

The Brown Act: Applying the Rules to Real Life Situations

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**CCLC Annual Convention
San Jose Fairmont, San Jose**

November 16, 2017

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Agenda

- New Requirements Added In 2017
- Top Ten Most Common Brown Act Violations and How to Avoid Them



New Requirements Added In 2017

New for 2017:

- Prior to taking final action on salaries, salary schedules, or fringe benefits of a “local agency executive” as defined in Gov’t Code Section 3511.1(d) a District must give an oral report in open session of compensation paid to the individual.
 - Applies to:
 - Superintendents, Deputy Superintendents, Assistant Superintendents, Associate Superintendents, Chancellors, Vice-Chancellors, Assistant Vice-Chancellors, “Department Heads”
 - Any individual who is employed by an employment contract between the local agency and that individual (Ed. Code 35031)
 - **Does not apply to:** Classified Management employees employed under Ed. Code 45100 or 88000 et. seq. (classified employees)
(Gov’t Code §54953)

New for 2017:

- For meetings after January 1, 2019, must post an agenda on District's primary Internet website homepage which may be accessed through a prominent direct link.
- Must use an "open format" which is retrievable, downloadable, able to be indexed, and electronically searchable.
- Also can comply with the new requirement by creating direct link to an "integrated agenda management platform".
(Gov't Code §54954.2)

New for 2017:

- Non-English speakers are entitled to at least twice the time which is normally allotted to a member of the public who wishes to publicly comment when a translator is used.

(Gov't Code § 54954.3)

The Top 10 Most Common Brown Act Violations and How to Avoid Them

10. Not Making a “Facts and Circumstances Statement” Prior to Going Into Closed Session to Meet with Legal Counsel

Closed Sessions – Litigation Advice of Counsel

- A board may meet in closed session to confer with, or receive advice from, its legal counsel regarding pending litigation when discussion in open session would prejudice the position of the district in the litigation.
 - Gov. Code, § 54956.9
- The board must either state on the agenda or publicly announce the authority for the closed session and, when known, the title of the case.
- Litigation is pending when:
 - Proceedings before a court, administrative body, hearing officer, or arbitrator have been initiated;
 - Based on existing facts and circumstances, there is a significant exposure to litigation; or
 - Deciding whether to initiate litigation.

Closed Sessions – Litigation Advice of Counsel

- Significant exposure to litigation based on "existing facts or circumstances" consists of:
 - Facts and circumstances that might result in litigation and which are not known to the potential plaintiff;
 - Facts and circumstances that might result in litigation which are known to the plaintiff and which are publicly stated on the agenda or announced;
 - Receipt of a tort claim or other writing threatening litigation, which shall be available for public inspection;
 - A statement made in a public meeting threatening litigation; or
 - A statement threatening litigation outside of a public meeting for which there is a contemporaneous record that is made available for public inspection
- Gov. Code, § 54956.9

9. Not Providing a 24 Hour Brown Act Notice Prior to Taking Personnel Action Based on “Complaints or Charges”

Specific Complaints or Charges

- As a condition to holding a closed session on specific complaints or charges brought against an employee by another person or employee, the employee must be given written notice of his or her right to have the complaints or charges heard in open session.
- The notice must be delivered to the employee personally or by mail 24 hours before the time for holding the session.
- If notice is not given, any action against the employee based on the specific complaints or charges shall be null and void.
 - Gov. Code, § 54957(b)(2)

Specific Complaints or Charges

- When a board is considering performance evaluations in connection with a decision to nonreelect a probationary teacher, it is not considering "specific complaints or charges" within the meaning of section 54957.
- The mere consideration of reasons for nonreelection does not constitute the hearing of specific complaints or charges brought against an employee by another person or employee.
- The Court of Appeal concluded in *Kolter v. Commission on Professional Competence of the Los Angeles Unified School District* (2009) 170 Cal.App.4th 1346 that the district need not issue a 24-hour Brown Act notice to a certificated employee before commencing dismissal proceedings.

