
City Attorney

City of Oakland
Public Ethics Commission
July 11, 2005

In the Matter of

)
) Complaint No. 05-03
)

Sanjiv Handa filed Complaint No. 05-03 on February 22, 2005.

I. SUMMARY OF COMPLAINT AND ALLEGATIONS

Mr. Handa filed Complaint No. 05-03 alleging that the Oakland City Council violated the Oakland Sunshine Ordinance and Ralph M. Brown Act by conducting an improper closed session meeting and by failing to disclose non-confidential information discussed in the closed session. **Attachment 1.**

II. BACKGROUND AND CONTENTIONS

On Tuesday, December 21, 2004, the Oakland City Council held a special closed session meeting. According to the Office of the City Clerk, written notice for the meeting was posted before noon on Friday, December 17, 2004. Among the items considered in closed session that day were five items of "anticipated litigation," four items of "pending litigation," one item concerning a real estate transaction, an item concerning labor negotiations, and one item dealing with a personnel issue. **Attachment 2.** The item involving the personnel issue was noticed in the following manner:

"5. Pursuant to Government Code Section 54957:

(a) Public Employee Dismissal/Release"

The required report from the closed session hearing stated:

"Pursuant to City Charter Section 402, the City Council accepted the City Clerk's resignation and in recognition of her nearly 34 years of service to the City, authorized approximately 3.5 months of compensation."

Attachment 3.

Mr. Handa contends that the Brown Act and Sunshine Ordinance did not permit the City Council to accept the resignation of Oakland City Clerk Ceda Floyd or to authorize compensation for her in closed session. He contends that the City Council did

not vote to disclose in open session any non-confidential information from closed session as required under the Sunshine Ordinance.

III. ANALYSIS

A. Was The Agenda Item Described Properly?

1. Brown Act Requirements

The Ralph M. Brown Act permits local legislative bodies to consider certain types of matters in closed session. Among the permitted subjects of closed session meetings are certain types of personnel matters. Under Government Code Section 54957(b)(1), local legislative bodies are permitted to consider the "appointment, employment, evaluation of performance, discipline, or dismissal of a public employee" in closed session. This section is commonly known as the "personnel exception" to open meeting laws.

Whenever a local body agendaizes a personnel matter for closed session, the Brown Act also permits the local body to use specific, pre-approved language to describe the item to avoid allegations that the item was improperly or inadequately described on the agenda. The specific, pre-approved language for noticing items under the personnel exception is:

"Public employee discipline/dismissal/release."

So long as a local legislative body uses this language (or something substantially similar) to describe a permitted personnel matter on a closed session agenda, the law will deem the agenda description to be adequate, even though it might not contain the same amount of information as other agenda items.

In this case, by using the words, "Public Employee Dismissal/Release," it appears that the City Council substantially complied with the agenda description requirements for a closed session hearing under the Brown Act.

2. Sunshine Ordinance Requirements

The Sunshine Ordinance requires that local bodies use the specific, pre-approved language of Government Code Section 54957 when noticing a permitted closed session agenda item. [O.M.C. Section 2.20.100] It further states that the failure to do so could result in the invalidation of any action not properly noticed. [Id.] Again, it appears that the item at issue in this complaint was properly described on the face of the agenda.

B. Were The Reported Actions Taken In Closed Session Permitted Under the Brown Act And/Or The Sunshine Ordinance?

1. Accepting the City Clerk's resignation

The question presented here is whether the City Council could accept the City Clerk's resignation in a closed session hearing agendized under the personnel exception to the Brown Act and Sunshine Ordinance.

As stated above, the personnel exception permits local legislative bodies to consider certain personnel matters in closed session. So long as the proposed action involves the "appointment, employment, evaluation of performance, discipline, or dismissal of a public employee," such actions may be taken in closed session. (The Sunshine Ordinance incorporates by reference the personnel exception for use by Oakland's local bodies. See O.M.C. Section 2.20.120(D)) While Commission staff could find no case law addressing whether a local body could accept a public employee's resignation in closed session, it believes such an action is within the scope of contemplated actions involving a public employee's "employment" relationship with the local body.

The above conclusion is further supported by another section of the Brown Act which specifies the manner by which a local body must publicly disclose actions taken in closed session pursuant to the personnel exception. Government Code Section 54957.1(a)(5) states that a local legislative body must report any action taken under the personnel exception to "appoint, dismiss, **accept the resignation of**, or otherwise affect the employment status of a public employee in closed session pursuant to Section 54957. . ." (Emphasis added.)

Thus it appears that accepting the resignation of a public employee is one of the permitted actions a local body may take in closed session under the personnel exception to the Brown Act and Sunshine Ordinance.

2. Considering compensation for a public employee in closed session

The section of the Brown Act that authorizes closed session hearings on personnel matters expressly prohibits discussion or action on "proposed compensation":

"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." [Government Code Section 54957]

In its written report from the December 21, 2004, closed session, the City Council disclosed that it had taken action on (and presumably discussed) a

proposal to recognize the City Clerk's 34 years' of service and to authorize approximately 3.5 months of additional compensation to her. This reported action appears on its face to conflict with Government Code Section 54957 and with O.M.C. Section 2.20.120(D), which incorporates this Brown Act prohibition into the Sunshine Ordinance.

