



February 2016

WEBSITE GLITCHES AND AGENDA POSTING

The California Attorney General has issued an opinion providing limited guidance on the question of what a local agency must do if its electronic agenda posting fails for some period of time before the scheduled meeting.¹ Looking through the lens of encouraging public participation and the "substantial compliance" doctrine, the Attorney General concludes that "fleeting or trivial technical issues" will not typically require cancellation of meetings. The opinion does not provide a justification for holding a meeting where the agenda has not been posted electronically at all.

BROWN ACT PROVISIONS —

The Brown Act requires the posting of a written agenda in advance of a board meeting (72 hours for regular meetings, 24 hours for special meetings). The Act requires that the agenda be physically posted at a location freely accessible to the public. In 2011, the Legislature added a requirement that the agenda also be posted electronically on a district's website if it maintains one.² The physical posting requirement has been interpreted to require continuous posting during the required notice period before the meeting.³

The agenda must contain a brief general description of each item of business to be transacted or discussed at the meeting. With very limited exceptions, no action can be taken on matters not listed on a timely-posted agenda. If a board were to take action at a meeting which was not properly noticed and posted, a member of the public or district attorney would have the right to bring an action seeking to have the action declared null and void and to recover attorneys' fees from the district if successful.

¹ California Attorney General Opinion No. 14-2013 (January 19, 2016).

² Government Code sections 54954.2, 54956. Prior to the 2011 legislation, electronic posting was mentioned in the Brown Act, but was optional.

³ 78 Opinions of the California Attorney General 327 (1995).

The relatively new provision in the Brown Act on electronic posting raises many questions, such as whether the failure of an electronic portion for a period of time prior to the meeting should trigger a Brown Act violation where, for example, the failure is caused by a power failure, cyberattack or other third party interference.

THE ATTORNEY GENERAL'S POSITION –

The Attorney General first reviewed the issue in light of the purpose of the posting requirement, to encourage public participation in local agency meetings. The opinion points out that a strict interpretation may cause needless rescheduling of meetings for trivial website issues, and might induce some agencies to discontinue their websites, all of which would not promote the Brown Act's goal of fostering public participation. The opinion also reviews the doctrine of "substantial compliance" contained in the Act, which states that actions taken in violation of certain provisions of the Act will not be invalidated if taken in substantial compliance with specified provisions of the Act, including the provisions governing electronic agenda posting.⁴

The Attorney General concludes that the agenda posting requirements are "not necessarily" violated when a local agency's website experiences technical difficulties that make the agenda inaccessible for a portion of the posting period. The opinion stresses that a fact-specific examination of whether the agency made reasonably effective efforts to notify interested persons of the meeting would be required, including consideration of how long the technical problem persisted, efforts made to correct it or otherwise ensure the public is informed, and the actual effect on public awareness. The Attorney General summed up by saying "we are confident that fleeting or trivial technical issues will not typically require the cancellation of meetings."

THINGS TO CONSIDER –

This guidance is to be applied on a case-by-case basis. This opinion does not provide support for what appears to be the more common problem – when for whatever reason, the agenda was not electronically posted at all. Whether this is a result of inadvertence or a technical problem or cyberattack, it would normally be hard to argue "substantial compliance" in that instance especially given that the public in many communities now relies on website postings to keep informed in the timing and content of Board meetings.

If the failure of electronic posting was only a partial one, boards should consult with legal counsel to help analyze the circumstances and provide guidance on whether the failure could truly be considered "trivial" within the meaning of the Attorney General's opinion. Where the website is down for a period of time such that people attempting to ascertain meeting details would not reasonably have the necessary information to decide whether their attendance is important, it may be difficult to argue "substantial compliance."

There may be circumstances where it is important that the board consider proceeding based on a "trivial failure" theory (where, for example, the availability of board members is an issue

⁴ Government Code section 54960.1(d)(1).

or because of the importance or timing of issues to be handled at the meeting). Boards will need to weigh this with the enhanced protection from potential challenge that flows from refraining from holding the meeting and handling the business at a future meeting. If the meeting was a regular meeting, any agenda items not required to be approved at a regular meeting could be made the subject of a special meeting, which could be scheduled on as little as 24 hours' notice.

If you have any questions or need further information concerning this or related issues, do not hesitate to contact our office.

– Grant Herndon

Education Law Updates are intended to alert clients to developments in legislation, opinions of courts and administrative bodies and related matters. They are not intended as legal advice in any specific situation. Please consult legal counsel as to how the issue presented may affect your particular circumstances.