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March 16, 2021

VIA ELECTRONIC MAIL

City of Davis Commissioners
23 Russell Boulevard
Davis, CA 95616

Re: **Summary of AB 992: The Brown Act and Social Media**

City of Davis Commissioners:

The purpose of this letter is to inform you about changes to the Brown Act, relevant to your use of social media platforms, which went into effect on January 1, 2021.

AB 992, signed by Governor Newsom, amends the Ralph M. Brown Act ("Brown Act") at Government Code section 54952.2 to address the use of social media by members of a legislative body. Prior to AB 992, the Brown Act was silent regarding social media and its use by members of a legislative body. This led to uncertainty as to whether certain uses of social media could result in unintended violations of the Brown Act. The new bill clarifies certain allowable uses of social media and provides guidance for applying the principles of the Brown Act to social media. Unfortunately, it also raises some new questions regarding what constitutes an "internet-based social media platform." Hopefully, additional guidance will come regarding the application of the law in the next year or two.

As you know, under the Brown Act, meetings of legislative bodies must be open and properly noticed unless a specific exception applies. The Brown Act defines a "meeting" as any congregation of a majority of the members of a legislative body at the same time and location to hear, discuss, deliberate, or take action on any item that is within the subject matter jurisdiction of the legislative body. Members are also prohibited 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. These types of interactions are often referred to as "serial meetings." As use of social media has grown more prevalent as a way of communicating with constituents and sharing information, we have been concerned that some social media interactions could be considered an illegal or serial meeting if multiple members are "interacting." The difficulty came with determining what could be considered a "communication" for purposes of complying with the Brown Act.

AB 992 amends the Brown Act to specify that a member of a legislative body may engage 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.

Importantly, however, under AB 992, ***two*** members of the legislative body are prohibited from using an internet-based social media platform to discuss among themselves their public agency's business. To that end, you are now **prohibited from responding directly to any communication on an internet-based social media platform regarding a matter that is within the subject matter jurisdiction of your Commission that is made, posted, or shared by any other member of your Commission**. This means that **Commissioners cannot "like," "retweet," "share" or otherwise react to a post made by another Commissioner that touches on topics within the subject matter jurisdiction of their Commission.** This prohibition applies to interactions between just two Commissioners, which is a unique element since an interaction between two Commissioners in person (or through another medium) would not otherwise be prohibited under the Brown Act.

This seems clear enough in the context of Facebook or Twitter, but the specific language of AB 992 raises some interpretive questions. "Internet-based social media platform" is defined by the bill to include any "online service that is open and accessible to the public." "Open and accessible to the public" is further defined to mean that "members of the general public have the ability to access and participate, free of charge, in the social media platform," with the only requirement for entry or membership being compliance with platform protocols and rules. The bill was clearly intended to include Facebook, Twitter, LinkedIn, and other platforms commonly referred to as "social media." It also includes forums and chatrooms that are accessible to members of the public. On the other hand, it does ***not*** appear to include sites like NextDoor that impose additional requirements (residency) on participants, private Facebook "groups," closed chat areas, or other internet sites that are not open to the public free of charge.

In addition, the bill prohibits "responding directly" to a post by another Commissioner or engaging in "discussion" on a topic that relates to the subject matter jurisdiction of the Commission. It does not appear to expressly prohibit Commissioners from separately responding to a communication regarding the Commission's subject matter jurisdiction that was posted by someone who is not a Commissioner as long as they avoid any "discussion" with each other. Until further clarification is provided on this requirement, **we would discourage Commissioners from engaging in any kind of back and forth conversation on a social media site related to the Commission's subject matter jurisdiction** if even one other Commissioner is also participating, as the risk of appearing to "respond directly" to another Commissioner is high.

Another question is whether local internet news sites or blogs constitute "internet-based social media platforms." Generally speaking, a news site that allows a member of the public to read a

certain number of posts for free before "paywalling" additional content probably would not be considered "free of charge" or subject to AB 992. Blogs are more difficult to analyze, as they do offer their content for free. Without additional guidance from the legislature, Attorney General, or courts on this point, it would be best to assume that the "comments" fields on news sites or blogs could be considered "social media" for the purposes of AB 992.

While AB 992 certainly raises some new questions regarding the definition of "social media," the main takeaway for Commissioners is that while social media posting is allowed, Commissioners cannot interact with the posts of other members on topics within the subject matter jurisdiction of their respective Commissions.

In those realms where AB 992 does not apply because an internet site does not meet the definition of "internet-based social media platform," please note that general Brown Act principles *do* still apply, and Commissioners should avoid any discussions that include a quorum of their respective Commissioners. As a best practice, it is a good idea to avoid engaging in back and forth with other Commissioners on any internet site, as it could create an appearance of impropriety and draw criticism from members of the public who are not well-versed in the specific language of AB 992 or the definition of "internet-based social media platform."

These revisions went into effect on January 1, 2021 and will remain in effect only until January 1, 2026, unless otherwise extended by the Legislature.

If you have any questions about AB 992, please do not hesitate to contact me.

Very truly yours,

Inder Khalsa

Inder Khalsa,
City Attorney