

The Brown Act in the Digital Age

Presented By:

James Sanchez
Sacramento City Attorney

Kendra Leigh Carney
Woodruff, Spradlin & Smart

A Brief History of the Brown Act

- In 1952, the *San Francisco Chronicle* exposed secret meetings conducted by local governments
- The League of California Cities drafted a new state open meeting law which Assembly Member Ralph M. Brown carried and Governor Earl Warren signed into law. The Ralph M. Brown Act, or the Brown Act for short, added Chapter 9 [§§ 54950-58] to the California Government Code

- The purpose of the Brown Act as established by the Legislature is to ensure that public commissions, boards and councils and other public agencies in California exist to aid in the conduct of the people's business
- Most importantly, ALL actions and deliberations by public agencies must be open



General Principles

- All meetings shall be open and public
- Actions and deliberations must be taken openly
- All persons shall be permitted to attend and participate in the meetings
- Only matters on the agenda can be discussed

Who is Subject to the Brown Act?

- Applies to “legislative bodies” including city councils and also advisory committees created by ordinance or resolution, and a commission or task force, other than an ad hoc committee or less than a quorum advisory committees

What is a Meeting?

- Any congregation of a majority of the members at the same time and place to hear, discuss, deliberate, or take action on any item that is within the subject matter jurisdiction of the body
- “Deliberation” includes collective decision-making and also the collective acquisition and exchange of facts preliminary to the ultimate decision
- “Action taken” is a collective decision or actual vote by a majority of the members of a body



What is Not a Meeting?

- Individual contacts between a council member and another person; or
- A majority of the members at a:
 - Open meeting of another body, for example, a properly agendized commission meeting
 - Members attending a League of Cities Conference
 - Social or ceremonial event

But members cannot discuss matters that are within their jurisdiction among themselves at these events!



Communication that Violates the Brown Act

A majority of members are prohibited from using a series of communications of any kind, directly or through intermediaries, to discuss, deliberate, or take action on business within its subject matter jurisdiction outside of a noticed, agendized meeting



Serial Meetings



- A series of private meetings or “serial meetings” allow a majority to commit to a decision or engage in deliberation of public business is a violation of the open meeting requirement
- Beware of “daisy chain” contacts: A to B and B to C can lead to a collective concurrence
- Beware of “hub & spoke” contacts: one person is the hub who then feeds and receives information to and from other members

Individual Contact with Constituent

- Individual contacts or conversations between a member of a legislative body and any other person (other than another member) do not violate the Brown Act
- This exception serves to protect the constitutional rights of individuals to contact their government representatives regarding issues which concern them
- But, if the constituent contacts a majority and conveys that other members are already in support of a measure and states that the Member's support will ensure the proposal succeeds, the interaction is in danger of triggering a "hub-spoke" serial meeting
- It is up to the member to halt the conversation

Brown Act in the Industrial Age

- 1953: Only half of U.S. households owned a television set
- 1960: Four out of five U.S. households had a telephone
- 1970s: Technology evolved and individuals - mostly hobbyists and electronics buffs - could purchase unassembled personal computers, but early computers could not perform many of the useful tasks that today's computers can
- 1984: 8% of U.S. households had home computers





Serial Meetings in the Industrial Age

- In-Person: A series of individual meetings that lead to a collective concurrence violates the Brown Act. But, a minority can discuss a policy privately without violating the Brown Act
- Telephone: A series of individual telephone conversations that lead to a collective concurrence violates the Brown Act - physical presence of members is unnecessary to establish an informal meeting
- Letters: Similar to the telephone, a series of correspondence that lead to a collective concurrence violates the Brown Act



The Proliferation of Technology

- The Brown Act was created in an era where communication vehicles were much more limited and it was easier to hide from the public eye
- In 1953, the only way the public interacted with their elected officials was through periodic in-person meetings
- Today, the rapid speed with which people can now send e-mails and text messages and post comments online means a casual e-mail conversation between two city council members or an offhand comment on a newspaper website may quickly and inadvertently turn into a “meeting” under the Brown Act



