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MEMORANDUM OF LAW

DATE: July 14, 2006

TO: Honorable Mayor and City Councilmembers

FROM: City Attorney

SUBJECT: Mayoral Appointments and the Confirmation Process for Certain Public Employees under the Mayor-Council Form of Government and the Ralph M. Brown Act

INTRODUCTION

Effective January 1, 2006, the City of San Diego's Council-Manager form of governance changed to a Mayor-Council form of governance for a five-year trial period. San Diego Charter, art. XV. The implementation of article XV divides City government into two parts: an executive-administrative branch headed by the elected Mayor and a legislative branch headed by the City Council. The City Charter vests all legislative power in the City Council, which must act by ordinance or resolution in all substantive matters. San Diego Charter §§ 11 and 270(c). The Mayor is now the Chief Executive and Chief Administrative Officer, and no longer a member of the City Council. San Diego Charter §§ 260(b), 265(b)(1), 270. The Mayor must approve and may veto most City Council ordinances and resolutions. San Diego Charter §§ 265(b)(5), 280, 290.

For the duration of the trial period, the City Charter provides the Mayor, either expressly or indirectly, with the authority to appoint certain public officials. Questions have arisen on the respective roles of the Mayor and City Council in the appointment and confirmation process for these public officials and how those roles may be impacted by the Ralph M. Brown Act.

QUESTIONS PRESENTED

1. Does the City Council or the Mayor set the compensation for City officials appointed by the Mayor under the Mayor-Council form government?
2. May the City Council meet in closed session under the Ralph M. Brown Act to discuss the confirmation of City officials appointed by the Mayor?

SHORT ANSWERS

1. The City Council sets the salary, or a range of salaries, for City officials in the annual Salary Ordinance. As appointing authority for these City officials, the Mayor sets the compensation for the position from within that range.
2. Mayoral appointments are not governed by the Ralph M. Brown Act [Act]. City Council confirmation of those appointments is governed by the Act. The City Council may not discuss the confirmation of the Mayor's appointment of City officials in closed session.

ANALYSIS

I. The Mayor Is the Appointing Authority for Certain Public Officials.

This memorandum addresses only those City Officials appointed by the Mayor under the Mayor-Council form of government that are subject to City Council confirmation. The positions include the City Manager (or Chief Operating Officer), the City Auditor and Comptroller, the City Treasurer, the City Police Chief, and the City Fire Chief. The source of the Mayor's appointment authority for these officials under the Mayor-Council form of government is article XV of the San Diego Charter.

Article XV of the San Diego Charter provides the Mayor, either expressly or indirectly, with the authority to appoint certain public officials. Subject to City Council confirmation, the Mayor has express and "sole authority" to appoint the City Manager (San Diego Charter § 265(b)(7)) and the City Auditor and Comptroller (San Diego Charter § 265(b)(10)). San Diego Charter section 260(b) also transferred the executive authority and powers of the City Manager found in Charter article V to the Mayor. Therefore, subject to City Council confirmation, the Mayor also has the authority under article V to appoint the City Treasurer (San Diego Charter § 45), the City Police Chief (San Diego Charter § 57), and the City Fire Chief (San Diego Charter § 58).¹

II. The Mayor Sets the Compensation for these City Officials within Salary Ordinance Ranges.

The City Charter authorizes and the Salary Ordinance sets the compensation ranges for these City officials.

¹ Unless otherwise provided in the Charter, the Mayor also has authority to appoint all the officers and employees in the administrative service of the City under his control. San Diego Charter § 29. Those appointments are not subject to City Council confirmation.

Annually, the Mayor and City Council negotiate the terms of the City's Salary Ordinance through a veto and approval process. San Diego Charter §§ 11.1 and 290(a). The City Council adopted the 2006-2007 Salary Ordinance (O-19491) on May 8, 2006. The ordinance establishes an "Executive Category" within the unclassified service and sets the range of compensation for officers serving in those positions. *See* San Diego Ordinance O-19491 (May 8, 2006). The salary ranges for each of the City official positions referenced above for whom the Mayor has appointing authority are found in Exhibit C to the ordinance. The ordinance expressly provides the "appropriate appointing authority" for each position with the power to establish the monthly compensation, so long as that compensation is within the range set by the ordinance. *Id.* § 2, p. 5.

