

Admin.

August 24, 2017

## Memorandum 2017-40

**Public Records and Open Meeting Practices**

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At its August 2017 meeting, the Commission<sup>1</sup> discussed whether to adjust its communication practices to better accommodate *City of San Jose v. Superior Court*, 2 Cal. 5th 608 (2017) (holding that “when a city employee uses a personal account to communicate about the conduct of public business, the writings may be subject to disclosure under the California Public Records Act.”).<sup>2</sup>

The Commission made the following decisions:

- Commissioners and staff should not use text messaging or social media to conduct substantive Commission business.
- Commissioners should segregate any email messages they send or receive relating to Commission business (other than messages from the staff), by placing such messages into a separate folder.
- Within a reasonable time after a Commissioner’s term ends, the Commissioner shall forward that email folder to the staff for safekeeping.
- The staff should continue to prepare an annual memorandum on open government laws, for training purposes.<sup>3</sup>

In addition, the Commission directed the staff to prepare implementing language for inclusion in the Commission’s *Handbook of Practices and Procedures*.<sup>4</sup> Draft language is presented below for the Commission’s review.

On a somewhat related point, Chairperson Lee raised an issue relating to the Commission’s current practice in creating meeting agendas.<sup>5</sup> That issue is discussed further below.

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1. Any California Law Revision Commission document referred to in this memorandum can be obtained from the Commission. Recent materials can be downloaded from the Commission’s website ([www.clrc.ca.gov](http://www.clrc.ca.gov)). Other materials can be obtained by contacting the Commission’s staff, through the website or otherwise.

The Commission welcomes written comments at any time during its study process. Any comments received will be a part of the public record and may be considered at a public meeting. However, comments that are received less than five business days prior to a Commission meeting may be presented without staff analysis.

2. *City of San Jose*, 2 Cal. 5th at 614.

3. Minutes (Aug. 2017), p. 4.

4. *Id.*

5. *Id.* at p. 3.

All statutory references in this memorandum are to the Government Code.

## ELECTRONIC COMMUNICATION PRACTICES

The Commission's *Handbook of Practices and Procedures* includes the following provisions on communications:

### 2.5. COMMUNICATIONS TO COMMISSION

2.5.1. Confidential communication to Commission

2.5.2. Anonymous communication to Commission

2.5.3. Communication to Chairperson or to individual Commissioner

2.5.4. Reproduction of written communication to Commission

The staff believes that this would be the most natural location for a new provision on electronic communications, along these lines:

#### **2.5.5. Electronic communications**

Commissioners and members of the staff shall not use text messaging or social media to send or receive a message that relates to the conduct of the Commission's business.

Members of the staff should only use an official account to send or receive email messages that relate to the conduct of the Commission's business. In the event that a staff member uses a personal account for such a purpose, the staff member shall forward a copy of the message to an official account.

If a Commissioner uses a personal account to send or receive an email message that relates to the conduct of the Commission's business, the Commissioner shall store the message in a location that is used exclusively for that purpose. When a Commissioner's term of service ends, the Commissioner shall forward all such messages to the Executive Director for retention.

For the purposes of this provision, "official account" means an email account within the domain "clrc.ca.gov." "Personal account" means any email account that is not an official account.

The Commission's annual memorandum discussing "Open Government Laws" shall reiterate these practices.

The language "relates to the conduct of the Commission's business" was chosen to directly parallel the CPRA's definition of "public record:"

"Public records" includes any writing containing information relating to the conduct of the public's business prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics. "Public records" in the custody of, or maintained by, the Governor's office means any writing prepared on or after January 6, 1975.<sup>6</sup>

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6. Section 6252(e) (emphasis added).

Paralleling the statutory language, rather than attempting to describe its scope, avoids difficult line-drawing problems and ensures that the provision is fully compatible with the requirements of the CPRA. However, Commissioners and staff should bear in mind the California Supreme Court's recent statement that

to qualify as a public record under CPRA, at a minimum, a writing must relate in some substantive way to the conduct of the public's business. This standard, though broad, is not so elastic as to include every piece of information the public may find interesting. Communications that are primarily personal, containing no more than incidental mentions of agency business, generally will not constitute public records./4/

/4/ We recognize that this test departs from the notion that "[o]nly purely personal" communications "totally void of reference to governmental activities" are excluded from CPRA's definition of public records. ... While this conception may yield correct results in some circumstances, it may sweep too broadly in others, particularly when applied to electronic communications sent through personal accounts.<sup>7</sup>

Thus, there is a good argument that a brief nonsubstantive text message or email that merely touches on Commission business (e.g., "Flight delayed. Will take separate cab.") would not be a "public record" subject to disclosure under the CPRA.

