LOS ANGELES COUNTY DISTRICT ATTORNEY'S OFFICE
BUREAU OF FRAUD AND CORRUPTION PROSECUTIONS
PUBLIC INTEGRITY DIVISION

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September 18, 2012

The Honorable Members of the La Habra Heights City Council
1245 North Hacienda Road
La Habra Heights, California 90631

Subject: Allegation of Brown Act Violations
PID Case 12-0345

Dear Council Members:

We received a complaint alleging that the La Habra Heights City Council violated the Brown Act on March 8, 2012 when it met in closed session with the entire City Council, the city Attorney, Sandra Levin, and Los Angeles County Sheriff's Department Captain Claus and Lieutenant McBride. We have reviewed the available evidence, including a video recording, the agenda and minutes for the March 8, 2012 meeting, information submitted by the City Attorney in response to our request for information, and the applicable law. Our analysis and findings are set forth below.

FACTUAL BACKGROUND
The posted agenda for the Council meeting held on March 8, 2012 includes Item B on the closed session agenda: "THREAT TO PUBLIC SERVICES OR FACILITIES Consultation with: Department Representative, Los Angeles County Sheriff's Department, G.C. Section 54957".

The agenda provides no information about whether the council convenes in open session and discloses the items to be discussed in the ensuing closed session, and/or hears public comment on the matters noticed for closed session consideration before it meets in closed session.

The recording of the meeting did not capture any of the proceedings prior to or including the closed session. Members of the public identified the "Department Representative" in attendance as both Captain Claus and Lieutenant McBride. Those identifications were confirmed by the City Attorney. Captain Michael Claus is the commanding officer of the Sheriff's Industry Station, which patrols La Habra Heights.

On the recording of the meeting, the city attorney, Sandra Levin, announced publicly, following the closed session, that no reportable action was taken during the closed session.

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In response to our request for information about the specific matter discussed in closed session, that we agreed would be used only for purposes of our analysis and would not be disclosed, the City Attorney, Sandra Levin, declined to provide any specific information, and asserted that such matter was confidential and protectable pursuant to the attorney-client privilege. While we do not agree that such matter falls within the privilege asserted, we conclude that our goal of compliance with the letter and the spirit of the Brown Act is more efficiently accomplished at this point by providing you with our analysis of the known facts and the applicable law, rather than convening an investigative grand jury, and engaging in protracted and expensive litigation that often follows. Be assured, however, that if similar conduct occurs in the future, we will not hesitate to convene a grand jury and pursue a more aggressive, comprehensive review of such circumstances.

ANALYSIS

The La Habra Heights City Council is a legislative body. Government Code Section 54952. As such, its meetings are governed by the Brown Act.

All meetings of the legislative body of a local agency shall be open and public, and all persons shall be permitted to attend any meeting of the legislative body of a local agency, except as otherwise provided in this chapter. *Government Code Section 54953.* No closed session may be held by any legislative body of any local agency except as expressly authorized by the Brown Act or other statutory exceptions listed in Government Code Section 54962. Because the closed session exceptions limit the public's right of access, the legal authority must be narrowly construed. *See Shapiro v. San Diego City Council, 96 Cal.App.4th 904, 917, see also Cal.Const. art I, section 3(b)(2).*

The law requires a legislative body to announce in open session those matters to be considered in closed session and to hear any public comment on those matters before it may legally meet in closed session. *Government Code Sections 54957.5, 54954.3(a).* We cannot determine whether the Council met the requirements for announcing the subjects for closed session while in open session. We note that as convenient as it may be for an agency to meet for closed session matters before convening in open session, the absence of any indication on the agenda when public comment on the closed session items will be heard potentially leaves the public with the impression that the matters will simply be heard without benefit of public input before the closed session is conducted. Such an impression is troubling.

On the other hand, the recording demonstrates that the Council complied with the requirement that, after any closed session, the legislative body shall reconvene into open session prior to adjournment and shall make any disclosure required by Section 54957.1 of action taken in the closed session.

Government Code Section 54957 permits closed sessions with the Attorney General, district attorney, agency counsel, sheriff, or chief of police, or their respective deputies, or a security consultant or a security operations manager, on matters posing a threat to the security of public buildings, a threat to the security of essential public services, including water, drinking water, wastewater treatment, natural gas service, and electric service, or a threat to the public's right of access to public services or public facilities.

This office recently reviewed a complaint involving a closed session that was conducted by the Los Angeles County Board of Supervisors, under the same statutory authority. In that case, the Board met regarding concerns about AB109 and the issues facing county government as it implemented realignment. A historical review of the section was helpful in that matter, and is equally pertinent in the case herein.

In an opinion dated May 4, 1978, the Attorney General considered whether a Board of Police Commissioners was permitted to meet in closed session to hear reports from and issue instructions to the chief of police regarding the conduct of confidential police investigations, the deployment of police personnel, the utilization of particular police tactics and similar matters, the public discussion of which would impair the ability of the police force to effectively carry out its duties. In short, "the question is whether the Legislature has authorized the Board to conduct all its 'sensitive' business with the chief of police in private. In our view, it has not. Authority for executive session must therefore be found in the explicit terms of the Act, or implied from some other confidentiality provision such as that which attaches to confidential records. Insofar as this may be deemed an inadequate solution, the problem appears to be one for legislative resolution." *61 Ops. Cal.Atty.Gen. 220* (1978)

A review of the legislative history of the Brown Act demonstrates the consistent intent of the legislature to permit closed session consideration by local legislative bodies for recognized areas of privilege, such as the attorney-client privilege, real estate and labor negotiations, employee privacy rights, and matters related to the protection of critical public services and infrastructure, like water and electrical services, as well as public buildings and employees, from security threats like riots, violent protests, or terrorist attacks. Notably, the Legislature has never revised the law to permit closed session consideration of "sensitive business" as discussed in the 1978 opinion of the Attorney General cited above. Rather, the Legislature has consistently adhered to narrow definitions of permissible closed session exceptions of the Brown Act, provided suggested language for purposes of ensuring sufficient public notice of such matters, and articulated the process by which public comment on such matters and public disclosure of action taken in closed session must be accomplished.

