

MEMORANDUM

DATE: January 22, 2010

TO: Novato Sanitary District Board of Directors

FROM: Kenton L. Alm, Board General Counsel

BY: Michael F. Dean, Equity Principal
Nancy B. Thorington, Associate Attorney

RE: **Attendance at Closed Session to Discuss Threatened Litigation**

I. Background

The United States Environmental Protection Agency ("EPA") and Department of Justice ("DOJ") are conducting a criminal investigation of the Novato Sanitary District ("District") to determine if the District or its employees violated the Clean Water Act. Such an investigation may lead to either civil or criminal litigation against either the District itself or its employees. Even where the potential action is brought against the District's employees rather than directly against the District, the District itself may have an obligation to defend and potentially to indemnify such employees. (Gov't. Code § 995.)

One of the members of the District Board, Dennis Welsh, was interviewed by the investigators and, according to the U.S. Attorneys Office, is considered a potential witness against the District. The Board wants to conduct a closed session to discuss the threatened litigation pursuant to the Brown Act (the "Act") (Gov't Code §§ 54950-954963) exception to the open meeting requirement that permits a legislative body to hold a closed session to discuss pending or threatened litigation. (Gov't Code § 54956.9.)

II. Issue

May the Board member who is a potential witness in the EPA/DOJ investigation of and potential legal action against the District or its employees participate in the closed session?

III. Short Answer

This issue raises the competing interests of the Board's right to have candid discussions with the District's attorney about the investigation versus the individual Board member's right to participate in the closed session. There is no clear answer to this issue. Consequently, we recommend seeking declaratory relief or other associated writ relief from a court to assist the Board in choosing the legally and ethically correct option.

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IV. Analysis

A. Brown Act

The Act requires that all meetings of the legislative body of a local agency be open and public, unless an exception applies. (Gov't. Code § 54953(a).) Section 54956.9 of the Act allows a public agency to hold a closed session to confer with, or receive advice from, its legal counsel regarding pending litigation if an open session discussion of the matter would prejudice the position of the agency in the litigation. Litigation includes, among other things, any adjudicatory proceeding before a court or administrative body. Litigation is considered pending if, among other circumstances, the agency has significant exposure to litigation. (Gov't. Code § 54956.9(b).) Here, a formal investigation has been initiated by EPA and DOJ, which could result in criminal charges being filed against the agency or its employees or civil or administrative fines and penalties being assessed against the District. Consequently, there is a clear basis under the Act for a closed session to discuss the investigation.

The Act prohibits the disclosure of confidential information acquired in a closed session. (Gov't Code § 54963(a).) "Confidential information" includes any communication made in a closed session that specifically relates to the basis for the closed session. (Gov't Code § 54963(b).) But the Act excludes from the disclosure prohibition "[m]aking a confidential inquiry or complaint to a district attorney or grand jury concerning a perceived violation of law." (Gov't Code § 54963(e)(1).) This is ambiguous in that it is not clear whether the violation of law referred to must relate to the provisions of the Act or whether a perceived violation may relate to a violation of any law, such as the Clean Water Act. The Act also excludes from the disclosure prohibition, "disclosures under whistle blower statutes (Labor Code § 1102.5, Gov. Code § 53296)." (Gov't Code § 54963(e)(3).)

Here, it appears Board member Welsh may believe that some violation of law occurred with respect to the District, which he discussed with an EPA investigator. Based on this perceived violation of law, he may interpret section 54963(e)(1) as giving him the right to disclose any information discussed in the closed session to the U.S. Attorney's office or EPA investigators. Section 54963 of the Act was enacted in 2002, and because it is relatively new, there are no cases or Attorney General opinions interpreting it. Thus, we do not know how a court would apply these provisions here and whether Board member Welsh would be precluded from disclosing confidential information regarding alleged Clean Water Act violations obtained in a closed session discussion of the EPA investigation.

B. Attorney-Client Privilege

Any discussions by a Board member with anyone other than those who are entitled to the confidential closed-session information would also implicate the attorney-client privilege. As the California Supreme Court noted, "Protecting the confidentiality of communications between attorney and client is fundamental to our legal system." (*People v. Superior Court (Laff)* (2001) 25 Cal.4th 703, 715.) It protects the right to "freely and fully confer" with one's attorney and is "held vital to the effective administration of justice." (*Ibid.*, internal quotations and citations omitted.) The Board as a whole, and not any individual Board member, is the client for purposes of the privilege. (*Hamilton v. Town of Los Gatos* (1989) 213 Cal.App.3d 1050, fn 7.) The Act specifically states that section 54956.9 "is the exclusive expression of the lawyer-client privilege for

