OFFICE OF
THE CITY ATTORNEY
CITY OF SAN DIEGO

Michael J. Aguirre
CITY ATTORNEY

1200 THIRD AVENUE, SUITE 1620
SAN DIEGO, CALIFORNIA 92101-4178
TELEPHONE (619) 236-6220
FAX (619) 236-7215

MEMORANDUM OF LAW

DATE: December 19, 2005

TO: Honorable Mayor and City Council

FROM: City Attorney

SUBJECT: State Law Preemption of San Diego Municipal Code Section 27.3564(e) as Applied to Disclosure of Information Obtained in Closed Session

INTRODUCTION

In April 2002, the City Council adopted an Ethics Ordinance that included a provision that makes it unlawful for a City official to disclose confidential information "acquired in the course of his or her official duties, except when such disclosure is a necessary function of his or her duties." SDMC § 27.3564(e). It has been publicly reported that a City official may have disclosed information allegedly obtained in a closed session of the City Council. Assuming an unauthorized disclosure was made, the question has arisen whether the City's ordinance that makes it a misdemeanor to disclose such confidential information is preempted by State law, and therefore unenforceable.

QUESTIONS PRESENTED

Does State law preempt San Diego Municipal Code section 27.3564(e) to the extent that it seeks to regulate the disclosure of confidential information obtained in closed session, and therefore, is it unenforceable?

SHORT ANSWERS

Yes. The Ralph H. Brown Act [Act] requires that legislative bodies hold their meetings open to the public unless expressly excepted by the Act. The Act permits the holding of closed sessions under certain circumstances and prohibits the unauthorized disclosure of confidential information obtained in such closed session. Because it appears that the State intended to fully occupy this area of the law, the City may not adopt an ordinance that duplicates or conflicts with these laws. Accordingly, San Diego Municipal Code section 27.3564(e) as applied to the unlawful disclosure of closed session information is preempted by State law.

BACKGROUND

The City Council adopted the City of San Diego Ethics Ordinance on April 29, 2002. The purpose of the Ethics Ordinance is to:

> assure that individuals and interest groups in our society have a fair and equal opportunity to participate in government; to embrace clear and unequivocal standards of disclosure and transparency in government so as to avoid conflicts of interest and the appearance of conflicts of interest; to increase understanding of the *City* Charter, ordinances, and the roles of *City Officials*; to help reenforce public trust in governmental institutions; and to assure that this Division is vigorously enforced. SDMC § 27.3501.

The Ethics ordinance also prohibits the misuse of City positions or resources. In that regard, the ordinance makes it "unlawful for any current or former *City Official* to use or disclose to any *person* any *confidential information* he or she acquired in the course of his or her official duties, except when such disclosure is a necessary function of his or her official duties." SDMC § 27.3564(e). A violation of this ordinance may be enforced by the San Diego Ethics Commission administratively or by referral to a law enforcement agency SDMC § 27.3581. Such a referral could result in misdemeanor penalties. *See* SDMC § 12.0201.

The Ethics Commission has received a request to investigate an alleged disclosure of confidential information obtained in closed session of the City Council. The authority for a legislative body to meet in closed session, and the circumstances by which information obtained in closed session may be disclosed, is regulated by State law. Accordingly, the question has arisen whether the State closed session laws preempt an attempt by a local agency to make disclosure of closed session information a misdemeanor.

ANALYSIS

I. California Open Meeting Laws.

The Ralph H. Brown Act requires that local agencies hold open and public meetings. The intent of the Act is to require all "public commissions, boards and councils and the other public agencies in the State" act and conduct their deliberations openly. This process allows the people of the State "[to] retain control over the instruments they have created." Cal. Gov't Code § 54950. However, the Act also permits closed sessions to discuss certain matters including real property negotiations, labor negotiations, and anticipated and pending litigation. Cal. Gov't Code §§ 54950 et seq. The Act also prohibits the disclosure of confidential information acquired in a

closed session meeting authorized under the Act, unless the legislative body authorizes the disclosure. Cal. Gov't Code § 54963(a) and (b).[1] Section 54963 states in full:

> **54963. Confidential information acquired during an authorized closed legislative session; authorization by legislative body; remedies for violation; exceptions.**
>
> (a) A person may not disclose confidential information that has been acquired by being present in a closed session authorized by Section 54956.7, 54956.8, 54956.86, 54956.87, 54956.9, 54957, 54957.6, 54957.8, or 54957.10 to a person not entitled to receive it, unless the legislative body authorizes disclosure of that confidential information.
>
> (b) For purposes of this section, "confidential information" means a communication made in a closed session that is specifically related to the basis for the legislative body of a local agency to meet lawfully in closed session under this chapter.
>
> (c) Violation of this section may be addressed by the use of such remedies as are currently available by law, including, but not limited to:
>
> (1) Injunctive relief to prevent the disclosure of confidential information prohibited by this section.
>
> (2) Disciplinary action against an employee who has willfully disclosed confidential information in violation of this section.
>
> (3) Referral of a member of a legislative body who has willfully disclosed confidential information in violation of this section to the grand jury.
>
> (d) Disciplinary action pursuant to paragraph (2) of subdivision (c) shall require that the employee in question has either received training as to the requirements of this section or otherwise has been given notice of the requirements of this section.
>
> (e) A local agency may not take any action authorized by subdivision (c) against a person, nor shall it be deemed a violation of this section, for doing any of the following:
>
> (1) Making a confidential inquiry or complaint to a district attorney

[1] Future references are to the California Government Code unless otherwise specified.

