EAST BAY MUNICIPAL UTILITY DISTRICT
Office of General Counsel

DATE: March 13, 2025

MEMO TO: Board of Directors

THROUGH: Derek McDonald, General Counsel

FROM: Lourdes Matthew, Assistant General Counsel

SUBJECT: Social Media Use Guidelines Update

SUMMARY

The Office of General Counsel (OGC) presented the Board with the annual Brown Act and Ethics Update on February 11, 2025. As a follow up to the presentation, this memorandum provides the Board with updated guidelines regarding the Brown Act provisions governing social media use by members of the Board.

The memorandum also provides examples applying the Brown Act provisions to particular situations and includes a discussion of constitutional considerations when engaging in certain social media activities.

DISCUSSION

<u>Brown Act Provisions Regarding Social Media Use by Members of a Legislative Body</u>

On September 18, 2020 California Governor Gavin Newsom signed Assembly Bill (AB) 992 into law. AB 992 took effect on January 1, 2021 to effectuate the legislative intent "to ensure the free flow of communications between members of a legislative body of a local agency and the public, particularly on internet-based social media platforms."[1] There has been virtually no guidance from the courts in construing the provisions of AB 992 since its enactment.

The Brown Act generally provides: "[a] majority of the members of a legislative body shall not, outside a meeting authorized by this chapter, 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."[2]

AB 992 clarified that this general rule shall not be construed as "preventing a member of the legislative body from engaging in separate conversations or communications on an internet-

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[1] AB 992 Sections 3 and 4.
[2] Cal. Gov. Code § 54952.2(b)(1).

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 ***provided that*** a majority of the members of the legislative body do not use the internet-based social media platform to discuss among themselves business of a specific nature that is within the subject matter jurisdiction of the legislative body."[3]

"Internet-based social media platform" means an online service that is open and accessible to the public.[4]

"Open and accessible to the public" means that members of the general public have the ability to access and participate, free of charge, in the social media platform without the approval by the social media platform or a person or entity other than the social media platform, including any forum or chatroom, and cannot be blocked from doing so, except when the internet-based social media platform determines that an individual violated its protocols or rules.[5]

"Discuss among themselves" means communications made, posted, or shared on an internet-based social media platform between members of a legislative body, including comments or use of digital icons that express reactions to communications made by other members of the legislative body.[6]

AB 992 also expressly provides that "[a] member of the legislative body shall not respond directly to any communication on an internet-based social media platform regarding a matter that is within the subject matter jurisdiction of the legislative body that is made, posted, or shared by any other member of the legislative body."[7]

Typical and well-known social media platforms include Facebook, Instagram, X (formerly Twitter), YouTube, and LinkedIn. Social media platforms generally allow a user to elect to make their accounts public or private. Users may post information, personal views or opinions, and may react to other users' posts. Posts may include texts, videos, links to other posts, and pictures, among other things. There are a number of variations in which social media may be used. Below are examples of possible and foreseeable uses of social media by Board members; however, an analysis of compliance with the Brown Act requires careful examination of the details.

[3] Cal. Govt. Code § 54952.2(b)(3)(A) (emphasis added).
[4] Cal. Govt. Code § 54595.2(b)(3)(B)(ii).
[5] Cal. Govt. Code § 54952.2(b)(3)(B)(iii).
[6] Cal. Govt. Code § 54952.2(b)(3)(B)(i).
[7] Cal. Govt. Code § 54952.2(b)(3)(A).

Permitted Uses and Specific Examples

The provisions in the Brown Act governing social media use provide that a member of the Board would not be prevented from engaging in separate communications or conversations on social media regarding a matter within the subject matter jurisdiction of the legislative body to: (1) answer questions; (2) provide information to the public; or (3) solicit information from the public.

Permitted uses could include the following hypothetical scenarios:

- A Board member may use a social media account to communicate with their constituents to provide information about the District, such as upcoming Board meetings, information about ward briefings, a link to the recording of a Board meeting on YouTube, and a myriad of other District-related information.

- A Board member could respond to a question on the Board member's social media account from a customer regarding a matter within the District's subject matter jurisdiction. For example, if a customer posts a question about the eligibility requirements for the District's Customer Assistance Program (CAP) on a Board member's Facebook page, the Board member may reply to the customer in the comment section with a link to the information on the District's website.

- A Board member would be permitted to post an invitation on their social media page to their followers for feedback about their ideas for improvements of District services.

