



STAFF REPORT

Discussion and Direction Regarding Closed Session Legalities, Investigation Activities and Punitive Measures

Honorable Mayor and City Council:

Summary

At the September 14, 2004 City Council meeting, the City Attorney was asked to prepare a memo regarding the Brown Act provisions for closed sessions, the process required to determine whether a violation of the Brown Act has occurred, the remedies available to address violations of the Brown Act provisions for closed sessions and an estimate for the cost of such a process. This report addresses the Council's requests.

Background and Discussion

The Ralph M. Brown Act (Government Code §54950 et seq., hereinafter the "Brown Act") governs meetings conducted by city councils. The Brown Act sets forth the legislature's determinations on how local entities are required to balance the public's right of access to meetings and the public entity's need for confidential candor, debate and information gathering. The purpose of the Brown Act is to facilitate public participation in local government decisions and curb misuse of the democratic process by secret legislation of public bodies. Cohan v. City of Thousand Oaks (1994) 30 Cal.App.4th 547, 555.

In order to achieve this purpose, the Brown Act imposes an open meeting requirement on all local legislative bodies. Government Code §54953. The Brown Act applies to all meetings conducted by a local entity. Meeting, as defined by Government Code §54952.2, includes "any congregation of a majority of the members of a legislative body at the same time and place to hear, discuss or deliberate upon any matter which is under the subject matter jurisdiction of the agency." Government Code §54952.2(a).

The Brown Act also contains specific exceptions from the open meeting requirements where a City Council has a demonstrated need for confidentiality. These closed session exceptions have been construed narrowly; thus if a specific statutory exception authorizing a closed session cannot be found, the matter must be conducted in public regardless of its sensitivity. Government Code §54962; Rowen v. Santa Clara Unified School District (1981) 121 Cal.App.3d 231, 234; 68 Ops.Cal.Atty.Gen. 34, 41-42 (1985).

Closed sessions are authorized for discussion of personnel issues, pending litigation, labor negotiations and real property acquisitions. Government Code §54956.8, 54956.9, 54957, 54957.6. Each closed session meeting must be announced in a public agenda. Government Code §54954.2, 54957.7. When final action is taken in closed session, the legislative body may be required to report on such action. Government Code §54957.1.

Penalties for Violations of the Brown Act

Violations of the Brown Act may be addressed through criminal penalties or civil injunctions.

On January 1, 2003, the Brown Act provisions regarding closed sessions were amended. The Brown Act at Government Code §54963 now provides:

54963. Closed session; Disclosure of confidential information

(a) A person may not disclose confidential information that has been acquired by being present in a closed session authorized by Section 54956.7, 54956.8, 54956.86, 54956.87, 54956.9, 54957, 54957.6, 54957.8, or 54957.10 to a person not entitled to receive it, unless the legislative body authorizes disclosure of that confidential information.

(b) For purposes of this section, "confidential information" means a communication made in a closed session that is specifically related to the basis for the legislative body of a local agency to meet lawfully in closed session under this chapter.

(c) Violation of this section may be addressed by the use of such remedies as are currently available by law, including, but not limited to:

(1) Injunctive relief to prevent the disclosure of confidential information prohibited by this section.

(2) Disciplinary action against an employee who has willfully disclosed confidential information in violation of this section.

(3) Referral of a member of a legislative body who has willfully disclosed confidential information in violation of this section to the grand jury.

(d) Disciplinary action pursuant to paragraph (2) of subdivision (c) shall require that the employee in question has either received training as to the requirements of this section or otherwise has been given notice of the

requirements of this section.

(e) A local agency may not take any action authorized by subdivision (c) against a person, nor shall it be deemed a violation of this section, for doing any of the following:

(1) Making a confidential inquiry or complaint to a district attorney or grand jury concerning a perceived violation of law, including disclosing facts to a district attorney or grand jury that are necessary to establish the illegality of an action taken by a legislative body of a local agency or the potential illegality of an action that has been the subject of deliberation at a closed session if that action were to be taken by a legislative body of a local agency.

(2) Expressing an opinion concerning the propriety or legality of actions taken by a legislative body of a local agency in closed session, including disclosure of the nature and extent of the illegal or potentially illegal action.

(3) Disclosing information acquired by being present in a closed session under this chapter that is not confidential information.

(f) Nothing in this section shall be construed to prohibit disclosures under the whistleblower statutes contained in Section 1102.5 of the Labor Code or Article 4.5 (commencing with Section 53296) of Chapter 2 of this code.

Separate and apart from the enforcement provisions of Government Code §54963, a City Council may direct that an alleged violation be investigated. If the investigation confirms that the alleged violation occurred, the City Council may adopt a resolution to censure, criticize, disapprove or condemn one or more of its members. Censure is defined as the “formal resolution of a legislative, administrative or other body reprimanding a person, normally one of its own members, for specified conduct.” Black’s Law Dictionary.

A city council’s statutory authority to censure arises from Government Code §36813. “The council may establish rules for the conduct of its proceedings. It may punish a member or other person for disorderly behavior at a meeting.” (See also White v. City of Norwalk (1990) 900 F.2d 1421, upholding city council rules of conduct and Richard v. City of Pasadena (1995) 889 F.Supp. 384, council rules of conduct must be clear and content neutral.)

Censure is considered to be disciplinary in nature by courts which have considered the issue. (See Fleury v. Clayton (1988) 847 F.2d 1229, holding that censure of a physician deprived him of a property interest in his license to practice.)

