

**ATTORNEY-CLIENT PRIVILEGE AND ATTORNEY WORK PRODUCT**

**MEMORANDUM**

**TO:** Mayor Rick Thomas, Vice-Mayor David Vodden, and Councilmembers Gary Hansen, Jeff Williams and Casey Hofhenke

**CC:** Marti Brown, City Manager

**FROM:** David G. Ritchie

**DATE:** March 17, 2023

**SUBJECT:** Training Reminder: Meetings, Brown Act prohibitions against “serial” or “seratim” meetings and related remedial actions, Committees and Social Media

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**BACKGROUND:**

There have been recent circumstances, including email correspondence by some members copied to multiple other elected members of the Council, and reported members in attendance at City ad-hoc committee meetings (creating a quorum). All involve matters within the subject-matter jurisdiction of the City and are anticipated or likely to come before council for decisions within the foreseeable future. These circumstances demonstrate an immediate need for further clarification and training of councilmembers on what constitutes a meeting, what are prohibited activities relating to gatherings outside of properly noticed meetings and what can constitute “serial meetings”, prohibited by the Brown Act.

**SUMMARY AND RECOMMENDATIONS:**

I have received reports that a quorum of members in attendance in at least one or more City-sponsored meetings relating to the swimming pool, originally stylized as an “ad-hoc” committee. This has caused me to review the parameters of this committee as established by council. In particular I take note of the comments by Vice-Mayor Vodden when he expressed that the committee not include any particular structure or parameters and entertain broadly any ideas from the public. The committee, as structured by Council is advisory in nature – meaning that it does not have the authority to make policy decisions. Further the committee does not have direct staff involvement and staff do not attend. The Committee did not have a set or regular schedule. It was not established with a prescribed limited specific time period (meaning it is open-ended as to how long the committee would endure).

Since the establishment of the committee, it has held meetings open to the public, but has not noticed any of these meetings in a manner that is consistent with the Brown Act. It is believed that at one or more of these meetings, a quorum was reached (e.g., a majority of council members was in attendance). It is not known in what capacity or to what extent the third member

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(not assigned by council as a committee member) actively participated, if at all. E-mail messages from certain committee members to staff are beginning to reveal that the discussions taking place are broadly about the direction of recreation and development of recreational facilities within the City. Some members of the public have made requests to have keys to City-owned facilities issued (this request was not granted) for the purpose of having contractors and/or other service providers inspect the facilities. These functions are historically and ordinarily strictly operational and conducted by staff rather than being conducted by advisory ad-hoc committee members. Moreover, these functions have never been known to be undertaken by ad-hoc committee members that are members of the public and not officials or employees of the City. Most often facility tours to vendors that may engage in public works design and construction, or repairs and maintenance are done within the context of an existing City-issued request for proposals so that the facilities inspection activities do not lead to allegations of an unfair proposal process in which some vendors get access and others do not. Issuing an RFP does not bind the City to move forward with a public works project but does help to create a level playing field for proposing firms and create circumstances that help the City directly compare proposals.

Overall, given the open-endedness and apparent broadening scope (the work of the Committee is not strictly defined), as well as the fact that a majority of council members appear to be attending meetings, and the committee or members are acting within operational areas, that this committee does not meet the strict requirements needed to be defined as an “ad-hoc” committee and is, in fact, a standing committee (if the third member in attendance is acting strictly in an observer role or if there have been no third members in attendance); or, alternatively, that the meetings of the committee are de facto meetings of the City Council (if the third member in attendance has engaged in any participation beyond being an observer ONLY).

**RECOMMENDATION 1: Meetings of the committee must be noticed as meetings of a Standing Committee and the Committee must operate as subject to the Brown Act. No city councilmembers who are NOT assigned to the Committee may attend other than in a limited capacity that they are OBSERVERS ONLY. Alternatively, the Council, should prescribe strict time limits and parameters over the scope of the subject-matter that the Committee will review, limit the Committee’s operational functions and ensure that it operates in a capacity that is advisory to the Council only. A third option is to disband the committee and have the issue taken up by the entire City Council that may result in new direction to staff and/or a new committee structure.**

A review of a range of email messages shows they were sent to a quorum of members of the City Council outside of a noticed meeting and pertaining to City business (relating to the pool, and access to pool facilities), and to the termination of the City Clerk.

