

The Brown Act – Fundamentals for Real Life Situations

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**CCLC Trustees Workshop
Resort at Squaw Creek**

May 3, 2019

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Overview

- The fundamentals of the Brown Act can provide guidance even in some of the most difficult real-life situations
- The nuances presented by these fact scenarios show how the fundamentals apply, and what other public agencies have done to address unique situations.

Scenario – We Don't Need Speaker Cards

- A vocal community member addresses the Board at each opportunity for public comment. He has continued to demand that CCD cease and desist from requiring speakers to submit speaker cards in which the speaker's name and topic must be provided.



Scenario – We Don't Need Speaker Cards

- At this meeting he submits a demand to cure and correct Brown Act violations regarding the use of speaker cards and also claims it is a violation of attendees' Free Speech rights.



Scenario – Public Comment Cards

- Government Code section 54954.3 :
- (a) Every agenda for regular meetings shall provide an opportunity for members of the public to directly address the legislative body on any item of interest to the public, before or during the legislative body's consideration of the item, that is within the subject matter jurisdiction of the legislative body
- (b) **The legislative body of a local agency may adopt reasonable regulations to ensure that the intent of subdivision (a) is carried out, including, but not limited to, regulations limiting the total amount of time allocated for public testimony on particular issues and for each individual speaker.**

Scenario – Public Comment Cards

- Neither case law nor an Attorney General opinion addresses the legality of a “speaker card” policy
- The use of “speaker cards” reasonably enables a governing board to determine how much time to allocate to each particular agenda item and efficiently and quickly summon members of the public who have indicated a desire to comment publicly on an item.

Scenario – Public Comment Cards

- Attendees cannot be obligated to register their names or provide other information as a condition for their attendance at the meeting. (Gov. Code § 54953.3.)
- However, requesting that individuals provide their names or some other manner in which they may be summoned to make their public comment, as well as the agenda item to which their public comment relates, would likely be deemed a reasonable regulation to ensure the efficient flow of the meeting under Government Code section 54954.3(b).

Scenario – Public Comment Cards

- Free Speech Analysis:
- Courts have recognized three types of “forums”:
 - (1) public forums;
 - (2) limited public forums; and
 - (3) nonpublic forums.

Scenario – Public Comment Cards

- Meetings of the legislative body of a local public agency are considered “limited public forums.”
 - The government may impose *reasonable time, place, and manner regulations* on the speech. However, the government entity cannot allow certain speech, but disallow other speech based on its *content*, unless the distinction is supported by a “compelling state interest.”
 - *Assuming the speaker cards do not require information which would reasonably deter individuals from making public comment*, they are a reasonable regulation on the time and manner of public speech at board meetings.

Scenario – Public Comment Cards

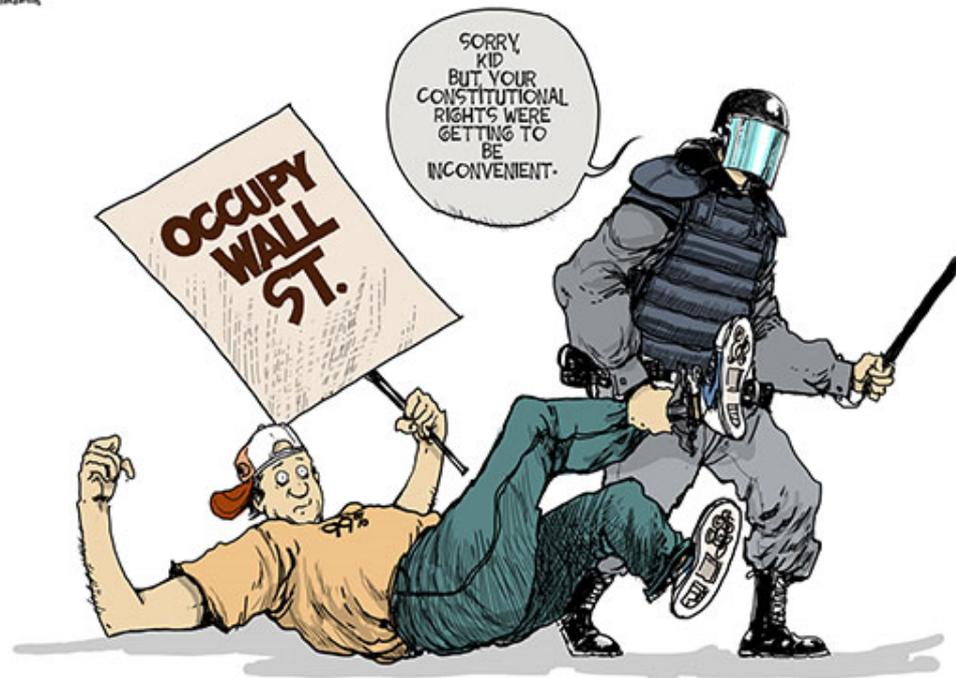
- Responding to cease and desist letters:
 - Any interested person may file an action to stop or prevent Brown Act violations. (Government Code section 54960)
 - Submit Cease and Desist Letter Describing the violation
 - Must be timely – 9 months of alleged violation (Government Code section 54960.2(a)(2).)

