Records Act*, 18 CHAP. L. REV. 869 (2015).

published in the *San Francisco Chronicle* in 1952.[22] These articles exposed the Bay Area government's dismissive attitude to open meeting requirements and the tactics adopted to avoid them.[23] Harris claimed M. A. Becker's remarks, then superintendent of the Sylvan Elementary School District, were typical: "The board takes care of the district all right . . . . We have visitors at the meetings sometimes, but they're mostly busybodies and troublemakers."[24]

Harris's articles are credited with inspiring the California State Legislature in 1953 to enact Assembly Bill 339, now Government Code sections 54950–54963, popularly called the Brown Act.[25] In its statement of legislative intent, the California State Legislature declared:

> 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.[26]

As Harris noted, the Brown Act did not appear in a legislative vacuum. California had laws prior to 1952 requiring that much government business be conducted in open public meetings.[27]

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22. Michael Harris, *Your Secret Government: It Comes in Many Guises*, S.F. CHRON., May 25, 1952, at 21 [hereinafter *Guises*]; Michael Harris, *Your Secret Government: Anatomy of the Caucus*, S.F. CHRON., May 26, 1952, at 19; Michael Harris, *Your Secret Government: Why Have a Closed Hearing?*, S.F. CHRON., May 27, 1952, at 15; Michael Harris, *Your Secret Government: 'Executive Sessions' Are Common in Contra Costa*, S.F. CHRON., May 28, 1952, at 17; Michael Harris, *A Star Chamber in Oakland*, S.F. CHRON., May 29, 1952, at 13; Michael Harris, *Your Secret Government: After a Caucus Is Over, After Smoke Has Cleared . . .*, S.F. CHRON., May 30, 1952, at 9; Michael Harris, *City Fathers Keep Doors Open*, S.F. CHRON., June 1, 1952, at 19; Michael Harris, *A Hidden Button, Narrow Hall . . .*, S.F. CHRON., June 2, 1952, at 19; Michael Harris, *The Average Citizen Wouldn't Have a Chance*, S.F. CHRON., June 3, 1952, at 15; Michael Harris, *Making Public Business Public*, S.F. CHRON., June 4, 1952, at 15 [hereinafter *Public*].

23. *Guises*, *supra* note 22, at 21.

24. *Public*, *supra* note 22, at 15.

25. CAL. GOV'T CODE § 54950.5 (West 2021).

26. *Id.* § 54950.

27. In the opening paragraphs of his first article, Harris observed: "When City Councils convene, the law is: "Meetings shall be public." For school boards, the

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Nevertheless, as Harris reported, these laws were routinely flouted by simply labelling such meetings with other names—caucus, star chamber, executive session, committee-of-the-whole, pre-council meeting, work session, and study meeting. In this way, Bay Area councils and boards contrived to avoid the reach of the legislation and to conduct in private business that should have been conducted in public.[28] Harris's message was clear: despite the clear words of the law, public officials were confident in their ability to keep the conduct of their business hidden from public scrutiny. The Brown Act was a legislative response calculated to correct this situation. As we conclude in this Article, with the benefit of hindsight, the Brown Act may be regarded as a success. We suggest that twenty-first century government in California is now largely conducted in the sunshine of public scrutiny. What is not immediately obvious is why the Brown Act succeeded where prior legislation had failed.

Rights are of little value unless they can be exercised by those entitled to them. The Latin maxim *ubi ius, ibi remedium* reiterates this principle as translated: where there is a right, there must be a remedy. As Chief Justice John Marshall observed, a government cannot be called a "government of laws, and not of men . . . if the laws furnish no remedy for the violation of a vested legal right."[29] Most states provide a variety of means by which their citizens can assert their right to observe and, sometimes, to contribute to open government.[30] California is no exception.

In this Article we consider how the Brown Act is policed within California. We discuss possible mechanisms by which compliance with the Brown Act's requirements is secured, including criminal sanctions,

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California Government Code requires: "No action authorized or required by law shall be taken by the governing board of a school district except in a meeting open to the public." For Supervisors: "All meetings of the Board of Supervisors shall be public."

> There are similar requirements for other public agencies which have the power, among other things, to decide what type of services the State's voters and taxpayers will receive and how much they will be required to pay for them.

*Guises*, *supra* note 22, at 21.

28. *Id.*

29. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803).

30. For a good overview of mechanisms for enforcing sunshine laws, see Daxton R. "Chip" Stewart, *Let the Sunshine in, or Else: An Examination of the "Teeth" of State and Federal Open Meetings and Open Records Laws*, 15 COMMC'N. L. & POL'Y 265 (2010).

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civil litigation, grand jury investigations, and self-policing. We examine in detail the identities of those bringing civil claims or invoking grand jury investigations, the subject areas implicated, the nature of the alleged violations of the Brown Act, and the eventual outcomes. After evaluating the extent to which each contributes to state compliance, we conclude that the best explanation for the Brown Act's success lies in the normalization of a culture of openness and transparency that has occurred at government level. We suggest that the continued success, which the Brown Act now seems to enjoy, owes much to the cooperation of government's own internal public law advisors in ensuring the quality of compliance that can instill public confidence in the transparency of governmental decision-making. We begin with an outline of the main provisions of the Brown Act and its subsequent revisions.

## I. THE BROWN ACT AND ITS APPLICATION

Since its 1953 adoption, the Brown Act has undergone a series of additions, amendments, and amplifications, such that only two parts of the original statute remain in force.[31] The original 686-word statute has grown to one of more than 19,000 words. As the League of California Cities' guide to the Brown Act notes, "The Brown Act covers members of virtually every type of local government body, elected or appointed, decision-making or advisory. Some types of private organizations are covered, as are newly elected members of a legislative body, even before they take office."[32] It is not the purpose of this Article to provide

31. The parts in question are the preamble in CAL. GOV'T CODE § 54950 (West 2021) ("In enacting this chapter, the California State 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."), and the open meeting requirement in CAL. GOV'T CODE § 54953(a) (West 2021) ("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.").

32. LEAGUE OF CAL. CITIES, OPEN AND PUBLIC V: A GUIDE TO THE RALPH M. BROWN ACT 6 (2016).

a full account of the Brown Act's provisions. However, we briefly summarize the Brown Act's more significant and most invoked provisions for the benefit of those unfamiliar with it. Any summary of a lengthy and complex piece of legislation, such as the Brown Act, involves an element of subjectivity. To minimize this, our summary is focused on those provisions that were most frequently discussed or cited in cases heard on appeal. We chose cases heard on appeal as these provide more authoritative interpretations than cases heard at first instance and produced a more manageable body of decisions for analysis.[33] The Brown Act operates at a local level and is complemented by the Bagley-Keene Open Meeting Act, which operates at a state level.[34]

The opening section of the Brown Act provides a statement of legislative intent that has guided its interpretation.[35] Successive courts have construed this statement as requiring a liberal interpretation in favor of openness.[36] The Brown Act applies to the legislative bodies of local agencies and their members. Within the context of the Brown Act, the phrase "legislative body of a local agency" is a term of art, the meaning of which is defined in sections 54951 and 54952.[37] The scope

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33. We initially conducted a search on August 28, 2020, of "Westlaw>Cases>California>All California State Cases" using the search phrase, "Ralph M. Brown Act." The result produced 253 reports. These were examined and reduced to a body of 136 decisions, discarding 119 decisions for a variety of reasons. Common reasons for excluding decisions were that Brown Act violations were not alleged in the claim (*see*, *e.g.*, Kent v. Lake Don Pedro Comty Servs Dist., No. F058926, 2010 WL 5396126, at *7 (Cal. Ct. App. Dec. 30, 2010)), that the decision only invoked the Brown Act by way of analogy in the Court's reasoning (*see*, *e.g.*, Funeral Sec. Plans, Inc. v. State Bd. of Funeral Dirs., 21 Cal. Rptr. 2d 92, 97–98 (Ct. App. 1993)), the Brown Act was dismissed as irrelevant to the argument (*see*, *e.g.*, Stribling v. Mailliard, 85 Cal. Rptr. 924, 926 (Ct. App. 1970)), or where an appeal turned on other legislation (often anti-SLAPP legislation), and where the Brown Act was a collateral issue mentioned but not the subject of the appeal (*see*, *e.g.*, Harrell v. Hanson, No. C078371, 2016 WL 5845784, at *1 (Cal. Ct. App. Sept. 30, 2016)).

34. This Article only considers the workings of the Brown Act. As at the date of writing this Article (April 2021), the workings of the Bagley-Keene Open Meeting Act do not appear to have been explored in any depth in law review articles. *See* CAL. GOV'T CODE § 11120 (West 2021); *id.* §§ 11130–32.

35. See CAL. GOV'T CODE § 54950, *supra* note 31, for its text.

36. *See*, *e.g.*, Int'l Longshoremen's & Warehousemen's Union v. L.A. Exp. Terminal, Inc., 81 Cal. Rptr. 2d 456, 460 (Ct. App. 1999).

37. *See* CAL. GOV'T CODE §§ 54951, 54952 (West 2021).

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of the phrase is wide and embraces, *inter alia*, the governing bodies, boards, commissions, or agencies of counties, cities, towns, school districts, municipal corporations, districts, and political subdivisions.[38] It is difficult to imagine a body within a county that raises or spends public monies that is not caught by the sweep of the phrase. The Brown Act applies not only to current members of these bodies but also to elected members who have yet to assume office.[39]

The Brown Act is concerned with the procedures of local agency legislative bodies at meetings for taking action. It defines broadly the word "meeting" to include not just the traditional physical coming together of members of the body in one place at the same time[40] but also virtual meetings and asynchronous communications used to arrive at agreements to act.[41] The phrase "action taken" is similarly broad and includes not just positive or negative decisions having immediate effect but also commitments or promises to act in a particular way at a future date.[42]

The central provision of the Brown Act is its original requirement 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 . . . ."[43] Section 54953 provides for meetings to be held by teleconference subject to giving notice and complying with the relevant provisions for a physical meeting.[44] Section 54953(b)(3) specifically provides that a teleconference meeting must be conducted "in a manner that protects the statutory and constitutional rights of parties or the public appearing before a legislative body of a local agency."[45] An important safeguard is the requirement that "[n]o legislative body shall take action by secret ballot, whether preliminary or final."[46] Legislative bodies of local agencies are required to "publicly report any action taken and the votes

38. *Id.*
39. *See id.* § 54952.1.
40. *See id.* § 54952.2(a).
41. *See id.* § 54952.2(3)(a)(1).
42. *See id.* § 54952.6.
43. CAL. GOV'T CODE § 54953(a) (West 2021).
44. *See id.* § 54953(b), (d).
45. *Id.* § 54953(b)(3).
46. *Id.* § 54953(c)(1).

