



Meetings and Technology: Finding the Right Balance

www.ca-ilg.org/technology-and-meetings

4/30/2013 (Update)

Question: *Our agency is mulling whether and how to take advantage of technology at meetings. What issues should we be aware of?*

Related Resources from the Institute

The Institute's website offers the following additional resources relating to technology, social media, and transparency:

- "Legal Issues Associated with Social Media" available at: www.ca-ilg.org/SocialMediaLegalIssues
- "Local Agency Website Transparency Opportunities" available at: www.ca-ilg.org/WebsiteTransparency
- "Taking the Bite out of Blogs: Ethics in Cyberspace" available at: www.ca-ilg.org/blogs

Answer: The answer to that question benefits from a clear sense of the purpose of the meeting. Meetings of public agency decision makers have several purposes. Meetings are where public agency decision-makers:

Consider the technical analysis and recommendations that staff has prepared:

- Hear public input
- Come together to make a decision
- Explain their reasons for the decision made.

A number of transparency and fair process rules govern public meetings. In addition, voters judge decision-makers in part by how decision-makers conduct themselves at public meetings.

With that backdrop in mind, let's look at specific issues that arise relating to meetings and technology.

Electronic Agendas

For Decision-Makers

Being prepared for meetings is a key responsibility for public officials. Providing agenda materials to decision-makers and others electronically result in speedier delivery. Electronic versions can also result in savings of public resources (staff time and supplies) in photocopying and delivering agendas in hardcopy form.

Through internal links and other techniques, electronic formats can involve advantages in making supporting materials easier to find in lengthier agenda packets. There are also software

packages that allow decision-makers to engage in the same activities when reviewing agenda materials electronically as they would for hard copy agenda materials (for example, highlighting text and note-making).

Whether electronic agenda packets work in any given jurisdiction will depend on decision-makers' 1) comfort level with technology and/or receptiveness to training, and 2) access to the necessary computer equipment to review agenda materials (see next section on providing computers to decision-makers).

For the Public

Another important purpose of agendas is alerting the public of what decision-makers will be discussing and deciding at a meeting. A key thing to understand about electronic agendas is that while many members of the public will be happy to receive this information electronically through either email or accessing the agency's website, the law requires agencies to make this information through more traditional channels if requested (see sidebar at right on digital divide).

As a result, agendas must be posted in an area "freely accessible" to the public and on its website (if it has one).¹ An agenda must explain where interested individuals can review agenda materials.² Members of the public can also request that copies of the agenda packet be mailed to them.³

Of course, agenda materials are public records and must be made available to the public.⁴ This includes documents distributed during a public meeting. If the document is prepared by the agency, the document must be made available at the meeting; if the document is prepared by others, like members of the public, the document may be made available after the meeting.⁵

Providing Computers to Elected Officials

To assure that all officials have ready and uniform access to electronic agendas, some agencies provide laptops or tablets to elected officials. The notion is that the officials will use these to review the agendas to be well prepared for meetings. The computers also enable elected officials to access the materials during the meeting. In addition, some agencies provide equipment to elected officials to enable them to receive and respond to email in their official capacity.

Agencies typically include the cost of providing and maintaining such equipment in their cost/benefit analysis on providing agendas in electronic format.

In the event that an agency does decide to provide such equipment, another issue to be aware of is the restrictions on use of that equipment. Using public resources for either personal or political

Additional Resources on Transparency and Meetings

The Institute's website offers additional resources relating to transparency, technology and meetings.

- **Transparency Strategies**, offers resources on suggested local agency website content and social media issues. www.ca-ilg.org/TransparencyStrategies.
- **Leadership Skills**, includes resources on chairing meetings, civility in public discourse, and meeting procedures. www.ca-ilg.org/leadership-skills.

purposes is unlawful.⁶ “Personal” use of public resources means activities that are for personal enjoyment, private gain or advantage.⁷ The statute penalizes both intentional and negligent violations.⁸

There are very narrow exceptions for “incidental and minimal” use of resources. An “occasional telephone call” is an example of an incidental and minimal use of public resources.⁹

To avoid traps for the unwary, a good practice is to specify that agency-provided electronic devices are for official use only.

Streaming and Archiving Meetings

In addition to broadcasting governing body meetings over cable, a number of local agencies also webcast their meetings and/or make the videos available from their websites. Others make the audio portion or the meeting available. “Live streaming” makes the meeting proceedings available as the meeting is occurring. This practice enables residents to access meeting proceedings in real time even if they are unable to attend the meeting in person.