Scenario – Public Comment Cards

- Within 30 days of receipt of Cease and Desist:
 - Agency may respond
 - If response is an “unconditional commitment to cease and desist” from future violations in the format set forth in 54962.2(c)(1)
 - No action can be commenced
- If no “unconditional commitment”
 - Interested person may file action 60 days after receipt of Cease and Desist

Scenario – This Group is Demanding an Agenda Item on What?!

- A local advocacy group demands that you place an item on the agenda with the exact wording it wants and tells you that any change to the agenda language is a violation of the Brown Act.



Scenario – This Group is Demanding an Agenda Item on What?!

- Requested Agenda Language:
 - It is hereby requested that an across the board pay cut for CCD administrators be made so that they all share the burden of sacrifice equally. It is requested that the President/Superintendent and Assistant Superintendents take a 25% cut, Managers take a 15% cut and college chancellors take a 10% cut. All money saved will be used to increase course offerings to make AA attainment faster.

Scenario – This Group is Demanding an Agenda Item on What?!

- Education Code section 72121.5
 - It is the intent of the Legislature that members of the public be able to place matters directly related to community college district business on the agenda of community college district governing board meetings, and that members of the public be able to address the board regarding items on the agenda as such items are taken up.

Scenario – This Group is Demanding an Agenda Item on What?!

- Education Code section 72121.5
 - It is the intent of the Legislature that members of the public be able to place matters directly related to community college district business on the agenda of community college district governing board meetings, and that members of the public be able to address the board regarding items on the agenda as such items are taken up.
- Board Policies typically allow the public to place items on the agenda as long as:
 - Within the subject matter jurisdiction of the Board
 - Submitted two weeks (14 days) prior to the Board meeting.

Scenario – This Group is Demanding an Agenda Item on What?!

- Any decision by the Board to deny a member of the public the opportunity to place an item on the agenda could be subject to judicial review under an “abuse of discretion” standard through a writ of mandamus action. (*Mooney v. Garcia* (2012) 207 Cal.App.4th 229, 235-36.)
- However, there is no requirement that an agenda item requested by a member of the public be placed on agenda verbatim or in a particular section.
- Typically, Agendas are developed by the Superintendent/President in consultation with the Board President.

Scenario – This Group is Demanding an Agenda Item on What?!

- Revised agenda language:
- **B-___, PRESENT , Administrative Salary Reduction and Allocation of Reserve Funds**
 - Advocacy Group will present this Agenda Item requesting an across the board pay cut for CCD administrators. Specifically, this group requests that the President/Superintendent, Assistant Superintendents, all Managers ranked above Chancellor and all Chancellors take cuts in their salaries. All money saved will be used to increase course offerings to make AA attainment faster.

Scenario – The President Wants “Virtual” Open Meetings



- The President wants to make Board meetings more accessible to the public and therefore wants to allow the public to attend board meetings virtually. Board members, the President and staff would attend remotely, and no facilities would need to be open to conduct the meeting.
- Is this legal?

