

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

**MEMORANDUM
MS 59**

(619) 533-5800

DATE: July 16, 2021

TO: Councilmembers Cate and Elo-Rivera

FROM: City Attorney

SUBJECT: Housing Authority Oversight of the San Diego Housing Commission and its Board

INTRODUCTION

You requested legal guidance about the oversight roles of the San Diego Housing Commission (Housing Commission) and the San Diego City Council (Council) in its role as the Housing Authority of the City of San Diego (Housing Authority), and the ability of the Board of Housing Commissioners (Board) to discuss policies, in open public meetings and in closed session, with the Housing Authority. This memorandum memorializes verbal advice our Office previously provided.

QUESTIONS PRESENTED

1. Can the Housing Authority meet with the Board in a joint open session meeting?
2. What is the legal process for discussing confidential closed session matters between the Board and the Housing Authority, including evaluation of the performance of the Housing Commission's President and Chief Executive Officer (Commission President)?

SHORT ANSWERS

1. Yes. The Housing Authority and Board may meet in joint public and open meetings on matters within their mutual purview provided the meetings for each body are appropriately noticed under the Brown Act.
2. There is no legal basis under the San Diego Municipal Code (Municipal Code or SDMC) for the Housing Authority and Board to meet jointly in closed session. In addition, the Commission President's employment contract, as drafted, does not legally support a joint closed session meeting for performance evaluation purposes. Nevertheless, as discussed in Section II (C) below, there are legal options available to facilitate joint conversations between the two legislative bodies.

BACKGROUND

The Housing Commission was formed by the Council in 1979 to act as the administrative body over housing policy and matters in the City of San Diego. City Att’y MOL 86-111 (Sept. 12, 1986). Prior to the Housing Commission’s creation, the Council declared itself the Housing Authority under the Housing Authorities Law, California Health and Safety Code sections 34200-34380. *Id.* The Housing Commission is governed by a seven-member Board appointed by the Mayor and confirmed by Council. SDMC § 98.0301(f). The Housing Commission is granted broad authority to exercise “all rights, powers, and duties of a Housing Authority pursuant to the provisions of [the Housing Authorities Law], except those expressly retained” by the Housing Authority. SDMC § 98.0301(a).

ANALYSIS

I. THE BROWN ACT ALLOWS TWO LEGISLATIVE BODIES TO MEET IN OPEN SESSION.

The purpose of the Brown Act is to ensure the actions and deliberations of public commissions, boards, and councils are conducted openly so that the public may participate. Cal. Gov’t Code §§ 54950, 54953(a). The Housing Authority and the Board are both legislative bodies subject to the Brown Act. *See* Cal. Gov’t Code § 54952(a)-(b). There is nothing in the Brown Act that prohibits two legislative bodies from calling a special joint meeting to discuss matters within their shared purview.¹ The Housing Authority and Board could post a joint agenda, providing public notice of the special joint meeting.² Furthermore, there is past precedent for joint meetings. For example, the Council’s Land Use and Housing Committee has met several times in joint sessions with the Planning Commission to discuss matters of mutual interest, including updates on the City’s Housing Element.

II. ONLY THE LEGISLATIVE BODY WITH DIRECT DECISION-MAKING AUTHORITY MAY MEET IN CLOSED SESSION UNDER ONE OF THE BROWN ACT CLOSED SESSION EXCEPTIONS.

The Brown Act permits closed session meetings as an exception to the open meeting requirements in limited circumstances. Cal. Gov’t Code § 54953(a). Closed session meetings must be expressly authorized by statute, which courts narrowly construe.

¹ The Brown Act also allows more than a quorum of a legislative body to attend an open and public meeting of another body. Cal. Gov’t Code § 54952.2(c)(4); *but see* City Att’y MS 2011-1 (Jan. 14, 2011) (discussing meetings of the legislative body and its standing committees). This meeting exception would allow more than a quorum of the Housing Authority to attend a Board meeting, or vice versa. If the Housing Authority members attended an open and public Board meeting, for example, the Housing Authority members could provide testimony to the Board in the same manner as members of the public. They could not conduct business of their own and should avoid the appearance that they may be improperly discussing other business.

