



**2021-2022
CAL CITIES OFFICERS**

President

Cindy Silva
Council Member,
Walnut Creek

First Vice President

Ali Taj
Council Member,
Artesia

Second Vice President

Daniel Parra
Council Member,
Fowler

Immediate Past President

Cheryl Viegas Walker
Mayor,
El Centro

**Executive Director
and CEO**

Carolyn M. Coleman

March 3, 2022

VIA ELECTRONIC AND US MAIL

Ms. Catherine Bidart
Deputy Attorney General, Opinion Unit
California Department of Justice, Office of the Attorney General
Catherine.Bidart@doj.ca.gov

Re: Opinion No. 21-1102

Dear Ms. Catherine Bidart:

I write on behalf of the League of California Cities¹ (Cal Cities) in response to your solicitation of views regarding the following questions:

1. Under the Ralph M. Brown Act² (Brown Act), may legislative support staff of individual City Council members attend a closed session to assist and advise their individual members in the performance of the member's duties?
2. If legislative support staff of individual City Council members are not permitted to attend a closed session as described in Question 1, may the members share information obtained in closed session with their individual support staff to assist the members in performing their legislative duties?
3. Would it violate the Ralph M. Brown Act for a City Council acting as the City's Housing Authority to meet jointly in closed session with the Board of Housing Commissioners, which the Housing Authority oversees, provided that statutory authorization exists for both entities to go into closed session?

After reviewing the legal authority cited below it is axiomatic that, as with most legal questions, these questions require fact-specific analyses and must be

¹ The League is an association of 478 California cities united in promoting the general welfare of cities and their citizens. The League is advised by its Legal Advocacy Committee (LAC), which is comprised of 24 city attorneys from all regions of the state. The LAC monitors litigation affecting municipalities and requests from the Attorney General for views on pending requests for legal opinions. The LAC reviewed the Attorney General's request for views on Opinion No. 21-1102 and identified the legal issues that it presents as being of concern to cities state-wide.

² Gov. Code, §§ 54950 *et seq.*

answered with “it depends.” Therefore, Cal Cities urges the Attorney General to draft Opinion No. 21-1102 narrowly, based on the specific facts presented in the request for opinion. The questions also implicate several related legal doctrines, including the attorney-client privilege, the common-interest doctrine, and the joint-defense privilege. Opinion No. 21-1102 should be drafted to avoid unintended consequences in these related fields.

DISCUSSION

1. Under the Ralph M. Brown Act, may legislative support staff of individual City Council members attend a closed session to assist and advise their individual members in the performance of the member’s duties?

Attendance at a closed session is limited to those with an official or essential role in the meeting, meaning those actually necessary to advise or take direction from the legislative body, given the specifically permitted purpose of the closed session.³ Depending on the need, this may include the body’s legal counsel, senior management staff, experts, negotiators, or consultants.

Individuals, including city officials, who do not have an official or essential role in the closed-session subject matter must be excluded from closed session. As such, city officials have been excluded from closed session in the following circumstances:

- An alternate legislative body member, when not serving in place of a regular member, may not attend a closed session of the body.⁴
- Council members with financial conflicts of interest in the subject matter of a closed session must be excluded and may not obtain a recording of the closed session kept pursuant to Government Code section 54957.2.⁵
- The mayor of a charter city, whom the charter designated as the executive head of the city, may not attend a closed session of the city’s redevelopment agency with the agency’s real property negotiators concerning the disposition and development of property, even where a portion of the real property at issue is owned by the city, the redevelopment project includes construction of a city facility, and the agency must obtain the city council’s approval of any disposition of property acquired with tax increment funds.⁶ The fact that the mayor would be acting as part of the “support staff” of the redevelopment agency, offering advice and consultation at the request of the redevelopment agency “regarding the price and terms of payment for the purchase, sale, exchange, or lease” of the city’s property, was insufficient to justify the mayor’s attendance at the closed session.

³ 86 Ops.Cal.Atty.Gen. 210, 215 (2003); 82 Ops.Cal.Atty.Gen. 29 (1999).

⁴ 82 Cal.Ops.Atty.Gen. 29 (1999).

⁵ *Hamilton v. Town of Los Gatos* (1989) 213 Cal.App.3d 1050.

⁶ 83 Ops. Cal. Atty. Gen. 221 (2000).