“Virtual” Public Meetings

- Is a virtual meeting truly “Open to the public”
 - Govt. Code 54953 “All persons shall be permitted to attend any meeting of the legislative body of a local agency, except as otherwise provided in the [Brown Act].”
 - Teleconferencing is authorized provided
 - Agendas are placed at all teleconference locations
 - Each teleconference location is identified in the notice and agenda
 - At least a quorum participates from within the boundaries
 - Members of the public have the opportunity to address the legislative body at each teleconference location
 - The roll call vote is recorded for each vote

“Virtual” Public Meetings

- Conditions to Attendance

- A member of the public shall not be required, as a condition to attendance at a meeting of a legislative body of a local agency, to register his or her name, to provide other information, to complete a questionnaire, or otherwise to fulfill any condition precedent to his or her attendance. (Government Code section 54953.3)

“Virtual” Public Meetings

- Conditions to Attendance
 - Would logging onto a live stream be a condition on attendance?
 - Could the district make live-streaming locations available to the public and thus satisfy the attendance and conditions requirements of the Brown Act?

Scenario – Masks, Posters and Protesters at the Public Meeting

- Student political group attends the CCD Board meetings wearing Guy Fawkes Halloween masks, bringing signs and banners into the meeting and at public comment doing protest chants for their allotted time. The Board president asks you if we can require the attendees to remove their masks out of safety concerns.



Scenario – Masks, Posters and Protesters

- Are the masks truly disruptive?
- Are posters truly disruptive?
- Are chants during public comment truly disruptive?

Scenario – Masks, Posters and Protesters

- *Norse v. City of Santa Cruz*, (9th Cir. 2010) 629 F.3d 966
- Norse made a Nazi salute in protest of the board's enforcement of a time limitation on his ability to speak, and in support of outbursts from other person's attending the board meeting. Board ejected him from Board meeting.
- 9th Circuit held that the gesture was protected by the First Amendment even though it was made after the time for public comment had expired. The crux of the Court's opinion is that disruption means actual disruption of the proceedings, "[I]t does not mean constructive disruption, technical disruption, virtual disruption, *nunc pro tunc* disruption, or imaginary disruption."

Scenario – Will the Potential Plaintiff Please Stand Up

- Campus security surveillance footage captures a 15 second physical altercation between a Board member and a CCD student on Friday evening. The student is a minor attending CCD as part of the dual enrollment program with the local high school district.



Scenario – Will the Potential Plaintiff Please Stand Up

- Risk Management has learned that the student has no idea who he fought with and has not told his parents about the incident because he does not want to get in trouble.
- After hearing about the incident the President places a closed session item on the agenda – Conference with Legal Counsel – Anticipated Litigation.
- The Board member involved has already contacted the media about the incident due to campus safety concerns.

Scenario – Will the Potential Plaintiff Please Stand Up - Continued

- Elements of closed session agenda items for conference with legal counsel
- Government Code section 54956.9
 - Pending Litigation: A point has been reached where, in the opinion of the board on the advice of legal counsel, and based on existing facts and circumstances, there is a significant exposure to litigation. (Gov. Code, § 54956.9(d)(2).)

Scenario – Will the Potential Plaintiff Please Stand Up - Continued

- Government Code section 54956.9
 - Significant Exposure to Litigation: A point has been reached where, in the opinion of the board on the advice of legal counsel, and based on existing facts and circumstances, there is a significant exposure to litigation. (Gov. Code, § 54956.9(d)(2).)
 - Facts and circumstances that might result in litigation but which the district believes are not known to the potential plaintiff, which facts and circumstances need not be disclosed. (Gov. Code, § 54956.9(e)(1).)
 - Facts and circumstances including, but not limited to, an accident, disaster, incident, or transactional occurrence that might result in litigation against the district and that are known to the plaintiff. These facts shall be publicly stated on the agenda or announced. (Gov. Code, § 54956.9(e)(2).)

