CASE NO. S260209

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

MICHAEL GOMEZ DALY et al.,

Petitioners (in superior court) and Respondents (on appeal),

v.

BOARD OF SUPERVISORS OF SAN BERNARDINO COUNTY, et al.,

Respondents and Real Party in Interest (in superior court) and Appellants,

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After Order by the Court of Appeal
Fourth Appellate District, Division Two
Civil No. E073730

EXHIBITS TO APPELLANTS' MOTION FOR JUDICIAL NOTICE

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Editorial Page

Monday, July 7, 1986 CC SANTA BARBARA

Cut the secrecy

Law against closed meetings needs strengthening

California's state and local governments have long operated under the Ralph M. Brown Act, which was intended to prevent public bodies from handling the public's business in private. Many governing units have spent much energy over the years in finding ways to step around that law, and some are still trying today.

There have been some rare cases, involving especially sensitive personnel matters, where private discussion could be justified. But there have been many other problems and plans brought up behind closed doors simply because the officials didn't want the public to know how they were handling these matters.

The Brown Act's restrictions were tightened by legislation in 1984. It said that public agencies must give the public notice 10 days in advance of their meetings. It said they could close the public out only to discuss personnel matters or to confer with their attorneys.

Confer with attorneys? John Van de Kamp, the state's attorney general, has told governing officials this provides a loophole that can be used for making all sorts of decisions without letting the public in on how they were made. His view is that state agencies, city councils, county supervisors, school boards and other official districts can secretly meet with their attorneys about many issues because there is always the possibility of litigation in the future.

Van de Kamp, whose first responsibility is to the public, knows the law's intent. When he was elected in 1982, he was a strong supporter of open meetings. Now he applies a personal interpretation to a law, suggesting how to make a joke of its intent. This indicates a lessened regard for the public interest which we also noted in Van de Kamp's recent campaign against Proposition 51, the initiative that puts a reasonable limit on the taxpayers' liability in certain damage suits. In that case he tried unsuccesfully to convince voters that 51 would damage the environment — a contention too far-fetched to be taken seriously.

The attorney general's loophole in open-meetings law must be closed. There is a bill in the state Senate (SB2173) that will do it. It would restrict those secret meetings with attorneys to instances when a lawsuit has been filed against the governing body or it is considering filing a legal suit. No longer could a council or a board "use" its attorney's presence to legitimize its excuse for secrecy in other matters. The bill deserves strong public support.

LOS ANGELES TIMES
July 1, 1986

Protection for the Public

California's Brown Act requires city councils, school boards, county boards of supervisors, water districts and other agencies to meet in public. Secret meetings are permitted only on sensitive subjects like personnel matters and lawsuits.

SB 2173, sponsored by Sen. David Roberti (D-Los Angeles), further clarifies the limited circumstances under which a public board can use lawyer-client protections to close a meeting. The bill, scheduled today before the Assembly Committee on Governmental Organization, deserves approval in order to protect the public debate.

Closing public meetings to discuss legal matters was a common excuse given before a 1984 law, shepherded through the California Legislature, by Sen. Barry Keene (D-Benicia). Under that law, boards and councils can go into executive session to plan legal action, contemplate the filing of a suit or discuss a significant risk of litigation.

A broad interpretation, by California Atty. Gen. John K. Van de Kamp, however, could allow agencies to discuss in secret any legal advice, any legal question, any mere threat of court action—a common and crippling occurence in today's overly litigious climate. Under that interpretation, any policy matter—particularly any controversial issue such as a rezoning change in which residents threatened to sue or any environmental decision that could prompt court action—could avoid public scrutiny.

SB 2173 would clarify the guidelines protecting the public's right to information. The bill also would extend the protection of the Brown Act to cover task forces conducting official business—another guarantee that the public would know more, not less. Approval is in the public's interest.

DAN WALTERS

Sunshine laws need recharge

California didn't enact the nation's first law requiring public policy-making bodies to meet publicly, but the Brown Act and its successors have been among the most advanced examples of so-called "sunshine laws."

The central thesis of California's Brown Act is stated succinctly: "All meetings of the legislative body of a local agency shall be open and public, and all persons shall be admitted to attend any meeting . . . except as otherwise provided."

As a practical matter, the guardians of the Brown Act are the reporters who are assigned to cover the city councils, school boards, county boards of supervisors and other local legislative bodies of California.

While the act grants the press no privileges beyond those accorded to members of the public, the media obviously have a keener and more professional interest than the casual attendee.

When, therefore, there are disputes over whether a meeting should be open or closed for some specific permitted purpose, it usually pits the press against the agency. And that carries over into the Legislature and the courts, where there are perennial disputes over the meanings of the Brown Act and the other sunshine laws.

During the years since the Brown Act's enactment, local governments' Sacramento lobbies, the League of California Cities and the County Supervisors Association of California, have pressed the Legislature for ever-more exceptions. Briefly put, local government officials want to conduct more and more of their business behind closed doors — for good reason, they assure us — and are always seeking more ways to do it.

One of the stickiest areas of dispute has been "pending litigation."

Local officials had contended, with some success, that they had the right to meet with their attorneys under the longstanding attorney-client privilege regardless of the Brown Act. There were frequent clashes between officials and reporters over what subjects could thus be discussed privately since, at least conceivably, almost anything could be subject to legal action.

Two years ago, in an effort to clear up the situation, the Legislature passed a Brown Act revision that allowed private sessions with attorneys to discuss suits already filed by or against the governmental body, "significant exposure" to a potential suit or the possibility of initiating legal action.

That should have been that. But an informal opinion by Attorney General John Van de Kamp has produced more chaos.

Van de Kamp, virtually ignoring the restrictions set forth in the Brown Act revisions, says that local officials have the innate right to meet with attorneys to discuss almost anything remotely connected to legal action — even to talk about policy decisions that could lead to litigation or affect some other pending lawsuit.

Van de Kamp's opinion has, in effect, opened the door to secret government in California at a point in the state's history when openness is more needed than ever.

The most awesome power possessed by local government is to decide zoning, planning and other development matters, and increasingly, such issues have become local hot potatoes. City council members and county supervisors would love to talk about the location of subdivisions, industrial parks and other developments in private, and the Van de Kamp opinion gives them the loophole to do so.

If the opinion becomes the guiding credo of local government in California, city and county attorneys will become powerful policy-makers and the spirit of the Brown Act — that the public's business should be conducted in public — will have been shattered.

Senate President Pro Tem David Roberti has introduced legislation, now pending in the Assembly, that clarifies whatever ambiguities Van de Kamp found in the last legislation and makes it clear when local officials may discuss substantive matters privately.

But — in a classic example of using the public's money to lobby against the public interest — the League of California Cities and the County Supervisors Association of California are trying to block passage of the Roberti bill.

Secret government, they are saying, would be more efficient government because local officials wouldn't have to put up with nosy reporters and pesky citizens as they discussed issues.

Secret government also would be something else: an open invitation to the kind of systemic corruption already evident in areas with heavy pressure from land developers.

SB 2173

Letter from the Editor

Will Corbin / A Editor

Punchline on this joke hits you secretly

Dear Reader, MAY 2 5 1986

The pamphlet we give reporters on California's open-meetings laws contains this little passage about the Brown Act:

"The act's central mandate . . . is deceptively simple: 'All meetings of the legislative body of a local agency shall be open and public, and all persons shall be permitted to attend any meeting . . except as otherwise provided . . . ' "

Ah, those four little words: "except as otherwise provided." That's where the technicalities come in. And in California, the technicalities are everything. If it's only a committee of the legislative body, you can't go. If they're talking about something that might hurt someone's feelings, you can't go. If they're talking about buying land, you can't go. If they're talking to a union, you can't go. If they're talking about a lawsuit, you can't go.

Now, according to California Attorney General John Van de Kamp, if they think they might do something that might make someone angry enough sometime to maybe take them to court someday, then a little private chat with the attorney is in order.

And you can't go.

Van de Kamp's position on the "litigation" exception to the Brown Act leaves a hole so wide that whatever meager force the law once had may now be gone.

Two years ago the Legislature passed a Brown Act amendment that was designed to clear up the questions about when a meeting on "litigation" could go private. It allowed closed sessions in three instances: to discuss an existing case; to discuss "significant exposure" to a lawsuit; or to discuss filing a lawsuit.

That law should have shut the door on the vague excuses of "litigation" public bodies had been using so liberally. But Van de Kamp, in an informal opinion, just opened it wider. He says it's in the public interest for agencies to go behind closed doors for legal advice which would "dissuade a public agency from taking questionable action which might otherwise lead to litigation." He says they can go private to discuss whether an action might be illegal or unconstitutional, whether it might pose "legal difficulties" or whether it might have some indirect impact on some other pending legal action.

Contrast that with a 1960 opinion from then-attorney general Stanley Mosk, now a justice of the state Supreme Court: "The city attorney may be called upon to explain the legality or legal implications of a proposal before the council. In such instances the public has a right to know all of this in order to assure that the representatives are acting in what it considers to be the public good. It is the sense of the Brown Act that such types of meetings be open to the public."

If local agencies follow Van de Kamp's advice, it's clear that the Brown Act will no longer make any sense. When the state's top legal eagle says that any matter with legal implications can be kept from the public, don't expect to see much beyond the reading of last week's minutes ("Several matters discussed in closed session") at your next city council meeting.

Not that it makes much sense anyway. A report on a 1981 annual conference of the League of California Cities in the *Los Angeles Daily Journal* included this passage:

"One speaker at the meeting, a city attorney from Monterey, advised council members they could hold pre-meeting meetings in secret if they labeled them 'study sessions.' If they could get their local city attorney to tell them it was all right, even though they knew it wasn't, the speaker told his laughing audience, they would be safe. And if worse came to worst, the maximum penalty, an injunction against continuing to do what they were doing, 'is no big deal.' "

They consider the Brown Act a joke already. John Van de Kamp just delivered the punchline. And the joke's on you.

Will Corbin

25¢

Gateway To The Monticello Dam

Winters Express

Volume 103 Winters, Yolo County, California, Thursday, July 17, 1986 Number 24

A QUICK OPINION

by Charles Wallace

Closed meeting law

I was at a commission meeting last week when a person in the audience asked to speak to the commission members privately in closed session after the meeting was over. Closed session is where the press and the public are not allowed to be in the room. When asked what he wanted to talk about, he said he had some development plans and would like to get an idea about how the commissioners felt. I brought up the California Brown Act that limits what can be discussed in closed session, and private talks aren't listed. He was told by the city attorney to talk to each commissioner privately, but that they couldn't talk to each other about the project until it came before them in an open meeting.

The Brown Act is a great piece of legislation. It stops government from conducting business behind closed doors. Recently Attorney General Van de Kamp ruled that government officials are free to discuss any matters in secret with their attorneys so long as the purpose is "the avoidance of litigation." People sue over everything these days and the avoidance of litigation is too broad. The present reading of the Brown Act exempts "pending litigation." If the city is sued and they have to talk to their attorney about the suit, they should have the right to talk privately without the suing party listening in.

The City of Winters used "the avoidance of litigation" to close the doors when John Atherton wanted something done about the noise levels emanating from Mariani Nut Co. The public announcement was that it was not the city's problem. How did they come to that conclusion and how did they vote? No one knows because it was in closed session.

Winters has a lot of rezoning and annexation going on right now. I for one like to know what's going on and listen to the discussion that take place. Fees, land use, garbage rates, everything that the city does affects all of us. Let's not be left out in the hallway.

Senator David Roberti has a bill, SB 2173, that would keep meetings open unless there is pending litigation. If you are a letter writer or phone caller, write or call your favorite politician and tell him that you want your government to be opened to public scrutiny, not put back into smoke filled rooms.

Cut the secrecy

SB 2173

JUL 7 1986

Law against closed meetings needs strengthening

California's state and local governments have long operated under the Ralph M. Brown Act, which was intended to prevent public bodies from handling the public's business in private. Many governing units have spent much energy over the years in finding ways to step around that law, and some are still trying today.

There have been some rare cases, involving especially sensitive personnel matters, where private discussion could be justified. But there have been many other problems and plans brought up behind closed doors simply because the officials didn't want the public to know how they were handling these matters.

The Brown Act's restrictions were tightened by legislation in 1984. It said that public agencies must give the public notice 10 days in advance of their meetings. It said they could close the public out only to discuss personnel matters or to confer with their attorneys.

Confer with attorneys? John Van de Kamp, the state's attorney general, has told governing officials this provides a loophole that can be used for making all sorts of decisions without letting the public in on how they were made. His view is that state agencies, city councils, county supervisors, school boards and other official districts can secretly meet with their attorneys about many issues because there is always the possibility of litigation in the future.

Van de Kamp, whose first responsibility is to the public, knows the law's intent. When he was elected in 1982, he was a strong supporter of open meetings. Now he applies a personal interpretation to a law, suggesting how to make a joke of its intent. This indicates a lessened regard for the public interest which we also noted in Van de Kamp's recent campaign against Proposition 51, the initiative that puts a reasonable limit on the taxpayers' liability in certain damage suits. In that case he tried unsuccessfully to convince voters that 51 would damage the environment — a contention too far-fetched to be taken seriously.

The attorney general's loophole in open-meetings law must be closed. There is a bill in the state Senate (SB2173) that will do it. It would restrict those secret meetings with attorneys to instances when a lawsuit has been filed against the governing body or it is considering filing a legal suit. No longer could a council or a board "use" its attorney's presence to legitimize its excuse for secrecy in other matters. The bill deserves strong public support.

per your request, Mike

Opinions

Keep government in the public's eye

Californians have always believed that the public's business should be conducted in public.

People rightfully feel that whatever elected boards do, they are doing it with the public's money. Therefore, the average guy should be entitled to know how these decisions are reached.

To that end, our state has one of the most stringent open-meeting laws in the country. The Ralph M. Brown act sets strict limits on the ability of city councils, school boards and other elected bodies to meet behind closed doors.

In short, the act says that unless you're dealing with sensitive personnel matters, labor negotiations or pending court action — you'd better do it in public.

Suddenly, the state's highest law enforcement officer — Attorney General John Van de Kamp — has come along with an opinion that threatens to blow a cannonball-size loophole in that tightly worded act.

The attorney general has suggested that the portion of the Brown Act dealing with pending court action can be liberally applied to almost any discussion that might have legal consequences. Any such talks, he concludes, could be taken up out of public view.

His opinion only has been expressed informally at this point, so it is not considered the law of the land. But if he publishes the opinion, he could drive the public's business right out of the council chambers and into the back rooms.

After all, what action taken by elected officials these days is not subject to legal action?

If a city council rezones a parcel from a residential to a commercial use, might the council not be sued by neighboring residents? Should the discussion of the rezoning therefore be held in private?

If a school board changes the boundaries of its elementary schools, might it not risk litigation from those who are inconvenienced by longer commutes? Should that discussion be held in private?

Van de Kamp's opinion could make a mockery of the state's open-meeting law. It invites any agency that wishes to carry a sensitive discussion out of the public's ear, to do so under the guise of protecting itself from possible legal consequences.

Senate Leader David Roberti has authored a bill that would limit significantly the ability of public bodies to invoke a "lawyer-client privilege" as an excuse for taking sticky policy discussions out of the public eye.

SB2173 would restrict this privilege to those occasions in which there is an existing court case under way; the public body in question has plans to sue someone; or there is a set of facts so threatening as to pose a significant risk of a suit against the body.

These would be the only circumstances under which boards could meet privately with their attorney.

Roberti's bill firms up language included in a bill by North Coast Sen. Barry Keene that was enacted two years ago. Keene's influence was crucial last week in helping SB2173 across its first Assembly committee hurdle.

If it is enacted, this bill will override any opinion issued by the attorney general.

We urge its full support by lawmakers who are concerned about protecting open access to government and the public's right to know.

THE SAN FRANCISCO
BayGuardian

2173

Curtains for the Brown Act?

A quiet move by the attorney general could wipe out California's pioneering open meetings law

California Attorney General John Van de Kamp has issued an informal opinion that could turn the state's landmark open meeting and public records laws into little more than a joke.

In a letter this spring to State Sen. Barry Keene, (D-Benicia), Van de Kamp argued that local agencies are free to hold secret meetings to discuss with legal advisors anything that potentially could be the subject of litigation. Since virtually anything a public agency does potentially could be the subject of a lawsuit, the opinion amounts to a blanket exemption from the open meeting requirements of the Ralph M. Brown Act for any local governmental body that wants to do business behind closed doors.

Van de Kamp's statement is not a formal legal opinion, so it lacks any binding authority. A formal attorney general's opinion on the matter, however, would have almost the same legal ramifications as a precedent-setting decision by the state Supreme Court or the Court of Appeal. And supporters of the Brown Act say it may just be a matter of time before Van de Kamp issues such an opinion.

"The attorney general only issues formal opinions when he receives a formal request," explained Joseph T. Francke, legal counsel to the California Newspaper Publishers Association. "But now that Van de Kamp has made his position on this issue perfectly clear, a request for a formal opinion could come at any time."

A boost to Agnost

Van de Kamp's position flies in the face of existing case law, and undercuts the stated goals of a Keene bill that took effect in January, 1985. The bill, SB 2216, was sponsored by the CNPA in an effort to close the loophole in the Brown Act that allows agencies to hide a broad range of closed-door activities under the mantle of "attorney-client privilege."

The Van de Kamp opinion also gives legal credibility to the practice of City Attorney George Agnost, who for years has used the claim of "attorney client privilege" to keep from public scrutiny his opinions, memoranda, notes, correspondence and other records addressing important — and controversial — public policy issues. In many cases, critics have charged that Agnost had no right to keep the information secret, since it had no relevance to pending litigation. On numerous occasions, the Bay Guardian has demanded access to records in the city attorney's office — and Agnost has refused to release the records, citing attorney-client privilege (see "The curious case of the secret bus shelter documents," Bay Guardian, April 16th, 1986).

Van de Kamp's arguments could also help Agnost and his deputies continue to defend their practice of meeting in closed session with city boards and commissions for discussions that participants say are not always limited to legal issues. In some cases, members of the Board of Supervisors and city commissions have charged privately that Agnost or his deputies have used the closed sessions to threaten that the supervisors or commissioners could be personally liable for millions of dollars in damages if they take actions contrary to the city attorney's recommendations.

Such warnings have angered a number of city officials, especially those who are also lawyers. These officials charge that the warnings of individual liability are based on very shaky legal analyses — in the overwhelming majority of cases, they say, city officials acting in their role as legislators or policy-makers cannot be held personally liable for their actions in a civil lawsuit. Agnost issues the warnings, critics suggest, in an effort to intimidate or frighten reluctant officials into following his advice — advice that virtually always advances the interests of major downtown developers and other powerful special interests. Agnost and his deputies argue that there are, in fact, cases in which courts have found city officials individually liable for actions they took as members of an elected or appointed governmental agency. They claim they never have issued any advice or warnings that were not properly grounded in law.

Under Keene's law, the public would have at least some opportunity to examine the specifics of those warnings and determine independently whether Agnost, an elected official, had overstepped his authority. Keene's law specifies that local agencies who meet with attorneys in closed session to discuss pending litigation must specify publicly whether the discussion involved an existing lawsuit (and if so, to identify it). The law also requires that the agency's attorney write a memo describing why the closed session is neccesary and outlining the facts and issues to be discussed. That memo must be made public if and when the specific case is litigated or settled.

According to Francke, Keene's bill was an attempt to codify a large body of case law that upheld the responsibility of public agencies to hold deliberations and make decisions in public, except for very specific, limited instances in which public disclosure of legal strategies or contract negotiations could hurt the agency's ability to prevail in court or at the bargaining table.

That philosophy was expressed as far back as 1960, in an opinion by then-Attorney General Stanley Mosk, who is now on the Supreme Court. "City councils," Mosk wrote, "are engaged regularly in deliberating or acting upon ordinances, regulations etc., where the legal implications of the subject matter are as important for a proper decision as factual or other information. . . . Thus, the city attorney may be called on to explain the legality or legal implications of a proposal before the council. In such instances, the public has a right to know all of this in order to assure that the representatives are acting in what it considers to be the public good."

However, despite the stated intent of Keene and the CNPA, Van de Kamp wrote that "it is unclear" whether the language in the legislation actually prevents closed meetings for attorney-client discussions unrelated to specific pending litigation. "We think the interests of the public are served," the opinion states, "when candid legal advice dissuades a public agency from taking questionable action which might otherwise lead to litigation."

Other implications

Although the Van de Kamp opinion does not apply directly to the Public Records Act, Francke suggested that it could be used by city officials to justify withholding documents that otherwise would be subject to public disclosure. "The Brown Act [which covers public meetings] and the Public Records Act are similar in many areas," Francke said. "I think, by implication, the [Van de Kamp] opinion would tend to fortify the position of a city attorney who argued that any, but any communication between a city official or agency and the city attorney was inherently confidential."

Van de Kamp's statements further appear to undercut the effectiveness of a pending bill by Assemblyman Lloyd Connelly (D-Sacramento), which would allow a court to invalidate the actions taken by a city agency in a closed session that violated the Brown Act. Connelly's bill is still before the Assembly, but were it to pass, Francke said, local agencies could use the "attorney-client privilege" claim to defend virtually any closed session, making it all but impossible to argue that an action taken in private was improper.

State Senate President Pro Tem David Roberti (D-L.A.) has agreed to amend into an existing bill language that would affirm the strict controls on closed meetings and render Van de Kamp's opinion moot. The Roberti Bill, SB 2173, has passed the Senate and is now before the Assembly.

Van de Kamp's opinion is just the latest in a series of assaults that have chipped away at the Brown Act. The bills by Keene and Connelly sought to put some teeth back into the act — but the attorney general's action means the legislature will have to take additional steps, at once, to prevent the complete erosion of California's pioneering open meetings law.

—Tim Redmond

SOS!

What you can do to help save open government in California: The state legislature must act soon to prevent the demolition of the Brown Act. The Bay Guardian urges everyone who wants to see the public's business done in public to:

1. Write or call your state Assembly representative and senator and demand their support for amendments to SB 2173 (Roberti) that would affirm strict controls on closed meetings as well as AB 2674 (Connelly), which puts some teeth back in the Brown Act.
2. Write or call Gov. Deukmejian and urge him to sign both bills.
3. Write or call Attorney General John Van de Kamp and let him know you oppose any attempts to weaken the public's right to see policy issues discussed and decided in the open.

Reprinted from the June 18th edition of the Bay Guardian.

The Sun
Opinion
Sunday, June 8, 1986
399 D Street, San Bernardino, Calif. 92401, 714/889-9666
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ROBERT W. RITTER / Executive Editor
MARIE SAULSBURY / Managing Editor/Sunday
WAYNE C. SARGENT / Editor
RICHARD S. KIMBALL / Editorial Page Editor

Open meetings law faces assault

Wayne Sargent

The history of open meeting laws in the United States is one of good initial intent, followed by erosion through amendment, exemption and negative interpretation.

An open meetings law is simply legislation designed to insure that government bodies conduct business in public. It embodies the principle stated by Woodrow Wilson: "Open covenants openly arrived at."

Such laws should be without controversy. The principle is easy to grasp. When school boards, councils, supervisors, boards and commissions of all sorts are elected or appointed, they serve the public and handle the public's money. Whether they take money in, dole it out, or both, it should not be hard to keep one's eye on the central idea that they are doing the public's business with the public's money. And therefore they should do it in public.

What happens is a kind of elected arrogance. Officials, having achieved the mandate of public vote, find it much easier not to have to explain daily each question, statement or vote.

What also happens is the growth of "sensitive" and "competitive" activity where damage can be done through distribution of information. On a national scale the matter of "national security" is such an area. There is no inclination to tell the public about any matter that would benefit an enemy or potential enemy. That premise is accepted, but the areas of exclusion tend to grow until most federal documents are "classified" and withheld from the public. At Grenada, Americans were not informed until the strike, invasion, and takeover were completed. It is a matter of concern simply because it was the first time in the 200-year history of the United States that the press did not accompany American fighting men into battle.

At local governmental levels, "personnel" matters have been conducted in secret. When Harry Mays was named this county's chief administrator, it was following weeks of secret screenings and discussions. How else could a decision be made without insulting hundreds of non-winning candidates who applied?

It is thus understood that the matter of openness in government is not all black and not all white.

But there has been erosion of California's chief open meetings law — the Ralph M. Brown Act — for a long time and right now it is under a threat which could all but void the intent of the act. And the man who is making that threat is the state's number one law enforcement officer, Attorney General John Van de Kamp, who was elected in 1982 amid statements of undying adherence to the principle of open meetings.

Just as Van de Kamp's appearance on TV in opposition to Proposition 51, the so-called "deep pockets" measure, shocked many of his followers, so has his role in interpreting open meetings laws now shocked the California media.

What has seemingly come between media and Van de Kamp is the matter of lawyer-client relationships. Along with aforementioned "national security" and "personnel matters," government agencies have traditionally gone into secret session when they were sued. It is understandable that a government agency should not be made to plan its defense in public to the benefit of the plaintiff.

Now, however, Van de Kamp is interpreting the Brown Act to permit a closed session whenever there is a discussion with an attorney for the purpose of *avoiding* litigation. And this is a very different matter. If a government agency may invoke attorney-client confidentiality at any time simply because it perceives the possibility of future litigation, then open meetings in California are headed for extinction.

If supervisors want to rezone county land for commercial use, there is always a threat of litigation by residential homeowners. May they then rezone in secret?

If the city council wants to levy a tax, may it not consult an attorney on a question of taxing authority or constitutionality? And if they debate such matters in secret, of what value is it for them to come to public chambers and take a formal vote? Where was the substance of the question discussed and decided?

Stanley Mosk, a former attorney general of consequence, wrote an opinion back in 1960, which said, in part:

"City councils are engaged regularly in deliberating or acting upon ordinances and regulations, where the legal implications of the subject matter are as important for a proper decision as factual or any other information in order to form an intelligent and proper decision. Thus a city attorney may be called upon to explain the legality of a proposal before the council. In such instances the public has a right to know all of this in order to assure that the representatives are acting in what it considers to be the public good. It is the sense of the Brown Act that such types of meetings be open to the public."

Van de Kamp thus far disagrees.

The focal point of the current situation is Senate Bill 2216 of the 1984 legislature. In it, Sen. Barry Keene attempted to *limit* the lawyer-client relationship in public meetings. Van de Kamp now takes a position contrary to the intent of the Keene legislation. Instead of narrowing the lawyer-client privilege, he broadens it to the point of destroying the Brown Act. If he formalizes that position it is very important because local governments will be then be handed a legal excuse to close doors.

If that happens California will have lost its place as one of the best states for the public, and its servant, the press, to monitor government at work. California could become a state where almost anything could be done in secret session under the protective banner of legal precaution.

It can only be hoped that Van de Kamp will remember his campaign promises of 1982 and fight for the public's right to know. He has, in this current election year, all but a free ride. He was unopposed in the June 3 primary. He will face a Republican no-name in November. Even so, he is taunting California's news media on an issue it values above all else — access to government and the public's right to know.

Sargent is editor of The Sun.

PRESS-TRIBUNE
OPINION

Friday, May 23, 1986

Spotlight

Van de Kamp does his part to shut door on open meetings

DENNIS WYATT

Press-Tribune columnist

Picture this if you will.

A school district superintendent calls a closed session with the school board to discuss personnel matters. After the public leaves, the superintendent tells the board he doesn't like the candidates running so far in an upcoming school board election. It seems the two who had filed so far were less than agreeable with the job he was doing as superintendent.

The superintendent wants the board to try to drum up new candidates. If new candidates don't emerge, he tells the board he'll resign after the election.

When questioned about the propriety of the board discussing efforts to influence an election for his benefit behind closed doors, the superintendent simply replies that the district's counsel indicated it was perfectly legal to do as it did not violate the Brown Act — the state's open meeting law.

Another incident.

A DISTRICT SUPERINTENDENT is concerned that several school board members are "listening to teachers and parents too much" so he brings the matter up in a closed session under the heading "potential litigation."

The superintendent reprimands the duly elected board members and warns them against paying too much attention to teachers or parents.

He justifies the closed-door session by attempting to [illegible] the board members in their place by citing the [illegible]ending litigation" provisions of the Brown Act. His rationale — the two board members could propose district policies based on their conversations with teachers and parents that could lead to litigation.

SOUNDS A LITTLE far-fetched, doesn't it?

Unfortunately, it did happen while I served for eight years on the Western Placer Unified School District board. The two examples of disregard of the public as well as skirting of the state's open meeting law did occur.

As a reporter over the years, I've also been told by disgruntled elected City Council members who were shocked to find a closed session called for "personnel reasons" or for "pending litigation" were actually private verbal whipping sessions inflicted upon them for daring to voice opinions different than the others elected to serve the public.

Sounds frightening, doesn't it?

The Ralph M. Brown Act has helped keep public boards for the most part from meeting in secret to spend your money and establish public policy without public input.

THERE ARE TWO basic original exceptions to the rules for all public board business to be conducted in the open before the people. One was extremely sensitive personel matters such as debating whether to dismiss an employee and the other was to discuss pending litigation.

Lawyers, however, who represent many public boards, seem to have a distaste for open meeting discussion of controversial items. They see all comments of school boards, city councils and other boards to be potential sources of lawsuits. So to make their job easier, they often try to keep the nastier stuff behind closed doors by contending there is always a slight chance someone might sue — way down the road.

THE BOTTOM LINE is lawyers have, at times, decided the agenda for public debate and what should be decided by public boards long before the constituents have a shot at saying their two cents worth on controversial subjects.

More often than not, the public representatives go along with the lawyers. After all, they assume, lawyers know the law. Unfortunately, they also know how to make their jobs easier.

Which brings us to the latest shenanigans of John Van de Kamp.

He's the guy who serves as California's attorney general when he's not busy moonlighting for the California Trial Lawyers Association in anti-Proposition 51 commercials.

VAN DE KAMP has issued a position that the Brown Act's litigation exception to open meetings can apply to any matter of controversey or perceived potential controversy.

To put it simply, Van de Kamp says its legal now for lawyers and public boards to chat about a thorny issue and take a united stand even before they have heard one word of public input at an open meeting.

Van de Kamp was elected to protect the interests of the people of California and enforce its laws.

True, it is his duty to issue opinions to clear up vague points in adopted laws.

But in this case, Van de Kamp is doing exactly what he accuses Supreme Court Chief Justice Rose Bird of doing — that is rewriting the law to suit his viewpoints on how society should be run.

BUT THEN AGAIN what else do you expect from someone who is trying to scare the state's voters into voting against Proposition 51 by claiming its passage will turn California into one gigantic toxic waste dump?

VIEWPOINT

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Senate bill would keep public business public

The public's business should be conducted in public.

That's a pretty innocuous statement with which most people would likely agree.

Two years ago, Sen. Barry Keene, D-Benicia, sponsored a bill that restricted public boards (city councils, school boards, sewer district trustees, etc.) from going into closed sessions. Secret meetings were permitted only on sensitive subjects such as lawsuits and discussing personnel.

Not long ago, California Attorney General John Van de Kamp issued his own opinion of Keene's bill which could create a huge loophole in the open meeting laws. Basically, Van de Kamp said public boards could close the door to the public to discuss almost any matter that *could* result in litigation.

What, in these litigious times, would *not* be covered by that sweeping interpretation.

We do not wish to use this issue to flog local boards such as our own City Council. They have not abused the privilege to meet behind closed doors. But with Van de Kamp's gigantic loophole blown through the state's open meeting law, think of the possibilities local boards could have to meet secretly:

- A study session on the new Hilton hotel because, after all, somebody out there *might* sue.
- Discussing contracts with the contractors building the new sewage treatment plant.
- Marine World.
- Cullinan Ranch or almost any controversial land-use proposal.

The state's open meeting law (also known as the Brown Act) recognizes the need for secret meetings between a public body and its legal counsel. There are certain situations when it is necessary. But Van de Kamp's surprising interpretation of this law would give public boards the excuse to meet privately on a whim.

There is a way to clear up this matter, however. Senate Bill 2173, sponsored by Sen. David Roberti, D-Los Angeles, would narrowly define the circumstances under which a board can meet privately with its attorney. Roberti's bill, for instance, would allow secret meetings when:

- There is an existing court case under way.
- The public body in question plans to sue someone.
- There is a set of facts so threatening as to pose significant risk of a suit against the public body.

Roberti's bill would also extend the protection of the Brown Act to cover the growing number of "task forces" and "advisory committees" that we see today.

When the state Legislature reconvenes in August, we hope the Assembly puts SB 2173 atop its agenda.

Those lawmakers who are truly concerned about the public's right to know should support SB 2173.

The Daily Breeze

opinion

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A10

Sunday, June 8, 1986

Preserve openness

Attorney General John Van de Kamp is telling Californians they no longer have the right to be informed about state and local government actions.

In direct conflict with the intent of the Ralph M. Brown Open Meetings Law, Van de Kamp has determined that local governments are free to discuss any matter with their attorneys in closed session — with no public witnesses — so long as the purpose is to avoid litigation.

In his opinion, matters involving the following should be held in closed session:

— "Advising a client that proposed action may be illegal or unconstitutional.

— "Advising a client that a proposed action poses legal difficulties but there are less problematical alternatives.

— "Advising a client about matters which may indirectly impact upon pending litigations."

In laymen's terms and in reality, anytime a school board, city council or commission faces a controversial issue, it can use any of these escape clauses to avoid public accountability.

Now, government officials frequently slam the door of access in the public's face, hiding behind the excuses of discussing "personnel matters" and/or "legal advice."

Unfortunately, more often than not, the struggle to preserve openness in government is seen by John Q. Public as a battle between the media and government. Not so.

Admittedly, openness makes the media's job easier and provides for more thorough reports. But the lack of openness may end up costing John Q. knowledge about how budgets are determined, discussions over possible tax increases or debates on rezoning residential property.

Van de Kamp, by liberalizing an already weak Brown Act, would make all that possible.

While there are legitimate occasions when discussions by public bodies should be held in private, amendments to the Brown Act have provided guidelines to cover such situations.

Van de Kamp's broad application of the "attorney-client" privilege to all deliberations of public agencies will give elected officials so inclined an excuse to close public access anytime they choose.

Any matter of actual or potential controversy — any proposal regarding government operations that might meet with resistance leading to a lawsuit at some future date — could trigger a closed meeting that would leave the public in the dark as to the legal basis for the agency's decision.

At worst, the entire discussion of the merits and pitfalls of the proposal could occur behind closed doors, with the distinction between legal liability and political accountability vanishing.

This is not an issue that should be of concern only to the media. This will drastically affect the way public officials conduct public business.

The majority of public agencies will not rush to close their doors as a result of Van de Kamp's interpretation of the Brown Act. Fortunately, they have a higher regard for public access than the attorney general.

But there are elected officials who will use Van de Kamp's opinion to justify a penchant for secrecy in the resolution of controversial and difficult public issues.

It is those officials which citizens must keep their eyes on so they might make informed decisions on Election Day and which the press must challenge through the courts.

A more specific course of action to register opposition to Van de Kamp's watering down of the Brown Act is for citizens to write their local assemblyman and state senator in support of SB 2173, legislation proposed by Senate President David Roberti, D-Hollywood, which would strengthen public access to meetings and deliberations of public agencies.

Citizens have every right to expect their representatives to conduct public business in a forum that allows accessibility, participation and accountability.

Secrecy should not be tolerated as a necessary evil.

Valley Press **Forum**

Editorial

Bill would slow erosion of state open meeting law

There is a constant tug of war going on in Sacramento between government officials who want to be able to discuss the public's business behind closed doors and the people, who believe that government should conduct its business in public view.

Those of us who toil in the media are on the side of the public because we, too, believe that the government should be out in the open.

The Ralph M. Brown Act, also known as the Open Meeting law, has been on the books for many years, but it is under constant assault in the legislature and in the courts.

The essence of the Brown Act is contained in this brief paragraph:

"The act's cental mandate . . . is deceptively simple: 'All meetings of the legislative body of a local agency shall be open and public, and all persons shall be permitted to attend any meeting . . . except as otherwise provided. . . .' "

From time to time, government officials try to sneak something through the "except as otherwise provided" loophole.

The County Supervisors Association and the League of Cities would like to use the loophole to make it possible for government bodies to discuss all sorts of things with their attorneys.

The problem is that once public officials get behind closed doors they can generally talk about anything and, inasmuch as they know they can get into trouble if it becomes known that they didn't stick to the letter of the law, they are unlikely to tell anyone outside the closed session what really was discussed.

Last week, the Governmental Organization Committee voted 9-0 for Senate Bill 2173, written by Senate President Pro Tem David Roberti, D-Los Angeles, which would carefully restrict closed sessions by government bodies wishing to confer with their attorneys.

The bill would also require government task forces to hold open meetings.

Last month, Roberti introduced his bill which would specify when a government body can go into closed session to confer with its attorney.

Attorney General John Van de Kamp recently said that a 1984 law allows bodies to hold closed sessions to obtain general advice from their attorneys because there is always the potential of litigation.

The Roberti bill would allow such closed sessions with attorneys only when a lawsuit or claim has been filed against the government body, the body believes it is likely to be sued, the body is considering filing a legal action, or the body is deciding whether a closed session is authorized.

Attorney General Van de Kamp's opinion would give government bodies a big key to lock the door at almost anytime they wished. In modern America every public and private institution is constantly facing the "potential of litigation."

On behalf of the state's citizens, who are ill-served when their government officials sneak behind closed doors to make decisions that should rightfully be made in public view, we wholeheartedly support Roberti's bill.

San Gabriel Valley Daily Tribune
July 12, 1986

Closed meetings issue

City officials in Valley generally oppose bill to clarify Brown Act

1416. 1462

By STEVE TAMAYA
Staff Writer

The Assembly is considering a bill that could restrict the ability of city councils and other governmental boards to meet in closed session with their attorneys.

San Gabriel Valley officials generally oppose the measure to clarify the Ralph M. Brown Act, the state law that requires government agencies to hold public meetings.

Exceptions under the Brown Act allow closed sessions when officials need to discuss issues related to personnel matters or possible litigation.

Senate Bill 2173 by Senate President Pro Tem David Roberti, D-Hollywood, would clarify the litigation provision and define when closed sessions could be held under that clause.

Closed sessions could be held only under four general conditions identified in the bill — when a lawsuit or claim has been filed against a government agency; when it is likely that a suit or claim will be filed; when the agency is considering filing legal action; or when its board is deciding whether a closed session is authorized.

Some local municipal attorneys are not vehemently opposed to SB2173, saying it would have a minimal impact at best. But others claim the bill would eradicate the right of cities and other government agencies to enjoy the same attorney-client privileges as the private sector.

"It's telling a public entity it has to get its legal advice in public," said Richard Morillo, city attorney for Monrovia and Monterey Park.

In El Monte, where the City Council has opposed SB2173, City Attorney Sidney Maleck said the measure would give private citizens and companies involved in negotiations with cities an unfair advantage because they can discuss their strategy behind closed doors.

"It's the taxpayer who loses then," Maleck said.

On the statewide front, the bill is backed by the California Newspaper Publishers Association and state Attorney General John Van de Kamp. But it is opposed by the state County Supervisors Association and the League of California Cities.

It was Van de Kamp who recently interpreted a 1984 amendment to the Brown Act to mean that government boards could confer with their attorneys on general issues because most decisions could lead to litigation.

The exception was only intended to authorize closed sessions when there is either pending or potential litigation. As a result of Van de Kamp's opinion, Roberti introduced new clarifying language in SB2173.

Last week the Assembly Governmental Organization Committee approved the bill on a 9-0 vote and sent it to the Ways and Means Committee. Two local members of the government panel, Republican Assemblyman Frank Hill of Whittier and Democratic Assemblywoman Sally Tanner of El Monte, voted for the measure.

Both had been lobbied by the CNPA, whose general counsel, Michael Dorais, wrote in a letter to lawmakers on SB2173 that to broaden the Brown Act's exception on potential litigation by including all attorney-client conferences would "swallow the rule of openness" intended by the law.

"SB2173 would end any ambiguity on this point, and for this reason we consider the bill essential to preserve the open meeting laws as meaningful instruments of public control," Dorais contended.

Hill said he had been lobbied by a number of cities to vote against the legislation. But he said he felt some legal "middle ground" was needed in determining when closed sessions could be held.

"I can see how cities can abuse the process," he said. "In theory, you can be sued for everything."

None of the local officials interviewed by The Tribune said they could recall any abuses of the law's exemption.

Duarte City Attorney William Camil said he would never allow his council to abuse the privilege and indicated SB2173 would have a minimal impact on the city.

Camil said he believes the bill is too restrictive, citing there are times when a city council needs to confer with an attorney "outside the scope of threatened litigation."

But he acknowledged those situations are not common and added that government agencies cannot fully enjoy the attorney-client privilege since "it is the public's business we're talking about."

Irwindale City Manager-Attorney Charles R. Martin, a veteran municipal attorney who has worked for many other Valley cities, said he does not find SB2173 objectionable.

"I and many other city attorneys thought that (bill) was the law anyway," Martin said. "It does not represent any change in how (Irwindale) does things."

Keep the door open

OVER THE YEARS the Hi-Desert Star has enjoyed a generally open and frank relationship with our local government agencies. Part of the explanation for that openness is undoubtedly the small town character of the communities we cover. Secretive government doesn't survive long in an area where your constituents are likely to be your next-door neighbors.

Another, more compelling explanation for this candor is California's Ralph M. Brown Act, which sets strict limits on how much business state and local government agencies can conduct behind closed doors away from the prying eyes of the press and the general public.

The Brown Act establishes very stringent limits on the use of closed sessions and it has become a model for other states' open-meeting laws. It does, however, recognize and define certain instances when a governing board of an agency may have a legitimate reason for going into a closed-door session. Sensitive personnel matters, labor negotiations and pending legal action are all matters that may be discussed out of the view of the public. Even then, the act requires that any action taken as the result of such discussions be announced in an open public session of the board.

For decades the delicate balance struck by the Brown Act has worked well, protecting both the right of the citizens of California to know what their government is up to and the legitimate need of government to preserve confidentiality in certain matters. But now, State Atty. Gen. John Van de Kamp has issued an opinion that threatens to throw that balance badly out

of wack.

Van de Kamp recently offered a very broad interpretation of the pending legal action section in the Brown Act. The attorney general would add the word *potential* to that section and allow governing boards to go into closed session to discuss any policy or action that *might* have a legal consequence.

Such an interpretation, we feel, would set the stage for widespread abuse and ought to be struck down. These days, what action by a government agency isn't potentially the source of a lawsuit? Reciting the pledge of allegiance to the flag at the start of a board meeting might well end up in court, the way things are going.

The possibility — real or imagined — of a lawsuit could provide unscrupulous politicians with a convenient excuse to remove virtually every piece of government business from the public's view.

At present, Van de Kamp has not issued a statement formally setting down his peculiar interpretation of the Brown Act. But his comment has already stirred considerable fear that the intent of the act might be undermined, and there is legislation pending to ensure that the attorney general's views never have the force of law.

Now awaiting action in the state Assembly is SB 2173, which would plug the pending legal action loophole proposed by Van de Kamp. The bill, authored by state Senator David Roberti, would allow boards to use legal action as a reason for a closed-door session in only three circumstances: when there is an existing legal action under way; when the board actually plans to sue somebody; or, when there exists a set of facts that pose a clear and significant threat of litigation against the government agency.

We think this is a fair set of ground rules, one that protects the rights of the people and the realistic needs of government agencies. We urge the quick passage of SB 2173.

Letter Policy

The Hi-Desert Star welcomes expressions of opinion from its readers on subjects of interest to Morongo Basin communities. Letters should be mailed to The Editor, Hi-Desert Star, Box 880, Yucca Valley CA, 92284, or delivered to the Star's office at 56445 Twentynine Palms Highway, Yucca Valley.

All letters must be signed and include a telephone number where the author can be reached. Typed material, not to exceed a page and one-half, double-spaced, is preferred. Letters may be condensed.

Anonymous letters or letters with pseudonyms will not be printed, nor will the name of the author be withheld. Potentially libelous or personally abusive comments will not be published, nor will promotional, commercial or strictly personal messages.

THE RALPH M. BROWN ACT 32 YEARS LATER: TIME TO REFORM THE REFORM LAW

By Daniel Borenstein
May 4, 1985

...The Legislature finds and declares that the public commissions, boards and councils and the other public agencies in this State exist to aid in the conduct of the people's business. It is the intent of the law that their actions be taken openly and that their deliberations be conducted openly.

The people of this State do not yield their sovereignty to the agencies which serve them. The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may retain control over the instruments they have created.

--California Government Code, section 54950, preamble of the "Ralph M. Brown Act."

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CHAPTER 1: INTRODUCTION

In response to a series of articles by a *San Francisco Chronicle* reporter, the state Legislature in 1953 approved a new law requiring that local government boards conduct most of their business in public.

The law, named after the legislator who carried the bill, Ralph M. Brown, has been amended in all but one legislative session since then.

But, despite 32 years of reform, the Brown Act is difficult to enforce. The penalty provisions are often not strong enough to encourage compliance. Closed sessions are used frequently, often straying beyond the permissible topics for discussion. And the law fails to define what constitutes a meeting.

Drawing from my five years' experience as a reporter covering local government in the Bay Area and the recommendations of journalists who responded to a 1984 survey conducted in cooperation with the California Newspaper Publishers Association, I have recommended 28 changes to the law.

Some suggested changes merely clarify ambiguities in

the law, while others are major, likely to draw strong opposition from local government organizations such as the League of California Cities. Consequently, a strategy for implementation of the reforms should consider prompt moves for passage of the less controversial reforms, following later by a push for the more controversial ones.

But, to begin, consider the problems of the early 1950s that prompted the original reforms, and then the problems I encountered in 1980 that prompted this re-examination of the law.

CHAPTER 2: REFORM OF THE 1950s

In 1951, a young reporter named Michael Harris came to the Bay Area, leaving a job on the *New Orleans Item* to join the *San Francisco Chronicle*. "I was just a kid of course," Harris recalled more than three decades later.[1]

But the "kid" was surprised by what he saw -- by the way California's local governments conducted their business behind closed doors.

Less than six months after he arrived, Harris wrote a series of 10 articles for the *Chronicle* about the governmental process in the Bay Area, titled "Your Secret Government."[2] At the time, state law required city councils and boards of supervisors to meet in public while school boards were required to only take action in a meeting open to the public.

"To some, whose knowledge of legal affairs is slim, the code may appear to be plain," Harris wrote. "But it has

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[1]Telephone intereview, December 1983.

[2]Michael Harris, "Your Secret Government," reprint of a series of 10 articles that appeared in the *San Francisco Chronicle*, May 25 - June 4, 1952.

been said that what looks like a brick wall to laymen may in reality be a triumphal arch to one versed in the ways of the law."

One such "triumphal arch" was the caucus, a closed meeting of a council or board, "known by a variety of names: caucus, star chamber, executive session, committee-of-the-whole, pre-council meeting, work session and--perhaps most euphonious of all--study meeting. ... There are exceptions, but most of the public bodies hold some caucus meetings."

A *Chronicle* survey revealed that in some cases boards and councils perform virtually all public business behind closed doors except the actual passage of resolutions and ordinances.

> The public meeting which follows a caucus may be extremely brief. A matter which is debated in a closed meeting for hours may be introduced in a meeting, exposed to public scrutiny for an instant, voted on and enacted into law in a matter of seconds. The vote itself is considered, in a legal sense, the only work the public body performs.

The second "triumphal arch" was the unannounced meeting.

> Sometimes they are held on nights or afternoons when the board does not normally meet. Or a procedure some boards favor is to wait until the public has gone home after a regular meeting is adjourned and then, free from scrutiny, reconvene and get to work on controversial matters.

School and special district boards were the most common practitioners of unannounced meetings, Harris reported.

"There seems to be an attitude -- particularly among school officials -- that permission to attend meetings is a favor which boards can grant or withhold."

The articles prompted Assemblyman Ralph M. Brown, D-Modesto, and the Assembly Interim Committee on Government Organization to launch an investigation and study of loopholes in state laws that permitted the closed-door meetings Harris described.[3]

The committee concluded:

> ... there is a genuine and compelling need for legislative action of a nature designed to curb this misuse of democratic process by public bodies who would legislate in secret. Unless for proper security reasons, the public has the right to be present and to be heard at all phases of legislative enactment by any governmental agency. This right is a source of strength to our country and must be protected at all costs.[4]

In January 1953, with the backing of the League of California Cities and the California Newspaper Publishers Association, Brown introduced Assembly Bill 339. The 1 1/2-page document was approved by the Legislature and signed by Governor Earl Warren on July 2, 1953. The law, which took effect Sept. 9, 1953, required local government agencies to hold their meetings in public. An exception was made for personnel matters, which could be discussed behind

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[3]Paul Jeffery, "California's 'Open Meeting' Fight," Freedom of Information Report No. 210, School of Journalism, University of Missouri at Columbia (October 1968).

[4]"Assembly Interim Committee on Government Organization Report," 1965, California Assembly, p. 16, as cited in Jeffery, *ibid.*

closed doors. The press was to be given notice of any special meeting held outside of a board's regular meeting time.

"There are few who don't admit that the Brown Act ... has had a profound effect on every city council, school board and public agency in the state," Harris wrote in an article marking the law's 10th anniversary.[5]

There is "virtually unanimous agreement that the Brown Act has had a substantial beneficial effect on local government," Assemblyman Milton Marks concurred in a 1966 article by Professor Albert Pickerell of the University of California, Berkeley, School of Journalism.[6]

But, despite the praise, there were problems. Pickerell conducted an extensive review of the law and concluded that there were "basic problems of application and interpretation of the Brown act" in numerous areas -- among them personnel sessions, the definition of a meeting, penalty provisions, and closed session to discuss land acquisition and pending litigation.

Eighteen years later, for this analysis, the California Newspaper Publishers Association and I teamed up to survey newspaper editors across the state. The results indicate that, despite changes in the law, at all but one session of the state Legislature,[7] there are still, as Pickerell found,

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[5]Michael Harris, "10 Years of the State Secrecy Ban," *San Francisco Chronicle*, July 1, 1963, p. 31.

[6]Albert G. Pickerell, "Brown Act -- Interpretations, Opinions," *California Publisher* (September 1966).

[7]The only exception is the 1963-4 session.

"basic problems of application and interpretation."

The law, which originally contained nine sections, now has 38. Some of the loopholes of the 1960s have been eliminated. But many improvements are still needed.

Nels Johnson, city editor of the Novato-based *Independent Journal*, noted, "The lack of teeth in the Brown Act gives many public agencies little incentive to follow the law and its spirit on a consistent basis."*

The narrow criminal penalty provisions make it virtually impossible to prosecute a local board member for a violation. No one has ever been convicted of a criminal violation of the Brown Act.

But to lay blame solely on the penalty provisions of the law would be a mistake. As Johnson put it, the 32-year-old law is "a piece of legislative Swiss cheese," still riddled with loopholes and difficult to interpret.

Until the enforcement provisions are strengthened to encourage greater compliance and the requirements of the law are clarified, the people will not remain informed "so that they may retain control over the instruments they have created."

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*Response no. 26 to survey by California Newspaper Publishers Association and Daniel Borenstein. For details of the survey, see Chapter 4.

CHAPTER 3: ANATOMY OF A BROWN ACT DISPUTE

I learned the hard way about problems with enforcement of the Brown Act.

It was November 1980 and I was the city reporter in Antioch for the *Daily Ledger*, the only local newspaper in the community of 43,000. Councilman Tom Torlakson had been elected to the Contra Costa County Board of Supervisors. For the four remaining council members, a taxpayer rights advocate and three pro-growthers, the task of selecting a successor to their most liberal member began. Rather than call a special election, at a cost to city taxpayers of $15,000, the council members announced they would make the decision themselves.

What they didn't say is the decision would be made secretly, without an opportunity for public comment and without public council discussion of the candidates and their qualifications.

Fourteen people applied for the job. At a council meeting Jan. 6, 1981, Councilman Victor Catanzaro nominated John Hall, a nine-year member of the planning commission, to fill the vacant post. Councilman Walter Pierce seconded the

nomination. Without comment before the vote, the council unanimously approved the appointment.[1]

The decision was made one week ahead of schedule. It was not on the agenda because Mayor Verne Roberts had previously announced the appointment would not be made until Jan. 13.

It was, I have since learned, a classic example of public officials skirting the Brown Act. The council got away with it because the vague wording of the law is open to broad interpretation, and the act contains no provisions for rescinding illegal actions. The council members showed little concern for the law because its minimal penalties present little risk to violators.

But how did four council members who often did not agree manage to select the same person from a field of 14? By the end of December 1980 I had learned how the selection was to be made.

"Comments and activities by members of the council suggest a scenario of a public vote on the selection of a replacement after private discussion among the council members on the merits of the candidates," I wrote in the newspaper's lead article Dec. 30.[2]

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[1]After the vote, according to the city clerk's minutes of the meeting, Pierce said there were many qualified applicants and expressed appreciation to all for their interest. Mayor Roberts noted that Hall comes to the council with experience from the planning commission and attends council meetings on a regular basis.

[2]"Council may fill seat privately," *(Antioch) Daily Ledger*, Dec. 30, 1980, p. 1.

Council members said they did not want to place any of the candidates in an awkward position by questioning them in public. "Somebody is going to get embarrassed if they're not chosen," Pierce said.

Catanzaro said the council would probably have a difficult time reaching an agreement on one candidate. "I'd hate to embarrass a bunch of people by going through a bunch of names," he said.

Bill Thon, the newspaper's managing editor, called for public interviews of the candidates. "Anything less," he editorialized, "is unhealthy to good government."[3]

The notion that the candidates would be embarrassed is "hogwash," Thon wrote.

> These 14 people have applied for a position of power within our city. As a councilman, the chosen member will be voting on issues that can affect our daily lives. We believe that's justification for the public knowing something about them, and we are surprised that members of the City Council who all had to face the scrutiny of an electorate would think differently. ... Applicants who are unwilling to face public examination should withdraw their names.

The dispute presented an interesting legal dilemma. The Brown Act prohibits local government agencies from conducting public business in private. While there are exceptions for discussion of matters such as legal and personnel matters, the selection of public officials is not

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[3]"Editorial: Private selection for public office," *(Antioch) Daily Ledger*, Jan. 2, 1981, p. 5.

excluded. Specifically, the law prohibits a majority of the members of a government agency -- a school board, city council, county board of supervisors or planning commission, for example -- from meeting in private to discuss public business. The law, however, allows one board member to meet individually with each of the others.

But Mayor Roberts went one step further. He asked his colleagues to submit a list of their first three choices from the list of 14.

How did the law apply in this case? The law doesn't specifically address such a scenario. Only an opinion from the state Attorney General's Office presented a similar analogy. As I reported,*

> Richard Martland, the head of the government section of the state attorney general's office, says the council members may legally discuss the candidates with other members of the council on an individual basis. Martland, however, warns that legal precedent suggests the council members may not relay the opinions of other council members in their private discussions.
>
> Thus, Martland suggests, Roberts may ask other council members for the names of the candidates they prefer, but he may not act as a negotiator for a private council decision.