Third parties not serving as agents of the body cannot attend closed session, with very limited exceptions, for example:

- A person serving as a reference for another person whose appointment is being considered by the legislative body may be interviewed in closed session.⁷
- A witness may attend and be examined in a closed session to hear charges or complaints against an employee, and the legislative body may also exclude any and all other witnesses during such examination.⁸
- An applicant and the applicant's representative may be permitted by a county retirement board to participate in the closed session as an interested party or advocate if the board believes that the applicant would have an official or essential role to play in the closed session.⁹
- A license applicant and the applicant's attorney may be permitted by a legislative body to attend the closed session if the purpose of the closed session is to consider the sufficiency of rehabilitation of the license applicant.¹⁰

As demonstrated in the above examples, determining whether a particular individual may attend a closed session requires a fact-specific analysis. Assemblymember Ward's request for an opinion concerns whether staff employed to assist individual San Diego city councilmembers in performing their duties may attend closed session meetings.¹¹ However, the request does not detail how these staff members would play an official or essential role in a particular closed session meeting. To the extent such staff members are merely serving as "support staff," akin to the mayor who wished to attend a closed session meeting of the city's redevelopment agency in 83 Ops. Cal. Atty. Gen. 221 (2000), the staff members likely must be excluded. However, if the presence of the staff members is necessary to advise or take direction from the legislative body, given the specifically permitted purpose of the closed session, they should be permitted to attend.

⁷ Gov. Code § 54957(b)(1).

⁸ Gov. Code § 54957(b)(3).

⁹ 88 Ops. Cal. Atty. Gen. 16 (2005).

¹⁰ Gov. Code § 54956.7.

¹¹ It is worth noting that, while councilmembers in the City of San Diego, and a handful of other large cities employ individual staff, most city council members in California cities do not employ staff to assist them individually. Rather most city staff are employed by the city - the municipal corporation as a whole - and take direction from a majority of city council members acting on behalf of the city (or the city's lead executive when the city business at issue is subject to the authority and oversight of a strong mayor or city manager). The analysis of whether city staff who serve the city as a whole may attend a closed session meeting will necessarily differ from the analysis of whether staff who serve an individual councilmember may attend a closed session. Opinion No. 21-1102 should avoid conflating the two analyses.

2. If legislative support staff of individual City Council members are not permitted to attend a closed session as described in Question 1, may the members share information obtained in closed session with their individual support staff to assist the members in performing their legislative duties?

The most common purposes of the closed session provisions in the Brown Act are to avoid revealing confidential information (e.g., prejudicing the city’s position in litigation¹² or compromising the privacy interests of employees). The courts and Attorney General have long recognized that disclosure of information obtained during closed session proceedings by the members of a legislative body necessarily destroys the closed session confidentiality inherent in the Brown Act.¹³ Accordingly, the Attorney General has opined that those without a right to attend a closed session meeting do not qualify to receive closed-session information.¹⁴

In 2002, the Brown Act was amended to expressly provide that confidential information acquired in a closed session must not be disclosed by any person, unless the legislative body authorizes disclosure of that confidential information.¹⁵ “Confidential information” means any communication made in a closed session that is specifically related to the basis for the legislative body’s meeting in closed session.¹⁶

¹² With respect to confidential information obtained during an authorized closed session meeting held for the purpose obtaining legal advice from agency counsel, the requirements of the attorney-client privilege must be respected. “Protecting the confidentiality of communications between attorney and client is fundamental to our legal system. The attorney-client privilege is a hallmark of our jurisprudence that furthers the public policy of ensuring the right of every person to freely and fully confer and confide in one having knowledge of the law, and skilled in its practice, in order that the former may have adequate advice and a proper defense.” *Mitchell v. Superior Court* (1984) 37 Cal.3d 591, 599. Because the city attorney’s client is the city—with the city council having ultimate authority to act on the city’s behalf—it follows that the city council holds the privilege. California Rules of Professional Conduct, Rule 1.13(b) (“the client is the organization itself, acting through its duly authorized directors, officers, employees, members, shareholders, or other constituents overseeing the particular engagement.”); *Ward v. Superior Court* (1977) 70 Cal.App.3d 23, 35. As the holder of the privilege, the city council may decide to waive the privilege. However, this must be a decision made by a majority of the city council. It cannot be the decision of an individual council member.

¹³ *Kleitman v. Superior Court* (1999) 74 Cal.App.4th 324, 334 (holding that members of a legislative body cannot be compelled to disclose their recollection of an unrecorded closed session pursuant to discovery requests in a writ proceeding alleging a Brown Act violation). See also 76 Ops.Cal.Atty.Gen. 290 [“The basis for our prior conclusions was that the statutes authorizing closed sessions and making records thereof ‘confidential’ would be rendered meaningless if an individual member could publicly disclose the information he or she received in confidence.”]; 80 Ops.Cal.Atty.Gen. 231, 239 (1997) [“Public statements by board members about the discussions in the closed session would violate the integrity of the confidential recording.”].

