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October 23, 2009

Ms. Yvonne Quiring, City Manager
City of Fillmore
250 Central Avenue
Fillmore, CA 93015

Re: Brown Act

Dear Ms. Quiring:

Last month, several articles and letters ran in the *Fillmore Gazette* regarding allegations that members of the Fillmore City Council had violated the Ralph M. Brown Act (public meeting law). One letter to the editor suggested that the District Attorney investigate this matter.

Because the District Attorney has authority to enforce the Brown Act, I requested that the City Clerk provide me with various documents mentioned in the articles. City Clerk Clay Westling and City Attorney Ted Schneider promptly provided me with copies of these documents, as well as agendas, minutes, and DVD recordings of relevant meetings. I appreciate their getting these materials to me. I also met and discussed the case on October 23, 2009, with Roger Meyers and Ted Schneider on behalf of the City Attorney.

In the furtherance of continuing compliance with the Act, I would like to share my observations, based on my review of the materials and the relevant law.

SERIAL MEETING ISSUE

The initial incidents occurred on August 13 and 14, 2009, when there were email exchanges between Transitional City Manager Larry Pennell and a majority of council members regarding evaluation of a candidate for the City Manager position. The City Council later approved a statement, which was also reiterated in open session by Mayor Walker and Mr. Schneider, that no action resulted from the exchange of these communications.

The legislative purpose of the Brown Act is that legislative bodies' "actions be taken openly and that their deliberations be conducted openly." (Gov. Code, § 54950.) "Action taken" is defined as including actual votes, as well as "a collective decision made by a majority of the members of a legislative body." (Gov. Code, § 54952.6.)

Serial meetings are prohibited by the Act in Government Code section 54952.2, subdivision (b)(1). This provision was amended effective January 1, 2009, to read:

> A majority of the members of a legislative body shall not, outside a meeting authorized by this chapter, use a series of communications of any kind, directly or through intermediaries, to discuss, deliberate, or take action on any item of business that is within the subject matter jurisdiction of the legislative body.

In enacting this amendment, the Legislature noted its intent to supersede the Court of Appeal holding in *Wolfe v. City of Freemont* (2006) 144 Cal.App.4th 533, which had limited the serial meeting prohibition to situations in which the communications resulted in reaching collective concurrence.

In the present case, there were a series of communications involving a majority of the members of the City Council, through the Transitional City Manager, expressing concerns regarding a candidate for appointment to the City Manager position. While these discussions could have occurred in closed session under the personnel exception (Gov. Code § 54957), they are not properly discussed by a majority of council members outside of a Council session through email.

The Council's conclusion that "no action" resulted from these communications appears to be based on the fact that a different candidate was ultimately selected. I do no know if this conclusion is correct because I do not know to what extent the email discussions contributed to the decision to reject one candidate and select another. Moreover, the serial meeting prohibitions of section 54952.2(b)(1) prohibit discussions whether or not they result in "action." However, the lack of "action" would be relevant if a lawsuit were brought to declare an action void under section 54960.1.

In any event, the Brown Act recognizes that a legislative body may "cure or correct" actions taken in violation of the Act. (Gov. Code, § 54960.1.) In the present case, the discussion of selection of City Manager was "cured" by the Council holding closed sessions pursuant to the personnel exception on August 25, 2009 (Item 11C) and September 8, 2009 (Item 11D) to appoint Yvonne Quiring.

CLOSED SESSION ON AUGUST 25, 2009

At the regular meeting of August 25, 2009, on unanimous vote of the Council, the Council went into "Urgent Executive Session regarding a Brown Act Violation Letter Submitted by Council Member Conaway." The referenced letter is dated the same day as the meeting, August 25, 2009. Mayor Walker stated that "the matter's come up since the agenda was published, and the matter is of such urgency that it cannot be delayed until the next meeting." Although this item was not on the posted agenda, consideration of this issue appears to come within the exception for a two-thirds vote that "there is a need to take immediate action and that the need for action came to the attention of the local agency subsequent to the agenda being posted...." (Gov. Code, § 54954.2(b)(2).)

Discussion of the matter in the closed session appears to be authorized as involving potential litigation under Government Code section 54956.9, subdivision (b)(2)(B), (b)(2)(C) and/or (b)(2)(E). If Councilmember Conaway was present for all or a portion of the closed session, this would not make the closed session improper because he was not the only "potential plaintiff" who could initiate litigation based on the original Brown Act issue.

At the conclusion of the closed session, Mayor Walker stated in public session that there was an unintentional Brown Act violation which caused no significant consequence, and that the matter was closed.

