

October 23, 1992
REPORT TO THE HONORABLE
MAYOR AND CITY COUNCIL
BROWN ACT; ALLEGED VIOLATION OF

In March and April of 1992, the subject of 1992 Community Development Block Grant ("CDBG") funding was before the City Council. We have been asked to review whether a single, non-public meeting of more than five (5) City Council staff members violated California's public meeting law (Brown Act) California Government Code section 54950 et seq.

SUMMARY

After a careful review of the facts, we conclude that this meeting of staff aides, in which one staff member voiced a conceptual framework for the City to apportion CDBG funds but no specific allocations were discussed, was not a violation of the Brown Act. We emphasize this review is only of the specific facts of this case. We further caution that meetings of council staff members could be perceived as violating the spirit of the Brown Act. Potentially, meetings of council member aides outside the public eye, without any opportunity for public debate, may be perceived as an attempt to circumvent the open meeting mandate. Accordingly, we believe the better policy is to avoid such meetings to make certain there is no appearance of impropriety.

DISCUSSION

I.

THE BROWN ACT

A. Purpose and Scope

The Act, California Government Code section 54950 et seq., requires that meetings of legislative bodies be conducted in public. Courts have interpreted the Act to require that all deliberative processes by decision-making bodies, including discussion, debate and the acquisition of information, be open for public scrutiny. *Sacramento Newspaper Guild v. Sacramento County Board of Supervisors*, 263 Cal. App. 2d 41 (1968). The Act applies to multi-member bodies such as councils, boards, and commissions because they are supposed to arrive at collaborative decisions through public discussion and debate. "Open Meeting Laws," California Attorney General's Office, 1989, p. 7.

The Act provides limited exceptions to the general

requirement that meetings be conducted in public. Courts and the Attorney General have construed these exceptions narrowly, while giving broad interpretation to provisions that promote openness. Thus, board members may not cast secret ballots at a public meeting. 68 Op. Cal. Att'y Gen. 65 (1985). Nor may board members use serial or seriatim meetings to evade the open meeting requirement. *Stockton Newspapers Inc. v. Redevelopment Agency*, 171 Cal. App. 3d 95 (1985); 65 Op. Cal. Att'y Gen. 63 (1982); 63 Op. Cal. Att'y Gen. 820 (1980).

B. Application

The Act applies only to "legislative bodies" of California local agencies. A "local agency" under the Act is a town, city, county, school district, or any board, commission, or agency thereof. Government Code section 54951. It also can be a nonprofit corporation created by these local agencies to manage any public work project. Government Code section 54951.7. Accordingly, the City of San Diego is a "local agency" under the Act.

The Act defines a "legislative body" in three sections. The term encompasses the

Governing board, commission,
directors or body of a local agency,
or any board or commission thereof,
and shall include any board,
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.

Government Code section 54952.

The term also includes boards, commissions, committees, or similar multi-member bodies that exercise power delegated to them by a legislative body. Government Code section 54952.2.

Finally, the term "legislative body" includes advisory bodies of local agencies created by formal action. Government Code section 54952.3. Expressly excluded from the definition are committees composed solely of members of the governing body of a local agency, which form less than a quorum of such governing body. Id.

According to the Act, then, members of the City Council comprise a "legislative body" and are subject to its mandates.

They therefore must conduct their meetings under public scrutiny.

C. Staff Members of Legislative Bodies

Staff members generally are government employees hired to assist members of legislative bodies. As such, staff members are distinct from the appointed or elected decision makers they serve. This distinction is implicit in the Act, as staffs of legislative body members are excluded from the definition of "legislative body." We have not been able to find a California case or Attorney General opinion which has construed the term "legislative body" to include staff. Moreover, the Act does not apply to "individual decision makers who are not members of boards or commissions such as agency or department heads when they meet with advisors, staff, colleagues or anyone else." "Open Meeting Laws," California Attorney General's Office, 1989, p. 8.

The only California opinion involving staff members is inapposite to the situation at hand. It concerned routine, non-public staff discussion with elected or appointed officials, not other staff. In Opinion No. 80-713 (1980), the Attorney General concluded that members of a community redevelopment agency or their staff violated the Act by regularly meeting with the city council and the city planning commission in closed sessions to discuss agency business. There, agency members or their staff met with small groups of the council and planning commission to brief them on agency business. As "legislative bodies," the agency members, council members and commissioners were subject to the Act. At no time was a quorum of any governmental body present at any given meeting. Focusing on whether these seriatim meetings violated the Act's requirements for notice and opportunity for public input, the Attorney General did not address the staff's role. 713 Op. Cal. Att'y Gen. (1980).

In sum, under the particular facts of this situation, the staff of City Council members is not a "legislative body" according to the Act. Our review fails to show a delegation of actual or de facto decision making authority to council aides in this specific situation. We are quick to caution, however, that council aides can act at times as the functional equivalent or alter ego of the councilmember. In such circumstances, the courts have condemned "informal conferences" by stating:

In this area of regulation, as well as others, a statute may push beyond debatable limits in order to block evasive techniques. An information conference or caucus permits crystallization of secret decisions to a point just short of ceremonial acceptance. There is rarely any purpose to a nonpublic pre-meeting conference

except to conduct some part of the decisional process behind closed doors. Only by embracing the collective inquiry and discussion stages, as well as the ultimate step of official action, can an open meeting regulation frustrate these evasive devices. Emphasis added.

Sacramento Newspaper Guild v. Sacramento County Board of Supervisors, 263 Cal. App. 2d at 50.

CONCLUSION

Although, we have not found that council aides violated the letter of the open meeting law in dealing with CDBG funds, we caution against meetings which lead to the perception of circumvention of the Brown Act open meeting mandate. Regular or sanctioned meetings of City Council staff members invite inquiry as to whether the public's business is indeed accomplished in public. The simplest way to avoid a protracted fact finding inquiry into a staff member's actual or implied authority to act on behalf of a Council member is to not hold such meetings.

Respectfully submitted,
JOHN W. WITT
City Attorney

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