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**MEMORANDUM**

**TO:** Dr. Bryan Reece, Chancellor, Contra Costa Community College District

**FROM:** Kathryn E. Meola, Partner  
Junn O. Paulino, Senior Associate

**RE:** Applicability of the Brown Act to Committees and Other Bodies including Participatory Governance Structures

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The purpose of this memorandum is to provide the Contra Costa Community College District ("4CD") with guidance on whether certain committees or other bodies which exist in the District (e.g. the Academic Senate, District Governance Council, etc.) are subsidiary "legislative bodies" within the meaning of the Brown Act and thus obligated to comply with its requirements.

**1. The Brown Act and Legislative Bodies.**

The Brown Act requires that "legislative bodies" of "local agencies" hold their meetings open to the public unless expressly exempted by the act.<sup>1</sup> California community college districts meet the definition of "local agency."<sup>2</sup> A "Legislative body" is not limited to the actual governing board or body of the local agency, but also includes "a commission, committee, board or other body of a local agency, whether permanent or temporary, decision-making or advisory, created by charter, ordinance, resolution, or formal action of the legislative body." (Government Code Section 54952(b)).

In 1983, the California Attorney General issued an opinion finding that meetings of the academic senate or faculty council are subject to the Brown Act.<sup>3</sup> In that opinion, the Attorney General observed that Government Code section 54952(b) contains a 2-part test to determine whether a committee or other body is a subsidiary "legislative body" subject to the Brown Act. It must be (1) advisory to the Board, (2) created by formal action of the Board.

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<sup>1</sup> 66 Ops.Cal.Atty.Gen. 252 (1983).

<sup>2</sup> Gov. Code, § 54951; 66 Ops.Cal.Atty.Gen. 252 (1983).

<sup>3</sup> 66 Ops.Cal.Atty.Gen. 252 (1983).

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2. **The Academic Senate is a Legislative Body.**

(a) **The Academic Senate is a “legislative body” within the meaning of the Brown Act because it is advisory to the Board and was created by formal action of the Board.**

Title 5, Section 53200, subdivision (b) defines the terms “academic senate” and “faculty council” to mean:

*“...an organization formed in accordance with...[the regulations] whose primary function is, as the representative of the faculty, to make recommendations to the administration of a college and to the governing board of a district with respect to academic and professional matters. (Emphasis in original.)”<sup>4</sup>*

Similarly, section 53203 of the Title 5 regulations adds:

*“After consultation with the administration of its community college, the academic senate or faculty council may present its written views and recommendations to the governing board. (Emphasis in original.)”<sup>5</sup>*

Accordingly, the Attorney General determined, “it is clear that an academic senate is an advisory body to the local governing board of a California community college district.”<sup>6</sup>

Next, we look to see if the Academic Senate was created by formal action of the Board. Title 5, California Code of Regulations, Section 53202 lays out the procedures for forming an academic senate. The provisions relevant to this analysis are:

(a) The faculty of a community college shall vote by secret ballot to form an academic senate or faculty council.

(b) In multi-college districts, the faculty of the district colleges may vote whether or not to form a district academic senate. Such vote shall be by secret ballot.

(c) The governing board of the district shall recognize the academic senate or faculty council and authorize the faculty to (1) Fix and amend by vote of the faculty the composition, structure, and procedures of the academic senate or faculty council; (2) Provide for the selection, in accordance with accepted democratic election procedures, the members of the academic senate or faculty council.

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<sup>4</sup> 66 Ops.Cal.Atty.Gen. 252 (1983); 5 CCR 53200(b).

<sup>5</sup> 66 Ops.Cal.Atty.Gen. 252 (1983); 5 CCR 53203(c).

<sup>6</sup> 66 Ops.Cal.Atty.Gen. 252 (1983).

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The California Attorney General stated that at first blush one might conclude that an academic senate is formed not by the district governing board, but by the vote of the faculty of the community college or colleges.<sup>7</sup> However, the California Attorney General reasoned that because section 53202, subdivisions (c)(1) and (2) require that certain steps or actions must be executed by the district's governing board after the faculty vote, e.g. recognizing the academic senate, that the establishment of an academic senate is attributable to a formal action by the district's governing board.<sup>8</sup>

**3. District Governance Council is also a Legislative Body Subject to the Brown Act.**

In 1994, in response to 4CD's request, we expressed an opinion that the District Governance Council ("DGC") is subject to the Brown Act; we continue to hold that opinion today. The analysis is again: 1) whether or not the DGC is an advisory body and 2) whether or not it was created by some "formal action" of the Governing Board.

