

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

**MEMORANDUM
MS 59**

(619) 236-6220

DATE: May 21, 2019

TO: Honorable Mayor and Members of the Audit Committee

FROM: City Attorney

SUBJECT: Appointment of City Auditor

INTRODUCTION

This Memorandum is to assist the Mayor and Audit Committee in their process to appoint a new City Auditor. The City of San Diego (City) must employ a new City Auditor, in accordance with San Diego Charter (Charter) section 39.2, following last year's resignation of the former City Auditor. There is an interim officer serving temporarily in the position, who will be replaced once the Charter-mandated process for the employment of a City Auditor is completed.

Under the Charter, the City Auditor is appointed by the Mayor, in consultation with the Audit Committee, and confirmed by the San Diego City Council (Council). Charter § 39.2. The City Auditor must be a certified public accountant or certified internal auditor, who serves for a term of ten years. *Id.* The City Auditor is an employee in the unclassified service of the City. Charter § 117(a)(7). California courts have recognized that applicants for City employment have a right to privacy in their application process. *See Gillespie v. San Francisco Pub. Library Comm.*, 67 Cal. App. 4th 1165, 1173 (1998). Therefore, the privacy rights of the applicants for City Auditor are a consideration in the appointment process.

The Audit Committee, a local legislative body under the Ralph M. Brown Act (Brown Act), at California Government Code sections 59450-54963, is responsible for directing and reviewing the work of the City Auditor, and the City Auditor reports to and is accountable to the Audit Committee. Charter §§ 39.1, 39.2. The Audit Committee also recommends the annual compensation of the City Auditor to the Council for determination. Charter §§ 39.1, 39.2. The City Auditor may be removed for cause by a vote of two-thirds of the Council upon a recommendation of the Audit Committee. Charter § 39.2.

The Mayor has engaged a consultant to assist with the recruitment process for the new City Auditor. The Mayor's appointed selection committee worked to narrow the applicants to a list of finalists. This selection committee is made up of Mayoral staff, the Independent Budget Analyst, the City Attorney, and two Audit Committee members. The Mayor, through his selection committee, now wishes to consult with the Audit Committee on the appointment of the City Auditor, as required by the Charter. This Memorandum discusses the process for appointment of the City Auditor in light of the applicants' right to privacy and the Audit Committee's obligation to comply with the Brown Act.

QUESTIONS PRESENTED

1. Does the Audit Committee have authority under the Brown Act to use closed session to consult with the Mayor and his selection committee on the appointment of the City Auditor?
2. Who may attend the closed session of the Audit Committee?
3. May the Audit Committee interview the applicants for City Auditor in closed session?
4. May the Audit Committee discuss compensation of the new City Auditor in closed session?

SHORT ANSWERS

1. Yes. The Brown Act authorizes a legislative body to use a closed session meeting to consider the appointment of public employees, so long as the legislative body plays a role in the appointment process. The Audit Committee has a Charter-mandated role to consult on the appointment of the City Auditor. Therefore, closed session may be used.
2. The closed session may only be attended by those individuals who have an official role in the closed session subject matter discussion. In this case, the Mayor and his selection committee, along with legal counsel, may attend the closed session with the Audit Committee.
3. Yes. The Audit Committee may interview the applicants for City Auditor in closed session, and may give input and advice to the Mayor and his selection committee related to the appointment.
4. No. The Brown Act requires that discussion of compensation for unrepresented City employees, including the City Auditor, take place in open session.

DISCUSSION

I. THE MAYOR MUST CONSULT WITH THE AUDIT COMMITTEE IN APPOINTING THE CITY AUDITOR.

Under Charter section 39.2, the Mayor appoints the City Auditor in consultation with the Audit Committee. To “appoint” means to make “the *final* selection of a candidate for a public office.” *Gillespie*, 67 Cal. App. 4th at 1174 (italics in original). “Consultation” means “[t]he act of asking the advice of or opinion of someone.” *Black’s Law Dictionary* 382 (10th ed. 2014). It also means “[a] meeting in which parties consult or confer.” *Id.* Therefore, while the final determination on whom to appoint to the position rests with the Mayor, the Audit Committee has a specific role in the appointment process. The Mayor’s appointment is subject to confirmation by the Council. Charter § 39.2.

II. THE AUDIT COMMITTEE MAY GO INTO CLOSED SESSION TO CONSULT WITH THE MAYOR AND HIS SELECTION COMMITTEE ON THE APPOINTMENT OF THE CITY AUDITOR.

The Brown Act generally requires that meetings of the legislative body of local agencies must be open to the public, with advance notice of the agenda, allowing for transparency and public participation. Cal. Gov’t Code § 54953(a). *See also* Cal. Const. art. I, § 3(b). “[T]he purpose of the Brown Act is to ensure openness in decision making by public agencies and facilitate public participation in the decision making process.” *Service Emp. Int’l Union, Local 99 v. Options-A Child Care & Human Servs. Agency*, 200 Cal. App. 4th 869, 877 (2011) (citing Cal. Gov’t Code § 54950; *Fischer v. Los Angeles Unified Sch. Dist.*, 70 Cal. App. 4th 87, 95 (1999)).

However, there are certain statutory exceptions to the open meeting requirements, including the personnel exception, which allows a legislative body to use a closed session meeting to consider, among other things, “the appointment [or] employment . . . of a public employee,” as long as the legislative body covered by the Brown Act has a duty in relation to the appointment. Cal. Gov’t Code § 54957(b)(1). The phrase, “to consider the appointment of a public employee,” as set forth at California Government Code section 54957(b)(1), includes interviewing candidates, reviewing resumes, discussing qualifications, and arriving at a decision prior to the actual appointment.