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or abstentions on that action . . . ."[47] To prevent final action being taken on the remuneration of local agency executives in closed meetings, the legislative body must orally report a summary of its recommendations prior to taking the final action during an open meeting.[48]

The Brown Act also provides some anti-evasion measures to deter officials from discouraging scrutiny. Section 54953 outlaws various conditions precedent to attendance at meetings.[49] The section requires it be made clear that all persons may attend meetings without signing, registering, or completing any document.[50] Finally, the section secures a right to record open meetings, unless doing so would persistently disrupt the meeting,[51] and prevents legislative bodies of local agencies from prohibiting or restricting broadcasts of their proceedings without good cause.[52]

Such a right would be of little value if the public could not discover when or where such meetings were to be held. For this reason, section 54954 requires that, with some exceptions, each legislative body of a local agency must give notice of the time and place for holding its regular meetings.[53] Normally, regular and special meetings are required to be held within the territory over which the body has jurisdiction.[54] Any person may require that a copy of the agenda or agenda packet be mailed to them and can file an annually renewable standing request for such items.[55] In the interest of transparency, section 54954.2 also requires that an agenda containing "a brief general description of each item" of business must be posted at least seventy-two hours before scheduled meetings.[56] The "brief general description" need not normally exceed twenty words.[57] Generally, "no action or discussion may be undertaken on any item not appearing on

47. *Id.* § 54953(c)(2).
48. *Id.* § 54953(c)(3).
49. CAL. GOV'T CODE § 54953 (West 2021).
50. *Id.* § 54953.3.
51. *Id.* § 54953.5.
52. *Id.* § 54953.6.
53. *Id.* § 54954(a).
54. *Id.* § 54954(b).
55. CAL. GOV'T CODE § 54954.1 (West 2021).
56. *Id.* § 54954.2(a)(1).
57. *Id.*

the posted agenda,"[58] although there are exceptions for emergency and continued meetings.[59]

A significant stipulation is the provision for active public participation in meetings subject to the Brown Act. Section 54954.3(a) stipulates that "[e]very 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."[60] The California State Legislature anticipated the chaos that might ensue if a number of members of the public insisted on addressing the meeting at length under color of exercising their rights under section 54954.3(a). Section 54954.3(b)(1) qualifies this right by specifying: "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."[61]

The ability to impose limits on speakers' freedom to address Brown Act regulated meetings was tested in *Ribakoff v. City of Long Beach*.[62] Ribakoff was a regular attender at meetings of the Long Beach Transit Company Board of Directors. The practice of the Board was to require persons wishing to speak at their meetings to fill out a public speaker's card, whereupon they would be allocated three minutes to address the Board on the relevant agenda item. Ribakoff did so and addressed the Board. However, when he tried to address the Board for a second time on the same agenda item, he was prevented from doing so.[63] He subsequently brought suit alleging, *inter alia*, that the Board's actions infringed his rights under the Brown Act and the First Amendment to the United States Constitution.[64] The Second District Court of Appeal found that a three-minute time limit on each speaker at the meeting did not violate Ribakoff's right to free speech because there was no evidence the restriction applied based on the content of his stated or

58. *Id.* § 54954.2(a)(3).

59. *Id.* § 54954.2(b)(1), (3).

60. *Id.* § 54954.3(a).

61. CAL. GOV'T CODE § 54954.3(b)(1) (West 2021).

62. 238 Cal. Rptr. 3d 81 (Ct. App. 2018), *reh'g denied* (Oct. 3, 2018), *rev. denied* (Dec. 19, 2018), *cert. denied sub nom.*, 139 S. Ct. 2640 (2019).

63. *Id.* at 88.

64. *Id.*

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intended remarks.[65] The decision's subsequent history, including the denial of certiorari by the United States Supreme Court,[66] has assured its position as the leading authority on time limits that may be imposed under section 54954.3(b)(1).

Any meeting may be adjourned or continued to a specified time and place.[67] There is also a provision for calling special meetings on giving twenty-four hours notice. Notice must be posted on the local agency's website, if it operates one, and given to media organizations that have requested special meetings notifications.[68] The notice "must specify the time and place of the special meeting and the business to be transacted or discussed."[69] A legislative body may hold an emergency meeting[70] without complying with either the twenty-four hours notice or posting requirement.[71]

There are special provisions for certain legislative bodies to hold closed sessions to instruct their negotiators as to terms for real property transactions,[72] "to consider the purchase or sale of particular, specific pension fund investments,"[73] "to hear a charge or complaint from [] member[s] enrolled in [their] health plan[s],"[74] or "to confer with, or receive advice from, [their] legal counsel regarding pending litigation when discussion in open session concerning those matters would prejudice [their position] in the litigation."[75]

A frequently litigated provision of the Brown Act is found in section 54957. Litigation often involves cases where local agencies are authorized to hold closed sessions "during a regular or special meeting to consider the appointment, employment, evaluation of performance, discipline, or dismissal of a public employee or to hear complaints or

65. *Id.* at 102–03.
66. Ribakoff v. City of Long Beach, Cal., 139 S. Ct. 2640 (2019).
67. CAL. GOV'T CODE §§ 54955, 54955.1 (West 2021).
68. *Id.* § 54956(a).
69. *Id.*
70. *Id.* § 54956.5(a) (defining what constitutes an "emergency situation").
71. *Id.* § 54956.5(b)(1).
72. *Id.* § 54956.8.
73. CAL. GOV'T CODE § 54956.81 (West 2021).
74. *Id.* § 54956.86.
75. *Id.* § 54956.9.

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charges brought against the employee by another person or employee unless the employee requests a public session."[76]

Authority to enforce the Brown Act's provisions through criminal prosecutions and civil actions is located in sections 54959 and 54960 and is discussed in detail in Part II, sections A and B respectively hereafter.

## II. ASSURING OBEDIENCE TO THE BROWN ACT

Michael Harris noted that, despite laws requiring that local government bodies conduct their business in public, compliance with pre-existing law was poor.[77] Nearly seventy years have passed since Harris's *Your Secret Government* articles appeared and there have been no subsequent investigations suggesting that the Brown Act is being ignored. What seems to be different is a cultural change brought about by a variety of mechanisms that, taken together, act as deterrence to non-compliance or, at least, encourage compliance. We examine each of these in turn.

### *A. Criminal Prosecution*

The way that state legislatures traditionally seek to assure compliance with statutes that impose unwelcome restrictions is to attach criminal sanctions for their breach. The original Brown Act, as enacted in 1953, had no penal provisions for disobeying its requirements.[78] It is notable that there were dissenting voices raised during the passage of the Brown Act. The *San Francisco Chronicle* reported that, at the meeting of the Assembly Interim Judiciary Committee in September 1952 to discuss the proposed law, the only disagreement was about the severity of the Brown Act's provisions and, in particular, the absence of a penal clause.[79] Supporters of the legislation pointed out that this was unnecessary since the effect of the

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76. *Id.* § 54957(b)(1).

77. *See generally* Harris, *supra* note 22 (detailing the context and need for the Brown Act's enactment).

78. *See* Ralph M. Brown Act, ch. 1588, § 1, 2 Stats. 3270 (1953).

79. Michael Harris, *Newsmen Tell Dangers of Secrecy*, S.F. CHRON., Sept. 11, 1952, at 1.

proposed legislation would be to invalidate enactments passed in contravention of its provisions.[80]

In 1961, the California State Legislature first attached criminal liability to the Brown Act by adding a new section 54959: "Each member of a legislative body who attends a meeting of such legislative body where action is taken in violation of any provision of this chapter, with knowledge of the fact that the meeting is in violation thereof, is guilty of a misdemeanor."[81] A little over thirty years later, a series of bills was presented to the California State Legislature that sought, *inter alia*, to amend the mens rea component of the penal section. In 1992, Senate Bill 1538 and Assembly Bill 3476, which would have effected major changes to the Brown Act and its penal provision, passed the Legislature but were vetoed by Governor Pete Wilson.[82]

In 1993, Assembly Bill 1426 and Senate Bill 36 amended section 54959 to provide: "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."[83] The wording was further revised the next year by Senate Bill 752 to provide:

> 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, and where the member intends to deprive the public of information to which the member knows or has reason to know the public is entitled under this chapter, is guilty of a misdemeanor.[84]

This remains the current wording.[85]

The essential difference between these definitions of the offense is the evolution of the requisite scienter. In 1961, this required acting "with knowledge of the fact that the meeting is in violation [of the Brown Act]."[86] In 1993, it became "with wrongful intent to deprive the

80. *Id.* at 4.
81. Ralph M. Brown Act, ch. 1671, § 6, 2 Stats. 3638 (1961).
82. *See* Ralph M. Brown Act, 7 Stats. 691 (1991–92).
83. Ralph M. Brown Act, ch. 1136, § 17, 2 Stats. 432 (1993–94).
84. Ralph M. Brown Act, ch. 32, § 18, 4 Stats. 5721 (1993–94).
85. *See* CAL. GOV'T CODE § 54959 (West 2021).
86. § 6, 2 Stats. at 3638.

