Who’s Afraid of the Big, Bad Wolfe? A Call for a Legislative Response to the Judicial Interpretation of the Brown Act

Oona Mallett*

TABLE OF CONTENTS

I. INTRODUCTION ............................................................................................................. 1073

II. THE BROWN ACT ........................................................................................................ 1075
   A. Defining Terms ........................................................................................................... 1075
   B. The Big Picture ......................................................................................................... 1077
   C. The Provision in Question ......................................................................................... 1079

III. WOLFE v. CITY OF FREMONT ............................................................................... 1080

IV. WHY WOLFE CONTRADICTS THE BROWN ACT ............................................. 1081
   A. Statutory Intent and Interpretation .......................................................................... 1081
   B. The Loophole Created By Wolfe ............................................................................. 1082

V. HOW TO RESOLVE THE DISCREPANCY .............................................................. 1085
   A. A Prior Attempt ......................................................................................................... 1085
      1. Arguments in Support of SB 964 ........................................................................ 1086
      2. Why SB 964 Failed .............................................................................................. 1087
         a. Overbreadth ...................................................................................................... 1087
         b. Transparency at the Cost of Functionality ...................................................... 1088
   B. Other Jurisdictional Efforts ...................................................................................... 1090
      1. Open Meeting Requirements ................................................................................. 1090
         a. Bagley-Keene Open Meeting Act .................................................................... 1091
         b. Government in the Sunshine Act ..................................................................... 1092
         c. Other States’ Open Meeting Requirements ....................................................... 1092
      2. Serial Meeting Prohibitions .................................................................................. 1093
         a. Finding Serial Meetings Violate Sunshine Laws .............................................. 1093
         b. Finding Serial Meetings Do Not Violate Sunshine Laws .......................... 1094
   C. A Call for a Better Effort ............................................................................................. 1095

VI. CONCLUSION ........................................................................................................... 1096

I. INTRODUCTION

The California Legislature codified the State’s interest in maintaining an open government by passing the Ralph M. Brown Act (“Brown Act”), which requires that local governmental bodies hold open meetings. Nevertheless, local

* J.D. Candidate, University of the Pacific, McGeorge School of Law, 2009; M.A., Spanish, Emphasis
government officials managed to find loopholes in the law, allowing them to make key governmental decisions behind closed doors, and without the input or knowledge of the citizens they purportedly served. The Legislature has amended the Brown Act several times since its original enactment, attempting to close these loopholes for good. In 2006, the California Court of Appeal for the First District interpreted one of the provisions of the Brown Act. Instead of closing a loophole, a footnote in Wolfe v. City of Fremont created one.

Wolfe held that members of local legislative bodies do not violate the Brown Act merely by meeting to discuss policy matters behind closed doors. They only violate the Brown Act if the members actually come to a decision regarding the action to be taken. This Comment contends that Wolfe’s holding is contrary to the Brown Act’s purpose and that the Legislature should remedy it.

Because the Brown Act is designed to prevent “back-door” deals by local legislative bodies, prohibiting only those meetings that successfully circumvent

---

1. CAL. GOV’T CODE §§ 54950-54963 (West 1997). The California State Legislature created the Brown Act to ensure that local government remain open to the public as stated by the California State Legislature in its declaration and statement of intent for the Ralph M. Brown Act:

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

   Id. § 54950.

2. See, e.g., Stockton Newspapers, Inc. v. Members of the Redevelopment Agency, 171 Cal. App. 3d 95, 214 Cal. Rptr. 561, 566 (3d Dist. 1985) (holding that a series of nonpublic telephone conversations would constitute a meeting for the purposes of the Act, and that any action taken in such a meeting would violate the Brown Act).

3. The Legislature enacted the Brown Act in 1953. See CAL. GOV’T CODE § 54950 (West 1997) (enacted by 1953 Cal. Stat. 3270). Since its enactment in 1953, the Legislature substantially added to and amended the Brown Act. For example, the Legislature statutorily defined the term “meeting” in 1993. See 1993 Cal. Legis. Serv. ch. 1137, § 2 (SB 36) (enacting § 54952.2 and defining the term meeting for the purposes of the Brown Act provisions). This provision has been amended twice since its enactment. See 1997 Cal. Legis. Serv. ch. 253, § 1 (SB 138) (amending the language to explicitly exclude attendance of members of one local agency at the meeting of another local agency where the members of the agency are only observers from the Brown Act open meeting requirements); 1994 Cal. Stat. ch. 32, § 3 (SB 752) (making technical changes to the statute).

4. See Wolfe v. City of Fremont, 144 Cal. App. 4th 533, 545 n.6, 50 Cal. Rptr. 3d 524, 531 n.6 (1st Dist. 2006) (providing that only those serial meetings that are successful in creating a collective concurrence violate the Brown Act and leaves open the possibility of deliberating in serial meetings if they are unsuccessful).

5. Id. at 546.

6. See id. (finding that the Brown Act is only violated if a collective concurrence is reached). The court stated that "section 54952.2, subdivision (b) now prohibits a legislative body from using virtually any means—whether ‘direct communication, personal intermediaries, or technological devices’—to reach a ‘collective concurrence’ outside the public forum." Id. at 545, 50 Cal. Rptr. 3d at 531. In footnote six the court limited the applicability of the statute, stating that “[a]ccordingly, serial individual meetings that do not result in a ‘collective concurrence’ do not violate the Brown Act.” Id. at 545 n.6, 50 Cal. Rptr. 3d at 531 n.6.
the open democratic process ignores the spirit and intent of the law. Rather, any intent to avoid public input through the use of such meetings, whether or not the attempt is successful, should be enough to violate the Brown Act. Therefore, the Brown Act provision that prohibits the use of serial meetings to develop a collective concurrence should be read to ban the use of serial meetings intended to develop a collective concurrence regardless of the success of the meetings.

Part II of this Comment provides a general understanding of the Brown Act and its role in maintaining an open government. It also lays out the specific provision prohibiting the use of seriatim meetings by local legislative bodies to develop a collective concurrence. Part III discusses the interpretation of this provision within the context of *Wolfe v. City of Fremont* and introduces the footnote that created the loophole. Part IV details the problematic situation resulting from the Wolfe court’s contradictory interpretation of the Brown Act’s intent. Part V explicates the California Legislature’s failed attempt to close this loophole in the 2007 legislative session and discusses the range of open meeting laws applied in other jurisdictions. Part V also lays out a proposal for a renewed effort to close the Wolfe loophole and thus uphold the intent of the Brown Act.

**II. THE BROWN ACT**

**A. Defining Terms**

According to the California Attorney General, “a serial meeting is 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.”

For example, a serial meeting occurs where one member, or a representative thereof, of the legislative body meets individually with other members, or their representatives, such that the cumulative set of meetings creates a collective quorum of the body. In a school board setting, serial meetings occur when, in

---

7. See infra Part IV.
8. See infra Part I.A (defining collective concurrence).
11. See id.

For example, a chain of communications involving contact from member A to member B who then communicates with member C would constitute a serial meeting in the case of a five-person body. Similarly, when a person acts as the hub of a wheel (member A) and communicates individually with the various spokes (members B and C), a serial meeting has occurred. In addition, a serial meeting occurs when intermediaries for board members have a meeting to discuss issues. For example, when a representative of member A meets with representatives of members B and C to discuss an agenda item, the members have conducted a serial meeting through their representatives as intermediaries.

