

AUTHORITY OF COUNCIL TO HOLD CLOSED SESSION ON AUGUST 25, 2009

The City Council is authorized under the Brown Act to hold closed sessions in the event of threatened litigation. Ordinarily, such closed sessions must appear as an item on the posted agenda for a meeting. In certain circumstances, however, the Brown Act permits a City Council to act upon a matter not appearing on the posted agenda when the City Council determines a need for immediate action, and such need came to the attention of the City after the agenda had already been posted.

On August 25, 2009, the City Council held an unagendized-closed session after the Council became aware of threatened litigation. Prior to going into closed session, the Council publicly identified the nature of the item justifying the closed session. The threat of litigation was from Councilmember Conaway, who delivered a demand letter on August 25, 2009 to the City Clerk. The closed session item did not appear on the agenda. Councilmember Conaway's August 25 letter concerned an August 14, 2009 e-mail from then-Interim City Manager Larry Pennell to the City Council regarding the hiring of a new City Manager. Councilmember Conaway asserted that Mr. Pennell's e-mail violated the Brown Act. The City Council believed immediate action was required for two reasons: (1) the City was imminently close to hiring a new City Manager and could not afford to delay the hiring process, and (2) the City needed to foreclose the possibility that Councilmember Conaway would initiate a lawsuit. Following the August 25 closed session, the City announced that Mr. Pennell's e-mail violated the Brown Act, but was of no consequence because no action resulted.

On August 31, the City received a demand letter from Mr. Richard P. McKee. Mr. McKee alleged that the August 25 closed session was held in violation of the Brown Act. Mr. McKee contends the closed session should have appeared on the posted agenda because the City knew of Mr. Pennell's email prior to the agenda being posted. Mr. McKee filed a lawsuit on September 21, 2009, in which he reasserted his claim.

The City agrees Mr. McKee is correct that whenever there is a close call, it is best to err on the side of open communication. Consequently, the substance of the August 25 closed session was fully disclosed to the public on September 22. Because of the City's continuing commitment to open and accessible government, the public can be assured that, if faced with the same circumstances, the City Council will not take action unless the item is on the agenda, or is clearly within the Brown Act's exceptions to the agenda requirement.