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When E-Mail Violates The Brown Act, and Other E-Mail Pitfalls

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by Natalie West and Michael Jenkins

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This column is provided as general information and not as legal advice. The law is constantly evolving, and attorneys can and do disagree about what the law requires. Local agencies interested in determining how the law applies in a particular situation should consult their local agency attorneys.

In September's column, we discussed e-mail in the context of public records. This month, we look at other issues that can arise when public officials communicate with each other and staff via e-mail.

Avoiding Brown Act Issues

Officials increasingly rely on e-mail to communicate with each other as well as with members of the public and with staff. Such widespread use of e-mail creates the risk of Brown Act violations.

The Brown Act requires all public meetings to be open and public.¹ The act prohibits "any use of technological devices that are employed by a majority of the members of a [city council] to develop a collective concurrence" on an action to be taken by the body. This is commonly known as the prohibition on "serial meetings."

The attorney general has issued an opinion concluding that "[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 Ralph M. 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." The opinion reviewed the policy and provisions of the Brown Act in detail, concluding that decisions should be made in public meetings because such meetings provide the opportunity for public attendance and public comment, characteristics that are missing from an exchange of e-mail.

Although we are unaware of any reported California case on these issues, we did find a case from the state of Washington, holding that the exchange of e-mail can constitute a prohibited meeting. A member of the public filed a lawsuit against school board members and members-elect alleging that they violated the state's open meeting law by sending each other private e-mail.² The Washington court adopted a broad interpretation of the term "meeting," noting that "elect-ed officials no longer conduct the public's business solely at in-person meetings," and quoting a California case: "If face-to-face contact of the members of a legislative body were necessary for a meeting, the objective of the open meeting requirement of the Brown Act could all too easily be evaded."³ The Washington court then concluded that, "In light of the [Washington statute's] broad definition of 'meeting' and its broad purpose, and considering the mandate to liberally construe this statute in favor of coverage, we conclude that the exchange of e-mails can constitute a 'meeting.'"⁴

Collective Concurrence

In both the California attorney general's opinion and the Washington case, the analysis focused on problems inherent when elected bodies use e-mail as a way of arriving at a collective concurrence. The question posed to the attorney general assumed that the e-mail was used for the purpose of deciding an issue: "May a majority of the members e-mail each other to develop a collective concurrence as to action to be taken by the board?" The Washington court stated, "We recognize the need for balance between the right of the public to have its business conducted in the open and the need for members of governing bodies to obtain information and communicate in order to function effectively. Thus, we emphasize that the mere use or passive receipt of e-mail does not automatically constitute a 'meeting.'"⁵

The Washington court's language seems to indicate that, in the view of that court, even an e-mail shared among all members of a legislative body would not violate open meeting requirements, as long as the e-mail is not circulated as a way of developing a collective concurrence outside the public forum. This is consistent with the authors' view that an e-mail sent by one council member to others, standing alone, does not constitute a serial meeting.

Nevertheless, the ease with which a sender can e-mail copies of messages to multiple recipients, hit "reply to all" on a return message and forward a message to other interested parties means that council members can easily communicate with more than a quorum of the council and may be developing a "consensus" without even realizing that there is a problem. Furthermore, an exchange of e-mails among council members is much closer to a contemporaneous exchange of ideas than a series of phone calls.

A council would clearly risk violating the Brown Act if a majority of its members participated in an online chat room at the same time. An exchange of e-mails can be almost as simultaneous as a chat room, if council members are seated at their computers, sending and receiving e-mails during the same period of time. For these reasons, it is important for council members to clearly understand the risks they are taking if they rely on e-mail to exchange information or points of view on city business.

In particular, council members should be very careful to avoid serial meetings via e-mail. The "daisy chain" type of serial meeting occurs when a council member addresses an e-mail to another council member, expressing a view about an action to be taken by the council, and the recipient replies and copies the reply to one or more other council members sufficient to constitute and involve a quorum of the body in the serial development of a collective concurrence.