*Id.*
anticipation of a vote or discussion at an open meeting, a board member meets with other board members privately to convince them to vote for or against a particular issue when it comes before the full board.\footnote{12} In general, there are two formats in which serial meetings are structured: (1) “hub-spoke” and (2) “daisy-chain.”\footnote{13}

The hub-spoke version of a meeting occurs when one board member, or representative of a board member, individually contacts other members to discuss an item of business or a transaction. The daisy-chain meeting occurs when one member calls another to discuss business and the second member calls a third to discuss the conversation, and so on.\footnote{14}

The Brown Act includes a limited statutory definition of a “meeting” as “any congregation of a majority of the members of a legislative body at the same time and place to hear, discuss, or deliberate upon any item that is within the subject matter jurisdiction of the legislative body or the local agency to which it pertains.”\footnote{15} Over time, the Brown Act’s definition of “meeting” has been expanded to include not only “traditional, formal meetings” originally included in the Act, but also “informal deliberative and fact-finding meetings.”\footnote{16} The California Attorney General, as well as the courts, have stated that attempts to evade the Brown Act’s open meetings requirement by using a series of private or closed meetings, known as serial or seriatim meetings, to make decisions about or deliberate upon public business is a violation of the Brown Act.\footnote{17} The collective-concurrence-creating discussions were included because “[o]nly by embracing the collective inquiry and discussion stages, as well as the ultimate step of official action, can an open meeting regulation frustrate these evasive devices.”\footnote{18}

\begin{footnotes}
\item[13] \textit{Id.}
\item[14] \textit{Id.}
\item[15] \textit{Cal. Gov’t Code} § 54952.2(a) (West 1997).
\item[16] Wolfe v. City of Fremont, 144 Cal. App. 4th 533, 541, 50 Cal. Rptr. 3d 524, 528 (1st Dist. 2006) (citing Roberts v. City of Palmdale, 5 Cal. 4th 363, 375, 853 P.2d 496, 502 (Cal. 1993)).
\item[18] Wolfe, 155 Cal. App. 4th at 542, 50 Cal. Rptr. 3d at 529.
\end{footnotes}
In determining what a collective concurrence is, the ultimate purposes of the Brown Act are instructive. A collective concurrence is developed when a local governmental body makes a decision as to the action it should take. The Brown Act defines this action as:

a collective decision made by a majority of the members of a legislative body, a collective commitment or promise by a majority of the members of a legislative body to make a positive or a negative decision, or an actual vote by a majority of the members of a legislative body when sitting as a body or entity, upon a motion, proposal, resolution, order or ordinance.

B. The Big Picture

The intent of the California Legislature in enacting the Brown Act was to ensure that local legislative bodies’ public hearings would be open. Open meetings in the context of the Brown Act are meant to require that discussions occur in front of a public audience and provide the public with an opportunity to attend and participate. The Brown Act regulates local governmental bodies “to facilitate public participation in local government decisions and to curb misuse of the democratic purpose by secret legislation by public bodies.” Its provisions “provide public access to the meetings of legislative bodies” because “such bodies are created for the purpose of reaching collaborative decisions through public discussion and debate.” The prohibition of serial meetings used to develop a collective concurrence, the focus of this Comment, is one that supports this stated purpose.

The Brown Act regulates a variety of local legislative bodies’ meetings. Its provisions contain a prohibition on serial meetings used to develop a collective concurrence.

19. AG BRIEF, supra note 10, at 12 (“In construing these terms, one should be mindful of the ultimate purposes of the Act—to provide the public with an opportunity to monitor and participate in the decision-making processes of boards and commissions.”).
20. Id.
21. CAL. GOV’T CODE § 54952.6 (West 1997).
22. CAL. GOV’T CODE § 54950.
It is clearly the public policy of this State that the proceedings of public agencies, and the conduct of the public’s business, shall take place at open meetings, and that the deliberative process by which decisions related to the public’s business are made shall be conducted in full view of the public. Id.
24. AG BRIEF, supra note 10, at 1. Included as local legislative bodies are boards of supervisors, city councils, and school boards. Id.
25. Id.
26. See id. at 11 (“The purpose of the serial meeting prohibition is not to prevent citizens from communicating with their elected representatives, but rather to prevent public bodies from circumventing the requirement for open public deliberation of issues.”).
convenience, in addition to notice and agenda requirements for regularly scheduled meetings, and exceptions to the provision for closed meetings.

The purpose and intent of the Brown Act is to “provide public access to the meetings of legislative bodies.” Prior interpretation of the Act provides that “all of the deliberative processes by legislative bodies, including discussion, debate and the acquisition of information, be open and available for public scrutiny.” Indeed, courts have held that it is not merely the pronouncement of the decision at the meeting that is intended to be open, but also the deliberations leading to that decision that ought to be open and public. The court further explained that the Legislature intended for deliberations and decisions to be included in the meaning of meeting under the statute because:

[a]n informal conference or caucus permits crystallization of secret decisions to a point just short of ceremonial acceptance. There is rarely any purpose to a nonpublic pre-meeting conference except to conduct some part of the decisional process behind closed doors. Only by embracing the collective inquiry and discussion stages, as well as the ultimate step of official action, can an open meeting regulation frustrate these evasive devices.

Because the Legislature intended to provide open governance both in the decision and discussion stages, courts have interpreted the Brown Act as disapproving the use of a series of closed meetings to discuss or convey information about any action item, even if a quorum of members of the legislative body of a local agency is intentionally not present. Such serial
meetings are prohibited because they undermine the Brown Act’s purpose: To provide open and public local agency meetings to encourage a more transparent government.\textsuperscript{34}

\begin{flushright}
\textit{The Provision in Question}
\end{flushright}

The Court of Appeals in \textit{Wolfe} interpreted the Brown Act provision which prohibits local governing bodies from using serial meetings to develop a collective concurrence.\textsuperscript{35} The Brown Act bans the use of “direct communication, personal intermediaries, or technological devices” by a majority of the members of a legislative body “to develop a collective concurrence as to action to be taken on an item.”\textsuperscript{36} The intent of this provision is to prevent local governmental bodies from making important policy decisions out of public view.\textsuperscript{37}

There are a number of communications that fall within the meaning of the statute including those that “contribut[e] to the development of a concurrence as to the ultimate action,” as well as those “which advance or clarify a member’s understanding of an issue, or facilitate an agreement or compromise among members, or advance the ultimate resolution of an issue.”\textsuperscript{38} Where the communications of the members “were not used to develop a concurrence as to action to be taken” there is no violation of the statute.\textsuperscript{39}

In the opinion of the Attorney General, this means that “substantive conversations among members concerning an agenda item prior to a public meeting probably would be viewed as contributing to the development of a clarification discussions as well as those "substantive discussions 'which advance or clarify a member's understanding of an issue, or facilitate an agreement or compromise amongst members, or advance the ultimate resolution of an issue.'"\textsuperscript{84} The people of this state do not yield their sovereignty to the agencies which serve them. [They] 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.