But Martland's comments and the attorney general's opinion were merely advisory. They would not be binding in court and they weren't enough to persuade the City Council to take another tack.

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*Attorney General Opinion No. 80-713, Oct. 30, 1980. For more on the opinion, see Chapter 7, Section II.

Roberts' public comments and interviews with other council members revealed that the council carried out its plans to secretly make the decision before a public vote.

Roberts, before nominating Hall at the council meeting, said he had met at his house with Catanzaro to review the three selections each council member had submitted. They opened the envolopes and discovered that five of the applicants had the support of two council members and two of the applicants each had the support of one council member.

Roberts, however, did not reveal the entire story. In a separate interview, Pierce added more, recounting his participation in the selection process. He said Roberts telephoned him and informed him of the results of the polling. Pierce then informed Roberts he could support any of the five people who received two votes.[5] The fourth council member, Wilhelmina Andrade, said the mayor also contacted her as he narrowed the field of candidates.[6]

In other words, Roberts brokered a decision that was made before any of the council members arrived at the meeting Jan. 6.

Interviews with three of the council members indicated Hall was not the first choice of at least two council members and was on at least one council member's list of three people.

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[5]"Council wants to forge ahead," *Daily Ledger*, Jan. 9, 1981, p. 1.

[6]"Opinion suggests illegal method," *Daily Ledger*, Jan. 7, 1981, p. 1.

But the council members would not say more. None was willing to disclose his or her three-person list. And, aside from his public comments at the meeting, Roberts refused to discuss the selection process.[7]

Press accounts, he said, had "blown it out of proportion."

"It's all over," he said.

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[7]"Council wants to forge ahead," *ibid.*

CHAPTER 4: THE 1984 SURVEY AND CRITERIA FOR REFORM

The Antioch example is by no means an isolated case. The California Newspaper Publishers Association receives about 100 calls a month from reporters and editors, primarily seeking clarification of the Brown Act.[1] The CNPA, which actively lobbies for changes to the law, also provides free legal counsel to reporters from the assciation's member newspapers.

To gain a better understanding of what open-meeting problems journalists face with public officials, and to help figure out solutions, the CNPA and I developed and sent out a two-page questionnaire in the spring of 1984 to about 425 newspaper editors across the state. Fifty-seven responded.

There were six questions. Answers to the first three, which called for multiple-choice responses, gave a quick sense of the magnitude and perceived cause of Brown Act compliance problems.

Question 1 asked if the newspaper had since 1980

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[1]Telephone interview with Joseph T. Francke, CNPA legal counsel, March 28, 1985.

experienced problems with public agencies over the application of the Brown Act. Of the 54 that answered that question, 42 said they had.

Question 2, designed to be answered by those who had responded affirmatively to the first question, was more complicated:

> Why do you believe the problems have occurred -- are they more a case of ignorance of the law (__1__), awareness of the law but a loose interpretation of it (__2__), or an exploitive attitude that prompts the agency to try to get away with as much as it can (__3__)? If more than one explanation applies, number them in order of priority.

Because the question presumes an affirmative answer to the first question, the five responses from people who answered "no" to the first question were not counted. Of the remaining answers to Question 2, 23 considered ignorance of the law one of, or the only, cause; 34 considered a loose interpretation one of, or the only, cause, and 21 considered an exploitive attitude one of, or the only, cause.

Question 3 was intended to help gain an understanding of how newspapers contend with Brown Act problems:

> How did you respond to the situation? Check any or all that apply. Oral protest (__1__) Editorial (__2__) Letter protest (__3__) Court action (__4__)

Of the 42 newspapers that respondend, 38 reported oral protests, 17 reported using editorials, 19 reported letter protests and 4 reported taking court action.[2]

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[2]For a detailed discussion of the responses to

(A detailed breakdown of the responses to the three multiple-choice questions appears in the appendix.)

While the first three questions provided a very rough statistical sampling, the written reponses to the other three questions and the request for copies of articles and correspondence about the incidents provide a helpful insight into the nature of the problems reporters face. Those responses are incorporated in much of the analysis that follows.

Using the questionnaire results and drawing from my own experiences as a reporter covering local governments in Alameda and Contra Costa counties for the past five years, I have analyzed the problem areas and recommended solutions. In doing so, I have applied five criteria:

1. Public government action and deliberation.

The primary goal of the Brown Act, as stated in the preamble to the law, is to ensure local government board actions are "taken openly and ... deliberations (are) conducted openly."[3]

There are many who argue that government functions more efficiently in private -- that government leaders are elected by the voters and should be judged by the end result, not the means used to get there. Clearly, an evaluation of the efficiency of government in public and private would go far beyond the scope of this paper.

Question 3, see Chapter 5.

[3]*California Government Code*, sec. 54950.

Suffice it to say that to accept the premise of closed government requires a rejection of the premise behind the Brown Act. Rather than seeking to clarify and strengthen the law, that perspective would lead to abolishment of it.

2. Easily interpreted law.

Many of the problems of ambiguity in the law arise because the Legislature has not directly addressed public policy issues. Reporters choose to interpret the law broadly, while government officials prefer a narrow interpretation. In most cases, the answer to the dispute lies in a "legal gray area" between the two perspectives that is not clearly specified in the law.

It is here, some would argue, that the dispute properly belongs in the courts like any other interpretation of the law. But the scenarios of many of the disputes come up repeatedly, indicating there is a need for the Legislature to set public policy.

3. Easily and quickly enforced law.

For the journalist, timeliness is as important as gaining access to information. This is not merely, as some cynics charge, because we are in a competitive business trying to beat our competition in order to sell more newspapers or obtain higher ratings. The value of open meeting laws to the press and the public is also to allow them time to disseminate information so that interested parties can respond. As journalists, our jobs are to be messengers, but ones that get the message out while it is still useful.

4. Incentives for compliance.

Members of the press are not interested in seeing public officials jailed or fined. Our primary goal is cooperation, in which we gain the public information to which we are entitled with as few roadblocks as possible. But some public officials resist the release of information, even when their actions are contrary to the law. The objective is to encourage public officials to familiarize themselves with the law and comply with it.

5. Minimal costs.

Price can serve as a deterrent to gaining information. In our litigious society, the tendency is often to force disputes into the courts, a costly alternative for all parties. In Brown Act cases, the cost of gaining information can become more than a newspaper is willing to pay. The losers are the uninformed members of the public.

With those goals in mind, I proceeded with the analysis.

CHAPTER 5: MAKING ENFORCEMENT CHEAPER AND QUICKER.

California print journalists are frustrated with the Brown Act. There is a pervasive feeling that the law is unenforceable.

Of the 42 newspapers responding to the questionaire that said they had disagreements with public agencies over the applicaton of the Brown Act, four reported taking legal action to resolve the disagreement. At first, this might seem to be a testimony to the strength of the law. After all, one might argue, the remaining 38 newspapers resolved their disputes without having to resort to court action.

A close examination of the written responses, however, indicates that is not the case. Rather, frustration with the law is discouraging journalists from taking action.

> *Public officials have no reason to fear the law, writes Jimmie Jones, general manager of the Vallejo *Times-Herald*. "It needs to be easier to complain and get action."[1]
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> *There "should be more backing for enforcement when the law is violated," says Don Hansen, city editor

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[1]Survey response no. 19.

of the *Turlock Journal*. "It's impossible to take every case to court."[2]

*"Judicial remedies (are) so slight they seem unworth pursuing," writes Walt Miller, managing editor of the *San Diego Union*.[3]

*The legal requirements are too burdensome and time-consuming, said Oceanside Blade-Tribune reporter Mark Arner. "You've got to pick your fights," he said.[4]

*"Although the Brown Act has been on the books since 1953, some Bay Area officials haven't gotten the word," the San Francisco Examiner editorialized. "Stiffer penalities for violators, as we have suggested before, might help spread the word."[5]

At the root of the problem are the enforcement provisions of the Brown Act. There were no enforcement provisions in the original, 1953 version. It was not until 1961 that provisions were added allowing for criminal prosecution[6] and pursuit of civil remedies[7] against violators. In 1975, the Legislature agreed to give judges discretion to award attorney fees to a prevailing plaintiff in a civil case.[8]

Nevertheless, in its current form, the system is cumbersome and the penalties are insignificant.

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[2]Survey response no. 25.
[3]Survey response no. 32.
[4]Telephone interview, June 1984.
[5]"Don't hide the public's business," *San Francisco Examiner*, Oct. 21, 1983.
[6]California Government Code, sec. 54959.
[7]Ibid., sec. 54960.
[8]Ibid., section 54960.5.

I. THE ENFORCEMENT AGENCY

Mel Opotowsky, editor of the Riverside *Press-Enterprise* and former chairman of the California Freedom of Information Committee, summarized the reason for the frustration journalists face attempting to enforce the Brown Act.

> As the system works now, newspapers, broadcasters and indeed the general public, after being refused records or barred from meetings, can (1) complain or (2) go to court. If oral complaints are made, the public official in question usually goes to the county or board attorney who invariably rules in favor of the officials -- to do otherwise would invite litigation. If a paper or broadcaster decides to go to court, it is a choice that will be expensive, take a lot of time and cast the paper or broadcaster in the role of an adversary. So, few go to court. Generally these disputes occur mostly on the local level but they do occur in great numbers.[9]

As evidence of the high costs and lengthy time court decisions entail, consider the following cases. A reporter for the *(Santa Rosa) Press Democrat* and a *Sebastopol Times* editor waited five years to win their case in the state Court of Appeal against the city of Sebastopol. Court costs and attorney fees, which the city was required to pay, were about $20,000.[10]

Clearly, a cheaper, quicker enforcement procedure is

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[9]Mel Opotowsky's statement of the position of the California Freedom of Information Committee, undated.

[10]"The Times Editorial Comment: 5 years and $20,000 later ...," *Sebastopol Times*, Nov. 25, 1981.

needed that will help ensure timely interpretations of, and compliance with, the law, without forcing the press or public agencies to bear major legal fees.

A. Advisory Commission -- The New York State Model

The Freedom of Information committee has recommended establishment of a state commission that would issue advisory opinions on open-meeting and open-record disputes. As a model, Opotowsky cites the experience of a similar commission that was established in New York state in 1974.

> It has no power to order anyone to do anything. Its opinions are strictly advisory. But virtually all journalists contacted say it has had a strong impact on public officials inclined to keep things to themselves."

The California commission, as in New York, would not preclude either party to a dispute from going to court, either before or after an opinion from the commission. The day-to-day operations of the New York commission are managed by two staff attorneys who answer questions and issue the written opinions. The staff work is reviewed by the full commission at its four meetings each year.

The commission, Opotowsky writes, provides a resource for quick answers to disputes and, more importantly, potential problem areas.

"Mel Opotowsky, "Freedom of Information state commissions." *Freedom of Information.* Report by the APME Freedom of Information Committee, November 1982.

> (B)ecause of its non-binding, advisory role, (the New York commission) has not been pitted against public officials; in fact, it now gets a large percentage of its requests for opinions from public officials BEFORE they make any final decisions on a disputed issue. Public officials, in other words, have come to respect, not resist, the process.[12]

If the system were adopted in California, reporters, public officials and members of the public would have a resource for quick, inexpensive answers to questions.

B. Administrative Enforcement -- The FPPC Model

The state Fair Political Practices Commission and a member of the Senate Office of Research are currently in the very early stages of discussions on whether to draft legislation that would give the FPPC enforcement powers in Brown Act cases.[13]

While neither office has yet come up with details, the FPPC's current authority for enforcement of campaign-contribution and conflict-of-interest cases can serve as a model for discussion.

The FPPC was established in 1974, when more than 70 percent of California voters approved Proposition 9, the Political Reform Act.[14] Like the advisory commission

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[12]*ibid.*, emphasis his.

[13]Telephone interviews with Greg deGiere, Senate Office of Research, and Kathy Donovan, staff attorney for the FPPC, March 7, 1985.

[14]*California Government Code*, sec. 81000 et. seq.

proposed by Opotowsky, the FPPC issues advisory rulings. However, unlike the New York commission, the FPPC will only offer advisory rulings to the affected public officials about particular cases. In the cases the FPPC currently deals with, "advice about specific situations cannot be given to members of the public." But "general guidance about the requirements of the law will be provided to anyone who requests it."[15] The practical effect is that the FPPC will direct members of the public to parts of the law that might be helpful. But the staff members "draw the line (before) reaching a conclusion," said Kathy Donovan, staff attorney.

Perhaps the most significant difference is the FPPC's authority to levy fines up to $2,000 per violation and issue cease-and-desist orders.[16] The commission's rulings may be appealed to the courts. But, according to Donovan, to the best of her knowledge that has never happened.

As an incentive to encourage public officials to seek the advice of the commission before acting in conflict-of-interest cases, the state law grants public officials immunity from prosecution if they fully disclose the case to the FPPC and rely on the commission's advisory opinion.

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[15]"A Guide to the Political Reform Act of 1974," pamphlet issued by the California Fair Political Practices Commission, October 1982.

[16]*California Government Code*, sec. 83116.

The New York and FPPC models would both provide a vehicle for quick advisory opinions. But there are some practical and political considerations that make the FPPC model more attractive for California:

-- The agency is already in existence and has a good reputation for firmness and fairness. Although taking on the Brown Act responsibilities would require additional staffing -- hence, additional funding -- there would not be a need to review a separate set of candiates for appointment to a new commission, as the New York model would. There does not seem to be a need to create a new agency, when an existing one seems well-suited for the job.

-- The creation of the agency was mandated by state voters. Their message was clear: They did not want their politicians influenced by contributions and financial self-interest. The tone of that mandate indicates they would similarly dislike "backroom politics." Application of those guidelines to the Brown Act is a logical extension of that mandate. The voters have already endorsed the FPPC structure for similar disputes.

There are, however, some potential pitfalls to the FPPC model that should be addressed.

-- Open-meeting cases, unlike conflict-of-interest cases, suggest a need for advisory opinions for not only the affected public officials, but memebers of the press and public as well. While in conflict-of-interest cases the vote of an official in conflict can be voided after the fact, the damage of closed-door discussion that the Brown

Act seeks to stop cannot be undone. An after-the-fact ruling, while providing the potential for fines, cannot open a meeting that has already been held. Thus, if a public official does not seek advice from the FPPC, the press or the public must be able to obtain a prospective advisory opinion.

-- Any advisory body would not be a panacea. If the Brown Act were not clarified, the commission attorneys would be caught trying to interpret the same "legal gray areas" that currently confound press and local agency attorneys, as well as judges. And if the penalty provisions of the law were not strengthened, public officials would have little incentive to follow the advice of the commission.

Thus, the commission must be regarded as just one part of a comprehensive reform of the Brown Act.

II. ENFORCEMENT PROVISIONS

As the law currently stands, there is little incentive, aside from political considerations, for public officials to obey the Brown Act. The law is fraught with loopholes that almost assure public officials will face no penalty for violations. And the provisions discourage members of the press and public from raising legal challenges to violations.

Under the law, a member of a legislative body who attends a meeting in violation of the Brown Act is guilty of a misdemeanor, *provided* the public official was aware the

meeting violated the act *and provided* action was taken at the meeting.[17] Taken together, the two provisions are so broad that there has never been a successful Brown Act criminal prosecution.

Civil action is permitted under the law to "stop or prevent violations or threatened violations."[18] But the law makes no provisions for nullification of illegal local government actions, nor does it provide a mechanism for preserving closed-door discussions. In other words, once a public agency takes action in private, the action is final and the contents of any private discusssion are lost.

Several amendments to the law would provide incentive for public officials to comply with the law -- by making the law easier to enforce and the risk of violation greater.

1. The knowledge provision should be amended.

With the Brown Act in its current form, public officials need only claim ignorance to avoid criminal prosecution. This provides an incentive for public officials not to read the law and not to be aware of it. And it provides an incentive for attorneys advising the public officials to interpret the law as narrowly as possible. After all, a legal opinion from an attorney that a meeting is not in violation is an almost prima facie defense that a public official was not aware the meeting was

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[17] *California Government Code*, sec. 54959.
[18] *California Government Code*, sec. 54960.

illegal.

There are two alternatives:

--Remove the knowledge provision. This would leave any member of a legislative body who participated in an improper meeting subject to prosecution for a misdemeanor.

The problem with this approach is that, even with strong incentives to encourage board members to familiarize themselves with the law, and even with clarifications of the most confusing parts of the law, the law will be subject to interpretation in the most difficult cases. A plan that would put board members at risk for innocent errors seems unfair and politically impractical.

--Adoption of the FPPC "willful" standard is the better alternative. Apparently framers of the Political Reform Act faced the same dilemma -- on the one hand unwilling to be forced to prove knowledge, on the other not wanting to prompt criminal prosecutions in cases of innocent error. The act provides, "Any person who knowingly *or willfully* violates any provision ... is guilty of a misdemeanor."[19]

Willful generally refers in criminal law to an act done with a bad intent. While still difficult to prove, the standard allows another means of prosecution for the worst cases, eliminating ignorance as a sole defense.

In less serious cases, the penalties are better left to a civil court or administrative hearing process.

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[19]*California Government Code*, sec. 91000(a).

2. Criminal violations should be a bar to seeking office. The Political Reform Act prohibits anyone convicted under the law of seeking office for the following four years.[20] The principle -- public officials who violate the legal restrictions of their office should be barred from seeking office -- is logically applicable to the Brown Act as well. As in the Political Reform Act, this would apply only to the most serious offenders, in cases where the difficult criminal burden of proof is met.

3. The "action taken" provision should be removed.

The requirement for a criminal prosecution that action must have been taken in the illegal meeting[21] is inconsistent with the philosophy of the Brown Act. Recall from the preamble that "it is the intent of the law that (board) actions be taken openly *and that their deliberations be conducted openly*."[22] Thus, the purpose of the law was not merely to require public votes on action. When Michael Harris described the closed meetings of the Bay Area, in many cases the problem was not secret votes, but secret deliberations. Public agencies would discuss the issues

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[20]*California Government Code*, sec. 91002.

[21]It should be noted that "action taken" does not require a formal vote. It also means "a collective committment or promise by a majority of the members of a legislative body to make a positive or a negative decision." (*California Government Code*, sec. 54952.6.) It does not, however, include deliberations.

[22]*California Government Code*, sec. 54950, emphasis added.

behind closed doors, but vote in public. The objective of the Brown Act is to also bring the discussion into the open. The penalty provisions of the law should reflect that intent.

The state Court of Appeal has noted that "critics of open meeting laws have been troubled by the prospect of criminal prosecutions against public officials who make the wrong guess when confronted with an ambiguous situation."[23] But the risk of making a wrong guess would be eliminated if prospective advisory opinions were available from the FPPC.

4. A provision should be added requiring that civil Brown Act cases be given high priority in the court calendars.

As already noted, Brown Act cases often take months or years to resolve. Even when Brown Act challenges to plaintiffs are successful, the delay takes away much of the benefit from the decision. The objective should be not only to make information available, but to make it available in a timely manner.

The Political Reform Act has a provision to ensure speedy court decisions when an election is pending: "If judicial review is sought..., the matter shall be advanced on the docket of the court and put ahead of other actions. The court may, consistent with due process of law, shorten

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[23] *Sacramento Newspaper Guild v. Sacramento Co. Board of Supervisors*, 69 Cal. Rptr. 480, at 485 (1968).

deadlines and take other steps necessary to permit a timely decision."[24] And under the Public Records Act, "The times for responsive pleadings and for hearings ... shall be set by the judge of the court with the object of securing a decision as to such matters at the earliest possible time."[25] The principles are applicable to the Brown Act.

5. District attorneys and the attorney general should be given authority to pursue civil actions.

Although the Brown Act does not specifically address the issue, the attorney general has ruled that "interested persons" who may seek civil relief do not include a district attorney or county counsel.[26]

This means that a district attorney and the attorney general can only involve themselves in a Brown Act case by filing criminal charges -- if they can meet the difficult knowledge burden of proof. Logically, they should be allowed to pursue injunctions to prevent violations or threatened violations.

Currently, only private parties -- members of the public or the press -- can pursue civil action. They must make a substantial investment in attorney fees, which they might not recover,[27] in order to keep public officials

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[24] *California Government Code*, sec. 83121.
[25] *California Government Code*, sec. 6258.
[26] 62 Ops. Cal. Atty. Gen. 150, April 10, 1979.
[27] There is no guarantee a prevailing plaintiff will recover court costs and attorney fees, as will be discussed below.

honest. Certainly this is a proper function for a district attorney, whose salary is paid by taxpayers as a whole. The beneficiary of open government, after all, is the public, not just individuals.

The precedent is again well-established by the Political Reform Act, which gives district attorneys civil prosecution power for local government cases.

6. The law should require the awarding of court costs and attorney fees to prevailing plaintiffs.

The Brown Act gives judges authority to award court costs and attorney fees to persons who successfully pursue a civil case against a local agency.[28] Currently, the law offers no guidance to judges as to when to award court costs and fees. The law state only that "a court may" order the compensation.

In 1981, in a case brought by Common Cause against the San Diego City Council,[29] the Fourth District Court of Appeal ruled that the court decision on costs and fees must include consideration of "the necessity of the lawsuit, lack of injury to the public, the likelihood the problem would have been solved by other means and the likelihood of recurrence of the unlawful act in the absence of the lawsuit."

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[28] *California Government Code*, sec. 54960.5.

[29] *Common Cause v. Stirling* (1981) 174 Cal. Rptr. 200, 119 C.A.3d 656.

In view of such wording, it is hardly surprising only four of the 42 newspapers in the CNPA survey went to court to resolve their Brown Act dispute. "The necessity of the lawsuit," it would seem, would be apparent simply by the ruling against the public agency. "Lack of injury to the public" could be interpreted to rule out any awards for court costs and fees, for it is the public agency which currently pays the bill. Public officials are protected from personal liability for Brown Act violations. "The likelihood the problem would have been solved by other means" suggests the plaintiff should have exhausted all other remedies first, a notion that is appropriate in most civil cases but not in issues of timely public access. Finally, "the likelihood of recurrence," while interesting, should have little bearing on the determination of the need to stop the original action.

In cases involving the state Public Records Act, the Legislature has provided definitive guidelines: "The court shall award court costs and reasonable attorney fees to the plaintiff should the plaintiff prevail in litigation filed pursuant to this section."[30]

But by failing to provide definitive guidance in the Brown Act, the Legislature has left the door open for the courts to create the law. It is difficult to imagine a Brown Act case in which a plaintiff who prevails against a

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[30]*California Government Code*, sec. 6259.

public agency in a Brown Act complaint does not deserve reimbursement for attorney fees and court costs. The uncertainty created by the Legislature's silence can only serve as a disincentive to interested parties pursuing worthy Brown Act complaints.

7. Financial liability for court costs should be moved from the local agency to the public officials.

The law specifically protects public officials from liability for court costs. Instead the financial burden for any judgement is placed on the local agency, removing personal responsibility from the public officials and reducing their incentive to be informed about and abide by the law. There seems little justification for taxpayers to pay the bill for the indiscretions of public officials.

8. Provisions for administrative and civil penalties should be added to the law.

With the exception of the extreme cases, in which criminal prosecution is an option, public officials face no financial risk. Even if the liability for attorney fees is placed on public officials, their risk may be minimal in a political world where public boards often make decisions that can, for example, increase the value of real estate by hundreds of thousands of dollars.

The objective here is to up the ante, by adopting penalities that will serve as deterrents, yet will not be so severe as to prevent qualified people from seeking public

office.

The percise amount is somewhat arbitrary, but again the Political Reform Act is a logical guide. The act allows the FPPC to impose fines of up to $2,000 per violation in administrative cases,[31] and provides for court-ordered civil penalities of the same amount.[32]

9. A provision should be added nullifying board actions that are in violation of the Brown Act.

A finding against a public agency does not invalidate its action. For example, the First District Court of Appeal held that a regulation secretly passed by a police commission would not be invalid even if the action violated the Brown Act.[33] At worst, board members face a don't-do-it-again warning.

Some might argue that there is little that can be done once a board acts in violation of the law. To nullify the action, one might argue, would only force the board to go back and publicly cast the vote it took privately, assuming a vote was taken.[34]

But that step alone would be significant. First, it would force each of the public officials to stand up and be

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[31] *California Government Code*, sec. 83116(c).
[32] *California Government Code*, sec. 91005.5.
[33] *Stribling v. Mailliard* (1970) 85 Cal. Rptr. 924.
[34] In the case of closed sessions in which a public employee is appointed, employed or dismissed, any action or the vote must be publicly revealed anyhow. (*California Government Code*, sec. 54957.1) But that does not extend to other actions a board might secretly take.

counted for their action. Second, unless the board members acted immediately after a court ruling against them, it would allow time for members of the public to lobby them individually in private and collectively in public. Third, it would give opponents of the action timely notice so that they might launch a referendum drive to overturn a board's action.

Finally, it would create a delay, which of itself would be an incentive in many cases to avoid secret decisions. One could imagine, for example, a scenario of a developer who secretly wins city council approval for his project. Under the current law, he need not wait for the end of the legal debate over the propriety under the Brown Act of the council action to begin construction. If the risk of nullifying the action is present, he too would seek a public review and decision.

10. Board members should be required to tape-record their closed sessions.

Currently, there is usually no way to publicly reveal the contents of a meeting that is later determined to be in violation of the Brown Act. The damage has been done -- unless the private meeting was tape-recorded or precise shorthand notes were taken, the dialog of the deliberations and actions is lost.

Mandatory tape recording of the meeting would solve the problem. The tape recordings would be kept secret, but could be reviewed by a judge *in camera* and could be made

public upon a court decision that the meeting was a violation of the Brown Act.

CHAPTER 6: BEHIND CLOSED DOORS

From the onset, the drafters of the Brown Act determined that requirements for open meetings could not be absolute. A provision was included in the original law providing for closed-door personnel sessions.[1] Since then, the exceptions to the open-meeting requirement have been expanded, both by the courts and the Legislature. Today, there are also provisions allowing local boards to meet behind closed doors with their representative during labor negotiations,[2] to meet with their attorney to discuss litigation or potential litigation,[3] and to maeet with their agent for discussion of property acquisition.[4]

However, our survey results indicate, members of the press feel the exceptions to the law are abused.[5]

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[1]*California Government Code*, sec. 54957.
[2]*ibid.*, sec. 54957.
[3]*ibid.*, sec. 54956.9.
[4]*ibid.*, sec. 54956.8. There are also provisions to allow a board to determine whether a license applicant who has a criminal record is sufficiently rehabilitated (sec. 54956.7), and to discuss matters "posing a threat to the security of public buildings or ... the public's right of access to public services or public facilities" or national security matters (sec. 54957).
[5]The comments which follow are from the survey, which was conducted before the passage in September 1984 of Senate Bill 2216. The bill, backed by the CNPA and authored

*Members of the San Diego County Board of Supervisors felt free to come out of an executive session and discuss what happened inside. "Public officials should take advantage of the exceptions to the open meeting law only when the matters they have to discuss are truly confidential," the *San Diego Tribune* editorialized. "The county supervisors have shown by their actions that many of the matters they discuss behind closed doors could better have been discussed in public."[4]

*"As long as a public body calls it 'litigation' or 'personnel,' it can go into closed-door session for anything," Jim Lycett, editor at the *Desert Sun* in Palm Springs.[7]

*Reporter Marjie Lambert of the *Sacramento Bee* says the boards she covers in El Dorado County "seem to feel that any personnel or litigation matters should be discussed in executive session, regardless of whether there is a need for confidentiality."[8]

Moreover, cases cited in the survey and personal experience suggest closed sessions are still a standard method of operation in some jurisdictions.

*The Los Angeles Harbor Department makes "extensive" use of closed sessions, according to John Davies, maritime editor for the *San Pedro News-Pilot*. "Regular executive sessions preceding public session without public discussion have become common place."[9]

*The Alameda County Board of Supervisors has a similar practice. Meetings are routinely preceded by closed sessions.

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by Sen Barry Keene, D-Benicia, is an attempt to address some of the concerns raised by the press. However, as will be discussed later, although the bill is a step in the right direction, it is not the best solution.

[4]"Confidential?" *San Diego Tribune*, Jan. 17, 1983, p. B10.

[7]Survey response no. 6.

[8]Survey response no. 29.

[9]Survey response no. 14.

*In San Francisco, an *Examiner* editorial in October 1983 was sharply critical of the Board of Education, which "has been acting as if the Brown Act did not exist." Of 42 meetings since January 1983, the board held 26 closed sessions. "That represents a staggering amount of time devoted to matters of litigation and personnel -- if the time was devoted to those matters."[10]

*"With all legal matters, all personnel matters and all labor negotiations conducted behind closed doors, too much of government is secret," writes Verne Cole, associate editor of the Fresno Bee.[11]

The closed-session exceptions to the Brown Act have created a two-fold dilemma for the press.

First, the law is often vague as to what is permissible for closed-door discussion under the exemptions. When deciding whether to invoke the attorney-client privilege, for example, at what point can an agency say there is the potential for litigation?

Second, the press must rely on the public agency to make a good-faith interpretation of the law. Because the discussion is private, the press and the public have no way to monitor at the time of the closed-door meeting to ensure it is confined to the allowable exceptions.

While some of the enforcement changes recommended in the previous chapter would help ensure the law is followed, the need for executive sessions should be re-examined.

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[10]"Don't hide the public's business," *San Francisco Examiner*, Oct. 21, 1983.

[11]Survey response no. 24.

I. PERSONNEL MEETINGS

The personnel section of the Brown Act has been amended six times in the law's 32-year history.[12] In its current form, the law permits public agencies to hold closed sessions to consider the "appointment, employment, evaluation of performance, or dismissal of a public employee or to hear complaints or charges brought against such employee by another person or employee unless such employee requests a public hearing." The term "employee" does not include elected officials nor persons appointed to serve on elected boards. The state Fourth District Court of Appeal has ruled that the law does not allow discussion of employee salaries behind closed doors.[13]

The law requires public boards to report at the public meeting during which the closed session is held *or* at the next public meeting "any action taken, and any roll call vote thereon, to appoint, employ, or dismiss a public employee arising out of any closed session." [14] However, the law can be sidestepped, as the following example indicates:

> *The Antioch City Council, in a closed session, either forced its city manager to resign or fired him. It wasn't until a meeting the following month

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[12]*California Government Code*, sec. 54957.

[13]*San Diego Union v. City Council of the City of San Diego*, Court of Appeal, Fourth Appellate District, 196 Cal. Rptr. 45, Sept. 7, 1983.

[14]*California Government Code*, sec. 54957.1.

> that Mayor Verne Roberts announced the council had voted 3-2 to give the city manger four months "to find a new job." Roberts said he made the information public because rumors about it were spreading through the city. But the council refused to publicly reveal who cast the three votes. While the city manager said he was "terminated," the city attorney said he "resigned." The distinction, the city attorney said, allowed the council to keep the vote secret because a resignation is distinguishable from a dismissal.

The incident demonstrates the need for two changes in the law. The first is timing and method of announcements of action. The law currently allows a board to wait until its next meeting, a delay that could be as long as a month for some public agencies, to reveal someone has been appointed, hired or fired. A requirement that the board announce the action immediately following the closed session would be helpful. But, in many cases, closed sessions are at the end of late-night meetings. That would mean the board would often come back into public session, face an empty room, and announce its action. Thus, an additional requirement that the board promptly issue public notice of the action is also necessary. This could be accomplished by making the information available on request and by the same method required for issuing notices of special meetings[15] -- prompt mailed notice to those members of the press that have requested it.

The second change would be an amendment to the law to include requests for resignations as an action that must be

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[15]*California Government Code*, sec. 54956.

publicly revealed. As the Antioch example demonstrates, public boards can go around the public announcement requirement of the Brown Act by requesting resignations rather than "dismissing" employees.

Both changes are minimal, short-term corrections of the personnel exception. Eventually, however, the entire rationale behind the provision should be re-examined. Indeed, the personnel exception to the law should be eliminated.

The stated purpose of the personnel exception, the Fourth District Court of Appeal noted, "is to protect the employee from public embarrassment and to permit free and candid discussion of personnel matters by a local governmental body."[16]

But, consider the following example:

> *In Fresno, the county hospital administrator, who had been given high marks as an administrator for several years, submitted his resignation after a closed-door session of the board of supervisors. "There are hints that he was forced to resign," according to Cole, the Fresno Bee associate editor, "but none of the participants in that closed-door session will talk. The question, therefore, is why he resigned. As it is, there is a feeling that either he was guilty of some sort of fraud or of moral turpitude. In either case, the public, who was his employer for several years, has a right to know."[17]

The case raises the question of whether the Brown Act personnel exception is protecting the people it was designed

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[16]*San Diego Union, ibid*, p. 9.
[17]Survey response no. 24.

to. Does the law protect innocent people from public inquisitions, as the framers intended,[18] or does it protect public employees from having to publicly account for their actions?

There are essentially two categories of employees in public agencies -- the top administrators and the rest of the employees.

The top administrators -- agency attorneys, city managers and planning directors, for example -- often have more effect than board members on the day-to-day operations of a local agency. With that much authority, their performance should be subject to the same public scrutiny as that of board members.

As for the rest of the employees, they report to the top administrators. There seems little reason for personnel issues affecting them to reach the board members. If they do, they are likely to be of a serious enough nature to merit public discussion. Issues of job performance are the very issues that affect members of the public the most.

At issue here is the role of government employees. Are they entitled to the same privacy enjoyed by workers in the private sector? The Legislature through the Brown Act has

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[18]Based on an interview with Michael Harris, December 1983. Harris said those involved with the writing of the original law were concerned that public personnel sessions would allow for McCarthy-like inquisition tactics. That concern, however, is an equally strong argument for open personnel sessions. Closed sessions allow for blacklisting tactics for political purposes that are not subject to public scrutiny.

already forced government employees into the public light not shared by their counterparts in the private sector. The law requires a local board to publicly report a closed session decision to appoint, employ or dismiss a public employee.[19]

As Shiela Toner, news editor of the Pacific Grove-Pepple Beach *Tribune*, writes, "the public has a right to know what kind of people are fulfilling public duties, and what kind of issues influence public employees."

Public employees are subject to a different standard because their ultimate employers are the members of the public. If the public is not privy to the reasons for hirings and firings, it has no way to evaluate the performance of its delegated representatives -- the board members of the local agency. Without public scrutiny, the danger exists that employees will be hired or dismissed for political reasons without the public's knowledge.

II. ATTORNEY-CLIENT PRIVILEGE

Until Jan. 1, 1985, the Brown Act contained no reference to attorney-client privilege for public agencies. But the state Court of Appeal had ruled in 1968 that absent legislation to the contrary, public boards could meet in

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[19]*California Government Code*, sec. 54957.1.

private to confer with their attorney.[20]

The court warned that the privilege should not be abused.

> Public board members ... may not arbitrarily or unnecessarily inflate confidentiality for the purpose of deflating the spread of the public meeting law. Neither the attorney's presence nor the happenstance of some kind of lawsuit may serve as the pretext for secret consultations whose revelation will not injure the public interest.

But that is exactly what happened.

*The El Dorado County Board of Supervisors during the first half of 1983 debated the accounting method applied to the crediting of delinquent property taxes to taxing entities. The issue was touchy because it has a direct effect on the county budget. At the time, the county was being sued by employees over temporary layoffs brought about by tight finances. Citing the employee suit, the board met in executive session, then voted publicly, but with little comment, on a motion that apparently was drafted and debated in the closed session.[21]

*The same board met twice in executive session in January 1984 before awarding a mining company a permit to do exploratory drilling -- over objections by neighbors. The board, noting lawsuits had been threatened, claimed the sessions were allowed because of potential lititgation.[22]

*Orange County supervisors routinely settle lawsuits out of court with a condition that all parties keep terms secret.[23] In 1983, the *Register* sued on the ground that the settlements involved expenditures of public money and were therefore matters of public record. A Superior Court judge and a state Court of Appeal ruled in

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[20]*Sacramento Newspaper Guild v. Sacramento County Board of Supervisors*, 69 Cal. Rptr. 480 (1968).
[21]Survey response no. 29.
[22]*ibid.*
[23]Survey response no. 57.

favor of the *Register*. Once unsealed, the court records indicated the settlement of the case that prompted the *Register* suit cost the county $48,000.[24]

*The East Bay Regional Park District board secretly reached a deal with Oliver de Silva Co. regarding the quarrying of Apperson Ridge near Sunol. Because the park district owns land nearby, de Silva wanted to ensure the district would not oppose the project when it was presented to county officials. Before the matter was brought to public attention, the parties reached a secret deal that involved the payment of $6 million-$8 million in royalties to the park district. District officials said potential litigation was involved because directors might have decided to file suit to stop the project.[25]

*While in closed session, the San Rafael City Council discussed an environmental report on an office project. Neighbors had said at an earlier meeting that the report was inadequate. Those comments, the city attorney said, indicated the neighbors were planning to sue -- hence grounds for the closed door discussion of the project.[26]

*The Alameda County Board of Supervisors backed itself into a political corner on redistricting and then tried to turn to an executive session to work out the dilemma. Only an outcry from reporters prevented the board from determining behind closed doors the fate of county supervisorial boundaries.[27]

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[24]"OC to pay Register legal fees in disclosure case," *The Register*, Feb. 15, 1985, p. B-7. See also *The Register Division of Freedom Newspapers, Inc. v. County of Orange*, 205 Cal. Rptr. 92 (Cal. App. 4 Dist. 1984).

[25]Survey response no. 44.

[26]Survey response no. 26.

[27]I was the reporter for the *Valley Times* covering that meeting in August 1984.

The story begins with a group of black political leaders from Oakland who were unhappy with the board's 1983 redistricting because it diluted the voting power of minorities. They launched an initiative drive to return to the original boundaries and prevent another redistricting until 1987.

At the board meeting, the supervisors learned from the registrar of voters that there were enough valid signatures to qualify the measure for the ballot. The question was which ballot.

Only one day remained before the deadline for the

The abuses became regular occurrences.

*Since virtually any action is open to legal challenge," writes Richard Palmer, publisher of the *Valley Press* and *Scotts Valley Banner*, "anytime any member of the public pops up and says, 'I'll sue if you do that,' our city attorney says, 'Ah, ha! Potential litigation' and shuts the meeting down."[28]

*Lambert, the Sacramento Bee reporter, whose beat includes the above-mentioned El Dorado County supervisors, concludes, "The broad language ... prompts boards to meet in closed session to discuss any touchy issue, even when there is no explicit

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November general election. The next election would not be until June 1986. Supervisor Joseph Bort wanted to know if the board was required to act Thursday, or could it put off a decision until after the November ballot deadline.

The political ramifications were tremendous. A November election would have placed the issue on the ballot at the same time that Supervisor Don Excell of Livermore, an original backer of the redistricing plan, was up for re-election. (Excell died one month before the election.) On the other hand, a delay until 1986 would have allowed Supervisor Fred Cooper, the instigator of the redistricting plan, to run in the district he carved out for himself -- the district that angered initiative sponsors the most.

Christian Peeples, the attorney for the initiative group told the supervisors they had no choice but to immediately put the issue on the ballot or adopt the initiative as law, making an election unnecessary. If the board took any other actions, Peeples said, the initiative group was likely to file a challenge in court.

It was then that Bort turned to County Counsel Richard Moore for his opinion. Moore wanted to go into closed session to advise his clients. Because Peeples had just threatened the board with a lawsuit, Moore contended, there was the "potential" for litigation. Consequently, he said, his discussion with the board fell into the attorney-client exemption to the Brown Act.

I and other reporters protested Moore's interpretation. The issue before the board was purely political, precisely the type of issue authors of the Brown Act intended to keep in the public forum. If the privilege were applied in this case, it could be carried over to every major policy decision that involves an unhappy environmental group or developer.

[28]Survey response no. 23.

> threat of a lawsuit. What that led to (in one case) was essentially deciding the issue in private just because it was controversial. And they justify it just by having their attorney in the room."[29]
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> *"Almost all acts of a council could become pending litigation," notes Calvin Chick, city editor of the *Morgan Hill Times*. "I sometimes believe the council uses the executive session as a dodge to discuss a touchy subject that might lead to a lawsuit."[30]

To curb those sorts of abuses, the California Newspaper Publishers Association in 1984 successfully lobbied for passage of Senate Bill 2216, authored by state Sen. Barry Keene, D-Benicia. The new law, an amendment to the Brown Act, allows a legislative body to meet in closed session with its attorney to discuss "pending litigation, when discussion in open session ... would prejudice the position of the local agency in the litigation."[31]

The existence of pending litigation is met by any one of three tests: 1) If a case has been filed, 2) if the legislative body has decided or is deciding to initiate legal action, or 3) if "a point has been reached where, in the opinion of the legislative body of the local agency on the advice of its legal counsel, ... there is a significant exposure to litigation against the local agency."

As a step toward narrowing the privilege, the new law is a move in the right direction. But it has three major

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[29]Survey response no. 29.
[30]Survey response no. 48.
[31]*Government Code*, sec. 54956.9.

pitfalls.

1. It does not address the problem of boards discussing public policy issues behind closed doors. As the above examples demonstrate, the threat of a lawsuit can be used as justification for closed sessions to receive legal advice on issues of public policy -- zoning approvals, environmental impact reports and reapportionment, for example.

But court action has become a standard recourse for those unhappy with board actions. And, conversely, as the example of the East Bay Regional Park District demonstrates, public agencies are prone to filing lawsuits as well. That means local boards will be able to justify acting without the public knowing whether the actions are legal.

To correct this, at minimum, an amendment to the Brown Act is called for which prohibits closed session discussion of the legality of pending public policy issues.

2. The press and public are almost powerless to challenge a closed session.

When determining whether to go into closed sessions, the most difficult cases will fall into the third category of the three-prong test. In those instances, the members of the legislative body will have to decide whether the public agency faces "a significant exposure to litigation" and whether public discussion "would prejudice the position of the local agency" -- two subjective standards for which board members will turn to their attorney for advice.

But, recall, as Opotowsky noted, the tendency of public agency attorneys is to err on the side of caution, on the

side of secrecy. And who's to say with any certainty how a judge would rule confronted with the same subjective standard? The possibility of litigation is present in almost every controversial policy issue before a board. One could argue that there is a "significant exposure to litigation" in each case.[32]

3. The new law begs the issue of whether there should be an attorney-client privilege at all.

The argument for the privilege is made in the 1968 appellate court decision that established it. The court held that public agency members, like private citizens, are entitled to secret consultation with their attorney. "Government should have no advantage in legal strife; neither should it be a second-class citizen," the court held,[33] relying on its argument from an earlier case:[34]

> Public agencies face the same hard realities as other civil litigants. An attorney who cannot confer with his client ouside his opponent's presence may be under insurmountable handicaps.

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[32]The recent addition of attorney-client privilege also includes requirements that the lawyer submit a written memorandum to the board explaining the reason for the closed session. If the lawsuit has not yet been filed, the memo is to include the existing facts and circumstances that justify the closed session. If it has been filed, the memo need only state the title of the case. The memorandum is to be made public once the pending litigation "has been finally adjudicated or otherwise settled." This will discourage clearly inappropriate closed sessions. But it will not settle the more difficult cases discussed above.

[33]*Sacramento Newspaper Guild, ibid,* at p. 490.

[34]*Sacramento Newspaper Guild v. Sacramento County Board of Supervisors*, 62 Cal. Rptr. 619 (1967), at p. 621.

> ... There is a public entitlement to the effective aid of legal counsel in civil litigation. Effecitive aid is impossible if opportunity for confidential legal advice is banned.[33]

Rather than publicly advising a local board of the risks of compromise, an attorney will "fight the lawsuit to its bitter end," the court warned.[34]

However, that reasoning assumes there is a traditional adversarial role. In fact, the rules of the game are different when public agencies are involved. Plaintiffs are prohibited from seeking punitive damages; they must file their claims within 90 days rather than a year or more, and they face a defendant often with an attorney already on staff and/or greater resources to hire one. In fact, government is not a "second-class citizen." It travels first class, often with major advantages over the plaintiff.

(To be sure, public agencies are currently facing a problem of being the "deep pocket" in multi-party litigation. But the answer to that dilemma is through other forms of legislation, not cutting off the public review of board decision-making.)

The court's reasoning also assumes an adversarial role in which the public agency should try to settle a case for as little as it can. However, public agencies have a moral responsibility to do more than just settle for whatever they can get away with. If someone has a legitimate claim,

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[33]originally from page 821.
[34]*Sacramento Newspaper Guild*, (1967), at page 491.

should the local agency take advantage merely because the claimant has an inadequate lawyer?

And the court's reasoning assumes that the public agency's case would necessarily be hurt by public disclosure. In fact, as the *Miami Herald* argued successfully before the Supreme Court in Florida, where there is no attorney-client privilege for public agencies, public exposure could be beneficial.

> Open meetings ... create an avenue for citizen input which may well improve the quality of public decision-making. Here, public access to the proposed litigation meeting, particularly by members of the bar from the local community, would prevent the systematic or occasional misevaluation of the litigation pending between the city and its residents.[37]

Moreover, the airing of the case in public ensures that closed sessions are not used for corrupt resolution of the cases. As Florida Governor Askew said in 1977 in vetoing a bill that would have established the attorney-client privilege there, many "matters of great public interest ... today are directly related to pending litigation." If public litigation decisions can be made secretly, he argued, "a strong possibility exists of misuse of the condemnation power, of collusive out-of-court settlements, and of other [avoidable] evils."[38] Among the possible evils, the *Herald*

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[37]*Neu v. The Miami Herald Publishing Co.*, Florida Supreme Court, Respondents' Answer Brief, p. 20, case no. 64,151, decided Jan. 18, 1985.

[38]As cited in *ibid.*, p. 32.

noted, are racial and sexual discrimination, and personal or political favoritism in approval of settlements.

Open discussions also ensure the settlements are in keeping with the public desire. As the newspaper argued,

> access to government meetings enables government to be responsive to the wishes of the governed. Here, public attendance at the council meeting would enable council members to adopt a position in the litigation that their constituents could endorse.[39]

That position was persuasive in Florida. California should adopt it.

III. LAND ACQUISITION

The Jan. 1, 1985, amendments to the Brown Act included a provision that, for the first time, expressly permitted board members to secretly discuss land acquisition.[40] Until then, boards had often relied on a 1975 state attorney general opinion as justification for the closed-door meetings.[41] The opinion applied to a case involving the similar open-meeting law for the regents of the University of California.[42]

The new amendments to the Brown Act narrowed the scope

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[39] *ibid.*, p. 20-21.

[40] Senate Bill 2216, adding sec. 54956.8 to the *California Government Code.*

[41] 58 Ops. Cal. Atty. Gen. 273.

[42] The Bagley-Keene Open Meeting Act, *California Government Code*, sec. 11120 *et seq.*

of the land-acqusition privilege. Before holding a closed session, board members must hold a public session at which they identify the property involved. Moreover, the closed session may be only to give instructions to a negotiator regarding price and payment terms of the deal.

The amendments were a major breakthrough for the press and public, clarifying in their favor an ongoing dispute as to whether parcels should be identified by the public agency before they are purchased. Public officials had often argued that identification of parcels would lead to increased prices and, consequently, the public should only learn after the fact that a specific site had been purchased.

However, a minor problem with the amendments has already become apparent. The law does not require the public agency to give advance notice, prior to the day of the discussion, that a particular parcel will be the topic of closed-door discussion. The problem presented is two-fold.

First, those who wish to protest the acquisition may not have sufficient time to make their feelings known. Second, because as a practical matter the press cannot attend every meeting of every public agency, the purchase might pass undetected.

The latter situation has already arisen at my own paper, the *Valley Times* in Pleasanton. On its agenda for its March 12, 1985, meeting, the East Bay Regional Park District announced it would give "confidential instruction

to land negotiators regarding terms of acquisition of previously identified land parcels pursuant to Government Code 54956.8 -- see resolution numbers." The agenda then lists six resolution numbers that, without telephone calls to the district, provide no help identifying the parcels.

"This is the prior public statement to identify the parcels and parties involved?" Managing Editor Ernie Hines asked rhetorically in his March 17 editorial.[43]

> It may meet the letter of the law, but does it comply with the spirit of the law? Of course not. It is another example of bureaucratic arrogance of the worse sort. Why not be open and straightforward rather than requiring interested public parties to jump through hoops to determine what the park directors are up to?

A simple solution would require that the public agency identify the parcels by location on a meeting notice that must be distributed to the press prior to a meeting.

But again, that begs the central issue: Do we want public agencies secretly deciding how much they will pay, from public funds, for property?

The major argument against public discussion -- that identification of the parcel will drive up its price -- has already been resolved in favor of public discussion. Under the new law, the parcel must be identified before the closed session.

So only the issue of price is left. As with

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[43] "The public has a right to know its business," *Valley Times*, March 17, 1985, p. 10A.

attorney-client privilege releated to settlement of civil suits, the question is whether a public agency should take on an adversarial role like that of a private citizen. Should a public agency be allowed to purchase for below "market" price?

There are two problems with a public agency doing so.

First, a public agency has a moral responsibility not to take advantage of an unsophisticated party, just as in a litigation settlement. This suggests discussion of price should be public to ensure a public agency does not unduly exerise its power.

Second, the concept of a "market" price -- the equilibrium point at which there is a willing buyer and a willing seller -- does not work with a public agency. Unlike in a transaction between private parties, many public agencies have the power of condemnation. For example, a seller, previously unwilling to sell at a particular price, may be willing to accept that amount to avoid legal proceedings. Thus the potential for taking advantage of even a sophisticated seller is present -- and should be subject to public scrutiny.

Skeptics of open price discussion contend the price will be drive up if the public agency disucusses the amount in public. Forgotten is the fact that there are no provisions under the Brown Act preventing the seller from soliciting higher bids from other interested parties after receiving the offer of a public agency. Thus, other interested buyers will be able to outbid the public agency

if they desire regardless of whether the price discussion is public.

But perhaps the most compelling arguments for public discussion of land negotiations pertain to the spirit of the Brown Act.

First, the spirit of the law logically applies to land acquisition. The public should know what goes into the decision-making process when expenditure of public funds is involved.[44]

Second, as with litigation settlements, only with public review are potential errors recognized. Just as a knowledgeable attorney who is also an interested citizen might keep a public agency from paying too much in a court settelment -- either by mistake or for politically motivated reasons -- so too might a real estate expert provide timely input to prevent a public agency purchasing property from making a costly mistake with taxpayer money.

IV. LABOR NEGOTIATIONS

Perhaps one of the most inconsistent sections of the Brown Act is the 1968 amendment permitting board members to

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[44]Under the Public Records Act, real estate appraisals may be kept secret until after a transaction is complete. (See *California Government Code*, sec. 6254(h).) This provision should also be eliminated, based on the same arguments that the decision-making process in land acquisitions should be public.

meet in closed session with their labor negotiator to discuss salaries and fringe benefits.[43] The provision should be abolished.

The law applies to labor negotiations with employee organizations, and, in 1984, was amended to include negotiations with "unrepresented employees" such as management employees. The local agency members may not meet as a group directly with the employees or their representatives. Instead the board is to meet with its representative, who in turn meets with the employees or their representative.

The 1984 amendment was an apparent response to a 1983 San Diego case in which the Court of Appeal ruled:

> Salaries and other terms of compensation constitute municipal budgetary matters of substantial public interest warranting open discussion and eventual electoral public ratification. ... *It is difficult to imagine a more critical time for public scrutiny of its governmental decision-making process than when the latter is determining how it shall spend public funds.* With ever-increasing demands on public funds which have dwindled so drastically since the passage of Proposition 13, secrecy cannot be condoned in budgetary determinations, including the establishment of salaries.[44]

Unfortunately, the state Legislature's response to the decision was to overturn it, rather than adopt its language to also open up collective bargaining situations. That move should be reconsidered. Certainly, as opponents will argue,

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[43] *California Government Code*, sec. 54957.6.
[44] *San Diego Union*, *ibid.*, p. 10, emphasis added.

it might be more difficult to conduct the negoitations. But that same reasoning would lead to the abolishment of the entire Brown Act.

CHAPTER 7: ON DEFINING A MEETING

Although the Brown Act seeks to ensure meetings are public, it contains no definition of a meeting.

However, opinions by the state attorney general and the courts have given meaning to the term. "Basically, a meeting is any gathering of a quorum of a legislative body, no matter how informal, where business is transacted or discussed."[1] The act does not prohibit agencies from social attendance at luncheons and dinners, such as are often given by fraternal groups such as the Rotary Club or Kiwanis. Attendance at professional conferences by a quorum or more of a board or commission are permissible. However, "care must be taken to avoid discussing matters which are before the board, or may potentially come before the board."[2]

While those guidelines may seem very clear, the press

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[1] *Secret Meeting Laws and Public Agencies*, publication of the Legal Information Center, Office of the Attorney General, April 1, 1981, p. 6.

[2] 80 Ops. Cal. Atty. Gen. 713 (1980), as cited in Frank Gillio, "The Ralph M. Brown Act," revised to March 1, 1983. Gillio is the city attorney of Millbrae, Monte Sereno and Los Altos Hills. The unpublished document was distributed at a meeting of the League of California Cities.

has experienced problems related to disputes over the defintion of a meeting.

I. SOCIAL GATHERINGS

During my tenure covering the Antioch City Council, I walked into a downtown restaurant prior to a council meeting and found three councilmen, a quorum of the five-member board, dining together with their wives. My inquiry as to whether public business was being discussed drew a sharp protest to my editor the following day. The meeting was a social occasion to celebrate the birthday of one of the wives, one councilman said. I had no business interrupting their private gathering, he said.

While the encounter was awkward and uncomfortable, the inquiry was appropriate. This was the same council that six months earlier had secretly selected someone to fill one of its vacancies. Seeing three members seated together prior to a council meeting was cause for suspicion.

The dilemma is not limited to Antioch:

> *In 1981, three of the five members of the San Marcos City Council met at a restaruant after a council meeting. Two said they always go to the restaurant after council meetings and happened to run into the third. Although city matters may have come in for cursory comment, no decisions on matters before the council are made at the restaurant, one of the councilmen said. Just a few days after the encounter, the council voted to uphold the firing of the city planning director.[3]

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[3]"San Marcos Incident Spurs Charge: Official denies violating anti-secrecy law," *San Diego Tribune*, Feb. 17, 1981.