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public of information to which it is entitled under [the Brown Act]."[87] The current requirement, enacted in 1994, is that "the member intends to deprive the public of information to which the member knows or has reason to know the public is entitled under [the Brown Act]."[88] The original definition required merely the accused's knowledge of the unlawfulness of the meeting attended. The 1993 definition shifted the requirement's focus to "knowingly depriving" the public of information to which it is entitled under the Brown Act. However, that definition was ambiguous as to whom the requisite knowledge was to be attributed—the accused or a majority of the California State Legislature. The current definition both clarifies that the accused's knowledge of wrongfulness is at issue and such knowledge includes both actual and constructive knowledge.[89]

Section 54959 does not define the phrase "knows or has reason to know."[90] The phrase occurs fairly frequently in California statutes.[91] Sometimes its appearance in a section is accompanied by a definition in a separate subsection,[92] and, in others, it is left undefined.[93] Where the phrase is not defined, California courts have construed the phrase as embracing both actual and constructive knowledge and have held that such a phrase is not unconstitutionally vague.[94]

Notwithstanding a legislative interest in refining the wording of the penal provision in section 54959, it appears that prosecutions are uncommon,[95] and it is claimed that there has not been a single

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87. § 17, 2 Stats. at 432.

88. § 18, 4 Stats. at 5721; CAL. GOV'T CODE § 54959 (West 2021).

89. CAL. GOV'T CODE § 54959 (West 2021).

90. *See id.*

91. A search of Westlaw's "California Statutes and Court Rules" file in March 2022 returned ninety-nine instances.

92. *See, e.g.*, CAL. GOV'T CODE § 87102.8(b) (West 2021) (prohibiting elected state officials using their position to make or influence governmental decisions before their agency when they know they have a financial interest).

93. *See, e.g.*, CAL. HARB. & NAV. CODE § 656.3 (West 2021) (requiring operators of vessels involved in accidents they know have resulted in death or disappearance of a person to report the incident to law enforcement).

94. *See, e.g.*, People v. Jimenez, H038857, 2014 WL 692906, at *17–18 (Cal. Ct. App. Feb. 24, 2014) (citing *In re* Jorge M., 4 P.3d 297 (Cal. 2000)).

95. *See* LEAGUE OF CAL. CITIES, *supra* note 32, at 59 (suggesting that prosecutions under the section are uncommon).

successful prosecution under it.[96] It is unclear why this should be so since, as we show in subsequent sections, alleged violations have been numerous. It may be that the low penalties associated with misdemeanor convictions deter district attorneys from prosecuting cases requiring specific, detailed mens rea and which are likely to be robustly defended by well-funded opponents. The section may serve a useful function in reminding members of a local agency that conducting business in contravention of the Brown Act may lead to prosecution.

### *B. Civil Actions*

Civil actions to prevent violations of the Brown Act's meeting provisions are available.[97] Actions for mandamus or injunctions were first added in 1961 and provided: "Any interested person may commence an action either by mandamus or injunction for the purpose of stopping or preventing violations or threatened violations of this chapter by members of the legislative body of a local agency."[98] These were enlarged to include declaratory relief in 1969 when the section was amended to read:

> 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.[99]

The section was rewritten in 1993 to give district attorneys standing to commence civil proceedings. The amended scope of declaratory relief now includes determining:

> [T]he 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

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96. *See Brown Act Primer,* FIRST AMEND. COAL. 14 (2006), https://firstamendmentcoalition.org/wp-content/uploads/2021/03/FACs-Brown-Act-Primer-Google-Docs.pdf (stating that there has not been a successful prosecution for violation of the Brown Act).

97. *See* CAL. GOV'T CODE § 54960 (West 2021).

98. Ralph M. Brown Act, ch. 671, § 6, 2 Stats. 3638 (1961).

99. Ralph M. Brown Act, ch. 494, § 2, 1 Stats. 1106 (1969).

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> 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.[100]

New subsections were added, enabling courts in certain cases to order legislative bodies to make audio records of their closed sessions and preserve copies, provide for their labeling and preservation, and specify the circumstances and procedures for discovery of their content.[101] Additional minor amendments were enacted in 1993,[102] 1994,[103] 2009,[104] and 2012.[105]

An obvious liminal question is that of standing to sue. The 1993 amendment removed any uncertainty as to whether a district attorney had standing to bring an action, but the question of exactly who was an "interested person" within the meaning of the section remained unclear. Attorney Ann Taylor Schwing notes that grants of standing to "any interested person" are not unusual in California's statutes.[106] She observes that courts usually construe the phrase as requiring prospective litigants to have a direct, not merely consequential, interest in the outcome of the action.[107] Courts have considered the meaning of the phrase in section 54960 in a number of cases and have given it a broad interpretation in keeping with the statement of legislative intent in section 54950.[108]

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100. Ralph M. Brown Act, ch. 1136, § 17, 2 Stats. 432 (1993–94).

101. *Id.*

102. *Id.*

103. *Id.*

104. Ralph M. Brown Act, ch. 88, § 58, 1 Stats. 270 (2009–10).

105. Ralph M. Brown Act, ch. 732, § 1, 4 Stats. 5217 (2011–12).

106. MARTIN D. CARR & ANN TAYLOR SCHWING, CALIFORNIA AFFIRMATIVE DEFENSES § 19:8 (2d ed. 2020).

107. *Id.* (citing, *inter alia*, Chas. L. Harney, Inc. v. Contractors' State License Bd., 247 P.2d 913, 914–15 (Cal. 1952) (construing "interested person" for declaratory relief)).

108. *See*, *e.g.*, Sacramento Newspaper Guild v. Sacramento Cnty. Bd. of Supervisors, 69 Cal. Rptr. 480, 484 (Ct. App. 1968) (suggesting the public's right to disclosure should logically extend standing to any county elector); Ribakoff v. City of Long Beach, 238 Cal. Rptr. 3d 81, 93 (Ct. App. 2018) (noting a broad authorization for citizen standing); McKee v. Orange Unified Sch. Dist., 2 Cal. Rptr. 3d 774, 778–79 (Ct. App. 2003) (concluding that an "interested person" in California Government Code sections 54960(a) & 54960.1(a) means "a citizen of the State of California").

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We took a closer look at cases heard by California's courts where Brown Act issues were raised in argument. Our preferred research tool was the Westlaw database which contains appellate cases rather than those heard at first instance. We reasoned that the subject matter, underlying issues, and character of parties in cases heard on appeal should not differ substantially from cases heard at first instance without an appeal. A search performed on February 6, 2021, revealed 257 Brown Act-related cases.[109] Inspection revealed that some were appeals from decisions of non-county specific bodies; some recited a Brown Act issue in proceedings below, which was not at issue in the instant appeal; some were from federal courts where the Brown Act was mentioned obiter; and some raised the Brown Act as an analogy to aid interpretation or for some other peripheral purpose. For our analysis, we decided to exclude these cases,[110] leaving us with a body of 136 appellate decisions implicating the Brown Act.[111]

The Brown Act came into force in 1953, and our body of cases is drawn from appeals throughout the period 1953 to April 2021. It is notable that the first recorded appeal was heard in 1973, but more than 100 of these cases have been heard in the last twenty years. This accords with the statutory history of the Brown Act, as the most extensive expansions and amendments were enacted after 2000. Getting an overall feel for such a large body of litigation is difficult. We performed an analysis of these cases and summarize our findings in the tables below. In each case, we began by identifying who brought an appeal against whom. The first-named party in the report of an appeal is not

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109. The search was made of the file "Westlaw>Cases>California>All California State Cases" using the phrase "Ralph M. Brown Act".

110. For examples of the kinds of cases excluded, see, Saraceni v. City of Roseville, No. C041085, 2003 WL 21363458, at *6 (Cal. Ct. App. June 13, 2003) (dismissing a Brown Act argument as immaterial); Versaci v. Superior Ct., 26 Cal. Rptr. 3d 92, 99, 103 (Ct. App. 2005) (a Public Records Act case with Brown Act analogies drawn); St. Croix v. Superior Ct., 175 Cal. Rptr. 3d 202, 205–07 (Ct. App. 2014) (city sunshine ordinance and Public Records Act case referring to or analogizing with the Brown Act); Travers v. City of Morro Bay, No. 2:08–cv–06822–FMC–MANx, 2008 WL 11338126, at *2–3 (C.D. Cal. Dec. 2, 2008) (Brown Act mentioned only as part of factual background of case); and Harrell v. Hanson, Nos. C078371, C079103, 2016 WL 5845784, at *1 (Cal. Ct. App. Sept. 30, 2016) (anti-SLAPP motion case, Brown Act a collateral issue not ruled upon).

111. The relevant cases are detailed in the Appendix, which are on file with the Law Review Office.

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necessarily the appellant. Many of the cases involved multiple parties, and we simplified our task by concentrating solely on the case report titular appellants and respondents. We distinguished between citizens acting in their private capacity and those acting as holders of an office, such as a district attorney. Our Table 1 findings show the respective percentages of all classes of parties in the appeals studied.

| **Appellants** | **%** | **Respondents** | **%** |
|---|---|---|---|
| Private citizens | 49.3 | Private citizens | 11.8 |
| Campaigns and SIGs | 23.5 | Campaigns and SIGs | 2.9 |
| Companies & corporations | 7.4 | Companies & corporations | 2.9 |
| Educational bodies | 5.9 | Educational bodies | 17.6 |
| Press & media | 5.1 | Press & media | 0 |
| Counties & cities | 4.4 | Counties & cities | 35.3 |
| Public bodies | 4.4 | Public bodies | 28.7 |
| Officeholders | 0 | Officeholders | 2.2 |

*Table 1: Identity and proportions of parties in Brown Act appellate litigation 1973–2020*[112]

Table 1 shows that the majority of appeals (72.8%) were brought by private citizens, campaigns, or special interest groups ("SIGs") against counties, cities, educational, and other public bodies such as special districts and public utilities (81.6%). We distinguished between educational bodies and other public bodies because of the significant number in which such bodies appear in the relevant litigations.

