

# MEMORANDUM

## ATTORNEY-CLIENT COMMUNICATION

TO: City of Placerville City Council

FROM: Mona G. Ebrahimi, City Attorney

DATE: January 3, 2023

RE: Brown Act Refresher and Governance Reminders

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As the City Council embarks on a new year of leadership, I wanted to distribute a memorandum to refresh everyone on some general governance matters and basic Brown Act principles to ensure a successful and legally compliant year ahead.

Newly elected councilmembers (or appointed members of committees/commissions) are required to file a Form 700, assuming office statement, within 30 days of their appointment. All other officials have until April 1, 2023, to file their updated statements. Please note that a supplemental or new Form 700 is required for appointments to other legislative board or bodies, but not participation in 2x2 committees or liaison responsibilities.

This memorandum specifically focuses on council communications and the prohibition of serial meetings that may result in an inadvertent Brown Act violation. There are also a few general governance reminders. Should you have any questions about this memorandum or a Brown Act or governance issue throughout the year, please do not hesitate to contact the City Attorney's office for guidance.

Remember, that even if the City Attorney provides you with advice, each individual is responsible for his/her conduct. Neither the City Attorney nor other staff are subject to the Brown Act.

### I. Brown Act

#### A. *Serial Meetings*

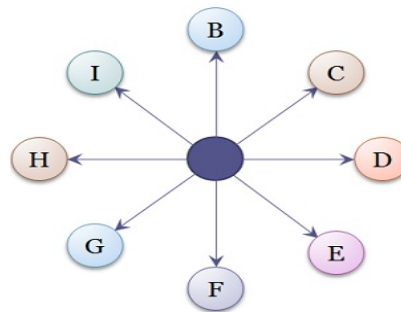
The Brown Act provides that "[a] majority of the members of a legislative body shall not, outside a meeting ... use a series of communications of any kind, directly or through intermediaries, to discuss, deliberate, or take action on any item of business that is within the subject matter jurisdiction of the legislative body." (Gov. Code, § 54952.2(b)(1).) The problem with such serial meetings, which are prohibited by the Brown Act, is that the public is deprived of the opportunity for meaningful observation of, and participation in, legislative decision-making.

Critically, the Brown Act defines a "meeting" as any congregation of a majority of the members to hear, discuss, deliberate, or take action on any matter within their subject matter jurisdiction.

Serial meetings sometimes occur either by a "daisy chain" or "hub and spoke" sequence. In the daisy chain scenario, one councilmember ("A") contacts a second ("B"), who contacts a third ("C") and so forth until a quorum has "discuss[ed], deliberate[d], or take[n] action" on an item within the council's jurisdiction.

**A → B → C = Illegal Daisy Chain**

In the hub and spoke scenario, a single councilmember individually contacts other members to discuss an item of business or transaction. When a person acts as the hub of a wheel (councilmember "A") and communicates individually with the various spokes (councilmembers "B", "C", etc.), a serial meeting has occurred. This may also be done by a staff person. In other words, a staff member (not subject to the Brown Act) who contacts each individual councilmember and discusses an item of business and indicates the position or statement or communications from another councilmember, could be creating a Brown Act violation on behalf of the council.



Each of these scenarios violates the Brown Act. Note that the communication need not result in a final decision; it is enough that the communication simply discusses an issue. Furthermore, the danger in having communications outside of a public meeting with another councilmember is that you may not know 1.) what the other councilmember will tell you, or 2.) whether he or she has spoken with other councilmembers.

Illegal serial meetings can occur through in-person discussions, emails, text messages, or any other medium.

**B. Use of Conduits**

A councilmember may engage in conversation with other councilmembers or staff outside an open and noticed meeting on matters in the council's jurisdiction only "in order to answer questions or provide information ... if that person does not communicate to members of the [council] the comments or position of any other member." (Gov. Code, § 54952.2(b)(2).) Such meetings may be, for instance, formal staff briefings, one-on-one meetings between councilmembers and staff, or passive conversations between councilmembers and staff.

Councilmembers and staff can inadvertently become impermissible conduits if, during or after such informational meetings, they take steps to act as an intermediary for other members of the body by sharing another's viewpoint.

**C. *Brown Act Violations at Publicly Noticed Meetings***

While it may seem impossible or even ludicrous to face a Brown Act violation during a duly noticed public meeting, it is possible. Councilmembers should not be engaged in discussions with colleagues, outside of the public process. For example, a councilmember should not have a sidebar discussion with a peer, even to ask a clarifying question, during a meeting. All questions and comments must happen as part of the meeting, and with the public being able to listen to all communications. The same is true for brief recesses in between meetings. Councilmembers should not discuss City business during breaks.