*The Livermore City Council regularly meets at a nearby restaurant after most council meetings. Reporters who have periodically attended the restaurant get-togethers have found the council stays away from public business. But press members, knowing nothing newsworthy is likely to happen if they attend, often forgo the meeting.[4]

*Three members of the Paradise Town Council attended a luncheon meeting with local developers and a citizens advisory committee. Formulation of an opinion survey on a moratorium for major construction was discussed. The mayor, who was present, said it was "a social thing, right out in public. No decisions were made."[5]

*After a 1981 meeting, Butte County Land Development Process Committee members stayed and continued to talk about issues that were pending. A secretary alerted county staff to the violation.[6]

*Marin County Board of Supervisors and their attorney justified a closed-door, "get-to-know-you" affair with San Francisco Foundation executives, saying the public had no right to attend. At issue were millions of dollars in Buck Fund grants sought by the county. It was merely a social occasion at which county business was not discussed by the board, the attorney said later.[7]

Examples like those are what tempt reporters to call for a ban on social encounters between board members. But that is not a realistic solution. Many of the politicians are friends who would otherwise socialize together. An attempt to stop such meetings would likely be ignored.

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[4]I covered the Livermore City Council in 1983 and interviewed Katherine Conrad, the current *Valley Times* reporter on the beat.

[5]"Restaurant Gathering With Builders: Ridge Councilmen Meet Illegally," *Chico Enterprise-Record*, July 10, 1981, p. 1A.

[6]"Brown Act Violations Explained," *Chico Enterprise-Record*, Jan. 15, 1981.

[7]"Right to know takes a beating," *Independent Journal*, March 27, 1982.

Instead, the emphasis should be on ensuring the private discussions do not stray to public business. This can be accomplished in part by codification of the attorney general definition of a meeting, which includes encounters "no matter how informal, where business is transacted or discussed." Taken together with the increased enforcement provisions recommended in Chapter 5, the legal emphasis on keeping discussion of public business limited to public meetings should deter violations. Although there is no way to ensure the law will not be sidestepped, the two changes would reduce the likelihood by increasing the risk for violators.

II. LESS THAN A QUORUM

The Brown Act is structured to ensure a quorum of a public agency board will not reach agreement in private on a matter of public interest outside a meeting. As long as only a minority of the board members privately deliberate together, the state attorney general has reasoned, "the opportunity for a full public hearing and consideration by a quorum still remains, and hence the public's right to an open meeting is still protected."*

The law, however, does not prohibit one board member from individually lobbying all of the other members. For

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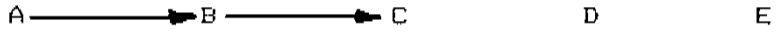
*Attorney General Opinion No. 80-713, Oct. 30, 1980, p. 823.

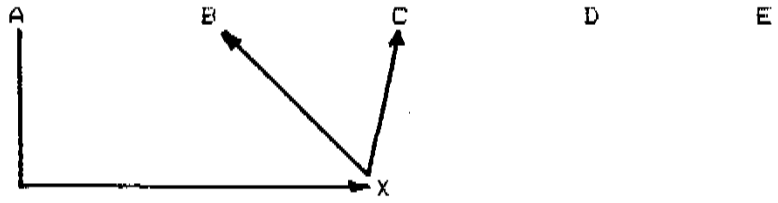
THREE MODELS FOR DODGING THE BROWN ACT

THE CORCORAN MODEL

THE GRAPEVINE MODEL



THE AGENCY-STAFF MODEL



example, Richmond Mayor Thomas Corcoran said he plans, when nominating people for appointments to city board and commissions, "to have the (needed votes for ratification) in my pocket before I make the appointment to avoid embarrassing people."[9] In practice, that is one way decisions are reached.

Just as likely is the "grapevine" scenario, in which Board Member A calls B, who in turn relays information to C. Recall, that essentially was the scenario in the Antioch City Council selection of a person to fill the vacant council seat.[10]

A third scenario, involves agency staff members or others. In 1980, Assemblyman Patrick Nolan presented the scenario to the state attorney general and asked for an opinion on its legality. The scenario was described in the subsequent opinion:

> A particular community redevelopment agency or its staff hold meetings with the city council and other city agencies such as the city planning commission. The meetings are held on or about the same date, but are broken up into groups so that at no time is a quorum of any governmental body present at any given meeting. However, all members of the city council or planning commission will meet with the redevelopment agency or its staff with respect to the same subject matter. No notice of these meetings is given by the city agencies, nor is the public invited.[11]

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[9]"Corcoran accepts power limitation," *The (Oakland) Tribune*, Nov. 11, 1984, p. D-2.

[10]**See Chapter 3.**

[11]*ibid.*, p. 822.

Then-Attorney General George Deukmejian ruled the meetings are illegal. In doing so, he relied on a 1961 state Supreme Court decision[12] in which the court held that the public deliberation required by the Brown Act "connotes not only collective discussion, but the collective acquisition and exchange of facts preliminary to the ultimate decision." In the case before him, the attorney general ruled the exchange of facts took place "in a series of meetings, not in a single meeting. The right of the public is clearly thwarted by having these meetings held in closed session."[13]

Codification of that opinion, banning individual meetings to get around the Brown Act, might reduce the amount of behind-the-scenes collection of information from staff members. It would be a step in the right direction, albeit a small one.

But it would not address the other scenarios -- that of one board member individually communicating with each of the others, and the grapevine passing of information from A to B, who in turn tells C. And once one board member talks to another, can we realistically expect the conversation to not include a comment about information from a third, as was done in the second scenario?

Realistically, if board members are allowed to continue

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[12]*Walker v. County of Los Angeles* (1961) 12 Cal. Rptr. 671.

[13]Attorney General Opinion No. 80-713, *ibid*, p. 827.

to talk to each other away from public meetings about public issues, the information is likely to be passed among a majority. Despite the intent behind the Brown Act, many of the decisions are arrived at long before the public discussion. What takes place at a meeting is often simply public posturing.

For that reason, it is recommended that the definition of a meeting include any encounter between two or more board members at which public business is discussed. In effect, this would ban board members discussing public issues outside a public meeting.[14]

Similarly, staff members should be prohibited from briefing a quorum of the board members unless the information is conveyed at a board meeting or in writing with copies made available to the press and public. Otherwise, rather than a board member individually contacting his colleagues, as in the Corcoran example, the staff members will be the conduit of information.

III. ENCOUNTER SESSIONS AND RETREATS

The writers of the Brown Act probably could have never foreseen that local boards would be taking trips at public expense to resorts such as Sea Ranch Lodge, along the

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[14]Again, the state of Florida can be looked to as a model. See Office of the Attorney General, *Florida Open Government Laws Manual*, (Tallahassee, Fla.: Florida Press Association, 1984), p. 10.

northernmost coast of Sonoma County, Napa's Silverado Country Club and Monterey. The stated objective is often for board members to learn how to communicate better with each other and staff members. Indeed, there are specialists who make their livings leading these groups.

According to a 1983 survey conducted by the League of California Cities, at least 56 cities have held team-building workshops. More than half have been held outside city limits.[15] Clearly, the excursions have become common occurences for many city councils and school boards across the state.

> *The Danville Town Council went to Monterey for its retreat. The only outsider who attended was a reporter from the city, who traveled the approximately 100 miles each way for the two-day event. During the meeting, the council agreed on a set of policy goals for the following year -- a new master plan for downtown, a new post office, proposed amendments to the general plan, a new parks master plan and traffic impact and landscaping maintenance fees.[16]
>
> *The Corona City Council barred the press from its annual retreat at Kellogg West, a conference center on the campus of California Polytechnic University in Pomona. "The city's position has been that the retreats do not violate the Brown Act as long as the discussion are general in nature and no action is taken," the Riverside *Enterprise* reported.[17]
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> *The Santa Rosa City Council members planned a session at Timber Cove to set goals for 1984 until they discovered their city charter prohibits

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[15]"City Council goes to the beach -- all for the good of Walnut Creek," *San Francisco Examiner*, Feb. 27, 1983, p. B1.

[16]"Danville leaders leave workshop with praise, ideas," *Valley Times*, Jan. 20, 1985.

[17]"Corona council members mum on retreat agenda," *(Riverside) Press-Enterprise*, April 7, 1984, p. B-1.

out-of-town meetings.[18]

*Healdburg officials, including the City Council, gave public notice before they went to Sea Ranch Lodge for two days. No one else made the trip. While there, they discussed items ranging from the general plan to a proposed major hotel project.[19]

*The Board of Directors of Brookside Hospital, a public hospital in San Pablo, went to the Silverado Country Club for their two-day session. The meetings, 30 miles from the hospital, were open to anyone who wanted to attend. Those who wanted to stay overnight, as the board and staff members did, could get a room at the club for $80. No specific plans were adopted during the two-day meeting, but the participants left with new ideas for future planning.[20]

*The Walnut Creek City Council traveled 100 miles to Pajaro Dunes, a Santa Cruz County beach community for their two-day retreat. "The decision to leave Walnut Creek to discuss how to improve city business was based on feedback council members got from other cities," according to *San Francisco Examiner* reporter Peggy Hernandez. "More work was accomplished away from home, the council was told."[21]

*The Antioch City Council held its encounter session at a community center in the city, meeting with staff members reportedly to improve their communications. The press was kept out. City Attorney William Galstan said the meeting was permissible because no city business was to be discussed. "The sole function of the seminar was to improve communication skills, and the nature of the session required a high degree of candor which would not have been possible if it had been open to press or public." Galstan further referred to an attorney general opinion [22] that state Land Commissioners could legally attend a national

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[18]"Council can't hold out-of-town session," *Santa Rosa Press Democrat*, Jan. 19, 1984.

[19]"Healdsburg officials on Sea Ranch retreat," *Santa Rosa Press Democrat*, Dec. 6, 1983.

[20]Daniel Borenstein, "Brookside ponders how to sell itself," *West County Times*, Nov. 6, 1983.

[21]"City Council goes to the beach -- all for the good of Walnut Creek," *ibid.*, Feb. 27, 1983, p. B1.

[22]Attorney General Information Letter 75-97 (1975).

conference if they avoided discussion of specific matter actually or potentially under consideration by the commission.

The meetings raise two issues:

1. Should they be open to the public? The answer is yes. None of the rationales for closing the meetings is sound:

--The-meetings-are-general-in-nature rationale. If the topic is nothing more than improving communications between the council members, that alone should be public. How well public officials communicate is information the public should have when it goes to the polls. The thurst of the Brown Act is to open up the decision-making process both for the discussuion of the issues and so that the public can see its elected officials in action.

--The need-for-a-high-degree-of-candor rationale. This violates the basic premise behind the Brown Act. Indeed, public officials could more easily work out their differences behind closed doors, but the Legislature has determined that only in a limited set of circumstances does the price of secrecy outweigh its benefits for local agencies. This is not one of the exceptions.

--The personnel-session rationale. As noted in the previous chapter, the personnel session should be abolished. But, even in its current form, it would require that retreat topic under this section be limited to consideration of the appointment, employment, evaluation of performance, or

dismissal of a public employee or to hear complaints or charges brought against such employee by another person or employee.[23] There seems little reason to travel to a distant location or call in a management consultant to evaluate the performance of a particular employee.

--The conference analogy. The two cases are easily distinguishable. Whereas the attorney general opinion cited by Antioch's city attorney dealt with commission members attending a general information meeting, the retreats discussed here have the particular board as the focus of the discussion. Moreover, rather than merely attending to gain information, the public agency is the focus of the discussion.

Because of the growing popularity of retreats, the Brown Act should be amended to specifically require that they be considered a meeting under the law.

2. Should they be held at remote locations outside the local agency boundaries? The answer is no.

The Brown Act has provisions aimed at ensuring people will be able to attend public agency meetings if they choose. The law prohibits holding meetings in places that dicriminate on the basis of race or sex.[24] Similarly, members of the public may not be required, as a condition for attending a public meeting, to register or sign a list.[25]

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[23] *California Government Code*, sec. 54957.
[24] *ibid.*, sec. 54961.
[25] *ibid.*, sec. 54953.3.

And the law prohibits the agency from charging admission to public meetings.[26]

Yet the law allows board members to travel hundreds of miles to hold a meeting -- certainly a deterrent to someone who wants to, say, drop by the council meeting and observe after work. Before the Walnut Creek City Council left for Pajaro Dunes, City Manager Tom Dunne acknowledged it was unlikely "anyone (else) would drive that far" to attend.[27] Similarly, residents of Danville would have been better off financially to pay a $20 admission fee than travel to Monterey to view their council's meeting. Retreats outside the local agency boundaries discourage members of the public from attending.

One of the reasons the Corona City Council leaves town is to avoid interruptions, according to Councilman William Miller. "When I'm in Corona, I can't get the phone to stop ringing," he said.[28]

Certainly, he doesn't take time out from council meetings to answer the telephone when he's in town. The fact is that board members enjoy plush accommodations and members of the public are discouraged from attending.

Out-of-town meetings should be banned unless there is something at a distant location that the board members have reason to observe -- a piece of equipment that the city is

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[26] *Ibid.*, sec. 54956.6.
[27] "Council to go on beach retreat," *San Francisco Examiner*, Feb. 25, 1983.
[28] "Corona council ...," *ibid.*

considering buying, for example. Meetings held outside agency boundaries should be limited to business that requires the board to travel. (They shouldn't approve purchase of the equipment while they are there.)

IV. BOARD-ELECTS

In March 1983, San Ramon voters decided to incorporate the community and selected the members of their first city council. But the incorporation did not take effect until July. Nevertheless, there was business to be done and the council members-elect set to work in closed session.

As Contra Costa Times reporter Brad Rovanpera pointed out,

> the Brown Act doesn't cover elected officials who haven't been sworn in. ...As a result, an elected council may hold as many private meetings as it wishes before it is sworn in without violating the letter of the law. That means there's a potential for decisions to be made in private that would under normal circumstances have to be made in a public meeting.[29]

And that is exactly what the council-elect did, meeting privately to select the new city's first mayor and adopting agendas for public meetings.

The problem posed by the meetings is not limited to new councils. People elected to existing boards generally have

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[29]"New San Ramon council walks tightrope on open meeting law," *Contra Costa Times*, April 30, 1983, p. 1A.

a waiting period between election day and the start of the new term. As the law now stands, they could meet with other board members, either existing or newly elected, provided that there is not a quorum of *existing* board members present. If a majority of a new board are yet to be sworn in, the entire board could legally meet privately to plan strategy and make decisions that they need only ratify at their first official meeting.

The law should be changed to apply to meetings of upcoming board members as well as those currently in office. The effective date would be election day.

CHAPTER 8: MISCELLANEOUS PROBLEM AREAS

In additon to the enforcement, closed session and meeting definition issues, there are some miscellaneous problem areas in the law.

I. AGENDA AND WRITTEN-MATERIAL ACCESS

The Brown Act requires that written material distributed to a quorum of the members of a public agency must be made available to members of the public. The law provides that the information be made available in accordance with provisions of the Public Records Act -- specifically that written material be made available for review during business hours[1] and that the agency determine within 10 days whether the written material can be made public when copies are requested.[2]

Unfortunately, these provisions, while perhaps logical

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[1]*California Government Code*, sec. 6253.
[2]*ibid.*, sec. 6256.

for documents requested under the Public Records Act, can be unworkable in situations covered by the Brown Act.

The typical documents sought under the Brown Act are staff reports and correspondence prepared for agency members prior to meetings. The material is usually distributed to the agency members within a few days prior to a meeting. Public agencies are usually, although not always, sensitive to the needs of reporters and, when requested by the press, provide copies of the background material to the press in advance as well. Such prompt distribution, however, is not required by either the Brown Act or Public Records Act.

Three problems arise:

1. Late material is prepared by staff members, and distribued to board members at a meeting -- without copies for the press or public. The Brown Act requires that writings "distributed during their discussion at a public meeting shall be made available for public inspection immediately or as soon threafter as is practicable."[3]

It is important to note that "made available for public inspection" is not the same as providing copies. Practically speaking, members of the press are greatly hindered if they are not able to obtain copies. For staff produced material, there seems to be no reason copies could not be made available for the press at the same time it is distributed to the board.

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[3] *Ibid.*, sec. 54957.5 (d).

2. No copies are available for the public at a meeting. While the press enjoys an ongoing relationship with the public agency, members of the public often do not. The unsophisticated person does not realize that agency members have more than an agenda from which to obtain information. Without the additional material, a member of the public (or press) is often unable to follow the discussion. For the public, some agencies make a collection of the staff material available for public review at the meeting. A requirement that a master copy of the board "packet" be available at a meeting for public review would help members of the public.

3. Prior to meetings, staff members distribute reports to board members, but delay release to the press. There seems to be little logic, except political motivation, for such action. Once the material has reached a quorum of the board, it should be available to the press and public.

II. ONE-MEMBER BOARDS

Currently, the Brown Act applies to legislative bodies and, under a 1981 amendment, to "any board, commission, committee, or similar *multimember* body which exercises any authority of a legislative body."[4] A problem arises for one-member hearing boards.

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[4]*Ibid.*, sec. 54952.2

When the San Jose Mercury News attempted to gain access to the proceedings of hearing officers appointed by the San Jose Advisory Commission on Rents, Superior Court Judge Charles Gordon sided with the city's effort to keep the proceedings closed. Gordon noted the hearing officers have authority to act on behalf of the commission by issuing binding, unappealable decisions. But, he said, he was bound by the wording of the 1981 amendment.[8]

The same logic would presumably apply, for example, to zoning administrators, who are often authorized to make major rulings on variances.

The Brown Act should be amended to require access to proceedings of one-member hearing boards.

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[8]*San Jose Mercury News v. City of San Jose*, Santa Clara County Superior Court, case no. 536381, decision issued Jan. 18, 1984. Ironically, although the judge denied the newspaper access to the proceedings, he upheld the newspapers claim under the Public Records Act in the same case to access to records from the proceedings. "It goes without saying," he wrote, "that in a free society, it is imperative, consistent with individual rights, that government conduct its business openly and subject to public scrutiny." (*ibid.*, p. 10.) Moreover, he awarded the newspaper attorney fees, as required under the public records law.

CHAPTER 9: A STRATEGY FOR IMPLEMENTATION

There are four alternative strategies for implementaton of the 28 Brown Act modifications proposed in this analysis.

1. Volutary compliance

For those reforms proposed where it would be applicable, seek agreement from statewide organizations representing cities, counties, school districts and other local agencies that they will ask their members for voluntary compliance. This is not a practical alternative. While many cities in the state are conscientious about complying with the Brown Act, others, as we have seen above, choose to read the law as narrowly as possible and, in some instances, ignore it. It is not likely a voluntary guideline would be helpful when the going gets tough -- when clarity in the Brown Act is especially important. The guidelines would not be binding and would serve as just one more in the set of numerous non-binding interpretations already circulating. What is needed is a definitive resource to go to -- the law itself. Any other strategy would not be a move toward our criterion from Chapter 4 that the law be easily interpreted.

2. Initiative approach

Launch an initiative for passage of the proposed reforms. While this strategy might be successful the price and risk is very high. It would require a well-financed campaign. I question whether publishers and broadcast station owners, the largest potential source of money for such an effort, would be prepared to bankroll it, especially not until other strategies have been tried first. And, indeed, their reluctance would be well-founded. An initiative drive would be divisive, creating tension between local government officials and the press -- perhaps damaging the newsgathering effort and even compliance with the Brown Act. And failure in an intitiative effort could be damaging not only to the proposed reforms, but to the exisiting laws. It might well be interpreted as a mandate for more closed-door government. The initiative route is an ace in the hole that should only be played after a more careful financial and political analysis -- and after other alternatives have failed.

3. One-shot legislative approach

Package all of the modifications into one bill and lobby for their passage. Based on the difficulty involved with the passage last year of Senate Bill 2216, it is unlikely the package of proposed reforms could make it through the Legislature in one shot. Strong opposition can be expected from the League of California Cities to many of the proposed reforms.

4. Phased legislative approach

Seek passage of the most politically feasible proposals and then work on the harder ones. This is the best alternative. In this way, the basic reforms would not be lost in the effort to pass tougher ones.

The first step in this approach is separating the proposals to determine which should be lobbied for first. The "Implementation Rankings" lists the proposals in terms of difficulty of passage, with a "1" ranking representing the easiest passage and "3" the most difficult.

It will be the slowest approach. But the press has been working on the Brown Act for 32 years. There's no reason to become impatient now.

IMPLEMENTATION RANKINGS

ENFORCEMENT REFORMS

PROPOSED REFORM	1	2	3	COMMENTS
1. Establishment of the FPPC as the enforcement agency.		x		Major reform, but it also has advantages for local agencies, which will be able to get definitive answers to disputes and immunity from prosecution.
2. Adoption of the FPPC "willful" standard for criminal prosecution.		x		Tougher penalty provision will face opposition, but it is modeled after an established law approved by voters.
3. Bar criminal violators from seeking office.		x		Tougher penalty provision will face opposition, but it is modeled after an established law approved by voters.
4. Remove the "action taken" clause from the criminal provisions.		x		Tougher penalty provision will face opposition, but it corrects a basic inconsistency in the existing law.
5. Higher priority for Brown Act cases on court calendars.	x			Difficult to oppose. Modeled after FPPC law.
6. Give district attorney and the attorney general authority to pursue civil actions.	x			Tougher penalty provision, but basically corrects a loophole in existing law.
7. Mandatory court costs to prevailing plaintiffs.		x		Will face firm opposition.
8. Financial liability for court costs moved from local agency to public officials.		x		Will face firm opposition.
9. Establishment of administrative and civil penalties.		x		Will face strong opposition, but is modeled after existing FPPC guidelines.
10. Nullify board actions in violation of the Brown Act.		x		Major, yet simple, reform.
11. Require tape-recording of closed sessions.		x		Will face opposition, but it is a simple reform.

CLOSED SESSION REFORM

PROPOSED REFORM	1	2	3	COMMENTS
1. Prompt notice of closed session hirings and dismissals. (Temporary measure until no. 3 is approved.)	x			Simple reform to clarify a procedural problem
2. Include requests for resignations as a dismissal that must be publicly. (Temporary measure until no. 3 is approved.)	x			Closes a loophole.
3. Elimination of personnel exception.			x	Will face very strong opposition. Requires eliminating provision from the original Brown Act.
4. Ban closed-session discussion of legality of pending public policy issues. (Temporary measure until no. 5 is approved.)		x		Will face strong opposition, but examples of abuse are blatant. Will be hard to defend opposition.
5. Elimination of attorney-client privilege.			x	Will face very strong opposition.
6. Identify on notices prior to meeting parcels to be discussed under land acquisiton privilege. (Temporary measure until no. 7 is approved.)	x			Simple procedural measure.
7. Eliminate closed sessions to discuss land acquisition.			x	Will face very strong opposition.
8. Eliminate privilege for closed-door meetings with labor negotiator.			x	Will face very strong opposition.

MEETING DEFINITION REFORMS

PROPOSED REFORM	1	2	3	COMMENTS
1. Codification of the attorney general definition of a meeting -- "no matter how informal, where business is transacted or discussed."	x			This is a mere codification of existing attorney general guidelines.
2. Codification of attorney general ruling banning use of staff to convey information without public knowledge.	x			This is a codification of existing attorney general guidelines.
3. Define meeting to include any discussion of public business between two or more board members.		x		Will face opposition, but will greatly simplify application of the law.
4. Prohibit staff members from briefing a quorum individually, yet privately.		x		Will face opposition.
5. Require that retreats be open to the public.	x			Simple clarification of the law. Will be politically difficult to oppose.
6. Require meetings be held within the agency boundaries unless there is a need to go outside.	x			Will face opposition from those who like the out-of-town retreats. But will be politically difficult to oppose.
7. Apply the law to meetings of a quorum of board-elects.	x			Essentially closing a loophole.

MISCELLANEOUS REFORMS

PROPOSED REFORM	1	2	3	COMMENTS
1. Require copies of reports distributed at board meetings be made available to the press at the same time.	x			Clarification of existing law.
2. Require master copy of board "packet" for members of the public to review.	x			Why would anyone oppose this?
3. Require copies of reports distributed prior to meetings be made available to the press at the same time as the board.	x			Clarification of existing law.
4. Require public access to meetings of one-member boards.	x			Closing of loophole.

APPENDIX: QUESTIONNAIRE AND RESPONSES TO MULTIPLE-CHOICE QUESTIONS

MULTIPLE-CHOICE QUESTIONS

1. Have you had, since 1980, disagreements with public agencies over the application of the Brown Act? Yes _____ No _____

2. Why do you believe the problems have occurred -- are they more a case of ignorance of the law (__1__), awareness of the law but a loose interpretation of it (__2__), or an exploitive attitude that prompts the agency to try to get away with as much as it can (__3__)? If more than one explanation applies, number them in order of priority.

3. How did you respond to the situation? Check any or all that apply. Oral protest (__1__) Editorial (__2__) Letter protest (__3__) Court action (__4__)

NOTE: The numbers in the response blanks did not appear in the questionaire. They are added here to correspond to the responses that follow.

APPENDIX

RESPONSES

PUBLICATION	Q1		Q2			Q3			
	Y	N	1	2	3	1	2	3	4
1. Apple Valley News, Hesperia	x				x	x		x	
2. Ohlone Monitor, Ohlone College	x			x		x			
3. Press-Tribune, Roseville	x		x	x		x			
4. Antelope Valley Press, Palmdale	x			1	2	x			
5. Blade-Tribune, Oceanside	x		1	2	3	x	x		x
6. Desert Sun, Palm Springs	x			2	1	x	x	x	x
7. Enterprise-Record, Chico	x		1	2	3	x	x		
8. Press-Enterprise, Riverside	x		2	1	3	x			
9. Californian, Salinas	x			1	2	x	x		x
10. Times-Advocate, Escondido	x		2	1	3	x	x		
11. Pierce College, L.A.[1]									

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[1]No response to this part of questionaire. Only responses to written questions provided.

12.	Desert Star, Yucca Valley	x			x			x		
13.	Desert Sentinel, Dsrt Ht Sprgs	x		2	1		x	x		
14.	San Pedro News-Pilot	x				x	x		x	
15.	Claremont Courier	x			1	2	x			
16.	Mountain News and Timberline Journal, Lake Arrowhead	x				x		x		
17.	The Dispatch, Gilroy	x		3	1	2	x	x	x	[2]
18.	Calaveras Prspect, San Andreas	x				x	x			
19.	Times-Herald, Vallejo	x			x		x			
20.	Daily News Tribune, Fullerton		x							
21.	Pacific Grove - Pebble Beach		x							
22.	Chino Champion	x			x		x			
23.	Valley Press & Scotts Valley Banner, Felton	x		3	1	2	x		x	
24.	The Fresno Bee	x			x		x	x		
25.	Turlock Journal	x			x	x	x		x	
26.	Independent Journl, San Rafael	x		2	1	3	x	x	x	
27.	Chowchilla News[3]									
28.	Daily Aztec, San Diego St. U.	x		x					x	
29.	Sacramento Bee	x		2	1		x		x	
30.	Evening Outlook, Santa Monica	x			x		x	x		
31.	San Francisco Examiner	x			2	1	x	x		
32.	San Diego Tribune	x		2		1	x			

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[2]Threat of court action, not counted in total.
[3]No response to this part of questionaire.

33. Santa Rosa Press Democrat	x		x			x	x	x	
34. San Marino Tribune		x							
35. Five Cities Times-Press-Recorder, Arroyo Grande		x							
36. Redding Record Searchlight	x		x			x		x	
37. Big Bear Life & The Grizzly, Big Bear Lake		x							
38. The Union, Arcata	x		2	1		x		x	
39. Reporter Publications, SF		x							
40. Advocate-News, Fort Bragg	x		x	x		x		x	
41. Sonoma Index-Tribune	x			1	2	x	x	x	
42. Los Banos Enterprise		x							
43. Contra Costa Sun, Lafayette		x							
44. Tri-Valley Herald, Livermore	x		2	1		x		x	
45. McClatchy Newspapers, Sacto.[a]									
46. Modesto Bee	x		1	2		x		x	
47. Poway News Chieftain	x			x		x		x	
48. Morgan Hill Times	x			x		x			
49. Desert Dispatch, Barstow		x							
50. Newhall Signal & Saugus Enterprise	x		x			x			
51. Appeal-Democrat, Marysville	x		2	1	3	x	x		
52. The Ferndale Enterprise		x							

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[a]Response duplicates that of satellite papers.
[b]Threat of court action, not counted in total.

53. Moorpark College Reporter		x									
54. Atascadero News		x									
55. Redlands Daily Facts	x		x	x		x	x	x			
56. Chowchilla News	x		x	x				x			
57. The Register, Santa Ana	x		2	1	3	x			x		
TOTAL*	42	12	23	34	21	38	17	19	4		

QUESTION 2 NUMBERED RESPONSES

(21 NUMBERED RESPONSES)

RESPONSES OF "1" - HIGHEST PRIORITY	3	15	3
RESPONSES OF "2"	10	5	6
RESPONSES OF "3"	2	0	7

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*Respondants 20, 21, 35, 42 and 54 answered no to question 1, but then answered questions 2 and 3. Their responses are not included in the tally above nor the totals.

BIBLIOGRAPHY

SOURCES CONSULTED

Adams, John B. "State Open Meetings Laws; An Overview." Freedom of Information Foundation, Columbia, Mo. July 1974.

Arner, Mark. Reporter for the *Oceanside Blade-Tribune*. Telephone interview, June 1984.

California Department of Justice, *Secret Meeting Laws and Public Agencies*. Sacramento: Legal Information Center, Office of the Attorney General; April 1, 1981.

California Fair Political Practices Commission. "A Guide to the Political Reform Act of 1974." Sacramento. October 1982.

California, State of. *Government Code*, section 54950 *et seq.*, "The Ralph M. Brown Act."

_____. *Government Code*, section 11120 *et seq.*, "The Bagley-Keene Open Meeting Act."

_____. *Government Code*, section 81000 *et seq.*, "Political Reform Act."

Clarke, Jack. "Open Meeting Laws: An Analysis." *Freedom of Information Center Report No. 338*. School of Journalism, University of Missouri at Columbia, June 1975.

deGiere, Greg. Staff member for the California State Senate Office of Research. Telephone interview, March 7, 1985.

Donovan, Kathy. Staff attorney for the California Fair Political Practices Commission. Telephone interview, March 7, 1985.

Dorais, Michael B. and Francke, Joseph T. *Reporter's Handbook on Media Law*. Sacramento. California Newspaper Publishers Association, 1982.

Florida Office of the Attorney General. *Florida Open Government Laws Manual*. Tallahassee, Fla.: Florida Press Association, 1984, p. 10.

Francke, Joseph T. Legal counsel for the California Newspaper Publishers Association, Sacramento. Numerous telephone interviews, 1983-1985.

"Gaining Access '84: Pullout section: 50-state survey." Published by Sigma Delta Chi.

Gillio, Frank. "The Ralph M. Brown Act." Revised to March 1, 1983. Gillio is the city attorney of Millbrae, Monte Sereno and Los Altos Hills. The unpublished document was distributed at a meeting of the League of California Cities.

Harris, Michael. "Your Secret Government." Reprint of a series of 10 articles that appeared in the *San Francisco Chronicle*, May 25 - June 4, 1952.

_____. "10 Years of the State Secrecy Ban." *San Francisco Chronicle*, July 1, 1963, p. 31.

_____. Reporter for the *San Francisco Chronicle*. Telephone interview, December 1983.

Jeffery, Paul. "California's 'Open Meeting' Fight." *Freedom of Information Center Report No. 210*, School of Journalism, University of Missouri at Columbia. October 1968.

Kelly, Margie. "Public Records and Public Meetings." *Freedom of Information Center Report No. 397*. School of Journalism, University of Missouri at Columbia, December 1978.

Opotowsky, Mel. Former chairman of the California Freedom of Information Committee, Riverside. Telephone interview, November 1984.

_____. "Freedom of Information state commissions." *Freedom of Information*. Report by the APME Freedom of Information Committee, November 1982.

_____. Statement of the position of the California Freedom of Information Committee. Undated.

Pickerell, Albert. "California's Brown Act 1953-1966." Reprint of a series of articles that appeared in *California Publisher*, August, September, October, November, 1966.

"Your Right to Know," a collection of articles printed by the *San Jose Mercury News*, Feb. 15-27, 1982.

NEWSPAPER ARTICLES ON BROWN ACT CASES

"Brookside ponders how to sell itself." *West County Times (Pinole)*, Nov. 6, 1983.

"Brown Act Violations Explained." *Chico Enterprise-Record*, Jan. 15, 1981.

"City Council goes to the beach -- all for the good of Walnut Creek," *San Francisco Examiner*, Feb. 27, 1983, p. B1.

"Corcoran accepts power limitation." *(Oakland) Tribune*, Nov. 11, 1984, p. D-2.

"Corona council members mum on retreat agenda." *(Riverside) Press-Enterprise*, April 7, 1984, p. B-1.

"Confidential?" *San Diego Tribune*, Jan. 17, 1983, p. B10.

"Council can't hold out-of-town session." *Santa Rosa Press Democrat*, Jan. 19, 1984.

"Council may fill seat privately." *(Antioch) Daily Ledger*, Dec. 30, 1980, p. 1.

"Council wants to forge ahead." *(Antioch) Daily Ledger*, Jan. 9, 1981, p. 1.

"Danville leaders leave workshop with praise, ideas." *(Pleasanton) Valley Times*, Jan. 20, 1985.

"Don't hide the public's business." *San Francisco Examiner*, Oct. 21, 1983.

"Editorial: Private selection for public office." *(Antioch) Daily Ledger*, Jan. 2, 1981, p. 5.

"Healdsburg officials on Sea Ranch retreat," *Santa Rosa Press Democrat*, Dec. 6, 1983.

"New San Ramon council walks tightrope on open meeting law." *Contra Costa Times*, April 30, 1983, p. 1A.

"Opinion suggests illegal method." *(Antioch) Daily Ledger*, Jan. 7, 1981, p. 1.

"Public has a right to know its business." *(Pleasanton) Valley Times*, March 17, 1985, p. 10A.

"Restaurant Gathering With Builders: Ridge Councilmen Meet Illegally." *Chico Enterprise-Record*, July 10, 1981, p. 1A.

"Right to know takes a beating." *(San Rafael) Independent Journal*, March 27, 1982.

"San Marcos Incident Spurs Charge: Official denies violating anti-secrecy law." *San Diego Tribune*, Feb. 17, 1981.

"Times Editorial Comment: 5 years and $20,000 later ..." *Sebastopol Times*. Nov. 25, 1981.

LEGAL RULINGS

California Office of the Attorney General. Information Letter No. 75-97 (1975).

_____. 80 Ops. Cal. Atty. Gen. 713. Oct. 30, 1980.

_____. 62 Ops. Cal. Atty. Gen. 150. April 10, 1979.

_____. 58 Ops. Cal. Atty. Gen. 273.

Common Cause v. Stirling, 174 Cal. Rptr. 200 (1981).

Neu v. The Miami Herald Publishing Co., Florida Supreme Court, Respondents' Answer Brief, p. 20, case no. 64,151, decided Jan. 18, 1985.

Sacramento Newspaper Guild v. Sacramento County Board of Supervisors, 62 Cal. Rptr. 819 (1967).

Sacramento Newpspaer Guild v. Sacramento County Board of Supervisors, 69 Cal. Rptr. 480 (1968).

San Diego Union v. City Council of the City of San Diego, 196 Cal. Rptr. 45 (1983).

Stribling v. Mailliard, 85 Cal. Rptr. 924 (1970).

Walker v. County of Los Angeles, 12 Cal. Rptr. 671 (1961).

OFFICE OF THE ATTORNEY GENERAL
State of California

JOHN K. VAN DE KAMP
Attorney General

OPINION	
of	No. 86-203
JOHN K. VAN DE KAMP Attorney General	OCTOBER 22, 1986
CLAYTON P. ROCHE Deputy Attorney General	

THE HONORABLE LLOYD G. CONNELLY, MEMBER OF THE CALIFORNIA ASSEMBLY, has requested an opinion on the following questions:

1. Does section 54956.9 of the Government Code, a provision in the Ralph M. Brown Act, authorize closed sessions of a city council for the purpose of discussing a proposed or tentative cease and desist order issued by a regional water quality control board?

2. Where one city agency has discussed in open session a proposed or tentative cease and desist order issued by a regional water quality control board, may the city council thereafter invoke section 54956.9 of the Government Code to discuss the same cease and desist order with its city attorney in closed session?

CONCLUSIONS

1. When a proposed or tentative cease and desist order has been served upon a city by a regional water quality control board, an "adjudicatory proceeding" has been commenced within the meaning of section 54956.9 of the Government Code. Accordingly, that section would authorize closed sessions of the city council with its city attorney to receive his or her advice and to discuss the legal options and strategies available to the city with respect to such "adjudicatory proceeding."

2. Where one city agency has discussed in open session a proposed or tentative cease and desist order

issued by a regional quality control board, the city council may nevertheless invoke the adjudicatory proceeding exception to the open meeting law to hold closed session meetings with its city attorney to receive his or her advice and to discuss the legal options and strategies open to the city with respect to such adjudicatory proceedings.

ANALYSIS

The Ralph M. Brown Act (Gov. Code, § 54950 et seq.) requires "legislative bodies" of "local agencies," as defined therein, to conduct their meetings in public session unless specifically excepted by the act or impliedly excepted by some other provision of law. (See generally Gov. Code, secs. 54951, 54951.1, 54951.7, 54952, 54952.2, 54952.3, 54952.5, 54953, 54956.7, 54957, 54957.6; Sacramento Newspaper Guild v. Sacramento County Bd. of Supr. (1968) 263 Cal.App.2d 41.)

In this opinion we deal with two city agencies, the city council and the city public works board, both of which are "legislative bodies" of "local agencies" within the provisions of the Ralph M. Brown Act. We also deal with section 54956.9 of the Government Code, which was added to the Ralph M. Brown Act at the 1984 session of the State Legislature (Stats. 1984, ch. 1126), and which specifically authorizes "legislative bodies" to confer with their attorney in closed session to discuss "pending litigation" as defined in that section. Section 54956.9 provides:

> "Nothing in this chapter shall be construed to prevent a legislative body of a local agency, based on advice of its legal counsel, from holding a closed session to confer with, or receive advice from, its legal counsel regarding pending litigation when discussion in open session concerning those matters would prejudice the position of the local agency in the litigation.
>
> "For purposes of this section, litigation shall be considered pending when any of the following circumstances exist:
>
> (a) An adjudicatory proceeding before a court, administrative body exercising its adjudicatory authority, hearing officer, or arbitrator, to which the local agency is a party, has been initiated formally.
>
> (b)(1) A point has been reached where, in the opinion of the legislative body of the local agency

on the advice of its legal counsel, based on existing facts and circumstances, there is a significant exposure to litigation against the local agency; or

(2) Based on existing facts and circumstances, the legislative body of the local agency is meeting only to decide whether a closed session is authorized pursuant to paragraph (1) of this subdivision.

(c) Based on existing facts and circumstances, the legislative body of the local agency has decided to initiate or is deciding whether to initiate litigation.

"Prior to holding a closed session pursuant to this section, the legislative body of the local agency shall state publicly to which subdivision it is pursuant. If the session is closed pursuant to subdivision (a), the body shall state the title of or otherwise specifically identify the litigation to be discussed, unless the body states that to do so would jeopardize the agency's ability to effectuate service of process upon one or more unserved parties, or that to do so would jeopardize its ability to conclude existing settlement negotiations to its advantage.

"The legal counsel of the legislative body of the local agency shall prepare and submit to the body a memorandum stating the specific reasons and legal authority for the closed session. If the closed session is pursuant to subdivision (a), the memorandum shall include the title of the litigation. If the closed session is pursuant to subdivision (b) or (c), the memorandum shall include the existing facts and circumstances on which it is based. The legal counsel shall submit the memorandum to the body prior to the closed session if feasible, and in any case no later than one week after the closed session. The memorandum shall be exempt from disclosure pursuant to Section 6254.1.

"For the purposes of this section, litigation includes any adjudicatory proceeding, including

eminent domain, before a court, administrative body exercising its adjudicatory authority, hearing officer, or arbitrator." 1/

We are presented with two questions in the context of this new provision of the Ralph M. Brown Act. The first is whether a city council is authorized by this section to discuss in closed session a proposed or tentative regional water quality control board cease and desist order against the city. The second is whether the city council can be precluded from invoking this section where a subordinate city agency, in our case the city public works board, has already discussed this particular tentative cease and desist order in an open session.

We conclude that a city council may discuss such a proposed or tentative cease and desist order with its city attorney pursuant to section 54956.9 within the ground rules set forth in that section. We further conclude that the prior public discussion of the proposed or tentative cease and desist order by the city's public works board would not prevent the city council from invoking section 54956.9.

1. The Status Of A Tentative Cease And Desist Order

The factual background for this request for our opinion is briefly as follows: A regional water quality control board sent to the city public works director a notice that it would hold an evidentiary hearing at a specified time and place and on a specified date to consider an enforcement order against the city with respect to raw sewage which was being discharged by the city. Alternative enforcement actions were specified, including a possible

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1. Prior to the enactment of section 54956.9 of the Government Code, both the courts and this office implied an exception to the open meeting requirements of the Ralph M. Brown Act to permit local bodies to consult with their attorneys within the confines of the attorney-client privilege. (See Sutter Sensible Planning, Inc. v. Board of Supervisors (1981) 122 Cal.App.3d 813, 825; Sacramento Newspaper Guild v. Sacramento County Bd. of Suprs., supra, 263 Cal.App.2d 41; 67 Ops.Cal.Atty.Gen. 111 (1984); 36 Ops. Cal.Atty.Gen. 175 (1960); Cal.Atty.Gen.Unpubl.Opns. I.L. 75-282; I.L. 71-5; compare 62 Ops.Cal.Atty.Gen. 150 (1979).)

cease and desist order to be issued against the city. The notice also stated that the board's staff, the city and other interested parties would be given the opportunity to present evidence at the scheduled hearing and that additional materials concerning the hearing would be sent to the city beforehand.

Within a week the regional water quality control board then sent to the city public works director a proposed or tentative cease and desist order to require the city to cease and desist violating discharge requirements previously ordered by the regional board (hereinafter "tentative cease and desist order"). The tentative cease and desist order set forth seven specific tasks to be completed by the city and a time schedule for the completion of each of these tasks. For example, Task I required increasing sewage treated at a particular water reclamation plant; Task VI required the engineering and design work for, and the construction and operation of, a new outfall relief sewer. The tentative cease and desist order concluded with the following warning:

> "If the City . . . fails to comply with any provisions of this Order, the Executive Officer is authorized to request the Attorney General to take the appropriate action against the discharger, including injunction and civil monetary remedies, pursuant to appropriate California Water Code sections, including but not limited to Sections 13331, 13350, 13385, and 13386."

The accompanying cover letter from the regional board's executive director to the city's public works director set forth the previously noticed date, time and place where "the Board would hold a hearing on the proposed enforcement action."

The city engineer then prepared a report on the tentative cease and desist order for the city's public works board. That report recommended that the city's designated representative should agree to only three of the seven tasks specified in the tentative cease and desist order at the hearing before the regional board. The city's public works board then held a public meeting at which it discussed in open session the tentative cease and desist order and the engineer's report, and adopted such report with additional comment.

Later the same day, the city council met and discussed the tentative cease and desist order with the city attorney in closed session. The authority specified for the closed session was subdivision (a) of section 54956.9 of the Government Code, supra. The propriety of such a closed meeting is the basis for question one of this request.

An examination of section 54956.9 of the Government Code discloses that there are a number of conditions precedent to the holding of a closed session pursuant to that section. Initially, there must be "pending litigation" as defined in the section. Secondly, the local agency's legal adviser must advise the legislative body that an open session to confer with, or receive advice from him or her with respect to the "pending litigation" would prejudice the position of the local agency in the litigation. In so doing the local agency's legal adviser must "prepare and submit to the body a memorandum stating the specific reasons and legal authority for the closed session." The memorandum must also contain other appropriate information to justify the session as falling within subdivision (a), (b), or (c) of the section. For example, with respect to subdivision (a), "the memorandum shall include the title of the litigation", or "otherwise specifically identify the litigation."

Accordingly, it is seen that the legal adviser to a local agency makes the initial determination as to whether a closed session may be legally justified under section 54956.9 of the Government Code. Thereafter, under the wording of the section, the legislative body is free to make its own determination as to whether to meet in closed session. Such is not mandated. The section merely specifies that "[n]othing in this chapter [the Ralph M. Brown Act] shall be construed to prevent a legislative body of a local agency, based on advice of its legal counsel, from holding a closed session to confer with, or receive advice from, its legal counsel regarding pending litigation."

Since we have been advised that the city herein was operating pursuant to subdivision (a), we assume that the memorandum required from the City Attorney had been properly prepared and submitted to the city council. The issue then resolves itself into whether an "adjudicatory proceeding" had been formally commenced against the city before a court or an administrative agency exercising its adjudicatory authority within the meaning of subdivision (a) of section 54956.9 of the Government Code.

An adjudicatory proceeding is one "in which 'the government's action affecting an individual [is] determined by facts peculiar to the individual case.'" (Horn v. County of Ventura (1979) 24 Cal.3d 605, 613.) As such, it is one which is "subject to procedural due process principles", that is due notice and the opportunity to be heard. (Id., at p. 612.) Likewise, it is one where findings will be made and judicial review will be available through administrative mandamus (Id., at p. 614.) In short, "adjudicatory" matters are essentially to be distinguished from "quasi-legislative" matters. The latter "involve the adoption of a 'broad

generally applicable rule of conduct on the basis of general public policy.'" (Id., at p. 613; see also, e.g., Griffis v. County of Mono (1985) 163 Cal.App.3d 414, 427.) 2/

We conclude from an examination of the relevant provisions of the Water Code that by at least the time of service of a tentative cease and desist order by the regional water quality control board on the city, an adjudicatory proceeding had been commenced. By that time the matters at issue before the board were drawn and the city advised of them so that it could prepare any defense it wished to present to the board concernng the proposed enforcement order.

Section 13300 et seq. of the Water Code sets forth the provisions for the "Administrative Enforcement and Remedies By Regional Board" with respect to actual or threatened violations of requirements prescribed by regional boards or the state water quality control board. One of such enforcement remedies is the issuance of cease and desist orders. Section 13301 of the Water Code provides:

> "When a regional board finds that a discharge of waste is taking place or threatening to take place in violation of requirements or discharge prohibitions prescribed by the regional board or the state board, the board may issue an order to cease and desist and direct that those persons not complying with the requirements or discharge prohibitions (a) comply forthwith, (b) comply in accordance with a time schedule set by the board, or (c) in the event of a threatened violation, take appropriate remedial or preventive action. In the event of an existing or threatened violation of waste discharge requirements in the operation of a community sewer system, cease and desist orders may

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2. See also, Ballentine's Law Dictionary (3d ed. 1969), page 32:

> "adjudicatory. A term employed in speaking of the quasi-judicial functions of an administrative agency."

and Black's Law Dictionary (5th Ed. 1979), pages 39-40:

> "Adjudicatory hearing. A proceeding before an administrative agency in which the rights and duties of particular persons are adjudicated after notice and opportunity to be heard."

restrict or prohibit the volume, type, or concentration of waste that might be added to such system by dischargers who did not discharge into the system prior to the issuance of the cease and desist order. Cease and desist orders may be issued directly by a board, after notice and hearing, or in accordance with the procedure set forth in Section 13302." (Emphasis added.)

Section 13302 provides an alternative hearing procedure whereby a panel of the regional board, after due notice and hearing, will hold an evidentiary hearing as to whether a cease and desist order shall issue. The panel then will report its proposed decision to the board which "after making such independent review of the record and taking such additional evidence as may be necessary, may adopt, with or without revision, the proposed decision and order of the panel." Section 13303 of the Water Code then provides that "[c]ease and desist orders shall become effective and final upon issuance thereof."

Section 13320 of the Water Code thereafter provides an appeal procedure to the state water quality control board from actions of regional boards, including enforcement proceedings taken by the issuance of cease and desist orders, by any aggrieved party. It provides:

"(a) . . . . . .

"(b) The evidence before the state board shall consist of the record before the regional board, and any other relevant evidence which, in the judgment of the state board, should be considered to effectuate and implement the policies of this division.

"(c) The state board may find the regional board action or inaction to be appropriate and proper. Upon finding that the action of the regional board, or the failure of the regional board to act, was inappropriate or improper, the state board may direct that the appropriate action be taken by the regional board, refer the matter to any other state agency having jurisdiction, take the appropriate action itself, or do any combination of the foregoing. In taking any such action, the state board is vested with all the powers of the regional boards under this division. . . . "

And finally with respect to the Water Code provisions in this sequence or process, section 13330 provides that "any aggrieved party may file with the superior court a petition

for a writ of mandate for review thereof." "The evidence before the court shall consist of the record before the state board, including the regional board's record, and any other relevant evidence which, in the judgment of the court, should be considered to effectuate and implement the policies of . . . [the Water Code]."

It is patent that the Water Code provisions outlined above set forth a classic example of administrative agencies, the regional board and the state board, acting adjudicatively or quasi-judicially with the usual recourse to the courts through administrative mandamus. (Cf. Code Civ. Proc. § 1094.5.) It is seen that this process included the mailing to the city of a tentative or proposed cease and desist order, in essence the accusation or complaint, with a notice of hearing thereon. The city had the choice of acquiescing in the proposed cease and desist order, or contesting it through the foregoing hearing process, where its individual rights could be adjudicated. Accordingly, by the time the regional board mailed the tentative cease and desist order to the city, an "adjudicatory proceeding" had been clearly commenced within the meaning of section 54956.6.

2. Application Of The Tentative Cease And Desist Order To The Provisions Of Section 54956.9 Of The Government Code

We have established that the sine qua non for the operation of subdivision (a) of section 54956.9 of the Government Code herein is (1) the commencement of an "adjudicatory proceeding" and (2) the general requirement that the closed session "is to confer with, or receive advice from, its legal counsel regarding pending litigation [in our case, the cease and desist order proceeding] when discussion in open session concerning those matters would prejudice the position of the" city in the pending litigation, based upon the advice of the city attorney.

This latter general requirement is essentially one requiring the exercise of judgment on the part of both the city council and the city attorney. We believe that the requirement of section 54956.9 of the Government Code that the attorney for the legislative body shall state "the specific reasons" for the closed session requires an articulation by him or her as to why the facts and circumstances are such that an open session would prejudice the local agency in the litigation. In the context of the tentative cease and desist order discussed herein, we can certainly envision the need to have discussed the strength and weaknesses of the city's position with respect to the four out

of seven tasks the public works board recommended should be contested at the hearing before the regional board. This is particularly true since not only could the city have been faced with a cease and desist order as proposed, but the city could also have been subject to civil penalties for failure to comply with the cease and desist order (either administratively or court imposed, see Water Code, § 13350), or could have been the subject of an injunction action brought by this office at the request of the local board (see Water Code, § 13331). 3/

Whether the city attorney and the city council made the proper "judgment call" under section 54956.9 is beyond the scope of our opinion function, being essentially a question of fact. In this respect, however, we note the competing policy considerations set forth by the court in the Sacramento Newspaper Guild case, supra. These would appear to be as germane to the codified litigation exception as they were when the court implied the exception to the open meeting requirements of the Ralph M. Brown Act in that case.

Thus, with regard to a public agency's need to confer with its attorney in private, the court stated:

> ". . . Government should have no advantage in legal strife; neither should it be a second-class citizen. We reiterate what we stated in the supersedeas aspect of this suit, Sacramento Newspaper Guild v. Sacramento County Board of Supervisors, supra, 255 Cal.App.2d at page 54:
>
> > 'Public agencies face the same hard realities as other civil litigants. An attorney who cannot confer with his client outside his opponent's presence may be under insurmountable handicaps. A panoply of constitutional, statutory, administrative and fiscal arrangements covering state and local government expresses a policy that litigating public agencies strive with their legal adversaries on fairly even terms. We need not pause for citations to demonstrate the obvious. There is a public entitlement

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3. These additional remedies available to the local board could also possibly have justified a closed session under subdivision (b) of section 54956.9 since failure to acquiesce in the regional board's decision would appear to have constituted "a significant exposure to litigation against the" city within the meaning of subdivision (b)(1).

to the effective aid of legal counsel in civil litigation. Effective aid is impossible if opportunity for confidential legal advice is banned.'

"Settlement and avoidance of litigation are particularly sensitive activities, whose conduct would be grossly confounded, often made impossible, by undiscriminating insistence on open lawyer-client conferences. In settlement advice, the attorney's professional task is to provide his client a frank appraisal of strength and weakness, gains and risks, hopes and fears. If the public's 'right to know' compelled admission of an audience, the ringside seats would be occupied by the government's adversary, delighted to capitalize on every revelation of weakness. A lawyer worth his salt would feel a sense of treachery in disclosing that kind of appraisal. (8 Wigmore op. cit. 2291, p. 553.). . . ." (Fn. omitted.) (263 Cal.App.2d at pp. 55-56.)

On the other side of the coin the court, however, cautioned:

"The two enactments [the Ralph M. Brown Act and the attorney-client privilege] are capable of concurrent operation if the lawyer-client privilege is not overblown beyond its true dimensions. As a barrier to testimonial disclosure, the privilege tends to suppress relevant facts, hence is strictly construed. (Greyhound Corp. v. Superior Court, supra, 56 Cal.2d at p. 396.) As a barrier against public access to public affairs, it has precisely the same suppressing effect, hence here too must be strictly construed. As noted earlier, the assurance of private legal consultation is restricted to communications 'in confidence.' Private clients, relatively free of regulation, may set relatively wide limits on confidentiality. Public board members, sworn to uphold the law, may not arbitrarily or unnecessarily inflate confidentiality for the purpose of deflating the spread of the public meeting law. Neither the attorney's presence nor the happenstance of some kind of lawsuit may serve as the pretext for secret consultations whose revelation will not injure the public interest. To attempt a generalization embracing the occasions for genuine confidentiality would be rash. The Evidence Code lawyer-client provisions may operate concurrently with the Brown Act, neither superse-

ing the other by implication." (263 Cal.App.2d at p. 58.)

Accordingly, we conclude on question number one that the mailing to the city of a tentative cease and desist order with the hearing date thereon by a regional water quality control board constitutes the commencement of an "adjudicatory proceeding" before that agency within the meaning of section 54956.9. As such it is pending litigation which may be discussed by the city council and its city attorney in closed session under section 54956.9 in the Ralph M. Brown Act. However, those discussions must be confined to those authorized by section 54956.9, namely to receive advice from the city attorney and to confer with him or her regarding the pending litigation when discussion of those matters in open session would prejudice the position of the city in the litigation. This would include such matters as discussing the legal options open to the city and the legal strategies to be employed by the city in the litigation, but would not include discussion on any matters which would not prejudice the city in the litigation.

3. The Question Of Possible Waiver By A Subsidiary City Agency Of Section 54956.9

The second question presented for resolution herein is whether when one city agency has discussed a tentative cease and desist order in open session, the city council may thereafter invoke section 54956.9 of the Government Code to discuss the same cease and desist order with its city attorney. In the context of the facts under consideration herein, the question is essentially whether the city public works board could have waived or nullified the city council's rights under section 54956.9 of the Government Code. We conclude that it could not have done so.

