

Common Legal Issues for Committee Members

Clean Energy Alliance
Community Advisory Committee

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Elizabeth A. Mitchell, Esq.
Assistant General Counsel

burke

BURKE, WILLIAMS & SORENSEN, LLP

Introduction

Overview of laws applicable to public officials:

- ▶ Brown Act
- ▶ Form 700
- ▶ Conflicts of Interest
- ▶ What's new

Brown Act - Open Meetings

- ▶ Government Code § § 54950 *et seq.*
- ▶ Requires meetings of the legislative bodies of public agencies to be open and public
- ▶ “Legislative body” includes the agency’s governing body (the Board) and advisory and decision making committees

Brown Act- What is a Meeting?

- ▶ Any congregation
- ▶ Of a majority of the members of the legislative body
- ▶ At the same time and place
 - ▶ Including teleconference locations
- ▶ To hear, discuss, or deliberate upon any item within the subject matter jurisdiction of the legislative body

Brown Act “Meeting” exceptions:

- ▶ Individual contacts
- ▶ Attendance at community meetings, meetings of other agencies
- ▶ Meetings of “ad hoc” subcommittees - temporary advisory committees of less than a quorum of the board, with a limited purpose, dissolved when the purpose is completed
- ▶ Conferences or seminars
- ▶ Social and ceremonial gatherings
- ▶ Observation of advisory committee meetings

Brown Act Violations

- ▶ “Informal” meetings that are not noticed
- ▶ “Serial” meetings
 - ▶ A series of individual contacts that results in a majority of the members reaching a collective concurrence on an item of business
 - ▶ Can occur by use of technology, such as email or social media
- ▶ Discussion of non-agendized items (other than brief response/direction to staff to agendize a future item)
- ▶ Improper noticing on the agenda - agenda must substantially comply with requirements

Social Media - AB 992

- ▶ Amends Government Code section 54952.2 to add new provisions
- ▶ Applies from January 1, 2020 through January 1, 2026



Direct Response Prohibited

- ▶ AB 992 prohibits even one member of the legislative body from responding in any manner to any other member's social media posts: “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.”
- ▶ No exceptions.
- ▶ Applies to just one response, making it a violation of the Brown Act regardless of whether a majority of the legislative body reads the response.

Emojis = Discussion

- ▶ AB 992 prohibits a majority of the members of the legislative body from using social media to “discuss among themselves” business of a specific nature that is within the subject matter jurisdiction of the legislative body.
- ▶ Prohibits “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.”
- ▶ The prohibition against members “discussing among themselves” specifically includes emojis

Remote Teleconferencing under the Brown Act

Existing Rules

- ▶ Traditional teleconferencing
 - ▶ Include remote address on agenda
 - ▶ Post agenda at remote location
 - ▶ Remote location open to the public
- ▶ Emergency teleconferencing (AB361)
 - ▶ Only during Governor's proclaimed State of Emergency
 - ▶ Legislative body makes findings initially and every 30 days regarding health and safety
 - ▶ Allows entire body to meet remotely

AB2449: *New Remote Teleconferencing Rules*

Allows less than a quorum of local officials to participate remotely if

- ▶ at least a quorum participates
 - ▶ in-person
 - ▶ at a single location identified on the agenda that is open to the public,
- ▶ and the legislative body follows certain procedural and substantive requirements

Procedural Requirements

- ▶ Regular noticed meeting
- ▶ Regular agenda posting
- ▶ Officials attending remotely must:
 - ▶ participate through ***both*** audio and visual technology
 - ▶ disclose, before any action, adults present in room and relationship to member

More Procedure

- ▶ Allow public to access meeting and provide comments, including by teleconference with instructions
- ▶ Pause meeting when there is any teleconference disruption for the public
- ▶ Real-time public comments must be allowed
- ▶ Submission of comments in advance cannot be required
- ▶ Access requirements for requests for reasonable accommodations
- ▶ Give notice of procedure

AB2449 Substantive Requirements

Member must need to participate remotely

- ▶ for just cause or
- ▶ emergency circumstances

What is just cause?

- ▶ Caregiving need for child, parent, grandparent, grandchild, sibling, spouse, or domestic partner requires remote participation
- ▶ Contagious illness that prevents in person attendance
- ▶ Need related to physical or mental disability not otherwise accommodated
- ▶ Travel on official business of the legislative body or another state or local agency

What are the limits for just cause?