² While the Brown Act generally requires a legislative body to meet at a regular time and place established by that body, it allows the legislative body to call special meetings. Cal. Gov’t Code §§ 54954(a), 54956.

Cal. Gov't Code § 54953; *Shapiro v. Board of Directors of the Centre City Dev. Corp.*, 134 Cal. App. 4th 170, 180-81 (2005). "The fact that material may be sensitive, embarrassing, or controversial does not justify application of a closed session unless it is authorized by some specific exception." City Att'y Report 2011-6 at 1 (Jan. 31, 2011) (citing *Rowen v. Santa Clara Unified School District*, 121 Cal. App. 3d 231, 235 (1981)). Closed session exceptions include real property and labor negotiations; performance evaluations, appointments, and discipline; and pending, existing, or anticipated litigation. Cal. Gov't Code § 54954.5. Only legislative body members with decision-making authority over the subject matter may meet in closed session under an express closed session exception.

In the attached Report, this Office discussed the Audit Committee's authority to participate in Council closed session meetings. City Att'y Report 2011-6. We concluded the Audit Committee's responsibilities supported meeting in closed session to review the performance of the City Auditor, but none of its other responsibilities fell within a specific closed session meeting exception. *Id.* We further concluded that the Audit Committee members could not attend closed session meetings of the Council because they did not have an official role in that meeting. *Id.* "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)." *Id.* at 3 (quoting 46 Op. Cal. Att'y Gen 34, 29 (1965)).

Under the rights granted by Municipal Code section 98.0301, the Housing Commission has broad authority to exercise public and essential governmental functions to carry out the purpose of the Housing Authorities Law. Cal. Health & Safety Code § 34310. For example, the Housing Commission may sue, be sued, and may contract as needed to exercise its powers. Cal. Health & Safety Code § 34311. It may acquire, lease, and operate property to create housing for low-income households. Cal. Health & Safety Code § 34312. The Board may meet in closed session to discuss matters within its decision-making authority, including real property negotiations and performance evaluations, and to confer with legal counsel concerning litigation.

The Housing Commission's broad authority is limited only by the powers retained by the Housing Authority. The Housing Authority expressly retained approval authority over the Housing Commission's budget, bond issuances and related actions, labor agreements, adoption or amendment to Housing Commission policies, and any other matter where the Council or Housing Authority determines the Housing Commission is to be advisory. SDMC § 98.0301(d)(9). The Housing Authority also has final approval over any matter referred to it within seven days of the Housing Commission action. SDMC § 98.0301(e)(2). Referral may occur by resolution of the Board, by request of the Housing Authority's Executive Director, or when requested in writing by two Councilmembers or the Mayor. SDMC § 98.0301(e)(2).

A. Joint Closed Session Meetings

A body may only meet in closed session on a subject matter over which it has decision-making authority. Municipal Code section 98.0301 does not grant joint authority on any matter to both the Board and Housing Authority; final decisions are made either by the Board or by the

Housing Authority. For example, if the Board is negotiating a real property acquisition, the Board has authority to complete the transaction without Housing Authority approval and may meet with Housing Commission negotiators in closed session. SDMC § 98.0301(e)(4).

The Housing Authority may review Board decisions, including those made in a closed session meeting, but may not do so at a joint meeting with the Board. SDMC § 98.0301(e)(2). Once the Housing Authority reviews a Housing Commission action, the Board has lost decision-making authority over that matter. Because the Board has effectively lost jurisdiction over the matter once referred to the Housing Authority, the Board may not legally participate in the Housing Authority's closed session. The Brown Act closed session exceptions only support the bare minimum of necessary participants in addition to the decision-making body. Unless specific facts support the necessity of a Board member's attendance at a Housing Authority closed session, they would likely not be legally permitted to join a Housing Authority closed session.³ A Board member's attendance would not be necessary to discuss real property negotiations or litigation because the Housing Authority can obtain information from the negotiating team or legal counsel. As discussed below, a Commissioner's input may be necessary for the Housing Authority to evaluate an employee's performance if the Housing Authority performed that function.