Next, we looked at the outcomes of these appeals. Table 2 summarizes our findings.

112. Identity of cases and their citations are on file with the authors and the Law Review Office.

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| Appeal Outcomes | % |
|---|---|
| Lower court decision affirmed | 59.6 |
| Lower court decision affirmed in part, reversed in part | 13.2 |
| Lower court decision reversed | 27.9 |

*Table 2: Outcomes in Brown Act appellate litigation 1973–2020*[113]

In the majority of cases, the decisions of lower courts were affirmed or affirmed in part and reversed in part. In fewer than one-third of cases (27.9%), lower court decisions were reversed. Combining the Table 1 and Table 2 findings, we see that most appeals are brought by private citizens singly or in groups and that most appeals are unsuccessful.

In further analysis, we looked at the nature of the subject matter of the disputes in the original proceedings and the relief sought. The original proceedings involved a wide variety of claims, but certain areas were litigated more frequently than others. Table 3 shows the general litigation areas comprising the subsequent appeals involving, *inter alia*, alleged Brown Act violations.

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| General Area of Original Dispute | % |
|---|---|
| Engagement and terms of employment | 9.6 |
| Employee evaluations, discipline, and termination | 19.1 |
| Real property disputes | 26.5 |
| Appointments to vacancies in office | 3.7 |
| Disposal, transfer and leasing of public property | 6.6 |
| First Amendment rights | 6.6 |
| Contractual and tortious claims | 8.8 |
| Public governance | 8.8 |
| Other | 10.3 |

*Table 3: Areas of original dispute in Brown Act appellate litigation 1973–2020*[114]

Our categorizations are painted with a broad brush as a finer grained analysis would have led to many categories with just a few instances. This could have obscured the emergence of a clearer picture of where the areas of greatest conflict lie. More claims arose in relation to disputes involving public servants than any other area. Nearly one-third of those disputes related to general hiring and terms of service, including remuneration and pensions, but close to two-thirds of those disputes related to staff evaluations, discipline, and terminations.

The next largest area is loosely labeled "Real property disputes." This label encompasses land use, zoning, and general development proposals but excludes exercise of eminent domain powers, rent control, and disposals and leases of public land. These two broad areas—employment and real property—accounted for more than one-half of all original disputes that resulted in an appeal raising one or more alleged Brown Act violations.

The "First Amendment rights" heading broadly covers disputes involving freedoms of speech and the press and the right to petition government for redress of grievances. Finally, the "Public governance"

114. Identity of cases and their citations are on file with the authors and the Law Review Office.

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heading covers a wide range of behaviors relating to the internal workings and decision-making processes of local government bodies and the conduct of public meetings.

We also analyzed the relief sought in the original proceedings that subsequently led to appeals that included alleged Brown Act violations. Some cases claimed the classic remedies of writ of mandate, or mandamus, with or without other discretionary relief, while others sought damages and other relief. In this Article, the discretionary remedies referred to are those of declaratory and injunctive relief. Claims for discretionary awards of attorney fees under section 54960.5 by prevailing litigants are treated separately in cases where they were explicitly claimed in the original proceedings. Table 4 reflects that litigants sought mandamus, with or without other relief, in more than sixty percent of cases.

| **Remedy Sought** | **%** |
|---|---|
| Mandamus | 34.6 |
| Mandamus + other discretionary relief | 26.5 |
| Discretionary relief | 28.7 |
| Attorney fees | 5.1 |
| Other remedies | 5.1 |

*Table 4: Relief sought in Brown Act appellate litigation 1973–2020*[115]

In a majority of these cases, alleged Brown Act violations raised on appeal were not the underlying cause of the original litigation. The Brown Act issues were peripheral to the main claim and were only central in cases categorized as "Public governance" in Table 3. In most cases, the Brown Act violations served as a tool to advance other

115. Identity of cases and their citations are on file with the authors and the Law Review Office. The heading "Mandamus + other discretionary relief" includes claims for declaratory relief, injunctive relief, or both. The heading "Discretionary relief" includes claims for declaratory relief, injunctive relief, or both. The heading "Other" includes such things as orders to compel discovery or arbitration, eminent domain actions, anti-SLAPP motions, etc.

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interests. As an example, the *Galbiso* litigation[116] raised, *inter alia*, a number of alleged Brown Act violations. These included the failure of the Orosi Public Utility District to afford Mary Galbiso an opportunity to make a public comment regarding its foreclosure action, and the fact that it had discussed litigation against her in a closed private session without making the required public disclosures. However, the litigation's purpose was not to correct the procedural inadequacies of the District's meetings. Rather, Ms. Galbiso was determined to reverse an attempted tax sale intended to satisfy disputed sewer assessments on her land.

Next, we looked at the frequency of allegations of different Brown Act violations and the Brown Act sections most often invoked in appeals.

| **Nature of Violation Alleged** | **%** |
|---|---|
| Meeting was/should have been open/closed | 40.4 |
| Adequacy of notice of a meeting | 24.3 |
| Adequacy of agenda provided for meeting | 19.1 |
| Whether actions constituted a 'meeting' | 11.8 |
| Whether participant a 'legislative body' | 11.8 |
| Ability of public to participate in meeting | 9.6 |
| Award of attorney fees to prevailing party | 8.1 |
| Other | 11.7 |

*Table 5*: *Nature of violations alleged in Brown Act appellate litigation 1973–2020*[117]

116. *See* Galbiso v. Orosi Pub. Util. Dist., 84 Cal. Rptr. 3d 788 (Ct. App. 2008); Galbiso v. Orosi Pub. Util. Dist., 107 Cal. Rptr. 3d 36 (Ct. App. 2010); Galbiso v. Orosi Pub. Util. Dist., No. F059461, 2011 WL 234873 (Cal. Ct. App. June 15, 2011).

117. Identity of cases and their citations are on file with the authors and the Law Review Office. Note that each percentage is expressed as that of all cases studied. Some cases involved more than one alleged violation. *See*, *e.g.*, Galbiso v. Orosi Pub. Util. Dist., 84 Cal. Rptr. 3d 788 (Ct. App. 2008) (detailing five total claims (two of which were under section 54950, et seq.)).

https://scholarlycommons.law.cwsl.edu/cwlr/vol58/iss1/2

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Since the Brown Act is an "open meetings" law, it is unsurprising that the most often alleged violation was whether a particular meeting was improperly open or closed. Less frequently alleged violations categorized under the "Other" heading include the questions of whether a particular body constituted a "local agency," whether an attorney-client privilege attached to the proceedings, whether certain behavior constituted "action taken," and whether a party had standing. Certain violations were commonly associated with specific kinds of underlying substantive disputes. So, allegations of improperly holding public meetings and failing to give meeting notices and proper agenda descriptions often figure in personnel disputes involving disciplinary or dismissal proceedings.[118]

Table 6 provides an analysis of the frequency with which Brown Act sections were discussed in detail in the ratio decidendi of appellate opinions.

| **Brown Act Section** | **%** |
|---|---|
| § 54951 | 2.2 |
| § 54952 | 23.5 |
| § 54953 | 8.8 |
| § 54954 | 26.5 |
| § 54956 | 19.9 |
| § 54957 | 34.6 |
| § 54959 | 0.7 |
| § 54960 | 23.5 |

*Table 6: Percentage of opinions citing sections of the Brown Act in Brown Act appellate litigation 1973–2020*[119]

118. *See*, *e.g.*, Boceta v. Inglewood Unified Sch. Dist., Nos. B168850C, B171190, 2005 WL 647336 (Cal. Ct. App. Mar. 22, 2005) (defining "notice"); Reid v. Fontana Unified Sch. Dist., No. E028760, 2002 WL 1278069 (Cal. Ct. App. June 10, 2002) (defining "agenda").

119. Identity of cases and their citations are on file with the authors and the Law Review Office. Sections not included in this table did not feature in detailed analysis in opinions even though they may have received passing mention.

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Rather than subjecting these opinions to fine-grained scrutiny, we confined our analysis to citing the referenced sections rather than their many individual subdivisions. The section most frequently the subject of argument was section 54957, which governs instances when local agencies may hold closed sessions and the procedures for holding such sessions. Section 54957 was discussed in 34.6% of appeals studied.[120] The next most frequently discussed provision was section 54954, which figured in 26.5% of cases and determines, *inter alia*, how notice of meetings is to be given, the provision of agendas, and the right of the public to participate in meetings.[121] This was closely followed by sections 54952 and 54960, each of which were discussed in 23.5% of cases respectively. Section 54952 specifies, *inter alia*, what constitutes a legislative body, a meeting, and an action taken and prohibits secret meetings to conduct business. Section 54960, *inter alia*, authorizes appropriate persons to institute civil proceedings for violations of the Brown Act and provides for the recovery of costs.[122]

Of the remaining sections of the Brown Act, only sections 54953 and 54956 were discussed with any frequency in opinions. Section 54953 is analyzed in 8.8% of cases and provides, *inter alia*, that all meetings of the legislative body of a local agency shall be open and public and that all persons shall normally be entitled to attend these meetings. It may be that the clarity of section 54953's requirements is such that, despite its centrality, it was subject to judicial analysis in only 8.8% of cases.[123] Section 54956 deals, *inter alia*, with the circumstances in which special meetings may be called and the procedures for doing so. The section is featured in 19.9% of opinions.[124] The remaining sections were significantly less frequently the subject of argument and together appeared in no more than 2.9% of cases.[125]

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120. Section 54957, or one or more of its subdivisions, was discussed in forty-seven cases (34.6%). CAL. GOV'T CODE § 54957 (West 2021).

121. Section 54954, or one or more of its subdivisions, was discussed in thirty-six cases (26.5%). *Id.* § 54954.

122. Sections 54952 and 54960, or one or more of their subdivisions, were each discussed in thirty-two cases (23.5% each). *Id.* §§ 54952, 54960.

