

EIA
CLOSED SESSION
HANDBOOK

October 3, 2016

I. INFORMATION FOR AGENDA

California Government Code § 54954.5 provides a list of ways to describe the various types of closed session discussion that are authorized under the Brown Act. A legislative body will not be found to be in violation of the Brown Act if the closed session items are described in substantial compliance with §54954.5. The specific closed session descriptions that are set forth at Government Code §54954.5 are as follows:

- License/Permit determination (Government Code §54956.7)
- Conference with real property negotiators (Government Code §54956.8)
- Conference with legal counsel – existing litigation (Government Code §54956.9(a))
- Conference with legal counsel – anticipated litigation (Government Code §54956.9(b))
- Liability claims/Workers' Compensation claims/Medical Malpractice claims (Government Code §54956.95)
- Threat to public services or facilities (Government Code §54957)
- Public employee appointment (Government Code §54957)
- Public employment (Government Code §54957)
- Public employee performance evaluation (Government Code §54957)
- Public employee discipline/dismissal/release (Government Code §54957)
- Conference with labor negotiators (Government Code §54957.7)
- Case review/planning (Government Code §54957.8)
- Report involving trade secret (various code sections)
- Charge or complaint involving information protected by federal law (Government Code §54956.86)
- Conference involving a joint powers agency (Government Code §54956.96)
- Audit by California State Auditor's Office (Government Code §54956.75)

Typically, when the EIA holds a closed session, it is to discuss the status of a liability, workers' compensation, or medical malpractice claim. On rare occasions, litigation directly involving the EIA is discussed. The writing that should be used to introduce the closed session varies depending upon the topic to be discussed. Below is a brief discussion of the three scenarios that we see most often: (1) review of claims; (2) the million dollar report; and (3) review of existing litigation.

Although not required by the Brown Act, at the beginning of the "Closed Section" portion of the Agenda, the EIA sets forth introductory language in italics that identifies the persons who might attend closed session. The language used for this purpose is as follows: "*For the following claims items, those in attendance may include members of the Committee and their alternates, legal counsel, as well as authorized staff, which may include the CEO, COO, CCO, claims manager and the primary claims handler and their supervisor.*"

A. Review of Liability, Workers' Compensation, and Medical Malpractice Claims

Under the "Closed Session" heading, there should be a sentence in italics stating the legal basis for the closed session. In addition, reference must be made as to what types of claims are being reviewed, i.e. liability claims, workers' compensation claims, medical malpractice claims, etc. Last, the name of the entity against whom the claim is being made and the claimant's name must be listed (unless the claim is one for tortious sexual conduct or child abuse and the claimant's name has not been publicly disclosed in which case use of the word "Doe" is appropriate).

1. Sample for Inclusion in Agenda

For the following claims items, those in attendance may include members of the Committee and their alternates, legal counsel, as well as authorized staff, which may include the CEO, COO, CCO, claims manager and the primary claims handler and their supervisor.

LIABILITY AND WORKERS' COMPENSATION CLAIMS

Pursuant to Government Code Section 54956.95, the Committee will hold a closed session to discuss the following claims:

LIABILITY CLAIMS

- A.1. Smith v. County of Neverland
- A.2. Jones v. City of Whoville

WORKERS' COMPENSATION CLAIMS¹

- B.1. Rogers v. Neighborhood Park and Rec District
- B.2. Foster v. County of Washoe

B. Million Dollar Report

Once each quarter, the Executive Committee is presented with the "Million Dollar Report" which is a list that contains information pertaining to all EIA claims that have incurred totals in excess of \$1,000,000.

¹ The Government Code does not require that the liability and/or workers' compensation claims be designated as "Requests for Authority" or "Requests for Reimbursement". However, the EIA will include such designations in the CRC Agenda so it is clear to the Committee Members what will be discussed. For example, for workers' compensation cases that will be discussed for settlement authority the header should read "**Workers' Compensation – Request for Authority**" whereas the claims that will be discussed for reimbursement authority should be listed under the header "**Workers' Compensation – Request for Reimbursement**"

1. Sample for Inclusion in Agenda

For the following claims items, those in attendance may include members of the Committee and their alternates, legal counsel, as well as authorized staff, which may include the CEO, COO, CCO, claims manager and the primary claims handler and their supervisor.