There appear to be some irregularities in the manner in which the closed session was handled. Before going into closed session, the Council failed to announce the subdivision of section 54956.9 that authorized a closed session, as required by section 54956.9(c). It does not appear that there was an opportunity for public comment as required by section 54954.3. At the conclusion of the closed session, the vote of each councilmember was not announced, as required by sections 54957.1(a)(2) and 54957.7.

However, whatever problems occurred regarding the August 25 unagendized closed session were cured by subsequent action of the Council. At the meeting on September 8, 2009, City Attorney Schneider announced the vote tally as 3 to 2. At the meeting on September 22, 2009, the matter was put on the agenda as item 9D, "Review of prior Demand for Cure of alleged Brown Act violation." At that time, the vote of each member was disclosed. There was also a thorough discussion at that time as to what had occurred in the closed session. Because the matter was on the September 22 agenda, any members of the public who wished to address the matter would presumably have the opportunity to do so. The Council's actions on September 9 and 22 were sufficient to cure any of the Brown Act issues arising at the August 25 meeting.

PAY RAISE

At the meeting of August 25, 2009, the Council discussed item 7A, adoption of a preliminary budget. During the discussion of this item, Mayor Walker made a motion to give a 5% pay raise to Interim Financial Director Leonore Young. The motion passed 3 to 2.

The Brown Act requires that the agenda contain "a brief general description of each item of business to be transacted or discussed at the meeting," which "generally need not exceed 20 words." (Gov. Code, § 54954.2(a).) The agenda need not specify the exact decision the legislative body will make. (*Phillips v. Seely* (1974) 43 Cal.App.3d 104, 119.) In the present case, it is not clear that the salary of Ms. Young went beyond the announced subject matter for item 7A.

Even if a violation had occurred regarding this matter, the subsequent action at the meeting of September 8, 2009, would constitute a cure. Item 9G on that agenda is listed as "Discussion and Direction Regarding Salary Increase for the Assistant to the Finance Director." Following discussion of the pros and cons, Mayor Brooks made the motion again for a 5% pay raise, and it passed again 3 to 2. This action was adequate to cure any previous violation, if there was one.

CONCLUSION

The District Attorney has the authority to bring a civil action under Government Code section 54960.1 to declare an action taken in violation of the Brown Act to be null and void. The legislative body must first be given the opportunity to "cure" the violations. In the present case, it is not clear whether the initial serial meeting conduct resulted in an action by the Council that a court could void by way of a lawsuit. Moreover, any issue regarding the email communications were cured by the personnel sessions on August 25 and September 8, 2009.

As discussed above, some technical violations may have occurred regarding the "Urgent Executive Session" on August 25, 2009, but the Council has cured them. Accordingly, a civil action by the District Attorney under section 54960.1 is unnecessary and would be unwarranted.

The District Attorney also has the authority to bring a civil action under Government Code section 54960 to enjoin threatened violations of the Brown Act. In the present case, the Council took the initiative to address the Brown Act concerns raised by Councilmember Conaway. It is significant that the Urgent Executive Session of August 25, 2009, does not demonstrate an intent to violate the Brown Act. On the contrary, the purpose of the session was to ensure that the Council was complying with the Act. The Council's admission that an unintentional violation had occurred, the prompt good faith actions to cure potential violations, and the continuing statements of intent to comply with the Brown Act, make it clear that there are no threatened violations that would warrant a civil action by the District Attorney pursuant to section 54960.

Finally, the District Attorney has the authority to bring a criminal misdemeanor prosecution for violation of the Brown Act under Government Code section 54959. Such a prosecution requires that the council members have a specific intent to "deprive the public of information to which the member knows or has reason to know the public is entitled." There is no evidence of such an intent here and there is no evidence of any intent to violate the Brown Act. Accordingly, the facts do not warrant a prosecution under section 54959.

Public access to the decision-making process of our legislative bodies is a hallmark of our democracy. I appreciate that the Brown Act can be complex and that members of public bodies must maintain constant vigilance to ensure compliance with its terms. In this case, the City Council and the City Attorney took the alleged violations seriously and took prompt action to remedy any violations that might have occurred. I very much appreciate the steps the Fillmore City Council and the City Attorney took in this matter to address Brown Act concerns as they arose to ensure public access to the decisionmaking process.

Very truly yours,

MICHAEL D. SCHWARTZ
Special Assistant District Attorney

pc: Ted Schneider, City Attorney
Clay Westling, City Clerk