CITY OF OAKLAND

OFFICE OF THE CITY ATTORNEY

Memorandum

TO: Council President Rebecca Kaplan and Members of the City Council

FROM: Barbara J. Parker
City Attorney

CC: Mayor Libby Schaaf
City Administrator Sabrina Landreth
Assistant City Administrator Maraskeshia Smith
Assistant City Administrator Ed Reiskin
Deputy City Administrator Betsy Lake

DATE: January 30, 2020

RE: **Public Legal Opinion regarding Brown Act Requirements to Report in Open Session Closed Session Actions On "Pending Litigation"**

Dear President Kaplan and Members of the City Council:

You requested a legal opinion on the Brown Act requirements to report in open session closed session actions on "pending litigation" as that term is defined in the Brown Act. (Government Code § 54950 et seq.) Pending litigation includes existing litigation and anticipated litigation (e.g. proposed lawsuits by the City, claims against the City, and threats of litigation).

Please see the attached public legal opinion from our outside legal counsel, Karen Getman, of the Olson Remcho law firm.

Barbara J. Parker

BARBARA J. PARKER
City Attorney

Olson | Remcho

MEMORANDUM

VIA EMAIL

To: Barbara J. Parker, Oakland City Attorney

From: Karen Getman

Date: January 29, 2020

Re: Brown Act Requirements Regarding Publicly Reporting Actions Taken in Closed Session Discussions of Pending or Proposed Litigation

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INTRODUCTION

You have asked that we provide a public legal opinion regarding Brown Act requirements to report in open session following closed session actions on "pending litigation" as that term is defined in the Brown Act. Cal. Gov. Code § 54950 et seq.

QUESTION PRESENTED

Under what circumstances does the Brown Act require that the Oakland City Council publicly report actions taken in closed session discussions of pending or proposed litigation or actions taken to settle a lawsuit, and what are the requirements for such a report?

BRIEF ANSWER

If during the closed session discussion the Council takes action to authorize the initiation, defense or other involvement in litigation, the action must be reported during the public portion of that same meeting.[1] The level of detail that must be provided in the report varies depending on whether disclosure would jeopardize the City's position in the litigation. Similarly, a decision to appeal or not appeal must be reported during the public portion of the same meeting if the decision is made by the Council rather than by the City Attorney.

If the closed session discussion authorizes settlement of litigation, the fact of approval and the substance of the settlement must be disclosed in open session at that same meeting if the

[1] If the action is to initiate or intervene in litigation, "the announcement need not identify the action, the defendants, or other particulars, but shall specify that the direction to initiate or intervene in an action has been given and that the action, the defendants, and the other particulars shall, once formally commenced, be disclosed to any person upon inquiry, unless to do so would jeopardize the agency's ability to effectuate service of process on one or more unserved parties, or that to do so would jeopardize its ability to conclude existing settlement negotiations to its advantage." Gov. Code § 54957.1(a)(2).

approval renders the settlement final. If further approval is required, the report must be made at the point when the settlement is final, and upon inquiry by any person.

ANALYSIS

A. General Reporting Requirements Under the Brown Act

The Brown Act, Government Code sections 54950 et seq.,[2] requires that legislative bodies of local public agencies, including charter cities, conduct their business in open public meetings unless a specific statutory exception allows for a closed session. § 54962. When closed session discussion is authorized, the subject of the closed session must be described on the meeting agenda in a manner substantially similar to the descriptions provided in section 54954.5. The Brown Act prohibits any person attending the closed session from disclosing confidential information obtained during the closed session unless the legislative body has agreed to disclosure. § 54963.

However, the Brown Act specifies seven types of closed session actions that the legislative body is required to publicly report and further enumerates the timing and, in some instances, the substance that must be included in the public report.[3]

With respect to closed session on litigation, the Brown Act provides:

> (a) The legislative body of any local agency shall publicly report any action taken in closed session and the vote or abstention on that action of every member present, as follows: . . .
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> (2) Approval given to its legal counsel to defend, or seek or refrain from seeking appellate review or relief, or to enter as an amicus curiae in any form of litigation as the result of a consultation under Section 54956.9 shall be reported in open session at the public meeting during which the closed session is held. The report shall identify, if known, the adverse party or parties and the substance of the litigation. In the case of approval given to initiate or intervene in an action, the announcement need not identify the action, the defendants, or other particulars, but shall specify that the direction to initiate or intervene in an action has been given and that the action, the defendants, and the other particulars shall, once formally commenced, be disclosed to any person upon inquiry, unless to do so would jeopardize the agency's ability to effectuate service of process on one or more unserved parties, or that

[2] Unless otherwise noted, all further statutory references are to the Brown Act.

