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Mr. Marc J. Nolan
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Email: Marc.Nolan@doj.ca.gov *Via Electronic Mail*

Re: ***Request for Opinion No. 18-903 (Sen. Jeff Stone)***

Dear Mr. Nolan:

I am writing on behalf of the League of California Cities ("League") with respect to Request for Opinion No. 18-903 from Senator Jeff Stone, dated September 12, 2018 (the "Request"). The Request relates to the Ralph M. Brown Act's (the "Brown Act")[1] prohibition of serial meetings.[2]

The League is an association of 475 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 Senator Stone's request for Opinion No. 18-903 and concur in this response. The League is interested in the Request because the Attorney General's opinion will have significant implications for how city councils and other city legislative bodies conduct business.

[1] See Gov. Code §§ 54950 et seq.

[2] Also pending before the Attorney General is Request for Opinion No. 18-901 from the Fair Political Practices Commission, assigned to Deputy Attorney General Lawrence Daniels. The third question posed in that request, involving a communication by one member of a body to members of the public, after the full body had received a communication on the subject from a member of the public, relates to the Bagley-Keene Act's prohibition of serial meetings, found at Government Code section 11122.5, subsection (b). The members of the League are not state agencies subject to the Bagley-Keene Act, and the League is not providing a separate letter expressing views on Request No. 18-901. However, insofar as the text of Government Code sections 54952.2 and 11122.5 is substantially the same with respect to serial meetings, the Attorney General may find the views expressed in this letter relevant to Request No. 18-901. As a general proposition, it is difficult for the League to see how a communication from one member of a body to members of the public violates the prohibition on serial meetings.

I. BACKGROUND

The Request is made on behalf of the Eastern Municipal Water District ("EMWD"), and concerns an alleged Brown Act violation.[3] According to the Request, EMWD is one of five agency members of a joint powers authority called the Santa Ana Watershed Project Authority ("SAWPA"). Each agency member of SAWPA appoints one member and one alternate to SAWPA's governing body, referred to in the Request as the "Commission." Ronald W. Sullivan and David J. Slawson are EMWD's representative and alternate to the Commission, respectively. On May 4, 2018, Sullivan and Slawson sent a letter to the other members of the Commission expressing EMWD's position on a matter that was coming before the Commission, namely the impacts of homelessness on the Santa Ana River watershed and EMWD's opposition to a proposed Memorandum of Understanding ("MOU") between SAWPA and the City of Riverside Housing Authority. The Request does not assert that the letter was coordinated with other members of the Commission – much less a majority of the Commission's members – and we assume there was no such coordination.

A member of the Commission has opined that the letter constitutes a serial meeting in violation of the Brown Act. As explained in further detail in Part III below, a serial meeting is a series of communications among a majority of the members of a local legislative body, "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."[4] According to the request, the Commission member believes action by only one member of the Commission and his alternate in sending a letter to the other members of the Commission constituted a serial meeting because: "SAWPA Commissioner Sullivan and SAWPA Alternate Commissioner Slawson wrote and signed the letter to discuss, deliberate, and to make a request within the subject matter of the SAWPA outside of a meeting," and also "communicated their position on the proposed MOU to let the rest of the SAWPA Commissioners know how they were intending to vote." EMWD disagrees with this characterization of the letter, and instead opines that no violation of the Brown Act occurred because the letter "was not an attempt to develop any collective commitment or promise by a majority of the SAWPA commissioners regarding a decision to be made on the MOU." For reasons explained below, the League agrees with EMWD's position.

II. QUESTION PRESENTED AND BRIEF ANSWER

The question presented by the Request can be summarized as follows:

> *Did a written communication from a constituent agency representative and his alternate to the joint powers authority board to which they were appointed constitute an unlawful "serial meeting" under the Brown Act?*

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[3] This letter assumes the truth of the assertions made in the Request.

[4] Gov. Code § 54952.2, subd. (b)(1).

In the League's view, the communication did not involve an unlawful serial meeting because there are no facts described in the Request demonstrating that a majority of the Commission's members collectively discussed, deliberated, or took action on a matter pending before the Commission. On the contrary, one of the five members of the Commission and his alternate sent a letter to the other members of the Commission, who were mere passive recipients of that one-way communication.

