

**CITY OF OAKLAND**  
**OFFICE OF THE CITY ATTORNEY**  
**LEGAL OPINION**

**TO: COUNCIL PRESIDENT LYNETTE GIBSON MCELHANEY  
CITY ADMINISTRATOR SABRINA LANDRETH**

**FROM: CITY ATTORNEY BARBARA J. PARKER**

**CC: CITY COUNCIL, CITY CLERK**

**DATE: JULY 14, 2016**

**RE: City Clerk's Attendance at Closed Session to Record Actions**

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**I. INTRODUCTION**

For many years, the City Clerk attended recorded and maintained records of the Council's actions in closed session. After the current City Administrator assumed her duties, she reduced the number of individuals who attend closed sessions and informed the Council president that the City Clerk and a number of other City administrative staff under her jurisdiction no longer would attend closed sessions. The City Administrator asked the City Attorney to record and maintain records of the Council's actions in closed session, and this Office agreed to do so.

The Council president and other Councilmembers have expressed their desire that the City Clerk resume her role of attending closed sessions to record and maintain records of the Council's actions. The Council president and the City Administrator have asked this Office's advice regarding this matter. It is our understanding that, consistent with the Councilmembers' desires, the City Administrator has agreed to have the City Clerk attend closed sessions to record and maintain a confidential record of the Council's decisions.

This is a public opinion consistent with our longstanding practice of issuing public opinions regarding City Charter interpretations of the respective powers of the various branches of the City government.

## **II. QUESTIONS AND BRIEF ANSWERS**

### **Question No. 1:**

Must the City Clerk attend closed session meetings to record and maintain records of the Council's action in closed session?

### **Brief Answer:**

No. Neither the City Charter nor applicable state law requires that the City Clerk attend closed sessions or that she record or maintain records of closed session actions.

The City Charter requires that the City Clerk keep a public record of the Council's ordinances, resolutions and motions. (City Charter section 402.) Except for the final actions that the Brown Act requires the Council to report out of closed session, all closed session discussions and actions are confidential and therefore not part of the public record. Consistent with Charter section 402, the City Clerk keeps a public record of the final decisions that this Office reports out of closed session.

The Charter also requires that the City Clerk perform "other duties of a City Clerk under general law where not inconsistent with this Charter or the ordinances of the City." Recording actions during Council closed sessions is not one of the City Clerk's required duties under general law. (Gov. Code sections 40801-40810, 54957.2(a).)

### **Question No. 2:**

Does the Council president or the City Council have authority to designate the City Clerk to attend closed sessions to record and maintain a record of closed session actions?

### **Brief Answer:**

The Council has authority to designate the City Clerk to attend closed sessions to record and maintain a record of closed session actions by passing a resolution or ordinance. Individual Councilmembers do not have the authority to designate or direct the City Clerk to attend closed sessions.

As a general rule, closed sessions under the Brown Act's exceptions to open meeting requirements may involve only the members of the Council plus additional staff that are necessary for the Council to be informed of and take action on a closed session item (e.g., attorneys required to provide legal advice, labor negotiators, real property negotiators and the City Administrator). The City Clerk's presence is not necessary for the Council to be informed of and take action on closed session items. However, the Brown Act provides that the Council by resolution or ordinance may designate the City

Clerk or other person to attend closed session to record and maintain a record of topics discussed and decisions made. (Gov. Code section 54957.2.) Thus the Brown Act recognizes that the Council has a legitimate interest in having a person, who otherwise is not necessary for the discussion and action on items, present in closed sessions for the purpose of maintaining a record of the actions.

Notwithstanding the Brown Act's authorization permitting the Council to designate the City Clerk "or other person" to attend closed session, we conclude that the Council does not have authority to designate any "other person" under the City Administrator's, City Attorney's, City Auditor's, Mayor's or an individual Councilmember's jurisdiction, or anyone who is not a City employee or agent, to attend closed session to record and maintain a record of topics discussed and decisions made. The Brown Act is permissive, not mandatory, on this subject. The City Clerk has a dual role under Charter; she is the Clerk of the Council and performs certain duties in that capacity. She also is a City officer and has a number of other charter-based duties; and she is appointed and removed by the City Administrator, subject to Council confirmation. All of the other employees in the City are under the sole jurisdiction of their appointing authorities and therefore those appointing authorities would need to authorize their attendance in closed session. Persons who are not City employees or agents would not have the duty to maintain confidentiality of closed session discussions and actions.

