

Admin.

December 21, 2004

Memorandum 2005-7

Recording of Commission Meetings

The Commission is in the process of switching to digital recording of its meetings. We received a letter from a member of the public urging that we make the digital recording files available on our website. This memorandum discusses the feasibility and advisability of providing copies of our meeting recordings to members of the public.

Current Practice

Commission meetings are open to the public and can be audio or video recorded by those in attendance. The Commission routinely tape records its meetings, as an aid to preparing the Minutes of the meeting. The tapes are erased and reused after the Minutes have been prepared.

On occasion, we have been asked for copies of one or more of the meeting tapes. Although we have no formal policy on providing duplicates of our tapes, we have tried to honor such requests when it has been feasible to do so. Requests for copies of the tapes have been rare in the past, but are becoming more common.

Digital Recording Files

The digital voice recorder stores audio as a series of computer data files. Those files can be transferred to the staff's desktop computers for playback, using proprietary software provided by the manufacturer of the recorder.

In theory, the recording files can be duplicated and transferred over the Internet, enabling anyone with the proper playback software to listen to the recordings on their own computers. In practice, this poses two problems:

- *File size.* At the best recording quality level, the recording files require 500 kilobytes of storage for every minute recorded. That means that a 60 minute recording would use 30 megabytes of storage space. A file that size is too large to be sent by email or posted to our website for download. The files from an eight hour meeting would occupy about half of all of the storage space we currently have available on our Internet server. A recording of a two-day meeting would exhaust our server capacity. File size can

be reduced considerably, but this results in a corresponding reduction in recording quality. We do not yet have enough experience with the system to know the optimum trade-off between sound quality and file compression. In making this determination, we should not undercut the primary purpose of recording (the preparation of Minutes) in order to facilitate a secondary use (public distribution).

- *Format incompatibility.* The data files are stored in a proprietary format that can only be played on software provided by the manufacturer. We obtained copies of the software on purchase of the recording devices. The software license agreement prohibits us from redistributing the software. As a result, most people will not have the means of playing the recording files back.

In short, the files will be of no use to most members of the public, but it would take most of our Internet storage capacity to make them available on the web. A person with a slower connection speed would find it difficult to download such large files. For those reasons, the staff recommends against posting the files to the Internet.

One alternative would be to make copies for individuals who request them, by burning the files to a compact disk. That would not be too difficult. It is our current practice to provide large documents on compact disk, on payment of a small fee to cover the costs of reproduction. That practice could be extended.

Chilling Effect

Our meetings are open and, under existing law, can be recorded by anyone in attendance. Those who participate in Commission deliberations should expect that their comments might be noted and circulated more broadly. However, our deliberative process depends on a free flowing and frank exchange of views. If meeting participants are worried about an unguarded statement being used against them, they may be less forthcoming.

Digital recording may increase that risk. Computer files can be copied and distributed widely, with very little effort (much more easily than cassette tapes). They can be edited, with clips taken out of context, resulting in intentional or unintentional distortions. The Commission should consider whether distribution of meeting recordings might have a chilling effect on public participation in our process.

Legal Requirements

The Bagley-Keene Open Meeting Act requires that we permit *inspection* of our recordings, on equipment provided for that purpose, but it allows destruction of the recordings 30 days after they are made:

Any tape or film record of an open and public meeting made for whatever purpose by or at the direction of the state body shall be subject to inspection pursuant to the California Public Records Act (Chapter 3.5 (commencing with Section 6250) of Division 7 of Title 1), but may be erased or destroyed 30 days after the taping or recording. Any inspection of an audio or video tape recording shall be provided without charge on an audio or video tape player made available by the state body.

Gov't Code § 11124.1(b).

While the Public Records Act requires an agency to provide copies of records on request, Section 11124.1 makes no mention of providing copies. Only the Public Record Act's inspection rights are specifically referenced. Does Section 11124.1 require that copies of recordings be provided? Probably not.

There is no case law interpreting Section 11124.1 (or its Brown Act analog, Government Code Section 54953.5). However, under established rules of statutory interpretation, a specific statute controls over a more general one. In this case, Section 11124.1 provides a rule for a very specific type of record (i.e., a recording of a public meeting). This specific rule was probably meant to supersede the rules for public access to government records generally.

That makes sense given the limited purpose for which meetings are recorded — as a temporary aid to the preparation of minutes, rather than to create a permanent record. Meeting recordings are analogous to preliminary notes that are not retained in the ordinary course of business. Such notes are generally exempt from disclosure under the Public Records Act. Gov't Code § 6254(a).

Statutory construction is also guided by the principle that a statute means what it says and nothing more (“*expressio unius est exclusio alterius*” — the expression of one thing is the exclusion of another). The Legislature is presumably aware that the Public Records Act provides for inspection and duplication of records, but Section 11124.1 only provides for inspection. The statute goes on to state a specific method of inspection (“on an audio or video tape player made available by the state body”). This very specific incorporation of just one of the rights provided by the Public Records Act probably signals an intention to exclude those rights that are not expressed (i.e., the right to a copy).

Alternatives

There are a number of ways we might choose to proceed:

- (1) *Discontinue recording.* We are not required to record our meetings. We could instead take detailed notes for use in preparing the Minutes. This would be less convenient and accurate, but would avoid the issue of providing duplicates. As noted above, preliminary notes are generally exempt from disclosure under the Public Records Act. Gov't Code § 6254(a).
- (2) *Continue to use the tape recorder.* We could continue to record meetings in the ubiquitous cassette tape format. That would avoid any computer storage issues. Note, however, that our current practice of providing duplicate tapes is really only feasible because of the relative infrequency of requests for duplicates. Recent months have seen an increase in requests. If that trend continues, it may become impractical to continue honoring those requests. Even if it is feasible to provide copies, the Commission might wish to discontinue the practice if it concludes that distribution of copies could have a chilling effect on public participation in our process.
- (3) *Allow inspection but not copying of digital recording files.* Consistent with Section 11124.1(b), we could make files available for inspection on our equipment for 30 days (after which the files would be erased). Copies of files would not be provided.
- (4) *Provide copies of digital recording files to individuals who request them.* Internet posting or distribution of files is not feasible. However, we could provide copies of files on compact disks for individuals who request them within the 30 days before they are erased. Demand would probably be small, considering that the files can only be played back on specialized software provided by the manufacturer.

The staff prefers the third or fourth alternatives.

Obsolete Statutory References

The Open Meeting Act, like many other statutes, includes references to "tape" recording that are technically obsolete when applied to digital recording technology that does not use "tape." Similar problems may exist with respect to photographic "film" or "negatives." This would seem to be an area in which the law could use some modernization. It would probably fall within our general authority to "study and recommend revisions to correct technical or minor substantive defects in the statutes of the state without a prior concurrent resolution of the Legislature referring the matter to it for study" (Gov't Code § 8298) or under our current resolution of authority, which authorizes study of matters relating to public records law (2003 Cal. Stat. res. ch. 92).

This strikes the staff as an ideal student project. It would be technical, but somewhat interesting. Very little Commission time would be involved. The staff requests authorization to assign this project to a student assistant on a low-priority basis (i.e., if it can be done without delaying any of our other pending projects that may also benefit from student assistance). Is that acceptable?

Respectfully submitted,

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