III. DISCUSSION

A. A One-Way Communication by Less than a Majority of a Legislative Body Does Not Constitute a Serial Meeting in Violation of the Brown Act Because a Serial Meeting Requires Action by a Majority to Reach a Collective Concurrence or to Discuss or Deliberate on a Matter Within the Body's Subject Matter Jurisdiction

The Brown Act governs public meetings of local legislative bodies. The Act defines the term "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."[5] With limited exceptions, the Act requires legislative bodies to conduct their business at properly noticed meetings that are open to the public. To prevent members of legislative bodies from evading the Brown Act's prohibition of non-public meetings, Government Code section 54952.2, subsection (b), states: "A majority of the members of a legislative body shall not, outside a meeting authorized by [the Brown Act], 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." Such a series of communications is commonly referred to as a "serial meeting." It is sometimes called a "seriatim meeting."

The current language of section 54952.2 prohibiting serial meetings was added to the Brown Act relatively recently.[6] However, the history of the serial meeting prohibition dates back to *Adler v. City Council* (1960) 184 Cal.App.2d 763, 767 ("*Adler*"), in which the court narrowly limited the scope of the Brown Act by deciding that an informal "fact-finding" session conducted by a city planning commission was not a meeting within the scope of the Act. The Legislature responded to *Adler* in 1961 by enacting Government Code section 54952.6 to clarify that the Brown Act not only prohibits a legislative body from taking a vote or other formal action in private, but also from deliberating in private on matters within the body's jurisdiction.[7] Thus, in *Sacramento Newspaper Guild v. Sacramento County* (1968) 263 Cal.App.2d 41, 47-51 ("*Sacramento Newspaper Guild*"), the court concluded that a county board of supervisors violated the Brown Act by conducting an unnoticed, non-public meeting regarding labor negotiations, even though the meeting was merely an informal "deliberative gathering" where no formal action was taken. Thus, it was established that the Brown Act requires not only that the

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[5] Gov. Code § 54952.2, subd. (a).

[6] See Stats. 2008, ch. 63, § 3.

[7] See *Stockton Newspapers, Inc. v. Redevelopment Agency* (1985) 171 Cal.App.3d 95, 101 ("*Stockton Newspapers*").

decisions of local legislative bodies be made in public, but also that any deliberation among a majority of a legislative body that might lead to final action must occur in public.

The idea that the Brown Act prohibits a majority of a local legislative body from deliberating outside of noticed public meetings was extended in 1985 in *Stockton Newspapers, Inc. v. Redevelopment Agency* ("*Stockton Newspapers*"). There, the court introduced the concept of serial meetings, and held that serial meetings violate the Brown Act even though they do not involve the presence of a majority of a legislative body in one location and at one time.[8] *Stockton Newspapers* involved a complaint for violation of the Brown Act alleging that the attorney for a redevelopment agency contacted each member of the agency's governing body to conduct a telephonic poll to obtain a collective commitment or promise to approve the transfer of ownership of real property forming part of a planned waterfront development.[9] The redevelopment agency challenged the complaint, arguing that even if such a series of communications occurred, it did not violate the Brown Act because each alleged communication involved less than a quorum of the legislative body.[10] The court disagreed because the Brown Act prohibits local legislative bodies from deliberating or taking action on matters within their subject matter jurisdictions in private.[11] The court observed that the allegations in the complaint were unclear as to whether it was merely the agency's attorney who intended his poll to help achieve a concurrence, or if the members of that body shared that intent.[12] According to the court: "If a quorum of the members of the legislative body so intended to unite in an agreement to agree, a violation of the Brown Act would be established."[13]

Two cases in 1993 clarified the scope of the serial meeting prohibition described in *Stockton Newspapers*. The first was *Roberts v. City of Palmdale* (1993) 5 Cal.4th 363 ("*Roberts*"), in which the court decided that the confidential transmission of a written legal opinion by a city attorney to the members of a city council did not constitute a serial meeting in violation of the Brown Act. This was because the Brown Act is intended to apply only to collective activity by a quorum of a legislative body.[14] Thus, in *Stockton Newspapers* it was the allegation of a collective intent by the members of the legislative body to reach a concurrence on a particular transaction that gave rise to a cause of action under the Brown Act.[15] In *Roberts*, however, there was no evidence of any collective action by the city council outside of a noticed

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[8] *Id.* at p. 104.

[9] *Id.* at p. 99.

[10] *Id.* at p. 102.

[11] *Id.* at p. 103.

[12] *Ibid.*

[13] *Ibid.*

[14] *Roberts, supra*, 5 Cal.4th at pp. 375-377.

