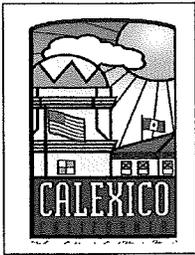


**AGENDA
ITEM**

13





AGENDA STAFF REPORT

DATE: January 19, 2016

TO: Mayor and City Council

APPROVED BY: Nick Fenley, Acting City Manager

PREPARED BY: Nick Fenley, Interim City Attorney
Carlos Campos, Interim City Attorney

SUBJECT: Discussion Regarding the Release of the Former City's Attorney (Attorney-Client Privilege) Response to the District Attorney's Letter Dated March 17, 2014 Regarding Brown Act Violations by the City (Requested by Mayor Kim).

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Discussion:

Discussion Regarding the Release of the Former City Attorney's Confidential Response to the District Attorney's Letter Dated March 17, 2015 Regarding Brown Act Violations by the City.

Background/Discussion:

On March 17, 2015, the City of Calexico received a letter from the Imperial County District Attorney's Office regarding Brown Violations. The District Attorney informed the City they had received a complaint that the City Council committed a violation of the Brown Act during a special meeting held in May of 2014. Moreover, the letter stated that after reviewing the complaint, the District Attorney also found that the City had violated the Brown Act on three other occasions.

In response to the District Attorney's letter, Calexico's former City Attorney drafted a response. Since the response is confidential and protected by the attorney-client privilege, only the council as a whole can authorize the release of the letter to the public and is the reason why the Mayor has asked for this item to be agendaized for discussion.

Fiscal Impact:

None Anticipated.

Attachment:

1. Imperial County District Attorney Letter Dated March 17, 2015

AGENDA
ITEM
13

IMPERIAL COUNTY
DISTRICT ATTORNEY'S OFFICE
Deborah D. Owen
Assistant District Attorney



GILBERT G. OTERO
DISTRICT ATTORNEY
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March 17, 2015

Honorable Members of the Calexico City Council
608 Heber Avenue
Calexico, California 92231

Re: Brown Act Violations
ICDA Investigation No. C14-053

Dear Members of the Calexico City Council:

We have received a complaint that the Calexico City Council ("the Council") committed a violation of the Ralph M. Brown Act (Cal.Govt.Code, §§ 54950-54963) ("the Brown Act" or "the Act") during a special meeting of the Council held on May 23, 2014. After reviewing the complaint, the agenda items for that meeting, interviewing relevant witnesses and consulting the applicable law, it appears that the Council not only violated the Brown Act at that particular meeting, but violations also occurred during previous closed sessions held on May 15th, May 20th, and May 21st. The issuance of this letter will, it is hoped, not only accomplish the twin purposes of educating yourselves and the public as to the requirements of the Act, but, also, that it will act as a guidepost by which future Brown Act violations may be avoided.

Originally passed in 1953, the Act is designed "to increase public awareness of issues bearing on the democratic process. . . ." (*Morrow v. Los Angeles Unified School District* (2007) 149 Cal.App.4th 1424, 1438). By requiring its servants to operate openly, the public is assured that "that they [will] maintain control over the instruments they have created." (Cal.Govt.Code, § 54950).¹ Thus, the Act requires

¹Section 54950 states in full: "In enacting this chapter, the Legislature finds and declares that the public commissions, boards and councils and 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."

that "all meetings of [a] legislative body of a local agency shall be open to the public, and all persons shall be permitted to attend. . . ." (Cal.Govt.Code, § 54953(a)). The law also requires that legislative bodies give advance notice of both regular and special meetings and that agenda items for each be posted no less than 72 hours before a regular meeting and no less than 24 hours prior to a special meeting. (Cal.Govt.Code, §§ 54954.2 & 54956). Such notices are also to be posted on the legislative body's website, if it has one, within these same time frames. (*Ibid*). With limited exceptions, a legislative body may not take any action nor discuss any item not on the posted agenda. (Cal.Govt.Code, § 54954.2(a)(2)).²

Despite its general requirement that all meetings be held in public, the Act recognizes that some subjects are more appropriately discussed in a closed session. (Cal.Govt.Code, §§ 54956.7-54957). For example, Section 54957(b)(1) permits the holding of a closed session at either a regular or special meeting in order "to consider the appointment, employment, evaluation of performance, discipline, or dismissal of a public employee[.]" Notice of the closed session and the agenda items to be discussed must still be given (Cal.Govt.Code, §§ 54952.2 & 54956), but it may be given in an abbreviated form. (*Ibid*). (California Government Code Section 54954.5 gives specific examples of acceptable abbreviation, This section is frequently referred to as "a Safe Harbor provision" as no official or elected body can be held to have violated the Act if the closed session items were described in substantial compliance with its terms. (Cal.Govt.Code, § 54954.5)). Prior to adjourning into a closed session, the Act requires that the item or items to be discussed during the closed session be disclosed during the public portion of the regular or special meeting. (Cal.Govt.Code, § 54957.7(a)). Aside from these items, no other item or business may be acted upon or discussed while the legislative body is in closed session. (*Ibid*). Once the closed session has ended, the legislative body is to meet again in open session and is to report any action taken during the closed session and the votes or abstentions thereon. (Cal.Govt.Code, §§ 54957.1(a), 54957.7(b)).

It was with the foregoing parameters in mind that our investigation considered the Council's regular and special meetings of May 15th, May 20th, May 21st and May 23rd of this year. Our investigation revealed that during each of these meetings one or more Brown Act violations occurred.

