Date of Hearing: May 1, 2019

ASSEMBLY COMMITTEE ON LOCAL GOVERNMENT
Cecilia Aguiar-Curry, Chair
AB 992 (Mullin) – As Amended April 22, 2019

SUBJECT: Open meetings: local agencies: social media.

SUMMARY: Creates a new exception to a prohibition in the Ralph M. Brown Act (Brown Act) against serial communications by a majority of a local legislative body's members, if they are using social media. Specifically, **this bill**:

1) Provides an exception to existing law that prohibits a majority of the members of a legislative body, outside a meeting authorized by the Brown Act, from using 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) Provides that the prohibition described in 1), above, shall not apply to the participation in an internet-based social media platform by a majority of the members of a legislative body, 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.

3) Provides the following definitions for the purposes of this bill:

    a) "Discuss among themselves" means communications made, posted, or shared on an internet-based social media platform between members of a legislative body. "Discuss among themselves" does not include either of the following:

        i) Individual communications made, posted, or shared by one or more members of a legislative body on an internet-based social media platform, provided that the communications do not respond directly to communications made, posted, or shared by any other member of the legislative body; or,

        ii) Communications made through the use of digital icons that express reactions to information, ideas, or opinions by others;

    b) "Generally open and available to the public" means that members of the general public have the ability to participate in the internet-based social media platform and are not blocked from doing so by a member of the legislative body;

    c) "Internet-based social media platform" means an online service that is generally open and available to the public; and,

    d) "Participation" means the act of publicizing information, ideas, or opinions electronically according to the protocols or rules of an internet-based social media platform.

4) Finds and declares that this bill imposes a limitation on the public's right of access to the meetings of public bodies or the writings of public officials and agencies within the meaning of Section 3 of Article I of the California Constitution. Pursuant to that constitutional provision, the Legislature makes the following findings to demonstrate the interest protected by this limitation and the need for protecting that interest:

   The limitations on the people's right of access set forth in this act are necessary to ensure the free flow of communications between members of a legislative body of a local agency and the public on internet-based social media platforms.

5) Finds and declares that Section 1 of this bill furthers, within the meaning of paragraph (7) of subdivision (b) of Section 3 of Article I of the California Constitution, the purposes of that constitutional section as it relates to the right of public access to the meetings of local public bodies or the writings of local public officials and local agencies, and declares, pursuant to paragraph (7) of subdivision (b) of Section 3 of Article I of the California Constitution, that the Legislature makes the following findings:

   This act is necessary to ensure the free flow of communications between members of a legislative body of a local agency and the public on internet-based social media platforms.

FISCAL EFFECT: None

COMMENTS:

1) **Author's Statement**. According to the author, "Working people, parents, homebound seniors and the average resident are not likely to be able to attend meetings to voice their opinion. Some of them utilize social media platforms to speak to their representatives; therefore allowing the Brown Act to exclude social media engagement reinforces the original purpose of the Act as new forms of communication are introduced."

   This bill is sponsored by the author.

2) **Background**. The Brown Act was originally enacted in 1953 and has been amended numerous times since then. The legislative intent of the Brown Act was expressly declared in its original statute, which remains unchanged:

   > "The Legislature finds and declares that the public commissions, boards and councils and other public agencies in this State exist to aid in the conduct of the people's business. It is the intent of the law that their actions be taken openly and that their deliberations be conducted openly. The people of this State do not yield their sovereignty to the agencies which serve them. The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may retain control over the instruments they have created."

   The Brown Act generally requires meetings to be noticed in advance, including the posting of an agenda, and generally requires meetings to be open and accessible to the public. The Brown Act also generally requires members of the public to have an opportunity to comment on agenda items, and generally prohibits deliberation or action on items not listed on the

agenda. The Brown Act defines a "meeting" as "any congregation of a majority of the member of a legislative body at the same time and location, including teleconference locations, to hear, discuss, deliberate, or take action on any item that is within the subject matter jurisdiction of the legislative body."