The proposed *Handbook* provision set out above is not expected to apply to such fleeting and nonsubstantive communications. However, the staff did not attempt to describe that limitation in the provision itself. Instead, Commissioners and staff should exercise their judgment about whether a communication "relates to the public's business" sufficiently to be a "public record," *erring on the side of caution*. (The above discussion could be reiterated in the Commission's annual "Open Government Laws" memorandum, as a reminder of the Court's construction.)

**The Commission needs to decide whether to include the provision set out above (proposed Rule 2.5.5) in its *Handbook of Practices and Procedures*, with or without changes.**

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7. *City of San Jose*, 2 Cal. 5th at 619-20 & n.4.

## MEETING AGENDA

### Background

Government Code Section 11125 requires that state bodies provide advance notice of public meetings. The notice must include a “specific agenda” that describes the business to be transacted at the meeting:

The notice of a meeting of a body that is a state body shall include a *specific agenda* for the meeting, containing a *brief description* of the items of business to be transacted or discussed in either open or closed session. *A brief general description of an item generally need not exceed 20 words.* A description of an item to be transacted or discussed in closed session shall include a citation of the specific statutory authority under which a closed session is being held. No item shall be added to the agenda subsequent to the provision of this notice, unless otherwise permitted by this article.<sup>8</sup>

Commission Chairperson Lee received input from Department of Justice counsel, suggesting that the Commission consider providing more detail in its agenda item descriptions.

In general, it is the Commission’s practice to list agenda items by reference to the title of the memorandum that will be discussed (which includes a reference to the corresponding study title). For example, the agenda for the Commission’s September 28, 2017, meeting includes the following two items:

#### **Disposition of Estate Without Administration [L-4130]**

**Discussion of Issues**  
Memorandum 2017-47

#### **Relationship Between Mediation Confidentiality and Attorney Malpractice and Other Misconduct [Study K-402]**

**Public Comment on Tentative Recommendation**  
Memorandum 2017-51 (BG) (to be sent)

**Analysis of Public Comment on Tentative Recommendation**  
Memorandum 2017-52 (BG) (to be sent)

Those agenda items will be used as illustrative examples in the discussion that follows.

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8. Section 11125(b) (emphasis added).

## Degree of Specificity Required

Section 11125 requires that each agenda item be given a brief general description, which generally need not exceed 20 words.<sup>9</sup> The 20-word specification provides useful guidance on the degree of brevity and generality that the Legislature intended. The required degree of specificity has also been addressed by the courts and the Attorney General.

In *San Diegans for Open Government v. City of Oceanside*,<sup>10</sup> which construes the parallel agenda specificity provision of the Ralph M. Brown Act, the court begins by noting that

an agency fulfills its agenda obligations under the Ralph M. Brown Act so long as it substantially complies with statutory requirements. “Substantial compliance ... means actual compliance in respect to the substance essential to every reasonable objective of the statute.”<sup>11</sup>

The court described the overall objective of the Ralph M. Brown Act as follows:

When the Legislature enacted the Ralph M. Brown Act, it declared that “the public commissions, boards and councils and the 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.”<sup>12</sup>

The court then explained the function of the agenda specificity requirement in achieving the Act’s overall objective:

In order to fully protect the people’s right to be informed, the Ralph M. Brown Act, by its terms, requires the agenda of a regular meeting of a local agency, such as the city council, be posted 72 hours before the meeting commences and contain “a *brief general*

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9. The same general requirement applies to local government entities. See Section 54954.2(a)(1) (“At least 72 hours before a regular meeting, the legislative body of the local agency, or its designee, shall post an agenda containing a *brief general description* of each item of business to be transacted or discussed at the meeting, including items to be discussed in closed session. A *brief general description of an item generally need not exceed 20 words.*”) (emphasis added).