\textsuperscript{34} See \textit{84 Ops. Cal. Att’y Gen. 30}, 30 (2001) (stating that the purpose of the Brown Act is to “allow the public to attend, observe, monitor, and participate in the decision-making process at the local level of government”).

\textsuperscript{35} \textit{CAL. Gov’t Code} § 54952.2 (West 1997) (prohibiting “a majority of the members of a legislative body” from using communications of any kind, directly or through intermediates, “to hear, discuss, or deliberate upon any item that is within the subject matter jurisdiction of the legislative body” outside of a publicly noticed meeting or certain enumerated exceptions); \textit{Wolfe}, 144 Cal. App. 4th at 545 n.6, 50 Cal. Rptr. 3d at 531 n.6.

\textsuperscript{36} \textit{CAL. Gov’t Code} § 54952.2 (a)-(b).

\textsuperscript{37} \textit{See AG BRIEF, supra} note 10, at 11 (“The purpose of the serial meeting prohibition is not to prevent citizens from communicating with their elected representatives, but rather to prevent public bodies from circumventing the requirement for open and public deliberation of issues.”). In a similar act, the Bagley-Keene Open Meeting Act, which regulates governmental bodies at the state level in California, the Legislature codified the purpose of the open meeting requirement by including the following:

The people of this state do not yield their sovereignty to the agencies which serve them. [They] 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.

\textsuperscript{38} \textit{AG BRIEF, supra} note 10, at 12.

\textsuperscript{39} \textit{Id.}
concernece as to the ultimate action to be taken.\textsuperscript{40} On the other hand, an executive officer “planning upcoming meetings by discussing times, dates, and placement of matters on the agenda” would not violate the Brown Act.\textsuperscript{41} The Attorney General also opined that the Act has been violated when executive officers “brief their members on policy decisions and background events concerning proposed agenda items” because “such discussions are part of the deliberative process” and “[i]f these communications are permitted to occur in private, a large part of the process by which members reach their decisions may have occurred outside the public eye.”\textsuperscript{42} The \textit{Wolfe} court, however, took a narrower interpretation of the Brown Act prohibition on serial meetings; in a footnote it stated that the provision does not prevent the use of discussions outside of the publicly noticed meetings if those meetings do not end in a collective concurrence.\textsuperscript{43}

\textbf{III. \textit{Wolfe v. City of Fremont}}

The case arose when Wolfe, a resident of the City of Fremont, sought legal action after the city council took a vote with little public discussion because they had discussed the issue in private.\textsuperscript{44} In 2004, the Fremont Police Department sought to change its policy on responding to home invasion alarms to avoid responses to non-emergency situations.\textsuperscript{45} Under the proposed amendment, police would not respond to home alarms without third party verification of an acceptable reason for the alarm.\textsuperscript{46} Seeking to enact this policy without any interference from the city council, “the city manager met individually with council members to explain the policy, garner their support, and secure their agreement not to take any action with respect to the policy.”\textsuperscript{47} In addition, prior to any scheduled public hearing on the matter, members of the city council met in private to discuss the policy.\textsuperscript{48} When the matter came up for hearing, there was very little public discussion among the council members, and, despite citizens’ discontent regarding the new policy, the city council enacted the change without dispute from any member.\textsuperscript{49}

Thereafter, Wolfe brought a lawsuit against the city manager and the city council alleging that the city’s process of approving a new response policy for

\begin{itemize}
\item \textsuperscript{40} \textit{Id.}
\item \textsuperscript{41} \textit{Id.}
\item \textsuperscript{42} \textit{Id.}
\item \textsuperscript{43} Wolfe v. City of Fremont, 144 Cal. App. 4th 533, 545 n.6, 50 Cal. Rptr. 3d 524, 531 n.6 (1st Dist. 2006).
\item \textsuperscript{44} \textit{Id.} at 538, 50 Cal. Rptr. 3d at 525-26.
\item \textsuperscript{45} \textit{Id.} at 539, 50 Cal. Rptr. 3d at 526.
\item \textsuperscript{46} \textit{Id.}
\item \textsuperscript{47} \textit{Id.} at 538, 50 Cal. Rptr. 3d at 525.
\item \textsuperscript{48} \textit{Id.}
\item \textsuperscript{49} \textit{Id.} at 539-40, 50 Cal. Rptr. 3d at 526-27.
\end{itemize}
home invasion alarms violated the Brown Act’s requirement that meetings of local legislative bodies be open and public.\textsuperscript{50} While the court did not determine whether a violation occurred, it remanded the issue with respect to the city council members on the assumption that achieving a “collective concurrence” by the use of “serial meetings” violated the Brown Act.\textsuperscript{51} However, the court also stated that in its interpretation of the Brown Act’s serial meetings prohibition only those meetings that \textit{actually} establish a concurrence violate the Act.\textsuperscript{52}

The court stated in a footnote that because the provision prohibits members from using direct communications “to reach a ‘collective concurrence’ outside the public forum,” “serial meetings that do not result in a ‘collective concurrence’ do not violate the Brown Act.”\textsuperscript{53} Accordingly, if city council members discuss a policy in private meetings without asking or telling each other how they will vote, their actions will not violate the Brown Act despite the fact that the deliberations are conducted outside a publicly noticed meeting.

IV. \textbf{WHY \textit{WOLFE} CONTRADICTS THE BROWN ACT}

\textbf{A. Statutory Intent and Interpretation}

As noted above, the purpose of the Brown Act is to provide for the possibility of public comment and participation in local governance by requiring local legislative bodies to meet openly.\textsuperscript{54} State courts and the Attorney General have both repeatedly interpreted the statute and its open meeting requirement as a means of protecting the public by requiring local governments to operate in full public view.\textsuperscript{55} From this multitude of interpretations have come general standards for interpreting the Act.

