

Office of
The City Attorney
City of San Diego

MEMORANDUM
MS 59

(619) 236-6220

DATE: February 9, 2005
TO: Government Efficiency and Openness Committee
FROM: City Attorney
SUBJECT: Remedies for Possible Brown Act Violation by Retirement Board

INTRODUCTION

On January 31, 2005, the City's new Government Efficiency & Openness Council Committee [GE&O Committee] met and heard testimony regarding a possible Brown Act violation by the Board of the San Diego City Employee's Retirement System [Board] at its meeting on November 19, 2004. At the November 19, 2004, Board meeting, an action was taken in closed session to exclude a Board member, Diann Shipione, from attending all future closed sessions of the Board. The action was taken during a closed session agenda item that was noticed as a conference with legal counsel regarding an existing litigation case, *Gleason, et al. v. City of San Diego, et al.*, Superior Court Case No. GIC 803779. In light of the questions that have arisen regarding the propriety of taking that action in closed session, and the way the item was noticed, the GEO Committee has asked for information from this Office regarding the remedies available for addressing this possible violation of the Brown Act.

ANALYSIS

The Ralph M. Brown Act, California Government Code sections 54950 – 54962 [Act], governs the subject of when a legislative body can meet in closed session, and what type of notice must be included on the meeting agenda for the closed session. The Act also provides specific remedies for violations of its provisions, such as the taking of an action in closed session that is not authorized, or not noticed properly. These remedies include both civil and criminal remedies.

1. Civil Lawsuit

The Act provides that the “district attorney, or any interested person” can file a civil action asking the court to invalidate an action taken in violation of the Act, stop or prevent violations or threatened violations of the Act, determine the applicability of the Act to particular actions, determine whether a rule or action by the legislative body to penalize or discourage expression by one of its members is lawful, and to compel the legislative body to tape record its closed sessions. A plaintiff bringing a civil action to enforce the Act may be awarded costs and attorneys fees by the court, if the action results in a finding that the legislative body violated the Act. Cal. Gov’t Code § 54960.5.

The Act contains strict time limits for filing a civil action. Prior to filing a lawsuit, a written demand must be made for the legislative body cure or correct the action taken that allegedly violated the Act. Cal. Gov’t Code § 54960.1(b). The written demand must be made within ninety days of the challenged action. Cal. Gov’t Code § 54960.1(c).¹ The legislative body then has thirty days to take corrective action. Cal. Gov’t Code § 54960.1(c)(2). If no corrective action is taken within thirty days, the party bringing the challenge then has fifteen days to file a lawsuit. Cal. Gov’t Code § 54960.1(c)(3). In the case of an improper notice with no action, the “cure” demand is not required.

On the issue of who is authorized to file such a civil action, “any interested person” has been interpreted to mean any citizen of the State. *McKee v. Orange Unified School District*, 110 Cal. App. 4th 1310 (2003). Additionally, for purposes of the California Government Code, “person” is defined as “any person, firm, association, organization, partnership, limited liability company, business trust, corporation, or company.” Cal. Gov’t Code § 17. “Person” also includes the state and its subdivisions. *People v. Centr-O-Mart*, 34 Cal. 2d 702 (1950). Therefore, it is clear that in most circumstances, any individual, organization, or government entity is authorized to file a civil suit to invalidate an action taken in violation of the Act.

2. Criminal Prosecution

A violation of the Act by a member of a legislative body who acts with improper intent is a misdemeanor, punishable by a fine or imprisonment. This remedy is directed at punishment of specific members of the Board, rather than the Board itself, and does not provide for any invalidation of actions taken, or injunctive relief for future violations. An investigation is currently underway in the City Attorney’s Office, Criminal Division, related to this matter. The status of that investigation, and whether it is civil or criminal in nature, is confidential information, and because of the ethical separation between functions of the Criminal and Civil Divisions, attorneys in the Civil Division are not privy to information about the investigation.

¹ In this case, the challenged action took place on November 19, 2004; therefore, the written demand for cure would need to be made within ninety days of that date, which is on or about February 17, 2005.

3. Action by the City Attorney Pursuant to San Diego Charter Section 40

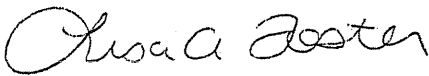
San Diego Charter section 40 provides: "The City Attorney shall apply, upon order of the Council, to a court of competent jurisdiction for a writ of mandamus to compel the performance of duties of any officer or commission which fails to perform any duty expressly enjoined by law or ordinance."

This language appears to provide a legal basis for the City Attorney, if ordered by the City Council, to file a writ of mandamus to compel the Board or its individual members to take some action required by law. If the action to be taken pursuant to this Charter provision was to seek reinstatement of Ms. Shipione to the Board's closed sessions, that action would need to be preceded by a written demand within ninety days of the Board's action excluding her from closed session, pursuant to California Government Code section 54960.1, and would need to comply with all other time limits set forth in the Act.

CONCLUSION

The City Council was briefed in closed session on February 8, 2005 regarding the available remedies for a violation of the Brown Act, and the City Attorney's recommendation in this matter. An investigation into this matter is currently being conducted by the Criminal Division of the City Attorney's Office. Additionally, any interested individual or organization, including Ms. Shipione or any concerned citizen, has until February 17, 2005, to issue a written demand to SDCERS for it to correct the action taken against Ms. Shipione. If the Board does not act on that written demand within thirty days, the party making the demand would then be able to file a civil suit to seek invalidation of the Board's action and injunctive relief allowing Ms. Shipione to once again attend the Board's closed sessions. That party would be entitled to recover costs and attorney's fees if successful.

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By 
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