



1400 K Street, Suite 400 • Sacramento, California 95814
Phone: 916.658.8200 Fax: 916.658.8240
www.cacities.org

April 1, 2015

VIA ELECTRONIC AND US MAIL

Ms. Anya Binsacca
Deputy Attorney General
455 Golden Gate Avenue, Suite 11000
San Francisco, CA 94102-3664
Anya.Binsacca@doj.ca.gov

Re: Opinion No. 14-1203

Dear Ms. Binsacca:

I write on behalf of the League of California Cities¹ (“League”) in response to your solicitation of views regarding the following questions:

1. Would a local agency be in violation of online agenda posting requirements, pursuant to Government Code section 54954.2, if the agency website experiences technical difficulties (for example, due to a power failure, cyber-attack, or other third-party interference), that results in the agenda becoming inaccessible to the public for a portion of the 72-hour mandated posting period prior to the agency’s regular meeting?
2. If such technical difficulties prevent a local agency from posting the agenda to its website for 72 hours prior to a regular meeting, but the agency meets all other Brown Act requirements and posts the agenda to its website once the technical difficulties are resolved, may the agency lawfully continue with the meeting as regularly scheduled?

CONCLUSIONS

The League urges the Attorney General to conclude that (1) no violation of online agenda posting requirements occurs when technical difficulties result in an online agenda for a regular meeting of a local agency becoming inaccessible to the public for a portion of the 72-hour

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 Attorney General’s request on Opinion No. 14-1203 and concur in this response.

mandated posting period, and (2) a local agency may lawfully hold a regular meeting even if technical difficulties prevent the agency from posting the agenda to its website for 72 hours prior to a regular meeting, if the agency meets all other Brown Act requirements and posts the agenda to its website once the technical difficulties are resolved.² These conclusions flow from a commonsense interpretation of the text and context of the online agenda posting requirement under section 54954.2, and will allow local agencies to conduct the public's business even when technical problems temporarily disable public access to online agendas.

DISCUSSION

A. No Violation Of Online Posting Requirements Occurs When Technical Difficulties Result In An Online Agenda For A Regular Meeting Of A Local Agency Becoming Inaccessible To The Public For A Portion Of The 72-Hour Mandated Posting Period

The purpose of the Ralph M. Brown Act ("Act") is to promote openness in government. (Gov. Code, § 54950.) To that end, the Act requires local agencies to hold their meetings publicly, and to post an agenda generally describing the business to be conducted at a regular meeting at least 72 hours in advance. (Gov. Code, § 54954.2.) For many years, local agencies satisfied the agenda posting requirement simply by ensuring the agenda was posted in a location freely accessible to the public. In 2011, the Act was amended to add that local agencies with websites were also required to post their agendas on those websites. (Stats. 2011, c. 692 (A.B. 1344), § 8.) Thus, Government Code section 54954.2(a)(1) currently provides, in pertinent part:

At least 72 hours before a regular meeting, the legislative body of the local agency, or its designee, shall post an agenda containing a brief general description of each item of business to be transacted or discussed at the meeting.... The agenda shall specify the time and location of the regular meeting and shall be posted in a location that is freely accessible to members of the public *and on the local agency's Internet Web site, if the local agency has one....*

(Italics added.) The italicized language was added by the 2011 amendment.

The critical textual inquiry here is whether an agency "has" a website when technical difficulties render the website non-operational. The dictionary defines the word "have" as "to hold in one's use, service, regard, or at one's disposal." (*Webster's Ninth New Collegiate Dictionary* (1983) 556.) Applying this definition, there is no violation of the Act when technical difficulties prevent online posting of the agenda during a portion of the 72-hour posting period. An agency's website is not available for the agency's use, nor at its disposal, where technical difficulties prevent the agency from using the website for the purpose contemplated by the Act – to post the agenda online. Hence for that time during which an agency's website is not functional, it has no website.

² The questions presented to the Attorney General do not involve a circumstance (which we think would be rare) in which technical difficulties result in the agenda being inaccessible online for the entire 72-hour period prior to the agency's regular meeting. Accordingly, we do not address such a circumstance, and suggest the Attorney General should likewise refrain from answering this unposed question.

This textual analysis derives not just from the dictionary, but from the nature of the online agenda posting requirement. Unlike most requirements imposed on local agencies under the Brown Act, the online agenda posting requirement is conditional: The agenda for a regular meeting “shall be posted ... on the local agency’s Internet Web site, *if the local agency has one.*” (Emphasis added.) Thus, an agency without a website provides legally sufficient notice merely through the traditional physical posting of an agenda in a freely accessible location for the 72-hour mandatory period. It would make no sense to conclude that an agency with a website, that also complies with the physical posting requirement, does not provide legally sufficient notice if its website is dysfunctional for part of that 72-hour period – even for as little as one or two hours. How can it be that the agency that is providing more notice of the agenda to the public would be found in violation of the Act? The Attorney General should not interpret the Act in a manner that defies common sense and produces such an absurd result.