Initially, we note that the usual rule is that once confidential information is disclosed to the public or to unauthorized third parties, confidentiality as to such information can no longer be claimed. It has been "waived." (See Black Panther Party v. Kehoe (1974) 42 Cal.App.3d 645; and, e.g., Evid. Code, sec. 912, waiver of attorney-client privilege.)

We do not, however, have such a situation herein with respect to the city public works board and the city council. Section 54956.9 of the Government Code, in permitting closed sessions, seeks to protect confidential communications between attorney and client, not the mere discussion of a matter such as the tentative cease and desist order. Accordingly, when the public works board met and discussed

the tentative cease and desist order, it in no way invoked section 54956.9, nor discussed confidential information in open session, nor waived confidential information. It was not until the city council met with its attorney to receive its attorney's advice and consultation relative to the tentative cease and desist order that section 54956.9 was even invoked.

Stated otherwise, although both bodies may have coincidentally discussed the tentative cease and desist order, the right to have met in closed session and resultant confidentiality arising from section 54956.9 related only to the attorney-client communication with respect thereto. In short, insofar as section 54956.9 of the Government Code is concerned, the two bodies were considering different information. Accordingly, no question of waiver could have arisen.

Furthermore, under section 54956.9 of the Government Code, the city council had the absolute right to confer with its attorney with respect to "pending litigation" in closed session under the ground rules set forth in that section. We see no way such right could have been nullified by what others might have done, whether they were a subordinate or advisory board, the city attorney or individual council members.

We therefore conclude on question two that where one city agency has discussed in open session a proposed or tentative cease and desist order issued by a regional quality control board, the city council may nevertheless invoke the adjudicatory proceeding exception to the open meeting law to hold closed session meetings with its city attorney to receive his or her advice and to discuss the legal options and strategies open to the city with respect to such adjudicatory proceedings.

* * * * *

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October 22, 1986

Honorable Lloyd G. Connelly
Member, California State Assembly
State Capitol, Room 2179
Sacramento, California

Dear Assemblyman Connelly:

Enclosed is our Opinion No. 86-203 issued in response to your February 12, 1986 request.

Sincerely,

JACK R. WINKLER
Assistant Attorney General
Chief, Opinion Unit

JRW:je

Enclosure

OFFICE OF THE ATTORNEY GENERAL
State of California

JOHN K. VAN DE KAMP
Attorney General

OPINION	
of	No. 86-203
JOHN K. VAN DE KAMP Attorney General	OCTOBER 22, 1986
CLAYTON P. ROCHE Deputy Attorney General	

THE HONORABLE LLOYD G. CONNELLY, MEMBER OF THE CALIFORNIA ASSEMBLY, has requested an opinion on the following questions:

1. Does section 54956.9 of the Government Code, a provision in the Ralph M. Brown Act, authorize closed sessions of a city council for the purpose of discussing a proposed or tentative cease and desist order issued by a regional water quality control board?

2. Where one city agency has discussed in open session a proposed or tentative cease and desist order issued by a regional water quality control board, may the city council thereafter invoke section 54956.9 of the Government Code to discuss the same cease and desist order with its city attorney in closed session?

CONCLUSIONS

1. When a proposed or tentative cease and desist order has been served upon a city by a regional water quality control board, an "adjudicatory proceeding" has been commenced within the meaning of section 54956.9 of the Government Code. Accordingly, that section would authorize closed sessions of the city council with its city attorney to receive his or her advice and to discuss the legal options and strategies available to the city with respect to such "adjudicatory proceeding."

2. Where one city agency has discussed in open session a proposed or tentative cease and desist order

issued by a regional quality control board, the city council may nevertheless invoke the adjudicatory proceeding exception to the open meeting law to hold closed session meetings with its city attorney to receive his or her advice and to discuss the legal options and strategies open to the city with respect to such adjudicatory proceedings.

ANALYSIS

The Ralph M. Brown Act (Gov. Code, § 54950 et seq.) requires "legislative bodies" of "local agencies," as defined therein, to conduct their meetings in public session unless specifically excepted by the act or impliedly excepted by some other provision of law. (See generally Gov. Code, secs. 54951, 54951.1, 54951.7, 54952, 54952.2, 54952.3, 54952.5, 54953, 54956.7, 54957, 54957.6; Sacramento Newspaper Guild v. Sacramento County Bd. of Supr. (1968) 263 Cal.App.2d 41.)

In this opinion we deal with two city agencies, the city council and the city public works board, both of which are "legislative bodies" of "local agencies" within the provisions of the Ralph M. Brown Act. We also deal with section 54956.9 of the Government Code, which was added to the Ralph M. Brown Act at the 1984 session of the State Legislature (Stats. 1984, ch. 1126), and which specifically authorizes "legislative bodies" to confer with their attorney in closed session to discuss "pending litigation" as defined in that section. Section 54956.9 provides:

> "Nothing in this chapter shall be construed to prevent a legislative body of a local agency, based on advice of its legal counsel, from holding a closed session to confer with, or receive advice from, its legal counsel regarding pending litigation when discussion in open session concerning those matters would prejudice the position of the local agency in the litigation.
>
> "For purposes of this section, litigation shall be considered pending when any of the following circumstances exist:
>
> (a) An adjudicatory proceeding before a court, administrative body exercising its adjudicatory authority, hearing officer, or arbitrator, to which the local agency is a party, has been initiated formally.
>
> (b)(1) A point has been reached where, in the opinion of the legislative body of the local agency

on the advice of its legal counsel, based on existing facts and circumstances, there is a significant exposure to litigation against the local agency; or

(2) Based on existing facts and circumstances, the legislative body of the local agency is meeting only to decide whether a closed session is authorized pursuant to paragraph (1) of this subdivision.

(c) Based on existing facts and circumstances, the legislative body of the local agency has decided to initiate or is deciding whether to initiate litigation.

"Prior to holding a closed session pursuant to this section, the legislative body of the local agency shall state publicly to which subdivision it is pursuant. If the session is closed pursuant to subdivision (a), the body shall state the title of or otherwise specifically identify the litigation to be discussed, unless the body states that to do so would jeopardize the agency's ability to effectuate service of process upon one or more unserved parties, or that to do so would jeopardize its ability to conclude existing settlement negotiations to its advantage.

"The legal counsel of the legislative body of the local agency shall prepare and submit to the body a memorandum stating the specific reasons and legal authority for the closed session. If the closed session is pursuant to subdivision (a), the memorandum shall include the title of the litigation. If the closed session is pursuant to subdivision (b) or (c), the memorandum shall include the existing facts and circumstances on which it is based. The legal counsel shall submit the memorandum to the body prior to the closed session if feasible, and in any case no later than one week after the closed session. The memorandum shall be exempt from disclosure pursuant to Section 6254.1.

"For the purposes of this section, litigation includes any adjudicatory proceeding, including

eminent domain, before a court, administrative body exercising its adjudicatory authority, hearing officer, or arbitrator." 1/

We are presented with two questions in the context of this new provision of the Ralph M. Brown Act. The first is whether a city council is authorized by this section to discuss in closed session a proposed or tentative regional water quality control board cease and desist order against the city. The second is whether the city council can be precluded from invoking this section where a subordinate city agency, in our case the city public works board, has already discussed this particular tentative cease and desist order in an open session.

We conclude that a city council may discuss such a proposed or tentative cease and desist order with its city attorney pursuant to section 54956.9 within the ground rules set forth in that section. We further conclude that the prior public discussion of the proposed or tentative cease and desist order by the city's public works board would not prevent the city council from invoking section 54956.9.

1. The Status Of A Tentative Cease And Desist Order

The factual background for this request for our opinion is briefly as follows: A regional water quality control board sent to the city public works director a notice that it would hold an evidentiary hearing at a specified time and place and on a specified date to consider an enforcement order against the city with respect to raw sewage which was being discharged by the city. Alternative enforcement actions were specified, including a possible

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1. Prior to the enactment of section 54956.9 of the Government Code, both the courts and this office implied an exception to the open meeting requirements of the Ralph M. Brown Act to permit local bodies to consult with their attorneys within the confines of the attorney-client privilege. (See Sutter Sensible Planning, Inc. v. Board of Supervisors (1981) 122 Cal.App.3d 813, 825; Sacramento Newspaper Guild v. Sacramento County Bd. of Suprs., supra, 263 Cal.App.2d 41; 67 Ops.Cal.Atty.Gen. 111 (1984); 36 Ops. Cal.Atty.Gen. 175 (1960); Cal.Atty.Gen.Unpubl.Opns. I.L. 75-282; I.L. 71-5; compare 62 Ops.Cal.Atty.Gen. 150 (1979).)

cease and desist order to be issued against the city. The notice also stated that the board's staff, the city and other interested parties would be given the opportunity to present evidence at the scheduled hearing and that additional materials concerning the hearing would be sent to the city beforehand.

Within a week the regional water quality control board then sent to the city public works director a proposed or tentative cease and desist order to require the city to cease and desist violating discharge requirements previously ordered by the regional board (hereinafter "tentative cease and desist order"). The tentative cease and desist order set forth seven specific tasks to be completed by the city and a time schedule for the completion of each of these tasks. For example, Task I required increasing sewage treated at a particular water reclamation plant; Task VI required the engineering and design work for, and the construction and operation of, a new outfall relief sewer. The tentative cease and desist order concluded with the following warning:

> "If the City . . . fails to comply with any provisions of this Order, the Executive Officer is authorized to request the Attorney General to take the appropriate action against the discharger, including injunction and civil monetary remedies, pursuant to appropriate California Water Code sections, including but not limited to Sections 13331, 13350, 13385, and 13386."

The accompanying cover letter from the regional board's executive director to the city's public works director set forth the previously noticed date, time and place where "the Board would hold a hearing on the proposed enforcement action."

The city engineer then prepared a report on the tentative cease and desist order for the city's public works board. That report recommended that the city's designated representative should agree to only three of the seven tasks specified in the tentative cease and desist order at the hearing before the regional board. The city's public works board then held a public meeting at which it discussed in open session the tentative cease and desist order and the engineer's report, and adopted such report with additional comment.

Later the same day, the city council met and discussed the tentative cease and desist order with the city attorney in closed session. The authority specified for the closed session was subdivision (a) of section 54956.9 of the Government Code, supra. The propriety of such a closed meeting is the basis for question one of this request.

An examination of section 54956.9 of the Government Code discloses that there are a number of conditions precedent to the holding of a closed session pursuant to that section. Initially, there must be "pending litigation" as defined in the section. Secondly, the local agency's legal adviser must advise the legislative body that an open session to confer with, or receive advice from him or her with respect to the "pending litigation" would prejudice the position of the local agency in the litigation. In so doing the local agency's legal adviser must "prepare and submit to the body a memorandum stating the specific reasons and legal authority for the closed session." The memorandum must also contain other appropriate information to justify the session as falling within subdivision (a), (b), or (c) of the section. For example, with respect to subdivision (a), "the memorandum shall include the title of the litigation", or "otherwise specifically identify the litigation."

Accordingly, it is seen that the legal adviser to a local agency makes the initial determination as to whether a closed session may be legally justified under section 54956.9 of the Government Code. Thereafter, under the wording of the section, the legislative body is free to make its own determination as to whether to meet in closed session. Such is not mandated. The section merely specifies that "[n]othing in this chapter [the Ralph M. Brown Act] shall be construed to prevent a legislative body of a local agency, based on advice of its legal counsel, from holding a closed session to confer with, or receive advice from, its legal counsel regarding pending litigation."

Since we have been advised that the city herein was operating pursuant to subdivision (a), we assume that the memorandum required from the City Attorney had been properly prepared and submitted to the city council. The issue then resolves itself into whether an "adjudicatory proceeding" had been formally commenced against the city before a court or an administrative agency exercising its adjudicatory authority within the meaning of subdivision (a) of section 54956.9 of the Government Code.

An adjudicatory proceeding is one "in which 'the government's action affecting an individual [is] determined by facts peculiar to the individual case.'" (Horn v. County of Ventura (1979) 24 Cal.3d 605, 613.) As such, it is one which is "subject to procedural due process principles", that is due notice and the opportunity to be heard. (Id., at p. 612.) Likewise, it is one where findings will be made and judicial review will be available through administrative mandamus (Id., at p. 614.) In short, "adjudicatory" matters are essentially to be distinguished from "quasi-legislative" matters. The latter "involve the adoption of a 'broad

generally applicable rule of conduct on the basis of general public policy.'" (Id., at p. 613; see also, e.g., Griffis v. County of Mono (1985) 163 Cal.App.3d 414, 427.) 2/

We conclude from an examination of the relevant provisions of the Water Code that by at least the time of service of a tentative cease and desist order by the regional water quality control board on the city, an adjudicatory proceeding had been commenced. By that time the matters at issue before the board were drawn and the city advised of them so that it could prepare any defense it wished to present to the board concernng the proposed enforcement order.

Section 13300 et seq. of the Water Code sets forth the provisions for the "Administrative Enforcement and Remedies By Regional Board" with respect to actual or threatened violations of requirements prescribed by regional boards or the state water quality control board. One of such enforcement remedies is the issuance of cease and desist orders. Section 13301 of the Water Code provides:

> "When a regional board finds that a discharge of waste is taking place or threatening to take place in violation of requirements or discharge prohibitions prescribed by the regional board or the state board, the board may issue an order to cease and desist and direct that those persons not complying with the requirements or discharge prohibitions (a) comply forthwith, (b) comply in accordance with a time schedule set by the board, or (c) in the event of a threatened violation, take appropriate remedial or preventive action. In the event of an existing or threatened violation of waste discharge requirements in the operation of a community sewer system, cease and desist orders may

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2. See also, Ballentine's Law Dictionary (3d ed. 1969), page 32:

> "adjudicatory. A term employed in speaking of the quasi-judicial functions of an administrative agency."

and Black's Law Dictionary (5th Ed. 1979), pages 39-40:

> "Adjudicatory hearing. A proceeding before an administrative agency in which the rights and duties of particular persons are adjudicated after notice and opportunity to be heard."

restrict or prohibit the volume, type, or concentration of waste that might be added to such system by dischargers who did not discharge into the system prior to the issuance of the cease and desist order. Cease and desist orders may be issued directly by a board, after notice and hearing, or in accordance with the procedure set forth in Section 13302." (Emphasis added.)

Section 13302 provides an alternative hearing procedure whereby a panel of the regional board, after due notice and hearing, will hold an evidentiary hearing as to whether a cease and desist order shall issue. The panel then will report its proposed decision to the board which "after making such independent review of the record and taking such additional evidence as may be necessary, may adopt, with or without revision, the proposed decision and order of the panel." Section 13303 of the Water Code then provides that "[c]ease and desist orders shall become effective and final upon issuance thereof."

Section 13320 of the Water Code thereafter provides an appeal procedure to the state water quality control board from actions of regional boards, including enforcement proceedings taken by the issuance of cease and desist orders, by any aggrieved party. It provides:

"(a) . . . . . .

"(b) The evidence before the state board shall consist of the record before the regional board, and any other relevant evidence which, in the judgment of the state board, should be considered to effectuate and implement the policies of this division.

"(c) The state board may find the regional board action or inaction to be appropriate and proper. Upon finding that the action of the regional board, or the failure of the regional board to act, was inappropriate or improper, the state board may direct that the appropriate action be taken by the regional board, refer the matter to any other state agency having jurisdiction, take the appropriate action itself, or do any combination of the foregoing. In taking any such action, the state board is vested with all the powers of the regional boards under this division. . . . "

And finally with respect to the Water Code provisions in this sequence or process, section 13330 provides that "any aggrieved party may file with the superior court a petition

for a writ of mandate for review thereof." "The evidence before the court shall consist of the record before the state board, including the regional board's record, and any other relevant evidence which, in the judgment of the court, should be considered to effectuate and implement the policies of . . . [the Water Code]."

It is patent that the Water Code provisions outlined above set forth a classic example of administrative agencies, the regional board and the state board, acting adjudicatively or quasi-judicially with the usual recourse to the courts through administrative mandamus. (Cf. Code Civ. Proc. § 1094.5.) It is seen that this process included the mailing to the city of a tentative or proposed cease and desist order, in essence the accusation or complaint, with a notice of hearing thereon. The city had the choice of acquiescing in the proposed cease and desist order, or contesting it through the foregoing hearing process, where its individual rights could be adjudicated. Accordingly, by the time the regional board mailed the tentative cease and desist order to the city, an "adjudicatory proceeding" had been clearly commenced within the meaning of section 54956.6.

2. Application Of The Tentative Cease And Desist Order To The Provisions Of Section 54956.9 Of The Government Code

We have established that the sine qua non for the operation of subdivision (a) of section 54956.9 of the Government Code herein is (1) the commencement of an "adjudicatory proceeding" and (2) the general requirement that the closed session "is to confer with, or receive advice from, its legal counsel regarding pending litigation [in our case, the cease and desist order proceeding] when discussion in open session concerning those matters would prejudice the position of the" city in the pending litigation, based upon the advice of the city attorney.

This latter general requirement is essentially one requiring the exercise of judgment on the part of both the city council and the city attorney. We believe that the requirement of section 54956.9 of the Government Code that the attorney for the legislative body shall state "the specific reasons" for the closed session requires an articulation by him or her as to why the facts and circumstances are such that an open session would prejudice the local agency in the litigation. In the context of the tentative cease and desist order discussed herein, we can certainly envision the need to have discussed the strength and weaknesses of the city's position with respect to the four out

of seven tasks the public works board recommended should be contested at the hearing before the regional board. This is particularly true since not only could the city have been faced with a cease and desist order as proposed, but the city could also have been subject to civil penalties for failure to comply with the cease and desist order (either administratively or court imposed, see Water Code, § 13350), or could have been the subject of an injunction action brought by this office at the request of the local board (see Water Code, § 13331). 3/

Whether the city attorney and the city council made the proper "judgment call" under section 54956.9 is beyond the scope of our opinion function, being essentially a question of fact. In this respect, however, we note the competing policy considerations set forth by the court in the Sacramento Newspaper Guild case, supra. These would appear to be as germane to the codified litigation exception as they were when the court implied the exception to the open meeting requirements of the Ralph M. Brown Act in that case.

Thus, with regard to a public agency's need to confer with its attorney in private, the court stated:

> ". . . Government should have no advantage in legal strife; neither should it be a second-class citizen. We reiterate what we stated in the supersedeas aspect of this suit, Sacramento Newspaper Guild v. Sacramento County Board of Supervisors, supra, 255 Cal.App.2d at page 54:
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> > 'Public agencies face the same hard realities as other civil litigants. An attorney who cannot confer with his client outside his opponent's presence may be under insurmountable handicaps. A panoply of constitutional, statutory, administrative and fiscal arrangements covering state and local government expresses a policy that litigating public agencies strive with their legal adversaries on fairly even terms. We need not pause for citations to demonstrate the obvious. There is a public entitlement

3. These additional remedies available to the local board could also possibly have justified a closed session under subdivision (b) of section 54956.9 since failure to acquiesce in the regional board's decision would appear to have constituted "a significant exposure to litigation against the" city within the meaning of subdivision (b)(1).

to the effective aid of legal counsel in civil litigation. Effective aid is impossible if opportunity for confidential legal advice is banned.'

"Settlement and avoidance of litigation are particularly sensitive activities, whose conduct would be grossly confounded, often made impossible, by undiscriminating insistence on open lawyer-client conferences. In settlement advice, the attorney's professional task is to provide his client a frank appraisal of strength and weakness, gains and risks, hopes and fears. If the public's 'right to know' compelled admission of an audience, the ringside seats would be occupied by the government's adversary, delighted to capitalize on every revelation of weakness. A lawyer worth his salt would feel a sense of treachery in disclosing that kind of appraisal. (8 Wigmore op. cit. 2291, p. 553.). . . ." (Fn. omitted.) (263 Cal.App.2d at pp. 55-56.)

On the other side of the coin the court, however, cautioned:

"The two enactments [the Ralph M. Brown Act and the attorney-client privilege] are capable of concurrent operation if the lawyer-client privilege is not overblown beyond its true dimensions. As a barrier to testimonial disclosure, the privilege tends to suppress relevant facts, hence is strictly construed. (Greyhound Corp. v. Superior Court, supra, 56 Cal.2d at p. 396.) As a barrier against public access to public affairs, it has precisely the same suppressing effect, hence here too must be strictly construed. As noted earlier, the assurance of private legal consultation is restricted to communications 'in confidence.' Private clients, relatively free of regulation, may set relatively wide limits on confidentiality. Public board members, sworn to uphold the law, may not arbitrarily or unnecessarily inflate confidentiality for the purpose of deflating the spread of the public meeting law. Neither the attorney's presence nor the happenstance of some kind of lawsuit may serve as the pretext for secret consultations whose revelation will not injure the public interest. To attempt a generalization embracing the occasions for genuine confidentiality would be rash. The Evidence Code lawyer-client provisions may operate concurrently with the Brown Act, neither supersed-

ing the other by implication." (263 Cal.App.2d at p. 58.)

Accordingly, we conclude on question number one that the mailing to the city of a tentative cease and desist order with the hearing date thereon by a regional water quality control board constitutes the commencement of an "adjudicatory proceeding" before that agency within the meaning of section 54956.9. As such it is pending litigation which may be discussed by the city council and its city attorney in closed session under section 54956.9 in the Ralph M. Brown Act. However, those discussions must be confined to those authorized by section 54956.9, namely to receive advice from the city attorney and to confer with him or her regarding the pending litigation when discussion of those matters in open session would prejudice the position of the city in the litigation. This would include such matters as discussing the legal options open to the city and the legal strategies to be employed by the city in the litigation, but would not include discussion on any matters which would not prejudice the city in the litigation.

3. The Question Of Possible Waiver By A Subsidiary City Agency Of Section 54956.9

The second question presented for resolution herein is whether when one city agency has discussed a tentative cease and desist order in open session, the city council may thereafter invoke section 54956.9 of the Government Code to discuss the same cease and desist order with its city attorney. In the context of the facts under consideration herein, the question is essentially whether the city public works board could have waived or nullified the city council's rights under section 54956.9 of the Government Code. We conclude that it could not have done so.

Initially, we note that the usual rule is that once confidential information is disclosed to the public or to unauthorized third parties, confidentiality as to such information can no longer be claimed. It has been "waived." (See Black Panther Party v. Kehoe (1974) 42 Cal.App.3d 645; and, e.g., Evid. Code, sec. 912, waiver of attorney-client privilege.)

We do not, however, have such a situation herein with respect to the city public works board and the city council. Section 54956.9 of the Government Code, in permitting closed sessions, seeks to protect confidential communications between attorney and client, not the mere discussion of a matter such as the tentative cease and desist order. Accordingly, when the public works board met and discussed

the tentative cease and desist order, it in no way invoked section 54956.9, nor discussed confidential information in open session, nor waived confidential information. It was not until the city council met with its attorney to receive its attorney's advice and consultation relative to the tentative cease and desist order that section 54956.9 was even invoked.

Stated otherwise, although both bodies may have coincidentally discussed the tentative cease and desist order, the right to have met in closed session and resultant confidentiality arising from section 54956.9 related only to the attorney-client communication with respect thereto. In short, insofar as section 54956.9 of the Government Code is concerned, the two bodies were considering different information. Accordingly, no question of waiver could have arisen.

Furthermore, under section 54956.9 of the Government Code, the city council had the absolute right to confer with its attorney with respect to "pending litigation" in closed session under the ground rules set forth in that section. We see no way such right could have been nullified by what others might have done, whether they were a subordinate or advisory board, the city attorney or individual council members.

We therefore conclude on question two that where one city agency has discussed in open session a proposed or tentative cease and desist order issued by a regional quality control board, the city council may nevertheless invoke the adjudicatory proceeding exception to the open meeting law to hold closed session meetings with its city attorney to receive his or her advice and to discuss the legal options and strategies open to the city with respect to such adjudicatory proceedings.

* * * * *

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OCT 30 1986

October 24, 1986

Honorable Lloyd G. Connelly
Member, California State Assembly
State Capitol, Room 2179
Sacramento, California 95814

Dear Assemblyman Connelly:

Opinion No. 86-203

I have attached a copy of Opinion No. 86-203 with a revision in Footnote 1. The revision adds a sentence relating to Senate Bill 2173. In other respects, the attached draft is identical to the original which issued to you on October 22, 1986.

Sincerely,

JACK R. WINKLER
Assistant Attorney General
Chief, Opinion Unit

JRW:je

Enclosure

OFFICE OF THE ATTORNEY GENERAL
State of California

JOHN K. VAN DE KAMP
Attorney General

OPINION	
of	No. 86-203
JOHN K. VAN DE KAMP Attorney General	OCTOBER 22, 1986
CLAYTON P. ROCHE Deputy Attorney General	

THE HONORABLE LLOYD G. CONNELLY, MEMBER OF THE CALIFORNIA ASSEMBLY, has requested an opinion on the following questions:

1. Does section 54956.9 of the Government Code, a provision in the Ralph M. Brown Act, authorize closed sessions of a city council for the purpose of discussing a proposed or tentative cease and desist order issued by a regional water quality control board?

2. Where one city agency has discussed in open session a proposed or tentative cease and desist order issued by a regional water quality control board, may the city council thereafter invoke section 54956.9 of the Government Code to discuss the same cease and desist order with its city attorney in closed session?

CONCLUSIONS

1. When a proposed or tentative cease and desist order has been served upon a city by a regional water quality control board, an "adjudicatory proceeding" has been commenced within the meaning of section 54956.9 of the Government Code. Accordingly, that section would authorize closed sessions of the city council with its city attorney to receive his or her advice and to discuss the legal options and strategies available to the city with respect to such "adjudicatory proceeding."

2. Where one city agency has discussed in open session a proposed or tentative cease and desist order

issued by a regional quality control board, the city council may nevertheless invoke the adjudicatory proceeding exception to the open meeting law to hold closed session meetings with its city attorney to receive his or her advice and to discuss the legal options and strategies open to the city with respect to such adjudicatory proceedings.

ANALYSIS

The Ralph M. Brown Act (Gov. Code, § 54950 et seq.) requires "legislative bodies" of "local agencies," as defined therein, to conduct their meetings in public session unless specifically excepted by the act or impliedly excepted by some other provision of law. (See generally Gov. Code, secs. 54951, 54951.1, 54951.7, 54952, 54952.2, 54952.3, 54952.5, 54953, 54956.7, 54957, 54957.6; Sacramento Newspaper Guild v. Sacramento County Bd. of Supr. (1968) 263 Cal.App.2d 41.)

In this opinion we deal with two city agencies, the city council and the city public works board, both of which are "legislative bodies" of "local agencies" within the provisions of the Ralph M. Brown Act. We also deal with section 54956.9 of the Government Code, which was added to the Ralph M. Brown Act at the 1984 session of the State Legislature (Stats. 1984, ch. 1126), and which specifically authorizes "legislative bodies" to confer with their attorney in closed session to discuss "pending litigation" as defined in that section. Section 54956.9 provides:

> "Nothing in this chapter shall be construed to prevent a legislative body of a local agency, based on advice of its legal counsel, from holding a closed session to confer with, or receive advice from, its legal counsel regarding pending litigation when discussion in open session concerning those matters would prejudice the position of the local agency in the litigation.
>
> "For purposes of this section, litigation shall be considered pending when any of the following circumstances exist:
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> (a) An adjudicatory proceeding before a court, administrative body exercising its adjudicatory authority, hearing officer, or arbitrator, to which the local agency is a party, has been initiated formally.
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> (b)(1) A point has been reached where, in the opinion of the legislative body of the local agency

on the advice of its legal counsel, based on existing facts and circumstances, there is a significant exposure to litigation against the local agency; or

(2) Based on existing facts and circumstances, the legislative body of the local agency is meeting only to decide whether a closed session is authorized pursuant to paragraph (1) of this subdivision.

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"Prior to holding a closed session pursuant to this section, the legislative body of the local agency shall state publicly to which subdivision it is pursuant. If the session is closed pursuant to subdivision (a), the body shall state the title of or otherwise specifically identify the litigation to be discussed, unless the body states that to do so would jeopardize the agency's ability to effectuate service of process upon one or more unserved parties, or that to do so would jeopardize its ability to conclude existing settlement negotiations to its advantage.

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We are presented with two questions in the context of this new provision of the Ralph M. Brown Act. The first is whether a city council is authorized by this section to discuss in closed session a proposed or tentative regional water quality control board cease and desist order against the city. The second is whether the city council can be precluded from invoking this section where a subordinate city agency, in our case the city public works board, has already discussed this particular tentative cease and desist order in an open session.

We conclude that a city council may discuss such a proposed or tentative cease and desist order with its city attorney pursuant to section 54956.9 within the ground rules set forth in that section. We further conclude that the prior public discussion of the proposed or tentative cease and desist order by the city's public works board would not prevent the city council from invoking section 54956.9.

1. The Status Of A Tentative Cease And Desist Order

The factual background for this request for our opinion is briefly as follows: A regional water quality control board sent to the city public works director a notice that it would hold an evidentiary hearing at a specified time and place and on a specified date to consider an enforcement order against the city with respect to raw sewage which was being discharged by the city. Alternative enforcement actions were specified, including a possible

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1. Prior to the enactment of section 54956.9 of the Government Code, both the courts and this office implied an exception to the open meeting requirements of the Ralph M. Brown Act to permit local bodies to consult with their attorneys within the confines of the attorney-client privilege. (See Sutter Sensible Planning, Inc. v. Board of Supervisors (1981) 122 Cal.App.3d 813, 825; Sacramento Newspaper Guild v. Sacramento County Bd. of Suprs., supra, 263 Cal.App.2d 41; 67 Ops.Cal.Atty.Gen. 111 (1984); 36 Ops. Cal.Atty.Gen. 175 (1960); Cal.Atty.Gen.Unpubl.Opns. I.L. 75-282; I.L. 71-5; compare 62 Ops.Cal.Atty.Gen. 150 (1979).) Senate Bill 2173 (1986), which would have added a paragraph to section 54956.9 stating that except as otherwise permitted by the section the lawyer-client privilege shall not be used as the basis for a closed session of a legislative body of a local agency, was vetoed by the Governor on September 30, 1986.

cease and desist order to be issued against the city. The notice also stated that the board's staff, the city and other interested parties would be given the opportunity to present evidence at the scheduled hearing and that additional materials concerning the hearing would be sent to the city beforehand.

Within a week the regional water quality control board then sent to the city public works director a proposed or tentative cease and desist order to require the city to cease and desist violating discharge requirements previously ordered by the regional board (hereinafter "tentative cease and desist order"). The tentative cease and desist order set forth seven specific tasks to be completed by the city and a time schedule for the completion of each of these tasks. For example, Task I required increasing sewage treated at a particular water reclamation plant; Task VI required the engineering and design work for, and the construction and operation of, a new outfall relief sewer. The tentative cease and desist order concluded with the following warning:

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The accompanying cover letter from the regional board's executive director to the city's public works director set forth the previously noticed date, time and place where "the Board would hold a hearing on the proposed enforcement action."

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Later the same day, the city council met and discussed the tentative cease and desist order with the city attorney in closed session. The authority specified for the closed session was subdivision (a) of section 54956.9 of the Government Code, supra. The propriety of such a closed meeting is the basis for question one of this request.

An examination of section 54956.9 of the Government Code discloses that there are a number of conditions precedent to the holding of a closed session pursuant to that section. Initially, there must be "pending litigation" as defined in the section. Secondly, the local agency's legal adviser must advise the legislative body that an open session to confer with, or receive advice from him or her with respect to the "pending litigation" would prejudice the position of the local agency in the litigation. In so doing the local agency's legal adviser must "prepare and submit to the body a memorandum stating the specific reasons and legal authority for the closed session." The memorandum must also contain other appropriate information to justify the session as falling within subdivision (a), (b), or (c) of the section. For example, with respect to subdivision (a), "the memorandum shall include the title of the litigation", or "otherwise specifically identify the litigation."

Accordingly, it is seen that the legal adviser to a local agency makes the initial determination as to whether a closed session may be legally justified under section 54956.9 of the Government Code. Thereafter, under the wording of the section, the legislative body is free to make its own determination as to whether to meet in closed session. Such is not mandated. The section merely specifies that "[n]othing in this chapter [the Ralph M. Brown Act] shall be construed to prevent a legislative body of a local agency, based on advice of its legal counsel, from holding a closed session to confer with, or receive advice from, its legal counsel regarding pending litigation."

Since we have been advised that the city herein was operating pursuant to subdivision (a), we assume that the memorandum required from the City Attorney had been properly prepared and submitted to the city council. The issue then resolves itself into whether an "adjudicatory proceeding" had been formally commenced against the city before a court or an administrative agency exercising its adjudicatory authority within the meaning of subdivision (a) of section 54956.9 of the Government Code.

An adjudicatory proceeding is one "in which 'the government's action affecting an individual [is] determined by facts peculiar to the individual case.'" (Horn v. County of Ventura (1979) 24 Cal.3d 605, 613.) As such, it is one which is "subject to procedural due process principles", that is due notice and the opportunity to be heard. (Id., at p. 612.) Likewise, it is one where findings will be made and judicial review will be available through administrative mandamus (Id., at p. 614.) In short, "adjudicatory" matters are essentially to be distinguished from "quasi-legislative" matters. The latter "involve the adoption of a 'broad

generally applicable rule of conduct on the basis of general public policy.'" (Id., at p. 613; see also, e.g., Griffis v. County of Mono (1985) 163 Cal.App.3d 414, 427.) 2/

We conclude from an examination of the relevant provisions of the Water Code that by at least the time of service of a tentative cease and desist order by the regional water quality control board on the city, an adjudicatory proceeding had been commenced. By that time the matters at issue before the board were drawn and the city advised of them so that it could prepare any defense it wished to present to the board concernng the proposed enforcement order.

Section 13300 et seq. of the Water Code sets forth the provisions for the "Administrative Enforcement and Remedies By Regional Board" with respect to actual or threatened violations of requirements prescribed by regional boards or the state water quality control board. One of such enforcement remedies is the issuance of cease and desist orders. Section 13301 of the Water Code provides:

> "When a regional board finds that a discharge of waste is taking place or threatening to take place in violation of requirements or discharge prohibitions prescribed by the regional board or the state board, the board may issue an order to cease and desist and direct that those persons not complying with the requirements or discharge prohibitions (a) comply forthwith, (b) comply in accordance with a time schedule set by the board, or (c) in the event of a threatened violation, take appropriate remedial or preventive action. In the event of an existing or threatened violation of waste discharge requirements in the operation of a community sewer system, cease and desist orders may

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2. See also, Ballentine's Law Dictionary (3d ed. 1969), page 32:

> "adjudicatory. A term employed in speaking of the quasi-judicial functions of an administrative agency."

and Black's Law Dictionary (5th Ed. 1979), pages 39-40:

> "Adjudicatory hearing. A proceeding before an administrative agency in which the rights and duties of particular persons are adjudicated after notice and opportunity to be heard."

restrict or prohibit the volume, type, or concentration of waste that might be added to such system by dischargers who did not discharge into the system prior to the issuance of the cease and desist order. Cease and desist orders may be issued directly by a board, after notice and hearing, or in accordance with the procedure set forth in Section 13302." (Emphasis added.)

Section 13302 provides an alternative hearing procedure whereby a panel of the regional board, after due notice and hearing, will hold an evidentiary hearing as to whether a cease and desist order shall issue. The panel then will report its proposed decision to the board which "after making such independent review of the record and taking such additional evidence as may be necessary, may adopt, with or without revision, the proposed decision and order of the panel." Section 13303 of the Water Code then provides that "[c]ease and desist orders shall become effective and final upon issuance thereof."

Section 13320 of the Water Code thereafter provides an appeal procedure to the state water quality control board from actions of regional boards, including enforcement proceedings taken by the issuance of cease and desist orders, by any aggrieved party. It provides:

"(a) . . . . . .

"(b) The evidence before the state board shall consist of the record before the regional board, and any other relevant evidence which, in the judgment of the state board, should be considered to effectuate and implement the policies of this division.

"(c) The state board may find the regional board action or inaction to be appropriate and proper. Upon finding that the action of the regional board, or the failure of the regional board to act, was inappropriate or improper, the state board may direct that the appropriate action be taken by the regional board, refer the matter to any other state agency having jurisdiction, take the appropriate action itself, or do any combination of the foregoing. In taking any such action, the state board is vested with all the powers of the regional boards under this division. . . . "

And finally with respect to the Water Code provisions in this sequence or process, section 13330 provides that "any aggrieved party may file with the superior court a petition

for a writ of mandate for review thereof." "The evidence before the court shall consist of the record before the state board, including the regional board's record, and any other relevant evidence which, in the judgment of the court, should be considered to effectuate and implement the policies of . . . [the Water Code]."

It is patent that the Water Code provisions outlined above set forth a classic example of administrative agencies, the regional board and the state board, acting adjudicatively or quasi-judicially with the usual recourse to the courts through administrative mandamus. (Cf. Code Civ. Proc. § 1094.5.) It is seen that this process included the mailing to the city of a tentative or proposed cease and desist order, in essence the accusation or complaint, with a notice of hearing thereon. The city had the choice of acquiescing in the proposed cease and desist order, or contesting it through the foregoing hearing process, where its individual rights could be adjudicated. Accordingly, by the time the regional board mailed the tentative cease and desist order to the city, an "adjudicatory proceeding" had been clearly commenced within the meaning of section 54956.6.

2. Application Of The Tentative Cease And Desist Order To The Provisions Of Section 54956.9 Of The Government Code

We have established that the sine qua non for the operation of subdivision (a) of section 54956.9 of the Government Code herein is (1) the commencement of an "adjudicatory proceeding" and (2) the general requirement that the closed session "is to confer with, or receive advice from, its legal counsel regarding pending litigation [in our case, the cease and desist order proceeding] when discussion in open session concerning those matters would prejudice the position of the" city in the pending litigation, based upon the advice of the city attorney.

This latter general requirement is essentially one requiring the exercise of judgment on the part of both the city council and the city attorney. We believe that the requirement of section 54956.9 of the Government Code that the attorney for the legislative body shall state "the specific reasons" for the closed session requires an articulation by him or her as to why the facts and circumstances are such that an open session would prejudice the local agency in the litigation. In the context of the tentative cease and desist order discussed herein, we can certainly envision the need to have discussed the strength and weaknesses of the city's position with respect to the four out

of seven tasks the public works board recommended should be contested at the hearing before the regional board. This is particularly true since not only could the city have been faced with a cease and desist order as proposed, but the city could also have been subject to civil penalties for failure to comply with the cease and desist order (either administratively or court imposed, see Water Code, § 13350), or could have been the subject of an injunction action brought by this office at the request of the local board (see Water Code, § 13331). 3/

Whether the city attorney and the city council made the proper "judgment call" under section 54956.9 is beyond the scope of our opinion function, being essentially a question of fact. In this respect, however, we note the competing policy considerations set forth by the court in the Sacramento Newspaper Guild case, supra. These would appear to be as germane to the codified litigation exception as they were when the court implied the exception to the open meeting requirements of the Ralph M. Brown Act in that case.

Thus, with regard to a public agency's need to confer with its attorney in private, the court stated:

> ". . . Government should have no advantage in legal strife; neither should it be a second-class citizen. We reiterate what we stated in the supersedeas aspect of this suit, Sacramento Newspaper Guild v. Sacramento County Board of Supervisors, supra, 255 Cal.App.2d at page 54:
>
> > 'Public agencies face the same hard realities as other civil litigants. An attorney who cannot confer with his client outside his opponent's presence may be under insurmountable handicaps. A panoply of constitutional, statutory, administrative and fiscal arrangements covering state and local government expresses a policy that litigating public agencies strive with their legal adversaries on fairly even terms. We need not pause for citations to demonstrate the obvious. There is a public entitlement

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3. These additional remedies available to the local board could also possibly have justified a closed session under subdivision (b) of section 54956.9 since failure to acquiesce in the regional board's decision would appear to have constituted "a significant exposure to litigation against the" city within the meaning of subdivision (b)(1).

to the effective aid of legal counsel in civil litigation. Effective aid is impossible if opportunity for confidential legal advice is banned.'

"Settlement and avoidance of litigation are particularly sensitive activities, whose conduct would be grossly confounded, often made impossible, by undiscriminating insistence on open lawyer-client conferences. In settlement advice, the attorney's professional task is to provide his client a frank appraisal of strength and weakness, gains and risks, hopes and fears. If the public's 'right to know' compelled admission of an audience, the ringside seats would be occupied by the government's adversary, delighted to capitalize on every revelation of weakness. A lawyer worth his salt would feel a sense of treachery in disclosing that kind of appraisal. (8 Wigmore op. cit. 2291, p. 553.). . . ." (Fn. omitted.) (263 Cal.App.2d at pp. 55-56.)

On the other side of the coin the court, however, cautioned:

"The two enactments [the Ralph M. Brown Act and the attorney-client privilege] are capable of concurrent operation if the lawyer-client privilege is not overblown beyond its true dimensions. As a barrier to testimonial disclosure, the privilege tends to suppress relevant facts, hence is strictly construed. (Greyhound Corp. v. Superior Court, supra, 56 Cal.2d at p. 396.) As a barrier against public access to public affairs, it has precisely the same suppressing effect, hence here too must be strictly construed. As noted earlier, the assurance of private legal consultation is restricted to communications 'in confidence.' Private clients, relatively free of regulation, may set relatively wide limits on confidentiality. Public board members, sworn to uphold the law, may not arbitrarily or unnecessarily inflate confidentiality for the purpose of deflating the spread of the public meeting law. Neither the attorney's presence nor the happenstance of some kind of lawsuit may serve as the pretext for secret consultations whose revelation will not injure the public interest. To attempt a generalization embracing the occasions for genuine confidentiality would be rash. The Evidence Code lawyer-client provisions may operate concurrently with the Brown Act, neither supersed-

ing the other by implication." (263 Cal.App.2d at p. 58.)

Accordingly, we conclude on question number one that the mailing to the city of a tentative cease and desist order with the hearing date thereon by a regional water quality control board constitutes the commencement of an "adjudicatory proceeding" before that agency within the meaning of section 54956.9. As such it is pending litigation which may be discussed by the city council and its city attorney in closed session under section 54956.9 in the Ralph M. Brown Act. However, those discussions must be confined to those authorized by section 54956.9, namely to receive advice from the city attorney and to confer with him or her regarding the pending litigation when discussion of those matters in open session would prejudice the position of the city in the litigation. This would include such matters as discussing the legal options open to the city and the legal strategies to be employed by the city in the litigation, but would not include discussion on any matters which would not prejudice the city in the litigation.

3. The Question Of Possible Waiver By A Subsidiary City Agency Of Section 54956.9

The second question presented for resolution herein is whether when one city agency has discussed a tentative cease and desist order in open session, the city council may thereafter invoke section 54956.9 of the Government Code to discuss the same cease and desist order with its city attorney. In the context of the facts under consideration herein, the question is essentially whether the city public works board could have waived or nullified the city council's rights under section 54956.9 of the Government Code. We conclude that it could not have done so.

Initially, we note that the usual rule is that once confidential information is disclosed to the public or to unauthorized third parties, confidentiality as to such information can no longer be claimed. It has been "waived." (See Black Panther Party v. Kehoe (1974) 42 Cal.App.3d 645; and, e.g., Evid. Code, sec. 912, waiver of attorney-client privilege.)

We do not, however, have such a situation herein with respect to the city public works board and the city council. Section 54956.9 of the Government Code, in permitting closed sessions, seeks to protect confidential communications between attorney and client, not the mere discussion of a matter such as the tentative cease and desist order. Accordingly, when the public works board met and discussed

the tentative cease and desist order, it in no way invoked section 54956.9, nor discussed confidential information in open session, nor waived confidential information. It was not until the city council met with its attorney to receive its attorney's advice and consultation relative to the tentative cease and desist order that section 54956.9 was even invoked.

Stated otherwise, although both bodies may have coincidentally discussed the tentative cease and desist order, the right to have met in closed session and resultant confidentiality arising from section 54956.9 related only to the attorney-client communication with respect thereto. In short, insofar as section 54956.9 of the Government Code is concerned, the two bodies were considering different information. Accordingly, no question of waiver could have arisen.

Furthermore, under section 54956.9 of the Government Code, the city council had the absolute right to confer with its attorney with respect to "pending litigation" in closed session under the ground rules set forth in that section. We see no way such right could have been nullified by what others might have done, whether they were a subordinate or advisory board, the city attorney or individual council members.

We therefore conclude on question two that where one city agency has discussed in open session a proposed or tentative cease and desist order issued by a regional quality control board, the city council may nevertheless invoke the adjudicatory proceeding exception to the open meeting law to hold closed session meetings with its city attorney to receive his or her advice and to discuss the legal options and strategies open to the city with respect to such adjudicatory proceedings.

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OFFICE OF THE ATTORNEY GENERAL
State of California

JOHN K. VAN DE KAMP
Attorney General

OPINION	
of	No. 86-203
JOHN K. VAN DE KAMP Attorney General	OCTOBER 22, 1986
CLAYTON P. ROCHE Deputy Attorney General	

THE HONORABLE LLOYD G. CONNELLY, MEMBER OF THE CALIFORNIA ASSEMBLY, has requested an opinion on the following questions:

1. Does section 54956.9 of the Government Code, a provision in the Ralph M. Brown Act, authorize closed sessions of a city council for the purpose of discussing a proposed or tentative cease and desist order issued by a regional water quality control board?

2. Where one city agency has discussed in open session a proposed or tentative cease and desist order issued by a regional water quality control board, may the city council thereafter invoke section 54956.9 of the Government Code to discuss the same cease and desist order with its city attorney in closed session?

CONCLUSIONS

1. When a proposed or tentative cease and desist order has been served upon a city by a regional water quality control board, an "adjudicatory proceeding" has been commenced within the meaning of section 54956.9 of the Government Code. Accordingly, that section would authorize closed sessions of the city council with its city attorney to receive his or her advice and to discuss the legal options and strategies available to the city with respect to such "adjudicatory proceeding."

2. Where one city agency has discussed in open session a proposed or tentative cease and desist order

issued by a regional quality control board, the city council may nevertheless invoke the adjudicatory proceeding exception to the open meeting law to hold closed session meetings with its city attorney to receive his or her advice and to discuss the legal options and strategies open to the city with respect to such adjudicatory proceedings.

ANALYSIS

The Ralph M. Brown Act (Gov. Code, § 54950 et seq.) requires "legislative bodies" of "local agencies," as defined therein, to conduct their meetings in public session unless specifically excepted by the act or impliedly excepted by some other provision of law. (See generally Gov. Code, secs. 54951, 54951.1, 54951.7, 54952, 54952.2, 54952.3, 54952.5, 54953, 54956.7, 54957, 54957.6; Sacramento Newspaper Guild v. Sacramento County Bd. of Supr. (1968) 263 Cal.App.2d 41.)

In this opinion we deal with two city agencies, the city council and the city public works board, both of which are "legislative bodies" of "local agencies" within the provisions of the Ralph M. Brown Act. We also deal with section 54956.9 of the Government Code, which was added to the Ralph M. Brown Act at the 1984 session of the State Legislature (Stats. 1984, ch. 1126), and which specifically authorizes "legislative bodies" to confer with their attorney in closed session to discuss "pending litigation" as defined in that section. Section 54956.9 provides:

> "Nothing in this chapter shall be construed to prevent a legislative body of a local agency, based on advice of its legal counsel, from holding a closed session to confer with, or receive advice from, its legal counsel regarding pending litigation when discussion in open session concerning those matters would prejudice the position of the local agency in the litigation.
>
> "For purposes of this section, litigation shall be considered pending when any of the following circumstances exist:
>
> (a) An adjudicatory proceeding before a court, administrative body exercising its adjudicatory authority, hearing officer, or arbitrator, to which the local agency is a party, has been initiated formally.
>
> (b)(1) A point has been reached where, in the opinion of the legislative body of the local agency

on the advice of its legal counsel, based on existing facts and circumstances, there is a significant exposure to litigation against the local agency; or

(2) Based on existing facts and circumstances, the legislative body of the local agency is meeting only to decide whether a closed session is authorized pursuant to paragraph (1) of this subdivision.

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We conclude that a city council may discuss such a proposed or tentative cease and desist order with its city attorney pursuant to section 54956.9 within the ground rules set forth in that section. We further conclude that the prior public discussion of the proposed or tentative cease and desist order by the city's public works board would not prevent the city council from invoking section 54956.9.

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An adjudicatory proceeding is one "in which 'the government's action affecting an individual [is] determined by facts peculiar to the individual case.'" (Horn v. County of Ventura (1979) 24 Cal.3d 605, 613.) As such, it is one which is "subject to procedural due process principles", that is due notice and the opportunity to be heard. (Id., at p. 612.) Likewise, it is one where findings will be made and judicial review will be available through administrative mandamus (Id., at p. 614.) In short, "adjudicatory" matters are essentially to be distinguished from "quasi-legislative" matters. The latter "involve the adoption of a 'broad

generally applicable rule of conduct on the basis of general public policy.'" (Id., at p. 613; see also, e.g., Griffis v. County of Mono (1985) 163 Cal.App.3d 414, 427.) 2/

We conclude from an examination of the relevant provisions of the Water Code that by at least the time of service of a tentative cease and desist order by the regional water quality control board on the city, an adjudicatory proceeding had been commenced. By that time the matters at issue before the board were drawn and the city advised of them so that it could prepare any defense it wished to present to the board concernng the proposed enforcement order.

Section 13300 et seq. of the Water Code sets forth the provisions for the "Administrative Enforcement and Remedies By Regional Board" with respect to actual or threatened violations of requirements prescribed by regional boards or the state water quality control board. One of such enforcement remedies is the issuance of cease and desist orders. Section 13301 of the Water Code provides:

> "When a regional board finds that a discharge of waste is taking place or threatening to take place in violation of requirements or discharge prohibitions prescribed by the regional board or the state board, the board may issue an order to cease and desist and direct that those persons not complying with the requirements or discharge prohibitions (a) comply forthwith, (b) comply in accordance with a time schedule set by the board, or (c) in the event of a threatened violation, take appropriate remedial or preventive action. In the event of an existing or threatened violation of waste discharge requirements in the operation of a community sewer system, cease and desist orders may

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2. See also, Ballentine's Law Dictionary (3d ed. 1969), page 32:

> "adjudicatory. A term employed in speaking of the quasi-judicial functions of an administrative agency."

and Black's Law Dictionary (5th Ed. 1979), pages 39-40:

> "Adjudicatory hearing. A proceeding before an administrative agency in which the rights and duties of particular persons are adjudicated after notice and opportunity to be heard."

restrict or prohibit the volume, type, or concentration of waste that might be added to such system by dischargers who did not discharge into the system prior to the issuance of the cease and desist order. Cease and desist orders may be issued directly by a board, after notice and hearing, or in accordance with the procedure set forth in Section 13302." (Emphasis added.)

Section 13302 provides an alternative hearing procedure whereby a panel of the regional board, after due notice and hearing, will hold an evidentiary hearing as to whether a cease and desist order shall issue. The panel then will report its proposed decision to the board which "after making such independent review of the record and taking such additional evidence as may be necessary, may adopt, with or without revision, the proposed decision and order of the panel." Section 13303 of the Water Code then provides that "[c]ease and desist orders shall become effective and final upon issuance thereof."

Section 13320 of the Water Code thereafter provides an appeal procedure to the state water quality control board from actions of regional boards, including enforcement proceedings taken by the issuance of cease and desist orders, by any aggrieved party. It provides:

"(a) . . . . . .

"(b) The evidence before the state board shall consist of the record before the regional board, and any other relevant evidence which, in the judgment of the state board, should be considered to effectuate and implement the policies of this division.

"(c) The state board may find the regional board action or inaction to be appropriate and proper. Upon finding that the action of the regional board, or the failure of the regional board to act, was inappropriate or improper, the state board may direct that the appropriate action be taken by the regional board, refer the matter to any other state agency having jurisdiction, take the appropriate action itself, or do any combination of the foregoing. In taking any such action, the state board is vested with all the powers of the regional boards under this division. . . . "

And finally with respect to the Water Code provisions in this sequence or process, section 13330 provides that "any aggrieved party may file with the superior court a petition

for a writ of mandate for review thereof." "The evidence before the court shall consist of the record before the state board, including the regional board's record, and any other relevant evidence which, in the judgment of the court, should be considered to effectuate and implement the policies of . . . [the Water Code]."

It is patent that the Water Code provisions outlined above set forth a classic example of administrative agencies, the regional board and the state board, acting adjudicatively or quasi-judicially with the usual recourse to the courts through administrative mandamus. (Cf. Code Civ. Proc. § 1094.5.) It is seen that this process included the mailing to the city of a tentative or proposed cease and desist order, in essence the accusation or complaint, with a notice of hearing thereon. The city had the choice of acquiescing in the proposed cease and desist order, or contesting it through the foregoing hearing process, where its individual rights could be adjudicated. Accordingly, by the time the regional board mailed the tentative cease and desist order to the city, an "adjudicatory proceeding" had been clearly commenced within the meaning of section 54956.6.

2. Application Of The Tentative Cease And Desist Order To The Provisions Of Section 54956.9 Of The Government Code

We have established that the sine qua non for the operation of subdivision (a) of section 54956.9 of the Government Code herein is (1) the commencement of an "adjudicatory proceeding" and (2) the general requirement that the closed session "is to confer with, or receive advice from, its legal counsel regarding pending litigation [in our case, the cease and desist order proceeding] when discussion in open session concerning those matters would prejudice the position of the" city in the pending litigation, based upon the advice of the city attorney.

This latter general requirement is essentially one requiring the exercise of judgment on the part of both the city council and the city attorney. We believe that the requirement of section 54956.9 of the Government Code that the attorney for the legislative body shall state "the specific reasons" for the closed session requires an articulation by him or her as to why the facts and circumstances are such that an open session would prejudice the local agency in the litigation. In the context of the tentative cease and desist order discussed herein, we can certainly envision the need to have discussed the strength and weaknesses of the city's position with respect to the four out

of seven tasks the public works board recommended should be contested at the hearing before the regional board. This is particularly true since not only could the city have been faced with a cease and desist order as proposed, but the city could also have been subject to civil penalties for failure to comply with the cease and desist order (either administratively or court imposed, see Water Code, § 13350), or could have been the subject of an injunction action brought by this office at the request of the local board (see Water Code, § 13331). 3/

Whether the city attorney and the city council made the proper "judgment call" under section 54956.9 is beyond the scope of our opinion function, being essentially a question of fact. In this respect, however, we note the competing policy considerations set forth by the court in the Sacramento Newspaper Guild case, supra. These would appear to be as germane to the codified litigation exception as they were when the court implied the exception to the open meeting requirements of the Ralph M. Brown Act in that case.