First, “as a remedial statute, the Brown Act should be construed liberally in favor of openness so as to accomplish its purpose and suppress the mischief at which it is directed.”\textsuperscript{56} Not only are the provisions to be read broadly to provide for openness, but the statutory exceptions are to be read narrowly as well.\textsuperscript{57} As a

\begin{footnotesize}
\footnotesize

\textsuperscript{50} \textit{Id.} at 538, 50 Cal. Rptr. 3d at 526.
\textsuperscript{51} \textit{Id.} at 550 n.11, 552-53, 50 Cal. Rptr. 3d at 535 n.11, 537.
\textsuperscript{52} \textit{Id.} at 545 n.6, 50 Cal. Rptr. 3d at 531 n.6.
\textsuperscript{53} \textit{Id.} at 545 & n.6, 50 Cal. Rptr. 3d 524, 531 & n.6.
\textsuperscript{54} \textit{See supra} Part II.A.
\textsuperscript{55} \textit{See}, \textit{e.g.}, Carlson v. Paradise Unified Sch. Dist., 18 Cal. App. 3d 196, 199, 95 Cal. Rptr. 650, 652 (3d Dist. 1971) (“Local governing bodies, elected by the people, exist to aid in conduct of the people’s business, and their deliberations should be conducted openly and with due notice.”); 63 Ops. Cal. Att’y Gen. 820, 821 (1980) (opining that the Brown Act requires local agencies to “hold their meetings open to the public, and conduct their deliberations and actions in public”).
\textsuperscript{57} Shapiro v. San Diego City Council, 96 Cal. App. 4th 904, 917, 177 Cal. Rptr. 2d 631, 641 (4th Dist. 2002) (“Statutory exceptions authorizing closed sessions of legislative bodies are construed narrowly and the Brown Act ‘sunshine law’ is construed liberally in favor of openness in conducting public business.”).
\end{footnotesize}
“sunshine” statute, the Brown Act is designed to make sure that governance is not happening in secret, but rather in full view of the public. Reading the exceptions narrowly and the protections broadly allows the greatest amount of “sunshine” in and thus protects the public interest.

Second, for the purposes of the Brown Act, a meeting includes not only the actions taken, but also the deliberations leading up to those actions. By including only the actions taken, and not the deliberations and discussions that lead to a legislative body’s final decision, the public is unable to view an important part of the decisional process. The Attorney General, relying upon prior court interpretation, included in the definition of deliberation, “not only collective discussion, but the collective acquisition and exchange of facts preliminary to the ultimate decision.” In prior interpretations of situations that arose under the Brown Act, the Attorney General suggested that the statute be interpreted flexibly and not with rigid technicality; this flexibility was intended to keep bodies from evading the Act’s intent, due to the negative impact on public involvement in self-governance.

B. The Loophole Created By Wolfe

Given that the appellate court in Wolfe interpreted section 54952.2(b) of the Brown Act to mean that there is no violation of the Brown Act unless a collective concurrence is actually created, there is some question as to whether all serial meetings are prohibited. The court focused on the language of the statute to reason that the use of serial meetings is not prohibited unless the meetings

58. See Cohan v. City of Thousand Oaks, 30 Cal. App. 4th 547, 35 Cal. Rptr. 2d 782 (2d Dist. 1994) (“The major objective of the Ralph M. Brown Act, which provides powers and duties common to cities, counties, and other agencies with regard to open meetings, is to facilitate public participation in all phases of local government decisionmaking [sic] and to curb misuse of democratic process by secret legislation by public bodies.”).

59. See 63 Ops. Cal. Att’y Gen. 820, 825 (1980) (“[T]he intent of the act was that deliberations as well as actions be taken openly.”); see also CAL. GOV’T CODE § 54950 (“It is the intent of the [Brown Act] that [the actions of local public agencies] be taken openly and that their deliberations be conducted openly.”).

60. See Sacramento Newspaper Guild, 263 Cal. App. 2d at 50, 69 Cal. Rptr. at 487 (“Only by embracing the collective inquiry and discussion stages, as well as the ultimate step of official action, can an open meeting regulation frustrate . . . evasive devices.”).


62. See 32 Ops. Cal. Att’y Gen. 240, 243 (1958). The Attorney General found that establishing a committee comprised of a quorum of the members is a violation stating:

Not only is there a possibility that a “committee” meeting composed of more than a quorum of the creating agency is only a subterfuge designed to evade the requirements of the law, but even where the local agency has created such a committee in the utmost good faith the extent to which full public deliberation before action will be offered by the agency will probably be greatly lessened in view of the fact that a quorum of the agency will already have deliberated upon the matter.

Id.

63. Wolfe v. City of Fremont, 144 Cal. App. 4th 533, 550 n.11, 552, 50 Cal. Rptr. 3d 524, 535 n.11, 537 (1st Dist. 2006).
actually develop a collective concurrence.\textsuperscript{64} Under the \textit{Wolfe} court’s interpretation, a party will not have a Brown Act violation claim against a legislative body unless the party can show that the body came to a collective concurrence in secret.\textsuperscript{65} The court stated that “section 54952.2, subdivision (b) now prohibits a legislative body from using virtually any means—whether ‘direct communication, personal intermediaries, or technological devices’—to reach a ‘collective concurrence’ outside the public forum.”\textsuperscript{66} It then limited this holding by stating that “[a]ccordingly, serial individual meetings that do not result in a ‘collective concurrence’ do not violate the Brown Act.”\textsuperscript{67} This limited interpretation of the Brown Act prohibition encourages local legislative body members to engage in secretive discussions that would otherwise be prohibited if not held in serial meetings.

According to \textit{Wolfe}, if the members of a body discuss the issues surrounding a matter of interest to the board through a series of secret meetings but do not make an actual decision in those meetings, there is no violation of the Brown Act.\textsuperscript{68} However, this contradicts decades of Attorney General opinions interpreting the prohibition of serial meetings. In these numerous interpretations, the courts and the Attorney General have found that deliberations and discussions in unnoticed and private meetings violate the spirit and intent of the Brown Act.\textsuperscript{69}

After judicial interpretation included serial meetings in the statutory definition of meetings despite the fact that a quorum was never present at any given meeting, the Legislature amended the statute to codify the interpretation.\textsuperscript{70} The California Attorney General supported the inclusion of serial meetings in the Brown Act’s provision by emphasizing the impact of such meetings and the problems that would ensue if they were not included.\textsuperscript{71} The Attorney General explained that by using seriatim meetings, a local agency effectively excludes the public from all decision making and the public meeting served merely as a “crystallization of secret decisions to a point just short of ceremonial

\begin{itemize}
\item \textsuperscript{64} \textit{Id.} at 545 n.6, 50 Cal. Rptr. 3d at 531 n.6 (noting that there is no violation unless a collective concurrence is actually reached).
\item \textsuperscript{65} \textit{Id.} at 545, 50 Cal. Rptr. 3d at 531.
\item \textsuperscript{66} \textit{Id.} at 545 n.6, 50 Cal. Rptr. 3d at 531 n.6.
\item \textsuperscript{67} \textit{Id.} (noting that there is no violation unless a collective concurrence is actually reached).
\item \textsuperscript{68} \textit{See supra} Part II.B (discussing the intent of enacting the Brown Act).
\item \textsuperscript{69} 63 Ops. Cal. Att’y Gen. 820, 827 (1980). Seriatim meetings occur when:
\begin{itemize}
\item [a] number of the members sufficient to constitute a quorum of the council and a quorum of the planning commission . . . are in the council of the court engaging in the “collective discussion” and “collective acquisition and exchange of facts preliminary to the ultimate decision” albeit they do so in a series of meetings and not in a single meeting.
\end{itemize}
\item \textit{Id.} (emphasis omitted).
\item \textsuperscript{70} \textit{See id.} at 828-29 (explaining that when a local redevelopment agency met privately with the city council, the resulting decisions and eventual development actions occurred without sufficient public input).
\end{itemize}
acceptance.” As a result, “the public’s right to be informed at all stages of the legislative or administrative processes of its governing bodies is nullified.”