**D. *Recommendations***

To avoid informational meetings becoming impermissible serial meetings, councilmembers and staff should take the following steps:

1. Briefings must be unidirectional, information should flow from the staff to the councilmember(s), and councilmember participation should be limited to questions and information acquisition. Councilmembers should not give staff direction or otherwise cause staff to shape or modify their recommendation—otherwise, the staff member is acting as an impermissible conduit to reach a consensus—whether or not the rest of the council is aware of this;
2. Councilmembers should not ask staff to describe the view or opinion of any other councilmember; and
3. Staff may present their view but should avoid asking for a councilmember's view. If a councilmember's viewpoint is shared during a one-on-one meeting, neither staff nor the council should use that information to build consensus or provide direction.

Councilmembers and staff are also prohibited from acting as a conduit for a councilmember excused for a conflict of interest. This typically happens where the excused councilmember communicates their opinion or preference to another councilmember or staff person. Where a councilmember has a conflict of interest, he or she is prohibited from participating in the agenda item at any point. This prohibition extends to preliminary discussions, deliberations, and planning through when the council takes action – the excused member may not be in the room or communicate with councilmembers or staff at any time. A councilmember or staff person who transmits or is influenced by the excused councilmember's communication is an impermissible conduit.

**E. Assembly Bill 992 (Use of Social Media)**

On January 1, 2021, the Governor signed Assembly Bill 992 into law, which addresses social media use by elected or appointed members of legislative bodies.

Prior to the passage of AB 992, councilmembers were generally allowed to communicate with other councilmembers concerning City matters if those communications involved less than a quorum of the legislative body. With the passage of AB 992, officials are prohibited from responding to social media posts by any another member, even if less than a quorum of the body is involved, if the post relates to matters within their jurisdiction.

AB 992 amended Government Code section 54952.2, which defines what is and is not a "meeting" for the purposes of the Brown Act. Now, councilmembers are only permitted to use social media to communicate on a matter within the subject matter jurisdiction of the council if the following conditions are met:

1. The social media platform is "open and accessible to the public," meaning a member of the general public has the right to access and participate free of charge and without prior approval or moderation by the platform, or a third party, except when in violation of the platform's terms and conditions;<sup>1</sup>
2. The communication is to "answer questions, provide information to the public, or to solicit information from the public regarding a matter that is within the subject matter jurisdiction of the legislative body;" and
3. The communication is not with any other councilmember, either directly or via sharing, liking, commenting, or posting an emoji on a communication that involves another councilmember or his/her post or comment.

This is more restrictive than if less than a quorum were to meet in person. Communications between two councilmembers on social media – e.g., commenting on a post by another councilmember, liking each other's posts, forwarding a post by another councilmember – **are prohibited.**<sup>2</sup>

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<sup>1</sup> The legislative history supports the conclusion that the Legislature intended that only public pages (e.g., not restricted by security settings to "friends" or "followers") on platforms like Facebook, Twitter, Instagram, and LinkedIn will meet this definition. In contrast, NextDoor, which only permits access by address verification, and non-public groups that require moderator approval, are examples of platforms that do not appear to meet this definition and should therefore not be used for City business. Any information a councilmember wishes to share should be referred to the City Manager's office.

<sup>2</sup> This limitation does not prohibit two councilmembers from reacting to a third-party post (e.g., a post to the City's social media account), as long as neither councilmember refers to posts or reposts or other councilmembers. For example, if the City (but not an individual councilmember) posted an informational item on social media, individual councilmembers could "like" or "share" the post.

### **Best Practices**

Based on our reading of the legislative intent behind AB 992, we provide the following recommendations:

- Councilmembers should not interact with each other regarding matters within the subject matter jurisdiction of the council on social media platforms that do not grant the public access and the ability to participate. This would also prohibit participation in Facebook pages or groups where the permission of a moderator is required in order to join.
- When interacting on a qualified platform, councilmembers should carefully review all commenters, sharers, and likers on a post prior to engaging, and be mindful of posts that might appear to include comments on the posts of other councilmembers. The safest practice is to avoid commenting, sharing or liking a post if another councilmember has already done so.
- Councilmembers should never respond to a post by another member of the council. This includes liking, sharing, or retweeting the post.

### **II. General Governance**

The City of Placerville has adopted additional rules and policies related to its councilmembers. These are memorialized in the "City Council Handbook", a copy of which may be accessed at the following link: [https://www.cityofplacerville.org/media/City%20Council%20Staff%20Reports/2018/11%2027%202018/12.2\\_Att1%20Full%20version%20City%20Council%20Handbook%20final%20approved%2020120313%20\(ES\).pdf](https://www.cityofplacerville.org/media/City%20Council%20Staff%20Reports/2018/11%2027%202018/12.2_Att1%20Full%20version%20City%20Council%20Handbook%20final%20approved%2020120313%20(ES).pdf).