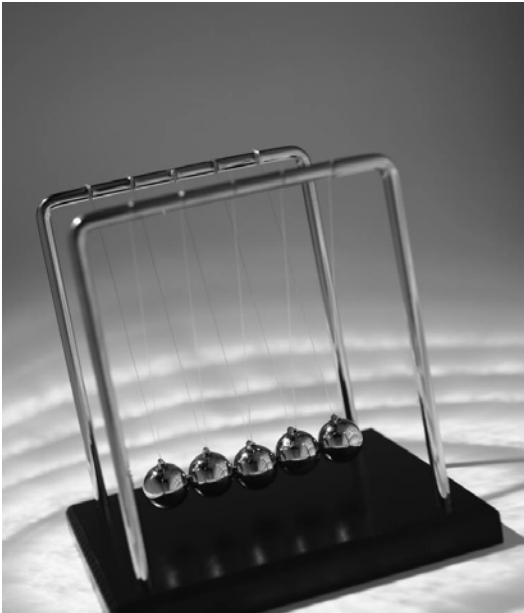
8. Subsidiary Bodies Not Complying with The Brown Act

Legislative Bodies



- The governing board of a school or community college district, ROP or JPA, etc.
 - Gov. Code, § 54952(a)
- Commissions, committees, boards, or other **subsidiary bodies** of a local agency, whether permanent or temporary, decision-making or advisory, ***created by resolution or some other formal action*** of a legislative body.
 - Gov. Code, § 54952(b)
- Community College Auxiliary Organizations are subject to the Brown Act Code (Ed. Code § 72670)
- Academic Senates and other shared governance structures.

Not Legislative Bodies



- **Ad Hoc Advisory** committees composed **solely** of the members of the legislative body which are less than a quorum of the legislative body.
 - Gov. Code § 54952(b)
- Except: **Standing committees** of a legislative body, irrespective of their composition, which have a **continuing subject matter jurisdiction**, or a meeting schedule fixed by resolution or other formal action of a legislative body, **are legislative bodies** for purposes of the Brown Act.

Other Legislative Bodies

- Committees appointed by the superintendent, without any formal action by the board, are not covered by the Act. However, the board must not in any way "instigate" the formation of the committee; the concept of "formal action" is broadly construed. (*Frazer v. Dixon Unified School District* (1993) 18 Cal.App.4th 781, 792-793.)

7. Failure to Report Out of Closed Session Properly

After Closed Session

- After closed session, the board must reconvene in open session (prior to adjournment) and report any action taken in closed session, including the vote or abstention of every member present.
 - Gov. Code, § 54957.1
- The reports may be made either orally or in writing.
 - Gov. Code, § 54957.1(b).
- Any documents referred to in a report of final action must be made available on the next business day following the meeting or, in the case of substantial amendments, when any necessary rewriting is complete.
 - Gov. Code, § 54957.1(c)

