



County of San Bernardino
Office of the District Attorney
MICHAEL A. RAMOS, District Attorney

March 16, 2011

VIA FIRST CLASS MAIL AND FACSIMILE TO: (949) 223-1180

Wesley A. Miliband
Aleshire & Wynder, LLP
18881 Von Karman Ave., Suite 400
Irvine, CA 92612

Re: Complaint re: Bighorn Desert Water View Agency Violation of Brown Act;
Our File No. PI593

Dear Mr. Miliband:

As you know, our Office has received a complaint from Mr. Jim Harvey alleging that on April 27, 2010, the Bighorn Desert Valley Agency Board of Directors violated Government Code §54954.2 (the "Brown Act") by voting to approve four items of compensation for General Manager Marina West without properly providing notice of its actions.

To investigate the complaint, we have considered Mr. Harvey's correspondence to our Office asserting his complaints, Mr. Harvey's May 1, 2010 letter to the Board of Directors alleging a Brown Act violation at the April 27, 2010 meeting, the agenda for the meeting, the minutes for the meeting, Susan Trager, Esq.'s May 10, 2010 letter addressed to Ms. Marina West, telephonic conversations I had with Ms. Trager and relevant legal authorities.

As explained below, it is our opinion that the Bighorn Desert Water View Agency's April 27, 2010 votes on Ms. West's compensation violated the Brown Act.

It is our understanding that the Board of Directors' April 27, 2010 Regular Meeting Agenda included a closed session item stating: "PUBLIC EMPLOYEE PERFORMANCE EVALUATION (Government Code section 54957(b)(1))." *No item regarding Ms. West's compensation was mentioned on the agenda for either the closed or open sessions.* Nonetheless, during the open session of the meeting, the Board of

Directors announced that Ms. West received a favorable evaluation during the closed session and the Board then voted on four separate items to increase Ms. West's compensation.

Furthermore, based upon my conversation with Ms. Trager, it is our understanding that it was Ms. West who drafted the agenda for the meeting – the very agenda that failed to give notice that increases in her compensation would be considered.

It is our further understanding that Mr. Harvey promptly pointed out this violation of the Brown Act in his letter of May 1, 2010 and, pursuant to Government Code §54960.1, demanded that the Board take action to correct its violation of the Brown Act.

Finally, it is our understanding that the Board of Directors did not respond to Mr. Harvey's demand. Instead, it appears that the Board relied upon Ms. Trager's May 10, 2010 letter which opined that the Board's actions did not violate the Brown Act.

For the reasons set forth below, we disagree with the conclusions in Ms. Trager's May 10, 2010 letter.

In Ms. Trager's letter of May 10, 2010, Ms. Trager acknowledged that "discussions about the salaries of non-elected officers must be discussed in open session." The letter failed to acknowledge, however, that each item that is to be discussed in open session must also be placed on the open session agenda pursuant to Government Code §54954.2(a), which provides, in its relevant part: "At least 72 hours before a regular meeting, the legislative body of the local agency, or its designee, shall post an agenda containing a brief general description of *each item of business* to be transacted or discussed at the meeting, including items to be discussed in closed session." (Emphasis added.) Instead, Ms. Trager's letter asserted that because Ms. West's *evaluation* was noticed on the *closed session* agenda pursuant to Government Code §54957(b)(1), the Board was not required to place the entirely separate issue of her *compensation* on the *open session* agenda pursuant to Government Code §54954.2(a).

To support the conclusion that a closed session agenda item for an *evaluation* provides sufficient notice of an open session vote on *compensation*, Ms. Trager made a number of arguments in her May 10, 2010 letter that I will address in order.

First, Ms. Trager stated: "We have found no statute requiring that the discussion about compensation be called out specifically in an agenda, when the item is described as 'Public Employee Performance Evaluation.'"

We believe Ms. Trager's analysis is incorrect. Initially, as discussed above, Gov. Code §54954.2(a) specifically states that the agenda must describe "each item of business" to be discussed or transacted. Hence, the statute plainly requires that

compensation be called out specifically on the agenda if it will be discussed at the Board meeting. It appears Ms. Trager's analysis recognized this requirement, but Ms. Trager appears to contend that a *closed session* agenda item for *evaluation* somehow constitutes notice that *compensation* will also be considered during the *open session*. This contention finds no support under the Brown Act.

According to the April 27, 2010 Agenda, Ms. West's evaluation was noticed for a closed session pursuant to Gov. Code §54957(b)(1), which expressly provides for closed session meetings to "...consider the appointment, employment, evaluation of performance, discipline, or dismissal of a public employee...". Nothing in §54957(b)(1) allows for closed session consideration of "compensation." In fact, §54957(b)(4) expressly states: "Closed sessions held pursuant to this subdivision *shall not include discussion or action on proposed compensation* except for a reduction of compensation that results from the imposition of discipline." Hence, not only does Gov. Code §54954.2(a) *specifically* require a description of each item to be discussed in open session, but Gov. Code §54957(b)(4) expressly prohibits an agenda item noticed pursuant to §54957 from including "compensation." In other words, there are statutes that require compensation to be called out on an open session agenda even when an evaluation of the same employee is noticed for the closed session portion of the same meeting.