However, Chief Deputy City Attorney Barbara Parker told Commission staff that the actions taken regarding the City Clerk were not only noticed under the personnel exception, but also as one of the five items of "anticipated litigation" also noticed for the December 21, 2004, meeting. Ms. Parker and Deputy City Attorney Vicki Laden told Commission staff that Ms. Floyd had engaged an attorney to represent Ms. Floyd prior to the closed session. Ms. Laden said that she had had a number of conversations with Ms. Floyd's attorney who, at some point, made statements threatening litigation over the personnel matters they were discussing. In addition, Ms. Parker stated that she was concerned over the existence of facts that Ms. Floyd, in concert with her attorney, could use to initiate a legal claim against the City. Because of the threat of litigation, Ms. Parker said the matter was concurrently noticed, along with the personnel matter, as one of the "anticipated litigation" items for the December 21, 2005, meeting.

a) Closed session based on "anticipated litigation"

In order to hold a closed session hearing under the "anticipated litigation" exception, local bodies must have received threats representing a "significant exposure to litigation" under several permissible situations. One situation occurs when a statement threatening litigation is made outside of an open and public meeting "so long as the official or employee of the local agency receiving knowledge of the threat makes a contemporaneous or other record of the statement prior to the meeting..." [Government Code Section 54956.9(b)(3)(E)] Another situation occurs when "facts and circumstances that might result in litigation against the local agency [exist] but which the local agency believes are not yet known to a potential plaintiff or plaintiffs, **which facts and circumstances need not be disclosed.**" [Government Code Section 54956.9(b)(3)(A)] (Emphasis added.)

The specific agenda description for items of anticipated litigation described in the preceding paragraph is extremely sparse: A local agency must only "specify the number of potential cases." No other information is required. [Government Code Section 54954.5(c)] Once in closed session, the Attorney General advises that a local agency may deliberate upon or take action concerning the settlement of pending litigation. [75 Ops.Atty.Gen. 14, 20 (1992)]

In this case, the Office of the City Attorney could produce no record of a written or verbal statement threatening litigation against the City. The only apparent basis for the closed "litigation" session was the existence of facts and circumstances which might have been used to initiate litigation against the City had they been known to Ms. Floyd and/or her attorney. Under the Brown Act and Sunshine

Ordinance, the City was not obligated to disclose publicly what those facts and circumstances were. Once in closed session, Ms. Parker stated that the City Council received an offer from Ms. Floyd to resign her employment and took action to settle any potential legal claims she could have asserted against the City by authorizing payment in an amount totaling approximately 3.5 months of compensation.

Commission staff reviewed a copy of the settlement agreement that was ultimately executed by the parties on January 5, 2005, that incorporates this basic agreement. (A copy of the settlement agreement is available from the Office of the City Attorney.) At no time, according to Ms. Parker, did Ms. Floyd or her attorney attend the closed session hearing.

Based on the above account, it appears that the City properly agendized a closed session hearing on an item of anticipated litigation. It also appears that the City Council was authorized to discuss and take action to settle any potential claims Ms. Floyd had against the City under that exception.

3. Reporting Action Taken In Closed Session

Under the Brown Act, local agencies are required to publicly report any action taken in closed session and the vote or abstention of every member present. The information required in the report depends on the subject matter considered. For action taken to accept the resignation of an employee, the report must be made at the public meeting during which the closed session is held. The report must also identify the title of the position affected. For action taken to settle litigation where, as here, final approval rests with another party, the report must be made "as soon as the settlement becomes final, and upon inquiry by any person, the local agency shall disclose the fact of that approval, and identify the substance of the agreement." [Government Code Section 54957.1(a)(3)(B)] The Sunshine Ordinance contains similar requirements and further provides that local bodies reconvene in open session to "disclose publicly all portions of its discussion which are not confidential." [O.M.C. §2.20.130(A)] There is no information that the City Council discussed items in closed session that were not covered under the personnel or anticipated litigation exceptions.

It appears that the basis of Mr. Handa's complaint was due to the manner in which the written report from closed session was written. The report discloses Ms. Floyd's resignation but does not reflect the fact that the 3.5 months of compensation was in the nature of a settlement of Ms. Floyd's potential claims against the City. Without this information, it is not unreasonable to conclude from the face of the report that the City Council made an impermissible award of compensation under the personnel exception. The Commission may wish to consider future policy amendments to the Sunshine Ordinance that require local bodies to disclose whenever one matter is listed and reported out of more than one closed session item.

IV. STAFF RECOMMENDATION

Commission staff recommends that the Commission dismiss Complaint No. 05-03 on grounds that the facts fail to support a finding that a violation of the Brown Act or Sunshine Ordinance occurred.

Respectfully submitted,

Daniel D. Purnell
Executive Director

*** City Attorney approval as to form and legality relates specifically to the legal issues raised in the staff report. The City Attorney's approval is not an endorsement of any policy issues expressed or of the conclusions reached by staff on the merits of the underlying complaint.*