**RECOMMENDATION 2: I am recommending that in addition to each of you reading this memorandum carefully. I will also be further recommending that Council, at its earliest opportunity, act to require a copy of the Ralph M. Brown Act (Brown Act) (Govt. Code 54950 et. seq.) be given to each member of the legislative body – a power**

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**provided for in Gov. Code 54952.7. Notwithstanding whether Council ultimately requires distribution of copies of the Brown Act to each member, I recommend that each member read the Act in its entirety.**

These recommendations are consistent with and directly relate to the role of a City Attorney, which includes rendering advice about the rules of procedure and decorum at City Council meetings and meetings of other legislative bodies of the City.

**RECOMMENDATION 3: I am recommending that an agenda item be placed on the Council Agenda for the March 28<sup>th</sup> Regular Council meeting to “sunshine” both the committee meeting activities and the email correspondence relating to the pool committee and to the termination (to the extent that the termination item can be shared due to personnel matter privacy restrictions, it may be that some of the messages require redaction).** This agenda item appears to be necessary due to the fact that been meetings of a standing committee (purportedly an ad-hoc committee, but not operating as such) that were not properly noticed were held, and the email correspondence appears to reveal that a serial meeting may have taken place. At minimum, the public should be informed as to these activities.

### **BASIC GUIDANCE ON MEETINGS AND SERIAL MEETINGS, USE OF SOCIAL MEDIA:**

1. The Brown Act (Gov. Code 54950) requires meetings of the City Council to be open and public. The transparency rights of the public require this openness as well, by virtue of Cal. Cost Article I, Section 3(b)(1).

2. Elected officials must conform their conduct to the Act – this includes members who are elected or appointed but have not yet taken formal office (Note that this compliance is required even though the number of members or number needed for a quorum is unaffected by the existence of council-members elect.)

3. A “Meeting” in the traditional sense is: any congregation of a majority of the City Council at the same time and location (including permitted teleconference locations) to hear, discuss, deliberate, or take action on any item that is within the subject-matter jurisdiction of the Council.

4. KEY POINT TO CONSIDER: Although there is a physical, simultaneous focus in the definition of “meeting”, the Act also prohibits a majority of members, outside an open and noticed meeting, from using a series of communications *of any kind, directly or through intermediaries, to discuss, deliberate or take any action on any item of business within the subject matter jurisdiction of the City Council. This includes information gathering and any and all other steps, tasks or functions that are preliminary to deliberating or talking action.*

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### 5. SEVEN EXCEPTIONS:

A. Individual contacts are not meetings and not prohibited, where a member and any other person can meet and discuss items within the subject-matter jurisdiction. There are limits on these discussions. During and after these contacts, members cannot communicate their comments or positions to any other members of the body. This allows individuals to “lobby” members (even all of them individually) but members should be cautious NOT to deliberate or reveal an intended position or action as this could create a violation in which a consensus is developed by the individual as an “intermediary”. Contacts with staff are similarly allowed to answer questions and provide information as long as the staff person is not converted into an intermediary. Staff cannot communicate a member’s position or comments to any other member (so that they do not become the “hub” in a hub and spoke serial meeting. (Gov. Code 54952.2(c)(1) and 54952.2(b))

B. Members can attend conferences and seminars (even a quorum of members) without them being characterized as meetings IF: the gathering is open to the public (even if attendees have to pay to attend), AND it involves discussion of items of general interest to the public or public agencies, AND members do not discuss business of any specific nature that is within the subject matter jurisdiction of the City with any other members. (Gov. Code 54952.2(c)(2))