3) **The Brown Act and Serial Communications**. The Brown Act contains a general prohibition against serial communications. It states, "A majority of the members of a legislative body shall not, outside a meeting authorized by (the Brown Act), 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."

   The Brown Act does provide a number of exceptions to the general prohibition against serial communications. These include the following:

   a) An employee or official of a local agency who engages in separate conversations or communications outside of a meeting 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;

   b) Individual contacts or conversations between a member of a legislative body and any other person that do not violate the general prohibition against serial communications;

   c) 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;

   d) 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;

   e) 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;

   f) 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; and,

g) 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.

4) **Social Media and the Brown Act**. A number of local agencies in recent years have been providing information and guidance to their elected officials regarding the use of social media and the type of activity that could pose a violation of the Brown Act.

According to paper presented at the 2016 Annual Conference of the League of California Cities (League) entitled, *Serially? Seriously. Avoiding the Perils and Pitfalls of Serial Meetings in the Digital Age*, under the Brown Act, "'Deliberation' refers to not only collective decision-making, but also the collective acquisition and exchange of facts preliminary to the ultimate decision. The California Supreme Court has stated that deliberative action includes a 'collective decision-making process' and 'deliberative gathering.' It also includes 'informal sessions at which a legislative body commits itself collectively to a particular future decision concerning the public business.' 'Action taken' means a collective decision made by a majority of the members of a legislative body, a collective commitment or promise by a majority of the members of a legislative body to make a positive or a negative decision, or an actual vote by a majority of the members of a legislative body when sitting as a body or entity, upon a motion, proposal, resolution, order or ordinance (citations omitted)…

"As of the time of preparing this presentation, 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 interactivity and group forming capabilities of digital media unleash tremendous communication potential for communities and several potential pitfalls for elected officials under constraints of the Brown Act…"

The League's paper made the following observations regarding specific forms of social media:

a) **Facebook**. "Clicking 'like' below a post on Facebook is an easy way to communicate approval without leaving a comment. In Bland v. Roberts, Daniel Carter, an employee of a Virginia sheriff's office, 'liked' the standing sheriff's opponent during an election and was subsequently fired…He sued, asserting 'liking' was a First Amendment right. The court was faced with whether the simple act of clicking a button actually showed thought and/or expression on the part of the user. Because this click of a button 'literally cause[d] to be published the statement that the user 'likes' something, which is itself a substantial statement,' the court found it did. Clicking the 'like' button on Facebook is speech. The court stated it was insignificant whether the user had typed the message or clicked the button causing a thumbs-up icon and Facebook generated message to appear. In the digital era of social media, the communicative use of the 'like' button on Facebook makes it clear how a rather simple function can take on expressive contours. In the

Brown Act context…a single click on a post about something within an elected official's subject matter jurisdiction could be found to form a part of the deliberative process…A single click by 'friends' that constitute the majority of the legislative body could easily be found to be a Brown Act violation, and one that is well documented and broadly broadcast at that."

b) **Snapchat**. "But for the Brown Act, the timing of a communication, for instance, between councilmembers during a council meeting, may be sufficient to prove unlawful, private communication… 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 (of time). Thus, violations of the Brown Act occurring via Snapchat are more akin to speaking directly to a majority of a local governing body in person or over the phone."

c) **Twitter**. "Twitter's Retweet feature allows users to quickly share messages with groups. For example, 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."

d) **Instagram**. "Since Instagram is all about visual sharing, are these pictures sufficient to be considered protected speech or speech at all? The adage that a picture is worth a thousand words is certainly correct here. A unanimous Supreme Court specifically extended the First Amendment to written, visual and spoken expression posted on the Internet in 1996. Instagram holds the ability to deliver 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, such as famine in South Sudan, are frequently used to communicate issues and shape social opinions. And, 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 a simulation of a project 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 (citations omitted)."