Scenario – Will the Potential Plaintiff Please Stand Up - Continued

- Safe Harbor Agenda Language for Closed Session Conference with Legal Counsel – Anticipated Litigation:
- CONFERENCE WITH LEGAL COUNSEL — ANTICIPATED LITIGATION
- a. **Significant exposure to litigation pursuant to subdivision (d)(2) and (e) of section 54956.9:** *(specify the number of potential cases.)*

Scenario – But We Only Post to Other Board Members on Their Private Facebook Pages

- Four of your five board members have personal Facebook pages set to private. All five board members are Facebook “friends.” One member posts on his FB wall, *“I’ll be voting yes on the Resolution to adopt a Project Labor Agreement. We must support living wages in our community.”*
- What if other board members reply to his post?
- What if two other board members hit “like” (or “react”)?



Like



Love



Haha



Yay



Wow



Sad

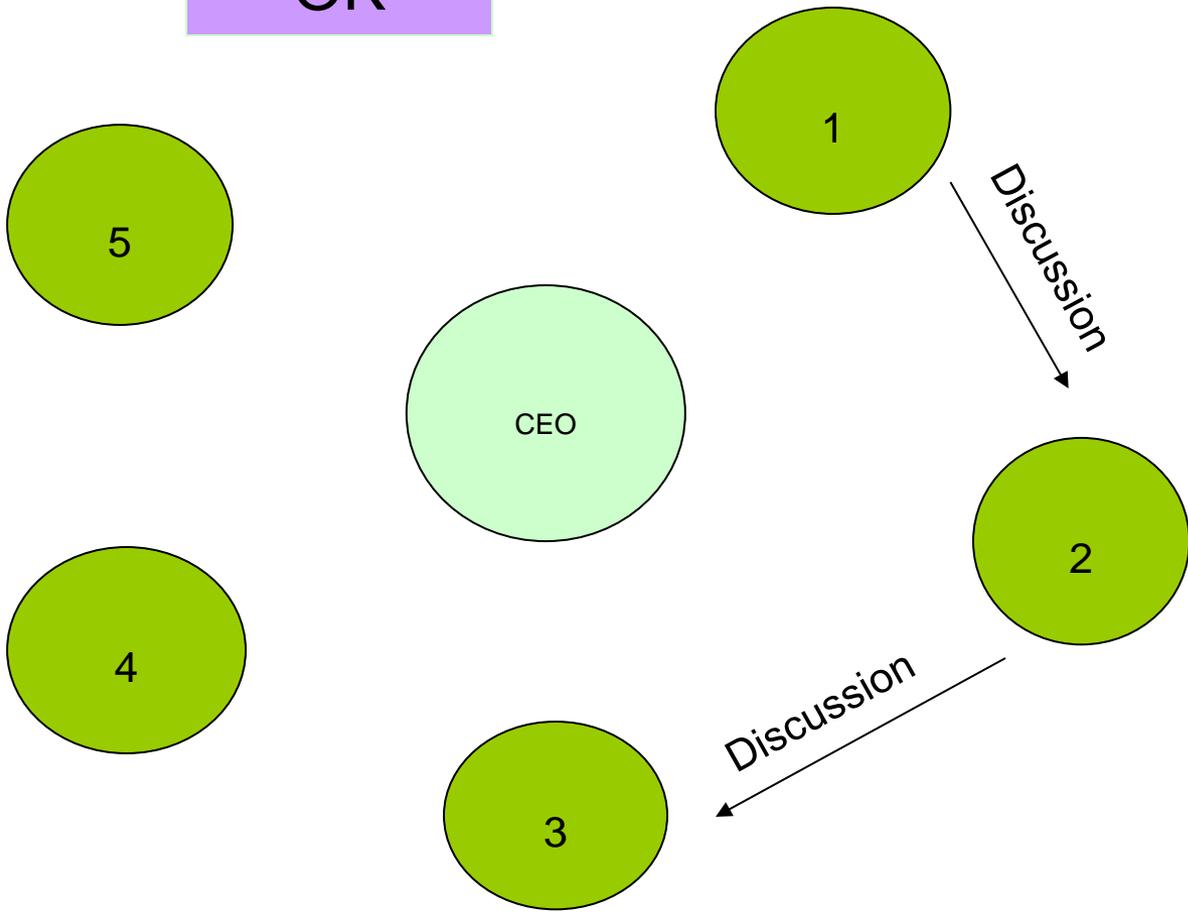


Angry

What's Prohibited

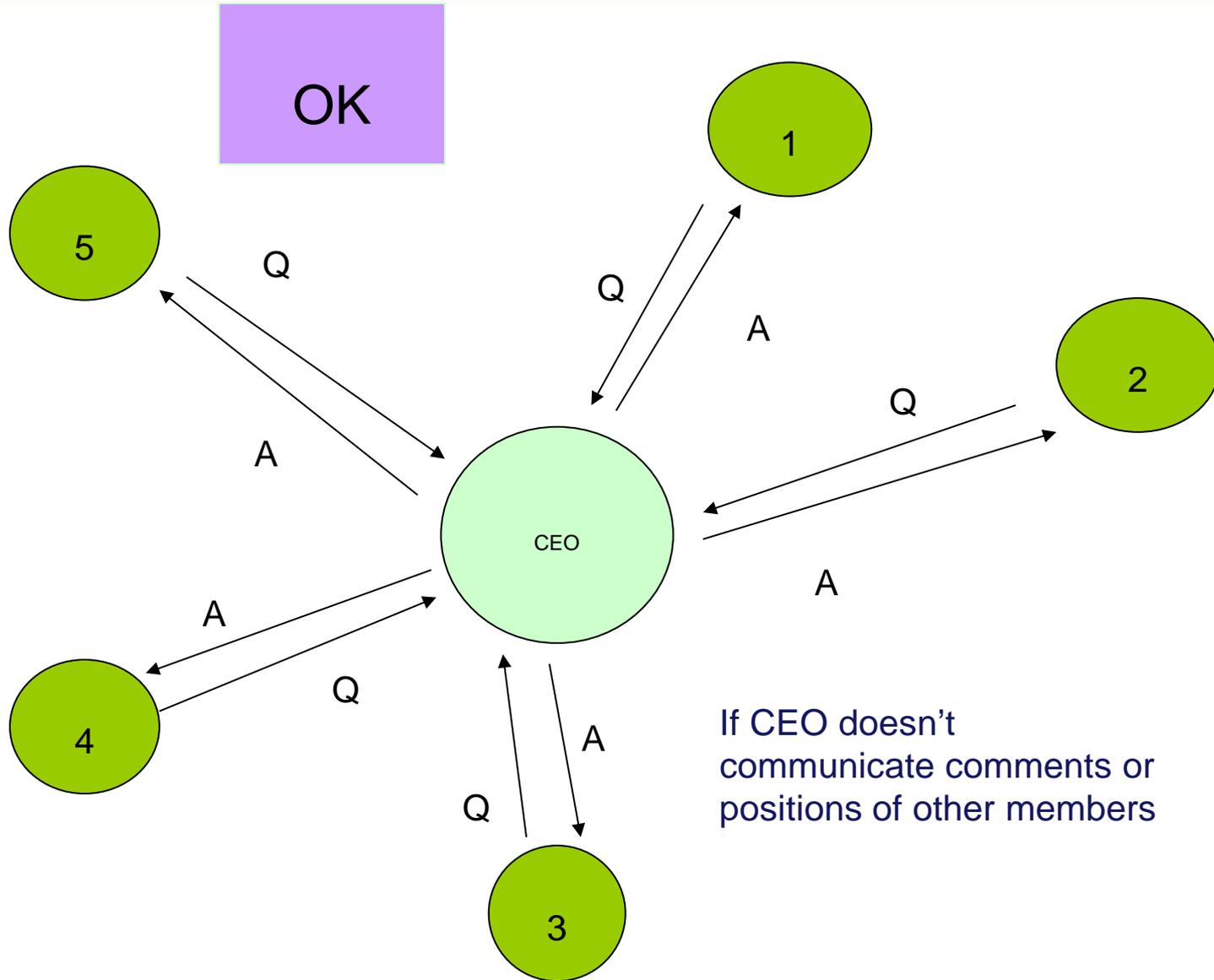
- Irrespective of form or media, the Brown Act prohibits board members from:
 - Exchanging facts to develop collective concurrence
 - Engaging in substantive discussions that:
 - Advance or clarify an issue
 - Facilitate agreement or compromise
 - Advance ultimate resolution
- It is conceivable that three or more board members could post comments or opinions on the organization's (or each other's) Facebook page(s) on issues up for board consideration. Such communications, when taken in aggregate, could constitute a prearranged discussion of the public business of the board by a majority of its members (i.e., a serial meeting.)

