New Law Finally Attempts to Address Social Media Use and the Brown Act

October 15, 2020
Number 73

Written by:
Harold M. Freiman
Partner
Walnut Creek

David J. Wolfe
Partner
Fresno

Michael Dunne
Paralegal
Fresno

May a member of an elected board, council, or other body subject to the Brown Act comment on, "retweet" or "like" a social media post from another member without risking a Brown Act violation? A new law signed by Governor Newsom, Assembly Bill (AB) 992, effective January 1, 2021, aims to clarify what types of social media interactions are permissible under the Brown Act, and which are not.

When the Brown Act was enacted in 1953, social media as we know it did not exist. Only about half of U.S. households even had a television set in their home. With the rise of the internet and social media, it became possible to have rapid communications and social interactions in a way that the drafters of the Brown Act could not have envisioned. Along with the new possibilities for social interaction came new pitfalls, as comments or even "likes" on a social media post by a quorum of a governing body can inadvertently become a "meeting" under the Brown Act. Until now the law has not attempted to address what types of social media interactions among locally elected officials are permissible.

AB 992 amends the Brown Act to provide that a member of a local agency legislative body may engage in conversations or communications on an internet-based social media platform, limited to the following purposes:

(1) Answering questions or providing information to the public; or
(2) Soliciting information from the public regarding a matter that is within the subject matter jurisdiction of the legislative body.

However, AB 992 prohibits:
(1) A majority of the members of a legislative body using a social media platform to discuss agency business of a specific nature among themselves; and
(2) Any member of a local agency legislative body responding directly to any communication from another member on an internet-based social media platform regarding a matter within their subject-matter jurisdiction.

The final version of the bill rejected language in the original draft of the bill that would have allowed additional social media interactions between members of a legislative body.

The bill defines "discuss among themselves" to include communications "made, posted, or shared" on an internet-based social media platform, and includes comments or digital icons that express reactions to the communications made by other members of the legislative body. In other words, commenting on another member's post, re-tweeting or forwarding, posting an "emoji," or even clicking the "like" button could constitute a "discussion" among members of the legislative body.

AB 992 does not, however, prohibit a member of a legislative body from commenting on, forwarding or "liking" a post made by a member of the public, as long as those comments do not become a discussion of agency business "of a specific nature" among a majority of the members of the legislative body. While the bill does not define the term "of a specific nature," that term is used elsewhere in the Brown Act to distinguish such prohibited discussions from permissible discussions of issues of general interest to the public or to public agencies of a similar type. Thus, for example, it appears that if a member of the public posts information that is of interest to the agency, one or more individual members of the legislative body could re-post that message in order to make the information more available to the public. However, because there is such a wide variety of types of interactions on social media, there are a host of specific situations that the legislation did not address, and where there are ambiguities that will likely lead to further debate over what exactly the new law permits or prohibits.

The Legislative staff report explaining the need for AB 992 quotes extensively from a paper presented to the 2016 Annual Conference of the League of California Cities that was co-authored by the then-Sacramento City Attorney James Sanchez, who is now a Senior Counsel in the Fresno office of Lozano Smith. This paper noted that while internet-based social media can "unleash tremendous communication potential for communities," it also has several "pitfalls" for local elected officials who are subject to the Brown Act. The paper noted that the state of the law at the time was uncertain as to how the Brown Act's constraints applied to such social media interactions. AB 992 was subsequently introduced to address these issues and provide more clarity regarding the application of the Brown Act to social media communications.

In a similar vein, a recently-issued opinion of the California Attorney General (Opinion No. 18-901; Sept. 22, 2020) addressed a question regarding whether it would violate the Bagley-Keene Open Meeting Act (which applies to state agencies) if a member of the Fair Political Practices Commission responded to an email message from a member of the public to all five commissioners by responding only to the sender of the message and other members of the public, but not to the other commissioners. The Attorney General concluded that under that factual scenario there would be no prohibited "serial meeting" as long as this correspondence was not part of a concerted plan by a majority of the commissioners to engage in a discussion of agency business through a series of communications.

Takeaways

Under AB 992, a member of a local agency legislative body may communicate with the public on a matter of agency business through social media, either by responding to a question or by soliciting information, without violating the Brown Act. This is true even though other members of the legislative body may see those posts. However, any social media interaction between members of the legislative body, including posting comments or "emojis," re-tweeting or even "liking" a communication from another member may constitute a Brown Act violation.

LS Lozano Smith
ATTORNEYS AT LAW

Additionally, members of the legislative body should not use their individual social media postings as a concerted effort to engage one another. Despite the Legislature's effort to clarify these issues, questions will continue to arise as to the boundaries of AB 992. Careful thought should be taken whenever engaging in any social media interactions where the agency's business is involved, and the agency's legal counsel should be consulted if there is any doubt about whether a social media interaction might run afoul of the Brown Act.

If you have any questions about AB 992, or the Brown Act in general, please contact an attorney at one of our eight offices located statewide. You can also subscribe to our podcast, follow us on Facebook, Twitter and LinkedIn or download our mobile app.

As the information contained herein is necessarily general, its application to a particular set of facts and circumstances may vary. For this reason, this News Brief does not constitute legal advice. We recommend that you consult with your counsel prior to acting on the information contained herein.