MEMORANDUM OF LAW

DATE: June 20, 1996

TO: Sean Kane Meyers, Assistant to the Mayor, Policy Development

FROM: City Attorney

SUBJECT: Use of Video Teleconferencing and the California Open Meetings Law (Ralph M. Brown Act)

You have requested clarification of the applicability of the Brown Act to teleconferencing. The following issues were raised:

QUESTIONS PRESENTED

1. May the Mayor or any member of the Council participate from a remote location in Council meetings or votes?

2. Must the remote location originate within City boundaries, or may it originate outside City boundaries or outside the boundaries of the United States?

3. May Council meetings be broadcast in a non-interactive manner over the Internet, using both sound and video capabilities, to remote locations inside and outside the City's boundaries?

4. May part or all of a City Council meeting be broadcast in a non-interactive manner through the use of video teleconferencing technology to remote locations inside and outside the City's boundaries?

SHORT ANSWERS

1. Yes, but the Mayor or the individual Councilmember who is at the "remote" location may not be counted for purposes of establishing a quorum or for determining the outcome of a vote. The Council must also provide appropriate notice and opportunities for the public to

testify or directly address the legislative body on any item of interest to the public. The video teleconferencing technology which is used must permit visual and auditory interaction.

2. The general rule of law is that all regular and special meetings of the City Council must be held within the boundaries of the territory over which the legislative body has jurisdiction. Cal. Gov't Code Section 54954(b). Where the Council is "meeting" according to the definition in the Ralph W. Brown Act ("Brown Act"), and where one of the narrow statutory exemptions enumerated in Section 54954 is satisfied, a Council meeting may be held outside the boundaries of the City and the proceedings may be broadcast to designated remote locations within the boundaries of the City. It is unclear whether those meetings may be held outside the United States.

3. Yes. As long as the on-line broadcast or transmission of a Council meeting that utilizes Internet technology does not permit Councilmembers or subscribers to use the technology for impermissible "communications" in violation of the Brown Act, then portions or all of a Council meeting may be broadcast from one location to any other location without violating the Brown Act.

4. No. Where video teleconferencing technology is implemented

pursuant to the express exceptions and limitations delineated in the Brown Act, that technology must provide the public with the opportunity to participate in the Council meeting on an interactive basis. Portions or all of the meeting may be broadcast or transmitted to any location, but those in attendance at designated remote locations must have the opportunity to testify before or directly address the legislative body through the use of that technology.

DISCUSSION

The policy underlying the adoption of the Brown Act was expressed by the Legislature as follows:

> 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.

Cal. Gov't Code Section 54950.

The legislative intent evinces a strong presumption in favor of providing public access to all deliberations of the Council pertaining to matters within its subject matter jurisdiction. By providing a public forum and by opening their proceedings to public view, the

representatives of the people remain accountable and responsive to their constituents. The ultimate purpose of the Brown Act is to provide the public with an opportunity to monitor and participate in the decision-making processes of boards and commissions. Daniel E. Lungren, The Brown Act: Open Meetings for Local Legislative Bodies, 12 (Ted Prim, ed., 1994) (hereafter "Open Meetings").

A. Councilmember Participation in Meetings from Remote Locations

The primary purpose of this memorandum of law is to apply the provisions of the Brown Act to the use of video teleconferencing technology. However, the questions posed will raise issues under the San Diego City Charter and those will be discussed briefly at the end of this section.

1. Definition of Meeting

Restrictions on the use of technology by individual Councilmembers come into play within the context of the legislative body's "decision-making processes." But under what circumstances is the Council said to be meeting? The Legislature has declared that the term "meeting" includes "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." Cal. Gov't Code Section 54952.2(a).

Members of the Council should be aware that the term "meeting" is interpreted liberally:

> This definition makes it clear that the body need not take any action in order for a gathering to be defined as a meeting. A gathering is a meeting if a majority of the members of the body merely receive information or discuss their views on an issue. A meeting also covers a body's deliberations, including the consideration,

> analysis or debate of an issue, and any vote which may ultimately be taken. Under this construction, any gathering of a majority of the members of a body to receive information, hear a proposal, discuss an issue or take any action on an issue under the subject matter jurisdiction of the body is a meeting subject to the notice and open meeting requirements of the Act.

Open Meetings, 8 (1994).