Thus, with regard to a public agency's need to confer with its attorney in private, the court stated:

> ". . . Government should have no advantage in legal strife; neither should it be a second-class citizen. We reiterate what we stated in the supersedeas aspect of this suit, Sacramento Newspaper Guild v. Sacramento County Board of Supervisors, supra, 255 Cal.App.2d at page 54:
>
> > 'Public agencies face the same hard realities as other civil litigants. An attorney who cannot confer with his client outside his opponent's presence may be under insurmountable handicaps. A panoply of constitutional, statutory, administrative and fiscal arrangements covering state and local government expresses a policy that litigating public agencies strive with their legal adversaries on fairly even terms. We need not pause for citations to demonstrate the obvious. There is a public entitlement

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3. These additional remedies available to the local board could also possibly have justified a closed session under subdivision (b) of section 54956.9 since failure to acquiesce in the regional board's decision would appear to have constituted "a significant exposure to litigation against the" city within the meaning of subdivision (b)(1).

to the effective aid of legal counsel in civil litigation. Effective aid is impossible if opportunity for confidential legal advice is banned.'

"Settlement and avoidance of litigation are particularly sensitive activities, whose conduct would be grossly confounded, often made impossible, by undiscriminating insistence on open lawyer-client conferences. In settlement advice, the attorney's professional task is to provide his client a frank appraisal of strength and weakness, gains and risks, hopes and fears. If the public's 'right to know' compelled admission of an audience, the ringside seats would be occupied by the government's adversary, delighted to capitalize on every revelation of weakness. A lawyer worth his salt would feel a sense of treachery in disclosing that kind of appraisal. (8 Wigmore op. cit. 2291, p. 553.). . . ." (Fn. omitted.) (263 Cal.App.2d at pp. 55-56.)

On the other side of the coin the court, however, cautioned:

"The two enactments [the Ralph M. Brown Act and the attorney-client privilege] are capable of concurrent operation if the lawyer-client privilege is not overblown beyond its true dimensions. As a barrier to testimonial disclosure, the privilege tends to suppress relevant facts, hence is strictly construed. (Greyhound Corp. v. Superior Court, supra, 56 Cal.2d at p. 396.) As a barrier against public access to public affairs, it has precisely the same suppressing effect, hence here too must be strictly construed. As noted earlier, the assurance of private legal consultation is restricted to communications 'in confidence.' Private clients, relatively free of regulation, may set relatively wide limits on confidentiality. Public board members, sworn to uphold the law, may not arbitrarily or unnecessarily inflate confidentiality for the purpose of deflating the spread of the public meeting law. Neither the attorney's presence nor the happenstance of some kind of lawsuit may serve as the pretext for secret consultations whose revelation will not injure the public interest. To attempt a generalization embracing the occasions for genuine confidentiality would be rash. The Evidence Code lawyer-client provisions may operate concurrently with the Brown Act, neither supersed-

ing the other by implication." (263 Cal.App.2d at p. 58.)

Accordingly, we conclude on question number one that the mailing to the city of a tentative cease and desist order with the hearing date thereon by a regional water quality control board constitutes the commencement of an "adjudicatory proceeding" before that agency within the meaning of section 54956.9. As such it is pending litigation which may be discussed by the city council and its city attorney in closed session under section 54956.9 in the Ralph M. Brown Act. However, those discussions must be confined to those authorized by section 54956.9, namely to receive advice from the city attorney and to confer with him or her regarding the pending litigation when discussion of those matters in open session would prejudice the position of the city in the litigation. This would include such matters as discussing the legal options open to the city and the legal strategies to be employed by the city in the litigation, but would not include discussion on any matters which would not prejudice the city in the litigation.

3. The Question Of Possible Waiver By A Subsidiary City Agency Of Section 54956.9

The second question presented for resolution herein is whether when one city agency has discussed a tentative cease and desist order in open session, the city council may thereafter invoke section 54956.9 of the Government Code to discuss the same cease and desist order with its city attorney. In the context of the facts under consideration herein, the question is essentially whether the city public works board could have waived or nullified the city council's rights under section 54956.9 of the Government Code. We conclude that it could not have done so.

Initially, we note that the usual rule is that once confidential information is disclosed to the public or to unauthorized third parties, confidentiality as to such information can no longer be claimed. It has been "waived." (See Black Panther Party v. Kehoe (1974) 42 Cal.App.3d 645; and, e.g., Evid. Code, sec. 912, waiver of attorney-client privilege.)

We do not, however, have such a situation herein with respect to the city public works board and the city council. Section 54956.9 of the Government Code, in permitting closed sessions, seeks to protect confidential communications between attorney and client, not the mere discussion of a matter such as the tentative cease and desist order. Accordingly, when the public works board met and discussed

the tentative cease and desist order, it in no way invoked section 54956.9, nor discussed confidential information in open session, nor waived confidential information. It was not until the city council met with its attorney to receive its attorney's advice and consultation relative to the tentative cease and desist order that section 54956.9 was even invoked.

Stated otherwise, although both bodies may have coincidentally discussed the tentative cease and desist order, the right to have met in closed session and resultant confidentiality arising from section 54956.9 related only to the attorney-client communication with respect thereto. In short, insofar as section 54956.9 of the Government Code is concerned, the two bodies were considering different information. Accordingly, no question of waiver could have arisen.

Furthermore, under section 54956.9 of the Government Code, the city council had the absolute right to confer with its attorney with respect to "pending litigation" in closed session under the ground rules set forth in that section. We see no way such right could have been nullified by what others might have done, whether they were a subordinate or advisory board, the city attorney or individual council members.

We therefore conclude on question two that where one city agency has discussed in open session a proposed or tentative cease and desist order issued by a regional quality control board, the city council may nevertheless invoke the adjudicatory proceeding exception to the open meeting law to hold closed session meetings with its city attorney to receive his or her advice and to discuss the legal options and strategies open to the city with respect to such adjudicatory proceedings.

* * * * *

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BARBARA S. BLINDERMAN
ELLIOTT E. BLINDERMAN
COUNSEL TO THE FIRM

Gene

January 29, 1986

Assemblyman Lloyd Connelly
State Capitol
Assembly Mail Room
Sacramento, CA 95814

Dear Assemblyman Connelly,

I am writing in appreciation for your introduction of Assembly Bill 2674. My client, Dorothy Green, was the plaintiff in Green v. City Council of Los Angeles, which challenged the vote in code on the Council's salary increase. Requiring agendas on action items and authorizing the voiding of actions taken in violation of the Ralph M. Brown Act are necessary steps in insuring open meetings.

The salary vote is not an isolated incident. Nor are other actions of the City Council which appear to violate the open meetings law. Mrs. Green has asked that I bring to your attention another example of questionable City Council action and to request that you ask for an Attorney general's opinion of whether the action violates the Brown Acts provisions.

The matter concerns an executive session called to consider a sewer treatment report that had been presented to the Board of Public Works in open session several hours before the Council session.

The background is as follows:

A Regional Water Quality Control Board staff report had tentatively recommended a cease and desist order, as one of several alternatives of action against the City of Los Angeles, resulting from repeated overflows of raw sewage into Ballona Creek. (Copy of Proposed Cease and Desist Order and Staff Report attached as Exhibit "A").

On the morning of January 22, 1986, the City's Board of Public Works, as part of its Supplemental agenda (Item 29 on the attached Board of Works agenda, Exhibit "B"), heard a City Engineer's report on recommendations (Tentative Cease and Desist Order - Jackson Avenue Overflow Structure, attached herein as Exhibit "C"). The report is a public document, and the matter was discussed in open session.

Jack R. Winkler Asst. A.G. 4-5/66
Water Quality Unit

In the afternoon of January 22, the City Council discussed in executive session, agended as an Additional Page, its Item 27, which stated its purpose was to confer with its attorney concerning the proposed action of the Regional Quality Board (relevant pages of the Council's Calendar and Journal attached as Exhibit "D" and "E"). This was the same matter discussed earlier by the Board of Public Works.

The City Attorney, in orally advising that an Executive Session was appropriate, stated that the matter concerned a proposed "appeal" from a Regional Quality Board action, as shown by the Council tape. This was in error.

As the enclosed article from the Los Angeles Herald Examiner (Exhibit "F") indicates, several Council members questioned the appropriateness of the executive session.

Because of the increased willingness of the City of Los Angeles to use executive sessions, and the public perception that such sessions are a misuse of the Council's power to hold such sessions for the purpose of avoiding public purview of sensitive matters, I believe it is urgent to determine whether the City has, in this instance, exceeded its powers.

I am therefore requesting that you seek an Attorney General's Opinion on the following questions:

1. Does the Ralph M. Brown Act and specifically Government Code Sec. 54956.9 permit closed sessions for discussion of tentative orders of the Regional Quality Control Board?

2. Could the Council hear a matter in executive session which had been previously heard in public session before another City agency? Does a closed session under these circumstances violate Sec. 54956.9?

3. Are Regional Quality Control Board actions included in the exclusion provisions of the Ralph M. Brown Act relating to litigation?

4. Was it appropriate for the City Council to exclude the public from its discussions, under Item 27, of the Cease and Desist Order?

I would appreciate any actions you can take concerning this matter.

Sincerely,

BARBARA S. BLINDERMAN

BSB:flg
Enclosures
cc: Dorothy Green

JOHN K. VAN DE KAMP
Attorney General

State of California
DEPARTMENT OF JUSTICE

1515 K STREET, SUITE 511
SACRAMENTO 95814
(916) 445-9555

February 19, 1986

Honorable Lloyd G. Connelly
Member, California State Assembly
State Capitol, Room 2179
Sacramento, California 95814

Dear Assemblyman Connelly:

Opinion No. 86-203

This will acknowledge your February 12 request for an opinion interpreting Government Code section 54956.9 in the Brown Act. Specifically you ask whether Government Code section 54956.9 authorizes a city council to hold a closed session to discuss a tentative cease and desist order against the city by a Regional Water Quality Control Board when the same matter was previously discussed in an open session by another city agency.

Your request has been assigned to Deputy Attorney General Clayton P. Roche in the Opinion Unit. The views of others interested in the issues raised both within and outside this office will be solicited. Your request and our opinion issued in response thereto will be considered public records subject to disclosure under the Public Records Act. When an opinion draft is approved by the Attorney General, it will be issued to you and published in the official reports.

Sincerely,

JACK R. WINKLER
Assistant Attorney General
Chief, Opinion Unit

Roche - (415) 557-2544
557-1586

JRW:je

cc: Richard Martland
Andrea Sheridan Ordin
Steve White
Allen Sumner

Panel Discourages Secret-Meetings Reforms

By SARAH BOTTORFF

A key Los Angeles City Council committee Friday doused two contradictory proposals to reform what has become the council's increasingly controversial practice of holding secret sessions on a variety of topics.

One plan would have made have made each councilmember subject to misdemeanor prosecution for disclosing the contents of a closed-door session. The proposal went down in a 4-0 vote of the council Rules Committee after Zev Yaroslavsky called the idea "inappropriate and insulting."

The second plan, which would have forced the full council to vote its assent each time the council president calls an executive session, also went down in a unanimous vote.

The committee members agreed that the plan was not really necessary, as the council can now call a vote any time it wants to —although Committee Chairwoman Joan Milke Flores acknowledged after the meeting that no councilmember has ever done so.

The Rules Committee does not necessarily kill the proposals. The panel's recommendation to "receive and file" the two plans now goes to the full council for a vote — which could be close. Councilmembers Howard Finn and Ernani Bernardi have previously called for fines and discipline of councilmembers who talk about executive session action.

There was a good deal of implied criticism in the committee discussion Friday of Council President Pat Russell and her use of her power to close council doors. Several committee members said they were particularly incensed about her call for an executive session Wednesday on a sewage treatment report that had been discussed in public session two hours before by the city's Board of Public Works.

That session Wednesday had fueled the ire of some of the small taxpayer groups who regularly attend council sessions, as well as an increasingly militant City Hall press corps, which has been contemplating formal protest of the numbers of matters the council refuses to discuss in public.

The criticism comes on the heels of the council's controversial vote without public discussion last year to give itself a 10-percent pay hike. The pay raise was overturned in a taxpayer's lawsuit late last year, although not on secrecy grounds. Los Angeles Superior Court Judge Raymond Cardenas found the hike exceeded the limits imposed by the city charter — but he did find the council, while keeping to the letter of a state anti-secrecy law, violated its spirit.

State Fines at Issue

As for the controversial sewage session Wednesday, Managing Assistant City Attorney George Buchanan argued that the council also had before it a city attorney report on attempts by state water quality experts to fines Los Angeles for coastal sewage spills.

But some committee members appeared unconvinced that this and other sessions were in keeping with the state Brown (anti-secrecy) Act requirements that executive sessions be conducted only on litigated or personnel matters. "I think we abuse the executive session process," said Councilman Hal Bernson. "In many sessions it appears to be unnecessary."

Flores added she was particularly embarrassed when she felt constrained to give reporters only bare-bones information Wednesday on the sewage discussion in question: "I just said we had approved the recommendations of the city engineer, not knowing that they already had the full city engineer's report."

Flores and Yaroslavsky said they felt during and after the closed-door session that nothing was being discussed that could not have been talked about openly. Neither councilmember explained why they did not call for a vote that day on opening the doors again.

In other issues before the rules committee, the members voted not to set up a policy on cross-examination of people in council chambers. The issue came up in 1984 when an attorney demanded his right to cross-examine some citizens who came to testify about a zoning matter. The council let him do it, as required by law in any such quasi-judicial proceeding, but no one before or since has demanded their cross-examination rights, said Buchanan.

The attorney advised the committee not to publicize a policy allowing cross-examination, which under a 1936 U.S. Supreme Court ruling, *Morgan v. United States*, 298 U.S. 468, requires councilmembers as well as members of the public to submit to cross-examination during council sessions. "If it's brought up, fine," said Buchanan. "If it's not: no harm, no foul," — and the committee agreed.

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BARBARA S. BLINDERMAN
ELLIOTT E. BLINDERMAN
COUNSEL TO THE FIRM

February 24, 1986

Mr. Gene Erbin
Office of Hon. Floyd G. Connelly
State Capitol
Sacramento, CA 95814

Re: Los Angeles City Council Executive Session on January 22, 1986

Dear Gene,

I've enclosed a transcript of the City Council discussion of Item 27 on January 22, 1986. This concerns the executive session on the Regional Water Quality Control Board's proposed actions on the sewage overflows.

I did the typing myself from the tape on the item given to me by the City Clerk's office. This is all there is. I had previously listened to the tape of the entire Council session of January 22, 1986 and do not recall any additional discussion of the executive session at that time. In fact, I let both sides of the entire tape run after the call for adjournment and it was silent. So I don't believe there's anything more than what is enclosed.

I've also enclosed a press packet that's been sent out on AB-2674.

Sincerely,

BARBARA S. BLINDERMAN

BSB:flg
Enclosure
Press Packet
Transcript Item 27

TRANSCRIPT

LOS ANGELES CITY COUNCIL SESSION

JANUARY 22, 1986

ITEM 27

EXECUTIVE SESSION - WATER QUALITY

RUSSELL: Mr. Ferraro.

FERRARO: Yea, Item 27, what's the purpose of an executive session on this? Why do we need an executive session? Is this something...

RUSSELL: City Attorney, do you want to say why we need the executive session on Item 27?

CITY ATTORNEY: As I understand it, there's a possible appeal from the order, cease and desist order, which has come down. Whether you wish to discuss that in open session or not is up to you. If you wish to go into closed session with discussion as to strategy options, pros and cons, that's up to you.

FERRARO: Shouldn't the public know about that?

RUSSELL: Mr. Ferraro, I've studied the documents and discussed it with the staff and I strongly recommend that we do this discussion in executive session and we most certainly will take any action to the public.

FERRARO: Well, if you want an executive session... but I, you know, this is a public matter and if, dealing with water quality, and I don't ...it seems we get

sessions every day now.

RUSSELL: Mr. Ferraro, we've been very careful about calling executive sessions.

FERRARO: Can we change the law in the state so we can have executive sessions for everything?

RUSSELL: Well, you may work on that if you wish.

Our meetings on executive sessions, Mr. Ferraro, have been on matters of litigation and those items which are clearly called out under the Brown Act. I think that all of us have generally in the past agreed that when we have matters of litigation those properly are discussed in executive session and obviously anything then that's, uh, any action taken is certainly public. We have...

CLERK: Councilman Lindsay has arrived in Chamber, Madame President.

RUSSELL: Is Mr. Bernardi still present?

LINDSAY: Anybody adjourned in...

RUSSELL: We have not yet adjourned Mr. Lindsay and we will at the conclusion of our executive session.

LINDSAY: O.K.

RUSSELL: We are waiting now to see if we have twelve votes before we go into executive session. If there is no urgency on the twelve vote items, we can simply withhold and, um, take care of them on next, at the next session.

On Item 2, Mr. Braude withholds for Item 2.

CLERK: Madame President I would need a motion on Item 3, the CAO report, Notice of Sale and Catagorical Exemption will require a roll call vote.

RUSSELL: Councilman Lindsay moves, and Councilwoman Flores seconds. Open the role on that Item. Close the roll.

CLERK: Ten ayes.

RUSSELL: Approved.

CLERK: Ordinance over.

RUSSELL: I have just been told that Mr. Bernardi is on his way so we'll hold up on voting on the ordinance until he arrives.

We have before us now the ordinance on Item 3. Open the roll. Close the roll.

CLERK: Twelve ayes.

RUSSELL: That matter is approved.

Mr. Braude has withdrawn his motion to withhold on Item 2.

FLORES: Are we open? Is the back door open? OK we're going to ask... is there any other business? Madame Clerk?

CLERK: The desk is clear Madame President.

FLORES: OK, we'll ask the Council to stand for adjourning motions and the audience...

END OF TAPE

BARBARA S. BLINDERMAN
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BARBARA S. BLINDERMAN
ELLIOTT E. BLINDERMAN
COUNSEL TO THE FIRM

January 29, 1986

Senator Milton Marks
State Capitol
Senate Mail Room
Sacramento, CA 95814

Dear Senator Marks,

I am writing in appreciation for your introduction of Assembly Bill 2674. My client, Dorothy Green, was the plaintiff in Green v. City Council of Los Angeles, which challenged the vote in code on the Council's salary increase. Requiring agendas on action items and authorizing the voiding of actions taken in violation of the Ralph M. Brown Act are necessary steps in insuring open meetings.

The salary vote is not an isolated incident. Nor are other actions of the City Council which appear to violate the open meetings law. Mrs. Green has asked that I bring to your attention another example of questionable City Council action and to request that you ask for an Attorney general's opinion of whether the action violates the Brown Acts provisions.

The matter concerns an executive session called to consider a sewer treatment report that had been presented to the Board of Public Works in open session several hours before the Council session.

The background is as follows:

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On the morning of January 22, 1986, the City's Board of Public Works, as part of its Supplemental agenda (Item 29 on the attached Board of Works agenda, Exhibit "B"), heard a City Engineer's report on recommendations (Tentative Cease and Desist Order - Jackson Avenue Overflow Structure, attached herein as Exhibit "C"). The report is a public document, and the matter was discussed in open session.

In the afternoon of January 22, the City Council discussed in executive session, agended as an Additional Page, its Item 27, which stated its purpose was to confer with its attorney concerning the proposed action of the Regional Quality Board (relevant pages of the Council's Calendar and Journal attached as Exhibit "D" and "E"). This was the same matter discussed earlier by the Board of Public Works.

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3. Are Regional Quality Control Board actions included in the exclusion provisions of the Ralph M. Brown Act relating to litigation?

4. Was it appropriate for the City Council to exclude the public from its discussions, under Item 27, of the Cease and Desist Order?

I would appreciate any actions you can take concerning this matter.

Sincerely,

BARBARA S. BLINDERMAN

BSB:flg
Enclosures
cc: Dorothy Green

STATE OF CALIFORNIA
GEORGE DEUKMEJIAN, Governor

CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD—
LOS ANGELES REGION

107 SOUTH BROADWAY, SUITE 4027
LOS ANGELES, CALIFORNIA 90012-4596
(213) 620-4460

January 16, 1986

Mr. Delwin A. Biagi, Director
Bureau of Sanitation
Department of Public Works
City of Los Angeles
Room 1410, City Hall East
200 North Main Street
Los Angeles, CA 90012

PROPOSED CEASE AND DESIST ORDER FOR THE CITY OF LOS ANGELES, HYPERION TREATMENT PLANT'S COLLECTION SYSTEM (CI 1492) (NPDES NO. CA0109991)

Enclosed is a copy of a tentative cease and desist order requiring the City to cease and desist from discharging wastes in violation or threatened violation of waste discharge requirements at the Jackson Avenue overflow structure (JAOS). The tentative order contains a time schedule to implement corrective actions which will eliminate dry weather overflows of sewage from JAOS to Ballona Creek. On January 27, 1986, the Board will hold a hearing on the proposed enforcement action. A staff report on the proposed enforcement action is also enclosed.

The meeting of which this item is a part will start at 9:30 a.m., in Room 1138 in the State Building located at 107 South Broadway in Los Angeles, California.

If you have any questions, please call me at (213) 620-4460 or Nelson Wong at (213) 620-5681.

Robert P. Ghirelli

ROBERT P. GHIRELLI, D.Env.
Executive Officer

NW:sml

cc: See attached mailing list

Enclosure

EXHIBIT "A"

RECEIVED JAN

A - 232b

City of Los Angeles
Mailing List

Regional Board Members
MaryEtta Marks, State Water Resources Control Board, Office of Chief Counsel
Ed Anton, State Water Resources Control Board, Division of Water Quality
Robert S. Horii, City of Los Angels, Bureau of Engineering
George Ohara, City of Los Angeles, Bureau of Sanitation
John Crosse, Hyperion Treatment Plant
City of Los Angeles Building Department
Richard Rinaldi, Los Angeles County, Department of Health Services
Bob Wills, Environmental Protection Agency, Region 9
City of Culver City
Building Industry Association of California, Inc.
Assistant Commissioner, Subdivisions, Department of Real Estate
Headquarters, Subdivision Offerings, Department of Real Estate
Nancy Taylor, Sierra Club Task Force
Dorothy Green, Los Angeles League of Conservation Voters

CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD
LOS ANGELES REGION
CEASE AND DESIST ORDER NO. 86-1

REQUIRING THE CITY OF LOS ANGELES TO CEASE AND DESIST DISCHARGES OF RAW SEWAGE FROM THE JACKSON AVENUE OVERFLOW STRUCTURE TO BALLONA CREEK (CI 1492) (NPDES NO. CA0109991)

The California Regional Water Quality Control Board, Los Angeles Region, finds:

1. The City of Los Angeles operates the North Outfall Sewer (NOS) collection system which is tributary to the Hyperion Treatment Plant. The collection system includes, in part, the area of La Cienega and San Fernando Valley.

2. The main trunk line for the NOS system has an emergency overflow structure located at Jackson Avenue in Culver City. The purpose of the structure is to relieve hydraulic overloading of the main trunk line and the treatment plant due to infiltration and inflow of storm water runoff. Overflows from the structure are to Ballona Creek.

3. The NOS at Jackson Avenue is designed for an average daily flow of 174 mgd and a peak daily flow of 280 mgd.

4. In 1985 the City experienced an increasing number of dry weather sewage overflows from the Jackson Avenue Overflow Structure (JAOS). Since January 1, 1985, the City has had at least 15 overflows during dry weather. The overflows at JAOS are due to inadequate capacity in the NOS line.

5. A discharge of sewage to Ballona Creek creates a condition of pollution and a potential public health hazard.

6. The discharges of sewage are a violation of the following requirement (for Hyperion Treatment Plant) contained in Board Order No. 75-100:

   General Requirement E.6.

   "Any diversion from or bypass of facilities, including the waste collection system, necessary to maintain compliance with the terms and conditions of this permit is prohibited, except (a) where unavoidable to prevent loss of life or severe property damage, or (b) where excessive storm drainage or runoff would damage any facilities necessary for compliance with the effluent limitations and prohibitions of this permit".

7. In August and October 1985 the Board imposed administrative civil liability (fines) on the City for seven recent discharges of sewage to Ballona Creek. The total amount of the fines was $180,050.00.

8. This enforcement action, which includes a time schedule, is being taken to ensure that the City eliminates dry weather overflows at the JAOS by implementing and completing the necessary work needed to provide the NOS system with adequate long-term capacity and eliminate any structural instability in the NOS in a timely manner.

9. The Board notified the discharger and interested agencies and persons of its intent to conduct a public hearing concerning violations or threatened violations of waste discharge requirements.

10. The Board in a public hearing heard and considered all testimony pertinent to this matter. All Orders referred to above and records of hearings and testimony therein are included herein by reference.

11. This enforcement action is being taken for the protection of the environment and as such is exempt from the provisions of the California Environmental Quality Act (Public Resources Code, Section 21000, et seq.) in accordance with Section 15321, Chapter 3, Title 14, California Administrative Code.

IT IS HEREBY ORDERED that pursuant to California Water Code Section 13301, the City of Los Angeles shall comply with the following:

1. Eliminate dry weather overflows of sewage from the JAOS by completing short and long-term corrective actions in accordance with the following time schedule:

	Task	Completion Date	Report of Compliance
I.	Increase volume of sewage treated at L.A.-Glendale Water Reclamation Plant (WRP) to 20 mgd.	February 15, 1986	March 1, 1986
II.	Have one million gallons of storage tank capacity available at JAOS.	July 15, 1986	August 1, 1986
III.	Installation of the permanent screening and continuous chlorination facility at JAOS.		
	a. Complete engineering design work	April 15, 1986	May 1, 1986
	b. Start construction	August 15, 1986	September 1, 1986
	c. Reach operational level	July 15, 1987	August 1, 1987

	Task	Completion Date	Report of Compliance
IV.	Increase volume of sewage treated at Tillman WRP to 40 mgd (Phase I)		
	a. Complete East Valley Interceptor sewer projects	June 15, 1987	July 1, 1987
	b. Reach operational level	September 15, 1987	October 1, 1987
V.	Construct Phase II (additional 40 mgd unit) of the Tillman WRP thereby increasing capacity from 40 mgd (existing Phase I) to 80 mgd.		
	a. Submit engineering design work and construction time schedule for Phase II expansion	June 15, 1987	July 1, 1987
	b. Complete construction	June 15, 1990	July 1, 1990
	c. Reach operational level	September 15, 1990	October 1, 1990
VI.	New North Outfall Relief Sewer (NORS)		
	a. Submit engineering design work and construction time schedule	June 15, 1987	July 1, 1987
	b. Complete construction	January 15, 1990	February 1, 1990
	c. Reach operational level	April 15, 1990	May 1, 1990
VII.	Complete cleaning of NOS between JAOS and Hyperion Treatment Plant	June 15, 1991	July 1, 1991

2. Submit quarterly reports of progress by January 15, April 15, July 15, and October 15 of each year until full compliance is achieved. The first quarterly progress report is due April 15, 1986.

If the City of Los Angeles fails to comply with any provisions of this Order, the Executive Officer is authorized to request the Attorney General to take the appropriate action against the discharger, including injunction and civil monetary remedies, pursuant to appropriate California Water Code sections, including but not limited to Sections 13331, 13350, 13385, and 13386.

I, Robert P. Ghirelli, Executive Officer, do hereby certify that the foregoing is a full, true, and correct copy of an Order adopted by the California Regional Water Quality Control Board, Los Angeles Region, on January 27, 1986.

_____

ROBERT P. GHIRELLI, D.Env.
Executive Officer

_____

DATE

NW/pl

STAFF REPORT ON PROPOSED
CEASE AND DESIST ORDER

FOR

VIOLATIONS OF NPDES PERMIT NO. CA0109991

BY

CITY OF LOS ANGELES
HYPERION SEWAGE TREATMENT PLANT
COLLECTION SYSTEM

California Regional Water Quality Control Board

Los Angeles Region

Date: January 14, 1986

INTRODUCTION

On January 27, 1986, the California Regional Water Quality Control Board, Los Angeles Region, will hold a public hearing to consider adoption of a cease and desist order for the City of Los Angeles, for violations of waste discharge requirements contained in Order No. 75-100 (NPDES Permit No. CA0109991) for the City of Los Angeles' Hyperion Sewage Treatment Plant. The Regional Board and U.S. Environmental Protection Agency (EPA) jointly adopted the waste discharge requirements on August 18, 1975.

The City of Los Angeles has violated and is threatening to continue violating its waste discharge requirements by discharging raw sewage from its Jackson Avenue overflow structure to Ballona Creek during dry weather periods.

The Regional Board may take any of the following actions:

1. Issue an order pursuant to Section 13304(a) of the California Water Code requiring the City to clean up and abate threatened dry weather discharges of raw sewage to Ballona Creek forthwith or in accordance with a time schedule to be set by the Regional Board.

2. Issue an order pursuant to Section 13301 of the California Water Code requiring the City to cease and desist discharges of raw sewage forthwith or in accordance with a time schedule prescribed by the Regional Board.

3. Issue an order pursuant to Section 13301 of the Water Code requiring the City to cease and desist discharges of raw sewage forthwith and restricting or prohibiting additional sewage connections to the collection system until sufficient capacity is provided.

4. Any other action appropriate as a result of the hearing.

DESCRIPTION OF THE FACILITY

The City of Los Angeles operates the Hyperion Sewage Treatment Plant at 12000 Vista Del Mar Boulevard, Playa Del Rey, and discharges up to 420 mgd of primary and secondary treated wastewaters to the Pacific Ocean. The city operates the North Outfall Sewer (NOS) collection system which includes, in part, the area of La Cienega and San Fernando Valley. The main trunk line for this system has an emergency overflow structure located at Jackson Avenue in Culver City. The purpose of the structure is to relieve hydraulic overloading at the Hyperion Treatment Plant facilities and the North Outfall trunk sewer line due to infiltration and inflow of storm water runoff. Overflows from the structure are to Ballona Creek.

VIOLATION OF WASTE DISCHARGE REQUIREMENTS

The City of Los Angeles operates the Hyperion Sewage Treatment Plant under requirements prescribed in Order No. 75-100, adopted by the Regional Board on August 18, 1975. Portions of this Order were revised by Order No. 75-165, which was adopted by the Board on December 1, 1975.

General Requirement E.6 states:

> "Any diversion from or bypass of facilities, including the waste collection system, necessary to maintain compliance with the terms and conditions of this permit is prohibited, except (a) where unavoidable to prevent loss of life or severe property damage, or (b) where excessive storm drainage or runoff would damage any facilities necessary for compliance with the effluent limitations and prohibitions of this permit. The permittee shall immediately notify the Board and the Regional Administrator (EPA) by phone and in writing of each such diversion or bypass, in accordance with procedures outlined in the attached Standard Provisions. The written confirmation shall include information relative to the location, estimated volume, date and time, duration, cause, and remedial measures taken to effect cleanup and/or prevent recurrence. Immediate measures shall be initiated to clean up wastes due to any such bypass or diversion and to abate the effects thereof or, in the case of threatened pollution or nuisance, to take other necessary remedial action."

In 1985 the City experienced an increasing number of dry weather discharges from the Jackson Avenue overflow structure (JAOS) to Ballona Creek. From January 1, to December 1, 1985, there were 18 discharges of raw sewage to the creek with a total volume estimated at 1.1 million gallons. Approximately 680,000 gallons occurred during dry weather; when there should have no overflow at all. At this time there is no explanation for the cause of the high flows which resulted in overflows at JAOS.

In two separate actions the Board imposed administrative civil liability (ACL) for seven of the most recent spills. The total amount of the ACL for the two actions was $180,050.00. The first action was Complaint No. 85-6, issued on August 8, 1985, for violations which occurred on July 12, 20, 22, and 26, 1985. The second action was Complaint No. 85-7, issued on October 11, 1985, for violations which occurred on August 2, and September 6 and 11, 1985. The August and October Complaint Notices and staff reports are included as Attachments 1 and 2, respectively.

The discharges of raw sewage from JAOS to Ballona Creek are due to inadequate capacity in the main sewer trunk line (North Outfall Sewer). The long-term solution to this problem is to increase capacity of the

North Outfall sewer trunk line at Jackson Avenue or reduce flow through the line so that dry weather discharges to Ballona Creek cease. In addition, the impacts from any discharge of sewage should be mitigated by, at least, chlorination.

Staff has been working closely with the City to implement short and long-term solutions to this problem. In response to the Board's November 14, 1985, letter (Attachment 3), the City's December 5, 1985, letter (Attachment 4) included a list of completed corrective actions and a list of proposed corrective actions.

After receiving the City's lists of completed and proposed corrective actions, staff believes that the lists are complete and identify all possible corrective actions with the exception of the City restricting the number of building permits it issues. Such a restriction, if implemented, would be for only the geographic area tributary to JAOS. The City has submitted information concerning this matter and a more detailed discussion of the connection-ban alternative (by the Board) is presented later in this report.

ALTERNATIVE ENFORCEMENT ACTIONS

The statewide program for water quality control consists of several elements including: the issuance of discharge requirements and permits which regulate activities that may affect water quality; monitoring and surveillance activities; and enforcement activities. The State and Regional Board's enforcement policy states in part that an effective and aggressive enforcement program is necessary to stimulate compliance with discharge requirements and permits, to act as a strong deterrent to those who would intentionally or negligently degrade the State's waters, and to compensate the State for harm caused to the environment.

Since the Board's enforcement action in July 1985, staff believes that the City has been working diligently to correct the problem at JAOS and that all the short-term corrective actions have been completed or are in progress. Although the short-term corrective measures appear to have eliminated the immediate threat of dry weather overflows of sewage, it would be prudent for the Board to consider enforcement actions other than ACL's to ensure that the proposed long-term corrective actions are implemented in a timely manner.

The following enforcement alternatives are available to the Board: time schedule order, cleanup and abatement order, cease and desist order, or cease and desist order with a connection ban. A discussion of each of the enforcement alternatives is presented below.

Time schedule order: Section 13300 of the California Water Code, provides that when a discharge of waste is taking place or threatening to take place, which violates or will violate waste discharge requirements, the Board may require submission of a detailed time schedule for specific

actions the discharger shall take to correct or prevent a violation of requirements.

Cleanup and abatement order: Section 13304(a) of the Water Code provides that the Board may adopt a cleanup and abatement order whenever any wastes have been discharged or deposited where they have been, or probably will be, discharged into waters of the state and creates, or threatens to create, a condition of pollution or nuisance. The order may direct those persons causing the discharge to clean up such waste or abate the effects thereof or, in the case of threatened pollution or nuisance; take other necessary remedial action.

The cleanup and abatement order is an enforcement action commonly used to correct problems associated with spills or discharges which are usually one-time or short-term in nature.

Since July 1985, the City has cleaned up all residual solids resulting from overflows at JAOS. As discussed previously in this report, the City has completed or will complete by July 1986 short-term corrective actions which should abate future overflows at JAOS. The City has also initiated long-term corrective actions, but it reports that long-term abatement of this problem will not be completed until 1993.

Cease and desist order: Section 13301 of the Water Code provides that whenever the Board finds that a discharge of waste is taking place or threatening to take place in violation of requirements prescribed by the Regional Board or the State Board, the Board may issue an order to cease and desist and direct that those persons not complying with the requirements or discharge prohibitions to either (a) comply forthwith, (b) comply in accordance with a time schedule set by the Board, or (c) in the event of a threatened violation, take appropriate remedial or preventive action.

A cease and desist order should be issued when significant violations of requirements are threatened, are occurring, or have occurred and are expected to continue in the future. This is the case with the JAOS situation.

The City indicates that, in addition to having inadequate capacity, other potential problems exist with the NOS trunk line. One problem pertains to the structural integrity of the sewer line, which was constructed in the 1920's. Due to the volume of sewage flowing (approximately 100 mgd) in the NOS at low flow periods, the City has not been able to effectively inspect or maintain the NOS line below JAOS. Perhaps equally importantly, the City has not been able to assess the structural integrity of this unreinforced concrete pipeline. One concern is that when the pipe is flowing full internal pressures could cause sewage to leak and erode the soil underneath the pipe and possibly causing it to eventually collapse in places. This is one reason why JAOS was constructed. The ramification of this structural problem is that, despite the City's corrective actions to reduce sewage flows and eliminate dry weather sewage overflows, a new NOS trunk line is

needed. A new NOS would allow the City to complete all repairs, maintenance and modifications of the existing NOS under nearly dry conditions and then have two good lines in service.

Staff's investigation of the JAOS problem indicates that it is not simply one of inadequate capacity. Short-term corrective actions have apparently eliminated dry weather overflows of sewage. Increasing the amount of sewage treated at the Tillman WRP will further reduce flows. However, reducing the amount of sewage in the NOS alone will not eliminate potential sewage spills. Due to the current doubtful state of structural integrity of the NOS, a new NOS is still needed.

Cease and desist order with connection ban: For the Board to impose a connection ban, a cease and desist order must be adopted. Section 13301 of the Water Code further states, "In the event of an existing or threatened violation of waste discharge requirements in the operation of the community sewer system, cease and desist orders may restrict or prohibit the volume, type, or concentration of waste that may be added to such system by dischargers who did not discharge into the system prior to the issuance of the cease and desist order." In this case the sewer connection ban would be for only the area tributary to JAOS (NOS system). The purpose of a sewer connection ban as written in Section 2244(a) of the California Administrative Code is listed below:

> "The purpose of prohibitions or restrictions on additional discharges is to prevent an increase in violation or likelihood of violation of waste discharge requirements during a period of violation or threatened violation or requirements and thereby prevent an increase in unreasonable impairment of water quality or an increase in nuisance."

The City has submitted information concerning a connection ban in a letter (Attachment 4) dated December 5, 1985. A map showing the locations of the City's major outfall sewer lines and sewer collection area was also included in the letter. In its letter the City indicates that an estimated 2500 new dwelling units may be developed in the area tributary to JAOS during each of the next two years. Based on this projection, flow in the NOS will increase by approximately 0.5 mgd/year.

Short-term corrective actions have reduced the flow by 29.6 mgd in the NOS at JAOS. These actions include:

(1) Operation of the Tillman Treatment Plant, thus removing 20 mgd from the NOS;

(2) diversion of about 3.2 mgd peak flow from the NOS-La Cienega, San Fernando Valley Relief Sewer (LCSFVRS) system to the NOS-North Central Outfall Sewer (NCOS) system; and

(3) diversion of about 6.4 mgd peak flow from the Hollywood Interceptor Sewer (a part of the NOS system) into the Westlake Relief Sewer System (a part of the NCOS system).

In addition to discharges of sewage upstream of JAOS, discharges of sewage to the NOS downstream of JAOS also affect JAOS. The City reports downstream discharges would impact JAOS because the slope of the sewer pipe is not steep enough. The additional discharges into the NOS could surcharge the pipe so that the sewage would backup the pipe and overflow at JAOS.

The City indicates that two large projects, the Howard Hughes Center and Playa Vista Annexation, are proposed downstream from JAOS. Except for the first building of the Howard Hughes Center, which will temporarily discharge about 0.2 mgd into the NOS, these projects will not contribute any flows to the NOS. The City plans to construct a new Ballona Creek pumping plant which will pump all the sewage generated from these projects, approximately 10.3 mgd, to the NCOS. The proposed project will also allow the City to take an additional 9.2 mgd out of the NOS and pump it into the NCOS. The new Ballona Creek pumping plant is expected to be completed in early 1988. Except for Building 1 of the Howard Hughes Center, the two developments cannot be occupied until the new pump station is completed.

The corrective actions taken by the City have reduced the flow in the NOS at JAOS or, in the case of downstream development, the additional flow reportedly will not increase sufficiently to cause a problem. Specifically, since the Tillman Treatment Plant has been on-line, peak flows at JAOS have decreased (as shown in Attachment 5). Based on the above information, a connection ban will not "prevent an increase in violation or likelihood of violation of waste discharge requirements".

Analysis of Alternatives and Recommendation

1. Time schedule order -- Staff does not recommend this action. The time schedule order is the first level Board enforcement action, and, as such, is not appropriate, in staff's opinion, due to the seriousness and significance of the violations. Furthermore, EPA does not recognize time schedule orders as adequate enforcement actions. Since this discharge is under NPDES permit, it would be prudent for the Board to choose a stronger alternative.

2. Clean up and abatement order -- Staff does not recommend this action. Although a clean up and abatement order with a time schedule would be an appropriate enforcement action to ensure that the problem at JAOS is corrected in a timely manner, staff believes the complexity and chronic nature of the problem, as well as the lengthy time that will be required for permanent correction, require stronger enforcement action.

3. Cease and desist order -- A cease and desist order is generally considered a stronger enforcement than a clean up and abatement order. Due to the significant nature of the violations and the complexity of the solution, this enforcement action should be strongly considered by the Board. Staff recommends the Board issue a cease and desist order with a time schedule. A detailed time schedule is proposed later in this report.

4. Cease and desist order with a ban on new connections -- This is arguably the strongest enforcement alternative available to the Board. However, because of the severity of the consequences flowing from such an action, the law is quite specific that connection bans are not to be used as a punitive measure for past failure to comply (Administrative Code, Section 2244-d). Connection bans may only be adopted to prevent an increase in violation. Staff does not believe there is evidence to support adoption of a connection ban, and recommends against this alternative.

CONCLUSION

The dry weather overflows of sewage from the City's JAOS are primarily due to inadequate capacity in the NOS.

Structural problems with the NOS also contribute to potential sewage spills. The City has taken short-term corrective actions to decrease flows in the NOS by diverting sewage to other parts of the collection system and taking sewage out of the NOS and treating it at upstream treatment plants. In addition to providing short-term storage capacity at JAOS, the City plans to take long-term corrective actions by increasing the capacity of the NOS system by constructing another NOS trunk line to Hyperion Treatment Plant.

After reviewing the City's proposed corrective actions, staff evaluated the available enforcement actions to the Board. These enforcement actions include: time schedule order, cease and desist order, cease and desist order with a connection ban, and cleanup and abatement order. Staff's evaluation indicates that, in this case, a cease and desist order with a time schedule would be the appropriate enforcement action. The proposed cease and desist order with its compliance schedule is necessary to ensure that the City installs the needed facilities to eliminate dry weather overflows of sewage from JAOS to Ballona Creek. All the proposed corrective actions are needed to prevent sewage overflows.

Proposed Time Schedule

If the Board accepts the staff recommendation and adopts a cease and desist order, with a time schedule, staff proposes the following.

Staff has reviewed the City's time schedule (Attachment 3) to complete long-term corrective actions. It appears that certain corrective actions

could be completed sooner than proposed; and therefore, the following time schedule is proposed for eliminating future dry weather sewage overflows at JAOS to Ballona Creek.

Should the Board adopt the proposed time schedule, the City of Los Angeles would be put on notice that if violations occur, the Executive Officer, is authorized to refer the matter to the Attorney General for appropriate enforcement action.

Task		Completion Date	Report of Compliance
I.	Increase volume of sewage treated at L.A.-Glendale Water Reclamation Plant to 20 mgd.	February 15, 1986	March 1, 1986
II.	Have one million gallons of storage tank capacity available at JAOS.	July 15, 1986	August 1, 1986
III.	Installation of the permanent screening and continuous chlorination facility at JAOS		
	a. Complete engineering design work	April 15, 1986	May 1, 1986
	b. Start construction	August 15, 1986	September 1, 1986
	c. Reach operational level	July 15, 1987	August 1, 1987
IV.	Increase volume of sewage treated at the Tillman Water Reclamation Plant (WRP) to 40 mgd (Phase I)		
	a. Complete East Valley Interceptor Sewer projects	June 15, 1987	July 1, 1987
	b. Reach operational level (40 mgd)	September 15, 1987	October 1, 1987
V.	Construct Phase II (additional 40 mgd unit) of the Tillman WRP thereby increasing capacity from 40 mgd (existing Phase I) to 80 mgd		

Task		Completion Date	Report of Compliance
	a. Submit engineering design work and construction time schedule for the Phase II expansion.	June 15, 1987	July 1, 1987
	b. Complete construction	June 15, 1990	July 1, 1990
	c. Reach operational level	September 15, 1990	October 1, 1990
VI.	New North Outfall Relief Sewer (NORS)		
	a. Submit engineering design work and construction time schedule.	June 15, 1987	July 1, 1987
	b. Complete construction	January 15, 1990	February 1, 1990
	c. Reach operational level	April 15, 1990	May 1, 1990
VII	Complete cleaning of NOS between JAOS and Hyperion Treatment Plant.	June 15, 1991	July 1, 1991

In addition to the above time schedule, the City would be required to submit quarterly reports of progress until full compliance is achieved.

The City has informed staff that it will need more time to complete these projects than staff's proposed time schedule allows. The City is particularly concerned with the time schedule for completion of NORS. It suggests that Tasks VI(b) and (c) be left open until VI(a) is completed or near complete. Staff concurs that projection of compliance time schedules for such major and complex projects is difficult at best. However, should the Board adopt the proposed time schedule or even one that is slightly longer, the Board could amend the time schedule if it proves too optimistic. Staff feels that a time schedule is needed as target dates for the City and that for now it should be shorter rather than longer.

RECOMMENDATION

Staff recommends adoption of the cease and desist order with its proposed compliance time schedule.

(5)

#1 COMMR AVILA — Recommending Board deny the appeal of Mr. William M. Hamburg (requesting for SSC adjustment rate "D"), but grant him the adjustment rate schedule "C" for 6023 Lubao Avenue, Woodland Hills, from billing period October 16, 1984 to the effective date of 1986 automated adjustment (approximately July 1986).

DISPOSITION: REPORT ADOPTED

(6)

#1-1 CE — Recommending Board designate the location Number 58j for the Hollywood Walk of Fame for the installation of the name of Bette Midler on Hollywood Boulevard scheduled for Thursday, February 6, 1986 at 12:30 p.m. near the corner of Orange Avenue.

DISPOSITION: REPORT ADOPTED

(7)

#1-2 CE — Recommending Board authorize the City Engineer to negotiate and issue Change Order Serial No. 116, to Morley Ziebarth and Alper for modifications to the existing Effluent Pumping Plant control systems at the Hyperion Treatment Plant.

DISPOSITION: REPORT ADOPTED

(8)

#1-4 CE — Recommending Board approve and forward the attached Negative Declaration/Final Environmental Assessment and Initial Study Report, and proposed freeway agreement, in triplicate, between the City of Los Angeles and the State of California Department of Transportation, to the Mayor and the City Council with the requests herein.

DISPOSITION: REPORT ADOPTED & REFERRED TO CITY COUNCIL

(9)

#1-5 CE — Recommending Board adopt this report and forward it to the City Council with the following recommendations:

1. Adopt the attached draft of Ordinance for the sale of City-owned property located at 733 North Vignes Street withoutcalling for bids to Southern California Rapid Transit District or its nominees or lawful successors in interest, for the amount of $37,000.

DISPOSITION: REPORT ADOPTED & REFERRED TO MAYOR

BOARD OF PUBLIC WORKS

January 22, 1986

9:30 a.m. - Room 350 - CITY HALL

MEMBERS: Maureen A. Kindel, President
Homer F. Broome, Jr., Vice-President
Edward J. Avila
Steve Harrington
R.O. Schwendinger

(Mike McKelvey, Secretary 485-3381)

MINUTES: Jan. 14, 1985 and Jan. 8, 1986 — APPROVED

CONTRACTS: — NONE SUBMITTED

PERSONNEL TRANSACTIONS: — APPROVED

(1)

VIDEO TAPE REPORT 9:30 A.M. — President Maureen A. Kindel, CITY'S SEWER PROGRAM.

DISPOSITION: VIDEO TAPE NOT PRESENTED

(2)

SUPERVISOR OF THE MONTH AWARD 9:30 A.M. — Sam L. Furuta - Bureau of Engineering

DISPOSITION: CITATION PRESENTED

(3)

DISCIPLINARY ACTION 9:30 A.M. — Recommended suspension - 20 days, Valencia Fields, Bureau of Engineering. (ADVISEMENT 1-8-86)

DISPOSITION: 20 DAY SUSPENSION APPROVED

(4)

HEARING CE 1-3 1/22/86 10:30 A.M. — Recommending Board terminate the Revocable Permit that was issued to Rodger La Chapelle on October 1, 1980 for private use of a portion of Truesdale Street for a container nursery and the erection of a chain link fence.

DISPOSITION: AFTER HEARING - REPORT REFERRED BACK TO CE WITH INSTRUCTIONS FOR FURTHER REPORT 2/12/86

EXHIBIT "B"

(10)

JT#1 IPW CE ACCEPTANCE
Safety Related Project - Unit 3, 263rd Street and Belle Porte Avenue completed by Newman and Sons, Inc.

DISPOSITION: REPORT ADOPTED

(11)

JT#2 IPW CE PARTIAL ACCEPTANCE
Airlie Drive (Near Tujunga Canyon Boulevard) completed by B.H. Mollett.

DISPOSITION: REPORT ADOPTED

(12)

JT#1 IPW CE ACCEPTANCE
DOT Pavement Markings - School - West Valley completed by Traffic Appliance Corporation.

DISPOSITION: REPORT ADOPTED

(13)

JT#1 CE OCC CONTRACT AWARD
Recommending Board declare the bid of ATP Construction, Inc. to be non-responsive for not meeting the MBE/WBE goals nor submitting documented evidence of good faith efforts to achieve the MBE/WBE goals for Replacement Sewer Program: Casitas Avenue, Fletcher Drive to Glendale Freeway and Casitas Avenue project; allow the proposed substituttion of an MBE subcontractor by George Jugovic Construction Company and declare the firm to be the lowest responsive bidder for this project; award a contract for $134,684 to George Jugovic Construction Company.

DISPOSITION: REPORT ADOPTED

(14)

JT#2 CE OCC CONTRACT AWARD
Pasadena Avenue Bridge over Pasadena Freeway in the amount of $21,930 to Burnett Constructors.

DISPOSITION: REPORT ADOPTED

(15)

#1 SM Recommending Board adopt the attached specifications and advertise for bids to trim 456 trees growing in the Parkways of Western Avenue between Torrance Boulevard and Carson Street and certain other streets at an estimated cost of $50,160 and that March 5, 1986 be set as the date for receiving bids.
DISPOSITION: REPORT ADOPTED - BIDS INVITED 3/5/86

(16)

#2 SM Recommending Board adopt the attached specifications and advertise for bids to trim 544 trees growing in the Parkways of 218th Street between Normandie Avenue and Western Avenue and certain other streets at an estimated cost of $59,840.00 and that March 5, 1986 be set as the date for receiving bids.

DISPOSITION: REPORT ADOPTED - BIDS INVITED 3/5/86

(17)

#3 SM Recommending Board adopt the attached specifications and advertise for bids to trim 548 trees growing in the Parkways of Clinton Street between Windsor Boulevard and Bronson Avenue and certain other streets at an estimated cost of $60,280.00 and that March 5, 1986, be set as the date for receiving bids.

DISPOSITION: REPORT ADOPTED - BIDS INVITED 3/5/86

(18)

#4 SM Recommending Board adopt the attached specifications and advertise for bids to trim 1,000 trees growing in the Parkways of Atlas Street between Alpha Street and Berkshire Avenue and certain other streets at an estimated cost of $110,000.00 and that March 5, 1986 be set as the date for receiving bids.

DISPOSITION: REPORT ADOPTED - BIDS INVITED 3/5/86

(19)

#5 SM Recommending Board adopt the attached specifications and advertise for bids to trim 452 trees growing in the Parkways of Oxford Avenue between Seventh Street and Wilshire Boulevard and certain other streets at an estimated cost of $49,720.00 and that March 5, 1986, be set as the date for receiving bids.

DISPOSITION: REPORT ADOPTED - BIDS INVITED 3/5/86

(20)

#6 SM Recommending Board adopt the attached specifications and advertise for bids to trim 400 trees growing in the Parkways of Beverly Glen Boulevard between Sunset Boulevard and Comstock Avenue and certain others streets at an estimated cost of $44,000.00 and that March 5, 1986 be set as the date for receiving bids.

DISPOSITION: REPORT ADOPTED - BIDS INVITED 3/5/86

(26)

COMMUNICATIONS — County of Los Angeles Department Health Services requesting Abatement of Nuisance and Hazard at 3710 Fletcher Drive, Section 61.01 LAMC.

DISPOSITION: REFERRED TO SM & SAN w/INSTRUCTIONS TO COMPLY

(27)

CLAIM - Johnson - Bateman Company claim #706265 for furnishing reinforced concrete pipe to Dabco Construction on the 5th Street Storm Drain Project.

DISPOSITION: REC'D & FILED

(28)

Rick Cole , CD#14, commending Ms. Terri McKinnon and Mr. David Reed for cooperation and conscientious assistance in connection with recent complaint.

DISPOSITION: RED'D & FILED

(21)

#7 SM — Recommending Board adopt the attached specifications and advertise for bids to trim 600 trees growing in the Parkways of Castle Heights Avenue between Beverwill Drive and National Boulevard and certain other streets at an estimated cost of $66,000.00 and that March 5, 1986, be set as the date for receiving bids

DISPOSITION: REPORT ADOPTED - BIDS INVITED 3/5/86

(22)

#1 SAN — PURCHASING AGENT AWARD
Recommending Board authorize the Purchasing Agent, Department of General Services, to award a contract to Pacific Aggregates, for furnishing the rental of a dump truck and loader to remove debris from Loop Conyon Debris Basin in accordance with Specifications No. F7998 and in the estimated amou;nt of $60,000.

DISPOSITION: ADVISEMENT TO 1/24/86

(23)

#1 SL — Recommending Board reject all bids submitted for the Washington Boulevard between Alameda Street to Main Street Replacement Lighting Project, and Instruct the Director, Bureau of Street Lighting, to negotiate for reconstruction of existing street lighting system as a part of the Long Beach - Los Angeles Rail Transit Project.

DISPOSITION: REPORT ADOPTED - BIDS REJECTED

(24)

#1 MES — Recommending Board review and approve the revisions contained in Personnel Directive No. 21, "Formal Employee Discipline".

DISPOSITION: REPORT ADOPTED

(25)

ADVISE-MENT #3 1/15/85 — Forwarding to the Mayor with the recommendation that the Bureau of Sanitation be authorized to negotiate a contract with the Management Coaching Co. to perform management training at the Hyperion Treatment Plant.

DISPOSITION: CONTINUED ADVISEMENT TO 1/24/86

S U P P L E M E N T A L - A G E N D A

BOARD OF PUBLIC WORKS

January 22, 1986

9:30 a.m. - Room 350 - CITY HALL

MEMBERS: Maureen A. Kindel, President
Homer F. Broome, Jr. Vice-President
Edward J. Avila
Steve Harrington
R.O. Schwendinger

(MIKE MCKELVEY, Secretary 485-3381)

BOARD REPORT NO. | SUBJECT

(29)

ORAL STATUS REPORT CE 9:30 A.M. — Jackson Avenue Pumping Plant Project

DISPOSITION: BOARD CONCURRED IN CE R/C's W/ADDITIONAL COMMENT

FORM GEN. 160 (Rev. 6-80)

CI ... LOS ANGELES

INTER-DE

JAN 22 1986

B. J. McKelvey
Secretary

THAT THE RECOMMENDATIONS IN THE FOREGOING MEMO BE CONCURRED BY THE BOARD OF PUBLIC WORKS WITH THE INCLUSION OF CERTAIN ADDITIONAL INFORMATION ENUMERATED BY THE BOARD AT THIS MEETING.