C. Members can attend open community meetings. These are meetings that are organized by persons or entities that are NOT the local agency (organized, held, promoted NOT by the City). Members who attend shall not discuss amongst themselves business of a specific nature that is within the subject-matter jurisdiction of the City. Best practices are to avoid sitting together when at such a meeting, and not making any comments on items that come up at the meeting that are within the subject-matter jurisdiction of the City. (Gov. Code 54952.2(c)(3))

D. Meetings of OTHER legislative bodies. A majority can attend properly noticed open meetings of other legislative bodies (like a County Board of Supervisors meeting for example). Members cannot discuss business within the subject-matter jurisdiction of the City amongst themselves. There are instances when a member can comment – you should seek additional guidance if you attend a meeting at which the other legislative body is discussing an agenda item that intersects with city business and you are selected to attend to communicate the view point of the City council as a whole. (Gov. Code 54952.2(c)(4))

E. Social or Ceremonial Gatherings. Examples of such events include weddings, holiday parties, swearing-in ceremonies. Members must not discuss any business within the subject-matter jurisdiction of the City. As with other types of exceptions, it is recommended that members do not sit together and do not make any comments or express views about City business at such events. (Gov Code 54952.2(c)(5))

F. Meetings of Standing Committees. Attendance of a majority of members at a properly noticed open standing committee of the City is not a meeting of the City Council IF

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members of the Council who are not members of the Standing Committee attend ONLY AS OBSERVERS. (Gov. Code 54952.2(c)(6)). This means other City Council members are allowed to be present but are prohibited from asking questions, making statements, sitting in their usual places on the dais. (81 Ops. Cal. Atty. General 156 (1998)). NOTE: this rule is for *STANDING COMMITTEES ONLY*. There is NO exception covering City ad-hoc committee meetings (those meetings, if they meet certain criteria are true ad-hoc committee meetings and are not subject to the Brown Act). The challenge is ensuring that an ad-hoc committee meeting is truly ad-hoc and not a standing committee meeting in disguise. (See additional discussion below for distinctions between Ad-hoc and Standing Committees.)

G. Grand Jury Testimony. An individual member, multiple members or the entire council may meet to provide testimony in private before a Grand Jury. This is not prohibited by the Brown Act. (Gov Code 54953.1)

H. Any Other Gathering that Does NOT fit into an exception (above). If you are unable to assign a gathering of a majority of Council members into one of the exceptions in A-G (above), there is NO exception for your gathering and it is a “meeting”. If you find yourself in a “meeting” that isn’t in a covered exception, that is not a properly noticed meeting of the City Council and is open to the public, you should immediately leave and report the incident to the City Attorney.

6. SOCIAL MEDIA. Members of Council can use social media to answer questions from the public, share information or solicit information from the public regarding matters within the subject matter jurisdiction of the City. There are some requirements if you are doing this.

A) The platform must be “open and accessible to the public”, which means that members of the general public have to have the ability to access and participate, free of charge, without any approval by the social media platform or moderators, or any other person or entity other than the social media platform. This includes forums, chatrooms, bulletin boards etc. and members of the public cannot be blocked, conditionally approved, or filtered from participating except when the internet based social media platform (the platform itself) determines the individual violated protocols or rules of the platform. (Gov Code 54952.2(b)(3)(B)(iii)).

B) Members cannot use ANY social media to “Discuss amongst themselves” (even just between two members) any official business. (Gov. Code 54952.2(b)(3)(A)) For purposes of social media, discuss amongst themselves means “communications made, posted or shared on an internet-based platform between members of a legislative body, including comments or use of digital icons [i.e., emojis] that express reactions to communications made by other members of the legislative body.” (AB 992)

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### ADDITIONAL DISCUSSION:

Meetings and Serial Meetings: Any discussion of prohibitions on serial meetings requires a clear understanding of what a meeting is, and is central to applying the Brown Act:

**“Meeting” defined:** Under the Brown Act, a “meeting” means “any congregation of a majority of the members of a legislative body at the same time and location, including teleconference location . . . , to hear, discuss, deliberate, or take action on any item” within the legislative body’s subject matter jurisdiction. [Gov.C. § 54952.2(a)]

The definition above clearly includes a range of activities which can constitute a meeting. **There is no decision required:** The definition covers any discussions between a majority of the members on an item within the body’s jurisdiction, *whether or not any collective decision is made*. A prior case decision in *Wolfe v. City of Fremont* had held that a series of individual conversations by City Councilmembers without an agreement did not constitute a meeting, however the legislature later rejected this.<sup>1</sup> The word “meeting” in the Brown Act “is not limited to gatherings at which action is taken by the relevant legislative body; deliberative gatherings are included as well. Deliberation in this context connotes not only collective decision making, but also the collective acquisition and exchange of facts (information gathering efforts) preliminary to the ultimate decision.”<sup>2</sup> These preliminary gatherings in which information is collected include study sessions or pre-meeting briefing sessions.<sup>3</sup>

In *Sacramento Newspaper Guild v. Sacramento County Bd. of Suprs.*, supra, 263 Cal.App.2d 41, 69 Cal.Rptr. 480, the members of a county board of supervisors were present at a luncheon at which the public business was discussed. This court deemed the informal luncheon discussion at a meeting should follow the Brown Act even though no formal action was taken there (p. 51, 69 Cal.Rptr. 480). The collective decision-making process consists of both “actions” and “deliberations” which must respectively be taken and conducted “openly” (§ 54950). Thus, the meeting concept cannot be confined exclusively to either action or deliberation but rather comprehends both and either (*id.*, at p. 47, 69 Cal.Rptr. 480). Since deliberation connotes not only collective discussion but also the “collective acquisition and exchange of facts preliminary to the ultimate decision,” the Brown Act is applicable to collective investigation and consideration short of official action. (*Id.*, at pp. 47–49, 69 Cal.Rptr. 480; see also *Rowen v.*

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<sup>1</sup> See Stats. 2008, Ch. 63 (uncodified legislative declaration disapproving dictum in *Wolfe v. City of Fremont* (2006) 144 CA4th 533, 545, 50 CR3d 524, 531, fn. 6, that indicated a series of individual meetings by body members that did not result in collective concurrence was not a “meeting” for Brown Act purposes)

<sup>2</sup> 216 *Sutter Bay Assocs. v. County of Sutter* (1997) 58 CA4th 860, 876-877, 68 CR2d 492, 502 (internal quotes and citations omitted) (superseded by statute on other grounds)

<sup>3</sup> See **California** Attorney General's Office, A Handy Guide to the Bagley-Keene Open **Meeting Act** 2004, 5, available on the **Calif.** Attorney General's website ([www.oag.ca.gov](http://www.oag.ca.gov))

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*Santa Clara Unified School Dist.* (1981) 121 Cal.App.3d 231, 234, 175 Cal.Rptr. 292.)<sup>4</sup>

Clearly, gatherings in which a majority of members are in the same room at the same time – whether a decision is made or not (including study sessions, deliberations and information gathering that is precedent to deliberations and decision-making outside of a duly convened meeting is prohibited (Gov. Code 54952.2, *Frazer v. Dixon Unified School District* (1993) 18 CA4th 781, 795). What about when the congregation of members is not simultaneous or is staggered over time, or doesn't involve direct contact at all between members and is a series of indirect contacts through an intermediary? When are these prohibited?