The League's paper continued, "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 arguably becomes a meeting with the mere click of a button. Should a council member post a blog entry about an upcoming agenda item, which is then commented on or retweeted, liked, photographed and posted by other council members, a discussion among the elected officials ensues electronically on the Internet.

"Whether this constitutes a Brown Act violation remains to be determined. The fact that the forums described above are public and allow the public to also comment on statements by the

councilmembers seems to suggest the council was not holding 'secret' meetings. But the discussion of city issues also did not occur pursuant to a noticed meeting under the Brown Act. Instead, the council used a series of electronic communications to discuss and deliberate on an item within their subject matter jurisdiction. And, openness of a conversation to the public is not the critical factor under the Brown Act. This discussion about city business, whether in person with a majority of the council, over the phone, via email or text, would not comply with the Brown Act. As discussed above, the main problem faced with the Brown Act and digital and social media is that the Act was drafted when communication was much more limited and it was significantly easier to have private conversations. New technology offers elected officials 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 of their commission or city council 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.

"A June 2009 study by the Public Policy Institute of California reveals these interesting trends:

- 76 percent of Californians have access to the Internet;
- Rural Californians are as likely to use the Internet as urban Californians and almost as likely to have access to high speed Internet;
- Latinos are less likely to use information technology than whites, blacks, and Asian Pacific Islanders;
- Those with disabilities also are less likely to use a computer and the Internet;
- Renters are less likely to have access to the Internet and broadband technology than homeowners;
- Access also varies by income as well.

"The potential to inadvertently hold a 'meeting' as defined by the Brown Act is startling and should give city attorneys second thought when advising elected officials about their use of social media. As discussed above, when a government body meets, the meeting is to be open to the public, in a public location, with no restrictions on who may attend and where open discussion is allowed. Statutes and rules are designed to ensure that fair notice is 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. Additionally the rules are to govern conduct so that an orderly meeting can be held (citations omitted).

"With so many people having access to digital and social media, it is ironic that elected officials discussing a topic in public on social media may be a violation of the Brown Act. One could argue that social media platforms are significantly more open, transparent and accessible than a council meeting at city hall. Yet, local officials should be wary of commenting on any other official's social media content out of a fear that more than one other official doing so would unintentionally create a 'serial' meeting. However, not all social media discussions are public and not everyone may be heard either. Until the Brown Act catches up with the digital era, it is best to caution elected officials from participating in

discussion on social media. Posting their own comment may be safest, but liking, retweeting, and commentating on other official's sites and posts may be a violation of the Brown Act."

5) **Bill Summary**. This bill seeks to add a new exception to the Brown Act's general prohibition against serial communications when a majority of a local governing body's members are using social media. This bill provides that the prohibition against serial communications shall not apply to the participation in an internet-based social media platform by a majority of the members of a legislative body, 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.

   This bill provides a number of definitions that apply only to this one particular exemption from the Brown Act's prohibition against serial communications. "Discuss among themselves" means communications made, posted, or shared on an internet-based social media platform between members of a legislative body. "Discuss among themselves" does not include either of the following:

   a) Individual communications made, posted, or shared by one or more members of a legislative body on an internet-based social media platform, provided that the communications do not respond directly to communications made, posted, or shared by any other member of the legislative body; or,

   b) Communications made through the use of digital icons that express reactions to information, ideas, or opinions by others.

   "Generally open and available to the public" means that members of the general public have the ability to participate in the internet-based social media platform and are not blocked from doing so by a member of the legislative body. "Internet-based social media platform" means an online service that is generally open and available to the public. "Participation" means the act of publicizing information, ideas, or opinions electronically according to the protocols or rules of an internet-based social media platform.