DATE: January 22, 1986

TO: MAUREEN A. KINDEL, Pres.
Board of Public Works

FROM: ROBERT S. HORII
City Engineer

SUBJECT: TENTATIVE CEASE AND DESIST ORDER - JACKSON AVENUE OVERFLOW STRUCTURE

RECOMMENDATIONS

Your Board recommend that the City's designated representatives at Regional Water Quality Control Board meeting on January 27, 1986 be instructed to:

1. Concur with the completion schedule for Tasks II to IV, inclusive, in the tentative order.

2. Oppose the inclusion of Tasks I and V through VII, in the tentative order for the reasons outlined in this report.

DISCUSSION

The California Regional Water Quality Control Board - Los Angeles Section (RWQCB) has issued a tentative cease and desist order on the Jackson Avenue Overflow Structure (JAOS) which will be before the RWQCB on Jan. 27, 1985. The recommended action in the tentative order is that the City shall comply with the following:

1. Eliminate dry weather overflows of sewage from the JAOS by completing short and long-term corrective actions in accordance with the following time schedule:

EXHIBIT "C"

Task	Completion Date	Report of Compliance
I. Increase volume of sewage treated at L.A.-Glendale Water Reclamation Plant (WRP) to 20 mgd	February 15, 1986	March 1, 1986
II. Have one million gallons of storage tank capacity available at JAOS.	July 15, 1986	August 1, 1986
III. Installation of the permanent screening and continuous chlorination facility at JAOS.		
a. Completion engineering design work	April 15, 1986	
b. Start construction	August 15, 1986	May 1, 1986
c. Reach operational level	July 15, 1987	September 1, 1986
IV. Increase volume of sewage treated at Tillman WRP to 40 mgd (Phase I)		August 1, 1987
a. Complete East Valley Interceptor sewer projects	June 15, 1987	
b. Reach operational level	September 15, 1987	July 1, 1987
V. Construct Phase II (additional 40 mgd unit) of the Tillman WRP thereby increasing capacity from 40 mgd (existing Phase I) to 80 mgd.		October 1, 1987
a. Submit engineering desgin work and construction time schedule for Phase II expansion	June 15, 1987	July 1, 1987
b. Complete construction	June 15, 1990	
c. Reach operational level	September 15, 1990	July 1, 1990
		October 1990

Task	Completion Date	Report of Compliance
VI. New North Outfall Relief Sewer (NOS)		
a. Submit engineering design work and construction time schedule	June 15, 1987	July 1, 1987
b. Complete construction	January 15, 1990	February 1, 1990
c. Reach operational level	June 15, 1990	July 1, 1991
VII. Complete cleaning of NOS between JAOS and Hyperion Treatment Plant	June 15, 1991	July 1, 1991

2. Submit quarterly reports of progress by January 15, April 15, July 15, and October 15 of each year until full compliance is achieved. The first quarterly progress report is due April 15, 1986.

In 1985 the City experienced an increasing number of dry weather overflows from the JAOS into Ballona Creek. The last dry weather overflow occurred on September 21, 1985. As a result of these spills the RWQCB imposed fines in the amount of $180,050 in two separate actions.

Operation of the Tillman WRP and implementing diversion actions at Valley Spring Lane and Foreman Avenue, and at Highland Avenue and Venice Boulevard have significantly reduced the flow in the NOS at Jackson Avenue. In addition further actions planned, corresponding to items I through IV in the tentative cease and desist order, will further reduce this flow.

The completion dates for tasks II, III and IV are achievable. These tasks include the following:

1. Construction of 1,000,000 gallon holding tanks at JAOS. A construction contract has been executed for the construction of these facilities and construction will start as soon as Culver City approves the plans for construction and issues a building permit. It anticipated that this will be accomplished within 7 to 10 days.

2. Installation of permanent screening and continuous chlorination facility at JAOS. The design of this project is underway and will be completed by April 15, 1986. Construction should be completed within the time frame recommended in tentative order. This project is partially funded and the remaining funds will be recommended in next year's 5-Year Capital Program.

3. Increase the volume of sewage treated at Tillman WRP from 20 mgd to 40 mgd. This can be accomplished after the completion of the four units of East Valley Interceptor Sewer projects. Bids have been received of the first three units and the bid on the remaining unit is scheduled to be received on Feb. 5, 1986. Construction on these projects are scheduled to be completed on or before the June 15, 1987 completion date in the tentative order.

The completion of the above-mentioned projects will assure that there will be no dry weather overflows within the forseeable future. The City should concur with this part of the tentative order.

The tentative order also listed completion dates for increasing the flow at Los Angeles-Glendale WRP to 20 mgd, Phase II of the Tillman WRP, construction of a new North Outfall Relief Sewers (NORS), and cleaning of the NOS between Jackson Avenue and Hyperion Treatment Plant. I recommend that the designated City representative appearing before the RWQCB be instructed to oppose including these projects as part of tentative cease and desist order for the following reasons:

1. The measures taken to date, together with the construction of the projects shown as items II, III, and IV in the tentative order will eliminate dry weather overflows and many of the wet weather overflows.

2. The maximum dry overflow to date has been 100,000 gallons over a 1-1/2-hour period. This occurred prior to the operation of the Tillman WRP. The 1,000,000 holding tanks and other mitigation measures to be taken will eliminate dry weather overflows for the forseeable future.

If the RWQCB includes the later-mentioned four projects as part of the cease and desist order, the City should go on record as objecting to the proposed completion dates. The time frames for completion are far too short to accomplish such major projects, and the City Council has not approved the funding of the construction projects.

Increasing the flow from 10 mgd to 20 mgd at the Los Angeles-Glendale WRP by February 15, 1986 is not achievable. The permanent dechlorination facility, which is under construction, must be completed prior to implementing this change. We estimate the dechlorination project will be completed by late April or early May 1986. We will increase the flow to the plant as soon as this project is completed.

A 2-year design period, together with a 30-month construction period is the minimum time needed for Phase II of the Tillman WRP. The present estimated construction cost of this project is $63,000,000.

We are in the process of preparing an RFP to have consultants prepare an environmental document and the engineering plans for NORS project. Our preliminary alignment on this 10-mile project proposes tunneling under existing public streets to significantly reduce acquisition of right of way, thereby reducing the time required to complete this project by approximately two years. There are two main unknown factors that will significantly impact the completion of design, first possible interference with oil well casings under LaCienega Boulevard in the Baldwin Hills area, and the second is the difficult crossing of the San Diego Freeway and Centinela Creek Channel at La Tijera Boulevard. After our consultant has thoroughly investigated these items during the design and construction, a time schedule can be developed. During the interim we would gladly submit periodic status reports to your Board and the RWQCB on this on the progress of this project. The estimated construction cost is $82,500,000.

Cleaning the 10-mile long section of the NOS from JAOS to Hyperion Treatment Plant at 100 feet per day would take a minimum of two years. However, the NORS project should be completed in order to reduce flow in NOS to permit effective cleaning of this sewer line.

Actions being considered by the RWQCB could include a time schedule order, and a cleanup and abatement order. The RWQCB staff report recommends that these actions are not stringent enough. The other possible action is a cease and desist order with a connection ban for the area tributary to NOS at the JAOS. According to the RWQCB staff report "connection bans may only be adopted to prevent an increase in violation." The RWQCB staff believes that there is not sufficient evidence to support this latter action.

BDG:rb

ADDITIONAL PAGE

COUNCIL CHAMBER
ROOM 340 10 AM

COUNCIL CALENDAR
CITY OF LOS ANGELES

- WEDNESDAY -
JANUARY 22, 1986

EXECUTIVE (CLOSED) SESSION

(27)
The City Council will recess to closed session pursuant to Government Code Section 54956.9(a) to confer with its Attorney in reference to proposed Cease and Desist Order No. 86-1 of the California Regional Water Quality Control Board, Los Angeles Region, directed against the City of Los Angeles and scheduled for hearing January 27, 1986, before said Board.

EXHIBIT "D"

ADDITIONAL PAGE

EXECUTIVE (CLOSED) SESSION

MEETING HELD - ACTION TAKEN

(27)

The City Council will recess to closed session pursuant to Government Code Section 54956.9(a) to confer with its Attorney in reference to proposed Cease and Desist Order No. 86-1 of the California Regional Water Quality Control Board, Los Angeles Region, directed against the City of Los Angeles and scheduled for hearing January 27, 1986, before said Board.

EXHIBIT "E"

MATTERS PRESENTED TO THE COUNCIL NOT ON PRINTED CALENDAR

CONCURRING MESSAGES FROM THE MAYOR - DEPARTMENTS NOTIFIED - FILED

84-1215 - Approving the grant agreement with the U.S. Department of Housing and Urban Development authorizing the increase in expenditure authority to the 1984 Rental Rehabilitation Program funds in the amount of $500,000; and further, approving all other recommendations specified in the report of the Grants, Housing and Community Development Committee.

86-0069 S1 - Authorizing the City Attorney to fill one position of Assistant City Attorney, Step III, Code 0553 for the period January 15, 1986 through June 30, 1986; and further, approving the transfer of $250,000 from the Reserve Fund to the Unappropriated Balance and appropriate therefrom to the Contractual Services Account No. 304 in the City Attorney Fund No. 11200 relative to the Voting Rights Act case filed against the City by the United States Justice Department.

85-1967 - Approving submission of the grant application to the American Honda Foundation in the amount of $55,800 in order to provide for a pilot program to develop a high school research internship in marine science and a marine science cirriculum for teachers.

85-1742 - Approving the HDG Grant Agreement between the City and the U.S. Department of Housing and Urban Development for the Hancock Terrace HDG grant; and further, approving all other recommendations specified in the communication from the General Manager, Community Development Department.

85-1730 S1 - Approving the appropriation of $181,405 from the Unappropriated Balance to the following accounts in the Department of Building and Safety Fund No. 10400 relative to the acceleration of the unreinforced masonry building repair program:

Salaries General, No. 101	$177,425
Printing and Binding, No. 212	1,195
Transportation Expense, No. 331	1,864
Office and Administrative Expense, No. 601	821
Total	$181,405

COMMUNICATIONS FROM CHAIRWOMAN, INDUSTRY AND ECONOMIC DEVELOPMENT COMMITTEE - ADOPTED

85-2133 - Recommending that in the matter of Board Order No. 5477 approving Permit No. 581 to Robert W. Nizich and Nino J. Rosini, a co-partnership, the Chairperson of this Committee (the other two members being absent from the meeting at which this matter was scheduled to be considered) RECOMMENDS that Board Order No. 5477, approved as to form by the City Attorney, IS CONCURRED IN, that the accompanying Permit No. 581 granted by the City of Los

City Council at odds over closed-door meeting on sewage

By John Chandler
Herald staff writer

A behind-closed-doors City Council meeting on sewage system problems ended abruptly yesterday after one council member walked out in disgust because the session was not being conducted in public.

After leaving the meeting, Councilman Zev Yaroslavsky declared that his colleagues had a questionable legal basis for holding the discussion in private. "I am not about to be a party to that kind of practice," he said.

Yaroslavsky said that during the closed session some of his colleagues joined him in objecting to it. A motion by him to reconvene the meeting in public failed 6-5. His motion needed eight votes to pass.

The session was called to discuss a $150,000 fine the city may face because of recent sewage spills into Santa Monica Bay. The spills spotlighted the city's sewage system problems and caused political headaches for Mayor Tom Bradley.

The staff of the Los Angeles Regional Water Quality Control Board has recommended the fine and the board is scheduled to consider Monday whether to levy it.

Yesterday's closed council meeting was called to discuss a recommendation by the city attorney's office that the council fight the fine, if it is levied. Two council members told the Herald that a motion by Councilman David Cunningham to follow that advice failed.

Then, Yaroslavsky's motion to have the council continue its debate in public failed. Yaroslavsky subsequently left the meeting.

The city's sewage problems, its response to the proposed fine and the issue of private versus public council debate are due to surface again today. The council's agenda lists another closed-door session to discuss the matters.

State law permits local legislative bodies such as the council to meet behind closed doors to discuss legal matters. City attorneys claimed yesterday that the private debate was proper under that law.

But Yaroslavsky disagreed. "This is principally a policy issue that should be discussed in public and only incidentally a legal issue. There's already enough secrecy around here to last a lifetime."

Councilman Hal Bernson defended the council's closed door session. Bernson said he shared the concerns of city attorneys that the city might end up getting hit with a stiffer fine because of statements of information emerging during a public debate on the sewage issue.

Under a new procedure, the regional water board could assess a maximum fine of $951,650 against the city for three recent sewage spills into Ballona Creek, a channel that leads to Santa Monica Bay.

EXHIBIT "E"

James Gibson -

Council holds secret session on sewage

By John Schwada
Herald City Hall bureau chief

The City Council yesterday went behind closed doors to review a plan to resolve Los Angeles' controversial sewage problems, even though another City Hall board had publicly dealt with the same plan earlier in the day.

The council's decision to conduct a secret meeting closed to the press and public on the sewage problems sparked criticism from one council member, who said the controversial issue deserved to be aired in public.

In an open meeting, the city's Board of Public Works agreed to accept parts of a state plan for halting sewage spills at Ballona Creek and to seek more time to comply with other parts of the plan.

Less than two hours later, the council heard city staff members give the same report that had been given earlier to the Board of Public Works and then ratified the board's action — but all behind closed doors.

Three council members, when told by a Herald reporter of the details of the Board of Public Works meeting, confirmed that the council had covered the same ground in its private session.

"That's exactly what the council discussed in its entirety. It's unbelievable," said one of the council members, all of whom spoke on the condition they not be named.

The propriety of the council discussing in secret a plan by the state's Regional Water Quality Control Board to prevent sewage spills in Ballona Creek was challenged by Councilman John Ferraro before the council went into its private session.

"This is a public matter," Ferraro complained to his colleagues, who in recent months routinely have discussed the sewage problems in private. "It seems we have an executive session for everything."

Council President Pat Russell told Ferraro that she "strongly recommended" that the meeting be held in secret and that such a session was justifiable under state law.

The state's open meeting law allows public groups such as the council to discuss litigation and personnel matters in secret.

Russell, who attended only a few minutes of it, later defended the executive session by saying, "We need to be in executive session so we're not broadcasting our legal strategies ... to (the water quality board's) lawyers."

But one council member, speaking on the condition of anonymity, said another motivation for Russell's support for discussing the sewage issue in private was to prevent potential political embarrassment for Mayor Tom Bradley.

Russell is a longtime ally of Bradley, who is expected to challenge Gov. George Deukmejian in this year's gubernatorial race. Deukmejian has frequently cited the city's sewage problems in criticizing Bradley's record as mayor.

Litigation between the city and the state might arise if the city fights the water quality board's expected approval Monday of the details of its plan to stop the accidental dumping of sewage into Ballona Creek. The water quality board already has fined the city more than $185,000 because of the spills.

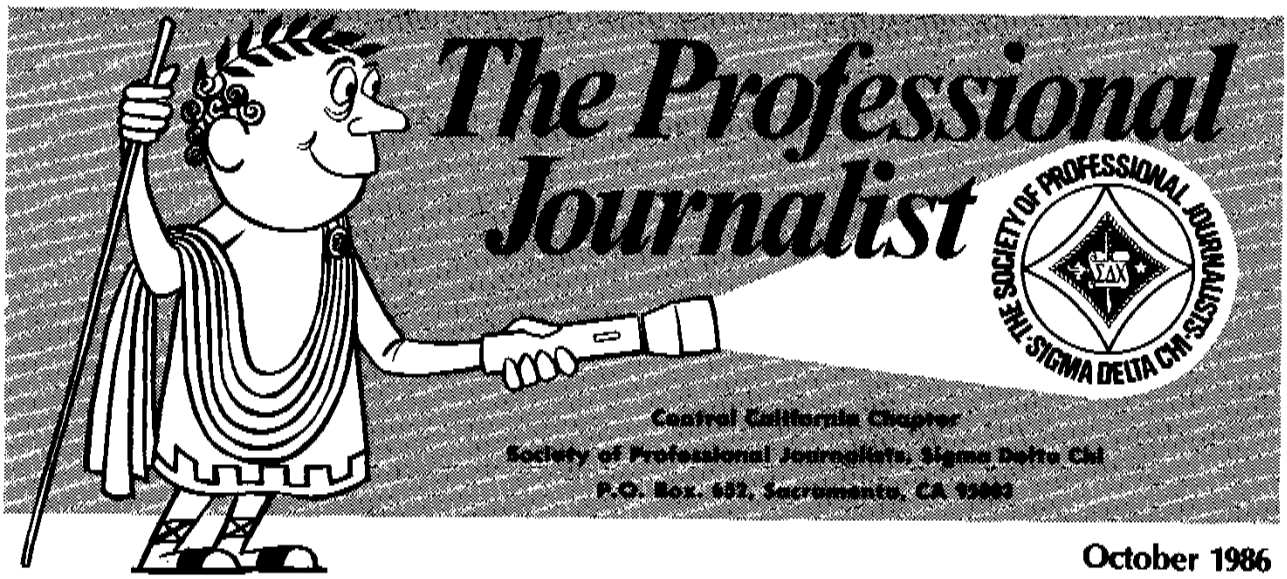
But one council member said discussion of litigation strategies occurred only to an "insignificant degree" during the executive session.

The secret meeting did result in the council agreeing that it will ask for more time to complete four of the seven steps that the water quality board's plan calls for the city to take to correct the Ballona Creek sewage spill problem.

The council's decision follows the public recommendation made by the Board of Public Works. That recommendation was based on a five-page report that detailed the seven steps, the water quality board's deadlines for completing them and the reasons the city needs an extension of the deadlines for four of the steps.

EXHIBIT "F"

A - 264b



October 1986

Chapter meeting Oct. 22 will examine role of news media in reporting on AIDS problem

By PATTI FORSTE
Program Director

Whether the news media is giving an accurate picture of the AIDS situation to the public will be the topic of a panel discussion at the next chapter meeting.

Deborah Blum, science reporter for the Sacramento Bee, will join Sacramento AIDS Foundation's Art McDermott and the director of state relations for the American Red Cross, John Horrell, on Wednesday, Oct. 22 at noon at the Spaghetti Factory, 1910 J St., in Sacramento.

Blum has been reporting on AIDS since she joined The Bee two years igo. She has a graduate degree from the University of Wisconsin.

Both Horrell and McDermott will discuss the education of the public concerning AIDS and how the media plays a role.

The lunch includes spaghetti with a choice of two sauces, salad, French bread and spumoni. Cost is $6.00 for members, $7.00 for non-members. Reservations should be made by Oct. 20 by calling Patti Forste at 371-8577 (h) or 322-0332 (w).

AIDS rumors: Do they belong in news stories?

By MORRIE LANDSBERG

That headline, in a Los Angeles Times series on journalistic ethics, points up a central question facing newspapers today and something that will be reviewed at the chapter's Oct. 22 meeting.

In his Sept. 3 story, David Shaw cited two issues:

- Should a newspaper mention AIDS as a cause of death if AIDS can be proved or is openly acknowledged?
- Should a newspaper mention AIDS if it is only widely believed but neither acknowledged nor proved?

"Both questions involve matters or privacy — medical and sexual," Shaw said, "since the most frequent victims of AIDS are homosexuals and many readers automatically assume someone is gay if he has AIDS, even though the disease also afflicts intravenous drug users and members of certain other groups.

"But the second question also involves a second ethical problem — the propriety of publishing a rumor."

When fashion designer Perry Ellis died, the Washington Post, USA Today, Newsday and the San Francisco Examiner mentioned rumors he had AIDS. The New York Times, Los Angeles Times, San Francisco Chronicle and the vast majority of other newspapers did not. UPI did. AP didn't.

Louis D. Boccardi, AP's president, said he can recall a time when people kept cancer out of the paper. There was an impression, he said, the victim bore responsibility for having the disease, and in the present climate, AIDS is a parallel situation. But it presents a dilemma to editors:

"Most of those close to the deceased know what he died of,"Boccardi said, and yet for the general public, "the cause of death of a prominent person . . . is a relevant piece of information . . . not a ghoulish question."

Shaw brought up another problem, that of concern by public health officials about the under-reporting of AIDS deaths by doctors safeguarding the privacy of AIDS victims and their families.

"By withholding this information, health care officials say, doctors distort the data needed for further research and for the establishment of sound public health policy.

"By not publishing information on AIDS deaths, it is thought, the press contributes to this problem and also compounds the social stigma already attached to AIDS."

In an article published by feed/back (spring 1986), Rodger

● Please see AIDS, 2

President's column

About babies and deadline and fulfillment

By LINDA BEYMER
Chapter President

When I've just faced a day full of deadlines, my son has broken the pot containing my prized white African violet and my husband has called to say he'll be home late — again — I begin to question this Super Mom business.

As a modern woman, I've been led to believe, given enough time, there isn't anything I can't achieve.

Time. There's the rub. As any mother of a 1-year-old bouncing baby bundle of terror will tell you, there aren't enough hours in the day to keep up with them.

Matthew is constantly testing his new-found abilities. While I'm attempting to make that gourmet dinner I feel I'm expected to prepare, my toddler is diligently seeking the source of those flashing colored lights on the video-cassette recorder, taking the machine apart piece-by-piece until he finds them.

"No!" I shriek. He looks at me, eyes twinkling, giggling merrily. It seems I say "no" quite a bit. I have this nagging fear one day at work, one of my reporters will be standing on a chair, seeking out a reference book on a top shelf, when I'll scream, "David, get down from there. You'll hurt yourself!"

It isn't always easy to be a mommy at home and a manager at work. Children require no tact (at the age of 1) and don't often appreciate — or understand — the phrase, "I really don't feel that's appropriate."

Nor do they comprehend why, after Mommy's been gone all day at work, laundry and dinner often regrettably take precedence over peek-a-boo.

If Matthew could talk, he would probably give me a puzzled look and ask, "Why are you running from one end of the house to the other with a sack of wet diapers in one hand and a jar of strained Gerber's vegetable beef dinner in the other?"

I would tell him a Realtor is coming to look at the house, Daddy's not home from work yet and I'm running late for an SPJ board meeting. If he were old enough to understand, I would put him on one knee and explain to him just why Mommy bothers with all the rush.

I'd concede some days, when I've been up half the night with a teething baby and I have a bad headache and more than enough headlines to write, the pace seems overwhelming.

But I'd balance that by explaining, as he grows older, Matthew will find life is about challenges. He'll learn a schedule that is full of obligations and responsibilities is much more fulfilling than one that is not.

And he'll find that, if he chooses a field he loves, work can be exciting and satisfying. The so-called life in the fast lane can be exhilarating, even if it means Kentucky Fried Chicken sometimes instead of home-cooked meals.

I'd say it's the little things along the way that make it all worthwhile. Like the time a free-lancer told me I had renewed her enthusiasm for writing. I think it was that same day Matthew greeted me with shrieks of delight when I arrived to pick him up at the babysitter's house.

I felt as if, just for a moment, I had achieved the perfect balance and the path I had chosen was worth the pain it took to travel it.

AIDS: A question of rumors

● From 1

Streitmatter, American University journalism professor, concluded with these words:

"Hundreds of hours of air time and many tons of newsprint will be devoted to this, the most sinister disease of the century, as it takes thousands of lives and challenges the press by creating still more hurdles.

"Just as a cure for AIDS is being sought one step at a time with few medical guidelines, so should the coverage of AIDS proceed — thoughtfully, and not necessarily by the journalism textbook. Reporters will be able to handle this and other complex stories if they remember the ultimate lesson of AIDS coverage: Newspapers are formed by applying black ink to white paper, but journalism is never a black-and-white business."

Student chapter member named regional mark of excellence winner

By D.R. BERRY
President, Student Chapter

Holly Heyser, a campus chapter member at California State University, Sacramento, recently learned she was a regional winner in the Society's Mark of Excellence competition. She now goes on to the national competition.

Heyser won in the Best Editorial writing category. The student chapter is trying to raise extra funds to help send her to Atlanta, Ga., for the national convention.

□□□

The CSUS chapter held its first general meeting Sept. 17. Art Nauman, the Sacramento Bee ombudsman, was the featured speaker. He spoke about what an ombudsman is and related several stories about his career. A question-and-answer session followed.

Kitty O'Neal, a CSUS graduate and radio personality, will be the next speaker. She'll talk about radio journalism and her work as producer of KFBK's Rush Limbaugh talk show. The meeting is scheduled Tuesday, Oct. 14, at 7:30 p.m. in the Oak Room of the Student Union building.

KCRA news anchor Stan Atkinson will speak to the chapter Oct. 23. His topic: "Difficulties journalists face in covering Third World countries."

Cheryl Romo goes Scandinavian

Cheryl Romo, a former chapter president, has a new job in the nation's capital: Washington-based Scandinavian correspondent for States News. As such she will write for the major papers in Sweden, Norway, Denmark and Finland. Her output will be translated and transmitted by the New York Times Syndicate.

On the personal side, Cheryl writes husband Charley Roberts is busy as Washington correspondent of the Los Angeles Daily Journal, and Michael is developing a Southern accent in kindergarten, you-all.

Central Cal Pro Chapter welcomes its newest members

By ALAN PRITCHARD
Chapter Secretary

It looks as if your SPJ Chapter will close out the year with 116 paid-up members, an increase of 16 from the 1985 figure.

Unfortunately, 26 persons who were members in 1985 failed to pay chapter dues for 1986 or we could have recorded up to 141 members for 1986. Undoubtedly some thought they were paid, some forgot. I can't imagine any of them deliberately ignoring membership in a professional news organization located in the hottest legislative cauldron in the country.

Maybe they don't know it, but they need us as much as we need them.

There were 39 new members this year and welcome to them. Eleven of these were new to the national as well as the chapter. They are Dan Durbec of the Manteca Bulletin, Richard Ek of CSU Chico, Linda Holderness of Neighbors, Bob Ingle of the California Dental Association, Kathleen L'Ecluse of the Fairfield Daily Republic, Glenna Lee of UOP Stockton, Wayne Miyao of the CNPA, R. Michael Montgomery of KXPR Sacramento, Arthur Nauman of the Sacramento Bee, Pat Sullivan of the LA Daily Commerce and Judy Tachibana of the Sacramento Bee.

Those previously members of national SPJ and affiliating with the chapter this year are Mary Apanasewicz of the Lodi News-Sentinel, Jim Barrera of Woodland, Joan Clark of Miwuk Village, Joan Deutsch of the Sacramento Union, Jim Drennan of KCRA Sacramento, Nancy Gilmore of Sacramento, James Hamblin of Sacramento, Linda Hanf of the Folsom Telegraph-News, Jerry Harrell of Carmichael (a returnee), Catherine Hedgecock of Stockton, Greg Kristapovich of Orangevale;

Lyle Lafaver of PG&E Chico, Joseph Lassica of the Sacramento Bee, Eric Luchini of Sacramento, Sue Mote of the Sacramento Union, Rebecca Murphy of Carmichael, Albert Nish Jr. of Modesto, Steve Nishimura of West Sacramento, Bob Nishizake of the Lodi News-Sentinel, Loretta Nofsinger of the Sacramento Bee, Deborah Pacyna of Citrus Heights, Gerald Perry of PG&E Modesto, Mari Petty of the Corning Daily Observer, Charles Rogers of Waterford, Miriam Sagaser of Sacramento, Linda Schneider of Sacramento, Eleanor Shaw of the Sacramento Bee and Robert Whittington of Stockton.

The total on the active file, including delinquents and prospects, amounted to 153. Of these, 86 are male and 67 female. Most worked for daily newspapers (47) while public relations accounted for 22.

Twelve worked on weekly newspapers, seven are college professors (journalism or English), six are in television and three in radio. Six are free-lancers, four work for a publishers association, four are in magazines, one works for a news service and five are retired.

Two serious losses this year were Cheryl Romo and Charley Roberts who moved to Washington, D. C. They were extremely active in chapter, regional and national affairs of the Society of Professional Journalists. We miss them very much.

Chapter officers

President: Linda Beymer, W: 924-7209, H: 391-7534

Vice President/Newsletter: Morrie Landsberg. H: 422-1828. Send copy to 6180 South Land Park, Sacramento, 95831

Secretary: Alan Pritchard. H: 428-4716. Address: 6448 Oakridge Way, Sacramento 95831

Treasurer: Hal Silliman. Address: McGeorge School of Law Public Relations Office, 3200 5th Ave., Sacramento, Calif. W: 739-7115.

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Look for more and more women covering sports

The locker room isn't the only problem for the few women working as sports reporters. Acceptance, says Kristine Hanson of KCRA-TV, is another.

Hanson, now assigned full time to sports after 11 years as a weather reporter, told the chapter dinner Sept. 30 conditions for women have improved because they have demonstrated their credibility in what has traditionally been a man's world.

Players and officials "have to believe women are there not to gawk but to do a job," she said.

Julie Fie, publicity director for the Sacramento Kings, said her basketball team has no policy of excluding women from the locker room after a game. She doesn't go in herself as a rule, and in the entire National Basketball Association, only three women cover its games. But if one of them wants to interview a player, she yells ahead, "women coming in!"

Without access, Hanson said, you lose immediacy and spontaneity. Now women are no longer barred, she said you'll see more and more women in sports reporting. It would help if they had a role model on the networks but the fact is "we haven't seen enough women succeed." Unfortunately, she said, the networks have thrown women into sports who were not qualified, and they quickly disappeared.

From the audience, Stan Johnson, Sacramento Bee executive sports editor, remarked his paper has four women in its sports department, one (Susan Fornoff) as a writer. He said the Bee is actively campaigning to get more women in sports but they're hard to come by.

The Professional Journalist

This issue of the Central California Professional Chapter newsletter was produced by Morrie Landsberg, editor; Susanne Rockwell; and Jim Drennan, and printed by The Sacramento Union.

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Changing youir mailing address?

Please let chapter secretary Alan Pritchard know by writing 6448 Oakridge Way, Sacramento, CA 95831, or calling 428-4716.

The Duke's votes outweigh signing of FoI bills

By DAN CARSON
FoI Director

Gov. George Deukmejian has vetoed major legislation to protect the First Amendment rights of college newspapers, to open executive task forces to public scrutiny and to force localities to justify going behind closed doors because of threatened lawsuits.

But the governor did sign a measure giving citizens the power to sue and overturn actions taken by local government agencies in violation of public notice and public-meeting requirements.

Summing up the results of the 1986 session, California Newspaper Publishers Association legal counsel, Joseph "Terry" Francke, voiced general displeasure with Deukmejian's stance.

"Shocked, chagrined, disappointed — pick your favorite word," he joked. But Francke took solace in the governor's signature of the bill putting enforcement teeth into the local government open-meetings law and the fact the Legislature even put the vetoed measures on Deukmejian's desk.

"I think you have to make the point the Legislature went the right way all three times," he said. "This is not a case of Senate or Assembly members scuttling and wanting to hide public records.

"They want to open task-force meetings. They want the public to be aware of important legal issues that may bear on city policy. They want students at California State University to have newspapers that can take an editorial position even on partisan political matters. And they want finally to have the Brown Act with some enforceable teeth."

The measure winning signature, AB 2674 by Assemblyman Lloyd Connelly, D-Sacramento, generally requires city councils and boards of supervisors to post specific agendas of their meetings 72 hours in advance. It also, in some cases, permits citizens to have local government actions declared null and void if the local government open-meeting act, known as the Brown Act, is found to have been violated.

Connelly hailed the signing of the bill, noting the prior penalty for Brown Act violations, criminal indictment, was useless. No one had ever been successfully prosecuted for a Brown Act violation in the history of the statute, he said.

Last year, Deukmejian had signed a Connelly bill allowing similar citizen lawsuits to enforce open-meeting laws applying to state government agencies.

One bill to fall victim to a veto was AB 1720 by Assemblyman Dan Hauser, D-Arcata. It stemmed from a 1984 incident in which editors of the Lumberjack newspaper at Humboldt State University wrote an editorial endorsing several political candidates.

The Hauser measure would have permitted such endorsements if the editors included a disclaimer in the publication making it clear the published views reflected their opinions and not that of the university system. The governor's veto message states:

"The trustees are granted the responsibility for the administration of the California State University. They have established administrative rules governing the use of funds, including state funds, for political purposes as evidenced by editorials in student publications. Hence, there is no need for this legislation."

Francke disagreed with that contention, and said a continued federal court case probably will ultimately determine whether the students' First Amendment rights to freedom of expression will supersede university constraints on newspaper editorials.

Deukmejian's veto of SB 2173 blocked enactment of a measure that would, among other things, have required state government task forces appointed by executive order to operate in public and provide public notice of their meetings.

Existing law says commissions appointed by the governor cannot act secretly. But the state legislative counsel and Gov. Deukmejian's legal affairs secretary have both offered their opinion task forces are different from commissions and therefore are not bound by openness requirements.

Sen. Milton Marks, D-San Francisco, introduced a measure to change the law but dropped it quickly in 1984 in the face of a Deukmejian veto threat. In his veto of the 1986 bill by Sen. David Roberti, D-Hollywood, Deukmejian asserted the restrictions on his task forces are "vague, potentially precluding virtually all forms of executive meetings from remaining confidential."

In drafting the bill, Roberti applied the public-access requirements to "any advisory" board created by a formal action of the governor, other state agencies, lawmakers themselves or local governing boards. The bill specifically revoked an exemption for advisory panels with three or fewer members, required them all to provide public notice of their meetings to persons who requested it.

Deukmejian said these features "may seriously hamper the economic and efficient functioning of government."

SB 2173 also would have deleted a law allowing California State University trustees to meet in secret to choose university sites. And it would have closed what the CNPA fears is a massive loophole in the local open-meeting requirements.

State law allows local governing boards to meet behind closed doors to discuss lawsuits. But the attorney general has ruled the current statute also permits agencies to discuss policy issues in secret in order to avoid potential lawsuits. While it contests that interpretation, CNPA had inserted into SB 2173 provisions that would have narrowly restricted the grounds for such secret talks and required public notice that they were being conducted.

Assemblyman Phil Isenberg, D-Sacramento, tried unsuccessfully to remove those provisions from the bill during a hearing of the Assembly Ways and Means Committee.

Deukmejian, at the urging of organizations representing local governments, said his veto came because "the provisions of this bill dealing with the attorney-client privilege are unduly restrictive, ignoring both the realities of a litigious society and the legitimate need for timely and candid legal advice."

But Roberti assailed the governor for vetoing a bill he termed "decent and right" and "would have expanded the public's right to know. These are bills that are basic to a democracy."

TO BE PUBLISHED IN THE OFFICIAL REPORTS

OFFICE OF THE ATTORNEY GENERAL
State of California

JOHN K. VAN DE KAMP
Attorney General

OPINION	:	No. 86-502
of JOHN K. VAN DE KAMP Attorney General	:	APRIL 1, 1987
CLAYTON P. ROCHE Deputy Attorney General	:	

THE HONORABLE RICHARD J. MOORE, COUNTY COUNSEL, ALAMEDA COUNTY, has requested an opinion on the following question:

Are meetings of the Board of Directors of the Oakland-Alameda Coliseum, Inc. subject to the open meeting requirements of the Ralph M. Brown Act, Government Code section 54950 et seq.?

CONCLUSION

Meetings of the Board of Directors of the Oakland-Alameda Coliseum, Inc. are subject to the open meeting requirements of the Ralph M. Brown Act, Government Code section 54950 et seq.

ANALYSIS

The Ralph M. Brown Act, Government Code section 54950 et seq.1/ requires that all meetings of "legislative bodies" of "local agencies" as defined in the act shall be open and public unless excepted by the act or by some other confidentiality provision of the law. (See 54951-54953; Sacramento Newspaper Guild v. Sacramento County Bd. of Suprs. (1968) 263 Cal.App.2d 41.) "Legislative body" as defined in the act is not restricted to the actual governing body of a "local agency."

1. All section references are to the Government Code unless otherwise indicated.

Also "local agency" as defined in the act may include nongovernmental bodies.

This request for our opinion posits the question whether the Board of Directors of the Oakland-Alameda Coliseum, Inc. is subject to the open meeting requirements of the Ralph M. Brown Act. The corporation is a California nonprofit corporation. Its board consists of private citizens, none of whom are appointed by any governmental officer or agency.

I. FACTUAL BACKGROUND

The Oakland-Alameda County Coliseum, Inc. was formed in 1961 by six private citizens under the then California General Nonprofit Corporation Law. Its stated purposes were to acquire the necessary real property and to construct a multi-purpose public recreation coliseum and stadium in the City of Oakland, and to conduct the business affairs of such a complex so as to ultimately vest in the City of Oakland and the County of Alameda all the right, title and interest of the corporation in the Coliseum complex.

To effectuate these purposes the corporation entered into a master agreement with both the City of Oakland and the County of Alameda which provided in detail for the acquisition and construction of the Coliseum complex, the operation thereof by the corporation, and the ultimate transfer of the complex to the city and the county. This agreement was entered into in the latter part of 1963.

The master agreement provided that the Coliseum should be constructed and financed through the medium of a classic lease and lease-back such as have been approved in cases such as Dean v. Kuchel (1950) 35 Cal.2d 444; City of Los Angeles v. Offner (1942) 19 Cal.2d 483 and County of Los Angeles v. Nesvig (1965) 231 Cal.App.2d 603.2/

Accordingly, the Coliseum, Inc. agreed to acquire at its own expense the real property on which the Coliseum complex was to be constructed and to convey it (including improvements to be made thereon) to the city and county.

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2. The lease and lease-back is commonly used to finance the construction of public facilities through the aegis of a nonprofit corporation, thus avoiding the debt limitation provisions of the California Constitution applicable to the state and local governments. (See. Cal. Const., art. XVI, §§ 1, 18.). See also section 54240 et seq. re "public leasebacks."

The city and county agreed to deposit with a local bank, as trustee, the sum of $1,000,000 as the purchase price of the real property. Coliseum, Inc. further agreed to simultaneously deposit the sum of $26,000,000 with that bank, as trustee, and agreed to place the deed to the real property in escrow for delivery to the city and county. The sums so deposited were to be applied to the purchase of the Coliseum complex site and (at the direction of the corporation) to the construction costs and expenses of the complex.

In the grant from Coliseum, Inc. to the city and county of the real property, the corporation reserved in its favor a ground lease for 40 years. The corporation then executed a sublease of the land and all improvements to be built thereon to the city and county which would expire 10 days before the expiration of the ground lease. In consideration of the sublease, the city and the county agreed to pay Coliseum, Inc. $1,500,000 per year which would be utilized to retire the bonds the corporation would issue to finance construction of the Coliseum complex. The master agreement further provided that Coliseum, Inc. agreed to build and operate the Coliseum facilities.

Additionally, the city and county agreed to pay to Coliseum, Inc. the sum of $250,000 as consideration for the execution of the master agreement. They also agreed to pay the corporation the sum of $1,000,000 in consideration of the corporation's agreement to have the plans and or specifications prepared and subsequently to transfer title to these plans and specifications to the city and county, subject, however, to the corporation's use. Finally, the master agreement provided that upon the termination of the 40 year ground lease which the corporation had reserved to itself, the title to all the Coliseum facilities would vest in the city and the county

As noted, the master agreement contained as a part thereof the actual operating agreement between Coliseum, Inc. and the City and the County. Under that "sub-agreement" the corporation agreed to operate the Coliseum facilities as an independent contractor and pay the net income from such operation to the city and the county. The operating agreement permitted and permits the corporation to adopt an annual budget, establish rules, regulations, rates and charges for the operation of the Coliseum complex. However, these matters are subject to be modified at the instance of the city and the county.

It is thus seen that for some time into the future the Oakland Coliseum complex is to be operated by the Oakland-Alameda Coliseum, Inc. Its basic policy decisions will be made by that corporation's board, subject to

possible change by the city and county. In short, it will not be until the year 2003 that the Oakland Coliseum complex will be both owned and operated by the city and county.3/

II. RESOLUTION OF THE ISSUE

As noted at the outset, the Ralph M. Brown Act is applicable to "legislative bodies" of "local agencies" as these are defined in the Act. As stated in section 54953:

> "All meetings of the legislative body of a local agency shall be open and public, and all persons shall be permitted to attend any meeting of the legislative body of a local agency, except as otherwise provided in this chapter."

However as noted at the outset, a "legislative body" as defined may not necessarily be the governing body, and a "local agency" as defined may not necessarily be a governmental unit.

Before discussing the two statutory provisions upon which the resolution of the question presented depends, that is, whether the Board of Directors of The Oakland-Alameda Coliseum, Inc. is subject to section 54953, supra, and other provisions of the Ralph M. Brown Act, we wish to dispose of a preliminary or threshold issue. It has been suggested that the Oakland-Alameda Coliseum, Inc. as an entity meets none of the definitions of a "local agency" set forth in the act. Accordingly, or so goes the argument, since the act applies only to "legislative bodies" of "local agencies", it is immaterial that the corporation or its board of directors may literally fall within the meaning of one or more of the definitions of "legislative body" set forth in the act. Although appealing in its simplicity, we reject such suggestion since it is based upon a faulty premise. That premise is that before a particular board or commission is subject to the Ralph M. Brown Act, the entity of which it is a part must itself be a "local agency." However, as we will demonstrate herein, all that is necessary is that a particular board or commission or other multi-member body meets any one of the definitions of "legislative body" contained in the act. If it does, then that particular

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3. We note parenthetically that the master agreement, including the method of financing the construction of the Oakland Coliseum complex and the operating agreement, was upheld by the courts as being in all respect "lawful and valid" in County of Alameda, et al.v. Eugene Warino, as auditor of the County of Alameda, et al., Alameda County Superior Court No. 337071.

board, commission or other multi-member body will be a "legislative body" of the local agency to which it is related or "tied" by the statutory definition.4/

For purposes of the Ralph M. Brown Act "local agency" is defined in three sections, that is, sections 54951, 54951.1, and 54951.7. For purposes of the act "legislative body" is defined in four sections, that is, sections 54952, 54952.2, 54952.3 and 54952.5.

Section 54951 sets forth what might be characterized as the general definition of "local agency." It provides:

> "As used in this chapter, 'local agency' means a county, city, whether general law or chartered, city and county, town, school district, municipal corporation, district, political subdivision, or any board, commission or agency thereof, or other local public agency."

Thereafter,"local agency" is defined in sections 54951.1 and 54951.7 to include certain nonprofit corporations, neither of which would include the Oakland-Alameda Coliseum, Inc. Section 54951.1 provides:

> "For the purposes of this chapter, and to the extent' not inconsistent with federal law, the term local agency' shall include all private nonprofit organizations that receive public money to be expended for public purposes pursuant to the 'Economic Opportunity Act of 1964.'"

And section 54951.7 provides:

> "'Local agency' includes any nonprofit corporation, created by one or more local agencies, any one of the members of whose board of directors is appointed by such local agencies and which is formed to acquire, construct, reconstruct, maintain or operate any public work project."

As will be recalled, the Oakland-Alameda Coliseum, Inc. was formed by six private individuals. And further, no member of its board of directors is appointed by either the City of

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4. The faulty basic premise also overlooks the real possibility that a multi-member group which meets one of the definitions of "legislative body" contained in the act may be a diverse group having no relationship to any common entity.

Oakland or the County of Alameda. Furthermore, it has nothing to do with the Economic Opportunity Act of 1964.

We now proceed to the definitions of "legislative body" for purposes of the Ralph M. Brown Act. Initially, section 54952 sets forth what may be characterized as the general definition thereof and provides:

> "As used in this chapter, 'legislative body' means the governing board, commission, directors or body of a local agency, or any board or commission, committee, or other body on which officers of a local agency serve in their official capacity as members and which is supported in whole or in part by funds provided by such agency, whether such board, commission, committee or other body is organized and operated by such local agency or by a private corporation."

Section 54952.2 then provides a definition of "legislative body" for bodies which have been delegated authority of a local agency. It provides:

> "As used in this chapter, 'legislative body' also means any board, commission, committee, or similar multi-member body which exercises any authority of a legislative body of a local agency delegated to it by that legislative body."

Section 54952.3 thereafter provides a definition of "legislative body" so as to include advisory bodies to a local agency. It provides:

> "As used in this chapter 'legislative body' also includes any advisory commission, advisory committee or advisory body of a local agency, created by charter, ordinance, resolution, or by any similar formal action of a legislative body or member of a legislative body of a local agency. . . .
>
> "'Legislative body' as defined in this section does not include a committee composed solely of members of the governing body of a local agency which are less than a quorum of such governing body. . . ."

And finally, section 54952.5 provides a definition of "legislative body" which includes permanent boards and commissions of a local agency. It provides:

> "As used in this chapter 'legislative body' also includes, but is not limited to, planning

commissions, library boards, recreation commissions, and other permanent boards or commissions of a local agency."

It is thus seen that the fact that a nonprofit corporation is not one of the types contemplated by sections 54951.1 or 54951.7 supra, does not necessarily preclude its inclusion within the requirements of the Ralph M. Brown Act. This is manifest from a reading of the definition of "legislative body" set forth in the general definition of section 54952 where certain boards, commissions, committees or bodies of a local agency are to be included "whether such board, commission, committee or other body is organized and operated by such local agency or by a private corporation." (Emphasis added.) In short, it is seen that if the statutorily specified relationship exists between a privately organized or operated committee and a "local agency", that board, commission or other body will be a legislative body of that local agency.

This same reasoning should apply throughout. Thus where a private board or commission meets the criteria set forth in any of the definitions of "legislative body", a sufficient connection will exist between it and the local agency to which it is "tied" so as to make it a "legislative body" of that local agency. We so conclude.5/

Having disposed of this preliminary threshold issue, we proceed to the main issue, that is, whether the Board of Directors of the Oakland-Alameda Coliseum, Inc. is subject to the Ralph M. Brown Act. As we view the problem, the question is whether to focus upon the definition of "local agency" set forth in section 54951.7, supra, to resolve the issue, or whether to focus upon the definition of "legislative body" set forth in section 54952.2 to do so.

Section 54951.7, enacted in 1970 (Stats 1970, ch. 710, § 1), provides that a "local agency" will include a nonprofit corporation formed 1) "to acquire, construct, reconstruct, maintain or operate any public work project" when 2) the nonprofit corporation was formed by one or more local agencies and 3) any one of its board members is appointed by such local agencies. The Oakland-Alameda

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5. We would also note the futility of attempting to narrowly construe what is a "local agency" for purposes of the Ralph M. Brown Act when one observes that "any board or commission thereof" is both a "local agency" as defined in section 54951 of the act and a "legislative body" as defined in section 54952 of the act. The Legislature itself has blurred any line one might attempt to draw between the two.

Coliseum, Inc. would meet criteria "1,"6/, but not "2" or "3." As will be recalled, the corporation was formed by six private citizens in 1961, and none of its board is appointed either by the City of Oakland or the County of Alameda.7/

Section 54952.2, enacted in 1981 (Stats 1981, ch. 968, § 25), defines "legislative body" to mean also "any board, commission, committee, or similar multi-member body which exercises any authority of a legislative body delegated to it by that legislative body." As will be developed at length, post, the legislative bodies of both the City of Oakland and the County of Alameda may be said to have delegated some of their powers to operate a Coliseum complex to the Oakland-Alameda Coliseum, Inc., and hence to its board of directors as its governing board.

We focus first upon section 54951.7. It has been urged that this section should govern our issue since it is the special provision of the Ralph M. Brown Act which specifies and hence governs which nonprofit corporations formed to construct or acquire and operate public works projects fall within the requirements of the act. This follows by application of the rule of construction that a special statute governs a more general statute which also would encompass the same subject matter, whether enacted before or after the more general statute. (See, e.g., Bailey v. Superior Court (1977) 19 Cal.3d 970, 977, fn. 8.) Accordingly, or so goes the argument, since the Oakland-Alameda Coliseum, Inc. does not fit the criteria set forth

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6. "There is no doubt that the term 'public works' means 'all fixed works constructed for public use,'. . .". (Cuttino v. McKinley (1933) 130 Cal.App. 136, 138. See also Raley v. California Tahoe Regional Planning Agency (1977) 68 Cal.App.3d 965, 982-983.)

7. One might speculate that the city and the county may have significant input as to who is appointed to the board. However, this would not vitiate the Articles of Incorporation of Oakland-Alameda Coliseum, Inc. which states:

> "Except to the extent that the By-Laws may provide that any vacancy created by the resignation or removal or a director elected by the members may be filled by the vote of the members, if the office of any director becomes vacant, the remaining directors in office, by a majority vote, may appoint any qualified person to fill such vacancy. . . ."

in section 54951.7, the Legislature intended to exclude it and similar nonprofit corporations from the requirements of the act.8/

We, however, decline to follow this argument for the reason that this rule of construction, that the special provision controls the more general provision (no matter which was first enacted), requires that the two statutes be inconsistent or in conflict. (See, e.g., People v. Garcia (1986) 178 Cal.App.3d 887, 894; Code Civ. Proc. 1859). It is readily seen that there is no conflict between the language of sections 54951.7 and 54952.2. The former merely sets forth criteria for including certain nonprofit corporations within the scope of the Ralph M. Brown Act. The latter provision merely provides that certain multi-member bodies will be considered "legislative bodies." Section 54952.2 is coincidentally broad enough to include those nonprofit corporations included within the scope of 54951.7 which have been delegated powers of "legislative bodies". In short, there is no conflict between these sections. There is at most an overlap in these statutory provisions.

Having rejected the applicability of section 54951.7 to resolve the issue herein, we now proceed to section 54952.2, the 1981 enactment. It is clear that both the City of Oakland and the County of Alameda would themselves have the power to operate the Coliseum complex. (See Gov. Code, § 25351 et seq.; City of Oakland v. Oakland Raiders (1982) 32 Cal.3d 60, 71.)9/

As will be recalled, the Oakland-Alameda Coliseum, Inc. was initially formed to acquire the necessary real property for and to construct and operate the Coliseum complex in the City of Oakland. The master agreement between the corporation and the city and county contained a "sub-agreement", that is, the "operating agreement". Under the latter agreement the corporation agreed to operate in the status of independent contractor all the Coliseum facilities (which the corporation had initially conveyed to

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8. This argument also brings into play the rule of construction that "the expression of certain things in a statute necessarily involves exclusion of other things not expressed." (Henderson v. Mann Theaters Corp. (1976) 65 Cal.App.3d 397, 403.)

9. Since the Coliseum complex was completed many years ago, we need not concern ourselves herein with respect to any delegation by the city and the county to acquire and construct such a complex.

the city and county, and ultimately had leased back to them). The operating agreement required and requires the corporation to pay the net income from such operation to the city and county. It also permitted and permits the corporation to adopt an annual budget, establish rules, regulations, rates and charges for the operation of the Coliseum complex to the corporation, and hence to its board of directors. This "operating agreement" parallels the operating agreement discussed in County of Los Angeles v. Nesvig, supra, 231 Cal.App.2d 603 with respect to the County Music Center. In that case the County of Los Angeles, also through the aegis of a nonprofit corporation and a lease and lease-back, provided for the construction of the Music Center. In that case, the county also provided that this nonprofit corporation should operate the Music Center under an "operating agreement" for 40 years.

Noting that a public body may not delegate its powers of control over public affairs, the court nonetheless held that the operating agreement was a lawful delegation of county functions stating:

> "Clearly, the operation and management of places of public assembly is an administrative function which may be delegated . . . the issue in each case of delegation is whether ultimate control over matters involving the exercise of judgment and discretion has been retained by the public entity . . .
>
> ". . . In Haggerty [Haggerty v. City of Oakland, 161 Cal.App.2d 407] . . . the lease of a convention hall and banquet building by the City of Oakland for operation by a private party was found to be a valid exercise of city power under proper controls, since under the lease the city retained the right to control the use of the premises for convention or banquet purposes and to control prices, charges, subleases, and practices of the lessee." (Id., at p. 617.)

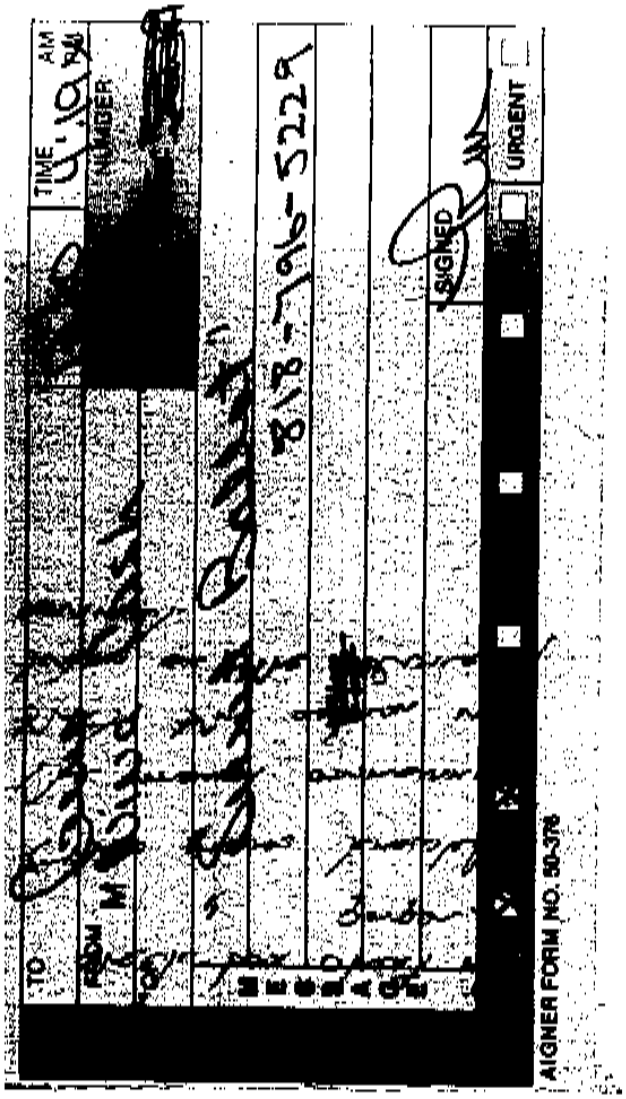
Accordingly, the board of directors of the corporation, as its governing body, have been delegated powers of the city and county to operate the Coliseum complex. Therefore, the status of the corporation and its board of directors is to be determined by section 54952.2, as added to the Ralph M. Brown Act in 1981, and not by inferences to be drawn from section 54951.7, the section added in 1970 relating specifically to nonprofit corporations formed to construct or operate public works projects.