Discussion on this subject turns in part on the distinctions between a “meeting” and the prohibition on a “serial meeting”. The Brown Act defines a meeting (described in detail above) to include a congregation of a majority of the local legislative body members “at the same time and location” to “hear, discuss, deliberate, or take action on any item” within the body's subject matter jurisdiction. [Gov.C. § 54952.2(a)] In contrast, the serial meeting prohibition is limited to “discuss[ing], deliberat[ing], or tak[ing] action on any item *of business*” within the body's subject matter jurisdiction. [Gov.C. § 54952.2(b)(1) (emphasis added)] Note that there is no clear authority on the distinctions -- the difference in the plain language of the two subdivisions suggests that the serial-meeting prohibition is limited to current or future business meeting agenda items (“item of business”), rather than the broader in-person meeting prohibition on “any item” within the body's subject matter jurisdiction. For example: members of a planning commission may, arguably, be permitted to engage in serial communications about a news story one of them read regarding a new design for rooftop solar arrays, so long as the technology is not foreseeably a subject of a pending or impending agenda item.

Standing Committees and Ad-Hoc Committees: As a threshold matter, California’s Ralph M. Brown Act applies to *any* committee of a legislative body that is empowered to make decisions, rather than simply advise. It is only advisory committees that *may* be exempt from the Brown Act. See Gov. Code section 54952(a)-(b). As to advisory committees, the Brown Act applies to “standing committees,” but **not** to “ad hoc committees.”

The challenge can come in defining which is which. Under the Brown Act a “standing committee” is one that has “continuing subject matter jurisdiction, **or** a meeting schedule fixed by charter, ordinance, resolution or formal action of a legislative body.” Gov. Code section 54952 (emphasis added). Whereas, purported ad hoc committees meet infrequently and not on a regular basis, the Attorney General has said that if the committee has the authority to hear and consider issues within the subject matter jurisdiction of the City Council, and the committee’s authority does not need to be periodically renewed (i.e., it is open-ended), the committee may be subject to the Brown Act. 79 Op. Atty Gen. Cal. 69 (1996) (you can find this opinion on the California Attorney General’s web site by searching for opinion number 95-614).

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<sup>4</sup> *Stockton Newspapers, Inc. v. Members of Redevelopment Agency*, 171 Cal. App. 3d 95, 101–02, 214 Cal. Rptr. 561, 564 (Ct. App. 1985)

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It's important to note the highlighted "or" above. If an advisory committee has a fixed meeting schedule, then it is a "standing committee" subject to the Brown Act. But even advisory committees without a fixed meeting schedule will constitute a "standing committee" if they have "continuing subject matter jurisdiction," for example if a city council were to create a committee empowered to address, e.g., homeless issues in an open-ended and continuing way – even if it does not meet on a regular schedule – then it would be a "standing committee."

The California Attorney General's Brown Act publication sets forth several hypothetical examples that help illustrate some of the important distinctions here:

A city council creates four bodies to address various city problems:

- Commission comprised of councilmembers, the city manager and interested citizens: This committee is covered by the Brown Act because there is no exemption for it regardless of whether it is decision-making or advisory in nature.
- Advisory committee comprised of two councilmembers for the purpose of reviewing all issues related to parks and recreation in the city on an ongoing basis: This committee is a standing committee which is subject to the Act's requirements because it has continuing jurisdiction over issues related to parks and recreation in the city.
- Advisory committee comprised of two city councilmembers for the purpose of producing a report in six months on downtown traffic congestion: This committee is an exempt advisory committee because it is comprised solely of less than a quorum of the members of the city council. It is not a standing committee because it is charged with accomplishing a specific task in a short period of time, i.e., it is a limited term ad hoc committee.
- Advisory committee comprised of two councilmembers to meet on the second Monday of each month pursuant to city council resolution: This committee is subject to the Act as a standing committee because its meeting schedule is fixed by the city council.

### CONCLUSION:

I recognize that the above represents a large amount of information and that there are subtle nuances spread throughout. Please review the Brown Act and schedule an appointment with me for further discussion, if you feel that you need more training on any of these issues after you have reviewed the memo on these topic areas:

- What a "Meeting" is?
- What is not a "meeting?"
- What communications can constitute a "serial Meeting?"
- What are the differences between an Ad-Hoc and Standing Committee?
- What level of participation you may have in ad-hoc and standing committees?