The Wolfe holding is problematic for several reasons. First, the Wolfe holding appears to ignore the general belief that the provisions requiring openness ought to be read broadly, as has been held by numerous appellate districts as well as the Attorney General. Thus, the court should have interpreted the phrase “to develop,” to encompass not only the completed development of a collective concurrence but also the attempt to develop a collective concurrence. By reading that term more broadly, the court would have provided more protection for the public’s interest in open governance. If all serial meetings are prohibited, and not merely those that are successful at developing a concurrence, the public will be more likely to gain access to local governance decisions and the discussions that lead to those decisions.

In addition, the judicially-developed and statutorily-supported standard includes deliberations as well as decisions in the regulation of open meetings, with the aim of providing the people access to all aspects of legislative decision-making. Thus, the prohibition on serial meetings should be read more broadly to include those discussions and deliberations that are encompassed in other meetings under the Brown Act. Indeed, the court has previously stated that “[o]nly by embracing the collective inquiry and discussion stages, as well as the ultimate step of official action, can an open meeting regulation frustrate . . . evasive devices.”

This discrepancy between the possible permitted behavior given the Wolfe footnote interpretation and the prohibited behavior under common interpretation of the Brown Act is significant. If a serial meeting is a meeting for the purpose of the Brown Act, as it seems to be both by the language of the statute as well as by

72. Id. at 828.
73. Id. (emphasis omitted).
75. See 63 Ops. Cal. Att’y Gen. 820, 825 (1980) (opining that to protect local government and prevent secret meetings, not just decisions but also deliberations are subject to Brown Act provisions); see also Sacramento Newspaper Guild v. Sacramento County Bd. of Supervisors, 263 Cal. App. 2d 41, 47, 69 Cal. Rptr. 480, 485. In Sacramento Newspaper Guild the court stated:
Section 54950 [the codification of the legislative intent behind the Brown Act] is a deliberate and palpable expression of the act’s intended impact. It declares the law’s intent that deliberation as well as action occur openly and publicly. Recognition of deliberation and action as dual components of the collective decision-making process brings awareness that the meeting concept cannot be split off and confined to one component only, but rather comprehends both and either.

Id.
77. Sacramento Newspaper Guild, 263 Cal. App. 2d at 50, 69 Cal. Rptr. at 487.
prior judicial interpretation and Attorney General opinions, the same requirements that apply to other meetings must also apply to serial meetings.\textsuperscript{78}

If the narrow approach suggested by \textit{Wolfe} is taken, then where there are only deliberations and no action, there is no violation of the Brown Act. For instance, where members of the county board of supervisors meet with members of a union at an informal lunch and discuss a pending strike by the union against the county, there would be no violation of the Brown Act unless the parties came to an agreement about how to resolve the strike.\textsuperscript{79} However, the board’s deliberations and discussions regarding the strike would not be public knowledge because the public and newspaper reporters would be excluded from the conversation, which would otherwise be part of an open meeting.\textsuperscript{80} This contradicts the intent of the Brown Act that all deliberations and actions taken by local legislative bodies be conducted in public view.

Thus, a meeting, serial or otherwise, that is unnoticed and private, in which deliberations or decisions are conducted, ought to be found to violate the Brown Act. Any contrary finding contradicts the Act’s purpose.\textsuperscript{81}

\section*{V. HOW TO RESOLVE THE DISCREPANCY}

\subsection*{A. A Prior Attempt}

In the 2007 Session of the California State Legislature, Senator Gloria Romero proposed a bill intended to close the loophole created by the interpretation of the Brown Act in \textit{Wolfe}.\textsuperscript{82} Senate Bill 964 declared the Legislature’s disapproval of the court’s interpretation in \textit{Wolfe}.\textsuperscript{83} \textit{Wolfe} construed the Brown Act as prohibiting only those serial meetings that actually result in a collective concurrence rather than an all out prohibition on collective concurrences developed behind closed doors.\textsuperscript{84} SB 964 would have prohibited “a majority of the members of a [local] legislative body” from “us[ing] 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.”

1. Arguments in Support of SB 964

Both proponents and opponents of SB 964 conceded that the Wolfe holding is problematic because it permits evasion of the existing Brown Act prohibition on serial meetings. The challenge is to prove that a collective concurrence was established in secret deliberations to which the public was not privy. According to SB 964’s supporters:

[...] the practical consequence of Wolfe is to insulate against challenge[,...] or even public awareness[,...] routine, institutionalized pre-meeting staff briefings of local agency councils, boards and commissions at which all or key parts of the agendas are serially presented, discussed and clarified (if not lobbied by staff), until and unless a citizen files a court action and undertakes discovery to try to prove that this secret process led to an actual common agreement or commitment by the majority on whether or how to act on individual agenda items.

Proponents of SB 964 claimed that the practical implications of the Wolfe holding undermine the Brown Act’s goals. SB 964 sought to attain open governance by restoring “public scrutiny of how local deliberative bodies debate and examine policy questions” and by preventing “a situation in which the members come to public meetings having fully digested their positions through private briefings, if not backstage deals.” In such cases, the public is not privy to the discussions that are the bases of decisions reached by the local legislative

85. SB 964, 2007 Leg., 2007-2008 Sess., at § 4 (Cal. 2007) (as enrolled on Aug. 30, 2007, but not enacted). Though outside the scope of this article, SB 964 would have also change the meaning of the term “meeting” in the Ralph M. Brown Act to include teleconferences. Id. § 3. In addition, SB 964 would have added a requirement that local agencies provide to all members of the legislative body of that local agency, in a non-discriminatory manner, all documents it creates without imposing a fee to obtain or inspect the document. Id. § 2.

86. See, e.g., Letter from Emily Franke, Executive Dir., Californians Aware: The Center for Public Forum Rights, to Senator Gloria Romero, Cal. State Senate (May 2, 2007) [hereinafter Franke Letter] (on file with the McGeorge Law Review) (“The practical consequence of Wolfe is to insulate against challenge or even public awareness [serial meetings] until and unless a citizen files a court action . . . to prove that this secret process led to an actual common agreement . . . .”); Letter from Debra Brown, Senior Legislative Advocate, California School Boards Association, to Senator Gloria Romero, Cal. State Senate (May 29, 2007) [hereinafter Brown Letter] (on file with the McGeorge Law Review) (noting that the Wolfe holding is “unfortunate[,...]”).

87. Franke Letter, supra note 86.

88. Id.

89. See id. (stating that the practical implications of the Wolfe holding permit secret briefings and that “[t]he goals of the Brown Act are thus crippled”). Among the most vocal supporters of the measure was the sponsor, the California Newspaper Publishers Association. ASSEMBLY COMMITTEE ON GOVERNMENTAL ORGANIZATION, COMMITTEE ANALYSIS OF SB 964, at 3 (July 11, 2007).

