

ENDORSED FILED

APR 25 2008

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SUTTER
CLERK OF THE COURT
By JENNIFER LAMBERT Deputy

Report
of the
2007-2008
Sutter County Grand Jury

ROBERT WILIAM AHU, KIMBER LEE ANDERSEN, GLENN ARONOWITZ,
MARIA A. ARREOLA, DEBORAH LEE BAKER, KEVIN CHARLES BERMINGHAM, KENNETH
DEAN BROOKE-FOREPERSON, NANCE ANN CONTRERAS,
JOAN DUBUISSON DOOLITTLE, KENT BRYON EKBERG, JOHN EDWARD ELLIOTT,
THERESE ANN GUIDERA, DOUGLAS JAMES HEACOCK, SATOKO SHINOZAKI KIM,
TAMI RENE KING, JODY MARIE MCGINNIS, SARA NEILAH NEUKIRCHNER, CYNTHIA LEE
TAYLOR, DIANE REBECCA UUTELA

Final report [pursuant to Penal Code Section 933(a)] on subject:

The Brown Act

Kenneth D. Brooke

Kenneth D. Brooke,
07-08 Grand Jury Foreperson

4.8.08

Date

Brown Act Complaint

Introduction:

The Grand Jury received and investigated a complaint regarding violations of the Brown Act by the Sutter County Board of Supervisors (BOS).

The complaint was investigated by the County Government Committee comprised of the following jurors: Glenn Aronowitz, Deborah Baker, Nance Contreras, Tami King, Kevin Bermingham, and Diane Uutela. Kenneth Brooke (foreperson) also participated in this investigation.

Discussion:

Upon receiving the complaint regarding alleged Brown Act violations, the County Government Committee researched the Brown Act. To gain further knowledge and understanding of the Brown Act, an interview with Sutter County's District Attorney Carl Adams was initiated by the committee. A second interview with Carl Adams also included County Administrative Officer Larry Combs. Sutter County Counsel Ronald Erickson declined to participate, asserting attorney-client privilege. Mr. Erickson's position is that he is the attorney for the BOS and Sutter County, not for the citizens of Sutter County. This is a position supported by Mr. Adams.

The County Government Committee reviewed "The Brown Act: Open meetings for local legislative bodies" from the California Attorney General's Office. Former Attorney General Bill Lockyer produced a document to provide brief descriptions of the Brown Act to "assist public officials and those who monitor the performance of local legislative bodies to minimize and resolve disputes over interpretations of the Brown Act." The Ralph M. Brown Act, commonly referred to as the "Brown Act," is contained in section 54950 et seq. of the Government Code.

From the Attorney General's interpretation,

"The Act represents the Legislature's determination of how the balance should be struck between public access to meetings of multi-member public bodies on the one hand and the need for confidential candor, debate, and information gathering on the other. ... As the courts have stated, the purpose of the Brown Act is to facilitate public participation in local government decisions and to curb misuse of the democratic process by secret legislation by public bodies. (Cohan v. City of Thousand Oaks (1994) 30 Cal.App.4th 547, 555.)

"However, the Act also contains specific exceptions from the open meeting requirements where government has a demonstrated need for confidentiality. These exceptions have been construed narrowly; thus if a specific statutory exception authorizing a closed session cannot be found, the matter must be conducted in public regardless of its sensitivity. (Section 54962; Rowen v. Santa Clara Unified School District (1981) 121 Cal.App.3rd 231, 234; 68 Ops.Cal.Atty.Gen 34, 41-42 (1985).)

"While the Act creates broad public access rights to the meetings of legislative bodies, it also recognizes the legitimate needs of government to conduct some of its meetings outside of the public eye. Closed-session meetings are specifically defined and are limited in scope. They primarily involve personnel issues, pending litigation, labor negotiations and real property acquisitions. (Sections 54956.8, 54956.9, 54957, 54957.6.) Each closed-session meeting must be preceded by a public agenda and by an oral announcement. (Sections 54954.2, 54957.7.) When final action is taken in closed session, the legislative body may be required to report on such action. (Section 54957.1.)"

According to the complaint received, an alleged violation of the Brown Act occurred on April 17, 2007, when public comment was not allowed prior to the BOS' vote on an Appearance Item portion of the agenda.

From the Attorney General's interpretation – Public Testimony:

"Every agenda for a regular meeting shall provide an opportunity for members of the public to directly address the legislative body on any item under the subject matter jurisdiction of the body. With respect to any item which is already on the agendas, or in connection with any item which the body will consider pursuant to the exceptions contained in section 54954.2(b), the public must be given the opportunity to comment before or during the legislative body's consideration of the item. (Section 54954.3(a).)"