LIABILITY AND WORKERS' COMPENSATION CLAIMS

Pursuant to Government Code Section 54956.95, the Committee will hold a closed session to discuss the following claims:

A.1. Report of Pending Workers' Compensation and General Liability Claims over \$1M (see attached for list of claims)

C. Conference with Legal Counsel – Existing Litigation

Under the "Closed Session" heading, there should be a sentence in italics stating the legal basis for the closed session. Next, the name of the case must be included. This can be accomplished by referencing the claimant's name, the name of the parties, the name of the case, or the claim number. Alternatively, the case name can be unspecified by stating "Case name unspecified." When this is used, the agenda must specify whether disclosure of the case name would jeopardize service of process or existing settlement negotiations. In the case of pending litigation, the Agenda must list the specific subsection of section 54956.9 under which the closed session is being held. (Gov. Code §54956.9(c).)

1. Sample for Inclusion in Agenda

For the following claims items, those in attendance may include members of the Committee and their alternates, legal counsel, as well as authorized staff, which may include the CEO, COO, CCO, claims manager and the primary claims handler and their supervisor.

CONFERENCE WITH LEGAL COUNSEL – EXISTING LITIGATION

Pursuant to Government Code Section 54956.9(a), the Committee will hold a closed session to discuss the following existing litigation:

A.1. Smith v. CSAC-EIA

A.2. Case name unspecified – Disclosure of the case name would jeopardize service of process.²

² If disclosure of the name of the case would jeopardize settlement discussions the agenda item would read, "Case name unspecified – Disclosure of the case name would jeopardize existing settlement negotiations."

II. WHAT TO SAY BEFORE GOING INTO CLOSED SESSION

Before going into closed session, the legislative body is required to disclose in open session a list of the item or items to be discussed in closed session. The disclosure can reference the agenda item by name or as listed by number or letter on the agenda. (Gov. Code §54957.7(a).)

For example, prior to going into closed session the Chair of the CRC should read a short statement stating that the Committee is going into closed session and should then either state the names of the claims that will be discussed or reference the agenda item numbers of such claims. Below are sample “scripts” of what the Chair should say before going into closed session to review claims, review the million dollar report, or review pending litigation.

A. Sample Script for Review of Claims

- “We will now go into closed session. During closed session we will discuss the requests for settlement authority for liability claims A.1 through A.4 and workers’ compensation claims B.1 through B.5. We will also discuss workers’ compensation requests for reimbursements C.1 through C.3.”

B. Sample Script for Review of the Million Dollar Report

- We will now go into closed session. During closed session we will discuss the workers’ compensation and liability claims that are listed in the agenda at pages [insert page numbers here].”

C. Sample Script for Review of Existing Litigation

- “We will now go into closed session. During closed session we will hold a conference with legal counsel regarding the existing litigation listed at item A.1 of the agenda.”

III. WHAT TO SAY AFTER CLOSED SESSION

After closed session, the legislative body is required to reconvene into open session prior to adjourning and make any disclosures that are required under Government Code §54957.1. This section explains what, if anything, must be reported out to the public after closed session is concluded. Specifically, the committee is required to publicly report any action taken in closed session and the vote or abstention on that action of every member present. What must be reported out varies depending upon what was discussed in closed session.

Because the EIA Committees typically are granting settlement authority for negotiating purposes to claims staff and there is no signed settlement agreement in place, the Brown

Act does not require a report out that settlement authority has been granted. Instead, the Chair should simply report out that “no reportable action was taken in closed session regarding the claims listed in the Agenda.” At a subsequent meeting, after the settlement is finalized, a disclosure regarding the settlement must be made. (Gov. Code §54957.1(a)(4).) The disclosure can be done orally or in writing and needs to set forth: (1) the name of the claimant; (2) the name of the entity that the claim was asserted against; (3) a brief summary of the substance of the claim; and (4) the monetary amount approved for the settlement.