90. Franke Letter, supra note 86.
body, which undercuts the transparency of local government and the goal of the Brown Act. ⁹¹

2. Why SB 964 Failed

Despite the bill’s passage in both the California State Senate and Assembly, the Governor vetoed SB 964. ⁹² In his veto message, the Governor cited the “impractical standard for compliance” provided in the bill as the cause of its failure. ⁹³ He then called for the Legislature to put forth a renewed and more judicious attempt to resolve the “problem of serial meetings [resulting] in public policy decisions.” ⁹⁴

a. Overbreadth

During the legislative drafting, many local government agencies voiced strong opposition because of concerns that SB 964 would prevent “communication between elected officials and the staff they rely on for unbiased information.” ⁹⁵ In its early form, SB 964 included a broad prohibition on communications, including those that “clarif[y] a member’s understanding of an issue.” ⁹⁶ The League of California Cities, however, negotiated amendments to SB 964 to prohibit only those communications that “discuss, deliberate, or take

---

⁹¹ See CAL. GOV’T CODE § 54953(a) (West 1997) (“All meetings of the legislative body of a local agency shall be open and public . . . .”); see also id. § 54950 (“It is the intent of the [Brown Act] that . . . actions [of local legislative bodies] be taken openly and that their deliberations be conducted openly.”).


⁹³ Id.

⁹⁴ Id.


⁹⁶ SB 964, 2007 Leg., 2007-2008 Sess. (Cal. 2007) (as amended on Mar. 29, 2007, but not enacted). The original language that caused this concern included the following:

Any use of substantive serial communications by members of a legislative body of a local agency, or by any officer, employee, consultant, or designee of the members of the legislative body or of the local agency, to conduct deliberations by a majority of the members of that legislative body is prohibited. For this purpose, deliberations include, but are not limited to, both of the following:

(A) Any communication that advances or clarifies a member’s understanding of an issue, facilitates an agreement or compromise among members on an issue, or advances the ultimate resolution of an issue.

(B) Any communication of information that is not otherwise part of the agenda packet for a publicly noticed meeting of the legislative body if that information relates to an item on an agenda for a meeting of the legislative body, or is likely to be placed upon an agenda of a meeting in the near future. Deliberations do not include communication of information that relates solely to the time and place of meetings, travel arrangements, delivery of meeting materials, or similar procedural matters.

Id.
action on any item of business." Subsequently, nearly all opposition to SB 964 was removed.

However, a few opponents remained concerned that the bill’s legislative intent was unclear. These opponents requested a statement clarifying that SB 964 should “not [be] construed as prohibiting routine communications and constrain a [local legislative body’s] ability to communicate with its elected governing board outside of publicly noticed open meetings.” Opponents hoped that this language would “ensure that communication between staff members and governing board members is still permissible as long as there is not a concerted plan to engage in collective deliberation.” However, this clarification never made it into the final version of the bill.

b. Transparency at the Cost of Functionality

According to opponents of SB 964, “[t]he need for open government must be tempered by the importance of educating policymakers.” Even after the amendments proposed by the League of California Cities were adopted, several opponents remained concerned that SB 964 permitted a gain in increased transparency at the cost of governmental functionality. Among their concerns was the possible lost efficacy of the staff members who support and inform the elected members of local governance bodies. Often, members of local governance bodies, who are commonly only part-time politicians, rely on their

97. SENATE LOCAL GOVERNMENT COMMITTEE, COMMITTEE ANALYSIS OF SB 964, at 3 (May 9, 2007).

The May 2, 2007 amendment replaced the language cited above with the following: “A majority of the members of a legislative body shall not 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.” SB 964, 2007 Leg., 2007-2008 Sess., at 4 (Cal. 2007) (as amended on May 2, 2007, but not enacted).
100. See id.
101. See Dixon Letter, supra note 103 (recognizing the importance of staff to the local legislative process).
full-time staff for interpretation and advice on issues they must vote upon because the staff members are far more experienced and knowledgeable on those issues.\textsuperscript{106} Acknowledging the importance of local legislative staff to the governing process in his opposition of SB 964, John F. Murray, the Mayor of Lemoore, stated that “their ideas and thoughts are valuable tools in promoting good governance. It must not be curtailed.”\textsuperscript{107} Many local legislative bodies remained concerned that if benign serial communications, such as those basic informational meetings or issue updates between staff members and board members, are read into the prohibition created by SB 964, it would be more difficult for local governing bodies to do what they were elected to do—govern.\textsuperscript{108}

Consider, for example, a school board member who approaches the chief business officer for the school district to discuss a facilities problem at one of the schools.\textsuperscript{109} If the business officer explains a situation at the school, or provides clarification of a policy to the school board member, it may qualify as a conversation to “discuss” an action item in violation of SB 964.\textsuperscript{110} If so, a vast number of concerns addressed by a school board in its occasional once-monthly meetings may not be dealt with. The practical effect of such a rule is that the business officer, and all other staff persons, will have to come to the scheduled meetings to share the information with the sitting board members so that they can vote knowledgeably on an agenda item.\textsuperscript{111} Surely, such a prohibition would impede local governing bodies in a way that would retard governance at the local level.\textsuperscript{112}

Many localities also expressed concern that, in passing SB 964, the State Legislature imposed limitations on local governments that it would not accept for itself.\textsuperscript{113} John F. Murray wrote:

Consider . . . what [the State Legislature] would be like without . . . staff, lobbyists, advocates and opponents, each providing [the legislators]}

\textsuperscript{107.} Id.
\textsuperscript{108.} SENATE LOCAL GOVERNMENT COMMITTEE, COMMITTEE ANALYSIS OF SB 964, at 3 (Apr. 25, 2007).
\textsuperscript{109.} This hypothetical is a fiction created by the author.
\textsuperscript{110.} See SB 964, 2007 Leg., 2007-2008 Sess., at 4 (Cal. 2007) (as enrolled on Aug. 30, 2007, but not enacted) (Prohibited communications include “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.”) (emphasis added).
\textsuperscript{111.} SENATE LOCAL GOVERNMENT COMMITTEE, COMMITTEE ANALYSIS OF SB 964, at 3 (Apr. 25, 2007).
\textsuperscript{112.} Id.
\textsuperscript{113.} See Dixon Letter, supra note 103 (“My colleagues and I understand the need for government transparency and support all reasonable efforts . . . to promote open government. However, we believe this transparency is vital at all levels of government, including the State.”).
information, pro and con, on matters that come before [the Legislature] for consideration and vote . . . . [I]t would be utter chaos for all that communication to be provided only in open public hearing. So too it is with city governments.\(^\text{114}\)

These concerns not only speak to the pretense of the measure’s passage by the State Legislature, but also to SB 964’s potential negative implications, which include the loss of governmental efficacy.\(^\text{115}\)

\section*{B. Other Jurisdictional Efforts}

California is not unique in its attempts to provide for open government. There are statutes at the federal level and in every state guaranteeing that legislative decisions are made within public view.\(^\text{116}\) These statutes, sometimes referred to as sunshine laws, require that public bodies hold open meetings and provide public access to records.\(^\text{117}\) In California, the Brown Act regulates local governmental bodies, while the Bagley-Keene Open Meeting Act regulates state bodies.\(^\text{118}\) At the federal level, the “Government in the Sunshine Act” regulates administrative agencies and other federal governmental bodies.\(^\text{119}\) Other states also regulate governmental bodies including provisions for public records and open meetings.\(^\text{120}\) A selection of these open meetings provisions will be reviewed below as will the applicability of such provisions to serial meetings.