- ▶ Member must notify legislative body
 - ▶ at the earliest opportunity possible, including at the start of a regular meeting, of need to participate remotely for just cause
 - ▶ include a general description of the circumstances relating to need to appear remotely
- ▶ Shall not be used for more than two meetings per calendar year

What are emergency circumstances?

- ▶ physical or family medical emergency that prevents a member from attending in person
- ▶ Cannot be used for more than
 - ▶ 3 consecutive months or
 - ▶ 20% of regular meetings in calendar year

What are the requirements?

- ▶ Member must request to participate remotely due to emergency circumstances
 - ▶ Made ASAP
 - ▶ Separate request for each meeting
- ▶ General description of circumstances
 - ▶ Need not exceed 20 words
 - ▶ Not required to disclose medical diagnosis or disability
- ▶ Legislative body must approve request
 - ▶ At earliest opportunity
 - ▶ May take action at beginning of meeting
 - ▶ Even if not sufficient time to post on agenda

Violations of Brown Act

- ▶ Can Have Significant Consequences
 - ▶ Invalidating or nullifying any decision made in violation of open meeting laws
 - ▶ Criminal sanctions for intentional violations of the open meeting laws (up to 6 months in jail/\$1,000 fine)
 - ▶ Potential payment of attorneys' fees for those who successfully sue the agency
 - ▶ Intense, adverse media attention



PRA Reminder: San Jose Searches

- ▶ Public records on private accounts
- ▶ Distinction between public and private records
 - ▶ Content
 - ▶ Context
 - ▶ Audience
- ▶ Affidavit regarding search
- ▶ Communications over social media are subject to the Public Records Act
- ▶ Best practice to avoid conducting any CEA business on private accounts, including email, texts and social media

New: PRA Renumbering

- ▶ AB 473 & 474
- ▶ Effective January 1, 2023
- ▶ No substantive changes
- ▶ Recodifies and reorganizing PRA moving it to Government Code section 7920.000, *et seq.*
- ▶ For example, former GC 6254(c) (which exempts “personnel, medical, or similar files, the disclosure of which would constitute an unwarranted invasion of personal privacy”) is relocated to GC 7927.700

Economic Disclosure Requirement- Form 700

- ▶ Required by Political Reform Act
- ▶ Designed to prevent conflicts of interest by requiring disclosure of personal financial interests
- ▶ Refer to CEA's Conflict of Interest Code
- ▶ Part of open and transparent government

Form 700

- ▶ Filed online, available for public inspection
- ▶ Interests of filer, spouse/domestic partner and dependent children (varies with type of interest)
- ▶ Financial interests: investments, real property, sources of income, gifts, loans, business positions
- ▶ Timing:
 - ▶ Assuming office - within 30 days of assuming office
 - ▶ Annual - while in office by April 1
 - ▶ Leaving office - within 30 days of leaving office
 - ▶ Amended - at any time

Form 700 - Continued

- ▶ Penalties for failing to file up to \$100 and for late filing of up to \$5,000
- ▶ Enforcement through the FPPC, publication in bulletin
- ▶ Prosecution by DA, Attorney General or citizens
- ▶ 5 year statute of limitations on administrative actions
- ▶ 4 years on criminal actions
- ▶ Resources:
 - ▶ Form 700 Instructions and Reference Manual (www.fppc.ca.gov)
 - ▶ 1-866-ASK-FPPC
 - ▶ Authority Counsel

Conflicts of Interest

- ▶ Generally governed by Political Reform Act
- ▶ Precludes an official from participating in a decision if it will impact the official's economic interests
- ▶ Common: Real Property disqualification
- ▶ Other potential conflicts of interest (especially those involving contracts under Government Code section 1090) should be discussed with CEA Counsel as soon as they are identified

Conflicts Requiring Disqualification

- ▶ Any ***source of income*** aggregating five hundred dollars (\$500) or more in value provided or promised to, received by, the public official within 12 months prior to the time when the decision is made (this includes community property).
- ▶ Any donor of, or any intermediary or agent for a donor of, ***a gift or gifts*** aggregating five hundred dollars (\$500) or more in value provided to, received by, or promised to the public official within 12 months prior to the time when the decision is made.
- ▶ Any ***business entity*** in which the public official is a director, officer, partner, trustee, employee, or holds any position of management.

Conflicts Requiring Disqualification - Continued

- ▶ Any business entity in which the public official has a direct or indirect **investment** worth two thousand dollars (\$2,000) or more.
- ▶ Any **real property** in which the public official has a direct or indirect interest worth two thousand dollars (\$2,000) or more.