The Digital Age



- 2013: 85% of U.S. households had home computers, 74% had Internet access
- 2015: Nearly 66% of Americans owned a smartphone and 65% of adults used social networking sites, up from 7% in 2005
- By 2018: The number of worldwide users is expected to reach some 2.5 billion, around a third of Earth's entire population

More Technology, More Problems



- The Internet and social media provide abundant opportunities for elected officials to post their unfiltered opinions, thoughts and general comments about city issues
- When these entries or articles are especially timely or controversial, they practically invite comments by interested residents and local officials
- No court has specifically ruled on the Internet or social media posts in regards to Brown Act requirements. However, the same serial meeting rules that apply to e-mail may likely apply to other digital and social online conduct such as texting, tweeting, liking, swiping, and commenting on stories and third party blogs and posts

The Experts



Digital and Social Media



- Digital media are the tools we use to communicate digitally and encompasses computers, software to run them, and the movement and storage of digital information via networks and storage or hard drives and clouds
- Social media are web-based communication tools that enable people to interact by both sharing and consuming various content and participating in social networking



Email

- A majority of members may not email each other to develop a collective concurrence as to action to be taken by the board. This applies to personal and work emails
- This is the case 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
- With the reply-all button so readily accessible, creating an “exchange of facts” is all too easy





Text Messages

- A series of cell phone text messages that lead to a collective concurrence violates the Brown Act
- Text messages sent to council members during an open meeting are secretive because members of the public are not privy to the content of the text message
- If a group text message or a series of text messages include a majority of the board or council members and relate to the deliberations at hand, then the board or council has violated the Brown Act

Blogs



- A blog is a website that contains online personal reflections, comments, and often hyperlinks provided by the writer
- Bloggers can reach thousands of people every day
- Common features:
 - (1) published in a chronological fashion;
 - (2) updated regularly;
 - (3) readers can comment;
 - (4) other blog authors can interact via trackbacks and pingbacks; and
 - (5) content is syndicated via RSS feeds

Blog Comments

- Blog comments allow readers to interact with the blogger and other readers
- The blog commenting space adds an interactive element to the blog
- Leaving blog comments allows readers to join in on the conversation about a topic that interests them
- People who leave comments on a blog can also leave links to other blogs or websites or their own blogs to further the conversation



Potential Brown Act Violation: Blogs

- If an elected official posts a comment on a blog site and the whole world can see it, is it still a violation?
- A single comment or interaction with the author or community is akin to a digital town hall or other meeting with the public
- The risk is that other officials will also comment. While the discussion may be held publicly, it is outside of a meeting. If a majority comment, it may be a Brown Act violation





- Facebook is a social networking website that allows users to create profiles, upload photos and video, send messages, and keep in touch with friends, family, and colleagues
- Each member has a “wall” similar to a virtual bulletin board where users can post text, video or photos. Facebook also allows a user to post status updates like a mini blog

What Does it Mean to “Like” Something on Facebook?

- Clicking “like” below a post on Facebook is an easy way to communicate approval without leaving a comment
- Clicking the “like” button on Facebook is speech. *Bland v. Roberts*, 730 F. 3d 368 (4th Cir. 2013)



Can “Like” Create a Brown Act Violation?

- A single click is speech, and on a post about a topic within an elected official’s subject matter jurisdiction could be found to form a part of the deliberative process
- A single click by a few Facebook “friends” that constitute the majority of a legislative body could easily be found to be a Brown Act violation, and one that is well documented and broadly broadcast





- Snapchat is a mobile app that allows users to capture videos and pictures that are deleted after a few seconds
- When a user decides to send a message the user decides whether it will live for one to ten seconds on the recipient's device. Once the time allotted has run, the message is most likely deleted from both devices and even from Snapchat's records

Do Snapchats Really Disappear?

