



Topic: **Reservoir Committee Agenda Item 3.5**      **2020 August 21**

Subject: **Review of Ralph M. Brown Act – Closed Sessions**

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**Requested Action:**

Receive report by Legal Counsel reviewing provisions of the Ralph M. Brown Act related to closed sessions.

**Detailed Description/Background:**

The approved OA Report included a recommendation that a review of the provisions of the Brown Act be provided to educate the Reservoir Committee and Authority Board on the circumstances under which closed sessions would be appropriate. Legal Counsel has prepared a report (attachment A) and will be making a presentation. All governing bodies of local agency's within California are subject to these same provisions of the Brown Act.

**Prior Action:**

April 17, 2020: Accepted plan and schedule for addressing the Organizational Assessment findings and recommendations.

November 21, 2019: Darling H2O Consulting, Inc. presented the draft Organizational Assessment.

August 26, 2019: Approved a budget reallocation for the organizational assessment and execution of a sole-source professional services agreement with Darling H2O to perform an organizational assessment.

July 22, 2019: Discussed working on an organizational assessment plan to evaluate the structure of the Sites Project's program management team, Reservoir Committee and the Authority.

**Fiscal Impact/Funding Source:**

Sufficient funds exist within the Amendment 1B work plan (budget) to perform this analysis and create this report to the Boards within the Legal Counsel services contract provided by Young Wooldridge.

**Staff Contact:**

Jerry Brown

**Attachments:**

Attachment A – Memo from Young Wooldridge, LLP

**TO: Sites Project Authority Board and Reservoir Committee**

**FROM: Scott K. Kuney; Alan F. Doud**

**DATE: August 13, 2020**

**RE: Review of the Brown Act – Items Appropriate for Closed Session**

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**I. Background**

Meetings of the Authority’s Board of Directors and of the Reservoir Committee (each a “Board” and together the “Boards”) are considered meetings of a legislative body of a local agency as those terms are defined under the Brown Act (Gov. Code § 54950 *et seq.*).<sup>1</sup> All meetings must therefore be open to the public, all Board actions be taken openly, and all Board deliberations be conducted openly. (§§ 54950; 54953(a).)

That said, the Brown Act authorizes the Boards to take certain actions and undertake certain deliberations in closed session in limited circumstances. (§ 54954.5.) The following addresses the request for a memorandum concerning appropriate topics for the Boards to discuss and act upon in closed session.

**II. Topics Eligible for Closed Session**

The Brown Act includes numerous exceptions that allow public agencies to meeting in closed session. Many of the exceptions are inapplicable to the Authority, and therefore we only address the exceptions upon which the Authority is likely to rely on a routine basis.<sup>2</sup>

**a. Litigation**

The Brown Act specifically authorizes the Board to hold 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.” (§ 54956.9(a).) A matter is considered pending if “litigation . . . has been initiated formally, a point has been reached where . . . there is a significant exposure to litigation . . ., or the local agency has decided to initiate or is deciding whether to initiate litigation.” (§ 54956.9(d).)

Litigation also includes “adjudicatory proceedings, including . . . before a court, administrative body exercising its adjudicatory authority, hearing officer, or arbitrator.” (§ 54956.9(c).)

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<sup>1</sup> All section references shall be to the Brown Act unless otherwise noted.

<sup>2</sup> Such inapplicable exceptions include those for joint powers authorities formed for purpose of insurance pooling (§ 54956.96), multijurisdictional law enforcement agencies (§ 54957.8), discussions for early withdrawal of funds in a deferred compensation plan (§ 54957.10), and the like.

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**b. Real Property Negotiations**

The Brown Act specifically authorizes the Boards to “hold a closed session with its negotiator prior to the purchase, sale, exchange, or lease of real property by or for the local agency to grant authority to its negotiator regarding the price and terms of payment for the purchase, sale, exchange, or lease.” (§ 54956.8.) Prior to doing so, the Boards are to identify in open session “its negotiators, the real property or real properties which the negotiations may concern, and the person or persons with whom its negotiators may negotiate.” (Id.)