123. Section 54953, or one or more of its subdivisions, was discussed in twelve cases (8.8%). *Id.* § 54953.

124. Section 54956, or one or more of its subdivisions, was discussed in twenty-seven cases (19.9%). *Id.* § 54956.

125. Sections 54951 and 54959, or one or more of their subdivisions, were discussed in three cases (2.9%). *Id.* §§ 54951, 54959.

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We are unable to establish what proportion of civil suits generally, and Brown Act cases in particular, are tried and subsequently appealed. We previously noted that the number of appeals involving Brown Act principles has increased significantly in recent years. Nevertheless, only 107 appeals heard since 1999 have involved substantial argument about the Brown Act's requirements—a mean of slightly fewer than five cases each year. This suggests that in a state with fifty-eight counties, a population greater than thirty-nine million people,[126] and thousands of local agencies, civil litigation alone is unlikely to be the means by which Brown Act obedience is compelled. The suggestion is reinforced by the fact that many appellants were private citizens and most trial courts' decisions were affirmed.[127]

However, certain characteristics make it more likely that a dispute implicating Brown Act principles will be litigated and appealed. A stereotypical appeal involved an underlying dispute concerning employment or land use brought by a private citizen seeking mandamus and declaratory and injunctive relief against a local authority or educational body. The appeal most likely raised Brown Act questions regarding the propriety of meetings held by the respondent, and the court subsequently affirmed the decision of the court below.

### *C. Investigations Made by Grand Juries and Responses to Them*

As we observed in an earlier article,[128] California is one of only two states requiring each county to appoint a civil grand jury with broad investigatory powers. California law requires that "one grand jury in each county, shall be charged and sworn to investigate or inquire into county matters of civil concern . . . ."[129] Another section of the Penal Code requires grand juries to:

> [I]nvestigate and report on the operations, accounts, and records of the officers, departments, or functions of the county including those operations, accounts, and records of any special legislative district or

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126. *See* Statista Research Department, *Resident Population in California From 1960 to 2020*, STATISTA (Jan. 20, 2021), https://www.statista.com/statistics/206097/resident-population-in-california/.

127. *See supra* Tables 1–2 and accompanying text.

128. *See* Nkem Adeleye et al., *California's Civil Grand Juries and Prison Conditions 2007-2017*, 57 SAN DIEGO L. REV. 609, 613, n.31 (2020).

129. CAL. PENAL CODE § 888 (West 2021).

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> other district in the county created pursuant to state law for which the officers of the county are serving in their ex officio capacity as officers of the districts.[130]

Remits such as these place grand juries in a strong position to investigate citizen complaints of Brown Act violations or to seek out such violations during wider statutory investigations. Grand juries are judicial bodies,[131] and their per diem allowances and expenses are met out of public funds.[132] On the other hand, private citizens' Brown Act suits carry the risk that the plaintiffs may not receive a discretionary award of their legal costs and, at worst, must bear their own costs and those of their prevailing opponents.

Our study of civil appellate litigation raising Brown Act issues covered the entire period the Brown Act has been in force. Consideration of grand jury annual reports for the same period would have required retrieval and examination of potentially more than 3,800 annual reports for the fifty-eight counties. Even confining our examination to reports for the last twenty years would have involved obtaining and examining as many as 1,160 reports. We therefore compromised and confined our examination of grand jury investigations implicating Brown Act issues to the potentially available 580 annual reports generated in a ten-year fiscal period.

The COVID-19 pandemic has hampered the work of many grand juries and by the time of writing in April 2021, many had yet to publish their reports for the fiscal year 2019–2020. We therefore covered the fiscal years 2009–2010 through 2018–2019. During this period, around one-third of the appeals we studied in Section B were heard. We believe this ten-year span of grand jury reports corresponds to a sufficiently large proportion of the appeals studied in this Article for us to draw valid conclusions about the relative importance of private Brown Act violations complaints and public judicial investigations of the same.

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130. *Id.* § 925.

131. *See* People v. Superior Ct. of Santa Barbara Cnty., 531 P.2d 761, 766 (Cal. 1975) ("As [Penal Code § 888] indicates, and as the California precedents have long recognized, the grand jury is a 'judicial body,' 'an instrumentality of the courts of this state . . . .'") (citations omitted).

132. For details of grand jury expenditure and other resources, see BRUCE T. OLSON, GRAND JURIES IN CALIFORNIA: A STUDY IN CITIZENSHIP 85 (2000).

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If every county's grand jury had completed and published an annual report each year during the ten-year period for which we collected data, there would be a total of 580 reports. The grand jury makes its annual report to the superior court of its county, but there is no firm rule governing the retention and publication of these reports once filed. In some cases, the local superior court will host copies on its website.[133] Many counties' grand juries have their own websites and host copies of annual reports there.[134] Another site, the University of California's Digital Resources for Law and Public Policy, aims to harvest copies, *inter alia*, of grand jury reports and host a searchable collection of them.[135] In some cases, county government or local media websites host copies of these reports.[136] There is also a requirement that a copy of each report should be sent to the California State Archives maintained by the Secretary of State.[137] The State Archives does not have a searchable database of its holdings. Rather, specific queries about documents must be sent to the archivists and, if copies are held, payment is needed for the document's paper delivery.[138]

To collect reports, we searched all fifty-eight Superior Court websites and downloaded available reports. Where these sites did not disclose reports, we searched grand jury websites, county government sites, newspapers, internet search engines, and the Digital Resources for Law and Public Policy site, in that order. When those searches did not

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133. *See*, *e.g.*, *Grand Jury Reports & Resolutions*, SUPERIOR COURT OF PLACER CNTY., http://www.placer.courts.ca.gov/general-grandjury-reports.shtml (last visited Oct. 21, 2021).

134. *See*, *e.g.*, *Civil Grand Jury*, CITY & CNTY. OF S.F., https://civilgrandjury.sfgov.org/#:~:text=The%20Civil%20Grand%20Jury%20is,government%20officers%2C%20departments%20or%20agencies (last visited Oct. 21, 2021).

135. *See The Univ. of Cal. Digit. Res. for L. and Pub. Pol'y*, CONTENTDM https://cdm16255.contentdm.oclc.org/digital/collection/p266301coll6/search/order/title/ad/asc (last visited Oct. 21, 2021).

136. *See*, *e.g.*, *Marin County Civil Grand Jury Final Reports*, CNTY. OF MARIN, https://www.marincounty.org/depts/gj/reports-and-responses (last visited Oct. 21, 2021) (detailing county hosting CGJ reports); *Final Reports and Responses*, MODOC CNTY. GRAND JURY, http://gsmall.us/GJ/FinalReports/index.html (last visited Oct. 21, 2021) (detailing media company hosting CGJ reports).

137. CAL. PENAL CODE § 933(b) (West 2021).

138. E-mail from Reference Archivist, California State Archives to Julian Killingley, Professor of Law (ret'd), Birmingham City University (Sept. 9, 2020, 20:04 UTC) (on file with the authors and the Law Review Office).

reveal reports, we inquired of the California State Archives or made California Public Record Act requests. We recovered 562 annual reports for the study period. However, we were unable to obtain the remaining eighteen reports from Alpine, Colusa, Del Norte, El Dorado, Sierra, Tehama, and Trinity counties.[139] Sometimes the absence of reports is unexplained, but we speculate that in other cases it may be because the counties had a small population and their superior court was unable to recruit a quorate jury in particular years.[140] In one county's case, the judge discharged an inquorate jury and decided there was insufficient time to recruit an alternate jury and allow it to complete its inquiries.[141] In another county's case, archived copies of reports were either inaccessible or comprised only a cover sheet and table of contents.[142]

All reports recovered were in portable document format ("PDF") files. Most of the documents were machine searchable and had been converted into PDF files from text files. However, in several cases, the PDF file was constructed from images of the original documents and was not directly searchable electronically. We used Nitro Pro 10 software as our PDF file reader, which reported whether files were non-searchable image files. Nitro Pro 10 offered the choice to convert the non-searchable image files using optical character recognition ("OCR") and save them into a searchable PDF format. We examined each file using the search string "Brown Act" to find investigations mentioning the Brown Act. Many investigations ended by reminding

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139. The missing reports were: Alpine County for fiscal years ending in 2012, 2013, 2014, 2015, 2016, 2018, and 2019; Colusa County for year ending 2010; Del Norte County for year ending 2010; El Dorado County for year ending 2013; Sierra County for year ending 2010; Tehama County for year ending 2013; and Trinity County for years ending in 2010, 2011, 2012, 2013, 2014, and 2019.

140. Alpine County had a population estimated in 2019 as 1,129 people. A quorate grand jury would have comprised probably more than 3% of the entire population of the county eligible for grand jury service. *Quick Facts: Alpine County, California*, U.S. CENSUS BUREAU, https://www.census.gov/quickfacts/alpinecounty-california (last visited Apr. 19, 2021).

141. *See* Cole Mayer, *Grand Jury Disbanded*, MOUNTAIN DEMOCRAT https://www.mtdemocrat.com/news/grand-jury-disbanded/ (Mar. 22, 2013, 3:08 PM) (regarding the discharge of the 2012–2013 El Dorado County Grand Jury noting, "According to the court order, the Grand Jury fell below the minimum of 12 active jurors and was thus discharged. No annual report had been made and there was no time left to select new members before the next Grand Jury is selected.").

142. *See Civil Grand Jury*, *supra* note 134.

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prospective respondents of the need to discuss their responses in meetings that themselves conformed to Brown Act requirements. We ignored reports where this was the only Brown Act reference.