\subsection*{1. Open Meeting Requirements}

Along with every state in the nation, the federal government enacted a law in response to the “good government” movements of the mid-twentieth century that
focused on making “the inner workings of state and local government more accessible to the public at large.”121 Most of these laws require both publication and notice of meetings as well as setting forth open meeting requirements similar to those laid out in the Brown Act.122 Below is a review of statutes requiring open meetings.

a. Bagley-Keene Open Meeting Act

The Legislature enacted the Bagley-Keene Open Meeting Act (“Bagley-Keene Act”) to codify the public policy of maintaining an informed public through requiring public agencies to operate openly.123 The Bagley-Keene Act requires that all state agencies conduct open meetings unless specifically exempted in the statute.124 The law’s intent is that state agencies conduct deliberations and take actions openly.125 It was developed to ensure that state agencies serve the interests of the public through continual oversight.126

The Bagley-Keene Act includes provisions that are identical to those of the Brown Act, including the definition of meeting and a prohibition of the use of communications to develop a collective concurrence.127 The Bagley-Keene Act “require[s] advance public notice of meetings by authorizing legal action to prevent threatened violations of the act or declare its applicability to past or threatened future ‘actions’ of a body, and to declare null and void an ‘action taken’ in violation of [the Act].”128 In addition, the Act also provides a broad definition for the term “action taken” to include “‘a collective decision’ of the members and ‘a collective commitment or promise . . . to make a positive or negative decision.’”129 However, the Bagley-Keene Act has not been interpreted

121. Id. at 719.
122. Id. at 719-20. “Most open meeting statutes prohibit the members of local government bodies not just from conducting official meetings in secret, but also from conducting informal, out-of-session ‘meetings’ as well.” Id. at 720.
123. See CAL. GOV’T CODE § 11120 (West 2005) (“It is the public policy of this state that public agencies exist to aid in the conduct of the people’s business and the proceedings of public agencies be conducted openly so that the public may remain informed.”).
124. Id. §§ 11120-11132.
125. Id. § 11120.
126. See id. (noting the role of regulation to ensure that governmental bodies serve the needs of the people who created them).
127. Id. § 11122.5.
(a) As used in this article, “meeting” includes any congregation of a majority of the members of a state body at the same time and place to hear, discuss, or deliberate upon any item that is within the subject matter jurisdiction of the state body to which it pertains. (b) Except as authorized pursuant to Section 11123, any use of direct communication, personal intermediaries, or technological devices that is employed by a majority of the members of the state body to develop a collective concurrence as to action to be taken on an item by the members of the state body is prohibited.
129. Id. (alteration in original).
to prevent serial meetings, as the quorum requirement still requires that a majority of the members of the body be at the same time and place for a meeting to occur.\(^{130}\)

\subsection*{b. Government in the Sunshine Act}

The Federal Open Meeting requirement for administrative agencies is set forth in the Administrative Procedure Act and requires that all meetings, subject to certain enumerated exceptions, be “open to public observation.”\(^{131}\) The statute defines a meeting as “the deliberations of at least the number of individual agency members required to take action on behalf of the agency where such deliberations determine or result in the joint conduct or disposition of official agency business.”\(^{132}\)

In \textit{F.C.C. v. ITT World Communications, Inc.}, the U.S. Supreme Court interpreted the Government in the Sunshine Act’s open meeting requirement to exclude informal background discussions because requiring such discussions to be conducted in public view would “impair normal agency operations without achieving significant public benefit.”\(^{133}\) Congress changed the language to “deliberations” instead of other more inclusive terms such as “assembly” or “gathering,” because it wanted “to permit preliminary discussion among agency members.”\(^{134}\) The federal government’s decision to prioritize efficiency over transparency distinguishes the Sunshine Act from the Brown Act, which has the explicit intent to provide public oversight of local government.\(^{135}\)

\subsection*{c. Other States’ Open Meeting Requirements}

There are three general methods taken by states to define a “meeting” for the purpose of open meeting laws.\(^{136}\) The most common approach is to include not only official, but also informal gatherings of members of a portion of a public body within the definition of a meeting.\(^{137}\) This definition seems to preclude some forms of communications, such as letters, by requiring that the members

\begin{enumerate}
\item See \textsc{Cal. Govt. Code} § 11122.5 (defining “meeting” with a quorum requirement).
\item 5 U.S.C.A. § 552(b).
\item Id. § 552(b)(2).
\item 466 U.S. 463, 469-70 (1984).
\item Id. at 470 n.7.
\item See supra Part II.B.
\item O’Connor & Baratz, supra note 120, at 725.
\item Id. at 725. An example of this type of definition is taken from the Virginia Freedom of Information Act:

“Meeting” or “meetings” means the meetings including work sessions, when sitting physically, or through telephonic or video equipment . . . , as a body or entity, or as an informal assemblage of (i) as many as three members or (ii) a quorum, if less than three, of the constituent membership . . . of any public body.

Id.
\end{enumerate}
themselves be present for the meeting to take place. Another approach is to include communications, either in person or by other means, which occur on either a formal or informal level. In this approach, there is no requirement that the members be present at the same time and place, and neither is there a reference to a collective concurrence. Therefore, the types of communications at question in Wolfe would be included. The third approach is to not provide a definition of meeting at all or to use a circular definition such that a meeting is defined as a meeting. This lack of definition would provide no added clarity, and rather than closing one loophole, would open countless others.

2. Serial Meeting Prohibitions

Due to the varying scope of definitions of “meeting” as provided in the sunshine laws, there has been a great deal of debate as to whether serial meetings violate the requirements for open meetings. Courts have dealt with this issue in different ways and arrived at conflicting results.

a. Finding Serial Meetings Violate Sunshine Laws

Some courts have interpreted statutory language to find a prohibition on serial meetings in light of, or even in spite of, the definition of “meeting” provided. Most definitions have a “numerosity requirement” that find a meeting cannot take place without a quorum present. Where only one or two members of the body are present at any given meeting, the question is whether

---

138. Id. at 726-27.
139. Id. at 727. An example of this style of “meeting” definition is taken from the Connecticut Freedom of Information Act, which provides:

“Meeting” means any hearing or other proceeding of a public agency, any convening or assembly of a quorum of a multimember public agency, and any communication by or to a quorum of a multimember public agency, whether in person or by means of electronic equipment, to discuss or act upon a matter over which the public agency has supervision, control, jurisdiction or advisory power . . . .

Id.