**c. Employees**

The Brown Act specifically authorizes the Boards to hold a closed session “to consider the appointment, employment, evaluation of performance, discipline, or dismissal of a public employee or to hear complaints or charges brought against the employee by another person or employee unless the employee requests a public session. (§ 54957(b)(1).) The Authority’s Executive Director position qualifies as an employee for purposes of this portion of the Brown Act, which acknowledges that an employee can include “an officer or an independent contractor that functions as an officer or an employee.” (§ 54957(b)(4).)

If closed session is held under this “personnel exception” to consider a complaint against one employee by another employee, the employee against whom the complaint was filed is to be given 24 hours written notice of the charged employee’s right to have the complaint heard in open session. (§ 549567(b)(2).) However, if a Board meets to consider whether a complaint is sufficient grounds for disciplinary action, that is properly a closed session matter and notice to the charged employee is not required.<sup>3</sup>

Other than a reduction in pay related to discipline, the “personnel exception” does not permit the Boards to deliberate upon or make decisions regarding employee compensation in closed session. (§ 54957(b)(4).)

**d. Others**

Public policy favors public business being conducted in the open, and the Brown Act closed session exceptions are to be narrowly construed. Matters might arise that do not fall squarely within one of the exceptions discussed above. Closed session matters have been interpreted by the Courts and the Attorney General, and those interpretations can inform implementation.

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<sup>3</sup> “As enacted, therefore, section 54957 does not entitle an employee “to 24-hour written notice when the closed session is for the sole purpose of considering, or deliberating, whether complaints or charges brought against the employee justify dismissal or disciplinary action. . . Accordingly, we conclude a public agency may deliberate in closed session on complaints or charges brought against an employee without providing the statutory notice.” (*Kolter v. Comm'n on Prof'l Competence of Los Angeles Unified Sch. Dist.*(2009) 170 Cal. App. 4th 1346, 1352 (citing *Bollinger v. San Diego Civil Service Com.* (1999) 71 Cal.App.4th 568, 574-5).)

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### **III. Rules and Limitations**

There are various rules and technical elements associated with Brown Act closed session exceptions and it is therefore critical that the Authority's legal counsel be consulted prior to any such discussion occurring or being placed on an agenda.

Among these technical aspects are the manner in which the closed session items are listed on the agenda. The Brown Act provides "safe harbor" language that, if used for an agenda, results in a presumption that a closed session item was properly noticed. (§ 54954.5) Another is the extent to which action taken in closed session is reportable out of closed session. (§ 54957.1.) Yet another is that, as the California Attorney General has opined, a closed session held under the litigation exception requires the participation the Authority's counsel.

All matters discussed and information disclosed in a Board's closed session is to remain confidential. (§ 54954.5) However, as a Joint Powers Authority the Authority can develop a policy, including in its Joint Powers Agreement or bylaws, that provides that "All information received by the legislative body of the local agency member in a closed session related to the information presented to the joint powers agency in closed session shall be confidential. However, a member of the legislative body of a member local agency may disclose information obtained in a closed session that has direct financial or liability implications for that local agency to the following individuals: (A) Legal counsel of that member local agency for purposes of obtaining advice on whether the matter has direct financial or liability implications for that member local agency. (B) Other members of the legislative body of the local agency present in a closed session of that member local agency." (§ 54956.96.) The Authority's Phase 2 Bylaws do include such a policy. (Phase 2 Bylaws, Sec. 6.3.)

The policy referenced in the foregoing paragraph can also provide for the attendance of an alternative Board member in a Board's closed session. However, the alternate's attendance can only be *in lieu of* the regular Board member's attendance. The Attorney General has opined that a meeting of a legislative body cannot be semi-closed (46 Ops.Cal.Atty.Gen. 34), and that if both an alternate board member and a regular member were to attend an otherwise closed session, their joint attendance would result in an unauthorized "semi-closed meeting." (82 Op. Atty Gen. Cal. 29, 10.)

As for the attendance of personnel other than Board member or alternates, it is generally held that closed sessions can include "any additional support staff which may be required (e.g., attorney required to provide legal advice; supervisor may be required in connection with disciplinary proceeding; labor negotiator required for consultation). Persons without an official role in the meeting should not be present." (83 Ops. Cal. Atty. Gen. 221, 2; 82 Ops. Cal. Atty. Gen. 29, 10-11.)