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purposes of conducting closed-session meetings." As such, it is the only opportunity that a public agency has to confer with its attorneys as a body and engage in a candid discussion regarding the merits of pending litigation. As one court stated, "there is a public entitlement to the effective aid of legal counsel in civil litigation." (*Sutter Sensible Planning, Inc. v. Board of Supervisors* (1981) 122 Cal.App.3d 813, 824.) Where, as here, one of the members of the Board appears to be adverse to the District itself, the presence of the adverse Board member in the closed session would preclude candid discussions with the Board's attorney. And, "an attorney who cannot confer with his client outside his opponent's presence may be under insurmountable handicaps." (*Ibid.*)

In addition, the California Attorney General has observed that disclosure of confidential information obtained in a closed session contradicts the decision to hold a closed session in the first instance. (80 Ops.Cal.Atty.Gen. 231 (August 14, 1997).) Thus, a board or one of its members "cannot claim to have a basis for holding a closed session while at the same time revealing information received at that meeting." (*Id.*) Moreover,

"if individual members of the board were to decide for themselves what aspects of such information could be disclosed without prejudicing the position of the agency, the protection of the litigation exception would quickly break down. This is particularly true where a legislative body is divided over the issue being litigated, with some members supporting a particular course of legal action (e.g., initiating, defending, or settling) and other members opposed. Board members cannot feel free to discuss the issues candidly with counsel if they believe that their disaffected colleagues will be unconstrained in talking publicly about closed session deliberations and thereby prejudice the course of action to be taken." (*Id.*)

Although this Attorney General's opinion was published prior to the enactment of Government Code § 54963 prohibiting disclosure of confidential closed-session information, it articulates well the theory behind the prohibition: disclosure would stifle candid discussions with the agency's counsel and "prejudice the course of action" that the agency may take.

Similarly, the court in *Sacramento Newspaper Guild v. Sacramento Co. Bd. of Supervisors* (1968) 263 Cal.App.2d 41, noted the significance of the attorney-client privilege with respect to public officials in a case that was published before Government Code § 54963 and stated:

Plaintiffs do not dispute the availability of the lawyer-client privilege to public officials and their attorneys. They view it as a barrier to testimonial compulsion, not a procedural rule for the conduct of public affairs. The view is too narrow. The privilege against disclosure is essentially a means for achieving a policy objective of the law. The objective is to enhance the value which society places upon legal representation by assuring the client full disclosure to the attorney unfettered by fear that others will be informed. . . . [Citations omitted.] The privilege serves a policy assuring private consultation. If client and counsel must confer in public view and hearing, both privilege and policy are stripped of value. (*Ibid.*)

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The Texas Attorney General cited the *Sacramento Newspaper Guild* case in an opinion that discussed whether an official could be excluded from an executive session based on the attorney-client privilege. Specifically, the Texas Attorney General was asked to determine whether a member of a school district board of trustees who had sued the other six members could be excluded from an executive session held to discuss the litigation. (Texas Attorney General Opinion No. JM-1004 (January 10, 1989).) The Texas Attorney General cited to *Sacramento Newspaper Guild* to emphasize that the policy underlying the attorney-client privilege permits governmental bodies to consult privately with their attorney. Opinion at p. 3 (citing *Sacramento Newspaper Guild v. Sacramento Co. Bd. of Supervisors*, 69 Cal. Rptr. 480, 489 (1968)). The Attorney General concluded that: (1) this policy justifies an exception from the usual rule that each board member must have an opportunity to attend all board meetings; (2) the six members of the school board who had been sued by a seventh member had a right to communicate with their attorney outside of the presence of the opposing party in the lawsuit; and (3) admitting the plaintiff board member to the attorney-client conferences would undermine the common law and statutory protection given attorney-client communications and compromise the efficacy of the adversary system of justice.

C. Conflict of Interest

The Political Reform Act of 1974 ("PRA"), Government Code section 81000 *et seq.*, was enacted to ensure impartial decision-making by public officials. The PRA specifically prohibits a public official from making, participating in making, or in any way attempting to use his official position to influence a governmental decision in which he has a financial interest. (Government Code § 87100.) A public official has a financial interest if it is reasonably foreseeable that the decision will have a material financial effect, distinguishable from its effect on the public generally, on the official or on any source of income aggregating \$250 or more received by the official within the 12-month period preceding the governmental decision. (§ 87103, subd. (c).)