Reporting Out Requirements

Settlement of Litigation

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

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

Reporting Out Requirements

Personnel Actions

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

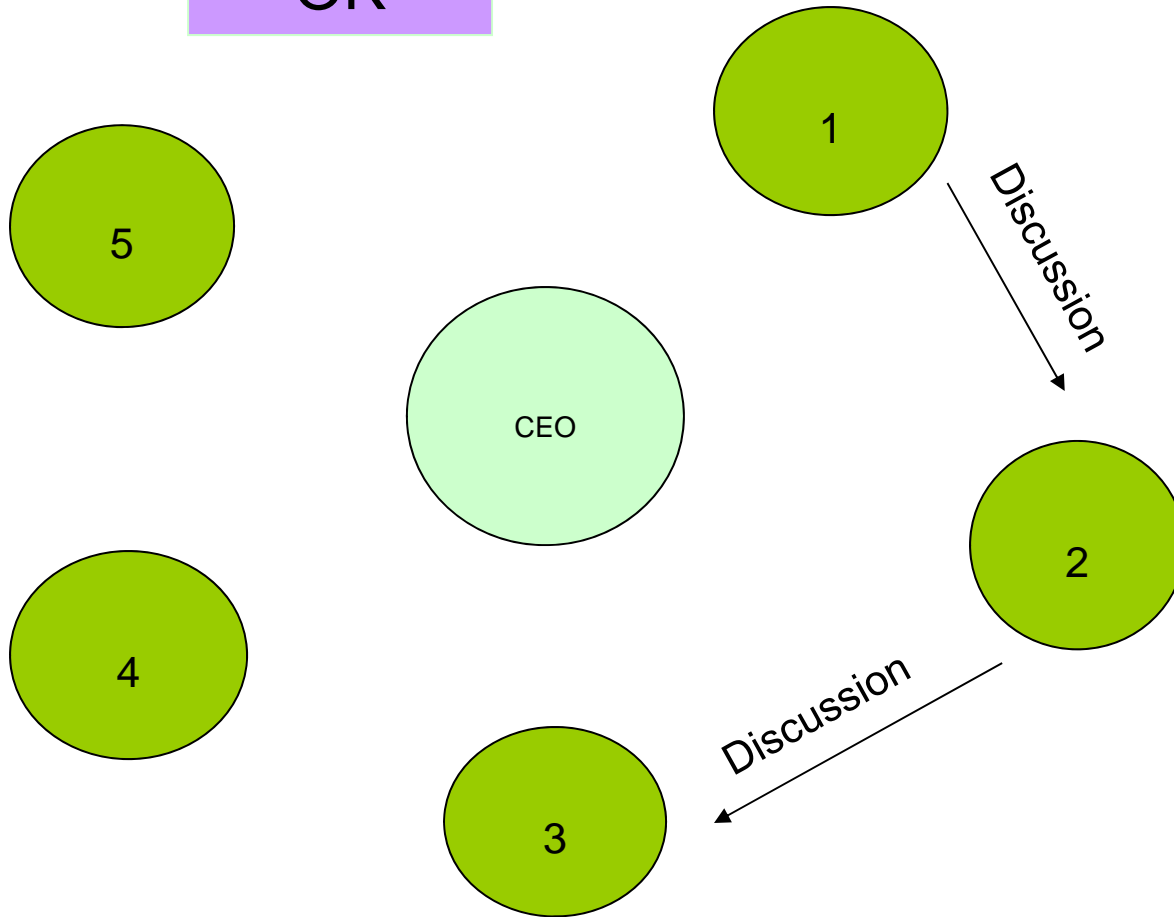
6. Engaging in Unlawful Serial Meetings

What is a “Serial Meeting”?



- A ***series of communications***, each of which involves ***less than a quorum*** of the legislative body, but which taken as a whole ***involves a majority*** of the body’s members.
- Any use of direct communication, personal intermediaries, or technological devices that is employed by a majority of the members of the legislative body to develop a collective concurrence as to action to be taken on an item by the members of the legislative body is prohibited.
 - Gov. Code, § 54952.2(b)