[3] For example, a closed session held to approve a labor agreement with represented employees "shall be reported after the agreement is final and has been accepted or ratified by the other party. The report shall identify the item approved and the other party or parties to the negotiation." § 54957.1(a)(6).

> to do so would jeopardize its ability to conclude existing settlement negotiations to its advantage.
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> (3) Approval given to its legal counsel of a settlement of pending litigation, as defined in Section 54956.9, at any stage prior to or during a judicial or quasi-judicial proceeding shall be reported after the settlement is final, as follows:
>
> (A) If the legislative body accepts a settlement offer signed by the opposing party, the body shall report its acceptance and identify the substance of the agreement in open session at the public meeting during which the closed session is held.
>
> (B) If final approval rests with some other party to the litigation or with the court, then as soon as the settlement becomes final, and upon inquiry by any person, the local agency shall disclose the fact of that approval, and identify the substance of the agreement.
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> (4) Disposition reached as to claims discussed in closed session pursuant to Section 54956.95 shall be reported as soon as reached in a manner that identifies the name of the claimant, the name of the local agency claimed against, the substance of the claim, and any monetary amount approved for payment and agreed upon by the claimant.
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> § 54957.1(a)(2)-(4).

Section 54957.1(b) provides that the required reports "may be made orally or in writing." When an individual has submitted a written request for all meeting documentation pursuant to section 54954.1 and is present at the time the closed session ends, he or she must be provided copies of contracts, settlement agreements or other documents that received final approval in closed session. § 54957.1(b).[4] If the documents require revisions and re-typing as a result of actions taken in the closed session, those changes must be orally described to the requestor, but the revised documents need not be provided until the retyping is complete (ordinarily, the next business day). § 54957.1(b) & (c).

[4] Note that the Council has authorized the City Attorney to settle claims and lawsuits against the City for an amount up to $25,000. Resolution No. 86476 C.M.S. In addition, before the City finalizes and executes contracts that are approved in closed session, the City Council must pass a resolution in open session publicly approving the agreements and authorizing the City Administrator to execute them (Rule 30 of the Council's Rules of Procedure Resolution No. 87044 C.M.S.); and the City Attorney must approve the agreements as to form and legality before execution (Oakland Charter § 401(6)). Rule 30 of the Council's Rules of Procedure, as set forth in Resolution No. 87044 C.M.S., states that "the Council shall approve and authorize contracts by resolution unless an ordinance is required . . . ." However, not all contracts require City Council approval. For example, the City Administrator is authorized by ordinance to execute professional services contracts in an amount not to exceed $250,000 per contract. Oakland Mun. Code § 2.04.020. The City Attorney has authority under the Charter to execute contracts for outside counsel, experts and the like. Charter § 401(6).

Finally, subdivision (d) of section 54957.1 contains this important caveat:

> Nothing in this section shall be construed to require that the legislative body approve actions not otherwise subject to legislative body approval.

§ 54957.1(d).

This has particular significance for the City of Oakland. Under the City Charter, the Council can direct the City Attorney to commence or defend litigation, or the City Attorney can commence litigation and seek ratification from the Council.[5] Charter § 401(6). Once the Council has directed commencement of or ratified the litigation, the City Attorney has the authority to conduct the litigation, keeping the Council informed but not requiring further approval before taking action except that the Council must authorize any settlement of actions against the City and any dismissal of actions brought by the City. *Id*. The Brown Act does not require reporting from the City Attorney; it only requires reporting of action taken by the Council as the legislative body of the City. §§ 54952, 54953; *see Wolfe v. City of Fremont*, 144 Cal. App. 4th 533 (2006) (communications by the city manager and chief of police are not regulated by the Brown Act); *Golightly v. Molina*, 229 Cal. App. 4th 1501 (2014).