There are very few cases in California on censure of council members and most of the applicable cases arise from disruptive behavior at meetings. Braun v. City of Taft (1984) 154 Cal.App.3d 332, 201 Cal.Rptr. 654 is a California case which deals directly with censure of a city council member for behavior outside a meeting. In Braun, the Council censured Council Member Braun for publicly releasing allegedly confidential city personnel documents. After being censured, Braun sued, asking the court to declare that the documents at issue were public records. The court remanded the matter to the City Council with direction to reconsider the censure action because the documents released were not confidential. Braun stands for the principle that legally sufficient grounds must exist in order for a City Council to adopt a resolution of censure.

The California Courts of Appeal have issued two other opinions addressing censure by a city council. See Scott v. McDonnell Douglas Corp. (1974) 37 Cal.App.3d 277, 112 Cal.Rptr. 609 and Richard v. City of Pasadena (1995) 889 F.Supp. 384. In Scott, a lawsuit was brought by the city manager after a majority of the city council signed a letter criticizing him. The letter was read at a city council meeting and distributed to those in attendance. The court held the letter was one of censure and reprimand, but denied the city manager's claim for relief. The court held that the council's actions were privileged because the letter was read at a council meeting and related to retention of the city manager whose appointment, performance and removal were within the purview of the council. Scott stands for the principle that courts usually defer to the free exchange of information as part of the "deliberative process" of a democracy. Even if the language used is vehement, caustic, or untrue, so long as the statements bear some connection to the work of the legislative body, council members have immunity from civil or criminal liability for broadly defined "legislative" activities. (See Bogan v. Scott-Harris (1998) 523 U.S. 44; San Pedro Hotel, Inc. v. City of Los Angeles (1998) 159 F.3d 470.)

Such immunity does not bar a member from being censured by a city council if the censure relates to an act or statement that is not connected to the work of the city council, or an act or statement that constitutes a violation of law.

The person to be censured is entitled to due process which requires notice and an opportunity to respond. (See Little v. City of North Miami (1986) 805 F.2d 962 and Richard v. City of Pasadena (1995) 889 F.Supp. 384.) The court in Richard set aside a censure action and awarded attorney's fees to a council member who was censured for violations of rules of conduct which the court ruled to be vague, overbroad and content based so as to inhibit free speech. The Little case involved a law school professor who sued the City because the council had censured him for improper use of public funds. The professor was assisting, without fee, an environmental group in litigation against the State. The professor was not notified of the pending council action, nor given the opportunity to respond. He claimed a deprivation of a property and liberty interest without due process of law. The court held that he had stated a cause of action under 42 U.S.C. §1983 by sufficiently alleging injury to his business reputation.

“It [the complaint] alleges that the City Council of North Miami, without affording appellant notice or a hearing, passed a resolution which has 'embarrassed [appellant] in his personal life' and '[degraded] him in his employment.' Based upon the liberal principles of notice pleading, we conclude that appellant has sufficiently alleged injury to his business reputation.”

As the holdings in Richard and Little demonstrate, liability may arise if the individual to be censured is not given notice of the charges and an opportunity to respond.

The Belmont City Council has adopted protocols pursuant to the authority granted in Government Code §36813. Section VI, Council Member Administrative Support, (J) provides:

J. Inappropriate Actions - The City Council has delegated the Mayor the responsibility to discuss, on behalf of the full Council, any perceived or inappropriate action by an individual Council Member or by commissioners. The Vice Mayor will discuss perceived inappropriate actions with the Mayor when the Mayor is directly involved in the incident(s). The Mayor or Vice Mayor will discuss with the Council Member the action and suggest a more appropriate process or procedure to follow. After this discussion, if further inappropriate action continues, the Mayor or Vice Mayor will report the concern to the full Council.

If a discussion regarding a “perceived or inappropriate action” occurs between the Mayor and a Council Member and there is no resolution, the issue may be brought forward for discussion by the City Council. This must be done as an open session item.

If the City Council wants to pursue an allegation of “perceived or inappropriate action,” the City Council would need to consider the following questions:

1. Has the action been addressed per the City Council’s protocols, Section VI(J)?
2. If so, does the City Council wish to act further on the action or did the process required by City Council Protocol's Section VI(J) adequately address the action?
3. If the City Council indicates a desire to pursue the matter, what perceived or inappropriate action will they be addressing (i.e., the City Council must give adequate notice of the charge)?
4. When will the City Council hearing be held to present the facts in support and to hear the response by the member whose actions are before the City Council for review?

5. Who will the City Council direct to gather information on the matter (staff or retained consultants/investigators)?

If the City Council gives direction to set a hearing, the City Council will be required at that hearing to:

- a. Receive information regarding the charge.
- b. Allow an opportunity for the member whose behavior is at issue to respond.
- c. Determine if the alleged behavior occurred.
- d. If so, determine whether the behavior was “inappropriate.”
- e. If so, consider a motion of censure or an alternative motion.

Alternatives to “censure” which do not have disciplinary meaning include actions to “criticize,” “disapprove” or “condemn.” Such an expression of council opinion is not disciplinary in nature because the council has free speech authority to express its opinion. (See *Scott*, supra at 37 Cal.App.3d 277.) Even if a non-disciplinary approach is taken, the council member who is to be criticized, disapproved or condemned should be given prior notice and an opportunity to be heard. (See *Little*, supra at 805 F.2d 962.)

Fiscal Impact

Until the City Council has clearly set the parameters for its inquiry, it is difficult to predict with accuracy the total cost of this process, but based on telephone inquiries with four law firms experienced in conducting this type of investigation, the hourly rates quoted ranged from \$200 per hour to \$400 per hour.

Recommendation

It is recommended that the City Council review the staff report and give direction to staff whether or not to proceed with an investigation. If the City Council directs that an investigation be initiated, staff recommends that Council also authorize retention of an independent investigator.

Alternatives

1. Take no action.
2. Request additional information from staff.

Censure Process
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Attachments

None.

Respectfully submitted,

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City Attorney