

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

**MEMORANDUM
MS 59**

(619) 533-5800

DATE: September 18, 2015

TO: Board of Library Commissioners

FROM: City Attorney

SUBJECT: Use of Closed Session by the Board of Library Commissioners

INTRODUCTION

During the Brown Act training conducted at the Board of Library Commissioners (Board) meeting on August 5, 2015, the Board requested additional information on the ability of the Board to meet in closed session to formulate and provide input and recommendations on personnel decisions, litigation, or real estate negotiations pertaining to the San Diego Public Library a department of the City (Library). This memorandum responds to that request.

Under the Brown Act, closed session meetings are treated as an exception to the rule that meetings be open and public. As I stated in the training, the opportunity to meet in closed session is limited, and for an advisory board, it should happen very rarely, if at all. Violation of the Brown Act can be the basis for a civil law suit, and intentional violation could expose Board members to criminal prosecution. Please consult with this Office before scheduling any closed session meetings.

ANALYSIS

The Board is subject to the Brown Act as an advisory board created by ordinance of a local agency. Cal. Gov't Code § 54952(b). The Brown Act requires "[a]ll meetings" of the Board "shall be open and public, and all persons shall be permitted to attend any meeting" of the Board, except as otherwise specifically provided. *Id.* § 54953(a). The Brown Act permits closed sessions as an exception to the open meeting requirements in limited circumstances. *Id.* §§ 54954.5, 54956.7-54957. The closed session exception is narrowly construed, whereas the provisions in favor of open meetings are construed liberally to achieve that purpose. *Shapiro v. Bd. of Dirs. of Ctr. City Dev. Corp.*, 134 Cal. App. 4th 170 (2005). The fact that material may be sensitive, embarrassing, or controversial does not, by itself, justify meeting in closed session; a closed session meeting must be

authorized by a specific exception. *Rowen v. Santa Clara Unified Sch. Dist.*, 121 Cal. App. 3d 231, 235 (1981).

The Brown Act includes exceptions to meet in closed session to discuss personnel matters, anticipated or pending litigation, real property negotiations, and public security. These exceptions are strictly construed and apply to the agency responsible for action on that item. *See Shapiro*, 134 Cal. App. 4th at 182 (Centre City Development Corporation's (CCDC) Board of Directors may not meet in closed session with Redevelopment Agency's attorney to discuss eminent domain litigation even though CCDC was acting as the Redevelopment Agency's agent to negotiate acquisition of the real property at issue); *see also Page v. Mira Costa Cmty. Coll. Dist.*, 180 Cal. App. 4th 471, 501-02 (2009) (school district board could not meet with opposing parties and their counsel as part of a mediation and outside of an open meeting where nothing in the plain text of the Brown Act authorized the practice).

The Board is charged with considering all policy matters relating to the Library's development and operation, and advising the Mayor on library policy. San Diego Municipal Code (Municipal Code) § 26.0301. As such, the Board's responsibilities do not appear to fall within any of the specific closed session meeting exceptions, including the following:

Personnel Matters. A legislative body may hold a closed session "to consider the appointment, employment, evaluation of performance, discipline, or dismissal of a public employee." Cal. Gov't Code § 54957(b). To take advantage of this exception, the body must have the power to appoint, evaluate, or dismiss the employee. *Gillespie v. S. F. Pub. Library Comm'n*, 67 Cal. App. 4th 1165, 1170-71 (1998) (Library Commission able to hold closed session because city charter required both mayor and commission to participate in appointing director). The Board does not have employees and Municipal Code section 26.0301 does not explicitly authorize the Board to participate in the hiring, firing, or evaluation of the Library Director or other City management employees. Such authority can be delegated to an appointed advisory body like the Board. *Id.*; 80 Op. Cal. Att'y Gen. 308 (1997). In that case, the Board may be able to meet in closed session to carry out its delegated duties, however, such a delegation would require further legal analysis.

Pending Litigation. The legislative body of a local agency may, upon the advice of its legal counsel, meet in closed session "to confer with, or receive advice from, its legal counsel regarding pending litigation when discussion in open session concerning those matters would prejudice the position of the local agency in the litigation." Cal. Gov't Code § 54956.9 (a). This exception does not permit the Board, as an advisory board to the City, to meet in closed session on litigation or claims against the City. *Shapiro*, 134 Cal. App. 4th at 185. Also, as the Board is not a legal entity that can sue or be sued, there should not be any claims or litigation filed against the Board. If one or more Board members were sued or threatened with litigation, we would consider the specific facts to determine whether a closed session discussion is legally appropriate.

Real Estate Negotiations. A legislative body of a local agency may hold a closed session with its real property negotiator "prior to the purchase, sale, exchange, or lease of real property by or for the local agency to grant authority to its negotiator regarding the price and terms." Cal. Gov't Code

§ 54956.8. This exception is explicitly limited to the local agency that owns or is seeking to acquire real property to give direction to its negotiator. As stated previously, the Board is not a separate legal entity; it does not own or acquire real property.

Public Safety. The legislative body of a local agency can meet in closed session with police, fire, or other security consultants on matters posing a threat to the security of public buildings, essential public services, or the public's right of access to public services or public facilities. Cal. Gov't Code § 54957(a). Like the other closed session exceptions, a court would likely narrowly interpret this to apply to a legislative body with a direct decision-making role in these matters.

CONCLUSION

The Board's responsibilities are advisory. The Board is not responsible for hiring, firing, or reviewing the performance of City staff, or for making decisions on litigation, real property negotiations, or security. Under the Brown Act, the Board's discussions must take place in public at a properly noticed meeting.

The Brown Act provides both civil and criminal penalties for failure to comply with its provisions, and a court may award attorney fees to the plaintiff if a violation is found. If the Board believes specific facts give rise to the need to call a closed session, please contact our Office in advance for legal advice.

JAN I. GOLDSMITH, CITY ATTORNEY

By /s/ Carrie L. Gleeson
Carrie L. Gleeson
Deputy City Attorney

CLG:jdf
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cc: Misty Jones, Director, San Diego Public Library