B. Executive Oversight

The Brown Act allows a legislative body to meet in closed session to evaluate a public employee's performance, but discussion and decisions related to the employee's salary must be held in open session. *San Diego Union v. City Council of the City of San Diego*, 146 Cal. App. 3d 947 (1983); City Att'y MOL 2011-17 (Nov. 4, 2011). The Housing Authority's Executive Director is the Commission President and the position is appointed by the Housing Authority. SDMC § 98.0301(b). The Housing Authority or Board may meet in closed session under the Brown Act to review the Commission President's performance, depending on which body holds authority over that task.

The current Commission President was appointed by the Housing Authority in 2008. His contract is silent about the performance evaluation process but provides that salary review is delegated to the Board. Housing Authority Report No. HAR 08-033 (July 24, 2008). The Board may meet in closed session to discuss the Commission President's performance and whether the performance supports a salary adjustment. *See* Cal. Gov't Code § 54957(b). Any salary adjustment, except a reduction of compensation resulting from the imposition of discipline, must take place in a public meeting. The Housing Authority may not lawfully attend the Board's closed session meeting discussing the Commission President's performance because it has no authority to evaluate performance or whether the performance warrants salary adjustment under the current contract.

³ The Board members are also prohibited from disclosing any confidential information acquired in a Board closed session unless the Board, as a whole, authorizes the disclosure. Cal. Gov't Code § 54963(a).

Following the process in Municipal Code section 98.0301(e)(2), the Housing Authority could review any Board action taken with respect to the Commission President's performance evaluation, salary adjustment, or both. Housing Authority review of the Board's evaluation of the Commission President could be held in closed session. Cal. Gov't Code § 54957(b). However, Housing Authority review of any salary adjustment must be held in a public meeting to comply with the Brown Act. Cal. Gov't Code § 54957(b). Depending on the facts, some of the Commissioners may be considered necessary parties to the Housing Authority's review of the Board's performance evaluation but the Board members would be prohibited from disclosing any confidential information acquired in the Board's closed session, unless the Board authorizes its disclosure. Cal. Gov't Code § 54963(a).

C. Legal Options for Oversight of the Housing Commission

While the current structure in Municipal Code section 98.0301 does not legally support the Board and Housing Authority meeting jointly in closed session, the Council could exert greater oversight of the Housing Commission in several ways. This list is just a few possible options:

- Less than a quorum of the Board could meet with less than a quorum of the Housing Authority to discuss issues and concerns.
- The Housing Authority could request the Commission President attend Housing Authority meetings to provide more information about Housing Commission activities.
- The Housing Authority could hold a joint open and public meeting with the Board to educate the Board about the Housing Authority's goals and expectations of the Board.
- The Housing Authority could exercise more frequently its authority in Municipal Code section 98.0301(e)(2) to review Board decisions.
- The Council could amend the Municipal Code to increase the Housing Authority's powers, including requiring Housing Authority approval for initiation of certain types of litigation or property acquisition and disposition actions. These amendments could result in additional oversight of Housing Commission activities.
- The Council could amend the Municipal Code to formalize a joint Housing Authority and Board performance review process for the Commission President that could support future joint closed session meetings for such performance review.⁴
- The Housing Authority could require joint performance review by both bodies in a future employment contract for the Commission President.

⁴ To ensure fairness in the performance evaluation process, we recommend the current Commission President be notified before amending the Municipal Code to change the performance review process.

CONCLUSION

The Board and the Housing Authority may legally convene a special joint public meeting to discuss matters within their shared purview provided the meeting is properly noticed by each body in compliance with the Brown Act. Under the current employment contract and authorities of Municipal Code section 98.0301, the Housing Authority and Board may not meet jointly in closed session to discuss matters that fall within the Brown Act's closed session exceptions, including employee performance evaluation. We have identified several options to increase oversight of the Housing Commission's activities and are available to discuss or assist with implementing them.

