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VIA ELECTRONIC AND U.S. MAIL

Catherine Bidart
Deputy Attorney General
Opinion Unit, Department of Justice
300 South Spring Street
Los Angeles, CA 90013
Catherine.Bidart@doj.ca.gov

Re: Opinion No. 18-201

Dear Ms. Bidart:

I am writing on behalf of the League of California Cities[1] ("League") in regard to the above referenced request for opinion from the Kern County Counsel.

This letter addresses the first of the two questions posed to the Attorney General: "Is it a Brown Act violation for the board members of a Joint Powers Authority to seek direction on Authority matters from the legislative body that appointed them to the Authority in an open session of that legislative body prior to the Authority Board hearing the matter and taking action at an open session of the Authority Board?" This letter does not address the second question posed to the Attorney General, and intimates no view on that question.

The League is interested in the first question presented because its member cities, and the joint powers authorities of which many cities are members, are subject to the Brown Act.[2] The Attorney General's views on that question will undoubtedly affect the practices of legislative bodies of cities and of joint powers authorities, as well as influence court interpretations of the Brown Act.

Summary

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1 The League is an association of 474 California cities united in promoting the general welfare of cities and their citizens. The League is advised by its Legal Advocacy Committee (LAC), which is comprised of 24 city attorneys from all regions of the state. The LAC monitors litigation affecting municipalities as well as requests from the Attorney General for views on pending requests for legal opinions. In addition, the League is advised by its Brown Act Committee, comprised of several city attorneys, which monitors litigation, legislation, and requests for views from the Attorney General on Brown Act matters. Both the LAC and the Brown Act Committee reviewed the Kern County Counsel's request for Opinion No. 18-201 and concur in this response.

2 See Gov. Code, §§ 54950 et seq.

In the League's view, the first question does not state a Brown Act violation. There is no textual basis to conclude otherwise. To do so would in effect disregard the text of the Brown Act, expand the definition of an unlawful serial meeting under the Act in a manner not intended by the Legislature, and interfere unnecessarily with the ability of joint powers authority member agencies to provide input into authority operations. Neither the facts presented in the request for opinion, nor the Attorney General opinions cited therein, provide a basis for finding a Brown Act violation.

Background

According to the request for opinion, the Indian Wells Valley Groundwater Sustainability Authority (the "Authority") is a joint powers authority with five member agencies. Two of those agencies include the Indian Wells Valley Water District (the "District") and the City of Ridgecrest (the "City"). Each member agency appoints a Director of the Authority's governing body. Three of the Directors, including the two appointed by the District and City respectively, enjoy heightened voting power whereby any two of those three Directors can effectively veto a decision of the Authority's five-member governing body.

According to the request for opinion, the legislative bodies of both the District and the City have a practice of including on the agendas of their respective regular meetings an item or items to advise and direct the member who serves as a Director of the Authority on matters pending before the Authority. These regular meetings of the legislative bodies of the District and the City occur shortly before the Authority's meetings: the Authority's meetings are held on Thursday mornings, whereas the District's meetings are held on the prior Monday evening and the City's meetings are held on the prior Wednesday evening. The District's and City's meetings are open to the public, and in at least the case of the City's meetings, are televised. At these meetings of the respective legislative bodies of the District and the City, there may be public comment on the agenda items relating to upcoming Authority business, as well as discussion and possible action regarding upcoming Authority business.

The request for opinion indicates that during the short interval between the separate meetings of the legislative bodies of the District and the City, on the one hand, and the Authority, on the other, the feedback and direction provided to the District and City members who serve as Directors of the Authority may be known and discussed in the local community, through various media outlets and by word of mouth. The public, as well as the District and City members who are Directors of the Authority, and all other Directors of the Authority, may learn of the tenor of the public comment and discussion that occurred at the meetings of the legislative bodies of the District and the City, and any direction or guidance that was provided to the members of those bodies who are Directors of the Authority by their respective legislative bodies.

As noted, the meetings of the legislative bodies of the District and City, so far as the request for opinion indicates, are conducted in compliance with the Brown Act; that is, properly and timely noticed, open to the public, providing an opportunity for public comment, and so

forth. Further, there are no facts presented that suggest that the members of the District's and City's legislative bodies who are Directors of the Authority confer with each other, directly or through intermediaries, regarding the agenda items pertaining to upcoming Authority business heard at the regular meetings of the District's and City's legislative bodies prior to meetings of the Authority.

Analysis

The intent of the Brown Act is that local agency legislative bodies conduct their deliberations openly.[3] To this end, the Act generally requires that legislative bodies must conduct their business at noticed public meetings open to the public with opportunities for public comment.

The Brown Act defines "meeting" as "any congregation of a majority of the members of a legislative body at the same time and location . . . to hear, discuss, deliberate, or take action on any item that is within the subject matter jurisdiction of the legislative body."[4] To prevent a legislative body from avoiding the Brown Act's requirements through nonpublic communications between or among a majority of a legislative body, the Act proscribes a series of communications "of any kind" involving "[a] majority of the members of a legislative body … outside a meeting authorized by this chapter, … 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."[5] Serial communications of this nature are commonly referred to as "serial meetings" (or "seriatim meetings").

As the Brown Act states, a serial meeting occurs only when there is some communication between or among a majority of the members of the legislative body. While there may be a variety of purposes for the communications, and these purposes are broadly defined ("to discuss, deliberate, or take action on any item of business … within the subject matter jurisdiction of the legislative body"), the element of interaction between or among a majority of the members, whether direct or through an intermediary, is a critical component of a serial meeting. Without collective communications involving a majority, there is no serial meeting. Collective acquisition of facts relevant to some decision pending before the body can give rise to a serial meeting.[6] But if a majority, or even all, of the members of a legislative body receive information individually, free of coordination by a member of the body or a person acting on behalf of a member, there is no serial meeting.