- Snapchat does not allow users to save received messages. But most cell phones allow users to capture a photo of the screen at any time, thereby creating a long lasting copy of the message
- Law enforcement may still access basic information about users via subpoenas and search warrants. Basic information does not include the actual content, just the fact that a message was sent
- Snapchat deletes all other content based information from its servers as soon as both parties have seen the content
- If the receiving party does not open the chat, the content of the message is deleted from their servers 30 days after initially sent



If the Snapchat Disappears Does the Brown Act Too?

- Snapchat is currently at the forefront of social media evolution and enables users to communicate more like they communicate in real life, with specific people and for specific periods times
- Violations of the Brown Act occurring via Snapchat are more like speaking directly to a majority of a local governing body in person or over the phone. Or creating a face-to-face daisy chain or hub and spoke
- A screen capture image or the timing of a communication may be sufficient to prove unlawful, private communication





- Twitter is a service for friends, family, coworkers and strangers to communicate and stay connected through the exchange of quick, frequent messages
- Users post tweets, which may contain photos, videos, links and up to 140 characters of text
- These messages are posted to the user's profile, sent to their followers, and are searchable on twitter search

What Does it Mean to Tweet?



- A tweet is any message posted to Twitter
- The user can select whether tweets are public or private. If tweets are public, anyone who runs a search for a keyword in those tweets may be able to see that message.
- If a message begins with @username, it is a reply to another user
- Direct Messages are private messages sent from one Twitter user to another user or a group of users and does not appear in public for anyone else to read
- A retweet is a tweet that is forwarded to a user's followers. Basically, a re-posting of another's tweet. Twitter's Retweet feature allows users to quickly share messages with groups

Brown Act Complications of Tweets and Retweets

- Assume Council Member A, of a five member city council, tweets a comment about an upcoming agenda item. Council Members B and C, who follow Council Member A on twitter, retweet the first comment in an effort to encourage the public to attend the meeting
- Depending on the content of the original tweet, once the tweets were posted, has a majority of the council “met” about the item without proper notice to the public?
- Arguably they have, even though the messages themselves are public and the public may immediately respond, there was no notice of the meeting





- Instagram is a picture sharing app
- In the words of Instagram, it “is a fun and quirky way to share your life with friends through a series of pictures. Snap a photo with your mobile phone, then choose a filter to transform the image into a memory to keep around forever”
- Users capture photos and post them online and have the option to include a message. All photos are public by default, which means they are visible to anyone using Instagram. Users can opt to make their profiles private which allows only user selected followers to see their photos. Similar to the Facebook button, users can tap to “like” or comment on other user’s photos

Can a Picture be a Brown Act Violation?

- Instagram is visual sharing, but are pictures sufficient to be considered protected speech or speech at all? Or speech that would violate the Brown Act?
- A picture is worth a thousand words here. A unanimous Supreme Court specifically extended the First Amendment to written, visual and spoken expression posted on the Internet in 1996. *Reno, Attorney General of the United States, et al. v. American Civil Liberties Union et al.*, 521 U.S. 844 (1997)



- Instagram delivers visual expression to many recipients quickly and conveniently and creates a platform for the sharing visual cues with people all over the world
- Instagram is currently used for social and political reform efforts. Photos documenting social issues frequently used to communicate issues and shape social opinions. Politicians already use Instagram to spread politics to a variety of demographics and communicate with potential voters
- Within the Brown Act context, a picture of a project site or other document with a brief note conveying support or opposition, liked by a majority of a legislative body considering the project could certainly violate the Brown Act and may also raise ex parte due process concerns

Social Media Legal Issues Relating to the Brown Act

- The speed at which a comment or post on a blog, Facebook, Snapchat, Instagram or other online forum or platform can travel, the number of people the content can reach, and the interactivity among users creates potential danger when considering the application of the Brown Act
- Online discussion of city business by a quorum of the legislative body is a meeting with the mere click of a button
- What happens if a council member posts a blog entry about an upcoming agenda item, which is then commented on or retweeted, liked, photographed and/or posted by other council members? A very public discussion occurs among those elected officials via digital and social media