6) **Policy Considerations**. The Committee may wish to consider the following:

   a) **Nature and Scope of the Problem**. While it is clear that the use of social media has raised significant concerns among local agencies regarding the potential Brown Act violations that could occur under specified circumstances, to date there has been no court action or documented public outcry that would seem to warrant legislative action. Local agencies have generally advised their elected officials to exercise caution when using social media platforms, and this exercise of caution appears to have been effective in preventing local elected officials from running afoul of the Brown Act. The Committee may wish to consider whether legislation is necessary at this time.

   b) **Access to Social Media**. While some contend that the use of social media is not only universal, but also preferable to the traditional means of communicating with local elected officials, others may argue the reverse. Given the digital divide that still persists in many California communities, the Committee may wish to consider the argument in support of this bill that social media is a more accessible and efficient means for

constituents to communicate with their elected officials than other forms of communication, including a person's physical attendance at public meetings.

c) **What Constitutes Discussion**? Contrary to the assertion by the League and the California Special Districts Association that this bill uses "the same language found in the community meetings exception" in the Brown Act, this bill proposes significantly more complex and prescriptive language than the community meetings exception, or any other existing exception. All of the existing exceptions name a specified activity that is permissible (individual contact or conversations, attendance at specified meetings or events, etc.), with the simple requirement 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." This bill's language extends well beyond this relatively straightforward language by adding a number of definitions, including one that qualifies what it means for members of a legislative body to "discuss among themselves." This includes communications made, posted, or shared on an internet-based social media platform between members of a legislative body. However, "discuss among themselves" does not include either of the following:

   i) Individual communications made, posted, or shared by one or more members of a legislative body on an internet-based social media platform, provided that the communications do not respond directly to communications made, posted, or shared by any other member of the legislative body; or,

   ii) Communications made through the use of digital icons that express reactions to information, ideas, or opinions by others.

   The Committee may wish to consider whether and to what degree specific posts represent a potential to convey the intent of a particular elected official and to what extent these posts could then constitute discussion or deliberation among members of a legislative body as intended under the Brown Act and interpreted by the courts.

d) **The Role of Public Notice**. As noted above in the League's paper, "The fact that the forums described above are public and allow the public to also comment on statements by the councilmembers seems to suggest the council was not holding 'secret' meetings. But the discussion of city issues also did not occur *pursuant to a noticed meeting under the Brown Act*. Instead, the council used a series of electronic communications to discuss and deliberate on an item within their subject matter jurisdiction. And, *openness of a conversation to the public is not the critical factor under the Brown Act*. This discussion about city business, whether in person with a majority of the council, over the phone, via email or text would not comply with the Brown Act." Additionally, "The potential to inadvertently hold a 'meeting' as defined by the Brown Act is startling and should give city attorneys second thought when advising elected officials about their use of social media. As discussed above, when a government body meets, the meeting is to be open to the public, in a public location, with no restrictions on who may attend and where open discussion is allowed. *Statutes and rules are designed to ensure that fair notice is 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." The Committee may wish to consider whether social media platforms provide the public notice that the Brown Act emphasizes as critical to open and public deliberations.

7) **Arguments in Support**. The League and the California Special Districts Association, in support, state, "The Brown Act was adopted in 1953, during a time when today's technological advances could not have been contemplated. The proliferation of social media, has made it easier to connect with the public, solicit feedback from constituents, and promote idea sharing within our communities. Because of these benefits, social media has become the modern 'community meeting.' Our local agencies support civic engagement. However, under current law, it is possible that civic engagement on social media is being hampered by a fear of unintentionally violating the law. Moving forward with this legislation will be a necessary step to modernizing the Brown Act. A clear rule in this area will allow a more transparent discussion between local agency officials and their constituents about issues facing local agencies.

"AB 992 recognizes this reality and creates clear guidance for local elected officials by setting the same standard as is currently in place under the community meetings exception to the Brown Act. The community meetings exception to the Brown Act allows a majority of the members of a local agency body to attend an open and publicized meeting held by another organization – such as a neighborhood association meeting, local candidates night, or service club meeting – to address a topic of local community concern. The exception does not permit a majority to discuss among themselves business of a specific nature that is within the legislative body's subject matter jurisdiction. Thus, the community meeting exception strikes an appropriate balance between encouraging the type of robust civic engagement that is necessary for a healthy democracy and ensuring that local agencies conduct the people's business openly and publicly. By employing the same language found in the community meetings exception to social media sites that are open and available to the public, AB 992 seeks to do the same.