And there is nothing close to such collective communications in the facts presented here. One Director of the Authority, by participating as a member of the legislative body of the District at its meetings, learns of information and possible direction from that body regarding

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3 Gov. Code, § 54950.
4 Gov. Code, § 54952.2(a).
5 Gov. Code, § 54952.2(b)(1).
6 *Roberts v. City of Palmdale* (1993) 5 Cal.4th 363, 376.

upcoming Authority business. Another Director of the Authority, by participating as a member of the legislative body of the City at its meetings, similarly learns of information and possible direction from that body. There is no assertion that these two Directors meet in private to discuss Authority business prior to meetings of the Authority (or at any other time).[7] There is likewise no assertion of private communications regarding Authority business between or among one or both of these Directors and the other Directors of the Authority. There is simply no basis here to find a Brown Act violation.

While there is no unlawful serial meeting here, and hence no Brown Act violation, it is worth noting two provisions in the Act that raise analogous issues, and bolster the conclusion that there is no violation.

First, the Brown Act expressly permits an agency employee or official to hold a series of individual briefings with the members of a legislative body concerning a matter pending before the body, provided that the views and comments expressed by the body's members to the employee or official are not communicated to the other members.[8] In this circumstance, a majority, or even all, of the members receive information that may pertain to the work of the legislative body. But they do not receive it collectively. For this provision, the absence of collective communication among the members of the legislative body is critical to these communications being lawful.

Second, the Brown Act expressly permits a majority of members of a legislative body to communicate their views on matters within the body's jurisdiction publicly at a noticed meeting of another legislative body, as part of the scheduled meeting of that other body.[9] In other words, there would be no Brown Act violation here even if the Directors appointed by the District and the City were to attend the meetings of each other's legislative bodies to express their views publicly on Authority business. If direct communication of this nature is permissible, then it cannot be a Brown Act violation for those Directors to meet separately in public with their respective legislative bodies.

Further, the two Attorney General opinions referenced in the request for opinion, as possibly supporting the view that the facts presented constitute a Brown Act violation, do nothing of the sort. The first opinion involved whether a member of a joint powers authority's governing board was bound by the views of that member's appointing body.[10] The Attorney General opined that nothing in the Joint Exercise of Powers Act, the relevant joint powers

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7 Such an assertion would raise a distinct issue under the Brown Act: whether such communications could constitute an unlawful serial meeting, given that the Act requires that there be communications involving a majority of the members of a legislative body to have a serial meeting. These two Directors are not a majority of the Authority, which has five Directors. Further, they do not have majority voting power, but rather have the power effectively to veto actions of the Authority. This letter does not address this distinct Brown Act issue because it is not raised by the facts presented.

8 Gov. Code § 54952.2(b)(2).

9 Gov. Code § 54952.2(c)(4).

10 83 Ops. Cal. Atty. Gen. 267 (2000).

agreement, or the ordinances and policies of the appointing agency bound the member to follow the lead of the appointing body. This opinion was not about the Brown Act, and is inapposite except that it indirectly supports the conclusion that there is no Brown Act violation here, because the request for opinion seems to be premised on the view that Directors of the Authority must follow "directions" they receive from their respective appointing authorities, which is not correct according to the opinion.

The second opinion held that where four members of a local governing body constituted a quorum of the body, attendance by a fourth member at a standing committee of three members violated the Brown Act.[11] The following year, in direct response to this opinion,[12] the Legislature amended the Act to establish that the "attendance of a majority of a legislative body at an open and noticed meeting of a standing committee of that body" is not a "meeting" and hence does not violate the Brown Act, "provided that the members of the legislative body who are not members of the standing committee attend only as observers."[13] In view of this amendment, the 1996 opinion is no longer persuasive authority, and in any event is inapposite, as the facts here do not involve a standing committee of the Authority's governing body. Further, under the text of the Brown Act when that opinion was decided, the attendance of the fourth member of the parent legislative body transformed the committee meeting into a meeting of the parent body that was not officially noticed, convened, or conducted as a meeting of that body. By contrast, there is no textual basis here to conclude that there is a meeting of the Authority occurring in violation of the Brown Act, or that the respective meetings of the legislative bodies of the District and City are occurring in violation of the Act.

The League appreciates the concerns expressed by the Kern County Counsel in the request for opinion. But under the facts presented, neither the letter of the Brown Act, nor its spirit, have been violated. All of the deliberations described occur openly. Further, local agencies have an interest in providing input into the operation of the joint powers authorities of which they are a part. To deprive agencies of that opportunity could have a chilling effect on the willingness of agencies to cooperate with one another under joint powers agreements. In any event, while the policy concerns raised by the request for opinion may be appropriate for consideration by the Legislature, they do not form a basis for finding a Brown Act violation.

Conclusion

For the foregoing reasons, the Attorney General should opine, in response to the first question posed, that "It is not a Brown Act violation for the board members of a Joint Powers Authority to seek direction on Authority matters from the legislative body that appointed them to the Authority in an open session of that legislative body prior to the Authority Board hearing the matter and taking action at an open session of the Authority Board."

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11 79 Ops. Cal. Atty. Gen. 69 (1996).

12 Sen. Floor Analysis, SB 138, Jul. 18, 1997.

13 Gov. Code § 54952.2(c)(6); Stats.1997, c.253.

Thank you for the opportunity to comment on the first question posed. Please do not hesitate to contact me with any questions.

Sincerely,

Corrie L. Manning
Assistant General Counsel
League of California Cities