Next, Ms. Trager wrote: "Similarly, no case law requires the noticing of a separate item."

Again, we believe this position is incorrect. In San Diego Union v. City Council of the City of San Diego (1983) 146 Cal. App. 3d 947, the court expressly held that compensation must be discussed – *and properly noticed* – in an open session.

Specifically, in San Diego Union, the San Diego City Council argued that under the Brown Act, the City Council could discuss and determine employees' evaluations and compensation in closed sessions. The court rejected the City Council's position, holding that while evaluations may be held in closed sessions, compensation issues must be considered in open session. Furthermore, in so holding, the court wrote at 955-956:

"Consistent with both the 'personnel exception' as to the evaluation of performance of a particular employee and the general mandate of the Brown Act, *we envision the two-step process of an executive session evaluating the performance of the public employee and a properly noticed, open session for setting that particular employee's salary as a facile matter, not negatively affecting the review process.*" (Emphasis added.)

Hence, San Diego Union clarifies that after an evaluation of a public employee is held in a closed session, compensation of that employee must be discussed in "a *properly noticed, open session.*" And, of course, as discussed above, under

§54954.2(a), proper notice requires a description of “each item of business” on the open session agenda.

Finally, Ms. Trager’s letter stated: “As to the point of whether there must be a separately agendaized item regarding discussion of compensation, the Attorney General of the State of California has twice opined that the question of an employee’s salary is ‘an integral part’ of the evaluation of that individual’s job performance.” Apparently, Ms. Trager’s point is that because prior Attorney General opinions held that “the question of an employee’s salary is ‘an integral part’ of the evaluation,” then the Public should know that a closed session agenda item for evaluation *necessarily* means that an open session vote on compensation will follow. We disagree.

First, the Attorney General decisions Ms. Trager cited were issued *before* the contrary ruling in San Diego Union as well as before the statutory amendment that added Gov. Code §54957(b)(4). Hence, *the Attorney General opinions Ms. Trager relied upon have been rejected by both case law and a statutory amendment*. This is not simply a matter of our opinion. In Travis v. Board of Trustees of the California State University (2008) 161 Cal.App.4th 335, the court expressly found as much, writing at 345:

“The Attorney General later used the same reasoning when concluding that the Brown Act’s personnel exception permitted closed session discussions of employee salaries. (61 Ops.Cal.Atty.Gen. 283, 286–287 (1978).) *That interpretation was rejected five years later in San Diego Union, supra, 146 Cal. App. 3d 947*. The court agreed that the personnel exception was designed to prevent public embarrassment. (*Id. at p. 954*.) However, it reasoned that requiring public sessions for employee salary decisions was consistent with the Brown Act’s stated purposes because those decisions implicated municipal budgetary matters that were a critical part of the government’s decision making process and therefore called for increased public scrutiny. (*146 Cal.App.3d at p. 955*.) *In 1994, the Legislature amended section 54957 by adding subdivision (b)(4), which now states that employee compensation may not be discussed in closed session except when a pay cut was considered as a form of employee discipline.*” (Emphasis added.)

Second, even if the Attorney General opinions were still valid statements of the law (which they are not), the reasoning of the opinions – that compensation is “integral” to evaluation – does not address the question at issue here: whether fair notice was given to the public of an upcoming Board action. The very concept of the Brown Act is that the public is entitled to notice and an opportunity to monitor and participate in government actions. Clearly, informing the public that a “performance evaluation” will be conducted in closed session in no fashion gives fair notice to the public that unmentioned “compensation” will then be voted upon in open session.

Given the above, it is our opinion the Board's actions were a violation of the Brown Act.

In your letter of March 10, 2011, you stated that a violation of the Brown Act has not been established and the Board is not admitting a violation of the Brown Act. However, you also represent that in the future the Board will provide separate notice on the open session agenda when employee compensation is to be considered *even if* notice of consideration of an employee's evaluation is also placed on the same agenda for closed session.

Based upon your representation that the Board will not repeat its above-described actions, we will consider this matter closed.

We note, however, that for the reasons discussed above, we disagree with your statement that a violation of the Brown Act has not been established. We believe the facts and law make clear that the Board violated the Brown Act. While we are satisfied with a promise that similar violations will not occur in the future, we are disappointed that the Board fails to acknowledge this violation.

We further note that our Office has previously opined that the Bighorn Desert Water View Agency violated the Brown Act. We understand that the current members of the Board were not members of the Board the last time we opined that the Board violated the Brown Act. Nonetheless, given the Board's failure to admit a violation now, we are concerned about the Board's future compliance with the Brown Act. Given this concern, we recommend that the current Board members obtain training on the requirements of the Brown Act.

Sincerely,

MICHAEL ABNEY
Deputy District Attorney
Public Integrity Unit
303 West 3rd Street
San Bernardino, CA 92415-0511

Cc: Mr. Jim Harvey