The remaining files contained some substantive discussion of Brown Act provisions. Sometimes a grand jury would simply note in passing approval that a body was conducting its affairs in accordance with Brown Act requirements.[143] We discounted these investigations from further study. In some cases, we excluded a grand jury's investigation because the single Brown Act mention was in the context of describing actions that could legitimately be done in secret, but the Brown Act was not raised as an investigatory issue.[144] We looked for investigations where either an alleged Brown Act violation was the main focus of the investigation or where substantial Brown Act violations arose as collateral issues in the course of investigations of other matters of concern. This left us with a total of sixty-five investigations for analysis, as listed in Appendix 2 to this Article.[145]

Our first interest was the identity of the sources of the grand juries' investigations. In Table 7, we analyze the sources that inspired the investigations studied.

| **Reasons for Investigations** | **%** |
|---|---|
| Citizen complaints to grand jury | 73.8 |
| Sua sponte inquiries by grand jury | 21.5 |
| Other | 4.6 |

*Table 7: Reasons for investigations undertaken during 2010–2019*[146]

143. *See, e.g.*, CNTY. OF HUMBOLDT, THE GRAND JURY OF HUMBOLDT CNTY. 2010-2011 FINAL REPORT 22 (2011).

144. *See*, *e.g.*, ALAMEDA CNTY. GRAND JURY, 2012-2013 ALAMEDA CNTY. GRAND JURY FINAL REPORT 85, 94 (2013).

145. Appendix 2, the identity of investigations in each category, and their citations are on file with the Law Review Office.

146. Identity of investigations in each category and their citations are on file with the authors and the Law Review Office.

Published by CWSL Scholarly Commons,

Unsurprisingly, citizen complaints prompted most investigations. Both Kern and Kings County had grand juries that investigated the greatest number of Brown Act violation complaints. These counties guided citizens using their websites on how to submit complaints using the provided pro forma documentation.[147] Most of the remaining investigations were undertaken on a grand jury's own initiative. Some counties did not investigate any alleged violations during the study period.[148] However, that does not necessarily indicate that those juries did not receive any complaints because decisions on whether to investigate complaints lie in each grand jury's discretion and their deliberations are secret.

Next, we looked to see whether the activities of particular bodies were more frequently targeted than others. Table 8 shows the distribution of investigation targets during the study period.

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147. During the study period, each grand jury investigated three citizen-prompted Brown Act complaints. Kern County's website has a grand jury complaint process page that includes a link to a downloadable PDF form and instructions on how to return it. It also has a telephone hotline for submission of anonymous complaints. *See Grand Jury Complaint Process*, KERN CNTY., https://www.kerncounty.com/government/other-agencies/grand-jury/grand-jury-complaintprocess#:~:text=Complaints%20may%20be%20submitted%20in,complaints%20may%20not%20be%20investigated.&text=Request%20that%20a%20form%20be,4800%20%E2%80%93%20you%20may%20remain%20anonymous(last visited Apr. 21, 2021). Kings County's website also has a grand jury page with a description of the complaints process and a link to a downloadable complaint form, which contains instructions for its return. *See Grand Jury*, KINGS CNTY. CA, https://www.countyofkings.com/departments/-grand-jury (last visited Apr. 21, 2021).

148. San Francisco and San Mateo grand jury annual reports during the period are examples of the lack of such investigatory initiatives.

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| **Legislative Body** | **%** |
|---|---|
| Special Districts (Non-Educational) | 32.3 |
| Education Special Districts | 26.2 |
| Cities or Towns | 23.1 |
| Counties | 12.3 |
| Legislative bodies generally | 6.2 |

*Table 8: Identity of bodies the subject of investigations during 2010–2019*[149]

It should be noted that each category does not contain the same number of constituents, so strict comparisons cannot be drawn as to the relative frequency of investigations. However, since there are likely to be many more non-educational special districts than other special districts, it is probable that allegations of Brown Act violations in Boards of Education, Schools, and College Districts are more frequent than in other bodies. It is unclear why this should be so, but we hypothesize that citizens have a closer and more personal interest in the governance of local educational bodies.

Our principal interest in the analysis lay in the frequencies of specific Brown Act violations. Most investigations involved more than one kind of alleged violation, although certain violations were frequently associated with other violations. For example, allegations that a legislative body had failed to provide a meeting agenda or had failed to sufficiently describe agenda items were frequently associated with allegations that the same body had failed to provide details of the relevant meeting's date and location. Similarly, allegations that a body had held inappropriate closed meetings were also associated with allegations that the body had conducted serial or secret meetings.[150] Table 9 sets out our findings in descending order of frequency.

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149. Identity of investigations in each category and their citations are on file with the authors and the Law Review Office.

150. *See, e.g.*, ALAMEDA CNTY. GRAND JURY, 2014-2015 ALAMEDA CNTY. GRAND JURY FINAL REPORT 33–49 (2015).

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| **Nature of Alleged Principal Violations** | **%** |
|---|---|
| Agenda inadequacies | 32.3 |
| Inappropriate closed sessions | 24.6 |
| Secret meetings | 23.1 |
| Inadequate familiarity with Brown Act | 20.0 |
| Impaired opportunity for public participation | 16.9 |
| Serial meetings | 16.9 |
| Breach of confidentiality | 12.3 |
| Inadequate notice of meeting | 12.3 |
| Defective minutes of meeting | 12.3 |

*Table 9: Frequency of allegations regarding particular Brown Act violations 2010–2019*[151]

The range of actions that might constitute a Brown Act violation is very wide. We condensed most of these behaviors into a table of nine categories. A general description of what these categories cover is desirable. The topic "Agenda inadequacies" covers, *inter alia*, missing agendas, vague or misleading descriptions of agenda items, failure to provide the public with agendas and associated documents, and meetings dealing with matters not appearing on agendas. The topic "Inappropriate closed sessions" covers both closed sessions dealing with business that can only lawfully be dealt with in open meetings and closed meetings that have been called, conducted, or reported otherwise than in accordance with the Brown Act's requirements. The topics "Secret meetings" and "Serial meetings" cover different but related behaviors. A secret meeting includes any meeting that has not been publicly announced, to which the public is denied admission or whose decisions are not minuted or reported. Serial meetings include meetings where a quorum of members participate in a series of meetings, physical or virtual, to discuss, deliberate, or take action on any item of business within the subject matter jurisdiction of the body.

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151. Identity of investigations in each category and their citations are on file with the authors and the Law Review Office.

https://scholarlycommons.law.cwsl.edu/cwlr/vol58/iss1/2

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The heading "Inadequate familiarity with Brown Act" covers repeated actions by members of a body that suggest those members are either ignorant of the provisions of the Brown Act or are willfully defying them. The heading "Impaired opportunity for public participation" covers a range of actions that prevent members of the public from attending meetings, erecting measures that might deter public attendance at meetings, providing no opportunity for the public to comment or make suggestions on business, or unduly limiting time afforded for public participation in meetings. "Breach of confidentiality" relates to unlawful disclosures of closed-meeting business. Some cases involved disclosures of privileged or personal information. The heading "Inadequate notice of meeting" covers both failure to notify persons whose behavior is to be considered at the impending meeting as well as failure to comply with Brown Act meeting requirements as to notification of time, date, and place of scheduled or continued meetings. Finally, "Defective minutes of meeting" covers failure to supply minutes, inaccuracies in minutes, and retrospective clandestine revisions of minutes.

It is apparent that the commonest Brown Act breaches investigated comprised agenda violations, improperly held closed sessions, and the holding of secret or serial meetings. It is unsurprising that investigations into closed sessions and secret or serial meetings make up the greater part of alleged violations of an open meeting law.

Our final analysis of these investigations looked at the responses of the bodies and officials that were the subjects of the grand juries' findings and recommendations. California law requires that each grand jury submit its report to the presiding judge of its county's superior court.[152] Copies are sent to any public agency or elected official that is the subject of findings or recommendations. The governing bodies of public agencies are required to "comment" to the presiding judge on any findings or recommendations that relate to them within ninety days of publication of the report.[153] Every elected county officer or agency head for which the grand jury has responsibility is also required to comment within sixty days to the presiding judge on findings and recommendations pertaining to matters under their control.[154]

152. *See* CAL. PENAL CODE § 933(a) (West 2021).

153. *See id.* § 933(c).

154. *Id.*

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The statutory requirement to comment to the presiding judge of the superior court is important. The fact that the reply is to a judge rather than to the grand jury is likely to make respondents take findings and recommendations seriously and give them a considered reply. However, the duty is no more than to "comment," and there is no requirement to act upon any of the findings or recommendations made by a grand jury.[155] Responses from agencies and officials, like the grand jury's original report, are sent to the presiding judge and copies are forwarded to the State Archivist to be kept "in perpetuity."[156]

We were interested to see how local agencies and officials responded to findings and recommendations made by grand juries. Tracking down these responses was not a simple task. Several grand juries completed their investigations early in the fiscal year. These juries frequently forwarded the results of their investigation to the affected agencies and officials and were able to incorporate their responses into the final reports.[157] Other juries adopted a practice of forming a review or continuity committee to gather and publish responses to the findings and recommendations made by their predecessors and comment upon their perceived adequacy or otherwise.[158] In some cases, a response perceived to be inadequate would prompt a further follow-up investigation.[159] These subsequent inquiries form part of the sua sponte investigations referred to in Table 7 above.[160] In some cases, responses do not appear in annual reports but are hypertext linked on one or more of the many websites that host copies of the reports. In a number of cases, no responses could be found even though an annual report with findings or recommendations was found.

We present our findings below in Tables 10, 11, and 12. Our summary inevitably simplifies a complex picture and classifying agency and official responses involves some subjectivity. The analyses

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155. *Id.*

156. *See id.* § 933(b).

157. *See*, *e.g.*, THE COUNTY OF FRESNO, 2017-18 FRESNO COUNTY GRAND JURY REPORT NO. 2 CITY OF SANGER ORDINANCE NO. 1094-MEASURE S 33 (2018).

158. *See*, *e.g.*, GLENN COUNTY GRAND JURY, 2012-2013 GLENN COUNTY GRAND JURY REPORT 33–45 (2012).