> or grand jury concerning a perceived violation of law, including disclosing facts to a district attorney or grand jury that are necessary to establish the illegality of an action taken by a legislative body of a local agency or the potential illegality of an action that has been the subject of deliberation at a closed session if that action were to be taken by a legislative body of a local agency.
>
> (2) Expressing an opinion concerning the propriety or legality of actions taken by a legislative body of a local agency in closed session, including disclosure of the nature and extent of the illegal or potentially illegal action.
>
> (3) Disclosing information acquired by being present in a closed session under this chapter that is not confidential information.
>
> (f) Nothing in this section shall be construed to prohibit disclosures under the whistleblower statutes contained in Section 1102.5 of the Labor Code or Article 4.5 (commencing with Section 53296) of Chapter 2 of this code.

Although the City's Ethics Ordinance does not specifically address disclosure of information obtained in closed session, it does provide that it is: "unlawful for any current or former *City Official* to use or disclose to any *person* any *confidential information* he or she acquired in the course of his or her official duties, except when such disclosure is a necessary function of his or her official duties." SDMC § 27.3564(e). "Confidential information" is defined to include information that would typically be discussed in closed session such as information pertaining to contracts, labor, real property negotiations, and pending or anticipated litigation. SDMC § 27.3503. Because both the Act and the City's ordinance seek to regulate similar or identical conduct, the question is raised whether the State law preempts the City's regulation.

II. Preemption Analysis

The California Supreme Court summarized the general legal requirements for a preemption analysis in *American Financial Services Assn. v. City of Oakland*, 34 Cal. 4th 1239 (2005). In general, any California city may make and enforce ordinances within its limits that are not in conflict with general state laws. Cal. Const. art. XI, § 7. Charter cities have additional authority because they may adopt and enforce ordinances that conflict with general state laws, so long as the subject of the regulation is a "municipal affair" rather than a matter of statewide concern. Cal. Const. art. XI, § 5. But if the matter is one of statewide concern, an ordinance of a charter city is preempted if it conflicts with state law.

There are three ways in which an ordinance may conflict with state law. "A conflict between state law and an ordinance exists if the ordinance duplicates or is coextensive therewith,

is contradictory or inimical thereto, or enters an area either expressly or impliedly fully occupied by general law." *American Financial Services Association v. City of Oakland*, 34 Cal. 4th 1239, 1251 (2005) citing *Sherwin-Williams Co. v. City of Los Angeles*, 4 Cal. 4th 893, 897-898 (1993). Although there is no express language in the Act indicating its intent to fully occupy this area, the court in *San Diego Union v. City Council of the City of San Diego,* 146 Cal. App. 3d 947, 958 (1983) held that the Act's openness requirement does address "a genuine and pure matter of statewide concern." Further, a court may imply the intent to fully occupy an area when:

> (1) the subject matter has been so fully and completely covered by general law as to clearly indicate that it has become exclusively a matter of state concern; (2) the subject matter has been partially covered by general law couched in such terms as to indicate clearly that a paramount state concern will not tolerate further or additional local action; or (3) the subject matter has been partially covered by general law, and the subject is of such a nature that the adverse effect of a local ordinance on the transient citizens of the state outweighs the possible benefit to the locality (citations omitted)." *Sherwin-Williams*, 4 Cal. 4th at 898.

As discussed below, we conclude that the SDMC section 27.3564(e) conflicts with State law because it enters an area fully occupied by the general law and because it is duplicative of the State law.

A. The State Law Fully Occupies the Regulation of Confidential Information Acquired in Closed Sessions.

In an opinion directly on point, the California Attorney General concluded that the Act's provisions are a matter of statewide concern and that a local agency may not adopt an ordinance that makes it a misdemeanor to disclose information obtained in a properly held closed session. 76 Ops. Cal. Att'y Gen. 289 (1993).[2] The Attorney General found that the Act does impliedly fully occupy the law regarding disclosure of closed session information. The primary reason for this conclusion was that the legislature had provided both specific and general criminal sanctions in sections 54959 and 1222 to enforce the Act's provisions. The opinion concluded that: "a local misdemeanor ordinance to further enforce the Act's provisions would be in conflict with state legislation either by duplicating it or being supplemental thereto in an area fully occupied by the Legislature. Such an ordinance would thus be preempted by state law and deemed void." *Id.* at 293.