[15] *Id.* at p. 376.

public meeting; the council members were merely passive recipients of the city attorney's communication.[16]

Following *Roberts*, the court in *Frazer v. Dixon Unified School District* (1993) 18 Cal.App.4th 781 ("*Frazer*") considered two separate alleged Brown Act violations by a school board relating to the adoption of an elementary language arts curriculum that was opposed by conservative religious families. The first alleged violation involved the attendance by a majority of the school board at a non-public, unnoticed showing of a videotape entitled "Holy Wars in Education."[17] In the court's view, this gathering violated the Brown Act because it involved a majority of the board meeting to receive information germane to the ongoing curriculum dispute.[18] In contrast, the second alleged violation involved the board members each receiving and privately reviewing materials from school district staff regarding the curriculum dispute.[19] Relying on *Roberts*, the *Frazer* court held that such "passive receipt by individuals of their mail" did not involve collective action by a quorum of the school board to make a decision or to deliberate on a matter before them, and therefore did not result in a serial meeting in violation of the Brown Act.[20]

Following the rulings in *Stockton Newspapers*, *Roberts*, and *Frazer*, the Legislature enacted S.B. 36 to codify the substance of those decisions.[21] S.B. 36 added Government Code section 54952.2 to the Brown Act, both to define what constitutes a "meeting" within the meaning of the Brown Act, and to prohibit serial meetings. As originally enacted, the serial meeting prohibition in subsection (b) of the statute stated: "[A]ny use of direct communication, personal intermediaries, or technological devices that is employed by a majority of the members of the legislative body to develop a collective concurrence as to action to be taken on an item by the members of the legislative body is prohibited."

Thirteen years later, the Legislature's choice of words, "employed . . . to develop a collective concurrence," gave rise to the court's decision in *Wolfe v. City of Fremont* ("*Wolfe*"). At issue in *Wolfe* was a controversial new policy governing a city police department's response to activated home invasion alarms.[22] To garner city council support for the policy, the police chief and city manager allegedly held a series of individual briefings with each council member to explain the policy.[23] Among the questions before the court in *Wolfe* was whether the complaint described a serial meeting in violation of the Brown Act where the series of briefings

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[16] *Id.* at pp. 375-377.

[17] *Frazer, supra*, 18 Cal.App.4th at pp.794-797.

[18] *Ibid.*

[19] *Id.* at pp. 797-798.

[20] *Ibid.*

[21] *Wolfe v. City of Fremont* (2006) 144 Cal.App.4th 533, 544 ("*Wolfe*"), citing Stats. 1993, ch. 1137.

[22] *Wolfe*, at p. 538.

[23] *Ibid.*

actually resulted in a collective decision by the members of the city council not to oppose the policy.[24] In the opinion of the court, the facts alleged did not describe a serial meeting because a serial meeting requires collective deliberation on matters within a legislative body's jurisdiction by a majority of the members of the body.[25] The council members were not alleged to have orchestrated the series of briefings, and there were no allegations that the police chief and city manager acted as intermediaries to share information between council members or to make each of the council members aware of the others' views.[26] Instead, staff simply convinced each council member separately not to oppose the new policy.[27]

If the court had stopped its analysis at the absence of any alleged collective action by a majority of the city council to deliberate on the alarm response policy, *Wolfe* would have been on point with *Roberts* and *Frazer*. However, in Footnote 6 of its opinion, the *Wolfe* court went further, explaining that: "[S]erial individual meetings that do not result in a 'collective concurrence' do not violate the Brown Act." In other words, because subsection (b) of Government Code section 54952.2 forbade any series of communications "employed . . . to develop a collective concurrence," it was not enough, according to the *Wolfe* court, to constitute a serial meeting for a majority of a legislative body to collectively engage in deliberations on a matter through a series of communications in an effort to develop a collective concurrence. Instead, it was necessary for the series of communications *actually to result* in a collective concurrence.

The Legislature disagreed with Footnote 6 of *Wolfe*, and responded by enacting S.B. 1732 in 2008.[28] S.B.1732 actually codified part of *Wolfe*'s holding as Government Code section 54952.2, subdivision (b)(2). That provision of the statute expressly authorizes an agency staff member to communicate with the members of a legislative body, "if that person does not communicate to members of the legislative body the comments or positions of any other member or members of the legislative body." However, subdivision (b)(1) of the statute was amended to clarify that a serial meeting results whenever a series of communications involving a majority of the legislative body is used to "discuss" or "deliberate" on (or take action on) matters within the body's subject matter jurisdiction.

In an uncodified section of S.B. 1732, the Legislature explained that its purpose in enacting the legislation was to disapprove of Footnote 6 of the *Wolfe* decision. Specifically, it stated, in subdivision (b) of Section 1 of the statute: "It is the intent of the Legislature that the changes made by Section 3 of this act supersede the court's holding described in subdivision (a)." (Section 3 consisted of the amendments to Section 54952.2, subsection (b), including the rewording of the serial meeting prohibition.) The court's holding described in subdivision (a) of

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[24] *Id.* at pp. 545-548.