¹⁴ See 80 Ops.Cal.Atty.Gen. 231, 235-241 (1997); 76 Ops.Cal.Atty.Gen. 289, 290-291 (1993).

¹⁵ Gov. Code, § 54963.

¹⁶ Gov. Code, §54963(b).



The only exceptions to the prohibition on disclosure of confidential information obtained in a closed session are: (1) when disclosure is for the purpose of making confidential inquiries or complaints to a district attorney or grand jury that are necessary to establish the illegality, or potential illegality, of an action taken by the legislative body;¹⁷ (2) when disclosure is for the purpose of expressing an opinion concerning the legality of actions taken in closed session;¹⁸ (3) when disclosure is made under the whistleblower statutes contained in Labor Code section 1102.5 or Government Code section 53296;¹⁹ and (4) when confidential information obtained during a Joint Powers Authority (JPA) closed session has direct financial or liability implications for a JPA member agency, the closed-session attendee may share the information with the member agencies' counsel and other members of the legislative body of the member agency in a closed session.²⁰

In sum, information acquired in a closed session must not be disclosed to those without a right to attend the closed session, unless: (1) the information acquired is not confidential information, as defined; (2) the legislative body authorizes disclosure of confidential information; or (3) one of the express exceptions to the prohibition on disclosure of confidential information obtained in closed session applies.

3. Would it violate the Ralph M. Brown Act for a City Council acting as the City's Housing Authority to meet jointly in closed session with the Board of Housing Commissioners, which the Housing Authority oversees, provided that statutory authorization exists for both entities to go into closed session?

The Brown Act does not expressly address whether a legislative body and a subsidiary or related entity of the legislative body²¹ may meet jointly in closed session when statutory authorization exists for both entities to go into closed session. However, Cal Cities believes that the relevant inquiry is the same presented by Question 1 above: whether both entities have an

¹⁷ Gov. Code, §54963(e)(1).

¹⁸ Gov. Code, §54963(e)(2).

¹⁹ But see 84 Ops.Cal.Atty.Gen. 71, 78 (2001) ["[T]he whistleblower statutory protections applicable to employees of state and local public entities do not supersede the statutes and rules governing the attorney-client privilege."]. See also *Cordero-Sacks v. Housing Authority of City of Los Angeles* (2011) 200 Cal.App.4th 1267, 1278 [citing holding of Attorney General's opinion].

²⁰ Gov. Code, § 54956.9.

²¹ In addition to housing authorities, there are other types of public entities that exist within the boundaries of cities that may be implicated by this question. These include entities of limited powers that cover all or a portion of a city and have a specifically prescribed purposes specified by the statute under which it is created, such as: (1) Industrial development authorities (Gov. Code, §§ 91500–91562); (2) Subsidiary districts (Gov. Code, § 56078); and (3) Parking authorities (Sts. & Hy. Code, §§ 32650–32667). In addition, cities may enter into agreements with other public agencies, or other entities such as hospitals and mutual water companies, to jointly exercise common powers. Gov. Code §§ 6500–6539.5. Joint powers agreements may create an agency or entity separate from the parties to the agreement. Gov. Code §§ 6503.5, 53050–53051.



official or essential role in the meeting given the specifically permitted purpose of the closed session.

One likely scenario where both entities may have an official or essential role to play is when a closed session is held to discuss pending litigation.²² When a government entity is sued, or when government officials are sued in their official capacities, other city officials or advisory bodies with jurisdiction over the general subject matter of the lawsuit also may be a party or potential party.²³ Thus, for example, where the common-interest doctrine or joint-defense privilege apply, it may be necessary for the entities to meet jointly in closed-session. To the contrary, two entities that are adversaries in a lawsuit may not meet in closed session for purposes of negotiating a settlement to that lawsuit.²⁴

CONCLUSION

Thank you for the opportunity to comment on the questions presented. Please do not hesitate to contact me with any questions, or to discuss this matter further.

Sincerely,

A handwritten signature in black ink, appearing to read "Alison Leary", is written over the typed name.

Alison Leary
Senior Deputy General Counsel
League of California Cities

²² California Government Code section 54956.9; *Shapiro v. Board of Directors of Center City Development Corp.* (2005) 134 Cal.App.4th 170 (agency must be a party to the litigation).

²³ 67 Ops.Cal.Atty.Gen. 111, 116-117 (1984)

²⁴ 62 Ops.Cal.Atty.Gen. 150 (1979).