In so concluding, we would point out that a body which has been delegated powers of a "legislative body" of a local agency pursuant to section 54952.2 will itself be a "legislative body" for purposes of the Ralph M. Brown Act only when meeting with respect to the exercise of those delegated powers. Such a delegation may be narrow or may be virtually all encompassing. We appear to be dealing with the latter form of delegation herein.

Conceivably, the Board of Directors of the Oakland-Alameda Coliseum, Inc. could meet for the sole purpose of discussing matters which do not fall within the scope of any delegation from the city or the county, for example, a discussion of purely corporate matters unrelated to the operation of the Coliseum complex. However, as a general proposition, it would seem that their meetings of necessity would normally relate to their delegated powers.

Accordingly, we conclude that the meetings of the Board of Directors of the Oakland-Alameda Coliseum, Inc. are subject to the open meeting requirements of the Ralph M. Brown Act.

* * * * *



The Sacramento Bee

Locally owned and edited for 129 years
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C.K. McCLATCHY, *editor, president, 1883-1936*
WALTER P. JONES, *editor, 1936-1974*
ELEANOR McCLATCHY, *president, 1936-1978*

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Wednesday, August 20, 1986

C.K. McCLATCHY, *editor*
GREGORY E. FAVRE, *executive editor*
PETER SCHRAG, *editorial page editor*
FRANK R. J. WHITTAKER, *general manager*

Editorials

Legal Secrecy

Two years ago, the Legislature thought it had closed one of the most abused loopholes in the Brown Act, the state's open-meeting law. Because so many local government bodies were asserting the attorney-client privilege as an excuse to conduct important public business in closed session, lawmakers passed a bill by Sen. Barry Keene to specify that government agencies could meet with attorneys in private when the agency was being sued, when it was thinking of suing or when it faced a significant risk of litigation.

That legislation was meant to settle the matter. But in an informal opinion earlier this year, Attorney General John Van de Kamp informed Keene that his bill, as written, did not constitute the only attorney-client exceptions to the Brown Act, but only specified three that were permissible. It did not prevent public bodies from also asserting the attorney-client privilege to meet in secret to receive legal advice on almost any government action, Van de Kamp said. That broader interpretation of the attorney-client exception to the Brown Act threatens to eclipse the state's sunshine laws.

To avoid that possibility, Sens. Keene and David Roberti are back this year with a bill, SB 2173, that makes clear that agencies can meet in private with their lawyers *only* to discuss pending litigation or when they spell out in advance facts that lead them to believe they face "significant exposure" to litigation. That limited attorney-client exception strikes the right balance between openness and the flexibility government bodies must have to carry out legal strategies.

Unfortunately, that balance doesn't satisfy the League of California Cities. It is pushing the Assembly Ways and Means Committee, which will consider SB 2173 today, to add a whole new loophole to the Brown Act that would permit public bodies to meet behind closed doors to discuss proposed contracts with outside parties such as real estate developers. But there is no evidence such an exemption is needed. Public bodies, by delegating contract negotiations to subcommittees or agency executives, already have all the authority they need to be effective negotiators. The League of Cities amendment, which would cover an enormous range of local government business, would make the Brown Act a virtual invitation to secrecy.

Some clarification of SB 2173 is in order. Amendments to spell out more plainly what is meant by "significant exposure to litigation" would be useful both to government officials and the courts that must enforce the law. But the contract loophole suggested by the cities would make SB 2173 a vehicle to destroy the Brown Act, not a bill to save it.

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Editorials

Legal Secrecy

Two years ago, the Legislature thought it had closed one of the most abused loopholes in the Brown Act, the state's open-meeting law. Because so many local government bodies were asserting the attorney-client privilege as an excuse to conduct important public business in closed session, lawmakers passed a bill by Sen. Barry Keene to specify that government agencies could meet with attorneys in private when the agency was being sued, when it was thinking of suing or when it faced a significant risk of litigation.

That legislation was meant to settle the matter. But in an informal opinion earlier this year, Attorney General John Van de Kamp informed Keene that his bill, as written, did not constitute the only attorney-client exceptions to the Brown Act, but only specified three that were permissible. It did not prevent public bodies from also asserting the attorney-client privilege to meet in secret to receive legal advice on almost any government action, Van de Kamp said. That broader interpretation of the attorney-client exception to the Brown Act threatens to eclipse the state's sunshine laws.

To avoid that possibility, Sens. Keene and David Roberti are back this year with a bill, SB 2173, that makes clear that agencies can meet in private with their lawyers *only* to discuss pending litigation or when they spell out in advance facts that lead them to believe they face "significant exposure" to litigation. That limited attorney-client exception strikes the right balance between openness and the flexibility government bodies must have to carry out legal strategies.

Unfortunately, that balance doesn't satisfy the League of California Cities. It is pushing the Assembly Ways and Means Committee, which will consider SB 2173 today, to add a whole new loophole to the Brown Act that would permit public bodies to meet behind closed doors to discuss proposed contracts with outside parties such as real estate developers. But there is no evidence such an exemption is needed. Public bodies, by delegating contract negotiations to subcommittees or agency executives, already have all the authority they need to be effective negotiators. The League of Cities amendment, which would cover an enormous range of local government business, would make the Brown Act a virtual invitation to secrecy.

Some clarification of SB 2173 is in order. Amendments to spell out more plainly what is meant by "significant exposure to litigation" would be useful both to government officials and the courts that must enforce the law. But the contract loophole suggested by the cities would make SB 2173 a vehicle to destroy the Brown Act, not a bill to save it.

MEMBERS
ELIHU M. HARRIS
TOM McCLINTOCK
SUNNY MOJONNIER
MAXINE WATERS

Assembly
California Legislature

Subcommittee on the Administration of Justice

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1100 J STREET, FIFTH FLOOR
SACRAMENTO 95814
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GENE ERBIN
COUNSEL

ROSEMARY SANCHEZ
SECRETARY

DATE: August 26, 1986

TO: Lloyd

FROM: Gene

SUBJECT: SB 2173 (Roberti) - Floor Statement

1) The most important provision of SB 2173 relates to the codification of the attorney/client confidential communication closed session section of the Brown Act.

Existing law, Section 54956.9 (See page 13, line 21), codifies the attorney client pending litigation confidential communication exemption that was first articulated by the courts in Sacramento Newspaper Guild v. Sacramento County Board of Supervisors (1968) 263 C.A.2d 41. Section 54956.9 was added to the Brown Act by SB 2216 (Keene) in 1984.

The question we are now confronting is: Does Section 54956.9 represent the only ~~reason that~~ local bodies can invoke the attorney/client confidential communication privilege to go into closed session, or are there ~~are~~ other attorney/client privileges, such as avoidance of litigation or contract instruction?

SB 2173 squarely answers this question: Section 54956.9 is the only attorney/client exemption. Page 14, lines 34-39 clearly state that there are no other attorney/client privileges. Any others that may exist at common law are repealed. Courts may no longer countenance closed session under the attorney/client privilege for any reason other than pending litigation as defined in Section 54956.9.

The attached letter from the Attorney General to Senator Keene is the genesis for SB 2173 and, in part, explains SB 2173's unusual procedural history. The letter intelligently discusses the difference between "pending litigation" closed sessions and "avoidance of litigation" closed sessions. In April, the AG had a position contrary to the present intent of SB 2173, which is the reason SB 2173 was amended. I am informed that the AG now supports SB 2173 and the codification of the pending litigation closed session privilege as the only attorney client closed session privilege.

Of course, there are other authorized closed sessions unrelated to the attorney/client privilege: real estate negotiations (Section 54956.8); appointment, employment, or evaluation of employees (Section 54957); employee contract negotiations (Section 54957.6); public safety (Section 54957).

2) The other potentially controversial provisions of SB 2173 relate to the Bagley-Keene Open Meeting Act, which governs the meetings of state bodies. They do two things:

a) Add legislative and executive branch "task forces" to the Act. (See page 3, lines 18 and 21-23; Section 11121(a) and (b).

b) Delete existing langauge in Section 11121.8 that states that advisory committees of state bodies are state bodies, "if the advisory body so created consists of three or more persons." (copy attached) This bill would require some state agencies, most importantly the Energy Commission, to radically change their operations or merely open them to the public. Then advisory bodies are two members.

Though we have not been supplied with sufficient facts to make a definitive determination, it appears that each of the board members might qualify under a remote interest exception. The X Oil employee might qualify under subdivision (b) (2). The one who supplies X Oil appears to fall within subdivision (b) (7). And finally, the branch manager of the Y Bank could possibly fall within subdivision (b) (9).

Accordingly, as to any particular individual board member's disqualification, whether there would be a different result under section 1090 *et seq.* than under the PRA would depend upon whether a remote interest exception applied. If it did, then abstention would be permitted the same as under the PRA. If not, the flat prohibition of section 1090 *et seq.* would in the usual situation, prohibit the whole board from acting and hence, prohibit the contract.[18]

Opinion No. CV 76-112—November 17, 1976

SUBJECT: APPOINTMENTS BY SECRET BALLOT AT PUBLIC MEETING OF CITY COUNCIL—During a public meeting, a city council may not make appointments to advisory commissions, committees and similar bodies by means of secret ballot.

Requested by: ASSEMBLYMAN, 22nd DISTRICT

Opinion by: EVELLE J. YOUNGER, Attorney General
Vance W. Raye, Deputy

The Honorable Richard D. Hayden, Assemblyman for the 22nd District, has asked for an opinion on the following question:

In view of the 1975 legislative changes (Stats. 1975, ch. 959, § 8) to the Ralph M. Brown Act, may a city council, during a public meeting, make appointments to advisory commissions, committees or bodies by means of a secret ballot?

The conclusion is:

A city council may not, during a public meeting, make appointments to advisory commissions, committees and similar bodies by means of a secret ballot.

ANALYSIS

The right of the public to be informed on governmental activity and to have access to the decision-making process is the focus of the Ralph M. Brown Act

[18] We do not attempt to determine all the ramifications of the doctrine of necessity in the case of a contractual transaction. This office has assumed its existence in extreme cases of emergency, or where no alternative source of supply of goods or services existed. See 57 Ops. Cal. Atty. Gen. 458, 462 (1974); 42 Ops. Cal. Atty. Gen. 151, 156 (1963); 4 Ops. Cal. Atty. Gen. 264 (1944); I.L. 76-138.

Interestingly, in above types of situations, the necessity is caused by the need to *obtain* something for the governmental unit, not by the mere fact that only that particular person or body may act with regard to the transaction. Compare section 87101 of the PRA.

(Gov. Code § 54950 *et seq.*, hereafter referred to as the Brown Act)[1]. With certain exceptions the Act requires:

> "All meetings of the legislative body of a local agency shall be open and public, and all persons shall be permitted to attend any meeting of the legislative body of a local agency, except as otherwise provided in this chapter." § 54953

One of the statutory exceptions to the foregoing directive is set forth in section 54947 which permits executive sessions to consider certain personnel matters. Prior to its amendments in 1975, section 54957 authorized executive sessions "to consider the appointment, employment or dismissal of a public officer or employee." In 1975 the foregoing language was amended to delete reference to public officers and the following language was added:

> "For the purposes of this section, the term 'employee' shall not include any person appointed to an office by the legislative body of a local agency; provided, however, that nonelective positions of city manager, county administrator, city attorney, county counsel, or a department head or other similar administrative officer of a local agency shall be considered employee positions; and provided, further that nonelective positions of general manager, chief engineer, legal counsel, district secretary, auditor, assessor, treasurer or tax collector of any governmental district supplying services within limited boundaries shall be deemed employee positions."

The apparent intent of the amendments was to generally restrict the use of executive sessions for the purpose of making appointments to those instances in which appointments to employee positions are under consideration. Where meetings are held to consider appointments to nonemployee positions, the Brown Act with certain exceptions now requires such appointments to be made at a public meeting. See generally 59 Ops. Cal. Atty. Gen. 266 (1976).

The present opinion request raises the question of whether the foregoing legislative changes affect the right of a city council[2] to vote on appointments to advisory commissions and similar bodies during a public meeting by secret ballot. While the question assumes that the scope of the privilege established by section 54957 affects the permissibility of secret ballot voting, it is our conclusion that regardless of whether the meeting is one which could be closed to the public under section 54957, a city council may not utilize a secret ballot to vote on candidates for appointments to advisory commissions and similar bodies.

In previous opinions we have suggested that positions on advisory commissions and analogous bodies are not "employments." See 42 Ops. Cal. Atty. Gen. 93, 95 (1963); I.L. 69-226 (1969).[3] Based on the reasoning of those prior opinions,

[1] All section references herein are to the Government Code.

[2] A city council is a "legislative body of a local agency." §§ 54951, 54952; 40 Ops. Cal. Atty. Gen. 4 (1962).

[3] The cited opinions also concluded that such positions are not offices. Thus, the authority of local agencies to consider appointments to advisory bodies in closed session was not

appointments to such positions would not appear to fall within the scope of the privilege established by section 54957. Assuming this to be the case, section 54953 of the Brown Act requires such appointments to be considered and made at an "open and public" meeting. There is considerable doubt as to whether a meeting at which action is taken by secret ballot can be considered an "open and public" meeting.[4] The courts of this state have never had occasion to consider the question and our research has disclosed only one judicial decision from any jurisdiction wherein the impact of open meeting laws on secret ballot voting has been considered.[5] In *Board of Education* v. *State Board of Education*, 79 N.M. 332, 443 P.2d 502 (1968), the New Mexico Court of Appeals was called upon to decide whether secret ballot voting violated a New Mexico open meeting law which required public agencies within its ambit to "make all final decisions at meetings open to the public." In deciding that secret balloting was not violative of the Act, the court held in substance that the New Mexico open meeting law merely required decisions to be reached at meetings open to the public and did not prescribe the means by which a decision is reached at such meetings. *Id.* p. 505. Although the New Mexico decision is not without logical support and cannot be lightly brushed aside, we decline to apply its holding to the question under consideration.

While the New Mexico statute only required the making of final decisions at "meetings open to the public" section 54953 of the Brown Act declares very broadly that meetings "shall be open and public, *and all persons shall be permitted to attend* . . . ." To construe the Act as a simple declaration of a right of public attendance would in effect render the phrase "open and public" mere surplusage. Such a construction would conflict with the well established presumption that every word in a statute was intended to have some meaning. See *County of Los Angeles* v. *Emme*, 42 Cal. App. 2d 239, 242 (1940); *Watkins* v. *Real Estate Commissioner*, 182 Cal. App. 2d 397, 400 (1960).

In our view the Brown Act not only requires proceedings of bodies within its coverage to be open to public attendance but also requires such proceedings to be conducted in a manner which permits full and complete disclosure of the action taken and the participation of individual members in such action. The Brown Act is intolerant of secrecy at any stage of proceedings which are required to be public. Support for such a construction of the Act exists in the language of the Act's preamble, section 54950, which declares the Brown Act's intent that the "actions [of legislative bodies] be taken openly and that their deliberations be conducted openly." "Openly" is defined by Webster's New International Dictionary (3rd ed. 1961) to mean "in an open manner: freely and without concealment." "Action taken" is defined by section 54952.6 of the Act to include, *inter alia*, "an

affected by the recent legislative changes to the Brown Act. No such authority existed before the amendments and none exists today.

[4] On the ambiguity of the phrase "open and public," see ten Broek, Welfare In The 1957 Legislature, 46 Cal. L. Rev. 331, 352 (1958).

[5] But see *Scott* v. *Bloomfield*, 94 N.J. Super. 592, 229 A.2d 667 (1967); *State* v. *LaPorte Superior Court No. 2*, 230 N.E. 2d 92, 94 (Ind. 1967).

actual vote by a majority of the members of a legislative body when sitting as a body or entity, upon a motion, proposal, resolution, order or ordinance." In light of the preceding definitions, action taken by secret ballot can hardly be regarded as action "openly taken."

We also consider it significant to the present inquiry that the Legislature in section 54950 considered open meeting requirements to constitute a means of enhancing the electorate's control over governmental machinery. Section 54950 also declares that:

> "... The people of this State do not yield their sovereignty to the agencies which serve them. The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed *so that they may retain control over the instruments they have created.*" (Emphasis added.)

The conventional means of asserting control over governmental institutions is through the electoral process. The ability of the people to evaluate the performance of their elected representatives so as to make informed choices among competing candidates would be severely restricted if the decisions of such representatives were insulated from public view through the device of secret ballot voting. While the public's control over non-elected officers is less direct, disclosure of the official positions taken by such officers is an important factor in assuring public control over the instrumentalities of government. In brief, the public's right to know *who* in government is responsible for actions taken by public agencies is just as important as the public's right to attend and participate in the deliberations leading up to the decision. The Brown Act was intended to assure that all aspects of the decision-making process, including the identity of the decision makers, is open to public view.

We conclude, therefore, that the mandate of section 54953 precludes secret ballot voting at meetings which are required by the Brown Act to be public.

While the foregoing conclusion is premised on the assumption that positions on advisory commissions and similar bodies are not "employments," a characterization of the positions as employee positions would not affect our conclusion. Even assuming appointments to advisory commissions are regarded as employee appointments for which executive sessions are permitted by section 54957, that fact would not authorize a city council to make appointments by secret ballot. In addition to the above discussed amendments to the Brown Act which were enacted into law in 1975, the Legislature in 1975 also added section 54957.1 to the Government Code. The section provides:

> "The legislative body of any local agency shall publicly report at a subsequent public meeting any action taken, *and the rollcall vote thereon,* to appoint, employ, or dismiss a public employee arising out of any executive session of the legislative body." (Emphasis added.)

language substantially identical to the above was also added to the State Agency Act § 11125.1(b). While the foregoing language does not state in explicit terms

that a rollcall vote must be taken on proposed employee appointments which are considered in executive session, such a requirement is necessarily implied. The obvious intent of the statute is to require a public disclosure of a minimal amount of information concerning action taken on personnel matters, to wit: the action taken and the vote of the members, even when an executive session is authorized. We therefore reject a construction of section 54957.1 which would only require an agency to report a rollcall vote when one is otherwise required by law. Our research has disclosed relatively few instances in which local governing bodies are required by statute to conduct rollcall votes, and no instances wherein state agencies subject to the State Agency Act are required to do so. If the rollcall requirements of sections 54957.1 and 11125.1(b) were limited in the manner suggested, the effect as a practical matter would be to render the requirements almost meaningless. Such a construction would not comport with the apparent intent of the section or with prior opinions of this office to the effect that the Brown Act should be liberally construed in favor of open and public meetings. 42 Ops. Cal. Atty. Gen. 209, 212 (1974); see also *Clements* v. *T. R. Bechtel Co.*, 43 Cal. 2d 227 (1954).

We conclude, therefore, that a city council may not make appointments to advisory commissions by secret ballot regardless of whether such appointments could properly be made in executive session pursuant to the authority of section 54957.

Opinion No. CV 76-91—November 30, 1976

SUBJECT: PUBLIC EMPLOYEES OR OFFICERS—CONSTITUTIONALITY OF PROHIBITION FROM SOLICITING OR RECEIVING POLITICAL CONTRIBUTIONS—Under Government Code section 3202, prohibition against local public employees or officers soliciting or receiving political contributions from fellow public employees or officers is constitutional. But this prohibition does not apply to solicitations or receipts of political contributions from local public employee organizations if such funds, when collected, were not earmarked for a clearly identifiable local officeholder.

Requested by: ASSEMBLYMAN, 72nd DISTRICT

Opinion by: EVELLE J. YOUNGER, Attorney General

Floyd D. Shimomura, Deputy

The Honorable Richard Robinson, Assemblyman for the 72nd District, has requested an opinion on the following question:

Whether Government Code section 3202's prohibition against local public employees or officers soliciting or receiving political contributions from fellow public employees or officers is constitutional?

ASSEMBLY THIRD READING

SB 2173 (Roberti) - As Amended: June 23, 1986

SENATE VOTE: 34-0

ASSEMBLY ACTIONS:

COMMITTEE	G. O.	VOTE	11-3	COMMITTEE	W. & M.	VOTE	
Ayes:	Bane, Floyd, Harris, Konnyu, Statham, Stirling, Tanner, Tucker, M. Waters, Hill, Condit			Ayes:			
Nays:	Areias, Felando, Frizzelle			Nays:			

DIGEST

Existing law provides that all meetings of a state body (state board, commission, or similar multi-member body of the state) are to be open and public, that public notice shall be given at least 10 days in advance of the meetings, that notice of the meetings shall be given to any person who requests the notice in writing, and that closed meetings may only be held if specified conditions are met.

This bill: 1) broadens the definition of state body to include every task force which is required by law to conduct official meetings; 2) requires every meeting of an advisory task force to be open and public; 3) requires state bodies to provide notice of each meeting to the State Library and that a State Meeting Calendar be compiled for public review; 4) establishes certain conditions which must be met before a closed meeting may take place; and, 5) provides that the lawyer-client privilege shall not be used as the basis for a closed session of a legislative body of a local agency.

Specifically, the bill:

1) Broadens the definition of "state body" to include: (a) any task force; and, (b) every board, commission, task force, or similar multi-member body created by resolution of the Legislature.

2) Provides that a memorandum submitted to a "state body" of a local agency by its legal counsel shall be protected by the lawyer-client privilege and its disclosure shall not be required.

- continued -

3) Provides that the term "state body" does not include the following:

   (a) State agencies as provided for in the California Constitution;

   (b) Districts or local agencies whose meetings are subject to the provisions of the Ralph M. Brown Act;

   (c) State agencies whose meetings are subject to the provisions of the Grunsky-Burton Open Meeting Act;

   (d) Public, higher education employers when they are conducting proceedings relating to employee matters;

   (e) Members of the Cancer Advisory Council when conducting certain, specified business; and,

   (f) The Board of Directors of the State Compensation Insurance Fund.

4) Includes advisory task forces among those entities considered to be a "state body."

5) Requires that the state body shall provide notice of each meeting to the State Library, which shall maintain and make available to the public a State Meeting Calendar.

6) Deletes a provision which allows the Trustees of the California State University to hold closed sessions dealing with site selection for the university.

7) Specifies that a state body will not be prevented from: (a) holding closed sessions with its negotiator prior to the purchase, sale, exchange, or lease of real property; and, (b) giving instructions to its negotiator regarding the price and terms of payment for the purchase, sale, exchange, or lease.

8) Specifies that prior to the closed session, the state body shall hold an open and public session identifying the real properties which the negotiations may concern and the persons with whom its negotiator may negotiate, and specify that the negotiator may be a member of a state body.

9) Specifies that the term "lease" includes the renewal or renegotiation of a lease.

10) Specifies that a state body shall not be precluded from holding a closed session for discussions regarding eminent domain proceedings.

- continued -

11) Provides that a state body shall be exempt from certain provisions relating to the identification of real properties prior to a closed session.

12) Specifies that litigation shall be considered pending under the following circumstances:

    (a) When an adjudicatory proceeding before a court, an administrative body exercising its adjudicatory authority, a hearing officer, or an arbitrator, to which the state body is a party, has been initiated; or,

    (b) When the state body has reason to believe that there is significant exposure to litigation against the state body; or,

    (c) When the state body is meeting only to decide whether a closed session is authorized; or,

    (d) When the state body has decided to initiate or is deciding whether to initiate litigation.

13) Specifies that the state body's legal counsel shall prepare and submit to it a memorandum stating the specific reasons and legal authority for the closed session. If feasible, the memorandum shall be submitted to the state body prior to the closed session and, in any event, no later than one week after the closed session.

14) Specifies that "litigation" includes any adjudicatory proceeding, including eminent domain, before a court, administrative body exercising its adjudicatory authority, hearing officer, or arbitrator.

15) States that disclosure of a memorandum shall not be deemed as a waiver of the lawyer-client privilege, and that the lawyer-client privilege shall not be used as the basis for a closed session of a state body.

16) States that if the session is closed in order that the state body may receive advice from its legal counsel, the state body shall identify the litigation to be discussed. The state body can be exempt from this requirement only if it demonstrates that by identifying the litigation: (a) the state body's ability to effectuate service of process upon one or more unserved parties would be jeopardized; or, (b) the state body's ability to conclude existing settlement negotiations to its advantage would be jeopardized.

17) Defines "legislative body" to include any task force.

- continued -

18) States that meetings of task forces shall be open to the public, notice of the meetings shall be provided 24 hours in advance, and specifies that if a task force elects to hold a regular meeting, it shall be done in accordance with established rules.

19) States that except as otherwise permitted by this measure, the lawyer-client privilege shall not be used as the basis for a closed session for a legislative body of a local agency.

FISCAL EFFECT

The State Library reports that this bill would result in minor, absorbable costs to the library from the new public meeting calendar requirement.

COMMENTS

1) According to the author, this bill is intended to include formalized task forces under the same open and public meeting requirements as similar multi-member bodies of the state. Dissatisfaction has been expressed by some individuals regarding the inability to obtain public information from task forces which have been established to conduct official state business.

2) Proponents state that this bill helps to clarify some confusion regarding a recent Attorney General's publication regarding the scope of the attorney-client relationship and how it was affected by the passage of SB 2216 - Keene (Chapter 1126, Statutes of 1984). Proponents believe that this bill is necessary to resolve misinterpretations as to what circumstances allow a local legislative body to meet in closed session with its attorney.

3) Opponents state that this bill would effectively abolish the attorney-client privilege between local governmental entities and their counsel, thus placing local governments in the unusual position of being prohibited from meeting confidentially with their attorney to receive legal advice. It is felt that there have been no instances cited which justify a narrowing of the attorney-client privilege. Opponents claim that while private citizens may receive confidential legal advice, and members of the Legislature are afforded the same privilege through the Legislative Counsel, this bill takes away this right of local governments.

4) Recent legislation, Chapter 1126, Statutes of 1984 (SB 2216 Keene), among other things, allows the legislative body of a local agency to meet in closed session to confer with its legal counsel regarding pending litigation, under specified conditions.

- continued -

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Ray Miller
445-3451
8/26/86

League of California Cities

California Cities Work Together

AB

Sacramento, CA
September 5, 1986

Governor George Deukmejian
State of California
State Capitol
Sacramento, CA 95814

Attn: Legislative Secretary

RE: Request for Veto - SB 2173 (Roberti)

Dear Governor Deukmejian:

We respectfully request you to veto SB 2173.

Currently, the Brown Act specifically regulates when a city council may meet with its attorney to discuss matters involving pending litigation or matters where the public agency faces a "significant exposure" to litigation. The Brown Act provisions relating to closed sessions for litigation are silent on how the Brown Act affects other aspects of the attorney-client privilege, such as avoidance of litigation and instruction by the council of its city attorney when the city attorney is negotiating a contract or is attempting to resolve a dispute in which the city is the potential plaintiff, but which has not yet reached the litigation stages. SB 2173 provides in Section 9 (the only section which we oppose) that the exclusive authority for an attorney-client closed session of a local public agency is the Brown Act, and that the attorney-client privilege of the Evidence Code does not apply to local public agencies. The sponsors of this provision, the California Newspaper Publishers Association, cite no real life situations that have arisen that cause the need for this legislation. In fact, their representative, Michael Dorais, has acknowledged in the press that the basis of the bill is an informal interpretation of existing law by the Attorney General which he claims holds the potential to "gut" the open meeting law.

The courts have considered the conflicts between the open meeting provisions of the Brown Act and the secrecy of the attorney-client privilege. In Sacramento Newspaper Guild v. Board of Supervisors (1968) 263 C.A. 2d 41 at 58, and in Sutter Sensible Planning v. Board of Supervisors (1981) 122 C.A. 3d 813 at 824 and 825, 116 C.R. 342, the courts have held that the two may co-exist. They have stated that the privilege must be strictly construed, and that a public agency may only hold an attorney-client session when genuine confidentiality is required, and that the consultation may only occur when a consultation in an open meeting would be injurious to the public interest. The Sutter court specifically held that avoidance of litigation was a proper basis for an attorney-client session. But the Sacramento court also stated on page 58 "To attempt a generalization embracing the occasions for genuine confidentiality would be rash." Yet SB 2173 attempts to do just that.

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LOS ANG
(21

We have sought from cities examples of situations where attorney-client sessions may be necessary which they believe are allowed by current law but might not be allowed by Section 9 of SB 2173. Following are some examples:

(1) As a result of the well-publicized sex discrimination case arising from the State of Washington, a southern California city council was questioning whether it should conduct a comparable worth study. It went into closed session with its attorneys to be advised by those attorneys on the sex discrimination litigation exposure that could result from such a study, and on alternative approaches to remedying sex discrimination in the city that could be used to avoid such litigation, while at the same time eliminating pay discrepancies between men and women.

(2) In many parts of the state, a controversy has occurred between cities within a county and the county itself over the legality of the distribution of traffic fines by the county. Some of these controversies have resulted in litigation, and some have been settled prior to litigation. If this bill is enacted, it would appear that since a city would be the potential plaintiff against the county, that the county could probably hold a closed session to discuss potential litigation, since it would have a "significant exposure" to being sued by the city. But until the city was actually deciding whether or not to sue (as contrasted to working on its negotiating position on the controversy preceding a lawsuit), it would probably not be allowed to go into closed session with its attorney, since the city is a potential plaintiff rather than a potential defendant.

(3) A city and private contractor have a contract. The city believes that the contractor has breached the contract, and the staff is in negotiations with the contractor to settle the controversy, perhaps modify the contract, and avoid a lawsuit. In this situation, if the city is the potential plaintiff and is not yet to the point of deciding whether or not to sue, this bill would probably preclude an attorney-client session to discuss the strengths and weaknesses of the city's position and the possible alternatives that could be pursued to obtain adequate performance and to reach the city's goals. A frank discussion could not occur between the city attorney and the governing body for fear of tipping off the other side.

(4) A large northern California city has a deep lake with steep slopes around it which was fenced for a number of years. Unknown to the city attorney, the recreation department took down the fence. When the city attorney found out about this, he urged the council to order the fence to be placed back up because the lake presented a significant danger of drownings occurring. Between the time of the city attorney's closed session with the council and the council's eventual decision to put the fence back up, a drowning actually occurred. The city attorney felt a closed session was necessary because a public discussion of the hazards presented by the lake would not only increase the city's exposure to litigation in any future accidents that occurred near the lake, but could be used as an admission by the city that a dangerous and defective condition existed. It is not clear whether this situation was a "significant exposure" to litigation, and therefore whether it would be allowed by SB 2173.

We believe that existing law as set forth in the case law and in the current provisions of the Brown Act properly balance the competing policies of the

open meeting laws and the attorney-client privilege. We therefore respectfully urge you to veto SB 2173.

Thank you for considering our views.

Sincerely,

Constance H. Barker
Attorney

cb903d3/leg

cc: Huston Carlyle, Jr.
Senator Roberti

League of California Cities
1400 K STREET • SACRAMENTO, CA 95814 • (916) 444-5790
California Cities Work Together

Sacramento, CA.
August 27, 1986

TO: Assemblyman Phillip Isenberg

FROM: Conni Barker, Attorney

RE: Examples of Problems Created by SB 2173

Phil, if you want the names of these local agencies, I will verbally supply them, but I don't have permission to release their name.

(1) Sex discrimination litigation exposure. As a result of the well-publicized sex discrimination case arising from the State of Washington, a Southern California city council was questioning whether it should conduct a comparable worth study. It went into closed session with its attorneys to be advised by those attorneys on the sex discrimination litigation exposure that could result from such a study, and on alternative approaches to remedying sex discrimination in the city that could be used to avoid such litigation, while at the same time eliminating pay discrepancies between men and women.

(2) A city and a county are currently in a joint venture on a waste-to-energy plant. The county is the lead agency. The county is being threatened with litigation now, but the city has not yet been threatened with litigation. The council will be making some decisions in the near future that could pull the city into or keep the city out of the litigation. The city attorney is not confident whether this situation is sufficient to constitute a "significant exposure to litigation" under current law, but it is clearly an appropriate situation for the city attorney at certain times, to pull the council into closed session to explain to them their litigation exposure, and ways to avoid being pulled into the lawsuit.

(3) A city and a school district have been in a controversy for some time over school mitigation fees. The city could take certain steps to avoid litigation with the school district or to protect itself in any future litigation, or it could take other steps that would pull it into a lawsuit. Eventually, the school district sued the city, but for a while it was unclear whether the school district would. The city attorney questions whether he would have had a "significant exposure" to litigation during the controversy and negotiations preceding the filing of the lawsuit, and, under this bill, counsel for the school district would have been unable to hold a closed session with the school district board of directors while the

pre-suit negotiations were occurring until the board was actually reaching a point where it was deciding whether or not to sue.

(4) Several years ago, the U.S. Supreme Court decided, in a case from Boulder, Colorado, that a city or county could have antitrust liability for its regulatory activities. This resulted in city attorneys and county counsels quickly analyzing their local ordinances to determine where their ordinances might be anti-competitive under the antitrust laws. Areas that were identified were rent control, taxi cab regulation, cable TV, and condominium conversion regulation. In several cities, the city attorney was required to hold a closed session with the council to explain where the city ordinances might run afoul of the antitrust laws, and to receive authority from the council to proceed with developing ordinances which would not be offensive or would be less offensive to the antitrust laws. This might or might not be allowed under the proposed amendment. A discussion in open session could have stimulated litigation, and the attorney's comments might have been used as an admission.

(5) In many parts of the state, a controversy has occurred between cities within a county and the county itself over the legality of the distribution of traffic fines by the county. Some of these controversies have resulted in litigation, and some have been settled prior to litigation. If this bill is enacted, it would appear that since a city would be the potential plaintiff against the county, that the county could probably hold a closed session to discuss potential litigation, since it would have a "significant exposure" to being sued by the city. But until the city was actually deciding whether or not to sue (as contrasted to working on its negotiating position on the controversy preceding a lawsuit), it would not be allowed to go into closed session with its attorney, since the city is a potential plaintiff rather than a potential defendant.

(6) Several years ago, the State Supreme Court invalidated Fresno's charitable solicitation ordinance. The ordinance was nearly identical to practically every other charitable solicitation ordinance in the state. Shortly thereafter, a person was going around Southern California suing cities without warning to invalidate their charitable solicitation ordinances and was collecting big attorneys fee awards. City attorneys found out about this at a city attorneys meeting and many of them proceeded to attempt to modify their charitable solicitation ordinances. Many city attorneys needed to discuss with the council the litigation exposure that would occur from various alternative regulatory approaches that were being considered in light of this decision, and needed to do it in private to prevent tipping off potential challengers of the constitutional problems presented by alternative regulatory approaches.

(7) A local government agency and private contractor have a contract. The local government believes that the contractor has breached the contract, and the staff is in negotiations with the contractor to settle the controversy, perhaps modify the contract, and avoid a lawsuit. In this situation, if the local agency is the potential plaintiff and is not yet to the point of deciding whether or not to sue, this bill would preclude an attorney-client session to discuss

the strengths and weaknesses of the local government's position and the possible alternatives that could be pursued to obtain adequate performance and to reach the local government's goals. A frank discussion could not occur between counsel for the local agency and the governing body for fear of tipping off the other side.

(8) A development approval is on appeal to the city council from the planning commission, and the council is determining whether to require a certain dedication of land as a condition of that development approval. The city attorney is of the opinion that the size and scope of the dedication may be an illegal taking of property, but the developer has been cooperative with the city, and has not communicated any threat to sue. Can the city attorney call the council into a closed session to explain to them if they impose the dedication, that they will probably be sued because the dedication is probably invalid and that they will probably either have to set it aside or pay money damages? Under this bill, the local government's attorney could probably not call the governing body into closed session, even though this would avoid a lawsuit, and the failure to hold a closed session may result in an invalid condition which is later sued upon.

(9) In one small Southern California city, about 1980, various council members, one-by-one, in violation of the Brown Act, promised a developer that if the developer did not oppose an assessment district that would be on his property, that the city would reimburse his costs to him by way of abatement of future tax increments from the redevelopment agency where his property was located. Those council members were voted out of office, and the new city attorney learned of this promise approximately one month after he took office. He immediately got an attorney general's opinion that this promise by the previous council members was an illegal gift of public funds. He then held a closed session with the new council to explain their exposure to being personally liable for this money and the city's exposure to possible taxpayer suits as well. The tax abatement has not occurred, and the city has saved approximately $5 million. Under this bill, it is questionable whether the city attorney could have held the closed session with the new council to avoid litigation and save the city all this money. The city attorney believes an open session could have caused a lawsuit to be filed that was avoided by the closed session.

(10) A large Northern California city has a deep lake with steep slopes around it which was fenced for a number of years. Unknown to the city attorney, the recreation department took down the fence. When the city attorney found out about this, he urged the council to order the fence to be placed back up because the lake presented a significant danger of drownings occurring. Between the time of the city attorney's closed session with the council and the council's eventual decision to put the fence back up, a drowning actually occurred. The city attorney felt a closed session was necessary because a public discussion of the hazards presented by the lake would not only increase the city's exposure to litigation in any future accidents that occurred near the lake, but could be used as an admission by the city that a dangerous and defective condition

existed. It is not clear whether this situation was "a significant exposure" to litigation.

cc: Cathy Snodgrass
Mark Wasser

CB827M2.leg

County Supervisors

August 25, 1986

The Honorable Philip Isenberg
Member of the Assembly
Room 2175, State Capitol
Sacramento, California 95814

RE: Senate Bill 2173 (Robert) - OPPOSE

Dear Assemblyman Isenberg:

This is in response to your request for a chronology of Senate Bill 2173.

The bill was introduced on February 20, 1986. As introduced, the bill proposed non-controversial amendments to Government Code Section 54952.3 regarding the definition of the term "legislative body" as used in the Brown Act. Basically, the bill would have expanded the definition of "legislative body" to include task forces and advisory commissions.

Subsequent amendments on April 10 and May 22 proposed changes to the State's Bagley-Keene Open-Meeting Act. Although of significance to State agencies, these amendments had no effect on local government. The bill was heard in Senate Judiciary Committee on May 21 and Senate Appropriations on June 2. It was approved by the Senate on June 12 as a Consent item.

It was read the first time in the Assembly on June 16 and referred to the Assembly Committee on Governmental Organization. The Assembly Committee on Governmental Organization is the policy committee with subject matter jurisdiction over the State's Bagley-Keene Open-Meeting Act. The referral to the Committee on Governmental Organizations was appropriate because at that time the bill did not propose any significant amendments to the Brown Act. However, on

Sacramento Office / 1100 K Street, #101 / Sacramento, CA 95814-3941 / 916/441-4011 ATSS 473-3727
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June 23, the day of its first hearing in the Assembly Committee on Governmental Organization, the bill was amended to add Section 9, the controversial Brown Act amendment.

The bill was reported from the Assembly Committee on Governmental Organization on June 23, with the author's amendments. It was amended and re-referred to the Assembly Committee on Governmental Organization. The June 23rd Brown Act amendments should have caused the bill's referral to the Assembly Local Government Committee, which has subject matter jurisdiction over the Brown Act. But that did not happen. The bill was heard in Assembly Governmental Organization on July 3. There was no discussion of the attorney-client privilege issue at that committee hearing. I testified in opposition to the bill and expressed the request that the bill be referred to the Assembly Local Government Committee for a policy hearing on the issue. My comments were met with extreme disfavor by the Committee members, who quickly moved the bill out of committee and expressly denied referral to Local Government.

The bill was referred to the Committee on Ways and Means, where it now resides on the Suspense File.

We are extremely disturbed that this bill, which purports to promote open government, was significantly amended late in the session to add a new, important issue which was never heard in the policy committee with subject matter over its contents.

The lateness of the June 23rd Brown Act amendments caused us considerable difficulty. We did not learn of the amendments until June 24. We immediately contacted our members, requesting review and comment. We also contacted the author's office to set up meetings to discuss the bill. Meetings were conducted on July 2, July 10, July 22 and August 15, in an attempt to work out amendments to resolve some of the problems with the bill. However, we did not obtain final comments from our membership until August 4. The shortage of time made it very difficult to analyze and work on this bill.

The attorney-client privilege is an important legal principle. We support the Brown Act and we believe the public has the right to know what its elected officials are doing. We also believe that elected officials, like everyone else in our society, ought to have the right to consult in confidence with a lawyer. We believe legal advice promotes

accountability and responsibility. By limiting confidential attorney-client discussions to litigation this bill will eliminate confidential legal advice.

Why should locally-elected officials be placed in a unique category as the only people in our society who do not have the right to obtain confidential advice and counsel from lawyers? We think that is an important question that is entitled to the kind of careful consideration that the legislative committee system is designed to provide. However, the attorney-client privilege portion of this bill has never been heard by any legislative policy committee. We object to that.

Because of the procedural history of the bill and because we believe that local government officials should be entitled to receive confidential legal advice and counsel from their lawyers, we oppose the June 23 amendment. We do not oppose the balance of the bill. Our position is that Section 9 should be deleted from the bill. We would support studying that issue within the normal course of the legislative process next year.

I have enclosed copies of correspondence between the Attorney General and Senator Keene, as well as a copy of the relevant portion of the Attorney General's handbook on the Brown Act which should serve to explain the Attorney General's position with regard to this issue.

I hope this letter is helpful. If you have any questions, please let me know.

Very truly yours,

COUNTY SUPERVISORS ASSOCIATION
OF CALIFORNIA

Mark A. Wasser
General Counsel

MAW:cb
Enc.

cc: Kathy Snodgrass (w/enc.)

CITY OF FOUNTAIN VALLEY

CITY HALL 10200 SLATER AVENUE FOUNTAIN VALLEY, CALIFORNIA 92708

FROM THE OFFICE OF THE MAYOR

July 24, 1986

Assemblyman Lloyd Connelly
Assembly Ways and Means Committee
State Capitol
Sacramento, Ca 95814

RE: SB 2173 - ROBERTI - BROWN ACT BILL
O P P O S E

Dear Committee Members:

The City of Fountain Valley urges your vote in opposition of SB2173 - Roberti when it is heard before your Assembly Ways and Means Committee.

This bill narrows the Attorney/Client privilege between the City's Attorneys and the City Council. Many times the adoption of ordinances and policies have significant legal consequences which would benefit a candid dialogue between the City Attorney and the Council on optional provisions.

If our City Attorney is required in open session to advise that certain action might bring about a risk of litigation, the City Council is almost inviting such action by our public discussion.

Just because the Brown Act requires a public official to deliberate an act in public, it does not follow that the public is best served by having the City's legal representative give the weaknesses and strengths of the City's legal position in public.

The City therefore requests your opposition to Senate Bill 2173 when it is heard in your Assembly Ways and Means Committee.

Very truly yours,

Fred Voss
Mayor

FV:DLH:bjs
CC: Senator Seymour
Assemblyman Frizzelle
League of Calif. Cities (2)

SENATE COMMITTEE ON JUDICIARY
Bill Lockyer, Chairman
1985-86 Regular Session

SB 2173 (Roberti) SB 2173
As amended April 10
Government Code
PAW

PUBLIC MEETINGS

HISTORY

Source: Author

Prior Legislation: SB 1540 (1984) - held in Senate G.O. Committee

Support: Unknown

Opposition: No Known

KEY ISSUE

SHOULD TASK FORCES AND ADVISORY COMMITTEES WHICH ARE ESTABLISHED TO CONDUCT OFFICIAL STATE MEETINGS BE SUBJECT TO THE OPEN MEETING ACT?

PURPOSE

Existing law requires all meetings of a state body to be open and public in accordance with the provisions of the Bagley-Keene Open Meeting Act. Notice of all meetings must be given to any person who requests the notice in writing.

This bill would broaden the definition of state body to include every task force which is required by law to conduct official meetings and every board, task force, or similar multimember body of the state created by executive order. It would

(More)

also expressly broaden the definition of state body to include advisory task forces, regardless of the size of the group. The bill would require state bodies to provide notice of each meeting to the State Library and would require the State Library to maintain and make available to the public a State Meeting Calendar including all notices it receives. Further, the bill would establish an exception to the open meeting requirement to provide for closed sessions under specified conditions.

The purpose of this bill is to respond to dissatisfaction expressed by the press and the public with the inability to obtain public information from task forces which have been established to conduct official state business.

COMMENT

1. Need for legislation

The Bagley-Keene Open Meetings Act requires state boards and commissions to conduct open meetings and to provide specific notice and agendas in advance. The author has introduced this bill because he has heard significant dissatisfaction with open meeting laws because they do not cover task forces and advisory bodies of state agencies. Consequently, the press and the public, especially legislative staff, have experienced difficulty in obtaining information from task forces established by the Governor and the Legislature to conduct official state business.

(More)

This bill would increase the scope of coverage of the open meeting law to include task forces and advisory boards, advisory commissions, advisory committees, and advisory task forces when they are conducting official meetings or conducting state business.

2. Three person rule deleted

Under existing law, the definition of "state body" for purposes of the Bagley-Keene Open Meeting Act also includes any multimember advisory body of a state body if created by formal action of the state body or of any member of the state body, and if the advisory body which has been created consists of three or more persons.

This bill would expressly broaden this definition to include advisory task forces and would delete the requirement that advisory bodies subject to the definition consist of three or more persons.

3. State Meeting Calendar

Under existing law, every state body must provide notice of each meeting to any person who requests such notice in writing. Notice must be provided at least 10 days in advance of the meeting, and must include the name, address and telephone number of any person who can provide further information prior to the meeting.

This bill would require every state body to provide notice to the State Library. The State Library would be required to maintain

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and make available to the public a State Meeting Calendar including all of the notices which it receives.

4. Exceptions to the open meeting requirement

Existing law provides that nothing in the Bagley-Keene Open Meeting Act shall be construed to prevent a state body from holding closed sessions during a regular or special meeting to consider the appointment, employment, or dismissal of a public employee, etc. Further, existing law provides that nothing in the existing law shall be construed to prevent the Trustees of the California State University from holding closed sessions dealing with site selection for the state university, or to prevent a state body from holding a closed session to confer with legal counsel regarding pending litigation when discussion in open session concerning those matters would adversely affect or be detrimental to the public interest.

This bill would provide instead that the act could not be construed to prevent a state body from holding closed sessions with its negotiator prior to the purchase, sale, exchange, or lease of real property by or for the state body to give instructions to its negotiator regarding price and terms of payment, or to prevent a state body, based on the advice of its counsel, from holding a closed session to confer with, or receive advice from, its legal counsel regarding pending litigation when discussion in open session would prejudice the state's position.

(More)

This bill would require the state body's legal counsel to prepare and submit to it a memorandum stating the specific reasons and legal authority for the closed session and would exempt the memorandum from public disclosure under the Public Records Act.

5. Concerns raised by STRS

The State Teachers' Retirement System has expressed concern over two provisions of this bill. They are working with the author's staff, and hope to develop amendments to the bill as drafted.

The first concern raised is that the bill would require state bodies to hold an open and public session in which they would identify the real property they are examining for investment. STRS believes that this would put its investors in a terrible position because they would be required to disclose all of its potential investment property before investing in it. The author is receptive to an exclusion to this requirement for PERS and STRS.

Their other concern relates to the provision that would require state bodies to record in a memo, all of their closed session discussions relating to ongoing litigation if the discussion would prejudice the position of the state body. Although the memo would be confidential while the case is pending, STRS claims that the memo could be disclosed once the litigation is final. STRS believes that the memo should remain confidential; a representative will address this concern in Committee.

(More)

6. Public bodies not covered by this bill

As used in this bill, "state body" would not include the following:

(a) the state Supreme Courts and Courts of Appeals;
(b) local agencies whose meetings are subject to the Ralph M. Brown Act;
(c) the state Legislature and committees whose meetings are subject to the Grunsky-Burton Open Meeting Act;
(d) public, higher education employers when they are conducting proceedings relating to employee matters;
(e) state Cancer Advisory Council members when conducting certain, specified business; and
(f) board of directors of the State Compensation Insurance Fund.

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T-A SPECIAL REPORT

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"Secrecy and a free, democratic government don't mix," said Harry S. Truman. In a dictatorship, secrecy is standard operating procedure. But in free, democratic America we demand that those we've elected to represent us do our business where we can watch them.

California's Ralph M. Brown Act specifically demands that of our city councils, school boards and other public bodies. Yet 25 percent of the time our North County elected officials meet, they are behind closed doors — where we can't see them.

In a six-part series, the *Times-Advocate* takes a close look at secrecy in local government — and why the protection of a California citizen's right to know is largely an illusion.

BEHIND CLOSED DOORS

By Frank Mickadeit
Times-Advocate Staff Writer

In Escondido, a school board secretly gives the go-ahead to a new pay system for its administrators. The superintendent's response when questioned by a reporter on the legality of the secret meeting: "You'll just have to sue us."

In San Diego, the city council approves a $644 million budget after council members and staff meet behind closed doors to conduct what one newspaper editor called "bootleg deliberations." His newspaper did sue.

In Fallbrook, a trustee who presided over the school board for nine years is asked why his board doesn't have an attorney prepare a memorandum stating why the trustees met in closed session, as required by state law. His response when shown the statute: "No, it says you 'shall' prepare it; I don't see where it says you *must* prepare it."

So goes the war in 1986 against secret meetings held by local government bodies — a war that was supposed to have ended 33 years ago when the California Legislature passed the Ralph M. Brown Act.

That law requires meetings of local elected bodies to be open to the public except when they involve discussion of a handful of narrowly defined topics.

Yet every year newspapers throughout the state report dozens of suspected violations of the law. In a 1984 survey of California newspapers by a University of California-Berkeley graduate student, 78 percent of those responding said they had clashed with a public agency over the Brown Act in the previous four years.

But because no Brown Act violations have ever been prosecuted criminally and few are even taken to court, there is seldom a final resolution.

So the frustration level surrounding the Brown Act is high. The Legislature constantly tinkers with it — one study showed that since 1953 it has been amended in every legislative session except one — and many journalists and politicians say it is still far from what it should be.

In general, newspaper editors, their attorneys and citizen watchdog groups complain that elected public officials are largely ignorant of the law beyond what they may learn in occasional seminars and from their attorneys.

As if by rote, they complain, officials have it drilled into their heads that "litigation, labor negotiation, personnel and property acquisition" matters are all acceptable material for a closed-door meeting without realizing that the law doesn't give them the authority to discuss every aspect of those topics privately.

And perhaps more abused than closed sessions are other mechanisms that frequently keep the public's business from the public: Committees consisting of less than a quorum of a legislative body, which can meet privately; out-of-town "retreats," where a public agency's long-range goals are often formulated; paper corporations that can be established to handle the menty items facing an agency; and the practice of what one attorney calls "daisy chaining," in which elected public officials reach a consensus on a matter by polling each other individually and thus avoiding a physical meeting of a quorum.

There has been no effective enforcement mechanism to punish violators. With no deterrent and a quirky provision in the law that says it must be proven that an official *knowingly* violated the act to be criminally liable, there is little for a dishonest or sloppy public official to worry about.

Please see Closed, page A4

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Closed

Continued from page A1

Journalists and others also complain that court decisions and interpretations of the Brown Act by the state attorney general over the years have failed to force public agencies to comply with the absolute letter of the law. Thus, the number of topics that can be discussed behind closed doors has gradually grown, even though the changes aren't always reflected in the Brown Act itself.

Public officials, in turn, complain that a strict interpretation of the law would tie their hands. Efficiency of government and candor among officials would be lost if they were forced to work in a "fishbowl" environment. And, they argue, if they can't operate effectively without worrying about violating technicalities in the statute, is the public's best interest really served?

As for effective punishment, the bad press generated by improper secret meetings is more than enough, public officeholders say.

And in North County, some public officials say the press has simply been dead wrong when it has accused them of violating the Brown Act.

Because of the expense involved, newspapers rarely sue the public body for such alleged violations — although the law clearly gives them that right. It is even more rare for the district attorney's office to conduct a criminal investigation into an incident. In fact, although the San Diego County district attorney's office receives two or three reports of suspected violations each month, Deputy District Attorney James Hamilton says there have been fewer than five full-scale investigations in the last 11 years.

Even promising cases, in which public business was clearly conducted in private, almost invariably fizzle out because of the almost impossible burden of proof: that elected officials met secretly with the knowledge that they were violating the Brown Act.

Neither Hamilton — who is assigned to Brown Act matters — nor any other person interviewed for these stories knew of a single instance in which an officeholder has faced criminal charges for a Brown Act violation.

"It is the only statute that I know of in which ignorance of the law is an excuse," Hamilton said. "I suspect that is exactly

itself to be abused by those individuals on the council who have been on the losing end of a political position," said Vista Mayor Mike Flick, who has been accused of violating the Brown Act in the past. "And I think sometimes the press has been naive in that regard, and other times I feel that the press itself does not like the political decision that has been made and has been biased in its reporting."

Because the law is virtually unenforceable and district attorneys have little interest in monitoring scores of public agencies, responsibility for defending the public's right to know has fallen almost solely to the press.

But because reporters in California are not allowed into closed sessions and are generally not privy to discussions among officeholders outside the confines of a regular public meeting, actual policing is largely due to happenstance.

When violations are discovered, it is usually because a disgruntled member of the public body tattles on his or her colleagues or because a sharp reporter or civic gadfly notes that some action announced abruptly by a legislative body could not have been decided without discussion in a closed meeting.

Reporters then typically question the board members and their legal counsel, obtain damning quotes from the newspaper's attorney and then write a story that suggests the legislative body met illegally.

and they put it in there knowing it would probably result in no prosecutions."

The effect of that provision is that members of a legislative body can claim the law was not clear to them or that in their attorney's opinion the closed session fell under a lawful exception. Because the law has been interpreted by various courts and attorneys general as to what the exceptions actually mean, their arguments can be convincing.

"There is a lot of inconsistency and a lot of ignorance," said University of San Diego law professor Robert C. Fellmeth, whose Center for Public Interest Law actively monitors and participates in open government issues. "And why should they bother to learn? To the extent that they're truly ignorant they're immune, really."

That point was driven home by Monterey Assistant City Attorney William Connors when he spoke to a group of city council members at the League of California Cities 1981 convention in San Francisco.

"While I often hear city attorneys inform their commissions and legislative bodies that they are free to disregard their legal opinion, in the case of a Brown Act violation, the absolute rule to follow is, 'Never disregard (the attorney's) legal advice,'" Connors said. "Even if you think (the advice) is wrong . . . . Regardless of the fact that you may disagree with your city attorney, if he says there is no violation, you have a pretty strong case in court that you were acting without knowledge."

That advice is contained

'I hope everyone would understand that although we're a public agency and, as the Brown Act says, we have an obligation, duty and desire to conduct our business in open...still we're a municipal corporation and in many respects we run ourselves as a business, and there are certain business activities which can't be profitably and successfully done in open session.

'I understand the perspective of the newspaper and that is editorializing on closed sessions is the only weapon short of litigation....You have to keep us, as I'm sure you say, 'honest.' From my point of view, the city doesn't lightly go into closed session.... And there have been occasions when we've had the right to go into closed session, but frankly we're not talking about anything that requires secrecy so we don't go into closed session.