Afterwards, a number of agencies post meeting recordings and minutes on the agency’s website.

This can demonstrate an agency’s commitment to transparency. Proactively providing such information can also save staff time in responding to questions and public records requests.

Accessing the Internet during Public Meetings

Using an electronic device (either agency-provided or one’s own personal device) to access the Internet during a meeting presents a number of issues.

At the most basic level, such activity suggests divided attention or inattention to the information being shared at the meeting. Focused attention on meeting proceedings throughout long meetings can require self-discipline at times. However, meeting participants and other constituents expect such attention as one of the responsibilities of public office. It also demonstrates respect for those presenting information at the meeting.

Members of the Connecticut state legislature found this out the hard way. A number of them were photographed playing a computer game during a legislative debate. One of the legislators issued an apology to his constituents. He reassured them that he does pay attention at meetings and works hard as their representative them.¹⁰

Current State of the Digital Divide

According to the Pew Center for the Internet, even though the increasing prevalence of smart phones has diminished the digital divide, one in five American adults still do not use the Internet. (See www.pewinternet.org/Reports/2012/Digital-differences/Overview.aspx?view=all.)

Moreover, the nature of the access matters: If information is not available on or suitable for a small screen, it is not available to people who rely on their mobile phones for Internet access. That’s likely to be young people, people with lower household incomes, and recent immigrants. (See www.pewinternet.org/Commentary/2010/September/The-Power-of-Mobile.aspx.)

Using Email/Texting during Meetings

Using email during meetings also presents transparency issues. Emails among decision-makers risk violating the California's open meeting laws. California law prohibits decision-makers from:

us[ing] 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.¹¹

The Attorney General has opined that this section prohibits officials from using email to develop a collective concurrence as to an action to be taken.¹² According to the opinion, posting the emails on the Internet and distributing them at the next public meeting of the body does not fix the problem. A key goal of open meetings laws is allowing the public to observe decision-maker deliberations.¹³

Another issue to be aware of is whether such emails or text message are subject to disclosure as public records, either under local agency policy or state law. Media outlets and open government advocates take the position that emails should be retained and produced upon demand as public records.¹⁴ In fact, one trial court has found that even emails the public officials send on their personal (non-agency) email accounts are public records subject to disclosure upon request.¹⁵ Although this decision is not binding on other courts, it demonstrates the potential breadth of the records subject to disclosure under the Public Records Act.

Irrespective of their legal status as disclosable records or not, once one pushes "send," the communications leave one's control. Officials are wise to be mindful of what they say in emails or text messages for a whole host of reasons.

Using Information Received Outside Public Hearings

Sometimes public hearings involve complex issues. It may be tempting to research the issue or consult an expert via email either in preparation or during the public meeting.

This is when the nature of the public meeting can be important to keep in mind. When a decision-making body is applying agency policies to specific situations (acting in an adjudicative or "quasi-judicial" capacity), special fair process rules can apply. A fair process issue can arise when decision-makers receive information outside the public hearing. For example, such an issue arose when members of a civil service board received evidence outside the administrative

Transparency Resources

There are two dimensions to public agency transparency:

- 1) Information transparency, and
- 2) Process transparency.

With respect to both kinds of transparency, a website is an opportunity to provide raw information (budget numbers and meeting dates) and also to provide the public with background information on what the numbers mean for the services they receive and how they can participate in the decision-making process if they choose.

Recognizing that many local agencies are struggling with budget cuts and providing information involves staff time, money and sufficient site capacity, the Institute has developed a number of resources designed to help local agencies offer general information about local agency decision-making to the public as part of its "local government 101" efforts (www.ca-ilg.org/localgovt101). The Institute welcomes links to its resources from agency websites.

hearing and also had conversations with the independent medical examiners and employee's physician outside the hearing.

Attorneys often refer to such information as "*ex parte*" because it occurs outside the hearing and typically from one side only ("from one side only" is a loose translation of the Latin term *ex parte*). The court found that receiving information outside the hearing was unfair, because the decision-makers based their decision upon information that not all parties were aware of and therefore had no opportunity to challenge.¹⁶

The Importance of Attentiveness

Technology should not be a distraction in a meeting. Another fair process issue that arose in one jurisdiction is whether decision-makers were truly paying attention at the hearing.¹⁷ As the appellate court noted, a fundamental principle of due process is "he who decides must hear."¹⁸ It also implicates values relating to respect, even when one disagrees with a position being advocated.