The California Court of Appeals has determined that under certain circumstances, a public official with a financial conflict should not be allowed to be present at a closed session because the attorney or the public officials might not feel free to disclose everything when the official with the conflict is present, thereby potentially denying the public entity effective assistance of counsel. In *Hamilton v. Town of Los Gatos* (1989) 213 Cal.App.3d 1050,¹ a council member had a financial conflict of interest in the subject of a closed session discussion. The council member voluntarily recused himself from participating in the closed session discussions, but subsequently sought to review a tape recording of the closed session. The court discussed the balancing of open government and full participation of the members of the legislative body with the body's ability to make informed and unbiased decisions. The court noted that,

"[although] dissent is a necessary part of our political system, and . . . the public has a right to be kept informed concerning public matters, . . . the policy of preventing unbiased

¹ The Court also stated in dicta that the attorney-client privilege, in and of itself, would likely not provide a basis to exclude the council member from gaining access to the tape recording.

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governmental decisions outweighs the public's right to know or to have all of its representatives be fully informed or actively participate in all governmental decisions." (*Id.* at 1058.)

It is unclear whether Board member Welsh has a statutory conflict of interest which would prohibit his participation in the closed session. There is no apparent financial interest that would require him to refrain from participating in the closed session under the terms of the PRA. However, a so-called "common law" conflict may exist. Similar to a corporate officer or director, a member of a legislative body has a fiduciary duty to the entity he or she represents – here the District. (*Hobbs, Wall & Co. v. Moran* (1930) 109 Cal.App. 316, 319.) An elected official must act with "disinterested zeal" in representing the public agency. (*Noble v. City of Palo Alto* (1928) 89 Cal. App. 47, 51.) Board member Welsh's active participation in the investigation against the District arguably places him in an adversarial position to the District in that the investigation could result in criminal, civil or administrative sanctions against the District. By way of analogy, one court found that, in the context of a corporation, a director

"cannot put on his director's hat and request privileged corporate documents which he intends to pass on to a shareholder . . . for use in litigation against the corporation. Such an act would be inconsistent with his fiduciary duty to the corporation." (*National Football League Properties v. Superior Court (Oakland Raiders)* (1998) 65 Cal.App.4th 100, 109-110.)

If Board member Welsh has a conflict, he would be precluded from participating in the closed session.² But whether such a conflict exists simply by reason of the Board member having previously cooperated with prosecuting authorities, and potentially being either requested or required to do so in the future, is not clear under existing law. However, since Board member Welsh is "aligned" with the prosecution, he does not appear to be "disinterested" in his zeal. And even if an actual conflict does not exist, there is certainly an appearance of a conflict. D. Declaratory Relief

Government Code § 54960 provides that any interested person may commence an action by mandamus, injunction or declaratory relief to stop or prevent a violation of the Brown Act or a threatened violation of the Act or to determine the applicability of the Act to actions or threatened future actions of a legislative body. Board member Welsh has sent letters to the Marin County Counsel and the Marin County District Attorney stating that he believes excluding him from a closed session discussion of the potential litigation would be a violation of the Act. As noted, it is unclear whether a conflict exists and thus whether Board member Welsh could lawfully be excluded from the closed session. If no such conflict exists and the Board member

² See, e.g., *Insurance Company of North America v. Superior Court (GAF Corporation)* (1980) 108 Cal.App.3d 758, 769 (stating that officers of a parent corporation were entitled to participate in discussions with the subsidiary's legal counsel "absent some conflict of interest or some evidence of antagonism among the entities.") The California Attorney General has also opined that excluding a member of a legislative body from a closed session may be appropriate where that member may disclose the confidential closed-session information. (76 Ops.Cal.Atty.Gen. 289 (December 30, 1993).)

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attends the closed session, it is also unclear whether he is precluded from disclosing to the EPA or the U.S. Attorney information obtained in a closed session on the issue. In addition, Evidence Code § 1040 allows a public entity to refuse to disclose official information and to prevent another from disclosing official information if disclosure is forbidden by law or disclosure of the information is against the public interest because the necessity for preserving the confidentiality of the information outweighs the necessity for disclosure in the interest of justice. Via a declaratory relief action, or other related writ action, the Board could seek a determination before a closed session is held on the applicability and interpretation of Government Code § 54963 and Evidence Code § 1040.

V. Conclusion

Two competing policies and bodies of law – full participation of the District Board members in the discussion with legal counsel regarding the threatened litigation versus the ability of the Board to have candid discussions with its legal counsel – need to be reconciled. No guidance exists where, as here, no financial conflict appears to exist, but there is a potential common law conflict because one of the Board members has taken a legal position that may be contrary to the District's interests. It is also unclear whether Government Code § 54963(e) precludes any disclosure of the confidential closed session information to investigating entities, and we found no cases or Attorney General opinions interpreting this section. Furthermore, it is unclear whether the attorney-client privilege would provide a separate basis upon which to preclude any disclosure of the confidential closed session information or provide a basis for the exclusion of the Board member who is a potential witness for the government against the District. Accordingly, we recommend that the Board file a declaratory relief action or writ with the Marin County Superior Court to obtain guidance that will allow the Board to act legally and ethically in this situation.

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