On Thursday, May 15, 2014, the Council held a special closed session meeting. The posted agenda for this meeting contained the following description: "PUBLIC

²Two exceptions to the rule exist: A non-listed item may be discussed and acted upon if the legislative body determines by majority vote that an emergency situation exists. The term "emergency" is limited to work stoppages or crippling disasters. (Cal.Govt.Code, §54956.5). The second exception is if the body finds by a two-thirds vote of those present or if less than two-thirds of the body is present, by unanimous vote, that there is a need to take immediate action on an item and the need for the action came to the attention of the local agency subsequent to the posting of the agenda. (Cal.Govt.Code, § 54954.2(b)). Neither of these exceptions applied to any of the meetings discussed below.

EMPLOYEE PERFORMANCE EVALUATION Title: City Manager. The first problem with this description is that it was not posted on the City of Calexico's web site as required under Government Code Section 54954.2(a)(1). Second, although the description comports with the "Safe Harbor" provision of Section 54954.5, the description was nevertheless deceptive. A reasonable person reading that description would certainly have concluded that the Council was going to evaluate the performance of the city manager, who, at that time, was Oscar Rodríguez. However, our investigation reveals that the actual topic discussed was the recent suspension and the possible reinstatement of Calexico Chief of Police Pompeyo Tabarez. Rodríguez was on a previously scheduled vacation and participated in the meeting via telephone. Rodríguez told our investigators that his performance was not evaluated during the closed session; that is, his performance as city manager was not praised, questioned nor chastised. Thus, these actions violated the Act's specific prohibition against discussing matters other than those announced on the posted agenda. (Cal.Govt.Code, § 54957.7(a)). The final problem with this meeting occurred once the members went back into public session: the city attorney, in reporting what had taken place in closed session, simply stated: "Direction given, no action taken." In fact, during the closed session, it had been decided that the city attorney would write a letter restoring Tabarez to full duty and informing him of a future fact finding interview which he would be required to attend. While not a technical violation of the Act, greater transparency would have been achieved had the city attorney said something to the effect of "direction given to Acting City Manager to work with the City Attorney to reinstate Chief Tabarez."

On Tuesday May 20, 2014, the Council held a regular meeting with all five council members present along with City Attorney Jennifer Lyon. A closed session was added at the request of Councilman/Mayor Bill Hodge and slated to start at 6:30p.m. according to the posted agenda. However, according to the published minutes, the closed session was actually called to order at 5:30p.m. This was a violation of Government Code section 54954.2(a)(1) which requires that the agenda specify the time and place of the meeting. Additionally, the published agenda indicated only one topic for discussion: "PUBLIC EMPLOYEE PERFORMANCE EVALUATION Title: City Manager." Yet, the published minutes indicated that the Council also discussed labor negotiations between the city attorney and an employee organization, SEIU/CMEA. This was a violation of the Act in that it violated its specific prohibition against discussing matters other than those announced on the posted agenda. (Cal.Govt.Code, § 54957.7(a)).

On Wednesday, May 21, 2014 a special closed session meeting was held by the Council. This meeting, however, was not published on the City of Calexico's web site as required by Government Code Section 54954.2(a)(1). In fact, it was not posted to the "Minutes" section of that site until August 25, 2014. At the closed session portion of the meeting, the Council was again slated to discuss the performance evaluation of the city manager. Mr. Rodríguez, however, was not present as he was on vacation. Nevertheless, the Council discussed the terms of his dismissal, a subject different than that originally posted. Because there was a

change of topic, the Council was obliged by Government Code Section 54954.3 to inform the public of that fact in a subsequent open session and to provide time for members of the public to comment thereon; neither was done here.

On May 23, 2014, the Council held another special closed session meeting. During this closed session the Council members received a fax from Oscar Rodriguez outlining his terms for severance, which the Council accepted. Councilmember/Mayor Bill Hodge then opened discussion on the hiring of a new city manager. Mr. Hodge also passed out the resume of Andrew Takata, touting him as precisely what the city needed in a new city manager. Following a rather heated discussion regarding the hiring process being used in this instance, a voice vote on hiring Takata was called for: the result was 3-1-1, with Councilmen Hodge, Joong Kim and Luis Castro voting yes, Councilman John Moreno voting no, and Councilwoman Maritza Hurtado abstaining. But when the action was reported by City Attorney Jennifer Lyon in the subsequent open session, she reported the vote has having been 3-1, failing to clarify whether the "1" referred to Moreno's no vote or Hurtado's abstention. This violated Government Code Section 54957.1(a) which requires the legislative body to "report any action taken in closed session *and the vote or abstention* on that action of *every member present . . .*" (Emphasis added). Not to be lost here, however, is that the entire discussion concerning Rodriguez's dismissal and subsequent replacement occurred during a session in which the Council was slated on the public agenda to discuss "PUBLIC EMPLOYEE APPOINTMENT, Title: Acting/Interim City Manager." While not a violation of the Act as the listed topic meets the "Safe Harbor" provision of Section 54954.5, nevertheless, we believe that greater transparency—a primary purpose of the Brown Act—would have been achieved had an additional topic been listed to the effect of "PUBLIC EMPLOYEE DISCIPLINE/DISMISSAL/RELEASE" so that the public would be better informed as to what the Council was doing so that interested citizens could weigh in on the issue.

We appreciate you addressing these issues promptly and hope that by bringing them to your attention will help guide your continuing efforts to comply with the Brown Act.

Very truly yours,



Gilbert G. Otero
District Attorney