10.4 Cal. App. 5th 637 (2016).

11. *Id.* at 642-43 (citations and internal quotations omitted).

12. *Id.* at 643 (citation omitted).

*description of each item of business to be transacted or discussed at the meeting, including items to be discussed in closed session. A brief general description ... need not exceed 20 words.”*<sup>13</sup>

Addressing the degree of specificity required, the court concluded:

Although there is not a great deal of direct authority with respect to what satisfies the Ralph M. Brown Act’s requirement of a “brief general description” of items to be considered by a local agency, we can discern from the statute itself, cases discussing the statute as well as closely related statutes, and other authority, a general principle that agenda drafters must give the public a fair chance to participate in matters of particular or general concern by providing the public with more than mere clues from which they must then guess or surmise the essential nature of the business to be considered by a local agency.<sup>14</sup>

The court further observed that, “so long as notice of the essential nature of the matter an agency will consider has been disclosed in the agency’s agenda, technical errors or immaterial omissions will not prevent an agency from acting.”<sup>15</sup>

The Attorney General reached a similar conclusion regarding the “specific agenda” language in Section 11125, after discussing a case that construed a parallel provision that governs school board meetings:<sup>16</sup>

“Decisions of local governing bodies of school districts may directly affect parents and teachers alike, as well as the students themselves. Thus, it is imperative that the agenda of the board’s business be made public *and in some detail* so that the general public can ascertain the nature of the business. It is a well-known fact that public meetings of local governing bodies are sparsely attended by the public at large *unless* an issue vitally affecting their interests is to be heard. *To alert the general public to such issues, adequate notice is a requisite....*” (First and Third emphases are added.)

By the same token, where the law clearly provides that certain members of the public are *entitled* to be apprised of some or all of a state body’s business in advance, “adequate notice is a requisite.” To make notice meaningful, a state agency must set forth an agenda item “in some detail.”

Furthermore, we note that section 11125 as originally enacted merely provided for the preparation and dissemination of an “agenda.” (See Stats. 1967, ch. 1656, § p. 4026.) In 1981, when the section was amended to its present form, the Legislature *added* the

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13. *Id.* at 643 (citation omitted) (emphasis in original).

14. *Id.*

15. *Id.* at 644-45.

16. *Carlson v. Pasadena Unified Sch. Dist.*, 18 Cal. App. 3d 196, 199-200 (1971).

adjective “specific” to the agenda requirements. In Webster’s Third New International Dictionary, Unabridged (1961), the pertinent definition of the word “specific” is:

“... 4a: characterized by precise formulation or accurate restriction...: free from such ambiguity as results from careless lack of precision or from omission of pertinent matter....”<sup>17</sup>

Taking those authorities together, it appears that Section 11225 requires that a state body describe its agenda items with sufficient specificity to allow the public to “ascertain the nature of the business” to be transacted. The agenda must give more than “mere clues” from which the public must “guess or surmise” the “essential nature” of the matters to be addressed at a meeting.

### **Commission Practice**

As noted above, the Commission’s general practice is to describe agenda items by reference to the title of the corresponding memorandum and study. The exception is for oral presentation items that do not have an associated memorandum, such as the Executive Director’s Report; those agenda items have a fuller textual description.

A memorandum title is generally adequate to convey the essential nature of the matters to be addressed in an agenda item. For example, the full title of Memorandum 2017-52 is:

Relationship Between Mediation Confidentiality and Attorney Malpractice and Other Misconduct; Analysis of Public Comment on Tentative Recommendation

That title is already 17 words long, just three short of the 20-word length specified in Section 11125. In the staff’s view, it provides a very clear description of the matter to be addressed.

Some practical considerations involved in describing Commission agenda items are discussed below.

#### *Unpredictable Content*

It is sometimes impossible to predict precisely which issues will be discussed in a memorandum. For example, we know that Memorandum 2017-52 will be an analysis of public comments, but we do not know the specific issues that will be raised in the public comments — *because we have not yet received them*. The general

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<sup>17</sup> 67 Ops. Cal. Atty. Gen. 84 (emphasis in original).

descriptor “analysis of public comments” was as specific as could be achieved when the agenda was drafted.