The case involved an appeal of a zoning administrator's decision to loosen certain restrictions imposed on adult business operators. The adult business videotaped the hearing, which showed decision-makers talking with each other, talking on cell phones and otherwise not paying attention to either side that was speaking. The court concluded that the inattentiveness of decision-makers during the hearing prevented them from satisfying fair process principles and overturned the decision.¹⁹

The Difference Between Legislative and Adjudicative Decision-Making

When an elected official acts in a legislative capacity, his or her decision-making is less constrained. For example, when one acts in a legislative capacity, one can review information submitted by interested parties and conduct one's own investigation; investigating and determining facts as a basis for legislation is acceptable. Also, courts generally won't inquire into what evidence was or was not examined or relied on by an elected official in reaching his or her decision.

Policies Prohibiting Messaging During Public Meetings

For all the above reasons, a number of public agencies have adopted policies prohibiting decision-makers from reading, sending or receiving messages while at meetings. Sample policies are available from the Institute's website.

Using Technology to Include an Official in a Meeting

California's open meeting law creates a limited opportunity for officials to use technology to participate in meetings. For purposes of this law, "teleconference" means a meeting of a legislative body, the members of which are in different locations, connected by electronic means, through either audio or video or both.²⁰ Special posting requirements apply²¹ and each teleconference location must be accessible to the public.²² The public must have the opportunity to address decision-makers at each location.²³

Using Technology to Expand Public Participation

Meetings offer one opportunity for the public to share their views on a matter with their elected representatives. Technology can expand those opportunities.

Many local agencies use translation equipment to enable non-English speaking residents to understand meeting proceedings. The same equipment can enable decision-makers to understand public comments offered in languages in which they are not fluent.

Local agencies are increasingly using online tools to encourage public input and public discussion of issues facing the community. Examples include e-comment features on agenda items, online surveys that help decision-makers expand their sense of community sentiment beyond those who can attend meetings, and online forums that enable residents to exchange ideas and also understand how their neighbors view a particular issue.

As with any public engagement effort, the first step is to be clear on the agency's goal in engaging the public on an issue or in general. Available resources to support the effort are another part of the analysis. Ideally, any online efforts will be part of a broader public engagement plan that are tailored to the needs of the community and include both online as well as face-to-face opportunities for public involvement. Technologies also exist to play a role in those meetings as well (for example, keypad polling devices for larger gatherings).

For ideas and strategies in this area, see *A Local Official's Guide to Online Public Engagement* (www.ca-ilg.org/document/local-officials-guide-online-public-engagement).

About the Institute for Local Government

This resource is a service of the Institute for Local Government (ILG) whose mission is to promote good government at the local level with practical, impartial, and easy-to-use resources for California communities.

ILG is the nonprofit 501(c)(3) research and education affiliate of the League of California Cities and the California State Association of Counties.

For more information and to access the Institute's resources on ethics visit www.ca-ilg.org/trust.

The Institute welcomes feedback on this resource:

- *Email:* ethicsmailbox@ca-ilg.org Subject: *Meetings and Technology*
- *Mail:* 1400 K Street, Suite 205 • Sacramento, CA • 95814

References and Resources

Note: Sections in the California Code are accessible at <http://leginfo.legislature.ca.gov/>. Fair Political Practices Commission regulations are accessible at www.fppc.ca.gov/index.php?id=52. A source for case law information is www.findlaw.com/cacases/ (requires registration).