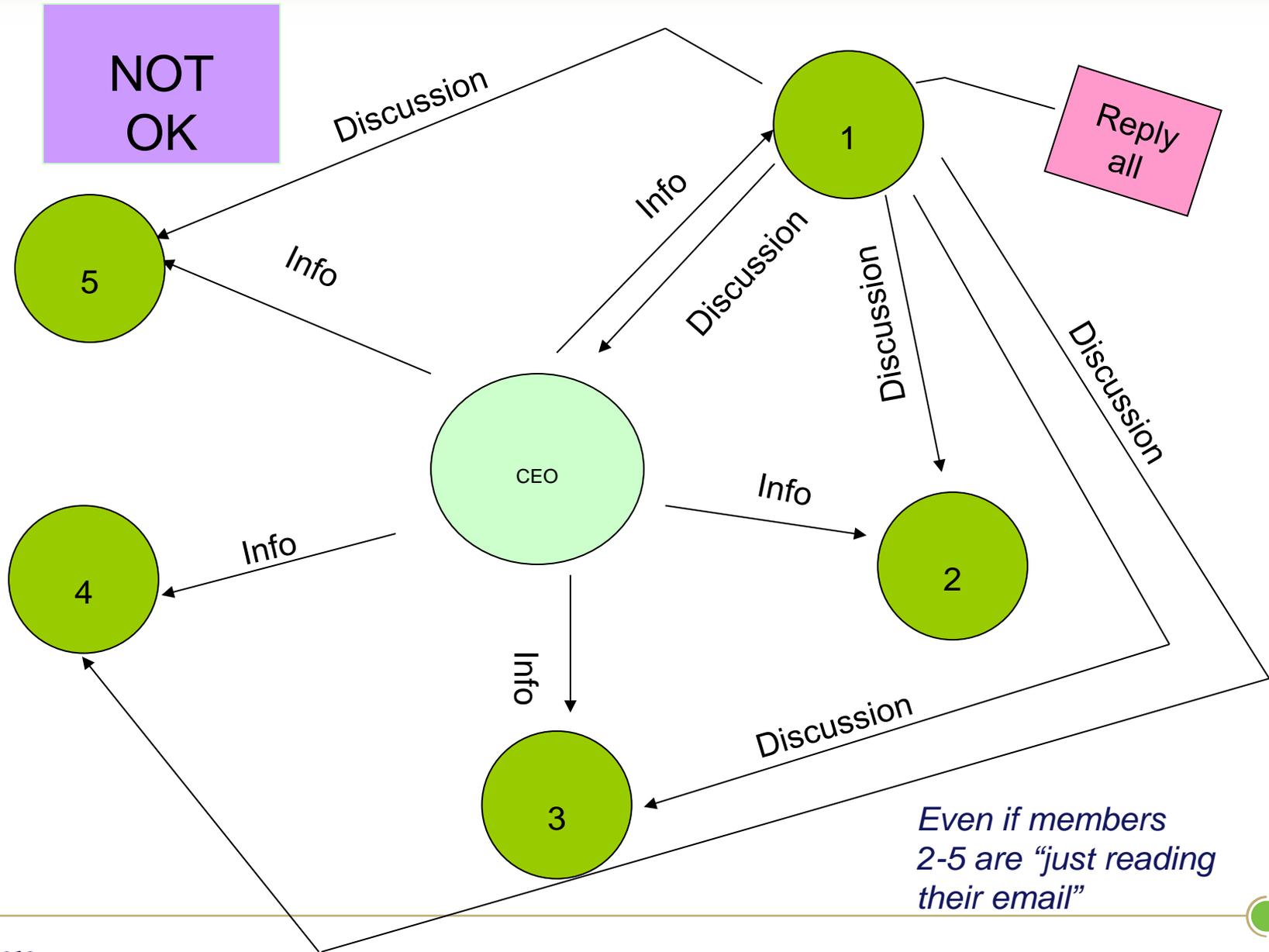
NOT
OK



What is a Not a “Serial Meeting”?

- An **employee or official** of a local agency may engage in **separate conversations or communications** outside of a meeting with members of a legislative body in order **to answer questions or provide information** regarding a matter within the jurisdiction of the agency, if that person does **not communicate to the comments or position of any other member** or members of the legislative body.
 - Gov. Code, § 54952.2(b)(2)





Scenario – “You Make the Citizen’s Arrest Then!” Says the Chief of Police

- A faculty member with pending dismissal proceedings against her attends a Board meeting where “discipline, dismissal and release” is a closed session item on the agenda. She has already received a 14 day stay away letter (Penal Code section 626.4) and is in violation of its terms. Out of concern that she did not receive her 24 hour notice, she lays down in front of the doors to the Board room. She states to the public and staff in attendance that she is protesting her due process violations.

Scenario – “You Make the Citizen’s Arrest Then!” Says the Chief of Police

- You show the chief of police the 14 day stay away letter, and tell him that the faculty member is in violation and that the CCD wants her arrested and removed from the Board room doors.
- The Chief of Police says, “This is a First Amendment issue, so you or your attorney make the Citizen’s arrest then.”
- Luckily, the faculty member got tired of laying down, and left before meeting started.

Scenario – Where was the Employee’s 24 Hour Notice of “Specific Complaints and Charges”

- Under what circumstances is a 24 hour written notice of an employee’s right to have complaints or charges hear in open session?
 - A. When a Board considers performance evaluations in a decision to nonreelect a probationary faculty member
 - B. When a Board considers the findings and recommendation of a hearing officer in a classified employee dismissal
 - C. When considering whether to initiate dismissal proceedings
 - D. When considering a complaint against a board member
 - E. None of the above

A Note on 14 Day Stay Away Letters

