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REPORT TO THE AUDIT COMMITTEE

**AUTHORITY OF THE AUDIT COMMITTEE TO HOLD CLOSED SESSION MEETINGS
OR TO PARTICIPATE IN CITY COUNCIL CLOSED SESSION MEETINGS**

INTRODUCTION

At the Audit Committee meeting on January 10, 2011, a Committee member expressed concern that an item on the City Council closed session docket relating to the City Auditor was not first presented to the Audit Committee. The Chairman asked the Office of the City Attorney to prepare a written report outlining the Audit Committee's ability to hold closed session meetings relating to the responsibilities of the City Auditor or the Audit Committee, and the Audit Committee's right to be briefed on audit-related matters to be discussed with the City Council in a closed session meeting.

DISCUSSION

The Audit Committee is a permanent body of a local agency created by charter and is subject to the Brown Act. Cal. Gov't Code § 54952(b). The Brown Act requires that, except as otherwise provided, "[a]ll 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 . . ." Cal. Gov't Code § 54953(a). Closed session meetings are an exception to the Brown Act's open meeting requirements and must be expressly authorized by statute. Cal. Gov't Code § 54962. The fact that material may be sensitive, embarrassing, or controversial does not justify application of a closed session unless it is authorized by some specific exception. *Rowen v. Santa Clara Unified School District*, 121 Cal. App. 3d 231, 235 (1981). Further, statutory exceptions in favor of closed session meetings are construed narrowly, whereas the Brown Act is construed liberally in favor of openness in conducting public business. *Shapiro v. Board of Directors of the Centre City Development Corporation*, 134 Cal. App. 4th 170 (2005).

Closed session exceptions include, but are not limited to, personnel matters such as performance evaluations, appointments, discipline, and dismissal; pending, existing, and anticipated litigation; real property and labor negotiations; and public security. Cal. Gov't Code § 54954.5. There is no specific statutory exception for the discussion of an audit conducted by a local agency's own internal auditor, although there is an exception that allows a local agency to hold a closed session meeting to discuss an audit by the State Bureau of Audits. Cal. Gov't Code § 54954.5.

The Audit Committee's responsibilities are described in the San Diego Charter and the San Diego Municipal Code. San Diego Charter § 39.1; San Diego Municipal Code § 26.1701. It is responsible for:

- (1) conducting the City Auditor's annual performance review;
- (2) directing and reviewing the work of the City Auditor;
- (3) overseeing the City's auditing, internal controls and any other financial and business practices as described in the San Diego Charter;
- (4) recommending the annual compensation of the City Auditor and the annual budget of the Office of the City Auditor to the Council;
- (5) recommending to the Council the retention of the City's outside audit firm and, when appropriate, the removal of such firm;
- (6) monitoring the engagement with the City's outside auditor and resolving any disputes that may arise between the outside auditor and City management with regard to the City's annual financial reports;
- (7) reviewing the results of significant investigations, examinations or reviews performed by government and regulatory authorities and any management response thereto; and
- (8) reviewing any issues that come to the Committee's attention which pertain to the accuracy and reliability of the City's financial practices and representations and which could have a negative impact on the ability of the public to reasonably rely upon such financial practices and representations.

Although the Audit Committee is not authorized to initiate or participate in litigation, it is required to review the performance of the City Auditor. This review occurs in a closed session meeting to ensure the City Auditor's privacy rights are protected. Cal. Const. art. I, § 1; Cal. Gov't Code § 54957(b). Action taken in a closed session meeting that affects the City Auditor's employment status is reported to the public in open session. Cal. Gov't Code 54957.1(a)(5). Confidential information acquired in closed session may not otherwise be disclosed unless such disclosure is authorized by the legislative body. Cal. Gov't Code 54963.

The Audit Committee's responsibilities do not otherwise fall within a specific closed session meeting exception. Thus, Audit Committee actions related to the responsibilities listed above must be taken in open session. This includes discussion of or actions relating to the City Auditor's compensation. *San Diego Union v. City Council*, 146 Cal. App. 3d 947 (1983).