- ¹ Cal. Gov't Code § 54954.2(a). See also 88 Ops. Cal. Att'y Gen. 218 (2005) (finding that an electronic kiosk accessible 24/7 to the public can be "freely accessible" to the public).
- ² Cal. Gov't Code § 54957.5.
- ³ Cal. Gov't Code § 54954.1.
- ⁴ Cal. Gov't Code § 54957.5(a).
- ⁵ Cal. Gov't Code § 54957.5(c).
- ⁶ See Cal. Penal Code § 424; Cal. Gov't Code § 8314.
- ⁷ Cal. Gov't Code § 8314(b)(1).
- ⁸ Cal. Gov't Code § 8314(c)(1).
- ⁹ Cal. Gov't Code § 8314(b)(1).
- ¹⁰ See <http://www.snopes.com/photos/politics/solitaire.asp>.
- ¹¹ Cal. Gov't Code § 54952.2(b).
- ¹² 84 Ops. Cal. Att'y Gen. 30 (2001) available at <http://ag.ca.gov/opinions/pdfs/00-906.pdf>. See also *Wood v. Battle Ground School District*, 107 Wash. App. 550 (2001) (email exchange among school board members amounted to illegal meeting under Washington's open meetings law); *Johnston v. Metropolitan Gov't of Nashville*, 320 S.W.3d 299, 312 (Tenn.Ct.App.2009) (e-mail exchanges in which "members are weighing arguments for and against a proposed zoning measure and which were copied to all members violate spirit of the open meetings law). See generally John F. O'Connor & Michael J. Baratz, *Some Assembly Required: The Application of State Open Meeting Laws to Email Correspondence*, 12 Geo. Mason L.Rev. 719 (2004). But see *Lambert v. McPherson*, --- So.3d ---, 2012 WL 1071632 (Ala.Civ.App., 2012) (unilateral declaration of elected official's opinions which did not involve an exchange of information or opinions among a quorum does not violate open meetings laws).
- ¹³ See *Coalition of Labor, Agriculture and Business v. County of Santa Barbara Board of Supervisors*, 129 Cal. App. 4th 205 (2d Dist. 2005).
- ¹⁴ See, for example, http://www.voiceofoc.org/countywide/this_just_in/article_b093e90c-edbf-11df-b928-001cc4c002e0.html ; <http://sanleandro.patch.com/articles/city-emails-fleeting-notes-or-vital-public-records>.
- ¹⁵ See *Smith v. City of San Jose*, No. 1-09-CV-150427 (March 19, 2013) (finding that personal emails are "retained" by public agency because they are retained by a public officials; in addition, such emails are also "prepared" and "used" by such officials). See also *Tracy Press, Inc. v. Superior Court of San Joaquin County (City of Tracy)*, 164 Cal. App. 4th 1290, 80 Cal. Rptr. 3d 464 (2008) (The appellate court dismissed, on technical grounds, a trial court decision finding that emails sent by public officials from their personal email accounts are not public records subject to disclosure, the court recognized that the question of whether the emails sent from the city council member's private email account are public records is a novel question they would not address in the appeal).
- ¹⁶ *English v. City of Long Beach*, 35 Cal. 2d 155, 157, 217 P. 2d 22, 24 (1950) (adjudicative body's acting on information of which parties were not apprised and which they had no opportunity to controvert amounts to a denial of a hearing). *Accord Today's Fresh Start, Inc. v. Los Angeles County Office of Educ.*, 128 Cal. Rptr. 3d 822, 844, 197 Cal. App. 4th 436, 463, (2 Dist. Jul 12, 2011).
- ¹⁷ *Lacy Street Hospitality Service, Inc. v. City of Los Angeles*, , 22 Cal. Rptr. 3d 805 (2 Dist. 2004), *decertified from publication* June 15, 2005.
- ¹⁸ *Vollstedt v. City of Stockton*, 220 Cal. App. 3d 265, 276, 269 Cal. Rptr. 404 (1990).
- ¹⁹ *Lacy*, citing *Haas v. County of San Bernardino*, 27 Cal. 4th 1017, 1024, 119 Cal. Rptr. 2d 341 (2002) ("due process requires fair adjudicators in administrative tribunals"); *Henderling v. Carleson*, 36 Cal. App. 3d 561, 566, 111 Cal. Rptr. 612 (1974) (takes as a given that administrative decision-maker listens at hearing), *disapproved on another point by Frink v. Prod*, 31 Cal. 3d 166, 180, 181 Cal. Rptr. 893 (1982); *Chalfin v. Chalfin*, 121 Cal. App. 2d 229, 233, 263 P.2d 16 (1953) (fact finder must listen to the evidence before making a decision).
- ²⁰ Cal. Gov't Code § 54953(b)(4).
- ²¹ Cal. Gov't Code § 54953(b)(3) ("If the legislative body of a local agency elects to use teleconferencing, it shall post agendas at all teleconference locations . . .").

²² Cal. Gov't Code § 54953(b)(3) ("Each teleconference locale shall be identified in the notice and agenda of the meeting or proceeding, and each teleconference location shall be accessible to the public.")

²³ Cal. Gov't Code § 54953(b)(3) ("The agenda shall provide an opportunity for members of the public to address the legislative body directly pursuant to Section 54954.3 at each teleconference location.")