Because the City Clerk has attended closed session for many years to record and maintain a record of closed session actions, we asked the City Clerk to search the City's records for a resolution or ordinance that designated her to perform this function. The City Clerk's Office advised us that it has not located such a resolution or ordinance. Accordingly, if the Council wishes to have the City Clerk perform this function, it should pass a resolution designating her to do so.

### **III. ANALYSIS**

The City Clerk's duties are set forth in the City Charter and the California Government Code.

#### **A. The City Charter requires that the City Clerk keep a record of all ordinances, resolutions and motions at public meetings**

The Charter provides that the City Clerk has a duty to "keep an accurate *public* record of all ordinances, resolutions and motions . . . ." (Emphasis added.) (City Charter section 402.) The City Charter provides:

Section 402. City Clerk. The City Clerk shall be appointed or discharged by the City Administrator subject to confirmation by the Council. He shall be the Clerk of the Council and keep an accurate public record of all

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ordinances, resolutions and motions, shall have custody of the official seal and all official records committed to his care, make affidavits and administer oaths without charge in matters affecting the business of the City, conduct elections, and perform the other duties of a City Clerk under general law where not inconsistent with this Charter or the ordinances of the City.

The City Clerk therefore, clearly has a Charter-based duty to keep public records of ordinances, resolutions and motions at public meetings. The Charter does not reference closed session in enumerating the City Clerk's duties. However, all closed session discussions and decisions are confidential, and the Council has no duty to keep minutes or records of closed session actions. (Gov. Code section 54957.1 and 54957.2(a).) The Council's only obligation regarding closed session meetings is to report out final actions that the Brown Act requires the Council to report out in open session, including the votes, abstentions and absences of the Councilmembers. (Gov. Code section 54957.1.) The City Clerk fulfills her duty under the Charter by keeping an accurate public record of the final decisions the Council reports out of closed session when they are announced to the public either orally or in writing. Accordingly, the presence of the City Clerk at closed session is not required by the City Charter.

**B. The City Clerk's duties under general law do not require attendance of closed sessions**

In addition to the City Clerk's duties under the City Charter, the Charter provides that the City Clerk shall "perform the other duties of a City Clerk under general law where not inconsistent with this Charter or the ordinances of the City." (City Charter section 402.)

The City Clerk's duties under general law are set forth in Government Code sections 40801 through 40814. A number of the duties outlined in the Government Code are inconsistent with the Charter. For example, the general law provides that the City Clerk shall be the accounting officer and the ex-officio assessor. (Gov. Code sections 40802 and 40810.) However, the following duties under general law are pertinent to our analysis:

Government Code Section 40801. The city clerk shall keep an accurate record of the proceeding of the legislative body and the board of equalization in books bearing appropriate titles and devoted exclusively to such purposes, respectively. The books shall have a comprehensive general index.

This section doesn't address whether the City Clerk has an obligation to accurately record the proceedings of the Council in closed session. But, "maintaining books bearing appropriate titles and devoted exclusively to such purposes" for closed

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session would be inconsistent with other provisions of the Government Code, namely the Brown Act which governs closed sessions. (Gov. Code section 54950 -54963.) The Brown Act does not require that the Council "keep an accurate record of the proceeding[s]" of the Council in closed session. (Gov. Code section 54957.2(a).) The Brown Act imposes a duty to keep a record of closed session proceedings only when a court orders that a legislative body do so as a result of finding that legislative body violated the Brown Act (for example by discussing and/or taking action on matters that are not permissible subjects for closed session). (Gov. Code section 54960(b).) In fact, the Council's only obligation under the Brown Act in terms of closed session discussions/action is to report out to the public final decisions such as litigation settlements. Moreover, the Brown Act clearly does not require that the City Clerk attend closed session to perform the recording function as the Act expressly gives the Council the option to designate the city clerk or other officer or employee to record closed session actions.