2. Impermissible Communications

In the context of Council meetings, the Brown Act does not prohibit the use of technological innovations per se, but rather the uses to which they are put. The focus of the inquiry is as follows: is technology being used to frustrate the central purpose of the Brown Act by limiting the ability of the public to participate in and monitor the deliberative processes of its elected representatives? The language of the Brown Act expresses these concerns clearly: "Except as authorized pursuant to Section 54953, 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." Cal. Gov't Code Section 54952.2(b).

3. Permissible CommunicationsF

The Council should be cautioned that this memorandum addresses situations where the Council is performing a legislative function and not a quasi-judicial function. For guidelines addressing the issue of ex parte contacts in the latter instance, see, for example, City Attorney Opinion No. 90-2 on "Limits on Ex Parte Communications by Council members," issued June 15, 1990, to the Honorable Mayor and City Council; and, City Attorney Reports to the Honorable Mayor and City Council on "City Council Guidelines on Ex Parte Communication by Councilmembers," dated June 15, 1990, and

July 1, 1993.

While technology can on occasion be used to circumvent the prohibitions of the Brown Act, it can also be used to enhance the ability of constituents to address grievances and communicate with their elected representatives. For this reason, the Brown Act exempts individual contacts or conversations between a member of a legislative body and any other person. Cal. Gov't Code Section 54952.2(c)(1).F

Within the language of this provision, the term "any other person" is construed to mean any person other than a Councilmember or a City employee. Open Meetings, 13 (1994).

The language of this exemption is designed to preserve the ability of constituents to contact their representatives about issues of concern to them. "Accordingly, if a member of the public requests a conversation with an individual member of the board, who then acts independently of the board and its other members in deciding whether to talk with the member of the public, no meeting will have occurred even if the member of the public ultimately meets with a quorum of the body." Id.

The Council should be aware that the Brown Act may still be violated if the members of a legislative body orchestrate contacts between a private party and a quorum of the body. Id.

4. Video Teleconferencing Exceptions

The Brown Act specifically contemplates the use of video teleconferencing technology. The exception authorized in Section 54953 states that "┌nσotwithstanding any other provision of law, the legislative body of a local agency may use video teleconferencing for the benefit of the public or the legislative body of a local agency in connection with any meeting or proceeding authorized by law." Cal. Gov't Code Section 54953(b)(1). Once again, the use of this technology is not prohibited by the Brown Act, only its misuse. Accordingly, certain restrictions are placed on its use in order to safeguard the rights of the public.

5. Restrictions Governing the Use of Video Teleconferencing Technology

The term "video teleconference" is defined as "a system which provides for both audio and visual participation between all members of the legislative body and the public attending a meeting or hearing at any video teleconference location." Cal. Gov't Code Section 54953(b)(4). Whenever video teleconferencing capabilities are employed in connection with any meeting or proceeding authorized by law, the Council must then provide opportunities for interactive auditory and visual participation to those in attendance at any teleconference location.

The Brown Act also specifies that the use of video teleconferencing "shall be limited to the receipt of public comment or testimony by the legislative body and to deliberations of the legislative body." Cal. Gov't Code Section 54953(b)(2).

Staff and consultants may testify from remote locations through the use of video teleconferencing technology. "Where the members of the body and members of the public are gathered at a single location, staff members or other persons retained to advise the body may appear from remote locations via technological devices, where it is in the best interests of the public to do so." Open Meetings, 14 (1994).

While the Brown Act does not appear to restrict individual Councilmembers from participating in Council meetings from remote locations, "only the persons physically present at the location designated for the meeting may be counted for purposes of establishing a quorum or determining the outcome of a vote." Open Meetings, 14 (1994).

Provided that a quorum is established by those Councilmembers who are physically present, and with the understanding that the absent Councilmember's vote shall not be counted, it would appear that the participation of the Mayor or an individual Councilmember is permissible from a remote location within the boundaries of the City or outside its boundaries. A more difficult question is raised where foreign countries are concerned, but on its face section 54954 does not seem to prohibit the use of video teleconferencing in this manner.

Finally, the Brown Act requires any legislative body of a local agency that elects to use video teleconferencing technology to "post agendas at all video teleconference locations and adopt reasonable regulations to adequately protect the statutory or constitutional rights of the parties or the public appearing before the legislative body of a local agency." Cal. Gov't Code Section 54953(b)(3).