"The League and CSDA recognize that, just as some members of a community may not have the resources necessary to attend community meetings, some members of a community will not be able to access social media. Given the resource limitations many members of our communities face, local agency officials should be encouraged to utilize as many channels of communication as possible to engage with their constituents. By utilizing diverse channels of communications, local agency officials can ensure that all members of a community can engage in local democracy, regardless of their socio-economic status. AB 992 promotes these efforts by ensuring that social media can be utilized as an additional forum for public discourse.

"Both Minnesota and Texas have adopted similar statewide approaches to provide clarity and guidance to local elected officials for their respective local government transparency laws. California local elected officials simply want statewide clarity and guidance, and to enhance civic engagement – recognizing that the use of social media by our residents will only continue to grow."

8) **Arguments in Opposition**. The California News Publishers Association (CNPA), in opposition, writes, "Despite AB 992's attempt to prevent a majority of members from conducting business that is within the subject matter jurisdiction of the agency, it is difficult to envision a situation where any social media communication involving a local official and which is responded to by other members that constitute a majority would not be a potential discussion of business. In prohibiting these discussions the bill also exempts certain communications from the prohibition in the definition of 'Discuss among themselves' which severely undermines the prohibition…Applying this standard to a five-member body, a response of two members to a tweet by a resident that references a communication made by a third member about an issue would be a permissible discussion because it would be a communication on a social media platform that 'does not directly respond to a communication made, posted, or shared by any other member of the legislative body.' Discussion, deliberation or action could thus be taken through the use of social media by the Board members and a member of the public whereas the same communication made on any other medium or platform would be prohibited by the serial meeting provision of the Brown Act.

"Similarly, assuming there is a body of five members, if one member posts on Facebook her position on an issue to be considered by the council and two other members respond with a like or a thumbs up icon, has consensus of a majority been reached? The answer is unclear but the exchange would be lawful because it was a communication 'made through the use of digital icons that express reactions to information, ideas, or opinions by others.' Rather than clarify how members of a legislative body could use social media in a way that is consistent with the principles of the Brown Act and Article I, Section 3 of the California Constitution, AB 992 seems to at best create more confusion or at worst, a roadmap to legally circumvent the serial meeting provision.

"The Legislature, in its wisdom, enacted the serial meeting provision of the Brown Act to prevent a majority of the members of a local agency from conducting the public's business outside of an open and public meeting. The social media exception proposed in AB 992 threatens to undermine this hallmark principle. Moreover, the proposed social media exemption also threatens to marginalize those in communities where internet access is intermittent or non-existent. Those who choose not to use social media at all could also be alienated, unaware of 'public discussions' via social media that could be important in understanding the development and shaping of local public policy before a formal vote of the legislative body.

"CNPA recognizes that social media is ubiquitous, enduring and a potentially effective tool for constituents to use to communicate with their elected officials. CNPA believes communities are well served when public officials and residents engage with each other openly and publicly. As outlined above, however, without being narrowed and clarified the existing language in the current bill fails to ensure that the public's business is conducted in public view. There needs to be a deliberate, thoughtful process involving all interested stakeholders to work through all of the issues associated with establishing a uniform social media policy. CNPA stands ready and willing to actively participate in that process. Unfortunately, though, AB 992 is not currently reflective of such an effort and is inconsistent with the mission of the Brown Act or the California Constitution."

REGISTERED SUPPORT / OPPOSITION:

Support

California Special Districts Association
Council Member Laura Parmer-Lohan, City of San Carlos
Councilmember Charles P. Stone, City of Belmont
Councilmember Sara McDowell, City of San Carlos
Councilwoman Giselle Halle, Redwood City
League of California Cities

Opposition

California News Publishers Association

Analysis Prepared by: Angela Mapp / L. GOV. / (916) 319-3958