**C. The Brown Act grants the Council the option to designate the City Clerk to record and maintain a confidential record of topics discussions and decisions made in closed session**

The Brown Act specifically addresses the issue of keeping a record of closed session. The Act permits the City Council to designate by ordinance or resolution "a clerk or other officer or employee of the local agency" to attend closed session and keep a confidential record of "topics discussed and decisions made at the closed session". (Gov. Code section 54957.2(a).) The Brown Act provides:

Section 54957.2. (a) The legislative body of a local agency may, by ordinance or resolution, designate a clerk or other officer or employee of the local agency who shall then attend each closed session of the legislative body and keep and enter in a minute book a record of topics discussed and decisions made at the meeting. The minute book made pursuant to this section is not a public record subject to inspection pursuant to the California Public Records Act (Chapter 3.5 (commencing with Section 6250) of Division 7 of Title 1), and shall be kept confidential. The minute book shall be available only to members of the legislative body or, if a violation of this chapter is alleged to have occurred at a closed session, to a court of general jurisdiction wherein the local agency lies. Such minute book may, but need not, consist of a recording of the closed session. (b) An elected legislative body of a local agency may require that each legislative body all or a majority of whose members are appointed by or under the authority of the elected legislative body keep a minute book as prescribed under subdivision (a). (Emphasis added.)

In sum, the Brown Act provisions of the Government Code grant the Council the option of designating a clerk to keep records; and the Council also has the option of keeping a minute book of topics discussed and decisions made in closed session. One such employee may be a deputy clerk appointed by the clerk to carry out duties. *Id.* The Brown Act does not require the attendance of the clerk in closed session, as the statute does not require a local agency to designate an officer or employee to perform this role. *Id.* 3 McQuillin Mun. Corp. § 12:63 (3d ed. 2016). "The [Brown] Act provides that a legislative body has the option of keeping a minute book for closed sessions." *Kleitman v. Superior Court*, 74 Cal. App. 4th, 324, 332 (1999) (Emphasis added) (holding that the Brown Act does not provide for disclosure of personal recollections of members of a legislative body regarding proceedings in unrecorded closed session).

Therefore, if the Council wishes to designate the City Clerk to attend closed session to record topics discussed and decisions made therein, the Council must pass an ordinance or resolution making the designation.

**D. The Council's authority to designate the City Clerk to attend closed session does not interfere with the City Administrator's powers under the Charter**

The City Clerk performs administrative functions and she is appointed and discharged by the City Administrator subject to Council confirmation. (City Charter section 402.) The Charter designates the City Clerk as both a City officer (City Charter section 400), and the Clerk of the Council (City Charter section 402). In this dual role, the City Clerk takes direction from both the City Administrator, who has the authority to assign and reassign work to the Clerk under Charter Section 503 and administer the Clerk's department under Charter section 600, and from the Council, which has the authority to give the Clerk direction as Clerk of the Council.

Generally, the City Administrator has the exclusive authority to assign and reassign duties to departments and staff within the City administration. (City Charter section 503.) The City Council generally has no authority under the Charter to assign duties to departments and staff who operate under the jurisdiction of the City Administrator or other City officers such as the Mayor, City Councilmembers, City Auditor and City Attorney. (City Charter section 503.) Indeed, City Charter section 218 (Non Interference in Administrative Affairs) prohibits the Council from giving orders to any subordinate of the City under the jurisdiction of the City Administrator or the other appointed or elected City officers and the Council has no administrative powers. (City Charter section 207.)

However, the Charter gives the City Clerk as "Clerk of the Council" special duties to serve the City Council in a clerkship capacity and function. The function of a clerk includes recordkeeping. Therefore, the City Council has the exclusive authority to designate the City Clerk to attend Council closed sessions and perform a recordkeeping role for the Council, whether or not the Clerk is assigned these duties by the City Administrator under the City Administrator's powers.

Please note that this conclusion is limited to the City Clerk due to the Clerk's special designation in the Charter as "Clerk of the Council," and does not extend to the assignment of other City staff members to perform this role. That issue is discussed below.