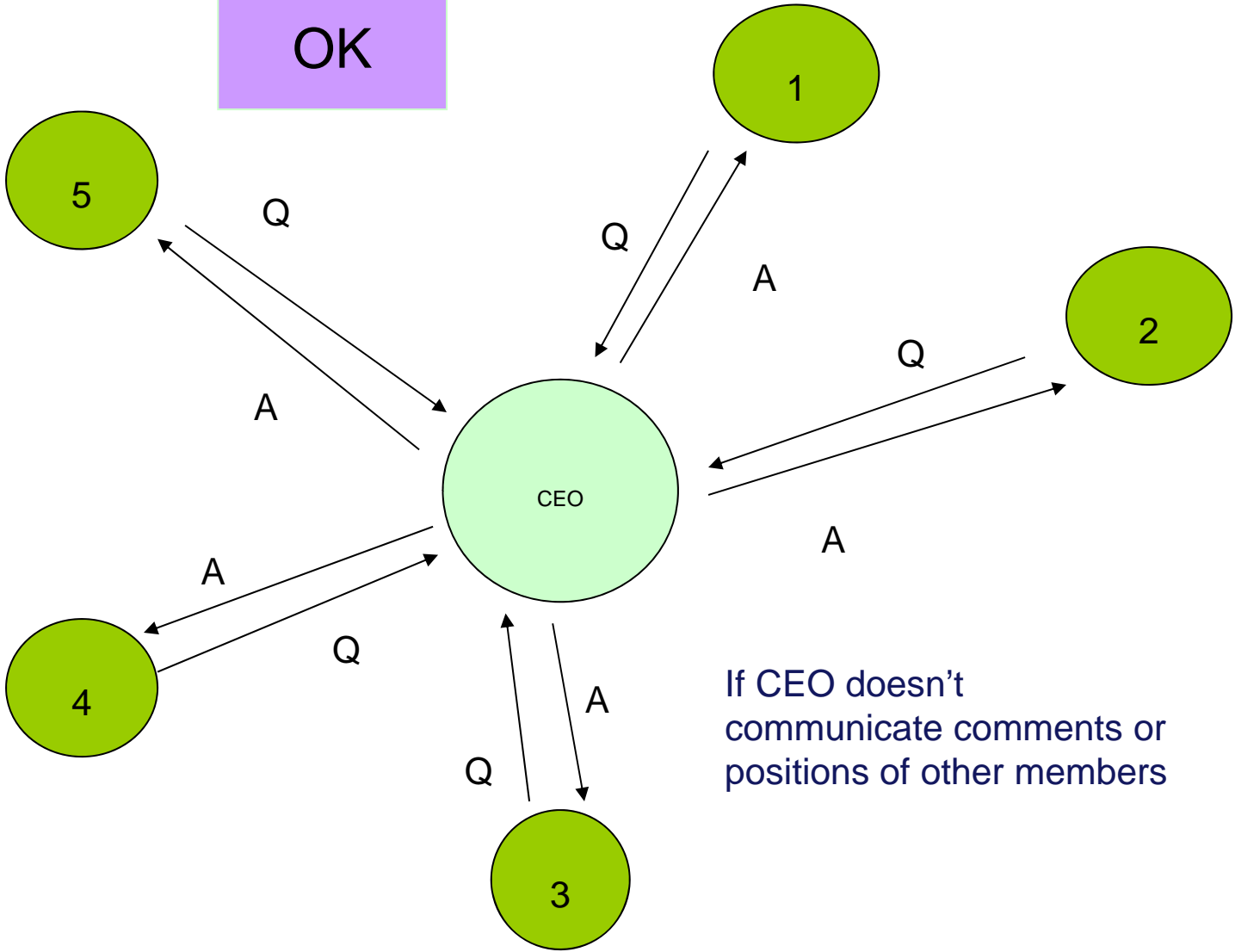
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OK



What is a Not a “Serial Meeting”?