- A Board member could post or share a post by another local agency. For example, the Board consists of Board Members A, B, C, D, E, F, and G. Board member D may share a post from the City of Oakland providing information about the City's upcoming Running Festival and Foot Race along with information that the District's Water on Wheels will be present and that the District will have a booth providing information on water conservation programs at the event.

    - Under this scenario, all seven members may share the City's post as long as there is no discussion among a majority of the Board members, in which they express reactions to the communications of other Board members, and as long as the Board members do not directly respond to any other Board members. Under this scenario, none of the Board members may share Board member D's post, but they may share the City's post.

- A majority of the Board members can express on their social media accounts that they like or dislike a particular movie or local sports team, as long as the topic is not within the District's subject matter jurisdiction.

- The Board consists of members A, B, C, D, E, F, and G. Board member F posts a picture of their labrador retriever on Instagram without any commentary. A majority of the Board may like the post because Board member F's pet is not within the District's subject matter jurisdiction.

- An employee posts about their complaints against the District on YouTube. All seven Board members view the post, but none comment or express a reaction to the complaint. Under this scenario, the Board members have not committed a Brown Act violation; even though they all may have viewed a post that is within the District's subject matter jurisdiction, none have engaged in a discussion.

Prohibited Uses and Specific Examples

Discussion Among Themselves

The Brown Act prohibits a majority of the Board members from using social media to discuss among themselves business of a specific nature that is within the District's subject matter jurisdiction. Discussion in this context means communications made, posted, or shared on social media between members, including comments or digital icons that express reactions to communications made by other members of the Board.

Directly Responding to Each Other

The Brown Act also prohibits a member of the Board from directly responding to any communication on social media regarding a matter that is within the District's subject matter jurisdiction that is made, posted, or shared by any other member of the Board.

Prohibited uses could include the following hypothetical scenarios:

- Board member D shares a post from the City of Oakland providing information about the City's upcoming Running Festival and Foot Race along with information that the District's Water on Wheels will be present and that the District will have a booth providing information on water conservation programs at the event. Board member C likes Board member D's post. Board member C has violated the Brown Act because they have directly responded to Board Member's D's post, which concerns a matter within the District's subject matter jurisdiction (the Water on Wheels and water conservation program).[8]

[8] As discussed above, even though only one Board member has responded to the post, and not a quorum, AB 992 specifically prohibits a single member of a legislative body from responding to the post of another. This is likely to prevent an inadvertent violation of the Brown Act, since no single member of a legislative body could predict if the other members would also respond and thus constitute a quorum.

- A Contractor posts on their social media page that the District should relax their contracting requirements. Board member E likes the post. Board member G dislikes the post. Board member A comments: "please tell me more." Board Member B comments: "we have requirements in place to protect public funds." Board members E, G, A and B have violated the Brown Act by engaging in a discussion among themselves on social media of a business of specific nature within the District's subject matter jurisdiction.

- The New York Times posts an article on X regarding a measles outbreak due to reduced vaccinations. The District is considering a policy requiring its employees to be vaccinated against the measles. Board Members A and C comment on the post of their support of mandatory vaccinations, along with 500 other user comments. Board members B and D express the thumbs down emoji on the post itself. Board members A, B, C, and D are unaware of the others' comments or reactions to the same post. A Brown Act violation could be found because: (1) adopting a vaccination policy for its employees is business of a specific nature that is within the District's subject matter jurisdiction; and (2) a majority of the Board have reacted or commented on the matter. Additionally, the provisions added by AB 992 do not necessarily require knowledge, or even intent, to engage in a prohibited communication for a violation to be found.

- Board member A answers a question from a ratepayer about CAP on A's Facebook page. Board member B responds to A's post answering the question in the comments section. B has violated the Brown Act.

- Board member E has multiple social media accounts with other names or handles. Board member E has a second Facebook account in which they go by the handle "E-Squared." The "E-Squared" account has no information that the user is a District Board member or affiliated at all with the District. Board member A responds directly to a comment by "E-Squared" about the State's Dam Safety practices. Here, Board member A could be found to have violated the Brown Act provision prohibiting members from directly responding to other members' social media posts. That particular provision of the Brown Act is broad and does not require that a Board member knowingly respond directly.

Examples of Close Calls

- The Board consists of members A, B, C, D, E, F, and G. Board member A shares the City of Oakland's post about its upcoming Running Festival and Foot Race and adds that the District will be providing information about the District's water conservation programs. Board members B and C like the City's post. Board member D posts a comment to the City's post that the District will be at the event with the Water on Wheels and water conservation booth. Board member F expresses surprise at the City's post. Here, a majority of the Board is expressing a reaction to the City's post. However, the reactions and comment are to the City's posts and not to that of any of the Board members. Additionally, an argument could be made that the City's Running Festival and Foot Race

does not pertain to a business of a specific nature within the District's subject matter jurisdiction.