SB1439-*New* Disqualification Rules Regarding Campaign Contributions

- ▶ Prohibits certain officers from making, participating in making or influencing decisions on licenses, permits and other entitlements for use where they have received a campaign contribution of more than \$250 within 12 months before or after a decision
- ▶ Eliminates exception to the Levine Act (GC 84308) for Councilmembers acting in their elected roles
- ▶ Now applies to Councilmembers acting in elected or appointed roles
- ▶ Expands reach from 3 months to 12 months before and after decision
- ▶ Must disclose on record and recuse
- ▶ FPPC Opinion: Applies to contributions received starting in 2023

Newish Real Property Conflict Rules

- ▶ Fair Political Practices Commission (“FPPC”) adopted changes to Regulation 18702.2 which provides the materiality standards for interest in real property
- ▶ Changes became effective March 22, 2019
- ▶ Modified the “500-Foot Rule”

Basic Conflict of Interest Rule is Unchanged

Section 87103 states:

- ▶ “A public official has a financial interest in a decision within the meaning of Section 87100 *if it is reasonably foreseeable that the decision will have a material financial effect*, distinguishable from its effect on the public generally, on the official, a member of his or her immediate family, or on any of the following: ...”

New “500-Foot” Rule

Under FPPC Regulation 18702.2:

- ▶ Different depending on the type of financial interest
 - ▶ Ownership
 - ▶ Leasehold
- ▶ For an official’s financial interest (other than leaseholds), there are 3 categories
- ▶ Broken down by where the official’s property is located in relation to the property that is the subject of the governmental decision

Within 500 feet

- ▶ Where the official's property is located ***within 500 feet*** of property that is the subject of a governmental decision
- ▶ Presumption that a decision within 500 feet of the official's property ***will have a material impact*** on the official's financial interest
- ▶ Public official is ***disqualified*** unless there is clear and convincing evidence to rebut the presumption of a conflict

More than 1,000 Feet Away

- ▶ Where the official's property is located *more than 1,000 feet of property* that is the subject of a governmental decision
 - ▶ Presumption that a decision more than 1,000 feet of the official's property *will NOT have a material impact* on the official's financial interest
 - ▶ Public official is *presumed to not have a conflict and may participate* unless clear and convincing evidence that shows a substantial effect on the public official's property

Between 500 and 1,000 Feet

Under FPPC Regulation 18702.2, a decision involving property between 500 and 1,000 feet will have a material impact on an official's financial interest (other than leaseholds), if the decision would change:

- ▶ The development potential of the official's parcel;
- ▶ The income producing potential of the official's parcel;
- ▶ The highest and best use of the official's parcel;
- ▶ The character of the official's parcel by substantially altering traffic levels, intensity of use, parking, view, privacy, noise levels, or air quality; *or*
- ▶ The market value of the official's parcel.

Leasehold Interests

Under FPPC Regulation 18702.2(c), the reasonably foreseeable financial effects of a governmental decision on any real property in which a governmental official has a leasehold interest as the lessee of the property is material only if the governmental decision will:

- ▶ Change the termination date of the lease;
- ▶ Increase or decrease the potential rental value of the property;
- ▶ Change the official's actual or legally allowable use of the property; or
- ▶ Impact the official's use and enjoyment of the property.

Disqualification Procedure

- ▶ Public disclosure of the economic interest when the agenda item is announced (for example, “I will be recusing myself from participating in this item because I own a home within 500 feet of the property that is the subject of this decision”)
- ▶ Leaving the room: legally required for some legislative bodies, and considered a “best practice” for others Important: Disqualification precludes any and all discussion of the item with staff and/or fellow committee members

Disclosure Procedure

- ▶ If the official is NOT disqualified, disclosure may still be recommended
- ▶ Also happens when agenda item is first announced
- ▶ Example: “I own property between 500 and 1,000 feet of the subject property. I have performed the analysis under the FPPC Rules and determined that I do not have a conflict.”

AB 1234 Ethics Training

- ▶ State law requires certain officials to receive two hours of ethics training every two years
- ▶ Applicability: members of legislative bodies who receive compensation or who are eligible for expense reimbursement
- ▶ Newly appointed officials must complete the training within one year of assuming office
- ▶ Alternatives for Compliance
 - ▶ In-person training
 - ▶ Online training: see “Local Ethics Training” link under the “Ethics” tab on FPPC website (www.fppc.ca.gov)

Thank You

Questions?

Elizabeth A. Mitchell, Esq.
Assistant General Counsel