Serial meetings can also be of the "hub-and-spoke" variety, where a person – perhaps a staff member or a lobbyist – e-mails a council member asking for his or her views on a pending issue, and then communicates those views with other members of the city council in such a way that a quorum of the body has developed a collective concurrence through an intermediary before the issue is considered at a council meeting.

Given the vastly expanded use of e-mail, it is imperative that local officials understand and act in accordance with the requirements of the Brown Act.

Improper Interference With Functioning of Staff

Several months ago, the Santa Cruz County Grand Jury issued a report finding that members of the board of supervisors sent thousands of e-mails and memos to staff in the Planning Department about pending projects.⁶ The grand jury concluded that such involvement created a variety of "chain of command" problems and gave the appearance that the supervisors were trying to facilitate special treatment for certain constituents.

In cities with a city manager form of government, most municipal codes or charters contain language providing that council members must deal with the city manager and not with the staff, except for the purposes of inquiry.⁷ Municipal codes also contain provisions

prohibiting an individual council member from giving orders or instructions to a city manager.⁸ It has always been difficult to differentiate a communication "for the purpose of inquiry" from a communication that gives an order or instruction. E-mail can make that distinction even more difficult, because it is easy for a council member to generate an e-mail that re-quires information to be assembled and processed or can be perceived as giving "instructions" to staff, even though it is intended to be a simple inquiry. Even appropriate e-mail can distract staff from their other responsibilities, because staff believes they have an obligation to answer responses from elected officials before addressing their other responsibilities. Some cities have adopted guidelines governing these sorts of communications from elected officials to city staff. A policy can be tailored to different circumstances and particular needs of an individual jurisdiction.

The ease, convenience and speed of e-mail both encourages communication and poses new challenges as elected officials carry out their responsibilities consistent with applicable law. We recommend development of local policies and regular training to ensure that use of e-mail and other emerging technologies remains within the framework of the applicable legal standards.

Footnotes

1. All statutory cites are to the Government Code unless otherwise noted.
2. *Wood v. Battle Ground School District, et al.* (2001) 27 P. 3d 1208. Relying on the language of the Washington statute, the appellate court first found there was no violation when officials who had not yet taken office engaged in various meetings. In California, unlike Washington state, members-elect are subject to the prohibitions of the Brown Act. Cal. Gov't. Code section 54952.1.
3. *Id.* at p. 1216. See, e.g., *Stockton Newspapers, Inc. v. Members of the Redevelopment Agency* (1985) 214 Cal. Rptr. 561, 565, 171 Cal. App. 3d 95.
4. *Wood v. Battle Ground School District, et al.*, *supra*, 27 P.3d at 1217.
5. *Id.* at p. 1217. Footnote omitted.
6. 2002-03 Santa Cruz County Grand Jury Final Report. *Obstacles to the Orderly Operation of the Santa Cruz County Planning Department.*
7. See, e.g. City of Sonoma Municipal Code §2.08.220 provides, "The city council and its members shall deal with the administrative services of the city through the city manager, except for purposes of inquiry, and neither the city council nor any member thereof shall give orders to any subordinates of the city manager."
8. See, e.g., Town of Moraga Municipal Code section 2.08.080 provides that, "The town manager shall take his or her orders or instructions from the council only when the council is sitting in a duly convened meeting and no individual councilman shall give orders or instructions to the town manager."

Tips for Avoiding Problems When Elected Officials Use E-Mail

The convenience of e-mail can make it easy to get into trouble. Consider these tips for council members:

1. Think carefully before responding to any e-mail; never reply when angry or in a bad mood. Don't make derogatory personal comments.
2. Refrain from replying to an e-mail if the reply will be directed to a majority of the council.

3. Refrain from taking a position or making commitments on matters yet to be decided by the council; remember, even if you don't do it, your e-mail can be forwarded by others to a majority of the council.
 4. Refrain from giving instructions to staff under the managerial control of the city manager.
 5. If e-mailing the entire council, do so only to provide information, and do not solicit a response. Do not communicate your position on a matter pending before the council to all other members of the council.
 6. Remember that when replying, you have no idea where (that is, in how many "in" boxes) your reply will end up, including the inbox of the editor of the local newspaper (and thereafter published in the local newspaper).
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