**E. The City Administrator retains the power to designate other City staff to attend closed session, subject to Council ratification by ordinance or resolution under the Brown Act**

There is some tension between the Charter's grant of general authority to the City Administrator to make staff assignments and the Brown Act's authorization giving the City Council the option to designate staff to perform closed session recordkeeping by taking legislative action. However, we conclude that there is no conflict between the City Charter and the Brown Act because the two statutes can be harmonized in a way that preserves the essential purposes of both laws.

First, we find no basis to determine that Government Code section 54957.2(a) intended to override or preempt the general authority the Charter grants to the City Administrator to make assignments, or to give authority to the City Council to override the City Administrator's Charter powers to generally assign City staff, including the assignment to perform the recordkeeping function in closed sessions. Section 54957.2(a) is essentially permissive in nature, allowing staff to attend closed sessions to perform a recordkeeping role if the local agency desires that arrangement; however, we do find that this section also is mandatory in the sense that a local agency that chooses to exercise its discretion to designate a staff member to perform this role, must do so by adopting legislation.

A state law preempts local law only in three circumstances:

- (1) there is express preemption, i.e., the state law says it preempts local law;
- (2) there is implied preemption, i.e., the state law is so extensive that it is clear that the state legislature intended to occupy the field covered by the law to the exclusion of further local law, or that any further local law in the area would thwart a paramount state concern; or

- (3) there is conflict preemption; i.e., the state law and the local law are contradictory or mutually exclusive.

*(Great Western Shows v. County of Los Angeles (2002) 27 Cal.4<sup>th</sup> 853, 860-861)*<sup>1</sup>

There is no express preemption here, since section 54957.2(a) does not say that it supplants local law. There is no implied preemption, because there is no indication that the state legislature intended to occupy the field of closed session staffing to the exclusion of a local law or that application of local law in this area would thwart a state policy objective; since section 54957.2(a) is essentially permissive, the state legislature does not require that anyone is designated to attend and perform recordkeeping at closed sessions. Accordingly, it appears the state legislature did not intend to foreclose a city administrator from assigning a staff person to exercise this function. Finally, there is no conflict preemption, since a local agency can comply with both laws -- for instance, by not making any section 54957.2(a) designation, or by subjecting an administrator's assignment of a staff person to perform the recordkeeping role to council ratification by resolution or ordinance.

Second, we find no basis to determine that the Charter provisions governing staff assignments override the procedural requirement of the Brown Act that the Council make any designation of staff to attend closed session in a record keeping role by resolution or ordinance. By enacting Section 54957.2(a), the state legislature clearly intended that a city that chooses to designate a staff member to attend closed session and keep minutes, must formalize that designation by taking legislative action. There also is a presumption that the City Administrator will exercise her administrative authority in conformance with state law requirements, including procedural requirements pertaining to closed sessions set forth in the Brown Act.

For the foregoing reasons, we conclude that the City Administrator has the authority under the Charter to assign a staff person other than the City Clerk to attend closed session and perform recordkeeping duties. However, any such assignment by the City Administrator nevertheless would require Council ratification by resolution or ordinance under Government Code Section 54957.2(a).

Finally, we note that the Council's designation of the City Clerk to perform the record-keeping functions, like the Charter's designation of the City Administrator to perform certain duties, extends to the deputy or assistant city clerk(s) that the City Clerk may direct to attend closed sessions when she is unavailable.

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<sup>1</sup> Local law also can be preempted if it duplicates state law. (*Id.*) There is no issue of duplication here.

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#### **IV. CONCLUSION**

The City Clerk's duties under the City Charter and general law do not require that she attend closed sessions; however, the Brown Act gives the Council the option to pass an ordinance or resolution that designates the City Clerk in her role as Clerk of the Council to attend closed session to keep a record of topics discussed and decisions made. The City Clerk has not located such an ordinance or resolution. One may have been adopted decades ago. However, at this juncture if the Council wants the City Clerk to attend closed session, it must pass an ordinance or resolution designating her to attend closed session to record topics discussed and decisions made. The resolution or ordinance is necessary to ensure compliance with the Brown Act because the City Clerk's attendance is not necessary for the Council to be informed of and to take action on closed session items. The City Administrator retains the authority to assign a staff person other than the City Clerk to perform these functions, although the Brown Act still would require that the Council ratify any such assignment by passing a resolution or ordinance.

Very truly yours,

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City Attorney

Attorney Assigned:  
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