B. <u>The Requirement That There Be "Action Taken"</u>

In addition to these provisions, the Brown Act also contains a specific definition of the phrase "action taken." That phrase is defined to mean:

> a collective decision made by a majority of the members of a legislative body, a collective commitment or promise by a majority of the members of a legislative body to make a positive or negative decision, or an actual vote by a majority of the members of a legislative body when sitting as a body or entity, upon a motion, proposal, resolution, order or ordinance.

§ 54952.6.

Despite the breadth of this language, not every decision made by a legislative body in closed session constitutes "action taken" for purposes of the Brown Act reporting requirements, even if the action is generally included within the types of decisions listed in section 54957.1. For example, among the actions that must be reported at the conclusion of a closed session are an "[a]ction taken to appoint, employ, dismiss, accept the resignation of, or otherwise affect the employment status of a public employee in closed session pursuant to Section 54957," which "shall be reported at the public meeting during which the closed session is held." § 54957.1(a)(5). The Attorney General has opined that when a legislative body meets in closed session to consider dismissal of a public employee, but decides not to dismiss him or her, no report is required. 89 Ops. Cal. Atty. Gen. 110, 111 (2006),

[5] The City Council has enacted ordinances that grant the City Attorney authority to bring certain types of actions, e.g. the Tenant Protection Ordinance. In addition, the City Attorney has independent authority under state law to bring certain types of actions, e.g. public nuisance or red-light abatement actions.

2006 Cal. AG LEXIS 17, *3-4. The Attorney General concluded that there must be "some modification or change in employment status" before a report to the public is required. 2006 Cal. AG LEXIS 17 at *7. *See also id.* at *7, quoting 63 Ops. Cal. Atty. Gen. 215, 218 (1980) (emphasis in original) ("'The Legislature, in enacting section 54957.1, did not provide that all "action taken" *with respect* to the appointment, employment or dismissal of an employee be reported at the Legislative body's next public meeting, but provided that action taken *to* appoint, employ or dismiss an employee be so announced.'").

In *Boyle v. City of Redondo Beach*, 70 Cal. App. 4th 1109 (1999), the city council published the agenda for a special meeting but on the day of the meeting, the council added to the agenda a discussion of pending litigation that had not been previously noticed. *Id*. at 1117-18. Plaintiff sued to have the action taken at the special meeting declared null and void. Under section 54960.1, a plaintiff suing for a determination that an action taken by a legislative body is null and void for failure to comply with the Brown Act must allege:

> (1) that a legislative body of a local agency violated one or more enumerated Brown Act statutes; (2) that there was "action taken" by the local legislative body in connection with the violation; and (3) that before commencing the action, plaintiff made a timely demand of the legislative body to cure or correct the action alleged to have been taken in violation of the enumerated statutes, and the legislative body did not cure or correct the challenged action.
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> *Boyle*, 70 Cal. App. 4th at 1116-17.[6]

[6] Section 54960.1 allows for the filing of a suit to declare null and void an action taken in violation of the Act, but "limits its remedy to actions that violated the Act's mandate for open and public meetings (§§ 54953, 54956, 54956.5) and its agenda posting requirements (§§ 54954.2, 54954.5, 54954.6)." *Olson v. Hornbrook Cmty. Servs. Dist.*, 33 Cal. App. 5th 502, 517 (2019). A judgment declaring an action null and void will not issue if the action was taken in substantial compliance with the Act. § 54960.1(d)(1). Even then, the plaintiff must show prejudice. *Olson*, 33 Cal. App. 5th at 517. Moreover, suit cannot be commenced until the plaintiff has presented the legislative body with a demand to cure or correct the action, and the legislative body has declined to do so. § 54960.1(b) & (c).

Substantial compliance will not preclude the filing of a suit pursuant to section 54960, which provides for mandamus, injunctive or declaratory relief to stop or prevent violations of the Act or to determine the applicability of the Act to past actions. *Olson*, 33 Cal. App. 5th at 525. However, suit cannot commence under section 54960 until the legislative body has been presented with a cease and desist letter and has failed to respond "with an unconditional commitment to cease, desist from, and not repeat the past action that is alleged to violate [the Act]. . . . ." § 54960.2(c)(1). Plaintiff also must meet the requirements for the form of relief requested, including the existence of a justiciable controversy. *See generally TransparentGov Novato v. City of Novato*, 34 Cal. App. 5th 140, 147-49 (2019).

