CALIFORNIANS AWARE
THE CENTER FOR PUBLIC FORUM RIGHTS

January 20, 2005

Donna Frye
Member of the City Council
City of San Diego
202 C Street
San Diego, CA 92101.

SENT BY FAX; COPY MAILED

Dear Councilmember Frye,

I have reviewed the January 12 letter to you from Lori Chapin, General Counsel of the San Diego City Employees' Retirement System, concerning the SDCERS Board's November 19, 2004 meeting, and the published agenda for that meeting, and I provide you here with my opinion concerning whether the action to ban Board Member Diann Shipione from future closed sessions was legally noticed and legally taken in the closed session listed as concerning "pending litigation" involving the plaintiff Gleason.

My short answer is that I believe that the agenda listing was defective in failing to include reference to the proposed action regarding Ms. Shipione, and that in any event that action had no place in any closed session.

Counsel Chapin's January 12 letter leaves the impression that the board was in a properly noticed closed session on pending litigation (*Gleason et al. v. City*) when it first learned that Ms. Shipione had (allegedly) "violated the confidentiality of the Board's previous closed session meeting by disclosing potential attorney-client privileged information and confidential closed session discussions to James Gleason... As a result...the Retirement Board voted 11-0 to, among other things, not allow Ms. Shipione to attend future closed session meetings of the Board."

Whenever at a regular meeting a legislative body proposes to take action on an item not listed on the agenda under circumstances such as these, the sole lawful way to do so is after "a determination by a two-thirds vote of the members of the legislative body present at the meeting, or, if less than two-thirds of the members are present, a unanimous vote of those members present, that there is a need to take immediate action and that the need for action came to the attention of the local agency subsequent to the agenda being posted..." (Government Code Section 54954.2, subd. (b), par. (2).)

Ms. Chapin does not mention such a finding, and if there had been one I would have expected her to say so. She admits that the board took clear "action" by the 11-0 vote. But even had the board made some kind of finding, I don't believe anything in what the board supposedly learned about Ms. Shipione's disclosures to Gleason would have justified taking immediate, non-noticed action to ban her from all closed sessions. That act was profoundly prejudicial to her ability to perform her duties as a public official. It cut her off from all participation in decisions affecting all litigation. Such a draconian move need not and should not have been taken in closed session at all, much less without public notice.

My reasoning is this. Even assuming, as Ms. Chapin suggests, that it was credibly established by some report in that closed session that Ms. Shipione had been leaking privileged closed session communications to Gleason, the most that that fact would have justified, in the immediate term, would be a decision that she not participate further in the closed door discussion of that case, i.e. that if she did not leave the discussion, it could not continue.

From that point forward any discussion about what to do for the longer term about her alleged breach should have been restricted to open session. The conduct or performance of a member of a legislative body is not a "personnel" matter that may be addressed in a closed session pursuant to Government Code Section 54957. Nor under these circumstances would such a discussion be lawful under the pending litigation exception of Government Code Section 54956.9, since *only information whose disclosure would prejudice the position of the agency in the litigation may be discussed in such closed sessions*—not any and all information about the case or threatened case.

The meeting took place several weeks after the passage and effectiveness of Proposition 59, whose amendment to the California Constitution made it imperative that limitations on access to public meetings such as the pending litigation closed session authority be interpreted narrowly. And in this case, since the board (or at least the staff) had decided that Ms. Shipione had already leaked information to Gleason, the topic of what to do about her breach *for the longer term* would not convey any information to Gleason that he did not already know.

Moreover, the Brown Act specifies certain disciplinary or at least corrective actions that may be taken when a local body member can be shown to have breached closed session confidentiality. As provided in Government Code Section 54963, subd. (c) they include:

> (1) Injunctive relief to prevent the disclosure of confidential information prohibited by this section.
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> •••••
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> (3) Referral of a member of a legislative body who has willfully disclosed confidential information in violation of this section to the grand jury.

These remedies are not necessarily the only ones available, but significantly, they carry with them due process protections to assure a body member is not stripped of one of the main powers and privileges of her office in a closed door kangaroo court.

In short, the 11-0 vote disclosed by Ms. Chapin was in my view not only a violation of the Brown Act unless preceded by an urgency finding by the requisite supermajority, but was overkill in accomplishing far more, in secrecy and without public notice or discussion, than would have been necessary to protect the board's legal interests even assuming the allegations against Ms. Shipione were true.

Likewise I believe it inappropriate for the board to have acted to send a letter to the Mayor recommending that she be removed from the board without notice of that action in the closed session. All the more emphatically, a move to oust Ms. Shipione from her appointed office entirely by accusations formulated in secrecy is alien to both the letter and spirit of the Brown Act, among other familiar precepts and principles. Ms. Shipione as a member of a legislative body may be evaluated, accused and disciplined by the body only in open and public session.

To be clear, and assuming that Ms. Shipione really did, as accused, leak privileged information to Gleason, my view is that the appropriate (and lawful) way of handling that breach would have been as follows:

1. The board is told, presumably at the beginning of the *Gleason v. City* closed session discussion, the concerns about Ms. Shipione's suspected disclosures to Gleason. (I have to assume that this information really had just reached staff's attention, because otherwise the closed session should not have been on the agenda to begin with.)
2. The board asks counsel if it is imperative to hold a discussion of the Gleason case at this time. If the answer is yes, Ms. Shipione is asked to absent herself from that discussion. If she refuses, or if immediate consultation with counsel is not essential in any event, the discussion is postponed to the next meeting. But even if she leaves and the Gleason discussion goes forward, it is not used to discuss or formulate action on Ms. Shipione's perceived breach. Instead —
3. The board directs staff to calendar a public discussion and recommended options concerning the suspected breach on the agenda of the next regular or special meeting.
4. The discussion and any action take place in public with the opportunity of citizens to comment and of Ms. Shipione to confront and question her accusers.

I would be happy to answer any questions you or others may have about my conclusions.

Sincerely,

Terry Francke
General Counsel
Californians Aware