

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

**MEMORANDUM
MS 59**

(619) 236-6220

DATE: February 25, 2022
TO: Andy Hanau, City Auditor
FROM: City Attorney
SUBJECT: City Auditor Participation in City Council Closed Session Meetings

INTRODUCTION

This Memorandum responds to the request that the Office of the City Attorney evaluate whether the City Auditor may meet with the San Diego City Council (Council) in closed session under the Ralph M. Brown Act's exceptions to open meeting requirements. Cal. Gov't Code § 54957(a) (section 54957(a)). The City Auditor asserts that it qualifies as a "security consultant" under section 54957(a) because it conducted an audit of the City's information technology (IT) infrastructure at certain City facilities and issued recommendations that identify significant IT security risks. The Auditor believes this work is the same type of work performed by an IT security consultant.

QUESTION PRESENTED

Is the City Auditor a "security consultant" under section 54957(a) and therefore allowed to meet with the Council in closed session to discuss matters posing a threat to essential public services, or a threat to the public's right to access public services or public facilities?

SHORT ANSWER

No. The role and responsibilities of auditors and "security consultants" are not synonymous and there are no other Brown Act exemptions that would authorize a closed-door performance audit.

ANALYSIS

I. THE BROWN ACT

Pursuant to the Brown Act, "[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," except as otherwise specifically provided. Cal. Gov't Code § 54953(a). Closed session meetings are exceptions to

open meeting requirements and are only permitted in certain limited circumstances with participation allowed only to individuals expressly authorized by the Brown Act. *See* Cal. Gov't Code §§ 54956.7-54957.

Under section 54957(a), the legislative body of a local agency may hold a closed session as follows:

with the Governor, Attorney General, district attorney, agency counsel, sheriff, or chief of police, or their respective deputies, or a security consultant or a security operations manager, on matters posing a threat to the security of public buildings, a threat to the security of essential public services, . . . or a threat to the public's right of access to public services or public facilities. Cal. Gov't Code § 54957(a).

As the Brown Act does not define "security consultant" or "security operations manager," the legal analysis requires review of case law, legislative history, and extrinsic aides to ascertain what the Legislature meant when it added "security consultant" and "security operations manager" to this closed session exception.

First, and consistent with our State's open meeting and transparency laws, case law requires that closed session exceptions be narrowly construed. *Shapiro v. Board of Directors*, 134 Cal. App. 4th 170, 180-181 (2005) (*Shapiro*); *see also*, Cal. Const. art. I, § 3(b)(2). Courts, in construing a statute, will look to a statute's language to ascertain and declare what is contained therein. *Shapiro*, 134 Cal. App. 4th at 180. They will not insert what has been omitted or omit what has been inserted. *Id.*

Here, section 54957(a)'s language is clear and unambiguous. The list of designated officials in section 54957(a) includes the Governor, specifically enumerated law enforcement officials including the district attorney, sheriff, or chief of police, and, as amended in 2002, security consultants and security operations managers. Auditors do not appear in the plain text of section 54957(a), and to find otherwise would be to "insert what has been omitted." *Shapiro*, 134 Cal. App. 4th at 180.

According to section 54957's legislative history, security consultants and security operations managers were added in 2002 following the 9/11 attacks. At that time, many cities were retaining private security consultants to offer advice and recommendations on the protection of major infrastructure such as wastewater treatment plants, major dams, and bridges. Initially, the legislation only proposed adding private security consultants to section 54957. The exception was broadened during the legislative process by deleting the requirement that consultants be private, and by adding the title of "security operations manager" to ensure that in-house consultants fell within the proposed amendment. There is no evidence in the legislative history indicating auditors were to be included in the list of officials identified in section 54957(a), and no indication the legislature intended that auditors be considered "security consultants."

Neither the language of section 54957(a) nor the legislative history supports a legal interpretation that the City Auditor would be considered a "security consultant" permitted to attend closed session.

II. USE OF EXTRINSIC AIDS

When statutory terms are undefined, courts may permit the use of extrinsic aids. In understanding “security consultant” under section 54957(a), a court could refer to the dictionary definition of “security consultant” or how the San Diego Charter or generally accepted government auditing standards (GAGAS) define the role of the City Auditor. These definitions do not support the Auditor’s legal conclusion. Although a security consultant and an Auditor may perform certain limited overlapping functions, the roles and responsibilities of these distinct positions are too dissimilar to support an interpretation that an auditor could be considered a “security consultant” under section 54957(a).

A security consultant typically refers to an individual or a group of individuals who are commonly retained to perform vulnerability or threat assessments on software, networks, and computer systems. In the context of section 54957(a), the legislative history suggests consultants were either retained or used in-house to assess the security of water and wastewater treatment plants, as well as major dams and bridges, in the immediate aftermath of the 9/11 attacks. Once their assessments are complete, security consultants work with their clients to develop security plans specific to their client’s needs.

Auditors, on the other hand, perform vastly different functions. As described in the San Diego City Charter, the City Auditor conducts audits in accordance with an annual Audit Plan using government auditing standards and performing such other duties as may be required either by ordinance or under State law, including investigating material claims of financial fraud, waste, or impropriety occurring within any City department. San Diego Charter § 39.2. While an auditor may be charged with understanding information systems controls under GAGAS (*see* GAGAS §§ 8.63 and 8.65), this function is not the same as performing a security assessment to identify vulnerabilities or threats. Performance audits have very different objectives. *See* GAGAS § 1.21 (performance audits assist management with, among other things, improving program performance and operations, reducing costs, facilitating decision making, and contribute to public accountability). Additionally, as defined by GAGAS, an auditor is not tasked with performing “security consultant” work but is defined as an individual who is assigned to planning, directing, or performing engagement procedures, including working on audits, attestation engagements, and reviewing financial statements. GAGAS § 1.27(f).

III. BROWN ACT VIOLATIONS ARE MISDEMEANORS THAT COULD RESULT IN FINES AND JAIL TIME

As explained in the Brown Act, “[e]ach member of a legislative body who attends a meeting of that legislative body where action is taken in violation of any provision of this chapter [the Brown Act], and where the member intends to deprive the public of information to which the member knows or has reason to know the public is entitled under this chapter, is guilty of a misdemeanor.” Cal. Gov’t Code § 54959. Thus, if closed session is held in violation of the Brown Act, Councilmembers may be prosecuted for violating the State’s open meeting laws. Those convicted of a misdemeanor may face up to 6 months in jail, a \$1,000 fine, or both. Cal. Pen. Code § 19. In addition, if a private party sues the City for improperly meeting behind closed

