

**Office of  
The City Attorney  
City of San Diego**

**MEMORANDUM**

**DATE:** February 13, 2007

**TO:** Michael Tussey, Director, Airports Division

**FROM:** John H. Serrano, Deputy City Attorney

**SUBJECT:** Airport Advisory Committee Election on January 9, 2007

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**INTRODUCTION**

Following the January 9, 2007 meeting of the Airports Advisory Committee [AAC] at which a candidate was selected to be nominated to the Mayor as Chairperson for 2007, a question was raised by a former committee member who objects to the use of a “secret ballot” procedure to choose the candidate.

**QUESTION PRESENTED**

Does the California Government Code prohibit secret balloting when selecting a Chairperson nominee for the AAC?

**SHORT ANSWER**

Secret balloting is barred by the California Government Code. Therefore the City Attorney recommends that the selection of a chairperson for the AAC be properly noticed as an agenda item for the next meeting and that the election either be validated by a public voice poll of all who previously voted for the candidates or conducted anew.

**BACKGROUND**

On January 9, 2007, the AAC selected a candidate from its membership to be recommended as this year’s Chairperson. The selected candidate is submitted to the Mayor for appointment in accordance with the AAC Bylaws. By general consent of the AAC on January 9, 2007, the casting of votes to choose the Chairperson nominee was done on “Post-It” notes, as secret ballots, with the voting occurring in full view of the public in attendance at the meeting. The ballots cast in favor of each candidate on the slate were immediately collected, tallied and the results announced in public. A winner was identified. After the meeting, the secretary disposed of the written ballots but recorded the final results of the election.

No objection to the election, the procedure, or results was made at the meeting.

The day following the election, a former AAC board member, who had been in the audience throughout the meeting, sent an email to the Airports Director objecting to the secret ballot under the Brown Act. He requested that the election be cancelled, vacated and redone after proper notice. He also stated that board members made phone calls before the meeting concerning the election and that this may have been done with the intent to influence its outcome. No specifics about the calls are given. He conceded in the same email that there is no evidence to support that claim and none has been made known to this office. Therefore, that aspect of his complaint is not addressed.

The AAC provides recommendations to the City Council on matters related to aviation planning, airport development, proposals, and policies. Staff administrative support is provided by airport management. The AAC is a forum for citizens with aviation-related issues and promotes the interests of general aviation in the City of San Diego. By law, it must report to the City Council at least once each year.

The twelve members of the committee are appointed by the Mayor for four-year terms. Bylaws, chapter 2, § 201. They are required to represent the diverse interests of the airport community. Per section 204 of the Bylaws, at the first meeting each calendar year, the Committee shall nominate a Chairperson by majority vote. The formal appointment of the Chairperson is done by the Mayor. If the Mayor does not make this appointment within forty-five days after being notified of the vacancy and nomination, the Committee may confirm a Chairperson from its membership. The Chairperson shall preside at all meetings and hearings of the Committee, decide all points of order or procedure, and perform all duties required by these rules.

The January 9, 2007 meeting was properly noticed under the Brown Act. The notice included information advising all interested persons that the meeting's business would include the selection of the Chairperson.

Section 402 of the AAC Bylaws requires that the minutes shall show the vote on every question on which the Committee acts. Sections 403 and 404 require the retention of files concerning all matters coming before the Committee and that such items are public records that shall be open for public inspection. The minutes of the meeting at which the election was held are being prepared and will reflect the proceedings to select a Chairperson.

The meetings of the AAC are governed by the committee's adopted Bylaws, which incorporate Robert's Rules of Parliamentary Procedure. Bylaws, Chapter 5, § 504. Robert's Rules address the casting of ballots in elections in Article 8, section 46, which provides, in pertinent part, as follows:

Voting by Ballot. The main object of this form of voting is secrecy, and it is resorted to when the question is of such a nature that some

members might hesitate to vote publicly their true sentiments. Its special use is in ... elections ... as well as in the preliminary steps ... Where the by-laws do not require the vote to be by ballot, it can be so ordered by a majority vote, or by general consent ....

At the meeting of January 9, 2007, the proceedings were conducted by secret ballot by general consent of the committee members in accord with Robert's Rules of Parliamentary Procedure.

### ANALYSIS

The objection to the election is based on the Brown Act. That law is found at California Government Code section 54950, *et seq.* and provides:

In enacting this chapter, the Legislature finds and declares that the public commissions, boards and councils ... exist to aid in the conduct of the people's business. It is the intent of the law that **their actions be taken openly and that their deliberations be conducted openly.** The people of this State do not yield their sovereignty to the agencies which serve them. The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may retain control over the instruments they have created.  
(emphasis added)

The focus of the Brown Act is to require that all meetings of a local agency shall be open and all deliberations public. The Bylaws of the AAC reflect these same core values in the requirement that all meetings and study sessions of the Committee shall be open to the public and requirement that all formal votes be made only at a public meeting (Bylaws, Chapter 3, § 303). The actions of the AAC in providing the public notice of its intent to conduct elections on January 9, 2007, at its public meeting and then conducting that election as noticed are all consistent with both the Brown Act and AAC Bylaws.

The Brown Act does not address election procedures. It does apply to the general conduct of meetings at which elections, and many other events, may occur. It requires that the public be informed about the collective decisions of legislative bodies.

The action taken by the AAC must be consistent with the law. Government Code section 54952.6 provides that "action taken" means a collective decision made by a majority of the members ... or an actual vote by a majority of the members of a legislative body when sitting as a body or entity, upon a motion, proposal, resolution, order or ordinance. Clearly the selection of the current year's chair by ballot amounts to taking "action" as defined by the Brown Act. Pursuant to Government Code section 54593:

(a) All 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, except as otherwise provided in this chapter.

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(c) No legislative body shall take action by secret ballot, whether preliminary or final....”

Here, the AAC took action by secret “Post-It” notes ballots, in public, at a noticed meeting. The ballots were collected, tallied and the results immediately published to the AAC members and the public. The ballots were then thrown away.

Secret ballots are expressly prohibited by section 54953(c). Items under consideration which are not subject to a specific closed meeting exception must be conducted in a fully open forum. 68 Ops.Cal.Atty.Gen. 65 (1985). One aspect of the public’s right to scrutinize and participate in public hearings is its right to witness the decision-making process. If votes are secretly cast, the aeronautic community and the general public are deprived of a portion of their rights. See also, 59 Ops.Cal.Atty.Gen. 619, 621-622 (1976).

Here, the votes were cast secretly and the ballots were disposed of. Without the retention of the ballots as disclosable records, the public has no way to verify the actions of the AAC. This voting transaction therefore lacked transparency when the vote occurred, and currently as well. The City Attorney recognizes that the selection of a chairperson is a delicate matter. However, the fact that the individual voter’s preference may be sensitive, embarrassing or controversial does not justify partial closure of a public session unless it is authorized by some specific exception. *Rowen v. Santa Clara Unified School District* (1981) 121 Cal.App.3d 231, 235. This conclusion is further supported by the AAC’s own Bylaws section 404 requiring the retention of all official records. The ballots were public records under the circumstances described for the election.

## CONCLUSION

Because the public record of this vote for a Chairperson nominee lacks the information, verifiability and transparency required by the Brown Act, it is the City Attorney's recommendation that the next meeting agenda for the AAC include an item referring to the completion of the procedures to select a Nominee as mandated by the Brown Act and/or a new election. The transparency issue can be resolved by the committee members stating on the public record their voting choice on January 9, 2007. Alternatively, a new election could be held.

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