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LEGAL UPDATE

January 11, 2021

To: Superintendents, Member School Districts (K-12)
From: Erin E. Stagg, Associate General Counsel *ES*
Subject: Social Media and the Brown Act – AB 992 Clarifies Permissible Social Media Use by Public Officials
Memo No. 01-2021

AB 992 took effect on January 1, 2021 amending the Brown Act with an aim to provide clarity on the actions public officials can and cannot take on social media. As the legislative analysis of the bill noted, whether it will achieve the right balance between constitutional and statutory public access requirements and the free flow of communication remains unclear.

AB 992, codified in Government Code section 54952.2, provides direction on the social media interactions of public officials that do and do not constitute an impermissible meeting. In brief, the Brown Act prohibits a majority of members of a legislative body from engaging in a “series of communications,” directly or through intermediaries, to “discuss, deliberate, or take action on an item” that is within the legislative body’s subject matter jurisdiction.¹ This restriction includes “serial” meetings in which members of a legislative body communicate indirectly or through a chain of communications, ultimately involving a majority of a legislative body.

Under AB 992, a public official ***may communicate on social media platforms to answer questions, provide information to the public or to solicit information from the public regarding a matter within the legislative body’s subject matter jurisdiction.*** However, these communications are only allowed as long as a majority of the members of the legislative body do not use any social media platform to “discuss among themselves” official business. Importantly, “discuss among themselves” has been broadly defined and arguably includes making posts, commenting, replying, sharing, reacting (e.g. “liking” a post) or using digital icons that express reactions, i.e., emojis.²

¹ Gov’t. Code § 54952.2

² AB 992 applies to social media platforms that are open and accessible to the public. This includes well known social media platforms such as Facebook, Instagram and Twitter, but could also be interpreted to include any online service that allows for public interaction such as chatrooms and forums, comment sections on blogs and online media.



Moreover, while a single contact between one public official and another would not normally constitute a prohibited meeting - provided that those officials do not constitute a quorum - AB 992 prohibits such social media interaction entirely. “A member of the legislative body ***shall not respond directly to any communication on an internet-based social media platform regarding a matter that is within the subject matter jurisdiction of the legislative body that is made, posted, or shared by any other member of the legislative body.***”

In other words, AB 992 arguably prohibits a public official posting a comment in response to, liking or sharing another public official’s social media post about an agency issue, even if the content of the post was not created by the public official (e.g., sharing or retweeting an official agency post). Determining whether a particular interaction violates AB 992 will generally be fact specific and require a case-by-case analysis.³ Local agencies and officials are encouraged to give careful thought whenever engaging in social media interactions involving agency business and remain aware if other public officials have already commented, shared, liked or reacted to a social media post regarding agency-related business.

While AB 992 clarifies certain issues relating to social media, it also raises a host of additional questions. For example, if a public official’s social media comments could lead to Brown Act violations, does that mean that the officials’ posts and comments are now subject to the California Public Records Act and potential disclosure? If a public official discloses on social media how they intend to vote on a particular upcoming issue involving due process considerations, could a party claim that they were denied a fair hearing? Our office will continue to monitor and provide updates as these issues develop further.

Please contact our office with questions regarding this Legal Update or any other legal matter.

The information in this Legal Update is provided as a summary of law and is not intended as legal advice. Application of the law may vary depending on the particular facts and circumstances at issue. We, therefore, recommend that you consult legal counsel to advise you on how the law applies to your specific situation.

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³ AB 992 does not include any new or additional enforcement provisions.

State of California

GOVERNMENT CODE

Section 54952.2

54952.2. (a) As used in this chapter, “meeting” means any congregation of a majority of the members of a legislative body at the same time and location, including teleconference location as permitted by Section 54953, to hear, discuss, deliberate, or take action on any item that is within the subject matter jurisdiction of the legislative body.

(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.

(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 by 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.

(3) (A) Paragraph (1) shall not be construed as preventing a member of the legislative body from engaging in separate conversations or communications on an internet-based social media platform to answer questions, provide information to the public, or to solicit information from the public regarding a matter that is within the subject matter jurisdiction of the legislative body provided that a majority of the members of the legislative body do not use the internet-based social media platform to discuss among themselves business of a specific nature that is within the subject matter jurisdiction of the legislative body. A member of the legislative body shall not respond directly to any communication on an internet-based social media platform regarding a matter that is within the subject matter jurisdiction of the legislative body that is made, posted, or shared by any other member of the legislative body.

(B) For purposes of this paragraph, all of the following definitions shall apply:

(i) “Discuss among themselves” means communications made, posted, or shared on an internet-based social media platform between members of a legislative body, including comments or use of digital icons that express reactions to communications made by other members of the legislative body.

(ii) “Internet-based social media platform” means an online service that is open and accessible to the public.

(iii) “Open and accessible to the public” means that members of the general public have the ability to access and participate, free of charge, in the social media platform

without the approval by the social media platform or a person or entity other than the social media platform, including any forum and chatroom, and cannot be blocked from doing so, except when the internet-based social media platform determines that an individual violated its protocols or rules.

(c) Nothing in this section shall impose the requirements of this chapter upon any of the following:

(1) Individual contacts or conversations between a member of a legislative body and any other person that do not violate subdivision (b).

(2) The attendance of a majority of the members of a legislative body at a conference or similar gathering open to the public that involves a discussion of issues of general interest to the public or to public agencies of the type represented by the legislative body, provided that a majority of the members do not discuss among themselves, other than as part of the scheduled program, business of a specified nature that is within the subject matter jurisdiction of the local agency. Nothing in this paragraph is intended to allow members of the public free admission to a conference or similar gathering at which the organizers have required other participants or registrants to pay fees or charges as a condition of attendance.

(3) The attendance of a majority of the members of a legislative body at an open and publicized meeting organized to address a topic of local community concern by a person or organization other than the local agency, provided that a majority of the members do not discuss among themselves, other than as part of the scheduled program, business of a specific nature that is within the subject matter jurisdiction of the legislative body of the local agency.

(4) The attendance of a majority of the members of a legislative body at an open and noticed meeting of another body of the local agency, or at an open and noticed meeting of a legislative body of another local agency, provided that a majority of the members do not discuss among themselves, other than as part of the scheduled meeting, business of a specific nature that is within the subject matter jurisdiction of the legislative body of the local agency.

(5) The attendance of a majority of the members of a legislative body at a purely social or ceremonial occasion, provided that a majority of the members do not discuss among themselves business of a specific nature that is within the subject matter jurisdiction of the legislative body of the local agency.

(6) The attendance of a majority of the members of a legislative body at an open and noticed meeting of a standing committee of that body, provided that the members of the legislative body who are not members of the standing committee attend only as observers.

(d) This section shall remain in effect only until January 1, 2026, and as of that date is repealed.

(Amended by Stats. 2020, Ch. 89, Sec. 1. (AB 992) Effective January 1, 2021. Repealed as of January 1, 2026, by its own provisions. See later operative version added by Sec. 2 of Stats. 2020, Ch. 89.)