Often, the staff will have a general sense of the specific issues that will be addressed in a memorandum, but cannot predict whether all of those issues will be included in the final version of the memorandum. For example, Memorandum 2017-47 (“Disposition of Estate Without Administration; Discussion of Issues”) could include any of a dozen subtopics that fall within the scope of the study. If all of those subtopics turn out to be straightforward, it might be possible to include all of them in the final memorandum. The agenda should not foreclose that possibility. But it is more likely that one or more of the issues will turn out to be complicated and time-consuming. In that case, some of the other issues will need to be omitted from the memorandum (to be taken up later). Conversely, research and analysis of an anticipated issue may reveal an unanticipated issue that turns out to be important and needs to be included in a memorandum. Again, the agenda should not be so specific as to limit necessary flexibility.

In such circumstances, the best approach is to provide a “brief general description” of an agenda item (as the statute requires), rather than trying to detail all of the subordinate issues that might be included in the discussion. This gives the public enough information to determine the “essential character” of the agenda item, while preserving the Commission’s flexibility as to subordinate issues.

#### *Omnibus Content*

As noted above, an agenda item will often address a multitude of discrete issues relating to a single broad topic. For example, as noted above, the broad subject addressed by Memorandum 2017-47 — technical issues relating to disposition of an estate without administration — is expected to include around a dozen distinct subtopics (adjusting an interest rate, adjusting a dollar threshold for the application of certain procedures, and making several minor technical changes to the rules for valuing property in different circumstances).

The level of detail required to describe all of those subtopics would far exceed what could be accomplished in 20 words.

#### *Memoranda as an Extension of the Agenda*

The Commission’s agenda items are tied to specific memoranda. The online agenda includes embedded download links for every memorandum. Any member of the public who looks at the agenda online and is unsure of the scope



of a particular agenda item can simply click through to the associated memorandum. The first one or two pages of the memorandum will provide a clear overview of the topic of the memorandum. The pages that follow will provide exhaustive detail.

In a sense, the online agenda can be understood as a hypertext document, which includes embedded links to expand the description of the agenda items. Viewed that way, a Commission agenda already provides greater descriptive detail than the statute requires, readily available to a reader who desires more information than is provided by the memorandum and study titles.

While it is true that the *hard copy* agenda does not provide the same easy access to the associated memoranda, Internet access is now ubiquitous. It should be simple for a person reading a hard copy agenda to locate and download the associated memoranda.

Moreover, the Commission has almost entirely moved away from reliance on hard copy agendas. Relatively few people receive a hard copy, and those who do are all people who have requested a hard copy of Commission materials in a specific study area (or been invited by staff to receive such material). These hard copy subscribers are typically sophisticated consumers of the Commission's work, with a specific interest in a particular study or study area. They usually receive hard copies of the memoranda referenced in the hard copy agenda. They should have no difficulty determining the essential nature of matters on the Commission's agendas.

## **Alternatives**

The staff sees the following alternative ways of describing agenda items:

- (1) **Continue the existing practice.** The Commission currently provides brief general descriptions of every agenda item, by setting out the titles of the associated memoranda and studies. These titles should be adequate to convey the "essential nature" of the business to be conducted. It is often impracticable to provide more than a brief general description (and the statute does not seem to require it). Moreover, the associated memoranda serve as a readily accessible extension of the agenda, providing far more detail than the statute requires. Note also that, to the staff's knowledge, the Commission has never before received a complaint about insufficient specificity in the Commission's agendas.
- (2) **Provide more detail in memorandum titles.** The staff could make an effort to provide more descriptive detail in memorandum and study titles. For example, "Disposition of Estate Without

Administration; Discussion of Issues” could be recast as “Disposition of Estate Without Administration — Technical and Minor Substantive Issues; Discussion of Issues.” That would give a reader slightly more of a sense of the specific focus of the agenda item.

- (3) **Add descriptive blurbs.** In addition to memorandum titles, the staff could add a descriptive blurb for each agenda item. For example: “The Commission will consider various technical and minor substantive issues relating to the existing statutes on the disposition of a decedent’s estate without administration.” The staff anticipates that this would involve significant redundancy.

**How would the Commission like to proceed?**

Respectfully submitted,

Brian Hebert  
Executive Director