It is clear that the DGC functions as an advisory body to the Governing Board because there is statutory authority for the DGC to play such a role. Education Code Section 70902(b)(7) provides that the governing board shall:

[E]stablish procedures . . . to ensure faculty, staff, and students the opportunity to express their opinion at the campus level and to ensure that these opinions are given every reasonable consideration, and the right to participate effectively in district and college governance . . . (emphasis added).

4CD Board minutes from the August 26, 1992 meeting note that the DGC will be involved prior to any revised budget recommendations being acted upon by the Board. Minutes from the December 16, 1992 Board meeting also reference the DGC and its role in making recommendations to the Board concerning the budget. As we understand it, the DGC functions as an advisory body to the Board on other policy decisions as well. Thus, the DGC fits under the first part of the definition of a "legislative body" under Government Code Section 54952(b) in that it is "advisory" to the Board.

Next we must determine whether the DGC meets the second requirement of being created by some "formal action" of the Board. Title 5, California Code of Regulations, section 51023.5(a)(1) makes clear that the Board is supposed to pass policies and procedures to identify the structures for non-faculty to be given a voice in the participatory governance process.

(a) The governing board of a community college district shall adopt policies and procedures that provide district and college staff the opportunity to participate effectively

<sup>7</sup> 66 Ops.Cal.Atty.Gen. 252 (1983).

<sup>8</sup> *Id.*, citing to *Joiner v. City of Sebastopol* (1981) 125 Cal.App.3d 799, 805, *infra*.

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in district and college governance. At minimum, these policies and procedures shall include the following:

(1) Definitions or categories of positions or groups of positions other than faculty that compose the staff of the district and its college(s) that, for the purposes of this section, the governing board is required by law to recognize or chooses to recognize pursuant to legal authority. In addition, for the purposes of this section, management and nonmanagement positions or groups of positions shall be separately defined or categorized.

(2) Participation structures and procedures for the staff positions defined or categorized.

DGC is one of the District's governance structures which are part of its participatory governance process which the District was required by law and regulation to form.

In addressing the issue of what sort of "formal action" is required with regard to academic senates, the Attorney General found that even though an academic senate is not created by some express, identifiable action of the governing board, its establishment is still attributable to the board. (*See* 66 Ops.Cal.Atty.Gen. 252 (1983)). The Attorney General reasoned that the term "formal action" should be construed broadly, citing the approach used by the Court in the case of *Joiner v. City of Sebastopol* (1981) 125 Cal.App.3d 799, 805, fn. 5:

We conclude also on the basis of undisputed facts that the proposed committee was "created by . . . formal action" of the city council. Respondent concedes that the city council, though it did not formally adopt a resolution, nevertheless took "formal action" when it designated two of its members to meet with two planning commission members. It follows (since that designation was pursuant to a unanimously approved plan) that the city council also took "formal action" when it adopted the proposed agenda for the meeting, i.e., that the group which was to meet would interview applicants and report back to the city council with recommendations. And, since the city council instigated that procedure as a means of fulfilling its responsibility to fill a vacancy on the planning commission, the "creation" of the committee must be attributed to the council's action. . . ."

Accordingly, it is not necessary to find a record of the District's Governing Board taking action to form the DGC in order to find that the requirement for "formal action" is met. In any event, the Board has subsequently expressly taken action on at least three occasions to approve the bylaws and amended bylaws of the DGC. Therefore, we believe that the DGC meets the second part of the definition of "legislative body" that it was formed by "formal action" of the Board. For these reasons, we believe that the DGC is subject to the Brown Act.

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**4. Other Subsidiary Legislative Bodies.**

While the Academic Senate and the DGC appear to fall squarely within the definition of a subsidiary “legislative body” pursuant to the Brown Act, other subordinate bodies existing at the District and College level must be analyzed under the 2-part test outlined above to determine if they are likewise subject to the Brown Act. If the committee or other body provides guidance or recommendations as part of the District’s official participatory governance process, including at the College level, then it is likely subject to the Brown Act. Even if the District can find no record of the Board taking a formal action to form a particular committee or other body, the “formal action” requirement can be met if the Board had a statutory or regulatory obligation to form the committee or other body similar to the formation of participatory governance structures.