80 Op. Cal. Att’y Gen. 308 (1997) (stating advisory body’s sessions held to interview candidates for the office of district superintendent and to arrive at a recommendation for the legislative board come within the closed session provisions of California Government section 54957).¹

On the Brown Act open meeting exception related to public employment, the California Attorney General has explained: “The purposes for holding closed sessions under the terms of section 54957 are to foster candid discussions by members of the legislative body concerning the qualifications

¹ Opinions of the California Attorney General do not bind California courts interpreting the Brown Act, but California courts afford the opinions “considerable weight.” *Freedom Newspapers, Inc. v. Orange Cty. Employees Ret. Sys.*, 6 Cal. 4th 821, 829 (1993).

of staff or prospective staff members without subjecting the latter to public embarrassment.” 80 Op. Cal. Att’y Gen. 308,310 (1997). *See also San Diego Union v. City Council*, 146 Cal. App. 3d 947, 955 (1983) (stating the “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”).

The Audit Committee may rely on the court’s decision in *Gillespie*, 67 Cal. App. 4th 1165, as authority to go into closed session to consult with the Mayor and his selection committee on the appointment of the City Auditor. In the *Gillespie* case, a group of citizens challenged the San Francisco Public Library Commission for holding a noticed closed session meeting to consider the appointment of an acting city librarian. *Id.* at 1168. Under the San Francisco city charter, the Public Library Commission had the duty to submit to the Mayor the names of at least three qualified applicants for librarian from which the Mayor must then make the librarian appointment. *Id.* at 1171. The Public Library Commission interviewed three candidates in closed session, and later announced in open session that the names of the three candidates would be submitted to the Mayor for consideration. *Id.* at 1168.

The appellate court determined that the closed session meeting complied with the Brown Act. *Id.* at 1169. The court reasoned that the Mayor’s discretion to appoint was not absolute. *Id.* at 1171. The court explained:

Both the Library Commission and the Mayor must participate in the appointment process before a candidate can be selected. The Charter’s language therefore compels the conclusion that although the Mayor has the power to ultimately select the successful

candidate, he shares the power of appointment with the Library Commission. The Library Commission’s closed session was thus permissible under . . . the Brown Act.

Id.

While the Audit Committee may use closed session to consult with the Mayor and his selection committee on the appointment of the City Auditor, the Audit Committee is not required under the Brown Act to report out the names of applicants or any other information on them, because the appointment process for City Auditor will not be completed at the conclusion of closed session. California courts have determined that candidates for public employment have a right to privacy that outweighs the public’s right to receive information about them before the appointment process has been completed. “The plain language of the [Brown] act and the [San Francisco sunshine] ordinance makes clear that only a candidate’s *actual appointment*, and not a candidate’s *nomination*, need be reported along with the corresponding roll call vote on the day of the action.” *Id.* at 1174, 1177 (italics in original).

As in *Gillespie*, the Mayor and his selection committee may consult with the Audit Committee as part of the appointment process, but this consultation does not complete the appointment process. Upon receiving the advice from the Audit Committee, the Mayor will make the final determination on the appointment, and then advance that determination to the Council for confirmation.

III. THE AUDIT COMMITTEE MAY INTERVIEW APPLICANTS FOR CITY AUDITOR IN CLOSED SESSION AND PROVIDE INPUT AND ADVICE TO THE MAYOR AND HIS SELECTION COMMITTEE.

Closed session meetings may only be attended by individuals who have an official role in the closed session subject matter discussion. 82 Op. Cal. Att’y Gen. 29 (1999). As the California Attorney General has explained:

As a general rule, closed sessions may involve only the membership of the body in question plus any additional support staff which may be required (e.g., attorney required to provide legal advice; supervisor may be required in connection with disciplinary proceeding; labor negotiator required for consultation). Persons without an official role in the meeting should not be present.

Id. at 33 (quotation marks and italics omitted). *See also, e.g., Shapiro v. San Diego City Council*, 96 Cal. App. 4th 904 (2002).

Here, the necessary staff are the members of the Mayor’s selection committee, who are available to discuss with the Audit Committee the process used to narrow the applicants. The Audit Committee may also interview the finalists for City Auditor in closed session, which is permitted under the Brown Act, and provide advice to the Mayor as required by the Charter.

IV. THE AUDIT COMMITTEE MUST NOT DISCUSS COMPENSATION OF THE APPOINTEE FOR CITY AUDITOR IN CLOSED SESSION.

While the Charter requires the Audit Committee to make a recommendation on compensation to the Council for final determination, this process should be in open session of the Audit Committee, after the Mayor makes his appointment decision. Charter §§ 39.1, 70. *See also San Diego Union*, 146 Cal. App. 3d at 955, 61 Op. Cal. Att’y. Gen. 283, 288 (1978). Further, under state law, the Audit Committee may not ask the applicants for salary history information. Cal. Lab. Code § 432.3. The City Auditor’s compensation, including salary and benefits, must be set within the range for the position established by the Council in the annual salary ordinance, and it must be discussed in open session. Charter §§ 11.1, 70, 290. *See San Diego Ordinance O-21069* (Apr. 23, 2019); City Att’y MOL ML-2011-17 (Nov. 4, 2011).

