SUBMITTED VIA ELECTRONIC MAIL

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Re: Request for Opinion No. 22-402

Dear Mr. Medeiros:

On behalf of the California State Association of Counties and League of California Cities, we appreciate the opportunity to provide comments on the opinion request submitted by the District Attorney of San Bernardino County. Our member cities and counties have extensive experience implementing the Brown Act for a wide array of legislative bodies, and we are pleased to be able to offer input on these issues.

In this case, the District Attorney has presented a substantial question "relating to" their office:[1] "[W]hether the executive committee of San Bernardino County District Advocates for Better Schools (SANDABS)...is a legislative body subject to the Brown Act." However, the request letter mis-frames the legal issue, and consequently focuses on the wrong facts and authorities. We suggest the following, more precise framing of the question presented here:

> Is an inter-agency body created informally by local agency staff, in which the legislative bodies of the local agencies subsequently approve participation by formal action, a "legislative body" under the Brown Act?

We believe that this is a very fact-specific inquiry. The record presented here is fraught with discrepancies, disputed facts, and missing critical information necessary for analysis.

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[1] Gov. Code, § 12519.

Absent further evidence, we do not believe the information provided supports a conclusion that SANDABS is a legislative body subject to the Brown Act as a matter of law.

I. SANDABS IS PROPERLY ANALYZED UNDER GOVERNMENT CODE SECTION 54952, SUBDIVISION (B), NOT SUBDIVISION (C)

Whether a collective body – especially an unconventional one – constitutes a "legislative body" under the Brown Act is often highly fact-specific, [2] and this case is no exception. In order to undertake the requisite precise analysis of factual nuance, it is first necessary to correctly identify the applicable legal authority. The requester expends considerable effort arguing that "SANDABS is *an entity* created by formal action of the school district boards to exercise their lawfully delegated lobbying authority" and thus constitutes a legislative body under Government Code section 54952, subdivision (c)(1).[3] However, this argument skips a crucial first step.

The governing provisions of the Brown Act "creat[e] a hierarchy of selected boards and their subsidiary bodies which are subject to the Act." [4] As relevant here, Section 54952, subdivision (b) deals with "subsidiary" bodies "*of* a local agency," whereas subdivision (c) addresses bodies that govern "*private or nonprofit* corporations or entities."[5] This distinction is critical, because the Brown Act deliberately provides much broader coverage of public bodies than private entities:

> "The general rule, then, is that the Brown Act applies to public rather than private entities…[T]here are a few exceptions to that general rule, as under certain circumstances private corporations or their boards must comply with the Act. But where the Legislature has intended private entities to come within the reach of the Act, it has explicitly so stated." [6]

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[2] As noted by a 2009 opinion addressing this very topic, "[h]ere the analysis must become more precise because the facts themselves are nuanced." (92 Ops.Cal.Atty.Gen. 102 (2009).)

[3] All further undesignated references are to the Government Code.

[4] Sen. Loc. Gov. Comm., analysis of Sen. Bill No. 1140 (1993-1994 Reg. Sess.) as amended May 24, 1993. (This bill was ultimately enacted as Stats. 1993, ch. 1138.)

[5] Cal. Attorney Gen. Office, The Brown Act: Open Meetings for Legislative Bodies (2003), p. vi *available at* https://oag.ca.gov/system/files/media/the-brown-act.pdf

[6] *Yoffie v. Marin Hosp. Dist.* (1987) 193 Cal.App.3d 743, 753. *Yoffie* was decided under the predecessor provisions of Section 54952; however, the salient point that the Brown Act applies to private entities only "in specified circumstances" remains valid after the 1993 reorganization. (See 85 Ops.Cal.Atty.Gen. 55 (2002).)

The request thus goes astray by simply assuming that SANDABS is "a private corporation, limited liability company, or other entity" analyzed under Section 54952, subdivision (c). As discussed in greater detail below, there is scant evidence of any intent to establish SANDABS as a separate *public* entity – but there is none whatsoever of an intent to establish a *private* entity of any kind. None of the indicia typically associated with creation of such an entity, e.g., articles of incorporation,[7] shareholders agreement,[8] or establishment of separate bank accounts outside the public treasury,[9] have been identified or provided with the request. The requester therefore errs in analyzing SANDABS under subdivision (c); rather, SANDABS and its executive committee are properly analyzed as public bodies under Section 54952, subdivision *(b)*.