The Brown Act states:

54954.3. (a) Every agenda for regular meetings shall provide an opportunity for members of the public to directly address the legislative body on any item of interest to the public, before or during the legislative body's consideration of the item, that is within the subject matter jurisdiction of the legislative body, provided that no action shall be taken on any item not appearing on the agenda unless the action is otherwise authorized by subdivision (b) of Section 54954.2. However, the agenda need not provide an opportunity for members of the public to address the legislative body on any item that has already been considered by a committee, composed exclusively of members of the legislative body, at a public meeting wherein all interested members of the public were afforded the opportunity to address the committee on the item, before or during the committee's consideration of the item, unless the item has been substantially changed since the committee heard the item, as determined by the legislative body."

In the agenda and minutes from the BOS' meeting dated April 17, 2007, there is ample advertising of public participation just prior to the Consent Calendar and just after "Correspondence Not Included in Agenda Pack". Examination of the minutes from the April 17, 2007, meeting reflects a specific instance in which public participation was solicited from those in the audience. To ensure the accuracy of "the minutes," the Grand Jury also reviewed a video of the April 17th meeting and confirmed that there was, in fact, a request for public participation made prior to the vote on the 'Consent Calendar.'

The complaint also alleged on-going violations of the Brown Act regarding non-disclosure of pending litigation upon which the Board has apparently agreed. Three particular instances have been noted in the complaint and all are related to closed session communications.

From the Attorney General's interpretation - Report at the Conclusion of Closed Sessions:

"Once a closed session has been completed, the legislative body must convene in open session. (Section 54957.7(b).) If the legislative body took final action in the closed session, the body may be required to make a report of the action taken and the vote thereon to the public at the open session. (Section 54957.1(a).) ... In the case of a contract or settlement of a lawsuit, copies of the document also must be disclosed as soon as possible. (Section 54957.1(b) and (c).) If final action is contingent upon another party, the legislative body is under no obligation to release a report about the closed session. Once the other party has acted, making the decision final, the legislative body is under an obligation to respond to inquiries for information by providing a report of the action. (Section 54957.1(a).)"

54957.1(a) The legislative body of any local agency shall publicly report any action taken in closed session and the vote or abstention of every member present thereon, as follows:

- (1) Approval of an agreement concluding real estate negotiations pursuant to Section 54956.8 shall be reported after the agreement is final, as specified below:
 - (A) If its own approval renders the agreement final, the body shall report that approval and the substance of the agreement in open session at the public meeting during which the closed session is held.
 - (B) If final approval rests with the other party to the negotiations, the local agency shall disclose the fact of that approval and the substance of the agreement upon inquiry by any person, as soon as the other party or its agent has informed the local agency of its approval.
- (2) Approval given to its legal counsel to defend, or seek or refrain from seeking appellate review or relief, or to enter as an amicus curiae in any form of litigation as the result of a consultation under Section 54956.9, shall be reported in open session at the public meeting during which the closed session is held. The report shall identify, if known, the adverse party or parties and the substance of the litigation. In the case of approval given to initiate or intervene in an action, the announcement need not identify the action, the defendants, or other particulars, but shall specify that the direction to initiate or intervene in an action has been given and that the action, the defendants, and the other particulars shall, once formally commenced, be disclosed to any person upon inquiry, unless to do so would jeopardize the agency's ability to effectuate service of process on one or more unserved parties, or that to do so would jeopardize its ability to conclude existing settlement negotiations to its advantage.

From the Attorney General's Interpretation - Pending Litigation Exceptions:

"The codified pending litigation exception relating to local bodies is contained in Section 54956.9. This section authorizes bodies to conduct closed sessions with their legal counsel to discuss pending litigation when discussion in open session would prejudice the agency in that litigation. "Litigation" includes any ad judicatory proceeding, including eminent domain, before a court, administrative body, hearing officer or arbitrator. For the purpose of this section, litigation is pending when any of the following occurs: litigation to which the agency is a party has been initiated formally (Section 54956.9(a); 69 Ops.Cal.Atty.Gen.232,240 (1996) [issuance of tentative cease and desist order initiates an ad judicatory proceeding]; the agency has decided or is meeting to decide whether to initiate litigation (Section 54956.9(c); or in the opinion of the legislative body on advice of its legal counsel, there is a significant exposure to litigation if matters related to specific

facts and circumstances are discussed in open session (Section 54956.9(b)(1). Agencies are also authorized to meet in closed session to consider whether a significant exposure to litigation exists, based on specific facts and circumstances. (Section 54956.9(c)(2); see 71 Ops.Cal.Atty.Gen.96, 105 (1988)

Existing facts and circumstances which create a significant exposure to litigation consist only of the following:

**The agency believes that facts creating significant exposure to litigation are not known to potential plaintiffs. (Section 54956.9(b)(3)(A).*

**Facts (e.g., an accident, disaster, incident, or transaction) creating significant exposure to litigation are known to potential plaintiffs. (Section 54956.9(b)(3)(B).)*

**A claim or other written communication threatening litigation is received by the agency. (Section 54956.9(b)(3)(C).)*

**A person makes a statement in an open and public meeting threatening litigation. (Section 54956.9(b)(3)(E).)*

**A person makes a statement outside of an open and public meeting threatening litigation, and an agency official having knowledge of the threat makes a contemporaneous or other record of the statement prior to the meeting. (Section 54956.9(b)(3)(E).)*

"Prior to conducting a closed session under the pending litigation exception, the body must state on the agenda or publicly announce the subdivision of section 54956.9 which authorizes the session. If litigation has already been initiated, the body must state the title of the litigation unless to do so would jeopardize service of process or settlement negotiations. (Section 54956.9(c).)

"In 75 Ops.Cal.Atty.Gen. 14, 20 (1992), this office concluded that the pending litigation exception could be invoked by a body to deliberate upon or take action concerning the settlement of litigation. "

54956.9(c) Based on existing facts and circumstances, the legislative body of the local agency has decided to initiate or is deciding whether to initiate litigation.

From a response to an interpretation presented by the Sacramento Newspaper Guild, the Attorney General elaborated and further concluded:

"This interpretation is supported by Section 54957.1(a)(3), which requires the body to disclose settlements where the body accepts a signed settlement agreement in closed session unless the agreement must be approved by another party or the court. "

The Brown Act states:

54957.1(3) Approval given to its legal counsel of a settlement of pending litigation, as defined in Section 54956.9, at any stage prior to or during a judicial or quasi-judicial proceeding shall be reported after the settlement is final...

The Brown Act clearly states, "If the legislative body took final action in the closed session, the body may be required to make a report of the action taken..." According to Mr. Adams the only time information must be disclosed after a closed session is when there has been a finalized agreement. He went on to explain that reporting on pending litigation in an open session could jeopardize the outcome of the case.

"... unless to do so would jeopardize the agency's ability to effectuate service of process on one or more unserved parties, or that to do so would jeopardize its ability to conclude existing settlement negotiations to its advantage."

If the litigation has been finalized on a separate day other than the BOS' closed session meeting day, the BOS does not need to disclose that information. According to Mr. Adams and the Grand Jury's interpretation of the Brown Act, if asked about a specific case that has been filed, then information must be released.

Closed sessions could also be held to discuss possible litigation and whether or not to enter into litigation, weighing pros and cons, including expenses involved.

"Agencies are also authorized to meet in closed session to consider whether a significant exposure to litigation exists, based on specific facts and circumstances."

According to Mr. Combs, Mr. Erickson advises all members involved in the closed session whether or not there is something to report. Mr. Combs and Mr. Adams went on to explain that the BOS can release any information they want from closed sessions, but on the advice of counsel, do not release any information due to the circumstances previously discussed. Mr. Combs explained that the BOS defers to Mr. Erickson's expertise and explanations regarding matters that occur in closed sessions. County Counsel advises the BOS not to disclose any information they are not legally obligated to disclose, even for informational purposes.

The operative language of the Brown Act, by which the BOS, on advice of County Counsel, limits disclosure of matters discussed in closed session regarding pending litigation is "... litigation to which the agency is a party has been initiated **formally**." Any intervening event, prior to initiating litigation, would preclude that litigation from being formally initiated and, therefore, an exception under the Brown Act. Due to this practice, the BOS rarely, if ever, has anything to report subsequent to a closed session regarding pending litigation.

Findings:

The Grand Jury finds no violation of the Brown Act Section 54954.3(a) as alleged in the complaint. The agenda, minutes, and video of the April 17, 2007 BOS' meeting reflect two separate occasions for public participation or comment.

The Grand Jury further finds no violations of the Brown Act Section 54957.1(a) or 54957.1(a)(2) as alleged in the complaint regarding non-disclosure of pending litigation.

Recommendations:

"...the purpose of the Brown Act is to facilitate public participation in local government decisions and to curb misuse of the democratic process by secret legislation by public bodies."

Transparency in government benefits all of its citizens. Therefore, the Grand Jury recommends that the BOS and County Counsel, in addition to adhering to the letter of the law, adhere to the spirit of the law, as it relates to the Brown Act.

The Grand Jury recommends that the BOS and County Counsel, whenever prudent, should disclose as much information as possible to the public.

Respondents:

Sutter County Board of Supervisors
County Counsel, Ronald Erikson
County Administrative Officer, Larry Combs
District Attorney, Carl Adams