Accordingly, as the appointing authority, the Mayor sets the compensation for the City Manager (or Chief Operating Officer), the City Auditor and Comptroller, the City Treasurer, the City Police Chief, the City Fire Chief, and any other position under his control. The compensation the Mayor sets must fit within the ranges set by the Salary Ordinance as finally passed by the City Council.

III. The Ralph M. Brown Act Does Not Permit Closed Session Confirmation Discussions of Mayoral Appointees.

While the Charter gives the Mayor the exclusive authority to appoint these public officials, the Charter also requires the City Council confirm the Mayor's appointment before the appointment process is complete. A question has arisen whether the personnel exception to the Act permits the City Council to discuss confirmation of the Mayor's appointments in closed session. We conclude the Act does not permit the City Council to discuss confirmation of the Mayor's appointments of City officials in closed session.

A. The Mayor's Selection of an Appointee Does Not Implicate the Ralph M. Brown Act.

It is helpful to explain why the Act is generally inapplicable to Mayoral acts in a Mayor-Council form of government.

"[T]he keystone of the Brown Act is the requirement that '[a]ll meetings of the legislative body of a local agency shall be open and public. . . ." *Roberts v. City of Palmdale*, 5 Cal. 4th 363, 375 (1993). Under the City of San Diego's new form of government, the Mayor is no longer a member of the City's legislative body. Moreover, it is settled law that "the action of one public official is not a 'meeting' within the terms of the act." *Ibid*; *Wilson v. San Francisco Mun. Ry.* 29 Cal. App. 3d 870, 878-879 (1973). So, when the Mayor exercises his *separate* power to act, as for example when he appoints a person to fill a vacant City position, his actions generally do not fall under the Act's jurisdiction.

Some cities do require a Mayor to select an appointee from a list of nominees presented by a body to which the Act applies. *See Gillespie v. San Francisco Public Library Commission*, 67 Cal. App. 4th 1165, 1173 (1998). When that occurs, the Act normally requires the nomination

process be public, unless an exception to the Act permits the process to be held in closed session. Cal. Gov't Code § 54953(a). In the *Gillespie* case, an appellate court found that the personnel exception to the Act (Cal. Gov't Code § 54957) applied to permit a Library Commission to meet in closed session to select three nominees from whom that City's Mayor would finally select the appointee. *Gillespie*, at 1169-1173. The court found the Mayoral appointment duty was effectively shared with the nominating body, thus permitting the closed session. *Id.* at 1173.

In San Diego, the Mayor does not share his authority to appoint the City officials that are subject to City Council confirmation and under discussion in this memorandum. The appointment authority is the Mayor's only. Accordingly, we believe the Act generally should not apply to the Mayor's appointment of these City officials.²

B. The City Council's Confirmation of a Public Employee Appointed by the Mayor Is Governed by the Open Meeting Provisions of the Ralph M. Brown Act.

Once the Mayor selects an appointee for a position, he or she must then seek confirmation of that appointment from the City Council at a regular City Council meeting.³ Unlike the Mayor's separate actions, the Act does apply to actions of the City Council. The question arises whether the City Council alone or with the Mayor may use a closed session to consider the *confirmation* of the Mayor's appointment under the personnel exception to the Act found in California Government Code section 54957.

Section 54957(b) provides in pertinent part that: "nothing contained in this chapter shall be construed to prevent the legislative body of a local agency from holding closed sessions during a regular or special meeting to consider the appointment [or] employment . . . of a public employee . . ." The legal question involves construction of the phrase in section 54957(b), "to consider the appointment." The *Gillespie* court implicitly construed the phrase to apply to a nomination process, when that is part of a *shared* Mayoral appointment power. The question is whether the phrase should be broadly construed to apply to a City Council's *confirmation* process after appointment by a Mayor who does not share appointment authority with the legislative body. Or should it be narrowly interpreted to permit closed session discussions *only* when the *legislative body* is the appointing authority for the public official?⁴

² We caution that the Act *could* be implicated if any single public official created a "serial meeting" seeking an advance collective concurrence of an appointee's confirmation from a legislative body. California Government Code section 54952.2 prohibits members of a legislative body or any *intermediaries* from using any direct communications to develop a collective concurrence on actions the legislative body might take.

³ Confirmation of the City Police Chief is more specifically governed by Council Policy number 300-08. *See infra*.

