

CITY OF OAKLAND



ONE FRANK H. OGAWA PLAZA • 6TH FLOOR • OAKLAND, CALIFORNIA  
94612

Office of the City Attorney  
Barbara J. Parker  
City Attorney

PHONE (510) 238-3601  
FAX: (510) 238-6500  
TTY/TD (510) 238-3254  
D:

**PUBLIC LEGAL OPINION**

September 26, 2018

**MAYOR LIBBY SCHAAF  
HONORABLE CITY COUNCIL  
CITY ADMINISTRATOR SABRINA LANDRETH**

Oakland, California

**Re: PENALTIES AND REMEDIES FOR VIOLATION OF THE RALPH  
M. BROWN ACT CLOSED SESSION CONFIDENTIALITY**

Dear Mayor Schaaf, President Reid and Members of the City Council, and City  
Administrator Landreth:

**I. INTRODUCTION**

This opinion describes the remedies and penalties for violation of the Ralph M. Brown Act (Government Code section 54950 et seq., hereinafter “the Brown Act” or “the Act”) closed session confidentiality.

**II. BACKGROUND**

The Brown Act is the state’s open meeting law. The Brown Act strikes the balance between the importance of public access to meetings of public bodies and the need for confidential discussions of certain matters. The courts have declared that the purpose of the Brown Act is to facilitate public participation in local government decisions and to curb misuse of the democratic process by public bodies secretly developing legislation. *Cohan v. City of Thousand Oaks*, 30 Cal.App.4<sup>th</sup> 547, 555 (1994).

The Brown Act declares:

In enacting this chapter, the Legislature finds and declares that the public commissions, boards and councils and the other public agencies in this State exist to aid in the conduct of the people's business. It is the intent of the law that their actions be taken openly and that their deliberations be conducted openly.

The people of this State do not yield their sovereignty to the agencies which serve them. The people, in delegating authority do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may retain control over the instruments they have created.

Government Code section 54950.

The Brown Act provides specific statutory exceptions to the open meeting requirements that allow closed session discussions; these exceptions are narrowly construed so that closed session discussion is prohibited unless a specific statutory exception authorizes closed session discussion of a particular matter. See e.g., *Rowen v. Santa Clara School District*, 121 Cal.App.3d 231, 234 (1981).

The Brown Act applies to the legislative bodies of all California local agencies such as councils, boards, commissions and committees. Government Code section 54951, 54952. Local agencies include all cities, counties, school districts, municipal corporations, special district and all other local public entities.

### III. QUESTIONS AND BRIEF ANSWERS

#### Question:

What are the remedies for violating the confidentiality of closed session Council meetings conducted pursuant to the Brown Act?

#### Brief Answer:

There are civil and criminal penalties for violations of the Brown Act provisions regarding confidentiality of closed session meetings. They include (1) an injunction prohibiting such violations and, if the conduct continues, court sanctions; (2) investigation by the Public Ethics Commission, which can impose monetary fines and/or refer the matter to the district attorney or others; (3) referral to the district attorney for criminal prosecution for willful failure to perform a duty required under law; (4) censure by the Council.

#### **IV. ANALYSIS**

##### **A. The Brown Act authorizes the Council to meet in closed session only in specifically enumerated circumstances**

The Council can hold closed sessions pursuant to the Brown Act for the limited purposes specifically identified in the Act, including labor negotiations, real property negotiations, personnel issues, threat to public security, and pending litigation. Government Code sections 54956.8, 54956.9, 54957, 54957.6.

The pending litigation exception authorizes the Council to meet in closed session with its legal counsel when open session discussion would prejudice the City in that litigation. Government Code section 54956.9(a). For purposes of the pending litigation exception, litigation is pending when (1) the litigation to which the City is a party has been formally initiated, (2) the Council is meeting to decide whether to initiate litigation, or (3) when there is significant exposure to litigation if matters related to specific facts or circumstances are discussed in open session.<sup>1</sup> Typically, a significant exposure to litigation exists when the City receives a claim or other written communication threatening litigation or an oral threat of litigation is made at an open meeting or outside of any open meeting.