Section 54957 of the Brown Act was amended in 1971 (SB 833) to authorize local legislative bodies to hold executive sessions with the Attorney General, district attorney, sheriff or police chief or their respective deputies on matters posing a threat to the public's right of access to public services or public facilities. Sponsors of the bill argued

that high security trials, bombings of public buildings, and potentially violent mass protests all require planning for the protection of the public and public employees. The impetus for the amendment was the threat of violence facing the public and public employees from riots, violent protests, bombings, and other dangerous activities that marked the early part of the 1970's, particularly in Alameda County.

In 1993, legislation that significantly expanded the Brown Act closed session language was adopted (*AB1426*), which specifically articulated the exceptions for closed session consideration previously established by the appellate courts regarding matters within existing, recognized legal privileges (*Government Code Section 54956.9, 54957*), and which provided the "safe harbors" language by which such matters should be agendized (*Government Code Section 54954.5*).

Section 54957 was amended in 2001, to permit a security consultant or security operations manager in closed session regarding a threat to the safety and delivery of essential public services, including water, drinking water, wastewater treatment, natural gas service, and electrical services. The expansion of this section came in response to the events on September 11, 2001. In his signing message, Governor Davis stated:

> "I am signing Assembly Bill 2645, which expands the scope of closed meetings for local government agencies under the Ralph M. Brown Act, to include matters involving the security of water and electricity infrastructure and services.
>
> In the wake of the terrorist attacks on September 11, 2001 greater confidentiality for local and state public meetings is warranted when issues of public safety are being discussed. Though I am signing this bill, I am concerned that state agencies cannot meet in closed session to address security issues relating to the state's critical infrastructure. Therefore, I am directing the State and Consumer Services Agency, in consultation with the Office of Emergency Services, to work with the Legislature on legislation that would permit all public entities to meet in closed session when discussing certain security issues that, if revealed, would compromise public safety and the state's critical infrastructure."

Governor Davis's comments illustrate the true intent of the legislature, not to provide closed session sanctuary for discussions of "sensitive business", but rather to ensure that public agencies, both local and state, have the ability to adequately and securely prepare for impending threats to critical infrastructure components and to the safety of the public.

Despite repeated amendments, many in response to appellate decisions upholding closed session meetings on matters involving established areas of privilege, like attorney-client discussions, and employee privacy rights, the Legislature has never

taken action to permit closed session consideration of "sensitive business" as discussed in the 1978 opinion of the Attorney General cited above. Rather, the legislature has consistently adopted statutory language that defines closed session exceptions of the Brown Act for recognized areas of privilege and matters of public necessity, like threats to critical public services and public facilities.

To the extent that the closed session subject matter was reduced or impacted deployment or other tactical concerns that local law enforcement officials were in a position to present to the Council (which is most likely given that personnel from the Industry station were involved), such discussion in closed session is not permissible. We understand that the topics implicate public safety in La Habra Heights. However, implication of public safety in such a broad sense is not a sufficient basis for closed session consideration. Discussions about deployment and tactical issues are essentially budget and personnel matters that the Sheriff's Department faces. While available or proposed solutions to such challenges can undoubtedly impact public safety concerns in the communities protected by the Sheriff's department, potential impact on public safety alone does not constitute the grave threat to public facilities and services that Section 54957 addresses. Therefore, any closed session consideration or discussion about deployment or other tactical concerns that the captain of the Industry station may have conveyed to the members of the Council would constitute a violation of the Brown Act.

If the topic of discussion was something that had occurred in the past, for instance, a failure to provide adequate personnel or a breakdown in deployment, such discussion similarly fails to meet the criteria by which the narrow exception for threat to public services applies. Past failures do not constitute a present threat. A threat, by definition, is prospective danger, that is, an indicator of danger that may, in the future occur. That members of a city council should be informed of such a breach is wholly understandable. However, such information, alone cannot be conveyed legally in a closed session meeting with the City Council without violating the Brown Act.

Because the City elected not to divulge the specific topic(s) of discussion, based upon an assertion of attorney client privilege, the precise nature of the discussion is unknown. In the interests of judicial economy, we have elected not to pursue this matter by grand jury investigation at this time. We believe that your agency will recognized the deep concern we have about your willingness and ability to comply with the letter and spirit of the Brown Act, and the critical role such compliance plays in encouraging public confidence in the integrity of the decision making process.

While we do not make any factual finding of violations of the Brown Act, we urge each of you to revisit the purpose of the Brown Act, which provides that all meetings are open and public except for those narrow, specifically articulated subjects for which closed session consideration is permitted. The very first provision of the Brown Act is telling:

> In enacting this chapter, the Legislature finds and declares that the public commissions, boards and councils and the 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.

Government Code Section 54950. The exceptions for closed session consideration are narrowly drawn, and established to protect the public's interest, not to provide refuge to the persons to whom the public has delegated authority from the specter of public scrutiny.

Because no further action is warranted in this matter at this time, the inquiry is closed.

Very truly yours,

STEVE COOLEY
District Attorney

By

JENNIFER LENTZ SNYDER
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Public Integrity Division