- Whether this constitutes a Brown Act violation remains to be determined
- The forums are public and allow the public to also comment on statements by the councilmembers so these are not “secret” meetings – but they are not noticed meetings either
- Transparency alone is not the critical factor under the Brown Act
- New technology offers great communication potential with little effort, but public officials may inadvertently find themselves in the midst of an e-mail conversation or conversation thread with other members without any such intent, or much thought or effort
- While it may seem behind the times or even counter to the concept of enhanced public transparency, such communications nonetheless present significant risks of Brown Act violations



Open Meeting Issues

- The potential to inadvertently hold a “meeting” is concerning
- Meetings must be open to the public, in a public location, with no restrictions on who may attend and where open discussion is allowed
- Fair notice must be given to the public of what will be discussed at a public meeting so the individual citizen can make an informed decision on whether or not he or she wants to attend that particular meeting
- With so much access to digital and social media, platforms that are significantly more open, transparent and accessible than city hall, it is ironic that such communication may be a violation



- Yet, the potential Brown Act pitfalls are real
- Local officials should be wary of commenting on any other official's social media content to avoid unintentionally creating a serial meeting
- Not all social media discussions are public and not everyone may be heard either. Posting their own comment may be safest, but liking, retweeting, and commenting on other official's sites and posts may be a violation of the Brown Act

Other Issues

- First Amendment: Interactivity provides the public and members means to respond which may be both critical of officials and trigger a “meeting” according to the Brown Act
- There may be technological ways to limit how much conversation occurs on a user’s page but it would be ill advised for an elected official to delete any posts other than their own from a site they or the City host





- Public Resources: Another consequence is the lack of control an official or agency may have over distribution of information. And, officials should be mindful of their use of public resources to maintain social media connections
- Public Records Retention: It is difficult to identify what data should be saved, but technology changes so rapidly it makes it difficult to anticipate how to save it. And, comments and conversations on these platforms only enhance the likelihood that a digital Brown Act violation may come back to haunt an elected official when captured and disclosed in a PRA request

Advising Agency Officials and Staff

- It may seem that clicking a key or tapping a button is not the same communication as the written or spoken word
- Instead, the reach of communication through social media and the ability to converse in seconds, in public, from anywhere exposes the limitations of the Act
- Since even clicking “like” on Facebook is considered a statement of expression, officials must think twice before participating in social media platforms
- Courts have barely dipped into the technology pool by addressing emails
- It is best for public officials to take conservative approach with other social media



Tips



- A social media presence is ok and may even be expected for a successful campaign
- But, officials should avoid commenting, liking, tweeting, retweeting, or posting regarding topics within the jurisdiction of the governing body on which they sit
- Posting general city information without personal comment or opinion is acceptable as it is likely posted publicly elsewhere. Posting a picture of the official at a city event without comment on any other city affairs is a safe bet too. But a seemingly innocent engagement in public or private social media discussion online may find the official charged with a Brown Act violation



Conclusion

- Encourage agencies and officials to:
 - Discuss and establish protocols for email communication among board members
 - Limit acceptance of all electronic messages, including text messages during meetings. The goal is transparency, and such data can be subject to Public Records Act requests
- Strictly avoid:
 - Online communication with fellow members on matters that will be discussed and voted on at a public meeting, or offering opinions on social media sites regarding matters within the board's jurisdiction
- Remember:
 - All communication can be subject to the Public Records Act, so a good rule of thumb is: If you do not want to read it in a newspaper tomorrow, do not post, Tweet, text, blog or email the message today

Questions?

James C. Sanchez

Office of the City Attorney

915 I Street, 4th Floor

Sacramento, CA 95814

Phone: (916) 808-5346

JCSanchez@cityofsacramento.org

Kendra L. Carney

Woodruff, Spradlin & Smart

555 Anton Blvd. Suite 1200

Costa Mesa, CA 92626

Phone: (714) 415-1073

kcarney@wss-law.com