LAW OFFICES OF YOUNG, MINNEY & CORR, LLP
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MEMORANDUM

Date: September 14, 2015

To: Risk Committee

From: Lisa A. Corr, Esq.

Re: Legal Advisory - Brown Act Compliance

You have asked our office to advise as to the following open meeting legal issues:

Issue No. 1: If a board member wishes to engage the Board or individual Board members in discussion outside of a properly agendized meeting, can he/she do so lawfully under the Brown Act?

Short Answer: While a one-way communication may occur outside a properly agendized meeting for the purposes of providing information to the Board or individual members, there can be no back and forth discussion or relay discussion amongst a majority of the Board

Issue No. 2: If a Board member is also a parent or employee, do the above restrictions against unlawful serial communications still apply?

Short Answer: For purposes of compliance with the Brown Act, once a parent or employee becomes a Board member of a non-profit corporation, such restrictions take precedence over any asserted rights of a parent or employee to communicate with Board members outside of properly agendized meetings.

ANALYSIS

I. Relevant Brown Act History

The Ralph M. Brown Act (Government Code ("Govt. Code") §54950, *et seq.*, hereinafter, "Brown Act") governs meetings conducted by legislative bodies, including school boards. The purpose of the Brown Act is to facilitate public participation in local government decisions and to curb misuse of the democratic process by secret legislation by public bodies. (*Cohan v. City of Thousand Oaks* (1994) 30 Cal.App.4th 547, 555.) To these ends, the Brown Act imposes "open meeting" requirements on local legislative bodies. (Govt. Code §54953(a); *Boyle v. City of Redondo Beach* (1999) 70 Cal.App.4th 1109, 1116.)

The Brown Act also contains specific exceptions from the opening meeting requirements (closed session items), but these exceptions have been construed narrowly. When matters are not

subject to a closed meeting exception, the Brown Act has been interpreted to mean that *all of the deliberative processes by legislative bodies, including discussion, debate and the acquisition of information, be open and available for public scrutiny*. (*Sacramento Newspaper Guild v. Sacramento County Bd. of Suprs.* (1968) 263 Cal.App.2d 41. Emphasis added.)

II. What is "Meeting" Under the Brown Act?

The Brown Act defines a "meeting," as "any congregation of a majority of the members of a legislative body at the same time and location, including teleconference . . . to hear, discuss, deliberate, or take action on any item that is within the subject matter jurisdiction of the legislative body. (Government Code ("Govt. Code"), §54952.2(a).) (Emphasis added.)

Communications held amongst board members outside of a regularly and properly agendized meeting have been held improper. In *Sacramento Newspaper Guild*, *supra*, 263 Cal.App.2d 41, the court held that a luncheon gathering which included several county supervisors, county counsel, county officers, and representatives of a union to discuss a strike was deemed a "meeting" under the Brown Act. Therefore, it should have been noticed. The court reasoned, "[c]onstrued in the light of the Brown Act's objectives, the term 'meeting' extends to informal sessions or conference of the board members designed for the discussion of public business." (*Ibid.* at 50.)

III. What Constitutes a "Serial Meeting" Under the Brown Act?

The Brown Act specifically prohibits serial meetings. Of particular concern is that serial meetings strip citizens of the constitutional right to address grievances and communicate with their elected representatives; and the Brown Act favors *public* deliberation by multi-member boards.

Pursuant to Govt. Code section 54952.2:

> (b)(1) A majority of the members of a legislative body shall not, outside a meeting authorized by this chapter, 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.
>
> (b)(2) Paragraph (1) shall not be construed as preventing an employee or official of a local agency, from engaging in separate conversations or communications outside of a meeting authorized under this chapter with members of a legislative body *in order to answer questions or provide information regarding a matter that is within the subject matter jurisdiction of the local agency*, if that person does not communicate to members of the legislative body the comments or position of any other member or members of the legislative body.
> (Emphasis added.)

Applied here, unlawful serial meetings can involve a chain of communication, in which Board member A contacts Board member B, who then discusses the same issues with Board

member C, and so on. Once the series of contacts includes a majority of the Board, an unlawful serial meeting has occurred. Additionally, when a single person (Board member A or a staff member) acts akin to the hub of a wheel, and communicates individually with Board members B and C to a point where a majority of the Board has been involved in communicating with the hub, an unlawful serial meeting has occurred. Thus, serious problems arise when communication occurs outside an agendized meeting amongst a majority of the Board.[1]

The Attorney General's guidance recommends that if someone, like an executive officer, wishes to address or brief the board members on proposed agenda items, he/she prepare a "one-way" memorandum outlining the issues for all of the members of the board. The risk of over-using this process, is, of course, that one-way communications form the basis as a jumping off point for the very back and forth discussion outside of a lawfully held meeting that is prohibited by the Brown Act.

IV. Can a Board Member Communicate Outside the Role of "Board Member"?

A Board member that serves in a role to the school other than as a "board member," i.e. a teacher or parent, may have a desire to communicate to the Board in a manner that is outside their role of a board member. However, as they are a board member, the Brown Act restrictions would apply to all of their communications with other board members. The Brown Act does not provide an exemption for communications that apply to some other role that a board member may play within an organization. Thus, a board member cannot pick and choose when a communication is considered a "communication from a board member." All communications will be considered to be from a board member under the Brown Act. Therefore, all communications from an individual board member to the entirety of the board must be treated ONLY as a one-way communication, and no response may be provided outside a lawfully held meeting. Additionally, that means that the communication may be considered a "public record" and may be requested by a member of the public.

V. Conclusion - What Does This Mean For PCHS?

While there is no legal prohibition for a Board member to communicate in a one-way communication with other Board members, it is not a best practice, creates legal liability and is thus not advisable. [2] Based upon the forgoing, it is important that no back and forth communication occur outside the scope of a properly agendized meeting. This would constitute a "serial meeting" and may open PCHS up to penalties, both criminal and civil, for violating the Brown Act. This means that Board members who may also be a parent or employee as a Board member cannot remove his/her Board member title for purposes of addressing the board and airing grievances of a personal nature. Rather, such communication may be raised appropriately under the School's policies, i.e. complaint policies. If a Board member wishes to communicate to the entirety of the Board, it should be done at a public meeting, in an appropriate manner under the Brown Act, to ensure that the rights of the public are protected.

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[1] In 84 Ops.Cal.Atty.Gen. 30 (2001), the Attorney General's office concluded that a majority of the body would violate the Brown Act if they e-mailed each other regarding current issues under the board's jurisdiction even if the emails were also sent to the secretary and chairperson of the agency, the emails were posted on the Internet, and a copy of the emails were reported at the next meeting.

[2] An inadvertent reply to an email, or an inadvertent "reply all" to a one-way communication would be a violation of the Brown Act and consequently could subject PCHS to liability.