##### **B. The Mayor, City Councilmembers, City Attorney, City Administrator, City Clerk and all other persons present have a legal duty to maintain closed session confidentiality**

Each member of the legislative body, i.e., the City Council, and all other persons attending the closed session (e.g. Mayor, City Attorney, City Administrator, City staff and consultants) must maintain the confidentiality of closed session discussions and actions unless and until the Council agrees to make the previously-confidential matter public. See Sunshine Ordinance, Oakland Municipal Code section 2.20.130. Specifically Government Code section 54963(a) prohibits all persons from disclosing confidential information they receive in a properly noticed closed session (including one to consider litigation, labor negotiations, real property negotiations, personnel issues and threats to public security) unless the legislative body as a whole has consented to the disclosure. Sunshine Ordinance, Oakland Municipal Code section 2.20.130; 76 Ops. Cal. Atty. Gen. 289 (1993).

---

<sup>1</sup> The pending litigation exception also authorizes the Council to meet in in closed session to consider whether a significant exposure to litigation exists, based on specific facts and circumstances.

Government Code section 54963(a) and (b), entitled “**Closed session; Disclosure of confidential information,**” provides:

- (a) A person may not disclose confidential information that has been acquired by being present in a closed session authorized by Section 54956.7 [discussion of granting a license or license renewal to a person who has a criminal record], 54956.8 [real property negotiations], 54956.86 [charge/complaint by person enrolled in health plan], 54956.87 [county health plan records], 54956.9 [pending litigation], 54957 [personnel or threat to public security], 54957.6 [labor negotiations], 54957.8 [ongoing criminal investigation by multijurisdictional drug law enforcement agency]; or 54957.10 [early withdrawal of deferred compensation funds in an emergency or other extraordinary event] to a person not entitled to receive it, unless the legislative body authorizes disclosure of that confidential information.
- (b) For purposes of this section, “confidential information” means a communication made in a closed session that is specifically related to the basis for the legislative body of a local agency to meet lawfully in closed session under this chapter.

(Emphasis and bracketed material added.)

An individual councilmember has no First Amendment right to disclose confidential closed session information. *Harron v. Bonilla*, 125 Cal. App. 4th 738 (2005).

### **C. Remedies for violation of closed session confidentiality**

Under the Brown Act (Government Code section 54963), the remedies for an unlawful disclosure of confidential closed session discussions are:

- (1) Injunctive relief to prevent the disclosure of confidential information prohibited by this section.
- (2) Disciplinary action against an employee who willfully disclosed confidential information in violation of this section.
- (3) Referral of a member of a legislative body who has willfully disclosed confidential information in violation of this section to the grand jury.

The grand jury could consider whether the violation suffices to issue an accusation of willful or corrupt misconduct in office under Government Code 3060, which can result in removal from office for egregious misconduct.

In addition, if the violator is a member of the City Council, the Council can censure a Councilmember under the censure policy that it has adopted as part of its Rules of Procedure Resolution No. 87044. Alternatively, the Council or one its

members can refer an offending member to the Public Ethics Commission, which has jurisdiction to foster and enforce a Councilmember's compliance with the Brown Act. City Charter section 603(b)(1)(iii).

Notably, the San Diego City Ethics Commission recently fined a city councilmember \$5,000 for sharing a confidential city attorney analysis with a private developer.

Finally, the Riverside District Attorney has publicly opined that disclosure of confidential information can be the subject of a criminal misdemeanor prosecution for violation of Government Code 1222, which is a willful omission by a public officer to perform a duty under law. *See also Adler v. City Council*, 184 Cal. App. 2d 763, 774-775 (1960). Any member of the public could make such a referral.

**V. CONCLUSION**

The Brown Act mandates that each person who attends a properly noticed closed session maintain the confidentiality of the discussions, information and any actions during closed session unless and until the Council as a body authorizes disclosure. We describe the remedies for violations of the confidentiality of closed sessions in this opinion.

Very truly yours,



BARBARA J. PARKER  
City Attorney

2563032v1