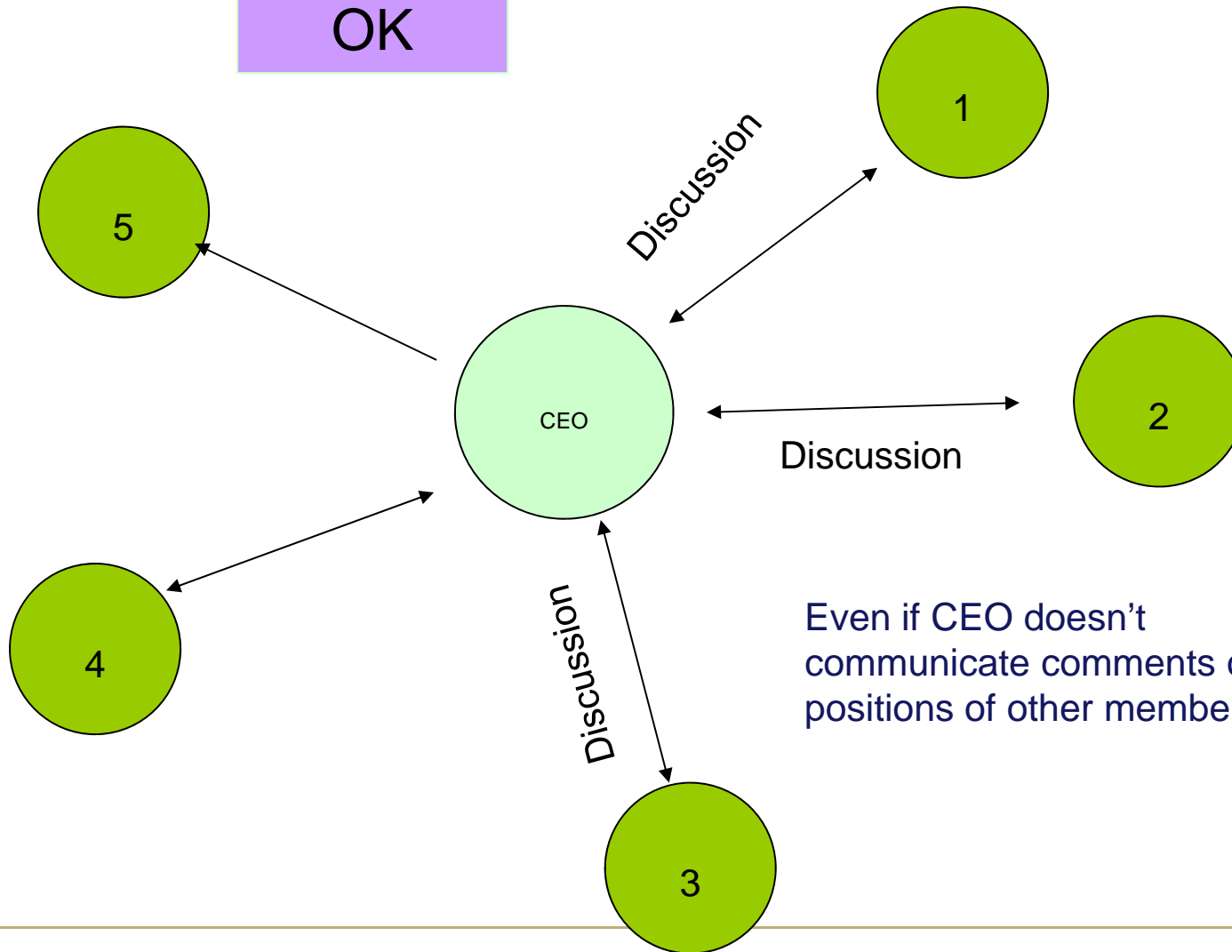
- An **employee or official** of a local agency may engage in **separate conversations or communications** outside of a meeting with members of a legislative body in order **to answer questions or provide information** regarding a matter within the jurisdiction of the agency, if that person does **not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