6. Participating in a Meeting Via Video Teleconferencing and the Effect of Charter Section 12

Section 12 of the San Diego City Charter declares that:

> It is the duty of the Council members to attend all Council meetings. The Council shall vacate the seat of any Councilmember who is absent from eight (8) consecutive meetings or fifty percent (50%) of any scheduled meetings within a month unless the absence thereof is excused by resolution of the Council.

The issue raised by this Charter section is whether a Councilmember who participates in a Council meeting via a video teleconference call is "absent" from the Council for purposes of Charter section 12. There is no clear answer to this question. Councilmembers should be aware that if they participate in Council meetings through the use of video teleconferencing they may be treated by a court of law as being absent for the purposes of Charter section 12. Accordingly, Councilmembers may wish to restrict their participation in Council meetings via video teleconferencing, particularly where "regular" Council meetings are concerned. For further information on the effect of absences from City Council meetings, you may consult City Attorney Opinion No. 93-26 on "Definition of Council Meetings for Purposes of Requiring Removal from Office Under Charter Section 12," issued on March 3, 1993, to the Honorable Mayor and City Council.

B. Location of Meetings and Location of Remote Broadcasts

While a few carefully circumscribed and extremely limited exceptions to the general rule exist,F

The exceptions are enumerated in section 54954(b), and pertain to situations where the purpose of the meeting is to:

1) Comply with state or federal law or court order, or attend a judicial or administrative proceeding to which the local agency is a party.

2) Inspect real or personal property which cannot be conveniently brought within the boundaries of the territory over which the local agency exercises jurisdiction provided that the topic of the meeting is limited to items directly related to the real or personal property.

3) Participate in meetings or discussions of multiagency significance that are outside the boundaries of a local agency's jurisdiction. However, any meeting or discussion held pursuant to this subdivision shall take place within the jurisdiction of one of the participating local agencies and be noticed by all participating agencies.

4) Meet in the closest meeting facility if the local agency has no meeting facility within the boundaries of the territory over which the local agency exercises jurisdiction, or at the principal office of the local agency if that office is located outside the territory over which the agency exercises jurisdiction.

5) Meet outside their immediate jurisdiction with elected or appointed officials of the United States or the State of California when a local meeting would be impractical, solely to discuss a legislative or regulatory issue affecting the local agency and over which the federal or state officials have jurisdiction.

6) Meet outside their immediate jurisdiction if the meeting takes place in or nearby a facility owned by the agency, provided that the topic of the meeting is limited to items directly related to the facility.

7) Visit the office of the local agency's legal counsel for a closed session on pending litigation.

Cal. Gov't Code ' 54954(b).

" ┌rσegular and special meetings

of the legislative body shall be held within the boundaries of the territory over which the local agency exercises jurisdiction." Cal. Gov't Code Section 54954(b). A central purpose of the Brown Act is to protect the public's right of access. Any technology that is used in connection with an authorized meeting or proceeding of the Council must be used in a manner which will protect and not subvert that right.

In those cases where the Council itself meets outside the boundaries of the City pursuant to one of the exceptions enumerated in Section 54954(b), then presumably the Council could broadcast its meeting, proceedings, or deliberations through the use of video teleconferencing technology to designated remote locations within the boundaries of the City. It is unclear whether the Council is empowered to "meet" outside the boundaries of California or outside the boundaries of the United States. In cases where a majority of the Council gathers and is not "meeting" pursuant to one of the exceptions enumerated in Section 54952.2(c) then the requirements of the Brown Act would not be imposed upon them.F

The following instances are not considered "meetings" under the purview of the Brown Act:

1) Individual contacts or conversations between a member of a legislative body and any other person.

2) The attendance of a majority of the members of a legislative body at a conference or similar gathering open to the public that involves a discussion of issues of general interest to the public or to public agencies of the type represented by the legislative body, provided that a majority of the members do not discuss among themselves, other than as part of the scheduled program, business of a specified nature that is within the subject matter jurisdiction of the local agency. Nothing in this paragraph is intended to allow members of the public free admission to a conference or similar gathering at which the organizers have required other participants or registrants to pay fees or charges as a condition of attendance.

3) The attendance of a majority of the members of a legislative body at an open and publicized meeting organized to address a topic of local community concern by a person or organization other than the local agency, provided that a majority of the members do not discuss among themselves, other than as part of the scheduled program, business of a specific nature that is within the subject matter jurisdiction of the legislative body of

the local agency.

