

**Office of
The City Attorney
City of San Diego**

**MEMORANDUM
MS 59**

(619) 236-6220

DATE: November 20, 2015

TO: Honorable Members of the City Council

FROM: City Attorney

SUBJECT: Open Meeting Requirements of the Ralph M. Brown Act
(California Government Code section 54950, *et seq.*)

INTRODUCTION

In January 2015, this Office provided the San Diego City Council (City Council) with a special briefing on the requirements and restrictions of California's open meeting law, the Ralph M. Brown Act (Brown Act or Act). This special briefing was the result, in part, of concerns regarding potential violation of the Act in the course of selecting a Council President in December 2014.

In addition, with the City's adoption of the mayor-council form of government, Councilmembers have become more directly involved in the administrative processing of legislative actions to City Council. A key component in the City's legislative process is the role of the Council standing and special issues committees (Committees). The Committees have assigned areas of responsibility under the Rules of Council. SDMC § 22.0101, Rule 6. Proposed legislative action, whether by resolution or ordinance, is normally routed through one of the Committees. This memorandum reminds the City Council of the Brown Act limitations on Councilmember communications outside a publicly noticed and open meeting of the City Council and addresses options for Councilmembers to communicate in processing proposed legislation.

ANALYSIS

The Brown Act's purpose is stated clearly in its opening section:

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 § 54950.

In the case of legislative bodies, that open deliberation occurs in a properly noticed meeting of the legislative body open to the public. A "meeting" is any congregation of a majority of the members of a legislative body to hear, discuss, deliberate, or any matter within their jurisdiction. Cal. Gov't Code § 54952.2(a). Discussions outside a properly notice meeting are prohibited:

A majority of the members of a legislative body shall not, outside a meeting authorized by this chapter, 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.

Cal. Gov't Code § 54952.2(b)(1) (emphasis added).¹

Use of any form of communication, telephone, email, or memorandum to discuss, deliberate, or take action would violate the Act. As stated by the California Attorney General regarding the sending of email in violation of section 54952.2(b):²

[A] majority of the board members of a local public agency may not e-mail each other to develop a collective concurrence as to action to be taken by the board without violating the Brown Act even if the e-mails are also sent to the secretary and chairperson of the agency, the e-mails are posted on the agency's Internet website, and a printed version of each e-mail is reported at the next public meeting of the board.

84 Op. Cal. Att'y. Gen. 30 (2001).

The Act also explicitly precludes a majority of the members of the City Council from attending a Council standing committee meeting, except as observers. Cal. Gov't Code § 54952.2(c)(6). The State Attorney General has opined that members of the legislative body of a local public agency may not ask questions, make statements, or sit in special chairs on the dais while attending a meeting of a standing committee of the legislative body when attending as observers. 81 Op. Cal. Att'y Gen 15 (1998).

¹ Prior to 2008, California Government Code (Government Code) section 54952.2(b)(1) prohibited a series of communications to "form a collective concurrence." The State legislature amended the section to expand the prohibition to include "discuss, deliberate, or take action."

² The Attorney General opinion was issued prior to the 2008 amendment to section 54952.2. However, the analysis applies equally to the broader prohibition against discussion in the current language of the section.

In 2011, this Office issued a memorandum discussing the attendance of a majority of Councilmembers at a meeting of a standing committee of the City Council. 2011 City Att’y MS 620 (2011-1; Jan. 14, 2011). That memorandum concludes that:

[A]t properly noticed meetings of Committees composed of a quorum of the Council, visiting Councilmembers may attend and participate as would any member of the public, and should sit with the public. At Committee meetings composed of *less* than a quorum of the Council, visiting Councilmembers may attend only as silent observers, when *their attendance creates a quorum*. When their attendance *does not create a quorum*, they may attend and participate as members of the public.

2011 City Att’y MS 620, 621 (emphasis added). The 2011 memorandum addressed the question of a Councilmember personally attending a Committee meeting. It did not address other forms of communication among Councilmembers, communications that could nonetheless violate the prohibitions on serial meetings. The prohibition on communications, as stated by the Act is direct or indirect (e.g., City Council staff)³ and as noted by the Attorney General, whether in person or in writing (e.g., memoranda). The Act does permit employees or officials to engage in separate communications outside of a meeting to answer questions or provide information. However, the Act explicitly prohibits the employee or official from communicating to the members of the legislative body the comments or position of another member of the body. Cal. Gov’t Code § 54952.2(b)(2).⁴

Reading the prohibitions on Councilmember communications and the exceptions of section 54952.2 together, this Office concludes that communications, including memoranda from Councilmembers to standing committees of which they are not a member, are potential violations of the Act. While one could argue that a Councilmember’s memo to a Committee of which he or she is not a member is a matter of the public record on the agenda item, it could also be argued that this essentially converts the Committee meeting into a meeting of the City Council – not properly noticed and in violation of the Act. The submission of the memo results in discussion of the item by a majority of the City Council, i.e., the Committee members who are present, plus the communicatory memo from another Council member. Once a majority of the Council is in discussion the Committee meeting becomes a Council meeting and would be in violation of the Act because the meeting was not properly noticed as a Council meeting. This exposes the City to potential claims (and legal costs) and could jeopardize decisions on important matters. To avoid potential Brown Act violations, Councilmember memoranda should be treated like any other form of Council communication and occur in the context of a meeting of the appropriate Council committee or City Council meeting.

³ City Council staff are representatives of their Councilmembers. As such, their communications could lead to discussion of an issue among a majority of the City Council. For this reason, this Office has long cautioned that Council staff docket briefings be open to the public. 1994 City Att’y Report 991 (94-2; Jan. 12, 1994).

⁴ Government Code section 54952 provides for a limited number of situations as exceptions, including, for example, the attendance of a majority of the City Council at a ceremonial event.

Councilmembers have input in the legislative process either through the Committees of which they are members, including the Committee of the Whole, or at City Council meetings. The Council President or the City Council, by majority vote, may refer items for which input by a majority of the City Council is warranted, to the Committee of the Whole. Rule 6.11.2(c), San Diego Municipal Code § 22.0101. In addition, the Charter Review Committee has recently recommended for City Council consideration, amendments to the Rules of Council to provide a process for a re-established Committee on Rules to consider legislation proposed by a City Councilmember that avoids potential Brown Act violations.

CONCLUSION

The City's committee structure and its legislative process as it has evolved since the adoption of the council-mayor form of government create the potential for inadvertent violations of the Brown Act. Recognizing the limitations of the City's committee structure, this Office is working with the Office of the Council President on proposed amendments to the Rules of Council to provide ways for Councilmembers to address issues while complying with the Act. We recommend that, until such time as the Rules of Council may be amended to provide some other process, Councilmembers confine their communications to Committees of which they are a member or bring the matter to the full City Council via Request for Council Action, to be discussed at a properly noticed City Council meeting.

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By /s/Prescilla Dugard
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Chief Deputy City Attorney

PMD:jls:ccm

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cc: Mayor Kevin Faulconer

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