OK



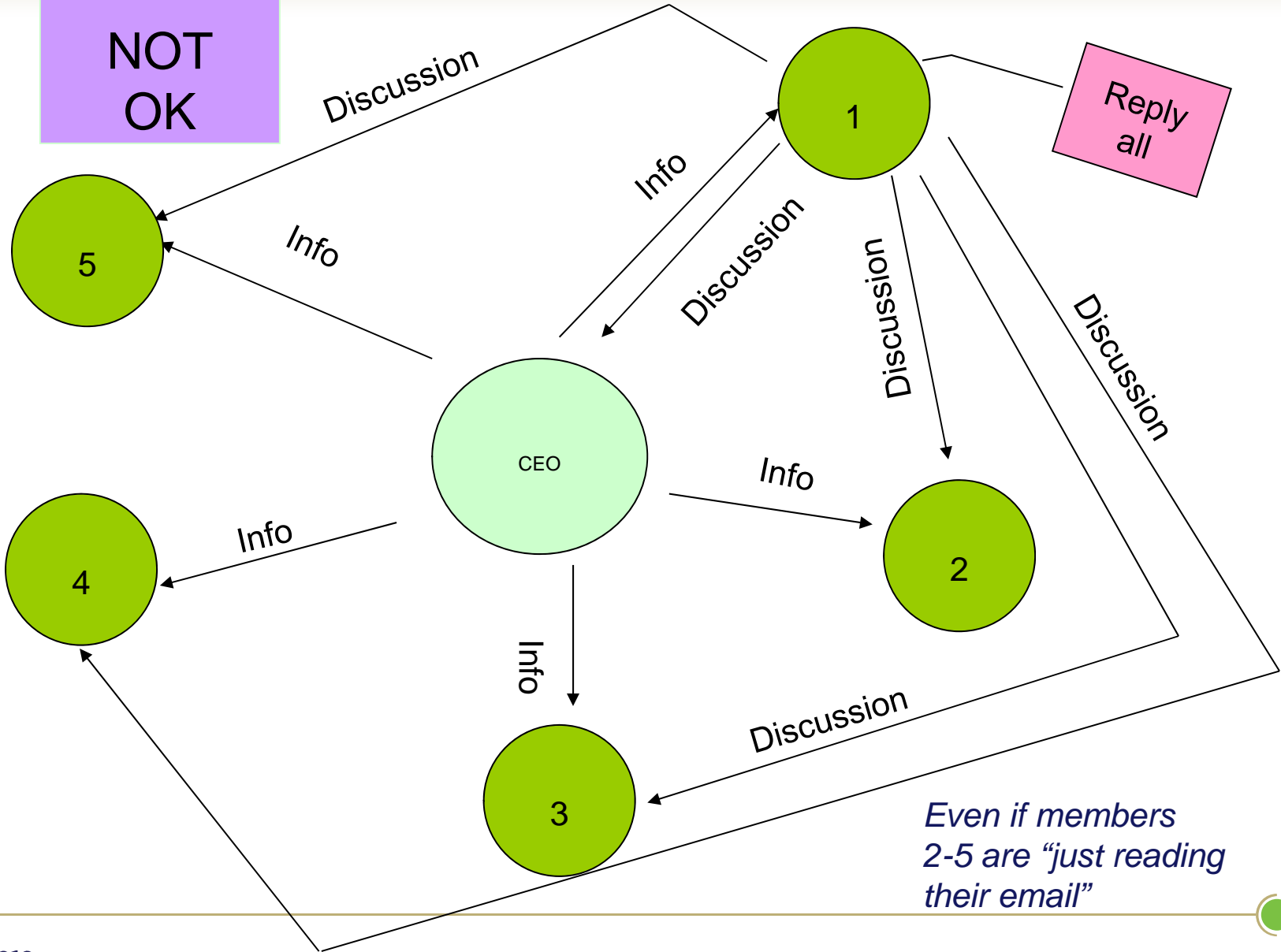
If CEO doesn't communicate comments or positions of other members

NOT
OK



Even if CEO doesn't
communicate comments or
positions of other members.

NOT OK



Even if members 2-5 are "just reading their email"

5. Allowing Discussion on Non-Agenda Items to Occur During Public Comment

Responses to Public

- The Brown Act limits board members' responses to public comments at any public meeting. Board members and staff may only:
 - Briefly respond to statements made or questions posed by persons making public comments;
 - Ask clarifying questions or make brief announcements;
 - Provide a reference to staff or other resources for factual information; and/or
 - Request staff to report back or place a matter on the agenda for a future meeting.