140. Id. at 728. Examples of such statutes are the Alabama Sunshine Law which “do[es] not define the term ‘meeting’” and the Arkansas Freedom of Information Act which “use[s] a circular definition that defines ‘meeting’ to include the ‘meetings’ of a statutorily-defined number of the members of a public body.” Id.

141. Id. at 729.
142. Id. at 729-35.
143. Id. at 730.
144. Id. An example of such a requirement would be where the statutory definition of meeting requires that three members of the body to be present. So, if “the chairman of the public body [were to] shuttle back and forth among multiple members of the public body for the purpose of engaging in a group discussion without ever having three members talking to each other at the same time,” is there a violation of the open meeting statute? Id.
the numerosity requirement is met when the quorum of members attend the cumulative whole of meetings, even if they are not at every given meeting. 145

A Florida District Court of Appeal dealt with a situation where a superintendent met with each member of the school board individually to discuss a redistricting problem, believing that such individual communications would comply with the state’s open meeting statute. 146 The Superintendent’s intent in taking these meetings in private was to avoid public outcry that would result from the redistricting plans. 147 Despite a previous interpretation of the statutorily defined “meeting” as not including communications between a district staff member and a single member of the board, the appellate court found that in this case the actions of the board violated Florida’s State Sunshine Law. 148 The court determined that “the scheduling of six sessions of secret discussions, repetitive in content, in rapid-fire seriatim and of such obvious official portent, resulted in six de facto meetings by two or more members of the board at which official action was taken.” 149

The court justified its interpretation of the Sunshine Law by stating that despite the school board’s desire to avoid needless distress in the community, “[s]chool boards are not supposed to conduct their business in secret even though it may all be for the best at the end of the day and notwithstanding that the motives are as pure as driven snow.” 150 Rather, “deliberations by a school board on whether a school is to be closed, are very much a matter of public concern, never mind the Sunshine Law.” 151 And, just because there will be some outcry by “adversely affected” groups, “[t]here is no reason why school boards should be excluded [from open meeting requirements] simply because secrecy was necessary to avoid . . . ‘disfunctional [sic] or disruptive . . . stress or distress in the community.” 152 Thus, the court interpreted the statutory definition of meetings broadly to include serial meetings.

b. Finding Serial Meetings Do Not Violate Sunshine Laws

Other state courts have found that similar situations do not violate the open meeting requirements because the numerosity requirement was not met at any given meeting. 153 A Georgia Court of Appeal found that since the statute required that a meeting take place at a specific time and place, seriatim meetings would

145. Id.
147. Id. at 579.
148. Id. at 579-80.
149. Id. at 580.
150. Id.
151. Id. at 581.
152. Id. (omission in original).
153. O’Connor & Baratz, supra note 120, at 732.
not violate the statute because a quorum of members is never present at that specific time and place. 154 In Minnesota, the open meeting statute does not define the term “meeting.” 155 Thus, the Minnesota Supreme Court read in a quorum requirement because under state law no public body could act without having a quorum of members present. 156 Such a reading excludes serial meetings from the definition of “meeting” for the purpose of the state’s open meeting law. 157 The court acknowledged that serial meetings are a means of circumventing the quorum requirement, but refused to interpret the quorum requirement loosely because “[t]here is a way to illegally circumvent any rule the court might fashion.” 158

However, most cases in which the courts have found that serial meetings do not violate the open meeting laws are ones in which the meetings are not preplanned or part of an effort to evade the statutory requirement, but rather occur without such malfeasance. 159 As a result of the decision to not find a violation of the open meeting requirement if the group assembled cannot take official action, there have been a number of Minnesota cases in which discussions and deliberations among members have occurred in private, out of public view. 160

C. A Call for a Better Effort

In light of the grave problems that will result from the loophole created by Wolfe, the California Legislature should make another attempt to amend the Brown Act provision prohibiting the use of serial meetings to develop a collective concurrence. In amending the current statutory language, the Legislature should keep in mind the limitations that Governor Schwarzenegger suggested when he vetoed the bill. Due to the concerns of SB 964’s opponents, including Governor Schwarzenegger, if the Legislature enacted an amendment, it must not restrain local government so as to render it ineffective. 161

154. Id. at 733 (discussing Claxton Enter. v. Evans County Bd. of Comm’rs, 549 S.E.2d 830 (Ga. Ct. App. 2001)).
156. Id. at 518.
157. Id.
158. Id.
159. O’Connor & Baratz, supra note 120, at 734-35.
160. See Sovereign v. Dunn, 498 N.W.2d 62, 66-67 (Minn. App. Ct. 1993) (citing the Moberg decision in its holding that unless the group of public officials that gathers “is capable of exercising decision-making powers of the governing body” they cannot violate the open meeting law even if they discuss pending matters); Hubbard Broad., Inc. v. City of Afton, 323 N.W.2d 757, 765 (Minn. 1982) (finding that two members of the city council discussing issues before the board outside of public view did not violate the open meeting law).
161. See Schwarzenegger Letter, supra note 92 (indicating that the interference with the legislative process by the possible inclusion of standard communications between legislative staff and members and its impact on the efficiency of local government was a cause of his veto of SB 964).
This Comment suggests the following amended text replace the current language in California Government Code section 54952.2(b):

[A]ny use of direct communications, personal intermediaries, or technological devices that is employed by a majority of the members of a legislative body in a single meeting or a collective majority of the members of a legislative body in a series of meetings

1. to develop a collective concurrence as to action to be taken; or
2. deliberate upon, hear, or discuss with the intent of developing a collective concurrence as to action to be taken on an item by the members of the legislative body is prohibited.\(^\text{162}\)

If such language were adopted, it would be clear that the statute prohibits not only those communications that result in a collective concurrence, but also those communications leading up to a collective concurrence. However, it would exclude those discussions between staff and members of the governing body that are not leading to a collective concurrence. The focus of this language is to prevent evasion of the open meeting requirements that is often the goal of serial meetings. Because pre-decisional activities are included, the intent of the Brown Act will be furthered by ensuring that both the decisions and pre-decisional discussions leading up to them occur within full view of the public.

VI. CONCLUSION

The Wolfe holding, while loyal to the letter of the law, ignores prior interpretational standards of the breadth of coverage of the Brown Act and opens a loophole that runs contrary to the stated purpose of the Brown Act: ensuring public participation in the decision-making process.\(^\text{163}\) It is important that the Brown Act’s purpose and intent be upheld without interfering with the efficacy of local government. Whether the California State Legislature enacts the suggested amendment or another, it is essential that it close the loophole created by Wolfe. The previous attempt to overturn this holding was overly broad and would have prohibited activity to the point of paralyzing and stifling local government.\(^\text{164}\) Because the Brown Act’s goal is not to retard local governance, but to ensure that policy decisions are made in public view, another more moderate effort to overturn the Wolfe holding through legislative action is required.

\(^{162}\) This is based on California Government Code section 54952.2(b). The current language states that “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.” Id.

\(^{163}\) See supra Part II (discussing the purpose and language of the Brown Act).

\(^{164}\) See supra Part V.A.2 (discussing why SB 964 failed).