4) The attendance of a majority of the members of a legislative body at an open and noticed meeting of another body of the local agency, provided that a majority of the members do not discuss among themselves, other than as part of the scheduled meeting, business of a specific nature that is within the subject matter jurisdiction of the legislative body of the local agency.

5) The attendance of a majority of the members of a legislative body at a purely social or ceremonial occasion, provided that a majority of the members do not discuss among themselves business of a specific nature that is within the subject matter jurisdiction of the legislative body of the local agency.

Cal. Gov't Code ' 54952.2(c).

C. Broadcasting Council Meetings Through Non-Interactive Internet Technology

The restrictions on the use of Internet technology would be the same as those governing the use of all "on-line" communications systems as well as non-electronic communications systems. The limits of the use of this technology were detailed in the Memorandum of Law (ML-96-23) dated April 25, 1996. There is nothing in the Brown Act to prohibit members of the public from "listening in" to meetings and proceedings of the legislative body which are covered by its provisions. The logical extension of this concept would permit passive viewing as well. Indeed, the intent of the law declares that deliberation as well as action shall occur openly and publicly, and that both of these "steps" must be taken "in public view." Sacramento Newspaper Guild v. Sacramento County Bd. of Suprs., 263 Cal. App. 2d 41, 47-48 (1968). The use of a computer does not alter the application or enforcement of the Brown Act as long as it is not used for impermissible "communication" purposes.

For example, provided that the on-line Internet service is being used to provide passive listening or passive viewing opportunities to members of the public located in City Branch Libraries, then no violation of the Brown Act has occurred. The same opportunities could be provided to City staff members or City employees located in City

facilities such as the City Administrative Building or the City Operations Building.

D. Using Video Teleconferencing Technology to Broadcast Council Meetings to Remote Locations Inside and Outside the Boundaries of the City.

The term "video teleconference" means "a system which provides for both audio and visual participation between all members of the legislative body and the public attending a meeting or hearing at any video teleconference location." Cal. Gov't. Code Section 54953(b)(4). The plain language of the statute makes it clear that if video teleconferencing technology is used in situations that are governed by the provisions of the Brown Act, then it must by definition afford the public the opportunity to participate in the meeting or gathering on an interactive basis. On its face the Brown Act does not prohibit the transmission or broadcast of Council meetings to any location, including a foreign country, provided that those present at the remote location may testify before or directly address the legislative body through the use of that technology.

Of course, any technological device which affords the public the opportunity to "listen in" on Council meetings, or to passively view the proceedings, could be used to broadcast portions or all of those meetings to any location in the world. A violation of the Brown Act only occurs if the technology which is used enables Councilmembers, their staff or consultants, and private parties to enter into impermissible communications or deliberations which exclude the public at large and deny them the opportunity to monitor and participate in those decision-making processes.

CONCLUSION

Where broadcasts of Council meetings are concerned, the issue turns on how the technology is used, rather than on what kind of technology is used. If the technology in question only affords the opportunity to listen to or observe Council proceedings, then there are no restrictions on their transmission to any remote location.

If video teleconferencing capabilities are employed, then the public must be provided with opportunities for visual and auditory interaction from designated remote locations. Video teleconferencing may not be used to develop a collective concurrence as to action to be taken on an item by a majority of the members of the legislative body, either among themselves or in conjunction with agency employees, representatives, or personal intermediaries. It is a violation of the Brown Act to seek to accomplish the same objectives through the use of any technology.

Finally, the Mayor or individual Councilmembers may participate in meetings from remote locations through the use of video teleconferencing technology, but that technology may not be used to establish a quorum or to register the vote of a member connected to the meeting through its use. Absent the extremely limited exceptions enumerated under Section

54954(b), the member's participation by means of video teleconferencing technology should occur from a remote location within the boundaries of the City.

As long as the constitutional and statutory rights of the public and any parties to the proceeding are protected through scrupulous adherence to the provisions of the Brown Act, the use of video teleconferencing technology will actually further its purposes. If video teleconferencing technology is not used for impermissible communications, it promises to increase the ability of constituents to participate in and monitor the deliberations of their elected representatives.

JOHN W. WITT, City Attorney

By
Cristie C. McGuire

Deputy City Attorney

EAS:CCM:jrl:pev(x043.2)
cc Dick Wilken, Deputy Director,
Information Technology
and Communications
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