159. *See*, *e.g.*, IMPERIAL COUNTY GRAND JURY,THE 2013-2014 IMPERIAL COUNTY CIVIL GRAND JURY FINAL REPORT 24 (2014).

160. *See supra* Table 7.

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relate only to responses to jury Brown Act-related findings and recommendations. Table 10 analyzes positive response occurrences, Table 11 analyzes negative responses, and Table 12 analyzes other responses. Note that our analyses relate to occurrences of types of responses to investigations and not to frequency. Each response type is counted once in each investigation regardless of the number of individual responses of that kind. Accordingly, our data cannot be used to determine the balance of response, e.g., overwhelmingly positive or negative, to any particular investigation. Attempting such an analysis would have increased our work by orders of magnitude.

We began by looking at what we classified as five positive responses.

| **Positive Responses from Agencies/Officials** | **%** |
|---|---|
| Agrees | 24.6 |
| Recommendation implemented | 36.9 |
| Recommendation not yet implemented, but will be | 15.4 |
| Will try to implement/continue to comply | 10.8 |
| Denies breaches but has/will amend practices | 3.1 |

*Table 10: Positive responses to findings of Brown Act violations 2010–2019*[161]

Table 10 indicates that respondents agreed with some of the grand jury's findings or recommendations in nearly one-quarter of investigations. In over one-half of investigations, respondents reported that they had implemented or would implement the jury's recommendations. In a smaller number of cases, respondents were less positive. Some would only go as far as to say they would "try" to implement recommendations. Others denied breaching the Brown Act but, nevertheless, stated they had or would implement a recommendation.

161. Identity of investigations in each category and their citations are on file with the authors and the Law Review Office.

Next, we looked at what we perceived as negative responses to a grand jury's findings or recommendations.

| **Negative Responses from Agencies/Officials** | % |
|---|---|
| Disagree | 16.9 |
| Agree in part/disagree in part | 13.8 |
| Denies breaching Brown Act | 7.7 |
| Jury's findings non-specific or unsubstantiated | 4.6 |
| Will not implement recommendations as unjustified | 12.3 |

*Table 11: Negative responses to findings of Brown Act violations 2010–2019*[162]

The most extreme negative reaction came from the Lassen County Board of Supervisors to findings and recommendations in a 2014 investigation.[163] The respectfully couched letter to the presiding judge first acknowledged the grand jurors' contribution and thanked them for their service and constructive criticism.[164] However, the Board's response quickly descended into a series of observations on the grand jury's motives and performance. The Board set the tone for what was to follow:

> The Board of Supervisors is also of the perception, and we don't believe we are alone, that some persons, whether they admit it or not, derive their interest in serving as a Grand Juror as a result of some experience or conflict with local government. Also, and perhaps for different reasons, some of the persons selected over the years to serve

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162. Identity of investigations in each category and their citations are on file with the authors and the Law Review Office.

163. *See* LASSEN CNTY. CALIFORNIA, LASSEN CNTY. CALIFORNIA GRAND JURY REPORT 2013-2014 30 (2014).

164. The Lassen County Board of Supervisors' response is found among a collection of responses gathered towards the end of the grand jury's report. THE LASSEN COUNTY BOARD OF SUPERVISORS, A RESPONSE TO FY 2013-2014 GRAND JURY REPORT (2014) *in* LASSEN CNTY. CALIFORNIA, LASSEN CNTY. CALIFORNIA GRAND JURY REPORT 2013-2014 (2014).

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> are, in fact, the "administrators, legislators, or politicians" that the Grand Jurors Association contends it is not made up of.[165]

The Board prefaced its detailed responses by warning what to expect:

> Contrary to past years where the Board has been fairly quiet, this year the Board will actively point out inaccuracies and misperceptions. This year, the Board of Supervisors will highlight the fact that the Grand Jury sometimes is composed of people who are not infallible, not always properly informed, and not always motivated to come to the proper conclusions.[166]

After some spirited dissents from the jury's findings, the Board went on to conclude:

> The Board specifically set out to show that the Grand Jury is not always right and to think so is also a mistake. Moreover, the Board tried to point out that dependent on who becomes involved in the reporting process, the integrity of a report itself can be called into question, thereby affecting the credibility of the whole.[167]

Generally, the responses disclosed in Table 11 suggest that agencies and officials responded negatively to a smaller proportion of findings and recommendations than those to which they responded positively. Although there was some disagreement in more than one-quarter of investigations, nevertheless, these figures suggest that there is confidence in the general quality of grand jury fact finding and remedial suggestions regarding Brown Act violations.

In Table 12, we summarize other responses made to or required by grand jury investigations.

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165. *Id.*
166. *Id.* at ii.
167. *Id.* at 22.

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| Other Findings/Responses | % |
|---|---|
| Recommendations require further analysis | 4.6 |
| No response required | 9.2 |
| Allegations not upheld | 1.5 |
| No response found or filed | 7.7 |

*Table 12: Other findings and responses to allegations of Brown Act violations 2010–2019*[168]

The most striking figure in Table 12 is the very low proportion of investigations that resulted in conclusions that there had not been any Brown Act violations. That suggests three things. First, citizens are not abusing the citizen-initiated complaints procedure by making malicious or frivolous complaints against agencies or officials. Second, investigations started on a grand jury's own initiative are not usually ill-founded. Third, we might infer that there is usually no smoke without fire and that most investigations studied uncover some evidence of Brown Act non-compliance.

### *D. Self-Policing and Public Awareness*

The Brown Act, in one form or another, has been around for close to seventy years. It would be surprising if California's public bodies and citizens had not developed an awareness of the Brown Act's provisions and its imposed rights and obligations for such an extended period. We considered the extent to which two separate mechanisms might contribute to informal reinforcement of Brown Act observance: self-policing by public bodies and public awareness.

#### *1. Self-Policing by Public Bodies*

One of the interesting aspects of the grand jury investigations is their insight into how local agencies react to behavioral challenges or reform recommendations. When a grand jury makes findings or recommendations, the subject agency or officials are required to

168. Identity of investigations in each category and their citations are on file with the authors and the Law Review Office.

respond to the local superior court's presiding judge.[169] That requirement alone usually ensures a degree of civility in the responses regardless of how well criticisms were received. In Table 10, we showed that most agencies and officials responded positively to the juries' findings and recommendations.[170] Such responses give insight into the degree to which the local government internalized the Brown Act principles. The occasional hostility to scrutiny and criticism that we commented upon suggests that jury findings of Brown Act violations may not always be a reliable indicator of impropriety—at least in the eyes of those criticized.[171]

Nevertheless, the relatively small number of investigations over a ten-year period and the high degree of acceptance of recommendations suggest public bodies are largely observant of the Brown Act and are willing to amend their conduct if found to be non-compliant. We attribute this degree of compliance to the fact of training; newly elected members and officials are routinely offered or given Brown Act training prior to their assuming office.[172] Many are provided with Brown Act guides like those prepared by the California League of Cities.[173] We also attribute this degree of compliance to vigilance on the part of local government officials, particularly the legal officers and advisors who ensure that Brown Act requirements become internalized in agency internal practices and procedures.

"Local agencies" defined in the Brown Act[174] extend to many public bodies located within California's fifty-eight counties. Many of these counties have full-time lawyers on staff, such as county counsel and city attorneys, or can call upon the local district attorneys or specialist law offices for legal advice. Public law practice is a legal specialty, and practitioners are expected to have knowledge of legal areas outside the normal competencies of ordinary private and corporate counsel. Public law practitioners ensure that their local

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169. CAL. PENAL CODE § 933(c) (West 2021).

170. *See supra* Section II.C Table 10.

171. *See, e.g.*, THE LASSEN CNTY. BOARD OF SUPERVISORS, *supra* note 164.

172. *See State Ethics Training Requirements for Local Officials: Frequently Asked Questions (FAQs)*, INST. FOR LOC. GOV'T (Sept. 4, 2012), https://www.ca-ilg.org/sites/main/files/file-attachments/state_ethics_training_faqs_10-4.pdf.

173. *See* LEAGUE OF CAL. CITIES, *supra* note 95.

174. *See* CAL. GOV'T CODE § 54951 (West 2021).

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agencies' members do not act ultra vires, and this extends to advising them of their Brown Act responsibilities.

The county counsel's office is a statutory post appointed by a county's board of supervisors.[175] A county counsel normally serves a four-year term[176] and "discharge[s] all the duties vested by law in the district attorney other than those of a public prosecutor."[177] The California State Association of Counties provides an overview of a county counsel's responsibilities.[178] The Association notes, "As the legal advisor to the Board of Supervisors, County Counsel attends its meetings, both public and closed sessions."[179] Similar functions are recommended for city attorneys appointed by city councils.[180]

County counsels have their own professional association, the County Counsels' Association of California, which helps them share expertise and knowledge of local government law.[181] There is no corresponding association for city attorneys, but rather their professional interests are served by a department within the League of California Cities.[182] The competence and vigilance of county counsels and city attorneys to ensure Brown Act compliance by their local agencies and officials is attested to by the comparative scarcity of prosecutions, civil litigation, and grand jury investigations discussed in this Article. These attorneys help ensure that the requirements of Brown Act-subject meetings are correctly observed. This raises public

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175. *See id.* § 27640.

176. *See id.* § 27641.

177. *See id.* § 27642.

178. *See County Counsel*, CAL. STATE ASS'N OF CNTYS., https://www.counties.org/county-office/county-counsel (last visited June 16, 2021).

179. *Id.*

180. *See* Jeffrey Kolin & Jonathan P. Lowell, *The Role of the City Attorney and Development of the City Attorney/City Manager Relationship – It's All Good, or Should Be*, LEAGUE OF CAL. CITIES (Sept. 20, 2013), https://www.cacities.org/Resources-Documents/Member-Engagement/Professional-Departments/City-Attorneys/Library/2013/2013-Annual-Conference-City-Attorneys-Track/9-2013-Annual-Jeff-Kolin-Jonathan-Lowell-The-Role (noting that city managers expect the city attorney to review agendas of city council meetings).