II. THE RECORD IS LACKING CRITICAL, UNDISPUTED FACTS TO DETERMINE WHETHER SANDABS IS A LEGISLATIVE BODY UNDER SECTION 54952, SUBDIVISION (B)

As noted above, Section 54952, subdivision (b) addresses subsidiary bodies of local agencies, providing that (with exceptions not relevant here) "a commission, committee, board, or other body of a local agency...created by...formal action of a legislative body" is subject to the Brown Act. The leading case concerning multi-agency bodies of this nature is *Joiner v. City of Sebastopol* (1981) 125 Cal.App.3d 799. Somewhat like the present case, *Joiner* concerned a "joint group" created by formal action of one legislative body, which included members of another legislative body, together forming "an independent, separate committee." Relying on an earlier Attorney General's opinion,[10] *Joiner* held that such a "unitary body" was, itself, a legislative body subject to the Brown Act under the predecessor to Section 54952, subdivision (b).

Nonetheless, while the present circumstances share some similarities with *Joiner*, there are also some quite significant differences. The "undisputed facts" in *Joiner* demonstrated that the city council "instigated" the procedure by which the multi-agency body was created,[11] whereas here there is no such clarity regarding the critical facts of SANDABS creation. "A commission, committee, board, or other body of a local agency is 'created by'...formal action of a legislative body if the legislative body 'played a role in bringing'...'into existence' the

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[7] *Epstein v. Hollywood Entertainment Dist. II Bus. Improvement Dist.* (2001) 87 Cal.App.4th 862, 865.

[8] *Int'l Longshoremen's & Warehousemen's Union v. L.A. Exp. Terminal* (1999) 69 Cal.App.4th 287, 291.

[9] See Gov. Code, § 27011. (Compare this with Request, pp. 5, 53.)

[10] 64 Ops.Cal.Atty.Gen. 856 (1981)

[11] *Joiner, supra,* 125 Cal.App.3d at p. 805.

commission, committee, board, or other body."[12] The SANDABS membership agreements approved by school district boards of trustees[13] plainly constitute "formal action" to join SANDABS by those boards; however, those membership agreements did not bring SANDABS and its executive committee into existence. Further, while the requester endeavors strenuously to connect San Bernardino County School District Board Policy 1160 with SANDABS, that policy on its face does not call for the appointment or creation of any committee – and no actual evidence, as opposed to speculation, has been presented that the existence of this policy played any role in motivating SANDABS' creation.[14]

The authorities on this point require a wholistic "look at the circumstances surrounding the [committee's] birth," rather than simply the formal actions through which the body was established.[15] However, the evidence is lacking with regard to precisely these critical facts. The only *actual facts* presented in the request regarding SANDABS' "birth" are a brief footnote that "[c]ounsel for the San Bernardino County Superintendent of Schools have told us they understand that SANDABS was created by informal meetings and agreements between school district administrators in the late 1980s."[16] The Attorney General's opinion unit does not make "factual...determinations,"[17] and the foregoing facts are wholly insufficient to conclude that SANDABS is subject to the Brown Act *as a matter of law*.

III. THE RECORD SIMILARLY LACKS SUFFICIENT FACTS TO DETERMINE THAT SANDABS IS A LEGISLATIVE BODY UNDER GOVERNMENT CODE SECTION 54952, SUBDIVISION (A)

The request also advances an alternative argument that SANDABS' executive committee may be subject to the Brown Act under Section 54952, subdivision (a), which covers "[t]he governing body of a local agency." This line of argument derives from *McKee v. Los Angeles Interagency Metropolitan Police Apprehension Crime Task Force* (2005) 134 Cal.App.4th 354, which held that a law enforcement task force created through a multi-agency memorandum of understanding constituted a joint powers authority, and was thus itself a local agency whose

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[12] *Californians Aware v. Joint Labor/Management Benefits Committee* (2011) 200 Cal.App.4th 972, 978.

[13] See, e.g., Request, pp. 71, 79.

[14] Indeed, no facts have been presented regarding whether these policies had even been adopted – and with what contents – at the time SANDABS was "created by informal meetings...in the late 1980s."

[15] *Epstein, supra,* 87 Cal.App.4th 862, 871-872. See also 85 Ops.Cal.Atty.Gen. 55 (2002).

[16] Request, p. 2.

[17] Cal. Attorney Gen. Office, *Guidelines Regarding Attorney General Opinions Under Government Code Section 12519* (March 2022), at p. 2.

governing body was subject to the Brown Act. However, *McKee* was premised on an "overwhelming[] indicat[ion]" of intent by the local agencies in that case to create a separate entity under the Joint Exercise of Powers Act.[18] The evidence presented here is somewhat less overwhelming. While the request indicates that SANDABS has in fact established a governance structure, fiscally independent accounting, and contracting authority suggestive of a separate legal entity, very little of that is actually set forth in the districts' membership agreements. Unlike *McKee*, here the districts' (all-important) contractual intent is not so easily determined from the terms of the documents they actually signed, and would require further factual inquiry – to which SANDABS's actual practices is certainly relevant, but not dispositive. As above, the facts and record presented are insufficient to conclude that the SANDABS executive committee constitutes a "legislative body" as a matter of law.