The court of appeal agreed that omission of the item constituted a violation of the Act, but nonetheless held that no cause of action existed under section 54960.1 for two reasons,[7] one of which was that there had been no "action taken" within the meaning of the statute:

> [T]he minutes of the May 28, 1997, meeting reflect that the City Council did no more than confer with and give direction to staff. Thus the City Council's activity did not constitute "an action taken" in violation of section 54956. Section 54952.6 defines "action taken". . . . The City Council made no collective decision, commitment, or promise, and took no "actual vote" on any pending motion, proposal, resolution, order, or ordinance relating to the Boyle lawsuit in the May 28 session. Thus for purposes of a section 54960.1, subdivision (a) suit, there was no "action taken by a legislative body" that could be found null and void. Where discussions between a city attorney and a city council occur but no action has been taken, there is no ground for relief under section 54960.1. (*Centinela Hospital Assn. v. City of Inglewood* (1990) 225 Cal. App. 3d 1586, 1599 [275 Cal. Rptr. 901].)
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> *Boyle*, 70 Cal. App . 4th at 1118.

The *Centinela* case cited by *Boyle* concerned in part an allegation that private meetings held between the city attorney and each of several members of the city council prior to a noticed public hearing at which the council voted to grant a special use permit violated the Brown Act. The court of appeal held that plaintiff's allegations did not give rise to a cause of action under section 54960.1:

> While the pleading herein alleges that there were *discussions*, the petition does not allege that in such discussions any action was taken within the meaning of section 54960.1. It is without dispute that all "actions taken" by the city council herein were at duly noticed public hearings.
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> *Centinela Hosp. Ass'n*, 225 Cal. App. 3d at 1599.

An unpublished First Appellate District decision upholding an Alameda County Superior Court ruling sheds further light on what constitutes "actions taken" for purposes of the Brown Act. *McKee v. San Francisco Bay Area Rapid Transit Dist. Bd. of Dirs.*, 2012 Cal. App. Unpub. LEXIS 2556 (Apr. 4, 2012). There, the Bay Area Rapid Transit District (BART) Board of Directors had adopted a resolution at a noticed public meeting in April 2009 authorizing its general manager to apply to the Metropolitan Transportation Commission (MTC) for federal funding under the American Recovery and Reinvestment Act of 2009 (ARRA). The following January, as the grants deadline approached and questions arose about BART's compliance with the funding requirements, the Federal Transportation Agency (FTA) administrator wrote to MTA and the BART general manager asking whether BART desired

[7] The second reason is that the City Council cured the violation by subsequently rescinding all action taken at the May 28 meeting in relation to the addition of the lawsuit item and did so within the 30-day period provided for in section 54960.1(c)(2). *Boyle*, 70 Cal. App. 4th at 1118.

to continue pursuing the ARRA funding. There was no dispute that, under the prior resolution, BART's general manager could have responded without further consultation with the BART board. *Id.* at *3. However, her response letter affirming BART's intent to continue pursuing the funding contained signatures of eight of the nine BART board members. Plaintiff alleged that this constituted a serial meeting in violation of the Brown Act, and demanded that BART rescind the action taken. BART's counsel wrote back that the letter "simply reiterated a position taken by the board in publicly noticed meetings on a [sic] least two occasions, including the 2009 resolution authorizing staff to pursue federal funding, and clearly does not constitute an 'action' as defined in the Brown Act." *Id.* at *5.

Both the trial court and the court of appeal agreed.

> We hold that the letter response by the signing board members did not constitute action taken, and thus did not violate the Brown Act. It did not change the previously and openly voted commitment of the board to pursue federal funding for the project, and no collective board action was required to respond to the [FTA] letter since the general manager, who also signed it, had the authority to issue the response on her own.
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> *Id.* at *15-16.

The court of appeal also rejected plaintiff's argument that the letter constituted new "action taken" because it was signed by eight of nine members, while the original resolution passed by a vote of seven to two.

> Actions by legislative bodies are often divided but collective concurrences, and it is the result that must count as the action, not the particular breakdown of the vote. In [plaintiff's] view, apparently, there would be new action not only upon any shift of a member's view, but also when board membership changed. It is a meaningless distinction when the prime concern of the Brown Act is ensuring that legislative bodies' "actions be taken openly and that their deliberations be conducted openly." (§ 54950.) The particular breakdown of a vote on an action appears to be immaterial unless, of course, the concurrence shifts enough that the outcome is different.
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> *Id*. at *14-15.