The 1993 Attorney General Opinion preceded the 2002 enactment of section 54963 that provided remedies for the unauthorized disclosure of information obtained in closed session. In particular, section 54963(c) states that any remedy currently available by law may be used to address such unlawful disclosures including, but not limited to injunctive relief, disciplinary action, and referral of legislative body members to a grand jury for action. Accordingly, the

---

[2] Opinions of the Attorney General generally are accorded great weight by the courts. *Moore v. Panish*, 32 Cal. 3d 535, 544 (1982).

Attorney General's Opinion that the legislature intended to fully occupy this area of the law is strengthened by the specific and comprehensive provisions concerning the unauthorized disclosure of closed session information.

A court is likely to concur with the Attorney General's Opinion that the legislature intended to fully occupy the field regulating the disclosures of confidential information acquired in closed session meetings governed by the Act. To the extent that the City's ordinance that makes it unlawful to disclose confidential information as applied to information obtained in closed session, it would be deemed void.

B. The Ordinance Conflicts with The State Law Because It Is Duplicative.

Even if the State legislature did not intend to fully occupy the field, the City's ordinance would be invalid because it conflicts with the State law to the extent it duplicates it. "[A]n ordinance which is substantially identical with a state statute is invalid because it is an attempt to duplicate the prohibition of the statute. (citations omitted)." *Pipoly v. Benson,* 20 Cal. 2d 366, 370 (1942). "Paradoxical as it may seem, it is apparent that an ordinance and a statute may be identical under this rule and yet the ordinance is invalid because within the constitutional provision it is in conflict with the statute. (citation omitted). The invalidity arises, not from a conflict of language, but from the inevitable conflict of jurisdiction which would result from dual regulations covering the same ground. Only by such a broad definition of 'conflict' is it possible to confine local legislation to its proper field of *supplementary* regulation." *Id.* at 370-371.

The City's ordinance making it unlawful to disclose confidential information obtained in closed session is substantially identical to the provisions in the Act. The ordinance provides that it is: "unlawful for any current or former *City Official* to use or disclose to any *person* any *confidential information* he or she acquired in the course of his or her official duties, except when such disclosure is a necessary function of his or her official duties." SDMC § 27.3564(e). "Confidential information" is defined in SDMC section 27.3503 as any information to which the following apply:

(a) At the time of the use or disclosure of the information, the disclosure is prohibited by a statute, regulation, or rule which applies to the *City*; or

(b) the information is not general public knowledge and will have, or could reasonably be expected to have, a material financial effect on any source of income, investment, or interest in the real property of a *City Official*; or

(c) the information pertains to pending contract, labor, or real property negotiations and disclosing the information could reasonably be expected to compromise the bargaining position of the *City*; or

(d) the information pertains to pending or anticipated litigation and disclosing the information could reasonably be expected to compromise the ability of the *City* to successfully defend, prevail in, or resolve the litigation.

Similarly, the Act prohibits disclosure of information "specifically related to the basis for the legislative body of a local agency to meet lawfully in closed session," including closed sessions involving real property negotiations, pending litigation, salary negotiations, and anticipated and pending litigation. Cal. Gov't Code § 54963(a). Because of this duplication, the City's ordinance conflicts with State law and would be deemed invalid.

The ordinance also conflicts with State law in that it seeks to regulate conduct already prohibited by State law. In particular, the ordinance defines "confidential information" as all disclosures of information "prohibited by a statute, regulation, or rule which applies to the City" at the time the information is disclosed or used. It is clear that the Act is a statute that applies to closed session meetings of the City. Accordingly, the City's ordinance would be invalid because it duplicates, and therefore, conflicts with State law.

The fact that the City's ordinance was adopted prior to the addition of section 54963 does not affect the preemption analysis. This issue is raised because section 54963(c) states: "[v]iolation of this section may be addressed by the use of such remedies *as are currently available by law*. . ." Arguably, the City's ordinance was a remedy available by law at the time section 54963 was added to the Act. However, it is well established that "where an ordinance is in substance a criminal statute attempting to prohibit conduct proscribed or permitted by state law either explicitly or impliedly, it is preempted. (citation omitted)" *A & B Cattle Company of Nevada, Inc. v. City of Escondido,* 192 Cal. App. 3d 1032, 1043 (1987).

CONCLUSION

The laws governing disclosure of confidential information acquired in closed session meetings are a matter of statewide concern. A local ordinance is invalid if it enters a field of law fully occupied by state law or is duplicative of the state law. The City's ordinance makes it unlawful to disclose confidential information acquired by a City official in the course of his or her duties. To the extent that the ordinance is applied to conduct regulated by the Act, such as the disclosure of information obtained in closed session, it would be preempted by state law and deemed void.

The Act permits the City to adopt disciplinary sanctions for officials who disclose confidential information learned in closed sessions. The City Attorney's Office recommends to

the City Council and Mayor that an appropriate ordinance creating disciplinary sanctions be prepared by this Office.

MICHAEL J. AGUIRRE, City Attorney

By
Michael J. Aguirre
City Attorney

MJA:jb
ML-2005-24