'The city attorney types who sit on these meetings and advise their clients, we have a strange job. We have a variety of clients. One portion of our clientele is the city council and the related city staff, but I think most of us view our ultimate client as being the public....And my job is not to concoct an excuse for a closed session to validate what the council wants to do or what anybody else wants to do in closed session if it's not proper...'

— David Chapman
Escondido city attorney

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on a tape recording entitled "New Council Briefing," which the League of California Cities gives to new city council members.

Also hampering prosecution is the requirement that an action must be taken or a decision reached in the unlawful meeting for a legislative body to be criminally liable: mere discussion of a subject, although not permitted by the Brown Act, is not a prosecutable offense.

This does not sit well with many advocates of open government, who say the discussion leading up to a decision is as important as the vote on the matter, and there is support among some members of the state's influential media organizations for eliminating that proviso as well as the knowledge requirement.

North County has been fairly fertile ground for reporters who relish the role of civic watchdog. City councils, school boards and hospital boards have all been the subject of Brown Act complaints in the last few years.

Articles and editorials have been written in local newspapers, the district attorney's office has been called on occasion, and reporters and editors have directly lobbied some public officials who they feel interpret the Brown Act too loosely.

Still, it is rare for public officials to admit violating the Brown Act or even that they could use a refresher course on the statute. With a few notable exceptions, North County officials interviewed for this series said their legislative bodies are "well-versed" or "very well-versed" in the Brown Act.

Most say they and their attorneys scrupulously confine their closed meetings to matters of litigation or personnel and, once in a while, acquisition of property. Under a separate statute, school boards are also allowed to discuss student disciplinary matters in closed session.

With all the other topics that must be discussed in the open, public officials agree that little time needs to be spent meeting in private. All they ask is that the press not be so fanatical about the law that it results in hampering officials' ability to effectively legislate. Vista's Flick, whose council has been accused of violating the Brown Act three times in the last two years, is one who thinks the media have clearly gone overboard.

"I would wager that today's application of the Brown Act would probably make the author roll over in his grave," Flick

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BEHIND CLOSED DOORS

said.

Yet in inland North County, many public agencies spend vast amounts of time in closed session.

A *Times-Advocate* audit of the minute books of 30 inland North County public agencies — all of the city councils and most school and special districts — showed that of the total time the legislative bodies met in 1985, 25 percent was in sessions closed to the public.

Nine of the legislative bodies spent at least a third of their time behind closed doors. The Escondido High School board spent virtually half its time in private in 1985. The board of the Escondido Mutual Water Co. spent 80 percent of its time in closed session, almost exclusively discussing legal strategy in a water rights lawsuit filed against it by local Indian bands.

As a group, city councils and fire districts spent the lowest percentage of their time behind closed doors. The Vista Fire Protection District board didn't hold a single closed session all year, according to its records.

On the other end of the spectrum were the school boards. Five spent at least 40 percent of their time in private. Only the one-school San Pasqual School District spent less than 20 per-

Such a lack of awareness troubles journalists, who don't like to see closed sessions treated in a cavalier manner. A legislative body should only enter a closed session as a last resort, they believe. Many news agencies and their lawyers try to point out that the Brown Act simply *allows* some matters to be discussed privately; it doesn't *require* that they be.

Some North County officeholders agree.

"I don't like doing a lot of the business we do in closed session," said Lance Vollmer, president of the Vista school board. "And I think the closed session should be limited specifically to personnel matters, because the adjudication of personnel matters, particularly where a person is vindicated, shouldn't be done in public. . . . The other thing that should be done (in closed sessions) is our negotiations for our pay — compensation responsibilities. And in my mind, everything else should be done in open session."

That would include land acquisition, all litigation that didn't involve a school employee and even expulsions of students. However, Vollmer said other members of his board won't let him bring those matters into the open meetings. The Vista

— David Chapman
ndido city attorney

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Ralph M. Brown, whose original bill included only one exception for closed sessions — personnel matters — might indeed roll over in his grave.

School boards must deal with expelling students, which other agencies don't, say school trustees in defense of their apparent inclination toward secrecy. However, school boards are also the only public bodies in North County that don't typically have an attorney sitting with them as they go in and out of closed sessions, thus acting as a monitor to make sure the conversation doesn't stray into areas not excluded under the Brown Act.

And many public officials admit that it is easy for the talk in closed sessions to drift off the subject.

It is also apparent from interviews with public officials that most are woefully unaware of how much time they spend meeting in private. Typical was the response from Escondido City Attorney David Chapman, asked to estimate how much time the City Council spends in closed session.

"A fraction," Chapman said. "I haven't any idea, but I'd be surprised if it's 1 percent."

Told the Escondido council actually spent more than 17 percent of its time behind closed doors, Chapman said, "I don't believe it. I can't believe that. Which is not to say I'm calling you a liar . . . "

1985.

Escondido City Councilman Jerry Harmon is another who doesn't think he and his colleagues should spend so much time behind closed doors.

"I think we tend to listen to the city attorney, and I think the tendency of an attorney — our attorney at least, and I suspect it's generally true of city attorneys in the state of California — is they will tend to push to the limits the opportunity to use the Brown Act for closed session," Harmon said. "If any errors are made, it's perhaps because we listen and hear what we want to hear in the way of reasons to have a closed session as opposed to reasons not to have one."

USD's Fellmeth, who has sat in on closed sessions of various legislative bodies, said, "Sure, they're all for open government in principle. It's freedom. It's democracy. But when you get down to being seated in executive session talking to their counsel . . . their question is, 'Do we have to do that in public, or can we do that in closed session?' That's their question. That's what they want to know."

One North County official, Tri-City Medical Center Trustee Margaret Merlock, became so fed up with her colleagues' closed-session conversations that she vowed to tell reporters what was discussed if the other board members didn't stick to legally excluded subject matter.

She also began taking a tape

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A4 TIMES-ADVOCATE, Escondido, Ca., Sunday, September 7, 1986

I don't think anyone is (satisfied with the Brown Act). The Brown Act takes a highly procedural-structural approach to the problem. It talks about ıgs as if meetings were the occasion ch government policy crystalizes. re not. That may be the case with a appellate but with tive ions, gs provide ⁄s on the na -vote) of on. But her late and seldom provides any tion on how decisions are made lic policies are formed."

— Terry Francke
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BEHIND CLOSED DOORS

insisting that the current law is quite sufficient.

"I think that any law you write will be subject to interpretation," said Escondido Elementary School District Superintendent John Cooper, whose job entails acting as his board's Brown Act monitor. "The best protection for any law is the spirit of the people who have to carry it out."

Vista School Board President Lance Vollmer is an exception. He would like to see closed sessions limited to personnel matters and labor negotiations. Litigation and property acquisition should be hashed out in public, he said. And when personnel matters are discussed behind closed doors, he would like to see those discussions reported thoroughly.

"Let's say we have a school employee we're going to admonish," Vollmer said. "We can't say 'Joe Blow, who was not a child molester but likes to spend a lot of time in the men's room, is no longer employed by the district.' We say, 'We discussed employee matters, and there was a termination.'"

As for a stronger enforcement mechanism, the officials generally say no thank you.

Since its passage in 1953 the Brown Act has been amended in every session of the Legislature except one. This year was no exception.

Connelly, D-Sacramento, introduced AB 2674, which would finally "put teeth in the Brown Act," according to its supporters.

Strangely, it has never been a provision of the Brown Act that an action taken in an illegal closed session was voided. Neither had the courts favored such a seemingly logical remedy. Connelly's bill provided for such a mechanism. As he later made compromises to win support for the bill, he added a provision stating that the offending local agency could correct the action itself within 30 days of receiving a complaint. Only then could a citizen go to court to have the illegal action nullified.

Connelly's bill would also put in the Brown Act for the first time a requirement that local agencies post a descriptive agenda 72 hours in advance of a regular meeting and adhere to it. The idea was patterned after

Closed

Continued from page A4

recorder into the closed sessions, which she says had a deterrent effect on other board members. In the two years since she started that practice, "I can guarantee you we've had a lot (fewer) closed sessions and a lot shorter closed sessions." Nonetheless, the Tri-City board spent more than 27 percent of its time behind closed doors last year.

Why do elected officials sometimes do the public's business in private?

In examining recent North County cases, a few possible reasons emerge: ignorance or a loose interpretation of the law; arrogance; a desire to head off potential protest of a controversial position; or to save themselves or someone else embarrassment.

• The *Times-Advocate* twice last year accused the Escondido City Council of improperly meeting in private to discuss changing an ordinance that regulates adult businesses. On both occasions, the council cited the Brown Act exception that allows public bodies to discuss litigation matters with an attorney if it appears the body will be sued. The council suspected that a particular adult bookstore owner might file suit.

The newspaper and an attorney for the California Newspaper Publishers Association argued that the discussion of changing the ordinance was not a legitimate closed session topic because it involved a legislative matter — changing a law — rather than litigation strategy.

• In April of this year the Escondido high school board met in closed session and discussed basing school administrators' salaries on work performance rather than on a fixed salary schedule. The district's superintendent, John Cooper, said the discussion came under the exception which allows some parts of the employee negotiation process to be done in private. But the *Times-Advocate* and a California Newspaper Publishers Association attorney argued that while the law allows discussions of individual performances in closed session, such general discussion of a pay system should rightfully have been discussed in the open. As for trying to paint the closed-door meeting as a negotiation session, the newspaper pointed out that the district was not in contract negotiations with administrators at that time. After failing to persuade a reporter that the private discussion was proper, Cooper said, "We're not going to change our way of operating. You'll just have to sue us." (Cooper later claimed he was quoted out of context.)

• In October 1984 the Palomar Pomerado Hospital District hastily called a board meeting to discuss reinstating a $100-a-meeting stipend for board members and limiting the number of terms a director may serve — issues that would have undoubtedly drawn public comment had the public been aware of the meeting.

However, the *Times-Advocate*, the main outlet for hospital board news in the community, did not receive notice of the meeting until the day it was to be held. The Brown Act requires that the media be informed at least 24 hours in advance of a special meeting. When *Times-Advocate* Editor Will Corbin took the unusual step of showing up in person to protest the meeting, the board's chairman quickly adjourned the session before any business was transacted.

The board never again brought up the stipend or length-of-term issues.

• In Fallbrook late last year, the high school board went into a closed session to tell Superintendent Robert Thomas he would have to reimburse the school district $15 he charged it for a fine he incurred at a Rotary luncheon. Then-school board President Wayne Miller said the matter was handled behind closed doors to save Thomas "public embarrassme that he considered it

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BEHIND CLOSED DOORS

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Miller responded, "No, it says
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here it says you *must* prepare
" He said he saw no reason for
e board to adopt the practice.

Closed sessions and hastily arranged meetings aren't the only ways some North County officeholders keep public business private.

Many legislative bodies create committees to do preliminary work on matters that will eventually come before the full board or council. Usually, the stated purpose of the committees is efficiency and, indeed, the system cuts down drastically the amount of time the full body has to meet.

However, the number of members on the committees is often just shy of a quorum of the full board, which means the committee does not fall under the Brown Act and can do virtually anything it wants without being subject to public scrutiny. Those officials who favor the committee system point out that the full board must still approve any actions or recommendations by the committee, a process which must take place in public.

Critics, however, say that all too often the essential deliberations have already taken place at the committee level when the matter finally comes into the open. By then, they say, the momentum is too great to significantly alter a committee's recommendation.

"I think the subcommittee system is perhaps a bigger weak link than closed session," said Escondido Councilman Harmon. "If 17 percent of (our) time is spent in closed sessions, I'd bet that an equal or greater amount of time is spent in subcommittee."

Harmon is specifically critical of the two-member City Council committee that met in private with developers and their agents for several years to work out a complex land deal that secured the site for the North County Fair mall, which opened earlier this year.

"An awful lot of public business that should have been discussed in public was used, managed and manipulated by the subcommittee process," Harmon said. "I think they specifically set it up to manage the results of that issue."

Escondido Mayor Jim Rady, who served on that committee with Councilman Doug Best, defended the practice, saying that to conduct all the deliberations in front of the entire council would have been "unwieldy." He also pointed out that the final decisions were made by the full council, in public.

Another way around the Brown Act is to conduct seriatim meetings, or as Florida First Amendment attorney Barry Richard calls it, "daisychaining."

Elected officials who either don't have the time or the desire to call a public meeting on a matter will simply conduct a poll, perhaps by telephone, of a quorum of colleagues and arrive at a consensus. By avoiding the physical meeting of a quorum, they often believe they have not violated the Brown Act.

The courts have ruled otherwise. In a recent San Diego County example, the San Diego *Tribune* sued the San Diego City Council, charging that some of its members and their aides hashed out part of the city's annual budget behind closed doors. The City Council, without admitting guilt, agreed in a consent decree that the type of action the newspaper alleged is illegal. The council also pledged to read the Brown Act, and some council members said they intend to review the stat

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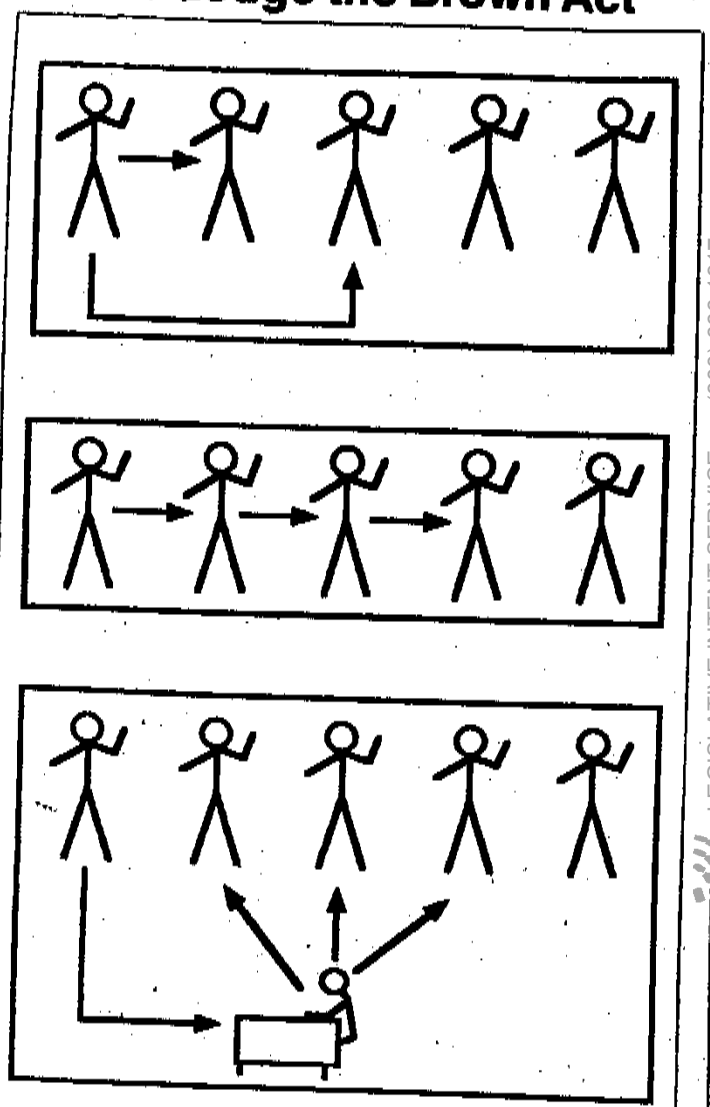
How to dodge the Brown Act



These are three variations of the illegal "seriatim" decision, in which a decision is reached by a quorum of a legislative body without the quorum ever physically meeting. **Top:** The first member of a five-member legislative body contacts two colleagues individually to reach a consensus. **Middle:** The "grapevine" or "daisychain" model, in which the first member contacts the second and the second contacts the third and so on. **Bottom:** A council member contacts a member of the agency's staff and that staff member contacts other members until a quorum has taken an action. The models ar
of *Contra Costa Times* reporter Daniel Borenstein.

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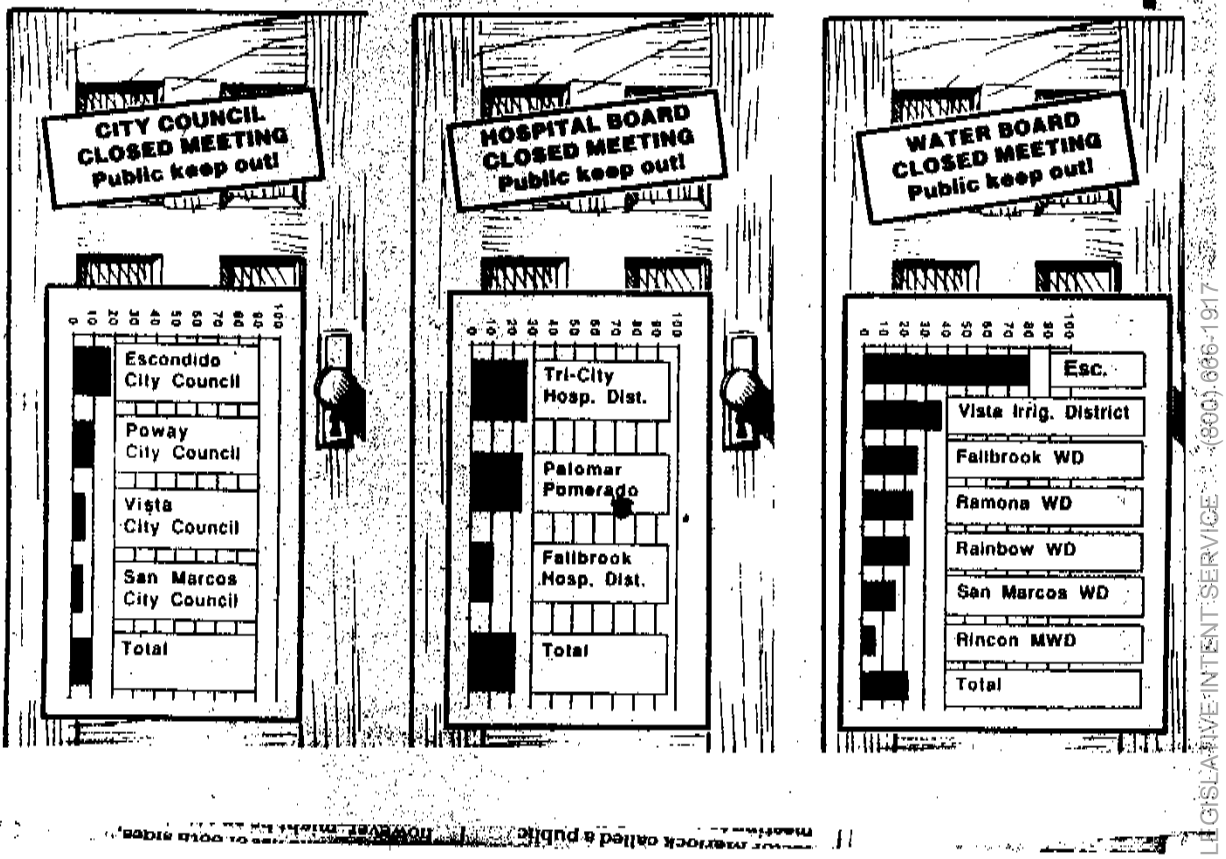

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a skilled group of people who find ways to get around it," he said, "and they are the same people who are involved with the Brown Act."

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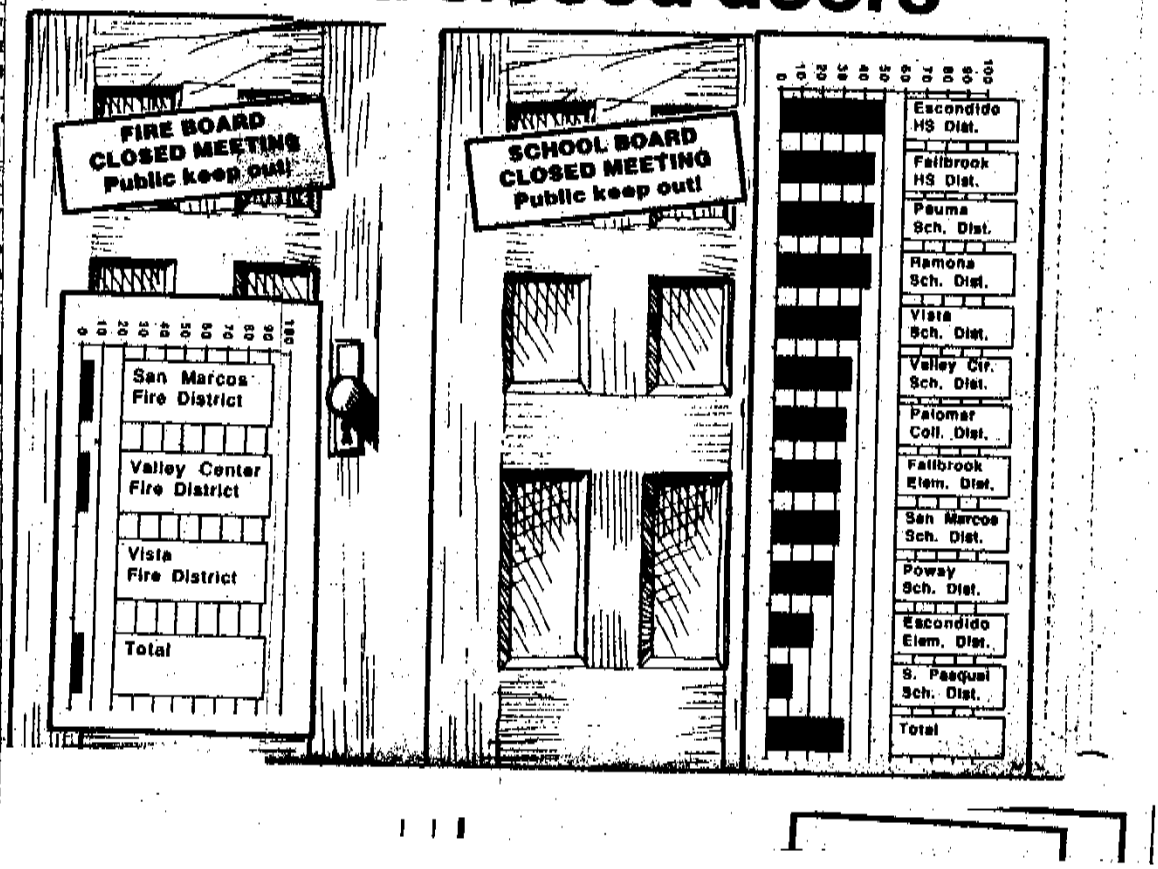

Although Ralph M. Brown was a Stanford-educated lawyer, an appellate judge and speaker of the California Assembly, he is best remembered as the sponsor of the local open meetings law that bears his name.

In 1953 the Modesto assemblyman was asked to sponsor the legislation, which was co-written by a *San Francisco Chronicle* reporter and a lawyer from the League of California Cities.

Brown was born in Kentucky in 1908 but moved with his family to Modesto in 1910 and lived there the rest of his life. He graduated from the University of California-Berkeley and Stanford law school. He was elected to the Assembly in 1942 and served there 19 years, the last three as speaker. In 1961 he was appointed judge in the 5th District Court of Appeal.

Brown died of a heart attack in 1966 as he was recovering from gall bladder surgery.

BEHIND CLOSED DOORS

ration set up by the public hospital board becomes a shell for other corporations that run the hospital — much like a holding company — and the public board only ratifies decisions in public as a formality. The boards of the private corporations that actually run the hospital usually contain one or two of the elected hospital board members.

USD's Center for Public Interest Law is suing hospitals in Palm Springs and Marin County to force them to halt the practice. Directors and administrators at Tri-City Medical Center in Oceanside were studying whether to set up the private corporations until Director Merlock called a public meeting to successfully marshal public protest against the move.

Proposed changes to the Brown Act involved two bills this year. One, by Assemblyman Lloyd Connelly, D-Sacramento, would require every public agency to post an agenda before holding a meeting and to stick to it. It would also put teeth into the law for the first time by allowing most decisions made in an illegal closed session to be nullified.

The other bill, by Sen. David Roberti, D-Los Angeles, would make it clear that public bodies and their attorneys can only discuss a specific piece of real or

Diego City Attorney John Witt, who heads that committee, said he hopes he can get the California Newspaper Publishers Association — the newspaper industry's Sacramento lobbying group — to participate.

However, the tenor of their relationship of late indicates that their interests may be too polarized for them to reach a happy compromise. As bills amending the current statute come before the Legislature, the cities have pleaded for more leniency in the law, while the newspapers have pushed to tighten it. As Witt puts it, "Newspapers . . . have tended to go for the jugular."

High on the list of both sides, however, might be an attempt to gather all applicable law into one statute and to either toss out or confirm the opinions of courts and attorneys general on the Brown Act.

Another idea involves turning over authority for enforcing the Brown Act to an agency, such as the Fair Political Practices Commission, which would have authority to fine offenders.

The press itself is now weighing a proposition by USD's Center for Public Interest Law which would give newspapers, particularly small- and medium-sized ones, a lot more clout with Brown Act violators. Either through dues or foundation grants, the law center would establish a legal service which would be prepared to take suspected violators to court on a moment's notice.

The presence of these "minute-men," as law center Director

The other bill, by Sen. David Roberti, D-Los Angeles, would make it clear that public bodies and their attorneys can only discuss a specific piece of real or potential litigation in closed session, not simply any legal matter that comes up.

Both bills passed the Legislature — the Roberti bill after a [redacted] tough fight. Gov. George [redacted]minejian signed the Conflict bill last week; he has until [redacted] to sign the Roberti measure.

There are many in the media and public office who would like to see the Brown Act rewritten completely. The League of California Cities, a lobbying group to which most of the state's cities belong, has formed a committee to study the matter. San

would be prepared to take suspected violators to court on a moment's notice.

The presence of these "minutemen," as law center Director Fellmeth calls them, would soon deter legislative bodies from blithely conducting improper closed sessions.

Deputy District Attorney Hamilton, who specializes in election law, is skeptical that anything can be done to stop determined public officials doing business in private.

"No matter how you write election laws, I've found there is a skilled group of people who find ways to get around it," he said, "and they are the same people who are involved with the Brown Act."

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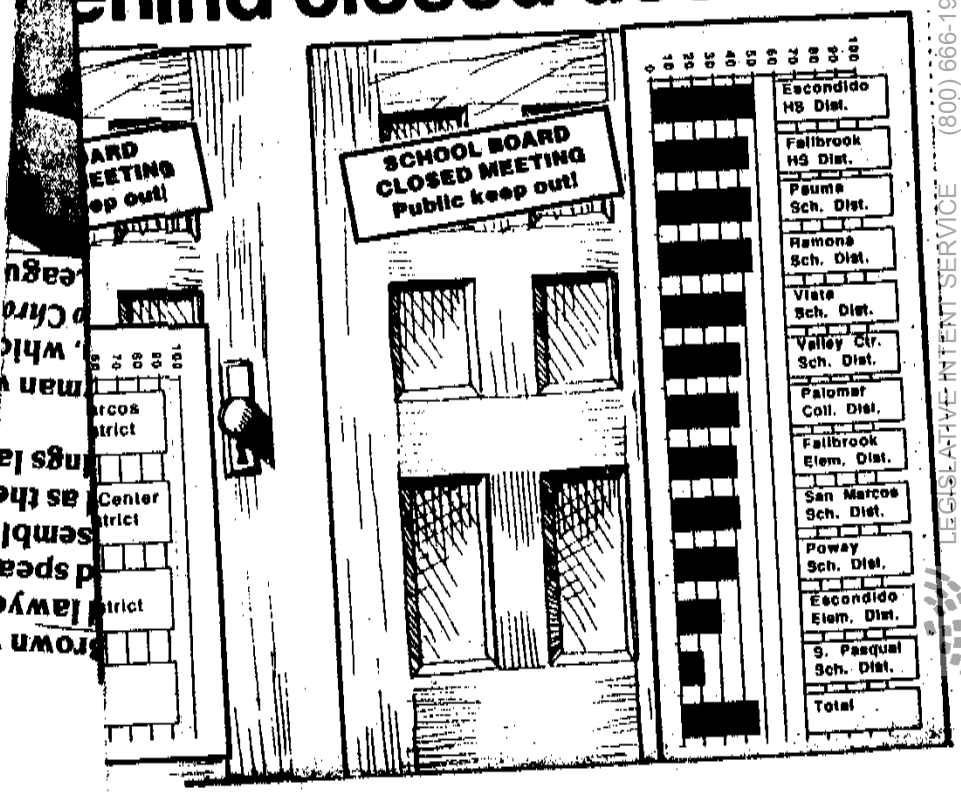

Fixing the Brown Act

BEHIND CLOSED DOORS

T-A SPECIAL REPORT / PART 6

By Frank Mickadeit
Times-Advocate Staff Writer

SACRAMENTO — Assemblyman Charles Calderon was indignant.

"I believe we are creating a standard by which we are making criminals out of public officials," the Los Angeles Democrat was saying to his colleagues on the Assembly Local Government Committee. "If we're not happy with the democratic system, with electing officials and simply trusting them, we ought to just abolish the system. . . . That's what bills like this are for."

The occasion was the first legislative hearing of AB 2674, a bill that would put some teeth in the Ralph M. Brown Act, the state's 33-year-old open meeting law.

While the bill eventually passed the Legislature, after being slightly watered down, Calderon's outburst illustrates the attitude that some would-be Brown Act reformists say keeps the statute little more than a paper tiger.

Even though suspected open meeting violations are rampant — the Los Angeles County District Attorney's office says it has received "literally thousands of complaints" in the last 20 years — what some see as inherent flaws in the law have kept anyone from ever being prosecuted. And few civil complaints are filed.

"The current Brown Act is just a good-conduct code without any force," said Assemblyman Lloyd Connelly, author of AB 2674.

That is generally how the League of California Cities, the County Supervisors Association and other Sacramento lobbying groups representing local government would like to keep it. Even some editors would just as soon leave the statute alone, hard-pressed as they are just to put out a daily newspaper, let alone mount what would be an arduous campaign to change the law.

But on the other side there are the reformers, those journalists, public interest attorneys and assorted government watchdogs who are itching to roll up their sleeves and draft something that would make the bad politicians pay out of their own pockets for doing the public's business in private, something that could maybe even re-

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Continued from page A1

move them from office, something that would *work*.

Idealists, purists, dreamers, whatever you want to call them, they are often found in the newsrooms of small and medium-sized papers that carry out the grunt work of reporting on local city councils and school boards.

Daniel Borenstein has covered local government for the *Contra Costa Times* for six years and has witnessed his share of closed-door tactics by public officials. The thesis he wrote last year while earning his masters degree at the University of California-Berkeley presents one of the most complete outlines for reforming the Brown Act.

The 97-page work recommends 28 specific ways to strengthen the law, ranging from defining what types of gatherings constitute meetings — something the Brown Act fails to do — to appointing the Fair Political Practices Commission as the agency to enforce the law.

Some of the key suggestions:

• Establish the Fair Political Practices Commission as the enforcement agency. Borenstein says this is a logical choice; the agency already enforces the Political Reform Act, which covers such things as campaign contributions and conflicts of

evaluation of city managers and other top administrators, to be discussed in private. Florida and Tennessee, which are considered to have the strongest open meeting laws, have no such exception.

• Eliminate the exception that permits closed sessions to discuss land acquisition and labor negotiations.

• Define a meeting by adding current attorney general opinions to the act. Thus the Brown Act would apply to any meeting, "no matter how informal, where business is transacted or discussed."

• Essentially ban out-of-town "retreats" by local legislative bodies by requiring them to meet within the agency's jurisdiction.

Borenstein is far from alone in his quest for reform. Some government watchdogs want to scrap the entire statute and start from scratch.

"I do think the law itself is shot full of so many loopholes that a major effort needs to be undertaken, that a group of experts has to sit down and totally redraft rather than fighting over amendments each year," said Mel Opotowsky, a managing editor at the Riverside *Press-Enterprise* and a member of the California Freedom of Information Committee.

The purists would like a law that would have one word after the heading "Exceptions for Closed Sessions:" None.

interest involving public officials. A major asset is the ability of the agency to levy civil fines of up to $2,000 against violators.

• Abandon the Brown Act's controversial "knowledge" standard, which requires proof that members of a legislative body knew they were violating the Brown Act before they can be held criminally liable. Prosecutors say this is an impossible burden of proof. Borenstein would replace it with a "willful" intent standard, which he says could apply to "an act done with bad intent." It is the standard used by the commission to adjudicate Political Reform Act matters.

• Eliminate the provision that the members of a legislative body must take an "action" in an illegal closed session to be found criminally liable. This provision ignores the concept that it is just as vital that discussion of a matter be held in public as it is that the actual vote be taken in public.

• Award mandatory court costs to the prevailing plaintiffs and shift the financial liability for such costs to the individual violators, not the local agency. Currently, it is up to the judge whether to assign court costs.

• Require that closed sessions be taped so when agencies arechallenged on the propriety of private meetings, a judge can review the tapes in chambers before ruling.

• Eliminate the exception [illegible] allows personnel matters, [illegible] as the hiring, firing and

[illegible] restricts closed sessions to a minimum but also outlaws other mechanisms of privacy such as committee meetings, is a popular model.

"Government in Florida has not come to a halt," notes *Times-Advocate* Editor Will Corbin, rebuffing a popular argument among public officials that a more stringent statute would tie their hands. Corbin was a Florida editor before moving to California in 1981.

Terry Francke, an attorney for the California Newspaper Publishers Association, suggests enlightening the public to backstage political maneuvers by forbidding any one person — whether a lobbyist, public agency staff member or citizen at large — from contacting more than one legislator on the same or related issue unless a copy of the communication is filed with the clerk of the board or council. Telephone conversations would be prohibited.

Corbin suggests that members of a legislative body not be allowed to discuss public business except at their public meetings, where all the discussion and decision-making would occur between the board members. Currently, officials are free to poll each other individually as long as they don't meet in a quorum and don't reach a consensus on a matter.

Among the most controversial aspects of opening up all meetings would be the baring of personnel sessions of high-ranking public officials, the

"I don't think anyone is (satisfied with the Brown Act). The Brown Act takes a highly procedural-structural approach to the problem. It talks about meetings as if meetings were the occasion at which government policy crystalizes. They are not. That may be the case with a jury or appellate panel, but with legislative institutions, meetings provide windows on the pro forma (motion-vote) aspect of legislation. But it's a rather late window and seldom provides any illumination on how decisions are made and public policies are formed."

— Terry Francke
attorney, California Newspaper Publishers Association

Legislature) know all the city council members and school board members in their districts. They are a part of them. When those people see that state restrictions are coming down, 25 percent say OK, but 75 percent don't agree and are upset, and they pick up the phone and call the legislator and get him on the line. He says, 'Say, I supported you in the last election, and I don't call you too often, but we really oppose this bill.' And that's real powerful stuff."

— Lloyd Connelly
California Assemblyman

types who are usually interviewed and evaluated by the legislative body itself. Even the original Brown Act — about a third the size of the current edition — allowed for such sessions to be done privately.

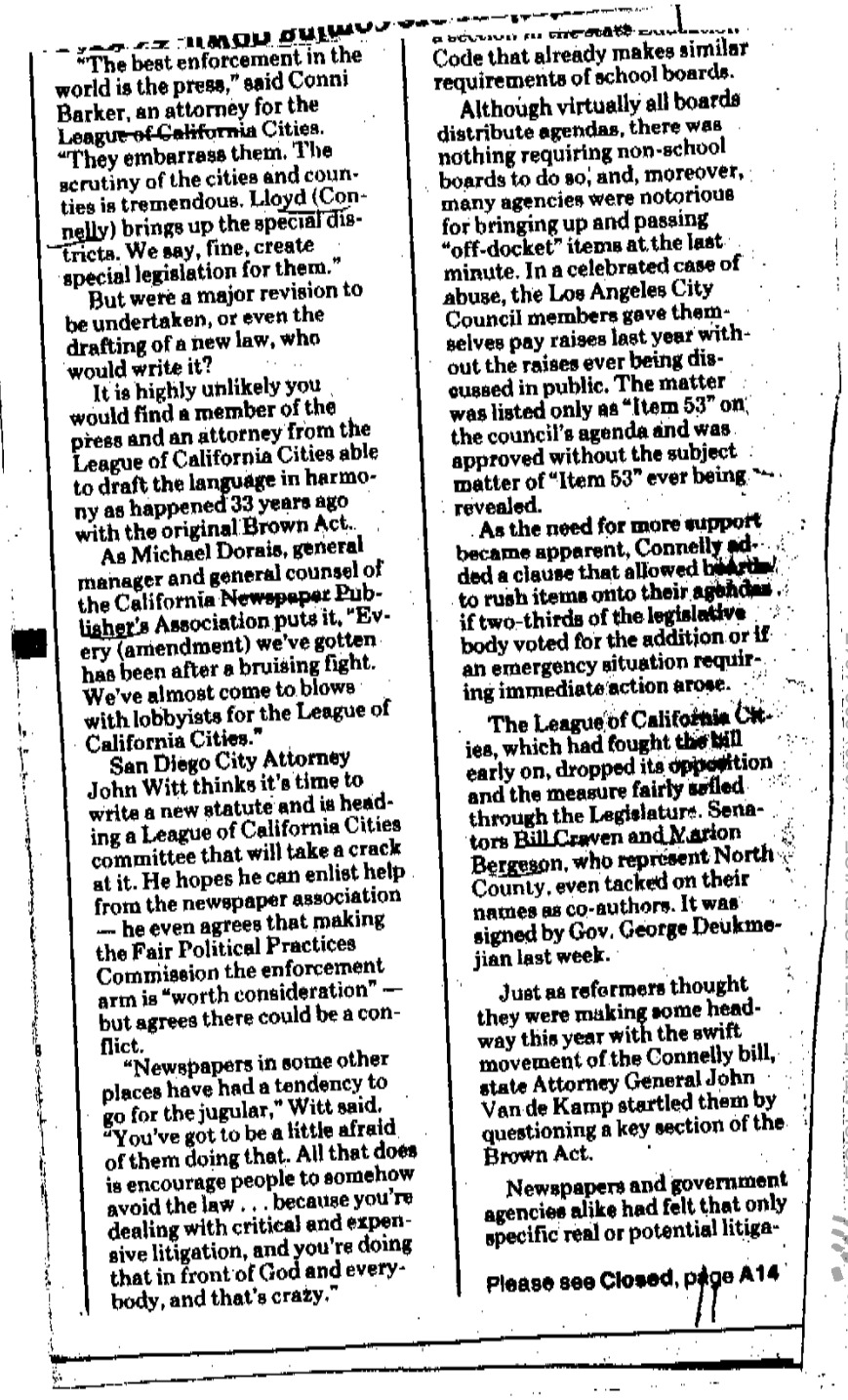
Borenstein argues, however, that "public employees are subject to a different standard because their ultimate employer is the public. If the public is not privy to the reasons for hiring and firings, it has no way of evaluating the performance of its delegated representatives — the board members of a local agency. Without public scrutiny, the danger exists that employees will be hired or dismissed for political reasons without the public's knowledge."

Striking the "knowledge" requirement is another hot topic. San Diego County Deputy District Attorney James Hamilton, while admitting the law is unenforceable the way it is, isn't necessarily inclined to change it.

"I won't say we wouldn't welcome it, but it would cause a lot of problems," he said. "If you took the knowledge factor out, we'd spend a lot of time investigating these things, and I'm not sure that's a proper remedy. Criminal prosecution is a drastic remedy."

Robert C. Fellmeth, director of the University of San Diego's Center for Public Interest Law, is all for Brown Act reform. But even he thinks the criminal provisions, in which a violator could conceivably go to jail, are "Draconian." Fellmeth favors a "spectrum of sanctions," that would include civil fines.

Local officials who would come under the law are naturally loathe to any such changes,



"The best enforcement in the world is the press," said Conni Barker, an attorney for the League of California Cities. "They embarrass them. The scrutiny of the cities and counties is tremendous. Lloyd (Connelly) brings up the special districts. We say, fine, create special legislation for them."

But were a major revision to be undertaken, or even the drafting of a new law, who would write it?

It is highly unlikely you would find a member of the press and an attorney from the League of California Cities able to draft the language in harmony as happened 33 years ago with the original Brown Act.

As Michael Dorais, general manager and general counsel of the California Newspaper Publisher's Association puts it, "Every (amendment) we've gotten has been after a bruising fight. We've almost come to blows with lobbyists for the League of California Cities."

San Diego City Attorney John Witt thinks it's time to write a new statute and is heading a League of California Cities committee that will take a crack at it. He hopes he can enlist help from the newspaper association — he even agrees that making the Fair Political Practices Commission the enforcement arm is "worth consideration" — but agrees there could be a conflict.

"Newspapers in some other places have had a tendency to go for the jugular," Witt said. "You've got to be a little afraid of them doing that. All that does is encourage people to somehow avoid the law . . . because you're dealing with critical and expensive litigation, and you're doing that in front of God and everybody, and that's crazy."

Code that already makes similar requirements of school boards.

Although virtually all boards distribute agendas, there was nothing requiring non-school boards to do so, and, moreover, many agencies were notorious for bringing up and passing "off-docket" items at the last minute. In a celebrated case of abuse, the Los Angeles City Council members gave themselves pay raises last year without the raises ever being discussed in public. The matter was listed only as "Item 53" on the council's agenda and was approved without the subject matter of "Item 53" ever being revealed.

As the need for more support became apparent, Connelly added a clause that allowed boards to rush items onto their agendas if two-thirds of the legislative body voted for the addition or if an emergency situation requiring immediate action arose.

The League of California Cities, which had fought the bill early on, dropped its opposition and the measure fairly sailed through the Legislature. Senators Bill Craven and Marion Bergeson, who represent North County, even tacked on their names as co-authors. It was signed by Gov. George Deukmejian last week.

Just as reformers thought they were making some headway this year with the swift movement of the Connelly bill, state Attorney General John Van de Kamp startled them by questioning a key section of the Brown Act.

Newspapers and government agencies alike had felt that only specific real or potential litiga-

Please see Closed, page A14

Escondido, CA
(San Diego Co.)
Times Advocate
(Cir. D. 32,685)
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Allen's P. C. B Est. 1888

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Continued from page A4

tion matters could be discussed in private.

However, Van de Kamp, in a letter to Sen. Barry Keene, a long-time open meetings advocate, said the Brown Act could be interpreted to allow for any legal matter to be discussed privately. Were Van de Kamp to issue a formal opinion, which was likely, legislative bodies throughout the state would be free to greatly expand their private discussions and decision-making.

Being late in the session, Keene had to attach a provision to an already controversial bill by Sen. David Roberti. The rider would expressly ban such general discussions of legal matters.

Although the bill faced tough opposition from the League of California Cities, it passed the Legislature last week and now awaits the governor's signature.

Despite those victories, reform of the Brown Act through the Legislature is not easy. Political insiders point out that this year's session was perfectly tailored for reform: an election year for legislators as well as the governor. Such bills would be much harder to pass in an off-year, they say.

And the mood of many legislators, particularly those on the local government committees that get the first crack at Brown Act bills, is one of sympathy toward local public officials. The Assembly Local Government Committee is packed with former city council members and city officials, such as former

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surer Bill Bradley. The chairwoman of the Senate Local Government Committee is Bergeson, the former head of a Newport Beach school board and president of the California School Boards Association.

"This about closes the thing as far as I'm concerned," Bradley said one day in Sacramento as he prepared to hear Connelly's bill. "You really couldn't add to it anything that's worth a tinker's damn."

As for trying to shed light on government through amendments such as those suggested by Francke and others, Bradley said, "My personal feeling is that the Brown Act isn't going to stop people from communicating over the telephone. Some big issue will come up, and Councilman A is going to call Councilman B and on and on and find out about it."

Although Frazee supported the Connelly bill, he echoed the complaint of many city council members who said adding teeth to the statute could be harmful. "We have a lot of people who cannot achieve their goal through (the votes of) a majority of their representatives, and I think this just allows another opportunity for those people to hold up the process and bring suit."

And then there is the pressure from the constituent city council and school board members, who typically have close ties to their legislators in Sacramento.

Connelly, who was once a Sacramento city councilman, talks of the local official who will call the state legislator and say, " 'Say, I supported you in the last election, and I don't call you too often, but we really oppose this bill.' And that's real powerful stuff."

Keene, usually in the vanguard on open meeting matters and whose name is on the Bagley-Keene act, the open meeting law that governs state agencies, is still weighing various additions to the Brown Act. Among those is the delegation of enforcement responsibility to the Fair Political Practices Commission. "He's looking into it," said an aide, Greg de Giere. "He's made no secret that he's been looking at it for some time."

But de Giere said Keene is not interested in rewriting the whole law. "Overall, with this year's bills, it's a pretty good (statute)," he said.

Such sentiment from the office of a legislator so identified [illegible] meeting law is hardly

Times Advocate

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Such sentiment from the office of a legislator so identified with open meeting law is hardly encouraging for the reform-minded.

With the Legislature's support for major reform in serious doubt, the only option left is a ballot referendum.

"This is just ripe for an initiative," Borenstein said in a recent interview. "I think it's going to come."

But from where? wonders the

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Contact: Gene Erbin
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For Immediate Release:
January 15, 1966

Brown Act To Be Toughened By Connelly Bill

Legislation that proposes major amendments to the Ralph M. Brown Act was introduced today by Assemblymen Lloyd Connelly (D-Sacramento) and Ross Johnson (R-Fullerton). The Brown Act generally requires that meetings of local entities, such as city councils and boards of supervisors, be open to the public.

"AB 267 does two things," said Connelly. "It requires local entities to post specific agendas for their meetings so that citizens can learn beforehand what business will be transacted and, secondly, allows citizens to go to court to have actions taken in violation of the Brown Act declared 'null and void'."

Presently, there is no law that requires specific agendas or permits the invalidation of illegal actions.

"This is an important bill because it puts sharp enforcement teeth into the Act. Right now, the Act is toothless," said Connelly.

The principal co-author of the bill is Assemblyman Ross Johnson (R - Fullerton). "This bill deserves bi-partisan support", said Johnson, "because it gives real meaning to the idea that citizens can participate in government and retain some degree of control over their own government."

A recent example of an egregious violation of the spirit of the Act which points out the need for this bill is the Los Angeles City Council's nearly

secret decision to raise its own pay. When the pay raise was voted on, it was referred to only as "Item 53," no description of the motion was given, and it was not available in print prior to the vote. In a subsequent court ruling, the judge concluded that the Council's actions violated the spirit of the law but not the letter of the Act, precisely because of the deficiencies in the Act this bill corrects.

The bill is supported by the Attorney General, the California District Attorneys Association and several individual district attorneys. Common Cause is the sponsor of the bill.

"Why shouldn't the people have some form of minimal notice of the meetings of their local government?" asked Connelly. "Why shouldn't the people have some opportunity to invalidate the illegal actions of their government?"

AB 2674 is based on Connelly's AB 214 (Chapter 936 of 1985) that was signed into law last year. That bill added the "null and void" provision of law to the Bagley - Keene Open Meeting Act which governs the meetings of state agencies.

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Cutting Down Secrecy

California's Brown Act requires boards of supervisors, city councils, water districts, school boards and other local bodies to conduct business in public. The broad protections are good for democracy, but an action that violates the law can remain valid and secrecy is rarely, if ever, penalized. Those weaknesses need correcting.

Assembly Bill 2674 would strengthen the Brown Act and make it easier to enforce. The California Legislature should make it law.

The new legislation would require policy bodies to post a specific agenda at least three days before a regular meeting and one day before a special session. No items could be added during a meeting. The new requirement would prevent cunning council members from hiding controversial motions until the last moment. Exceptions would be made for genuine emergencies, and the exemption for discussing personnel matters would remain.

Had the changes been in effect last year, members of the Los Angeles City Council could not have sneaked through a motion for a 10% pay raise, identified only by number and not by topic, without public discussion or public notice.

Had the new enforcement provision been in effect, the council's action could have been redressed without proof of criminal intent. Superior Court Judge Raymond Cardenas subsequently found that the process had violated the spirit, but not the letter, of the Brown Act. He struck down the pay raise, however, because he found that it violated a provision of the city Charter.

AB 2674 would allow any action, found in violation of the law by a court, to be declared void automatically. Sneakiness would no longer pay off. That is significant, because there is no record of a successful criminal prosecution of the Brown Act, according to Assemblyman Lloyd G. Connelly (D-Sacramento), one of the bill's sponsors.

Connelly's co-sponsor is Assemblyman Ross Johnson (R-La Habra). That bipartisan support indicates that both Democrats and Republicans support the precepts of good government. The attorney general, the California District Attorneys Assn. and the League of Women Voters also support the measure. Common Cause, the citizens' lobby, is the original sponsor.

A similar measure, sponsored by Connelly during the last legislative session, tightened up the Bagley-Keene Open Meeting Act, which governs meetings of state agencies just as the Ralph M. Brown Act governs meetings of local agencies.

Local officials may chafe at the new restrictions. They may protest that the requirements would slow government business. Secrecy may speed some decisions, but that efficiency is at the expense of democracy. AB 2674 deserves passage.

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The Sacramento Union

THE OLDEST DAILY IN THE WEST
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Editorials

Toughen open meeting law

Last June, members of the Los Angeles City Council, without any notice to the public and without debate or discussion, unanimously approved "Item 53," an ordinance giving a 10 percent pay increase to themselves, the mayor and other top city officials. Mayor Thomas Bradley signed the ordinance the next day, but the resultant public uproar brought a law suit and a Superior Court judge overturned the council's action.

However, the judge didn't say the officials violated the state's open meeting law for local governments requiring advance notice and public discusssion of agenda items. Thus did the court emphasize the toothless nature of the law, known as the Ralph M. Brown Act.

Now, however, a bill has been introduced to amend the law to require local entities to post specific agendas for meetings at least 72 hours before items are acted upon. More importantly, it allows citizens to go to court to nullify actions taken in violation of the Brown Act.

Assemblymen Lloyd Connelly, D-Sacramento, and Ross Johnson, R-La Habra, are authors of the measure, indicating the bipartisan support for the bill (AB 267). Mr. Connelly was the author of a measure signed by Gov. Deukmejian last year adding similar enforcement provisions to the open meeting law covering state agencies.

The latest measure has broad support from law enforcement officials, but some local government officials don't like it because it impedes upon their "finality of action." This seems like a minimal problem compared with informing citizens about what their elected officials are voting for and letting citizens invalidate illegal actions of their government.

Editorial Page

Monday, Feb. 10, 1986 CC SANTA BARBARA NEWS-PRESS

The public's business

None of it should be handled secretly

California generally has done well in prohibiting government bodies from meeting in private, away from the public's eyes and ears.

School districts and community college districts are required to tell the public in advance what items of business they plan to discuss. That's covered in the Brown Act. State agencies are required by the Bagley-Keene Open Meeting Act to tell all interested individuals in advance what they plan to discuss, so that the public can be on hand.

But the Brown Act needs more teeth in it. It deals with local governing bodies—city councils, county boards of supervisors, planning commissions. Its intention is clear: These bodies, with few exceptions, must handle the public's business in public. But the act's weakness is that it doesn't provide any remedy for violations.

Assemblyman Lloyd G. Connelly, whose legislation last year strengthened the Bagley-Keene Act covering state agencies, wants to do the same with the Brown Act. His new bill would require local bodies to post their specific agenda well in advance of any regular or special meetings. But if a council or board did ignore this requirement and take actions in private, the courts would be authorized to declare these actions "null and void."

There is no hardship here on these governing bodies. Our system is designed with open doors for the citizenry. Connelly's new bill deserves the full support of the Legislature.

Santa Ana, CA
(Orange Co.)
Register
(Cir. D. 279,452)
(Cir. Sat. 246,128)
(Cir. Sun. 311,062)

JAN 17 1986

Allen's P. C. B Est. 1888

Government in the open

Last year the state Legislature put some teeth into the open-meeting law covering state agencies. This year, it has a chance to do the same for the law covering local governments. It's long overdue.

A bill by Assemblymen Ross Johnson, R-Fullerton, and Lloyd Connelly, D-Sacramento, not only would strengthen existing requirements that local governments notify citizens of actions they plan to take, but it would also impose penalties on governments that fail to comply.

Under the existing Brown Act, passed in 1953, local legislative bodies such as city councils, school boards, boards of supervisors, water districts and many special districts need only post notices of upcoming meetings. The Johnson-Connelly bill would require that they post specific agendas 72 hours before their meeting.

Perhaps most importantly, the bill would allow courts to invalidate actions taken at meetings that do not comply with the law.

The Johnson-Connelly collaboration came about after the Fullerton assemblyman learned of the unorthodox manner in which Los Angeles City Council members voted themselves a 10-percent pay increase last June. The pay-increase issue, known only as "item 53," did not appear on the council's agenda, and was not discussed in an open meeting prior to the vote.

Although the increase was later voided because it exceeded a ceiling imposed in the Los Angeles City Charter, the judge in the case admitted that the council's vote was legal under the Brown Act.

That's just one example of the arrogant manner in which governments sometimes handle what is euphemistically called the "public's business." It's unfortunate that government officials seem to need constant reminding, but in order for a free society to remain free it is essential that people be fully aware of actions suposedly taken on their behalf, and that they have the power to nullify actions of which they were not made aware.

There may be no foolproof way to ensure that government business is conducted in the "open." And operating in the open is still no substitute for a more widespread conviction that many of the actions governments take are none of their business in the first place.

But if governments continue to arrogate power unto themselves, they should at least have some incentive to do so in public rather than behind closed doors. To this end, the Johnson-Connelly bill is a welcome and overdue contribution.

Salinas, CA
(Monterey Co.)
Californian
(Circ. 6xW. 23,602)

JAN 17 1986

Allen's P. C. B Est. 1888

A remedy to secrecy

Last year, the Legislature moved halfway toward toughening the state's open meetings law. This year, it should finish the job.

A bill signed into law last year allows citizens to sue to have actions of state agencies overturned if they violated the state's Brown Act. That act requires government bodies to make decisions in public and to post public notice of meetings.

Now, Assemblymen Lloyd Connelly, D-Sacramento, and Ross Johnson, R-La Habra, are sponsoring a bill that would apply similar standards to local government boards and councils.

The 32-year-old Brown Act has been a valuable wedge for the public and news media to use to gain access to public business. But its value has been undermined by the fact that it carries with it little enforcement clout. The law carries no penalties unless criminal intent can be proven, which is nearly impossible.

So, if a citizen fights for access to a public meeting, he may win the satisfaction of having a court say he's right, that the law should be enforced. Then, the offending agency lets him into the next meeting, no penalties are issued, the decisions made secretly remain in force.

Allowing citizen suits to overturn secret actions would recognize the fact that, in a democracy, public participation is a mandatory part of the process.

Without it, an act has no validity, and the court should be allowed to say so.

STATE OF CALIFORNIA
Supreme Court of California

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