⁴ As, for example, in the appointment of the City Clerk, or the Independent Budget Analyst. San Diego Charter §§ 38, 270(f).

This question has not been decided directly by a court. However, considering the requirement to narrowly construe exceptions to the open meeting laws and applying established rules of statutory construction of Act provisions, we believe a court would adopt the latter interpretation.

“[T]he underlying purposes of the “personnel exception” are to protect the employee from public embarrassment and to permit free and candid discussions of personnel matters by a local governmental body.” (*San Diego Union v. City Council* (1983) 146 Cal. App. 3d 947, 955; 196 Cal. Rptr. 45.) [A court] must nonetheless ‘construe the “personnel exception” narrowly and the “sunshine law” liberally in favor of openness [citation]. . . .’ (*Ibid.*)” *Bollinger v. San Diego Civil Service Com.*, 71 Cal. App. 4th 568, 573 (1999).

Consistent with that analysis, our court of appeal has consistently, and narrowly, interpreted the exceptions to the Act provisions. For example, the court narrowly interpreted the word “employment” in California Government Code section 54957 to prohibit closed City Council sessions to discuss the *terms and conditions of employment*, including salaries in *San Diego Union v. City Council*, 146 Cal. App. 3d 947, 949-950 (1983). In *Shapiro v. Board of Centre City Development Corporation*, 134 Cal. App. 4th 170 (2005), the court held that California Government Code section 54956.9 does not permit closed session meetings with counsel about litigation to which an agency is not a party. *Id.* at 180-181, 185. And in *Shapiro v. San Diego City Council*, 96 Cal. App. 4th 904 (2002), they found California Government Code sections 54954.2(a)(2), 54957.7(a), and 54956.8 do not permit the City Council to discuss matters that are not expressly permitted by the real estate negotiation exception. *Id.* at 917

Although no California case directly addresses this issue, a 1997 opinion from the California Attorney General provides assistance. The opinion concluded that the phrase “to consider the appointment” of a public employee, “includes the interviewing of candidates, reviewing resumes, discussing qualifications, and arriving at a decision *prior to the actual appointment.*” 80 Op. Cal. Att’y Gen. 308, 309 (1997) (emphasis added). This would further the purposes for holding closed sessions under California Government Code section 54957 by fostering “candid discussions by members of the legislative body concerning the qualifications of staff or prospective staff members without subjecting the latter to public embarrassment.” *Ibid.*

Accepting this definition of the phrase permits closed session discussion by any body that holds or shares appointing authority, as, for example, the *Gillespie* court decided. However, this definition would not permit closed session *confirmation* discussions by a legislative body where the appointment authority is held by a Mayor not subject to the Act’s provisions. Although the City Council must confirm the Mayor’s appointment, the confirmation process is unlike the appointment process. It does not involve the comparative and potentially embarrassing discussions that can be involved in the appointment process. We conclude the purposes of the Act would not be furthered by extending the personnel exception to the confirmation process after the appointment process is otherwise completed. *See also* 85 Op. Cal. Att’y Gen. 77, 78-79 (2002) [Personnel exception does not permit a board without the power to appoint or approve employee appointment to meet in closed session on those employee-related matters].

This interpretation also is consistent with the City Council's procedure described in Council Policy 300-08 for confirmation of the City's Police Chief, a copy of which is attached for review. When the City Manager held the appointment authority for that public official, the City Council required "[a]ll proceedings . . . relative to [that] confirmation proceeding shall be public." Council Policy 300-08, p. 1. There is every reason to continue this procedure now that the Mayor holds the appointment authority. Accordingly, this Office concludes that the City Council confirmation process for a Mayoral appointment of a City official must be public under the Act and not the subject of closed session discussion.

CONCLUSION

In this memorandum, we examine the respective roles of the Mayor and City Council in the appointment and confirmation process for certain high level public officials and how the appointment and confirmation roles may be impacted by the Ralph M. Brown Act.

We conclude that the Mayor, as the appointing authority for these City officials, sets the salary for each position from within a range of salaries for the positions set by the City Council in the annual Salary Ordinance. We also conclude that under the City's current Mayor-Council form of government the Act is not generally applicable to the Mayor's appointments of City officials. Additionally, we conclude the open meeting provisions of the Act preclude the City Council from meeting in closed session to discuss the confirmation of the Mayor's appointment of these City officials.

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By Michael J. Aguirre
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Attachment
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