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MEMORANDUM OF LAW

DATE: November 4, 2011
TO: Members of the Audit Committee
FROM: City Attorney
SUBJECT: Closed Session Meetings for Purposes of Conducting a Performance Evaluation

INTRODUCTION

The Audit Committee is required to annually evaluate the City Auditor's performance. San Diego Charter § 39.1; San Diego Municipal Code § 26.1701. As allowed under the Ralph M. Brown Act (Brown Act), this performance evaluation is conducted during a closed session meeting of the members of the Audit Committee. Cal. Gov't Code §§ 54950.5, 54957(b)(1). This Office has been asked whether the City Auditor's salary may be discussed in closed session.

QUESTION PRESENTED

May the Audit Committee discuss or determine the City Auditor's salary during a closed session meeting in which his performance is evaluated?

SHORT ANSWER

Although the Brown Act permits a legislative body to meet in closed session to evaluate a public employee's performance, salary discussions and determinations are prohibited. The Audit Committee may, however, determine during a closed session performance evaluation that the City Auditor's performance warrants a salary adjustment. Discussions about the amount of a salary adjustment would need to occur at a properly noticed public meeting.

ANALYSIS

I. AN EMPLOYEE'S JOB PERFORMANCE MAY BE EVALUATED IN CLOSED SESSION, BUT SALARY LEVEL DISCUSSIONS AND DETERMINATIONS MUST OCCUR AT A REGULARLY NOTICED PUBLIC MEETING

In *San Diego Union v. City Council of the City of San Diego*, 146 Cal. App. 3d 947 (1983), the San Diego City Council met in closed session to discuss the performance and salaries

of the city manager, planning director, city auditor, and city clerk. The Council later approved at a regularly scheduled meeting the salaries of each employee as agreed upon in closed session. A local newspaper, the San Diego Union, objected to the closed session salary determination and obtained an order enjoining the Council from discussing and determining employee salaries in closed session.

On appeal, the Court rejected the City's argument that salary fell within the performance evaluation exception of the Brown Act because an employee's salary is a term and condition of the employee's continued employment and closely related to performance. *Id.* at 954-55. The Court also rejected the City's argument that salary discussions should occur in closed session to protect affected employees from undue public embarrassment. *Id.*

The Court, in agreeing with the newspaper, concluded the Brown Act "must be narrowly construed with all doubts resolved in favor of open and public meetings . . ." ¹ *Id.* at 953. Accordingly, the performance evaluation exception must be limited to an evaluation of an employee's performance, and cannot be broadly interpreted to include discussion of or determinations of salary levels. Salary discussions and determinations must occur in open session because salary decisions involve an expenditure of public funds:

Salaries and other terms of compensation constitute municipal budgetary matters of substantial public interest warranting open discussion and eventual electoral public ratification. Public visibility breeds public awareness which in turn fosters public activism politically and subtly encouraging the governmental entity to permit public participation in the discussion process. It is difficult to imagine a more critical time for public scrutiny of its governmental decision-making process than when the latter is determining how it shall spend public funds . . . other factors must be considered such as available funds, other city funding priorities, relative compensation of similar positions within the city and in other jurisdictions, before determining the salary increase. Each of these considerations is of acute public interest.

San Diego Union v. City Council of the City of San Diego, 146 Cal. App. 3d 947, 955 (1983).

Nevertheless, it would be permissible for the City Council, in evaluating an employee's job performance in closed session, to determine whether the employee's performance "warrants a salary increase and then to meet in public to determine salary adjustment." *Id.* The Court stated, "[c]ommon sense compels the conclusion that oblique references to discussions of salaries for specific individuals within executive sessions evaluating the performance of that public employee would not violate the Brown Act so long as the specific discussions as to the amount of salary increase are reserved for a properly noticed, public meeting." *Id.* at 955-956, referencing 61 Op. Cal. Att'y Gen. 283, 288 (1978).

¹ The Court notes the performance evaluation exception fails to mention salary discussions: "[h]ad the Legislature intended the "personnel exception" to permit closed hearings for the determination of the cited public employees' salaries, it could have easily included such authorization when it enacted section 54957.6 in 1968." *Id.* at 956.

II. A REDUCTION OF COMPENSATION RESULTING FROM THE IMPOSITION OF DISCIPLINE MAY BE DISCUSSED IN CLOSED SESSION

In response to *San Diego Union v. City Council of the City of San Diego*, 146 Cal. App. 3d 947 (1983), the Legislature amended the Brown Act in 1994 to affirm that employee compensation may not be discussed in closed session except when a pay cut is considered as a form of employee discipline. It states, in pertinent part, as follows:

§ 54957. Closed sessions; personnel matters; exclusion of witnesses

...

(b)(1) . . . 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, 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.

(2) . . .

(3) . . .

(4) For the purposes of this subdivision, the term "employee" shall include an officer or an independent contractor who functions as an officer or an employee but shall not include any elected official, member of a legislative body or other independent contractors. . . . *Closed sessions held pursuant to this subdivision shall not include discussion or action on proposed compensation except for a reduction of compensation that results from the imposition of discipline.*

Cal. Gov't Code § 54957 (emphasis added).

Thus, although a closed session meeting may be held to evaluate the performance of an employee, the legislative body is specifically prohibited from discussing or acting on proposed compensation unless compensation is reduced because discipline is imposed.

The penalties associated with a Brown Act violation are steep. A member of a legislative body is guilty of a misdemeanor if the member attends a meeting of that legislative body where action is taken in violation of the Brown Act and the member intends to deprive the public of information to which the member knows or has reason to know the public is entitled. Cal. Gov't Code § 54959. The district attorney or any interested person may commence an action by mandamus, injunction, or declaratory relief to stop or prevent violations or threatened violations of the Brown Act by members of a legislative body. Cal. Gov't Code § 54960.²

² Note, for instance, that in 2007, the District Attorney as part of a legal settlement over Brown Act issues, required San Juan Capistrano Unified School District to audiotape all of its closed-session meetings, and has actively monitored the school district's handling of closed session matters since that time.

CONCLUSION

The Audit Committee may not discuss or determine the City Auditor's salary level during a closed session meeting to evaluate the City Auditor's performance. If the Audit Committee determines during the closed session performance evaluation that the City Auditor's performance warrants a salary adjustment, the Audit Committee must discuss and determine the salary adjustment at a properly noticed public meeting.

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By 

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