IV. WHETHER SANDABS EXERCISES DELEGATED AUTHORITY IS NOT RELEVANT, AND IS HIGHLY UNCLEAR UNDER THE FACTS PRESENTED

As indicated above, the proper analysis of whether SANDABS qualifies as a "legislative body" focuses on its *history and structure*, not its *functions*. If SANDABS was created by formal action of any school district board, it is subject to the Brown Act, either as a subsidiary body of that board or as a separate public entity, *regardless of its activities*. Examination of a body's functions is necessary only in the case of "a private corporation, limited liability company, or other entity," for which creation by a legislative body is not, by itself, sufficient to establish coverage under the Brown Act. As noted, there is no evidence at all that SANDABS is such an entity,[19] and it is consequently unnecessary to address in detail the arguments advanced by the requester regarding SANDABS' lobbying activities. However, given the request's extensive discussion of this subject, a few observations appear warranted.

Any analysis of the question of "delegated lobbying authority" would be complicated by several large uncertainties. Is lobbying an "authority" that can be "delegated" by a governmental body "to a private corporation, limited liability company, or other entity"? Such entities require no governmental "authority" to engage in constitutionally protected petitioning activity, and the mere fact that such activity is convenient or beneficial to the governmental

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[18] *McKee, supra,* 134 Cal.App.4th at p. 359. Additionally, in *McKee*, there was no question of *what kind* of separate entity the parties intended to create, as the police powers exercised by the entity there plainly required a *public* entity (i.e., JPA), rather than one of the many various forms of private entity local agencies may legally create. (See, e.g., Corp. Code, §§ 5065, 5120, 7120, 18030, 18035.)

[19] Moreover, even were Section 54952, subdivision (c) applicable here, analysis under that provision would similarly founder on the threshold requirement of creation by a legislative body, rendering the question of delegated authority irrelevant.

body is plainly insufficient to establish a "delegation."[20] Indeed, *Lehane v. City and County of San Francisco* (1972) 30 Cal.App.3d 1051, 1054-1055 makes it perfectly clear that an association of local governments expressing *its own position* on legislative proposals is exercising *its own power*, not any authority delegated by its members.

Rather, "delegation" under subdivision (c)(1) exists where the governmental body has "retain[ed] ultimate control over administration so that it may safeguard the public interest."[21] Absent such control, the private entity is not "*exercis[ing] authority* that may lawfully be delegated" by the public entity, and its governing body is not subject to the Brown Act. Applying this standard to activities that, as noted, "private...entities" have not merely the ability but the *right* to engage in of their own accord is inherently fact-intensive and fraught with complication. Moreover, those facts are not well presented for analysis here. According to the requester, the SANDABS membership agreements "preclude the districts from taking lobbying positions adverse to or in conflict with the entity..."[22] If accurate, this would present the precise inverse of a "lawful delegation" under *International Longshoremen's* and its progeny, as the private entity, not the governmental body, would "retain ultimate control" of the activity. [23]

However, even this is not clear. The actual membership agreements submitted with the request merely provide that the district "shall support, to the extent possible, the activities of [SANDABS EC] in the form of correspondence and contact with legislators representing San Bernardino County."[24] On its face, this appears to provide neither party with "ultimate control" or "plenary decisionmaking authority"[25] over the other's activities. Any meaningful analysis of that issue here would require additional factfinding, and the end-result would be fact-specific at best.

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[20] See, e.g., 87 Ops.Cal.Atty.Gen. 19 (2004). Further, any reading so broad would render the latter portion of subdivision (c)(1) surplusage, as elected legislative bodies do not commonly create entities to engage in activities that are not convenient or beneficial.

[21] *Int'l Longshoremen's, supra,* 69 Cal.App.4th at pp. 297-298; *Epstein, supra,* 87 Cal.App.4th at p. 873; 85 Ops.Cal.Atty.Gen. 55 (2002).

[22] Request, p. 2.

[23] It is unclear whether such an arrangement would be lawful, and if not, what would be the remedy. (Compare *Lehane, supra,* 30 Cal.App.3d at p. 1054.) However, regardless of the consequences under substantive law, such an arrangement would not trigger *application of the Brown Act* under Section 54952, subdivision (c).

[24] Request, pp. 48, 53, 56.

[25] *Epstein, supra,* 87 Cal.App.4th at p. 873

V. CONCLUSION

For all of these reasons, we recommend that your office conclude that Section 54952, subdivision (b) provides the appropriate test for determining whether SANDABS' executive committee is subject to the Brown Act, and that the evidence presented by the requester is insufficient to support finding such coverage absent further fact-finding.

Respectfully Submitted,

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