Note that this implies the reporting of the actual vote tally is "immaterial" under the Brown Act. However, where "action is taken," the Act does state that the legislative body "shall publicly report any action taken in closed session and the vote or abstention on that action of every member present . . . ." § 54957.1(a).

With these principles in mind, we address the specific questions posed.

C. Closed Session Discussion – Pending or Proposed Litigation

Section 54956.9 authorizes a legislative body to hold a closed session "to confer with, or receive advice from, its legal counsel regarding pending litigation when discussion in open session concerning those matters would prejudice the position of the local agency in the litigation." It also allows for a closed session discussion with counsel when "there is a significant exposure to litigation against the local agency" or "the legislative body of the local agency has decided to initiate or is deciding whether to initiate litigation." § 54956.9(d)(2) & (4). Note that the Attorney General has opined that the agency's counsel must be present at the closed session for the litigation exception to apply. Cal. Atty. Gen., The Brown Act, p. 40 (2003).

If the litigation arises from a claim made under the Tort Claims Act or some other writing threatening litigation, the claim or writing "shall be available for public inspection pursuant to Section 54957.5." § 54956.9(e)(3). However, "[n]othing in this section shall require disclosure of written communications that are privileged and not subject to disclosure pursuant to the California Public Records Act . . . ." § 54956.9(f).

Section 54957.1 describes the manner and content of the public report that is required at the conclusion of the closed session discussion of pending or proposed litigation if there has been action taken by the legislative body. Two provisions of that section are applicable here: subdivision (a)(2) concerning approval given to legal counsel to defend, to seek or refrain from seeking appellate review, or to file as amicus curiae in any form of litigation; and subdivision (a)(3) concerning approval given to legal counsel to settle pending litigation.

Subdivision (a)(2) requires that approval "to defend, or seek or refrain from seeking appellate review or relief, or to enter as an amicus curiae in any form of litigation" after a closed session consultation with legal counsel pursuant to section 54956.9 "shall be reported in open session at the public meeting during which the closed session is held." The report must identify the litigation adversary if known and the substance of the litigation; however, if the approval is to initiate or intervene in an action, the parties and substance need not be identified until the action is formally commenced, at which time it must be "disclosed to any person upon inquiry, unless to do so would jeopardize the agency's ability to effectuate service of process . . . [or] its ability to conclude existing settlement negotiations to its advantage." § 54957.1(a)(2). Again, however, this report is required only if the legislative body took collective action to initiate or defend the litigation, or to file or decline to file the appeal. Based on the statutory language and case law, our opinion is that if the particular action being discussed was authorized by the City Attorney once the litigation is underway, e.g., the filing of a motion, brief or appeal, then no report should be required unless the legislative body takes action to change course, e.g., preclude the City Attorney from filing the motion or continuing with the litigation. *See McKee*, 2012 Cal. App. Unpub. LEXIS 2556 at *15-16.

Subdivision (a)(3) requires the legislative body to report out from a closed session in which it has approved a settlement of pending litigation. If the approval is of a settlement offer signed by the opposing party, then the legislative body must report its acceptance and the substance of the settlement at the public session of the meeting at which the closed session took place. § 54957.1(a)(3)(A). If final approval rests with another party to the litigation, then the report is not required until the settlement becomes final, at which point the fact of approval and substance of the

agreement must be disclosed "upon inquiry by any person." § 54957.1(a)(3)(B). Note that under the City Charter, Council approval is required for settlement or dismissal of litigation. Charter § 401(6).

CONCLUSION

The Brown Act allows the City Council to meet in a properly noticed closed session with the City Attorney to discuss pending or proposed litigation, including a litigation settlement. If the Council takes action at that closed session to initiate, defend or intervene in litigation, to authorize or decline to authorize an appeal, or to approve a litigation settlement, a public report of the action taken is required, although the timing and the content of that requirement varies. However, if the Council has not taken action within the meaning of the Brown Act because, for example, it has already authorized the action and is not changing course, then no public report is required.

KG:NL
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