And the real-world harm local agencies would suffer under such a nonsensical interpretation would be great. An agency that did not fully comply with the online agenda posting requirement – through no fault of its own – would have to cancel and reschedule its regular meeting, or run legal risks by holding the meeting. Cancelling the meeting would delay the agency in making decisions. In some cases delay might be a minor inconvenience, but in others it could create significant inefficiencies and waste of public resources. Furthermore, for important decisions that for legal, procedural, or practical reasons must be made at the scheduled meeting, cancellation could be disastrous. Absent the clearest direction from the Legislature – which is not present here – this type of technical failure, not of the agency’s making and not covering the entirety of the 72-hour period for posting the agenda online, should not be understood to compel these inevitable and harmful results.

The ultimate beneficiaries of the Brown Act – members of the public who observe and may participate in a meeting of a legislative body of a local agency – would be ill served by such delays. Those who know of a regular meeting – through (1) the physical posting of the agenda in a freely accessible location, (2) the mailing of the agenda to interested persons on a mailing list pursuant to Government Code section 54954.1, (3) the advance scheduling of regular meetings in accordance with Government Code section 54954(a), (4) other notices, such as newspaper publications, separate postings at sites, or mailings to residents or neighbors which may be required by state or local laws governing hearings on matters such as fee increases and land use decisions, (5) word of mouth, or (6) in some cases, online posting of the agenda before a technical problem renders the agency website nonoperational – may well attend the scheduled meeting, only to learn then that the agency has cancelled it due to the technical problem. In such circumstances, dozens, potentially even hundreds, of members of the public could be inconvenienced.

California’s open government laws are guided by a rule of reason. Courts and the Attorney General have avoided rigidly interpreting the California Public Records Act in a manner that would frustrate an agency’s ability to conduct its business if another interpretation ensures that the overall purpose of the Act is still served. (*Rosenthal v. Hanson* (1973) 34 Cal.App.3d 754, 760-61 (applying “rule of reason” to Public Records Act); 76 *Ops. Cal. Atty. Gen.* 235, 241 (1993) (same); *Bruce v. Gregory* (1967) 65 Cal.2d 666, 673-76 (interpreting earlier

public records laws.) A similar approach is warranted here with the Brown Act – even more strongly warranted – because the rule of reason in this instance conforms to a literal interpretation of that requirement.³

B. A Local Agency May Lawfully Hold A Regular Meeting Even If Technical Difficulties Prevent The Agency From Posting The Agenda To Its Website For 72 Hours Prior To A Regular Meeting, If The Agency Meets All Other Brown Act Requirements And Posts The Agenda To Its Website Once The Technical Difficulties Are Resolved

Our response to the second question posed to the Attorney General logically follows from our response to the first. Because the Brown Act is not violated when technical difficulties prevent online posting of a regular meeting agenda during a portion of the 72-hour online posting period, the agency may lawfully proceed with its meeting if all other requirements of the Act have been met and the agency posts the agenda to its website once the technical difficulties are resolved.

But if the Attorney General rejects our response to the first question, it is still possible to accept our response to the second. The Act expressly prohibits a court from voiding certain actions where an agency has substantially complied with the Act such that its purpose is served. (Gov. Code, § 54960.1(d)(1).) Under the circumstances here – the agency complies with all other agenda notice requirements and posts the agenda to its website once the technical difficulties are resolved – there is substantial compliance.

And yet the far better approach is for the Attorney General to accept both of our conclusions. Local agencies and members of local legislative bodies should not have to operate in a legal twilight zone under the cloud of an Attorney General opinion that concludes that the online agenda posting requirement is violated whenever a technical problem interferes with online posting for any portion of the 72-hour posting period. An intentional violation of the Act may carry criminal penalties. (Gov. Code, § 54959.) And lawsuits under the Act carry potentially significant costs for agencies in the form of attorneys’ fees that may be awarded to a prevailing plaintiff. (Gov. Code, § 54960.5.) An Attorney General opinion finding substantial compliance with the Act but also finding a violation would not adequately protect agencies and their members from legal challenges they may face, institutionally and personally.

* * * * *

³ One could argue that a local agency “has” a website even when the website is dysfunctional due to technical problems that make it impossible to post the agenda of a regular meeting online for the entire 72-hour posting period. But “[w]hen the words of a statute can lead to differing interpretations, it is appropriate to consider the potential consequences that will flow from a particular interpretation.... [W]hen confronted with statutory text that is susceptible of two constructions, we will choose the one that renders the statute reasonable, fair and harmonious with its intended purpose, and not one that would produce absurd results.” (91 Ops.Cal.Atty.Gen. 46, 49 (2008) (citations omitted).)

Thank you for the opportunity to comment on the questions presented. Please do not hesitate to contact us with any questions, or to discuss this matter further.

Sincerely,

A handwritten signature in cursive script that reads "Corrie Manning". The signature is written in black ink and is positioned below the word "Sincerely,".

Corrie Manning
Deputy General Counsel
League of California Cities