- Board member G posts on Instagram a picture of themselves at the Lafayette Reservoir with a note: "Thankful for another journey around the sun." Board members A, B, and C like the post. Board members D and E comment "Happy Birthday, G!" Board member F comments: "Happy Birthday! My present to you is to vote with you on approving the contract with MicroSoft." There could be a violation of the Brown Act because although the original post did not concern a matter within the subject matter jurisdiction, there is direct communication regarding a matter within the District's subject matter jurisdiction.

Constitutional Considerations

In addition to the Brown Act, public officials' social media use is also governed by constitutional considerations. In 2024, the United States Supreme Court issued a key decision regarding the constitutionality of public official activities on social media. In *Lindke v. Freed (Lindke)*, a public official was sued under 42 U.S.C. section 1983 for violating the First Amendment rights of a member of the public who engaged with the official on the official's social media account.[9] James Freed was a City Manager for the city of Port Huron, Michigan. Freed maintained a personal Facebook account in which he posted about his personal life and his job as City Manager. During the COVID-19 pandemic, Freed used his Facebook account to post personal and job-related information about COVID. Freed's account was public and had over 5,000 "friends," which included plaintiff Kevin Lindke. During the pandemic, Lindke posted comments in response to Freed's posts about the pandemic, which included posts about the City's actions in responding to the pandemic. Lindke's comments and reactions expressed his displeasure with the City's response. Freed deleted Lindke's comments and blocked Lindke from his social media account.

Lindke sued Freed pursuant to section 1983 alleging Freed restrained his right to free speech by deleting his comments and blocking him from engaging on Freed's Facebook account.

The Supreme Court held that a public official's social media account will be presumed to be personal and not subject to constitutional claims of others, unless: (1) the public official possesses actual authority to speak on behalf of the agency, in which case the official's act constitutes state action; and (2) the official purports to exercise that authority when the public official posts on social media.

The trial court granted summary judgment in favor of Freed and the Court of Appeals affirmed the trial court's decision. However, the Supreme Court vacated those rulings and remanded the case for review under a two-pronged test developed in its ruling.

[9] *Lindke v. Freed* (2024) 601 U.S. 187.

The inquiry of whether a public official's social media account is to be insulated from liability because it is a personal account requires careful examination of the details and would involve scrutiny of the official's job duties, authority, social media posts, and nature of the official's social media engagement on the account.

The Supreme Court recognizes that public officials "are also private citizens with their own constitutional rights."[10] Thus, Board members may maintain their own private social media accounts. To minimize the risk of constitutional claims such as those raised in *Lindke*, for Board members maintaining a private account, it is highly recommended that while in office, the Board member include a disclaimer on their account that the account is their personal social media account. Additionally, a Board member may make their account private and limit others' access to the account.

Should a Board member wish to create a social media account to engage with constituents and members of the public, they should be aware that activity on a public account for use in their capacity as a Board member could create exposure to constitutional liability if they limit the ability of members of the public to comment on posts. To best protect against liability, a Board member should take caution in deleting comments of members of the public engaging on the social media page and blocking certain users.

<u>Recommendations for Social Media Use</u>

There are numerous scenarios demonstrating how social media use may run afoul of the Brown Act and the First Amendment rights of those with whom a Board member may engage on social media. That there is scant case law to provide guidance encourages caution in how Board members use social media. Accordingly, below are recommendations to minimize the risk of violating the law:

- Maintain a public social media account if you wish to use it to share or comment on District business matters.

- Refrain from posting about District business on a social media account intended to be private.

- Be aware of the social media account handles or names used by other Board members.

- Do not follow or friend other Board members.

- Before reacting to or commenting on a post by a third party relating to District business matters, if the reactions and comments are viewable, check to see if other Board members have reacted to or commented on the post. If three other Board members or a quorum of a committee have reacted or commented, refrain from reacting or commenting.

[10] *Lindke v. Freed* (2024) 601 U.S. 187, 196.

- Be cautious in deleting comments, "unfriending", or blocking users for posts expressing their viewpoint regarding District business matters.

CONCLUSION

To avoid a violation of the Brown Act, caution must be taken when using social media. When in doubt, please contact OGC for further guidance.

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