MARA W. ELLIOTT, CITY ATTORNEY

By /s/ Heather M. Ferbert

Heather M. Ferbert
Chief Deputy City Attorney

HMF:sc

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Attach.: City Att'y Report 2011-6 (Jan. 31, 2011)

cc: Mayor Todd Gloria

Hon. City Councilmembers

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Jan I. Goldsmith
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January 31, 2011

REPORT TO THE AUDIT COMMITTEE

AUTHORITY OF THE AUDIT COMMITTEE TO HOLD CLOSED SESSION MEETINGS
OR TO PARTICIPATE IN CITY COUNCIL CLOSED SESSION MEETINGS

INTRODUCTION

At the Audit Committee meeting on January 10, 2011, a Committee member expressed concern that an item on the City Council closed session docket relating to the City Auditor was not first presented to the Audit Committee. The Chairman asked the Office of the City Attorney to prepare a written report outlining the Audit Committee's ability to hold closed session meetings relating to the responsibilities of the City Auditor or the Audit Committee, and the Audit Committee's right to be briefed on audit-related matters to be discussed with the City Council in a closed session meeting.

DISCUSSION

The Audit Committee is a permanent body of a local agency created by charter and is subject to the Brown Act. Cal. Gov't Code § 54952(b). The Brown Act requires that, except as otherwise provided, "[a]ll 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 . . ." Cal. Gov't Code § 54953(a). Closed session meetings are an exception to the Brown Act's open meeting requirements and must be expressly authorized by statute. Cal. Gov't Code § 54962. The fact that material may be sensitive, embarrassing, or controversial does not justify application of a closed session unless it is authorized by some specific exception. *Rowen v. Santa Clara Unified School District*, 121 Cal. App. 3d 231, 235 (1981). Further, statutory exceptions in favor of closed session meetings are construed narrowly, whereas the Brown Act is construed liberally in favor of openness in conducting public business. *Shapiro v. Board of Directors of the Centre City Development Corporation*, 134 Cal. App. 4th 170 (2005).

Closed session exceptions include, but are not limited to, personnel matters such as performance evaluations, appointments, discipline, and dismissal; pending, existing, and anticipated litigation; real property and labor negotiations; and public security. Cal. Gov't Code § 54954.5. There is no specific statutory exception for the discussion of an audit conducted by a local agency's own internal auditor, although there is an exception that allows a local agency to hold a closed session meeting to discuss an audit by the State Bureau of Audits. Cal. Gov't Code § 54954.5.

The Audit Committee's responsibilities are described in the San Diego Charter and the San Diego Municipal Code. San Diego Charter § 39.1; San Diego Municipal Code § 26.1701. It is responsible for:

- (1) conducting the City Auditor's annual performance review;
- (2) directing and reviewing the work of the City Auditor;
- (3) overseeing the City's auditing, internal controls and any other financial and business practices as described in the San Diego Charter;
- (4) recommending the annual compensation of the City Auditor and the annual budget of the Office of the City Auditor to the Council;
- (5) recommending to the Council the retention of the City's outside audit firm and, when appropriate, the removal of such firm;
- (6) monitoring the engagement with the City's outside auditor and resolving any disputes that may arise between the outside auditor and City management with regard to the City's annual financial reports;
- (7) reviewing the results of significant investigations, examinations or reviews performed by government and regulatory authorities and any management response thereto; and
- (8) reviewing any issues that come to the Committee's attention which pertain to the accuracy and reliability of the City's financial practices and representations and which could have a negative impact on the ability of the public to reasonably rely upon such financial practices and representations.

Although the Audit Committee is not authorized to initiate or participate in litigation, it is required to review the performance of the City Auditor. This review occurs in a closed session meeting to ensure the City Auditor's privacy rights are protected. Cal. Const. art. I, § 1; Cal. Gov't Code § 54957(b). Action taken in a closed session meeting that affects the City Auditor's employment status is reported to the public in open session. Cal. Gov't Code 54957.1(a)(5). Confidential information acquired in closed session may not otherwise be disclosed unless such disclosure is authorized by the legislative body. Cal. Gov't Code 54963.