181. *Welcome to the County Counsels' Association of California*, COCONET.ORG, https://www.coconet.org/landing.php (last visited June 16, 2021).

182. *See City Attorneys*, LEAGUE OF CAL. CITIES, https://www.calcities.org/home/get-involved/professional-departments/city-attorneys#:~:text=The%20California%20City%20Attorneys%20Community,to%20access%20the%20Community%20here (last visited Sept. 6, 2021).

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awareness of local agency meetings and affords citizens opportunities to observe and participate in the conduct of civic business. County counsels and city attorneys also provide or facilitate Brown Act-awareness training for members and staff of local governments covered by the Brown Act.[183] Training is particularly important because the serial communications prohibition means that local agency members may often act where their behavior cannot be observed by their legal advisers and timely advice given.[184]

It is not possible to evaluate the precise significance of the role played by county counsels and city attorneys in ensuring that local agencies conduct their affairs in a manner that accords with Brown Act requirements. However, it would be a serious dereliction of their legal duties if they failed to advise their local agencies and their members of what was required to conduct business lawfully. The background advice and guidance that county counsels and city attorneys provide has likely ensured that most public business is properly noticed and conducted. Over many years, this has brought about a situation whereby few citizens consciously think about the open conduct of meetings because it is now part of the cultural and political landscape of the conduct of California's public affairs. Open meetings are unexceptional because they have become the norm. So, it is likely that citizens notice when the Brown Act requirements are *not* adhered to rather than when local agencies are in Brown Act compliance.

### *2. Sources of Public Awareness*

Intuitively, it might appear that exercising rights under the Brown Act could be related to the extent of political and civic engagement within California. The phrase "political and civic engagement" is nebulous and has a variety of different meanings. For this Article's purposes, we adopt the meaning given by Professors Martyn Barrett and

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183. *See, e.g.*, Phil Pogledich & Makayle Leigh, *Brown Act Training for Advisory Committee Members & Staff Liaisons,* YOLO CNTY., https://www.yolocounty.org/home/showpublisheddocument/55735/637164070232170000 (last visited Oct. 21, 2021).

184. *See* CAL. GOV'T CODE § 54952.2(b)(1) (West 2021) ("A majority of the members of a legislative body shall not, outside a meeting authorized by this chapter, use a series of communications of any kind, directly or through intermediaries, to discuss, deliberate, or take action on any item of business that is within the subject matter jurisdiction of the legislative body.").

Bruna Zani. Both professors used the phrase as embracing two distinct concepts: "political engagement," denoting "the engagement of an individual with political institutions, processes and decision-making," and "civic engagement," denoting "the engagement of an individual with the interests, goals, concerns and common good of a community."[185]

We might expect that the Brown Act's provisions would be important to politically and civically engaged citizens. A convenient indicator of broad political engagement is citizen participation in the election of officials.[186] Such an indicator is easily measured from election returns. Measurable indicators of civic engagement are scarcer; however, figures are available for voluntary work in communities.[187] We might hypothesize that strong measures of political and civic engagement *should* be significant factors in ensuring Brown Act compliance.

However, evidence suggests that political and civic engagement in California is lower-middle ranking when compared with engagement in other states. In a 2002 study, the Public Policy Institute of California reported that voter "[t]urnout in municipal elections around the country averages half that of national elections . . . and local voter turnout often falls below one-quarter of the voting-age population."[188] Anecdotal evidence suggested that voter turnout in California was even lower than in the rest of the country.[189] The report noted the very uneven distribution of voters and non-voters across the population; for example, California residents who voted were likely to be predominantly highly educated, wealthy, old, and white.[190] Differences were found to be particularly large across educational levels.[191] More

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185. Martyn Barrett & Bruna Zani, *Political and Civic Engagement: Theoretical Understandings, Evidence, and Policies*, *in* POLITICAL AND CIVIC ENGAGEMENT: MULTIDISCIPLINARY PERSPECTIVES 4 (Martyn Barrett & Bruna Zani eds., 2015).

186. *See*, *e.g.*, Richard P. Adler & Judy Goggin, *What Do We Mean by "Civic Engagement"?*, 3 J. TRANSFORMATIVE EDUC. 236, 242 (2005).

187. *See*, *e.g.*, T*rends and Highlights Overview*, CORP. FOR NAT'L & CMTY. SERV., https://www.nationalservice.gov/vcla/state/California (last visited Sept. 3, 2021).

188. ZOLTAN L. HAJNAL ET AL., MUNICIPAL ELECTIONS IN CALIFORNIA: TURNOUT, TIMING, AND COMPETITION 2 (2002) (citation omitted).

189. *Id.*

190. *Id.* at 3.

191. *Id.*

recent research has shown that basic educational attainment in California, i.e., graduating from high school, is the lowest for any state in the nation, with some seventeen percent of California's citizens not having graduated from high school.[192]

Although the usual measures of civic engagement do not suggest any strong correlation with Brown Act awareness, there are some other citizen-centered organizations that have a role in ensuring Brown Act observance. The U.S. Supreme Court has held that the First Amendment right to freedom of speech is not confined to the act of communicating information but extends to receiving information.[193] Although we have been unable to obtain details of membership numbers, California hosts many organizations such as the California branches of the American Civil Liberties Union, the First Amendment Coalition, and Californians Aware, which are dedicated to policing First Amendment rights. We suggest these organizations are instrumental in disseminating awareness of Brown Act open meeting provisions among their members, including their right to be made aware of meetings and to participate in local government decision making. As evidence, we point to the fact that the First Amendment Coalition and Californians Aware both appear as parties in several of the appeals cited in Appendix 1 to this Article.[194]

Finally, we cannot overlook the media's role in giving awareness of local government activities and in reporting attempts to discourage public attendance at meetings or contributing to decision making. The media draw attention to Brown Act breaches and help police its observance by, when necessary, litigating their right to attend Brown Act-subject meetings. The *Los Angeles Times*, Freedom Newspapers, and Stockton Newspapers all appear as parties in several of the appeals cited in Appendix 1 to this Article.[195] Additionally, the *San Francisco*

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192. *See Educational Attainment by State 2021*, WORLD POPULATION REV., https://worldpopulationreview.com/state-rankings/educational-attainment-by-state (last visited Sept. 3, 2021).

193. Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 757 (1976) (citing Kleindienst v. Mandel, 408 U.S. 753, 762–63 (1972)).

194. Appendix 1, the identity of investigations in each category, and their citations are on file with the Law Review Office.

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*Chronicle*'s original 1952 article series was the inspiration for the Brown Act's passage.[196]

## CONCLUSION

In our Introduction, we took it as axiomatic that local California government is presently conducted openly. But we noted that even though open meeting laws were enacted prior to the Brown Act's passage, transparent government had not always been the norm. We set out to investigate how the Brown Act's requirements came to be embedded in the conduct of local California politics and the mechanisms by which this was achieved.

The most direct way to enforce statutes is to criminalize their breach. We noted that Government Code section 54959 potentially criminalizes the behavior of those who deprive the public of information to which they knew the public were entitled. We also observed that there have been no known convictions for this offense. We cannot feasibly evaluate the deterrent effect of the section. The training requirements previously mentioned will ensure awareness that such a penal provision exists. Thus, the training requirements may operate as an instance of the exhortation "to speak softly and carry a big stick."[197]

We then considered the extent of civil enforcement through actions that invoked Brown Act requirements. We saw that many claims for mandamus, injunctions, or declaratory relief resulted in appeals. We can say from the number of such appeals instanced in Appendix 1 that these claims are not unusual.[198] However, the normality of these claims is more indicative of Brown Act knowledge among California's legal practitioners than indicative of such knowledge among politicians and the public. Even in cases where Brown Act violations are proven, we cannot say whether knowledge of that result eventually filtered back to the members or officials who were found responsible for the violations. We suspect that adverse decisions against a local agency are more likely

196. *See* Harris, *supra* note 22.

197. The Editors of Encyclopedia Britannica, *Big Stick Policy*, ENCYC. BRITANNICA, https://www.britannica.com/event/Big-Stick-policy (last visited Oct. 21, 2021).

198. Appendix 1, the identity of investigations in each category, and their citations are on file with the Law Review Office.

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to result in better training and awareness within the organization than any substantial increase in wider public awareness.

The incidence of grand jury investigations into alleged Brown Act violations does suggest that there is at least a minimal degree of public awareness about the way local government should be conducting its decision making. Moreover, we can infer from the number of sua sponte investigations that grand jurors would come away with Brown Act knowledge. In Section III, we suggested that the public in California may have limited awareness of the Brown Act and its provisions. Most of the formal policing of the Brown Act's provisions is found in judicial rulings and grand jury recommendations, often prompted by private grievances or public complaints. This suggests wider awareness among attorneys and a few members of the public. However, we believe that the mechanisms by which implementation and observance of the Brown Act's principles have been achieved are invisible to the public gaze. Public awareness in the form of media reports, assertion of legal rights in litigation, and complaints to grand juries exists—but not to such an extent as to suggest that they are the most significant mechanisms by which Brown Act observance has been achieved. We must look elsewhere for the mechanism.

The unsung heroes of Brown Act compliance, we suggest, are most likely to be the public law attorneys who serve as in-house or consultant counsel to California's county and city councils and local agency boards. Unlike courts and grand juries that adjudicate and investigate after the event, a public law attorney's role is prophylactic. It is the routine work of these attorneys that ensures that their clients—California counties, cities, and local agencies—do not breach the Brown Act. It is often only when they attend meetings as advisors to the chair that their work becomes publicly visible. It is their vigilance that ensures that the Brown Act can work as its framers intended.

The fact that legal challenges and grand jury reports reveal occasional lapses from Brown Act ideals suggests that there may still be a slight haze in the air. However, the relative infrequency of these lapses in a large and populous state, such as California, dispels the myth that the conduct of local government business now takes place in a smoke-filled room.

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