[25] *Ibid.*

[26] *Ibid.*

[27] *Ibid.*

[28] See Stats.2008, ch. 63.

Section 1 was *Wolfe's* Footnote 6: "The Legislature hereby declares that it disapproves [Footnote 6] to the extent it construes the prohibition against serial meetings … to require that a series of individual meetings by members of a body *actually result in* a collective concurrence to violate the prohibition *rather than also including the process of developing a collective concurrence as a violation of the prohibition."* (Emphasis added.)

The Legislature attributed no intent to the amendments to Section 54952.2, subsection (b), other than the overruling of *Wolfe's* Footnote 6. S.B. 1732 did not disapprove of the holdings in *Stockton Newspapers*, *Roberts*, *Frazer*, or *Wolfe* that a serial meeting requires collective communications by a majority of a legislative body to deliberate or take action on a matter within its subject matter jurisdiction. As one court explained the purpose and effect of S.B. 1732: "The Legislature's concern was that *Wolfe* would allow use of serial meetings to discuss and deliberate as long as no *collective concurrence* was reached, meaning that members might discuss everything about a proposed action short of polling for a concurrence, then convene in open session just for the poll and the action itself. *To abrogate that view*, the section now reads that serial communications cannot be used 'to discuss, deliberate, *or* take action on any item of business' …." (first and third emphases in original; second emphasis added).[29] Thus, as amended, section 54952.2, subsection (b), still applies only to discussions, deliberations, or actions taken collectively by "a majority" of the members of a legislative body.

B. The Request Does Not Describe Collective Communications by a Majority of a Legislative Body to Deliberate Outside of a Noticed, Public Meeting in Violation of the Brown Act

Like in *Roberts*, *Frazer*, and *Wolfe*, the Request does not describe facts that would violate the prohibition on serial meetings in Government Code section 54952.2, subsection (b). If a majority of the Commission had collectively communicated through a series of communications about the matters discussed in Sullivan and Slawson's letter, then a serial meeting would have occurred. However, all that occurred here, according to the Request, is that Sullivan, who is only one of five members of the Commission, and Slawson, his alternate, transmitted a letter about a matter pending before the Commission. The remaining four members and their respective alternates were passive recipients of that letter. This was nothing more than a one-way communication by less than a majority of the Commission, not an attempt by a majority to deliberate amongst themselves outside of a noticed public meeting.

As stated in Government Code section 54950, the purpose of the Brown Act is to ensure that meetings of legislative bodies occur in public. To constitute a meeting, deliberations by members of a legislative body are not required actually to result in a collective concurrence, as the Legislature made clear in adopting S.B. 1732. However, according to *Stockton Newspapers* and its progeny, a serial meeting requires at least that a majority of a legislative body participate in a series of communications intended to "concur[] in the purpose of arriving at a collective

[29] *McKee v. San Francisco Bay Area Rapid Transit District Board of Directors*, 2012 WL 1114250 at 4 (Court of Appeal, First District; unpublished opinion).

commitment."[30] The Legislature cannot have intended to implicate an entire legislative body in a Brown Act violation based on members' mere "passive receipt . . . of their mail."[31]

Whether a serial meeting requires collective communications by a majority of a legislative body, which the League sees as the essence of the serial meeting prohibition, has important implications for how local agencies conduct business in California. For example, in some jurisdictions it is common for an individual member of a legislative body, or even for less than a majority of the members of the body, to circulate public memoranda prior to a meeting expressing their views on matters appearing on the meeting agenda. This practice ensures that members' views receive adequate consideration, much the same as when members of the public share their views on pending matters in advance of a meeting. Similarly, in some jurisdictions, members of legislative bodies submit questions to staff prior to meetings, which staff answer in communications to the entire body to ensure that all members of the body have the same information prior to the meeting. If passive receipt of information by a majority of the legislative body outside of a meeting violates the Brown Act, it is possible, and perhaps likely, that neither of these practices is permissible even though they facilitate informed decision-making. The purpose of the Brown Act is not to prevent public officials from making informed decisions. It is to prevent a majority of a legislative body from meeting in private.

IV. CONCLUSION

For the foregoing reasons, a written communication from a constituent agency representative and his alternate to the joint powers agency board to which they were appointed does not constitute an improper serial meeting under the Brown Act.

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[30] *Stockton Newspapers, supra*, 171 Cal.App.3d at p. 103.

[31] *Frazer, supra*, 18 Cal.App.4th at p. 797.