

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

**MEMORANDUM
MS 59**

(619) 236-6220

DATE: September 29, 2020

TO: Members of the Audit Committee

FROM: City Attorney

SUBJECT: Closed Session Meeting related to City Auditor Appointment

On Wednesday, September 30, 2020, you are scheduled to go into a closed session meeting of the Audit Committee to interview candidates for the position of City Auditor. Audit Committee staff has also scheduled and noticed an open session item related to consideration of recommended compensation for the City Auditor appointee.

San Diego Charter (Charter) section 39.1 provides, in part: "The Audit Committee must evaluate applicants for the position of City Auditor and recommend to the City Council no fewer than three qualified candidates for consideration, based on the minimum qualifications set forth in section 39.2 of this Charter and other criteria determined by the Audit Committee." This Charter section also provides: "The Audit Committee recommends the annual compensation of the City Auditor and annual budget of the Office of City Auditor to the City Council and conducts an annual performance review of the City Auditor." San Diego Charter § 39.1.

At your direction, staff members from the Independent Budget Analyst's Office, working with less than a majority of the Audit Committee, have narrowed the list of City Auditor applicants for the Audit Committee to consider. The Audit Committee must now evaluate the applicants and provide a list of no fewer than three qualified candidates to the City Council for final determination.

Under the Ralph M. Brown Act, and more specifically at California Government Code section 54957(b)(1), a legislative body of a local agency may hold a closed session meeting, as an exception to the open meetings mandate, to consider the appointment of a public employee, such as the City Auditor. 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 of staff or prospective staff members without subjecting the latter to public embarrassment. These purposes would be served by allowing closed sessions for interviewing candidates, reviewing resumes, discussing qualifications, and arriving at a decision prior to the actual appointment." 80 Cal. Op. Att'y Gen. 308 (1997) (citations omitted).

The Audit Committee performs a Charter-mandated duty in the City Auditor appointment process, allowing for the closed session discussion on the appointment recommendations. The City Council cannot appoint a City Auditor without the participation of the Audit Committee. *See, e.g., Gillespie v. San Francisco Pub. Library Com.*, 67 Cal. App. 4th 1165, 1172, 1177 (1998) (“a body therefore need not be vested with sole power of appointment before it may properly ‘consider the appointment’ of a public officer in closed session”).

However, this “personnel exception” covering public employee appointments is narrowly construed. It does not permit the legislative body to discuss employee compensation, except in the context of a legislative body giving direction to a previously and publicly designated negotiator, under California Government Code section 54957.6. The open meetings exception authorizing closed session meetings with a body’s labor negotiator is not available to the Audit Committee because the Audit Committee only recommends City Auditor compensation. It does not determine compensation.

The California Court of Appeal, in a case involving this City, explained why compensation must be discussed in open session:

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.

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

Therefore, the Audit Committee must discuss its recommendations related to initial, annual compensation of the City Auditor appointee in its open meeting.

In addition, California Labor Code section 432.3 prohibits an employer from asking, verbally or in writing, for salary history information, including compensation and benefits, from an applicant for employment. This section also prohibits an employer from relying on the salary history information of an applicant for employment as a factor in determining whether to offer employment to an applicant or what salary to offer an applicant. Cal. Lab. Code § 432.3.

Given the narrow scope of the closed session discussion related to public employee appointment and the state law prohibition on discussing prior salary history with applicants for employment, we advise that you avoid any discussion of compensation in your closed session meeting. In your open session meeting, you may discuss and make policy recommendations to the City Council related to the compensation of the next City Auditor, in accordance with your duties under the Charter.

Members of the Audit Committee

September 29, 2020

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I have attached a detailed prior memo from our office on the parameters of closed session discussions of the Audit Committee related to the employment of the City Auditor, which will provide further information to you. *See attached* 2011 City Att’y MOL 209 (2011-17; Nov. 4, 2011). In addition, I am available to provide any further legal guidance on this matter, as needed.

MARA W. ELLIOTT, CITY ATTORNEY

By /s/ Joan F. Dawson
Joan F. Dawson
Senior Deputy City Attorney

JFD:jdf

MS-2020-27

Doc. No.: 2491416

Attachment

cc: Andrea Tevlin, Independent Budget Analyst

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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.

JAN I. GOLDSMITH, CITY ATTORNEY

By



Mara W. Elliott
Deputy City Attorney

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