- Penal Code § 626.4: Notice of withdrawal of consent; report; action on report; reinstatement of consent; hearing; unlawful entry upon campus or facility; punishment.
- Statute authorizes Chief administrative officer of a campus or other facility withdraw consent to remain on campus or facility where there is reasonable cause to believe that such person has willfully disrupted the orderly operations of the campus or facility.

Scenario – Exijo un Intérprete – I Demand an Interpreter

- A non-English speaking member of the public demands that the CCD provide and pay for translation services at every Board meeting. When one is not provided the individual demands additional time during public comment.
- Are CCDs required to provide translation services for open session at Board meetings?

Scenario – Exijo un Intérprete – I Demand an Interpreter

- Providing translation services for public comment at Board meetings is entirely optional for CCDs.
- Title VI and Government Code section 11135 make it illegal for any person to be denied full and equal access to the benefits of any program or activity conducted, operated or administered by any state agency.
- In other situations, such as an expulsion hearing or due process hearing, items may have to be rescheduled or pulled from the agenda in order to have a translator available.

Scenario – Exijo un Intérprete – I Demand an Interpreter

- Government Code section 54954.3(b)(2) states that when the legislative body of a local agency limits time for public comment, the legislative body shall provide at least twice the allotted time to a member of the public who utilizes a translator to ensure that non-English speakers receive the same opportunity to directly address the legislative body of a local agency.
- However, this requirement shall not apply if the legislative body of a local agency utilizes simultaneous translation equipment in a manner that allows the legislative body of a local agency to hear the translated public testimony simultaneously.

Question & Answer
Session

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Thank You

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