The Audit Committee's responsibilities do not otherwise fall within a specific closed session meeting exception. Thus, Audit Committee actions related to the responsibilities listed above must be taken in open session. This includes discussion of or actions relating to the City Auditor's compensation. *San Diego Union v. City Council*, 146 Cal. App. 3d 947 (1983).

The next issue is whether the Audit Committee may meet in closed session with the City Council. We conclude it may not. In *Shapiro v. Board of Directors of the Centre City Development Corporation*, 134 Cal. App. 4th 170 (2005), the plaintiff, Mel Shapiro, sued the Board of Directors of the Centre City Development Corporation (CCDC Board) after the CCDC Board met in closed session with attorneys for the Redevelopment Agency of the City of San Diego (Agency). Mr. Shapiro argued the CCDC could not rely on California Government Code section 54956.9, which permits the legislative body of a local agency to hold closed session

meetings with its counsel to discuss litigation to which it is a party, because CCDC was *not a party* to the Agency's eminent domain litigation. The trial court found that the closed session was permissible because CCDC acts as an agent of the Agency with respect to eminent domain litigation. The appellate court disagreed: "[f]inding no express authorization for the CCDC Board to meet in closed session with legal counsel for the Agency in the text of section 54956.9, we conclude that such closed-session meetings are not permitted by the Brown Act." *Id.* at 173.

Notably, the appellate court discussed and discredited a California Attorney General opinion (1984 Opinion) that posed a fact pattern similar to the one at hand. In 67 Op. Cal. Att'y Gen. 111 (1984), the California Attorney General determined that an advisory committee created by the Board of Supervisors (Board) to advise it on airport matters could meet in closed session with county counsel about airport-related litigation in which the Board was the defendant because county counsel is the legal representative for all county entities, including the advisory committee. The appellate court took issue with the 1984 Opinion because it preceded California Government Code section 54956.9 (the litigation exception), effective in 1987, and implied an exception based on various court rulings relating to attorney-client privilege. The Brown Act did not expressly authorize closed session meetings between the advisory body and county counsel.

We conclude the Audit Committee cannot meet in closed session with the City Council because there is no specific authority in the Brown Act authorizing such a meeting. Nor may the City Council delegate its authority to the Audit Committee for purposes of creating a right in this body to meet in closed session with the City's attorneys as this right is not delegable. *Shapiro v. Board of Directors of the Centre City Development Corporation*, 134 Cal. App. 4th 170 (2005).

We also conclude the Audit Committee cannot sit in on City Council closed session meetings as observers, even if the subject matter relates to responsibilities within its purview, because Audit Committee members do not have an official role in the meeting.¹ "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)." 46 Op. Cal. Att'y Gen 34, 29 (1965). Although Audit Committee members provide a valuable role in the rendering of advice to City policymakers, they are not members of the decisionmaking body, the City Council, and do not have an official role in City business.

CONCLUSION

The Audit Committee is responsible for reviewing the performance of the City Auditor. As permitted by the Brown Act and the California Constitution, the Audit Committee may conduct the City Auditor's performance review in closed session and issue public reports if required thereafter. There is otherwise no specific authority in the Brown Act that would allow the Audit Committee to meet in closed session to carry out its other Charter and statutory

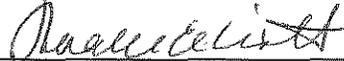
¹ Note, however, that two of the Audit Committee members are also City Council members. The City Council members would attend the closed session meeting in their capacities as such.

responsibilities. Further, since closed session meetings may only involve the membership of the body in question and any additional support staff as required, the Audit Committee may not participate in a City Council closed session meeting even if the meeting concerns a City audit. The Audit Committee has no greater access to such information than the general public and is not entitled to a pre- or post-City Council closed session briefing.

To better facilitate communication between the City Council and the Audit Committee, the Audit Committee Consultant or the assigned Deputy City Attorney can share any reportable action that occurred in a closed session meeting of the City Council relating to City audits with the Audit Committee by memorandum or verbal report at a regularly scheduled Audit Committee meeting. Note, also, that Audit Committee members may access City Council meeting agendas at <http://www.sandiego.gov>.

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By



Mara W. Elliott

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