The next issue is whether the Audit Committee may meet in closed session with the City Council. We conclude it may not. In *Shapiro v. Board of Directors of the Centre City Development Corporation*, 134 Cal. App. 4th 170 (2005), the plaintiff, Mel Shapiro, sued the Board of Directors of the Centre City Development Corporation (CCDC Board) after the CCDC Board met in closed session with attorneys for the Redevelopment Agency of the City of San Diego (Agency). Mr. Shapiro argued the CCDC could not rely on California Government Code section 54956.9, which permits the legislative body of a local agency to hold closed session

meetings with its counsel to discuss litigation to which it is a party, because CCDC was *not a party* to the Agency's eminent domain litigation. The trial court found that the closed session was permissible because CCDC acts as an agent of the Agency with respect to eminent domain litigation. The appellate court disagreed: "[f]inding no express authorization for the CCDC Board to meet in closed session with legal counsel for the Agency in the text of section 54956.9, we conclude that such closed-session meetings are not permitted by the Brown Act." *Id.* at 173.

Notably, the appellate court discussed and discredited a California Attorney General opinion (1984 Opinion) that posed a fact pattern similar to the one at hand. In 67 Op. Cal. Att'y Gen. 111 (1984), the California Attorney General determined that an advisory committee created by the Board of Supervisors (Board) to advise it on airport matters could meet in closed session with county counsel about airport-related litigation in which the Board was the defendant because county counsel is the legal representative for all county entities, including the advisory committee. The appellate court took issue with the 1984 Opinion because it preceded California Government Code section 54956.9 (the litigation exception), effective in 1987, and implied an exception based on various court rulings relating to attorney-client privilege. The Brown Act did not expressly authorize closed session meetings between the advisory body and county counsel.

We conclude the Audit Committee cannot meet in closed session with the City Council because there is no specific authority in the Brown Act authorizing such a meeting. Nor may the City Council delegate its authority to the Audit Committee for purposes of creating a right in this body to meet in closed session with the City's attorneys as this right is not delegable. *Shapiro v. Board of Directors of the Centre City Development Corporation*, 134 Cal. App. 4th 170 (2005).

We also conclude the Audit Committee cannot sit in on City Council closed session meetings as observers, even if the subject matter relates to responsibilities within its purview, because Audit Committee members do not have an official role in the meeting.¹ "As a general rule, closed sessions may involve only the membership of the body in question plus 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)." 46 Op. Cal. Att'y Gen 34, 29 (1965). Although Audit Committee members provide a valuable role in the rendering of advice to City policymakers, they are not members of the decisionmaking body, the City Council, and do not have an official role in City business.

CONCLUSION

The Audit Committee is responsible for reviewing the performance of the City Auditor. As permitted by the Brown Act and the California Constitution, the Audit Committee may conduct the City Auditor's performance review in closed session and issue public reports if required thereafter. There is otherwise no specific authority in the Brown Act that would allow the Audit Committee to meet in closed session to carry out its other Charter and statutory

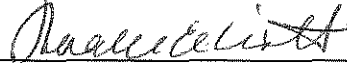
¹ Note, however, that two of the Audit Committee members are also City Council members. The City Council members would attend the closed session meeting in their capacities as such.

responsibilities. Further, since closed session meetings may only involve the membership of the body in question and any additional support staff as required, the Audit Committee may not participate in a City Council closed session meeting even if the meeting concerns a City audit. The Audit Committee has no greater access to such information than the general public and is not entitled to a pre- or post-City Council closed session briefing.

To better facilitate communication between the City Council and the Audit Committee, the Audit Committee Consultant or the assigned Deputy City Attorney can share any reportable action that occurred in a closed session meeting of the City Council relating to City audits with the Audit Committee by memorandum or verbal report at a regularly scheduled Audit Committee meeting. Note, also, that Audit Committee members may access City Council meeting agendas at <http://www.sandiego.gov>.

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By



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