A. Sample Script for Reporting Out After Review of Claims

- “We will now leave closed session and reconvene into open session. Pursuant to California Government Code Section 54957.1, no reportable action was taken in closed session regarding the claims listed as Agenda items A.1 through A.4, B.1 through B.5, and C.1 through C.3.”

B. Sample Script for Reporting Out After Review of the Million Dollar Report

- “We will now leave closed session and reconvene into open session. Pursuant to California Government Code Section 54957.1, no reportable action was taken in closed session regarding the claims listed in the Agenda at pages [insert page numbers here].”

C. Reporting Out After Review of Existing Litigation

1. If the public body gives approval to legal counsel to defend, or seek or refrain from seeking appellate review, or to enter as an amicus curiae in any litigation, then such direction shall be reported in open session once the closed session has ended and the public portion of the meeting has resumed. (Gov. Code §54957.1(a)(2).) The report shall identify, if known, the names of the parties and the substance of the litigation (i.e. a very brief summary). The report shall also disclose the vote or abstention of each member. (Gov. Code §54957.1(a).)
- Sample Script: “We will now leave closed session and reconvene into open session. Pursuant to California Government Code Section 54957.1, approval by a unanimous vote was given by the Committee to defend the legal action titled *County of Neverland v. CSAC-EIA*. The case involves a claim that the EIA failed to provide coverage to the County on a property claim.” **[Note:** If it is not a unanimous vote, then the Chair will need to report out which members voted for, against or abstained.]
2. If the public body gives approval to initiate litigation or intervene in an action, then the report in open session only needs to state that public body has given direction to initiate or intervene in an action

and that the particulars of the case (i.e. names of the other parties to the action and substance of the case) will be disclosed to any person upon inquiry once the action has been formally commenced unless doing so would jeopardize the agency's ability to effectuate service of process or jeopardize the agency's ability to conclude existing settlement negotiations.

- Sample Script: "We will now leave closed session and reconvene into open session. Pursuant to California Government Code Section 54957.1, approval by a unanimous vote was given by the Committee to initiate an action. The particulars of the case will be disclosed to any person upon inquiry once the action has been formally commenced unless doing so would jeopardize the EIA's ability to effectuate service of process or jeopardize the EIA's ability to conclude existing settlement negotiations."

3. If the public body accepts a settlement offer signed by the opposing party, then the body shall report its acceptance in open session and identify the substance of the agreement.

- Sample Script: "We will now leave closed session and reconvene into open session. Pursuant to California Government Code Section 54957.1, approval by a unanimous vote was given by the Committee to accept a settlement offer signed by the opposing party in the case *County of Neverland v. CSAC-EIA*. The terms of the agreement include that the County will dismiss the case in exchange for payment of [insert amount here]. [Insert any other additional key terms here as well.]"

IV. WHAT TO WRITE IN THE MINUTES

A. Closed Session Minutes

The public agency may by resolution designate a clerk or other officer or employee of the agency to attend closed session and keep a record of topics discussed and decisions made. (Gov. Code §54957.2(a).) This minute book is not a public record and shall be kept confidential. (*Id.*)

B. Regular Minutes

The simplest thing to do here would be to mimic what was reported out by the Chair of the Committee. For example, in the "Review of Claims" example set forth above at Section III.A. of this document, the Chair would report out the following: "Pursuant to California Government Code Section 54957.1, no reportable action was taken in closed session regarding the claims listed as Agenda items A.1 through A.4, B.1 through B.5, and C.1 through C.3." In the minutes, the note taker should write, "No reportable action was taken in closed session regarding the claims listed as Agenda items A.1 through A.4, B.1 through B.5, and C.1 through C.3."