- Gov. Code, § 54954.2(a)

4. Talking About Performance Problems When Not Considering Specific Discipline and Not Identifying the Title of the Employee Involved

Public Employee Evaluation

- For closed session discussions concerning personnel matters pursuant to Government Code 54957:
- Closed Session: Public Employee Performance Evaluation
 - Title: (Specify position title of employee being reviewed)
- Closed Session: Public Employee Discipline/Dismissal/Release
 - (No additional information is required in connection with a closed session to consider discipline, dismissal or release. “Discipline” includes potential reduction of compensation)

Public Employee Evaluation

- Evaluation extends to all employer consideration of an employee's discharge of her job duties after appointment or employment and before dismissal.
- Section 54957 is not limited to the consideration of formal evaluations.
- "We conclude the phrase 'evaluation of performance' encompasses a review of an employee's job performance even if that review involves particular instances of job performance rather than a comprehensive review of such performance."
 - *Duval v. Board of Trustees* (2001) 93 Cal.App.4th 902

Public Employee Evaluation

- Evaluation may properly include such preliminary matters as the selection of evaluation criteria, the establishment of a fact-gathering mechanism, designation of particular areas of emphasis in the evaluation, and the setting of goals, since each might reflect the board's initial perception of the employee's performance since the last evaluation.
- Under evaluation of performance, a governing board may take action as to its final findings with respect to evaluation of a particular employee, and may meet with the employee to give him or her input regarding performance.
- Personal performance goals are an integral part of the confidential evaluation process and may be discussed in closed session.

3. Not Announcing Closed Session Agenda Items in Open Session and Taking Public Comment on Them Prior to Going Into Closed Session

Prior to Closed Session

- Prior to closed session, the board must disclose ***in an open meeting*** the items to be discussed in closed session.
- The announcement can either repeat all of the information already stated on the agenda, or it may simply refer to the items as they are listed on the agenda by number or letter.
 - Gov. Code, § 54957.7

2. Failure to Permit Public Inspection of Board Meeting Materials Provided to Board After Agenda is Distributed

Meeting Material – Public Records

- If a public record that relates to an agenda item for an open session of a regular meeting of the legislative body of a local agency is distributed less than 72 hours prior to that meeting, the writing shall be made available for public inspection pursuant to Section 54957.5(b)(2) at the time the writing is distributed to all, or a majority of all, of the members of the body.
 - Gov. Code, § 54957.5(b)(1)
- The district must make any writing described above available for public inspection at a public office or location that the agency designates for this purpose.

Meeting Material – Public Records

- Each local agency shall list the address of this office or location on the agendas for all meetings of the legislative body of that agency.
- The local agency also may post the writing on the local agency's Internet Web site in a position and manner that makes it clear that the writing relates to an agenda item for an upcoming meeting.
- Documents prepared by the district must be made available for public inspection at the meeting; documents prepared by any other person must be made available after the meeting.

- Gov. Code, § 54957.5(c)

1. Adding Items to the Regular Meeting Agenda Less than 72 Hours Without Making the Required Findings

Notice of Meetings and Agendas

- A regular meeting agenda may ***not*** be ***changed*** within the 72-hours preceding the meeting, ***unless***:
 - A majority determines that an emergency exists pursuant to Gov. Code, § 54956.5; or
 - Two-thirds of the board members present determine that there is a need for immediate action and the need to take action came to the district's attention after the posting of the agenda; or
 - The item was previously posted for a meeting occurring not more than five days prior and the item was continued to the next meeting.
 - Gov. Code, § 54954.2(b)
- If no exception applies, the board must either postpone consideration of the item for at least 72 hours, or call and notice a special meeting.

Notice of Meetings – Special Meetings

- Special Meetings – 24 Hour Notice
 - Gov. Code, § 54956
 - May be called by either the president or by a majority of the board.
 - The board may only consider business specified in the notice.
 - The board may hold a closed session as part of a special meeting.
 - Public speakers must be heard, but only on items appearing on the agenda.
 - Gov. Code, § 54954

Question & Answer
Session

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Thank You

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