



## *Everyday Ethics for Local Officials*

### **Closed Session Leaks: Discretion is the Better Part of Valor – and Ethics**

*October 2010*

#### **QUESTION**

We believe one of our elected officials frequently discloses information from our closed session discussions. Our agency scrupulously follows open meeting laws and announces the results of closed session decisions as the law requires. Our agency counsel diligently keeps us informed about what may and may not be discussed during closed session.

Our colleague, however, says that he believes in a higher level of transparency than required under the state's open meeting laws. This has compromised our agency's position on more than a few occasions; specific examples include instances where the agency's negotiating positions with unions, real property owners and individuals suing the agency have been disclosed.

In fact, the situation has grown so bad that staff is hesitant to share sensitive information in closed session out of a concern that the information will immediately become public.

#### **ANSWER**

Let's start by examining transparency as a value. In the public sector, transparency provides the public with access to information and helps people participate knowledgeably in public agency decision-making processes. It also helps the public understand what actions decision-makers have taken and, as a result, evaluate whether those actions are in the public's interest.

#### **Thanks to Our Supporter**

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Burke, Williams & Sorensen represents cities, counties, redevelopment agencies, joint powers authorities and special districts throughout California. *Western City* and ILG appreciate Burke, Williams & Sorensen's shared commitment to promoting ethics in public service.

## Closed Sessions: A Question of Competing “Right” Values

As discussed in this column in other contexts, there can often be competing “right” values at stake in a situation. When it comes to closed sessions, some of the competing right values include:

- Respect for certain individuals’ privacy;
- Public officials’ overall responsibility to stretch limited public resources as far as possible in serving the public’s needs; and
- Public safety.

A related value is public officials’ responsibility to make decisions based on the best information and options available.

For example, responsible oversight of taxpayer dollars is the reason that the state’s open meeting laws provide for closed sessions on such things as a public agency’s negotiating positions with property owners, unions and litigants. Securing the best deal for the public in negotiations is much more difficult if the public agency’s negotiating position and strategy are known. Making these decisions in closed session helps decision-makers serve their communities by being careful stewards of public resources.

Leaks of negotiating strategies and positions typically result in the public getting a less favorable deal in negotiation — something that public agencies cannot afford, especially in these difficult economic times. Suppose the leaker discloses the agency’s bottom line; in other words, decision-makers set a maximum parameter of “x” amount, but directed the negotiator to try to get the other side to agree to less. When the other side knows how high the agency will go, they simply insist on getting the maximum. So the leaker has given away whatever amount less than “x” that the other party might have agreed to.<sup>1</sup>

For this reason, when a leaker discloses information in an effort to curry favor with those who benefit from the confidential information in their negotiations with the agency, no competing right value is involved. The leak is a breach of the leaker’s legal and ethical responsibilities to his or her constituents. This is also likely to be the case if the leak is motivated by a desire to torpedo policy objectives with which the leaker disagrees.

In your question, you also note that staff is becoming reluctant to share all the information decision-makers may benefit from to make an informed decision. This results in elected decision-makers — including the leaker — receiving less than complete information needed to make well-informed decisions in closed sessions.

### What Closed Session Information Is Confidential?

“Confidential information” is a communication made in a closed session that is specifically related to the reason for the closed session.<sup>23</sup> There may be some kinds of information disclosed in closed session that are not confidential and therefore can be disclosed.<sup>24</sup> Agency counsel can answer questions regarding what information is confidential and what is not.

The Brown Act, the state’s open meeting law, generally balances the values of transparency and responsibility in how it treats closed sessions. One way it does this is by requiring that public agencies describe the nature of the closed session item on the agenda.<sup>2</sup> This usually enables the public to know that a given topic area (at least in general terms) is being discussed and, if the public chooses, offer their thoughts before the agency goes into closed session.<sup>3</sup>

The Brown Act also requires the public agency to “report out” to the community the actions taken in a closed session.<sup>4</sup> Sometimes the initial disclosure is limited to prevent compromising the public agency’s negotiating position.<sup>5</sup> However, once the negotiations are concluded fuller disclosure may occur so the public can hold its representatives accountable for the decisions made in closed session.<sup>6</sup> Agency officials may collectively decide to routinely disclose such information at the appropriate time, in the spirit of transparency and the public interest.

### **Transparency Standards: A Collective Decision**

In general, local agencies may adopt policies providing for greater transparency than that provided by state law, and a number of agencies have done so. However, when it comes to confidential information learned during closed sessions, the decision to provide greater transparency must reflect the collective judgment of the decision-making body. It is not, under most circumstances, one that an individual elected official may make for him- or herself.

For this reason, the Brown Act specifically *prohibits* the disclosure of confidential information acquired in closed session:<sup>7</sup>

A person may not disclose confidential information that has been acquired by being present in a closed session ... to a person not entitled to receive it, *unless the legislative body authorizes disclosure of that confidential information.*<sup>8</sup>

#### **Brown Act Resources**

The League of California Cities, in collaboration with a number of other associations, publishes a plain language explanation of the Brown Act’s requirements called *Open and Public: A Guide to the Ralph M. Brown Act*. The 44-page guide is currently in its fourth edition and offers an excellent resource for those who want to understand the Brown Act’s various provisions. The resource is available online without charge online and also is available for sale for \$20 from the League’s publications unit at (916) 658-8247.

Recognizing that there may be some members of boards and commissions who may want to understand just the key elements of the law that apply to their roles, the Institute for Local Government makes available a short pamphlet for local agencies to distribute. Titled *The ABCs of Open Government Laws*, the pamphlet is three-hole punched and suitable for inclusion in “congratulations on your appointment” letters, agenda binders and orientation packets for newly elected and appointed officials.

Thanks to generous funding from Richards, Watson and Gershon, the pamphlet has just been updated. Complimentary sample hard copies are being sent to city and county clerks in November. The pamphlet is also available online at [www.ca-ilg.org/abc](http://www.ca-ilg.org/abc) or for sale for \$2 each. Quantity discounts for hard copies are available, as well as licenses to duplicate an electronic version.

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This language underscores the notion that if confidential information is to be disclosed, such a decision is the prerogative of the group of decision-makers — not simply one individual.

### **What About the Leaker’s Right to Free Expression?**

The Brown Act creates a small window for a closed-session participant to share his or her opinion concerning the propriety or legality of actions taken by a legislative body of a local agency in closed session.<sup>9</sup> Thus, if the leaker is concerned that the agency’s negotiating position needs to be thriftier, the official can say something along the lines of, “I think our upper limit is too high.” If asked for specifics, the official should say, “Because I want our community to get the best deal possible in these negotiations, I am not going to undermine our negotiators’ efforts by disclosing our negotiating strategy.” Beyond such statements, however, the courts have rejected the notion that an elected official has a free-expression right to share confidential information.

One case<sup>10</sup> involved elected officials’ sharing information from a personnel closed session. Two elected officials discussed with the local newspaper the reasons for terminating an employee. One described the perceived problem from the board’s perspective, and the other described his own concerns. The newspaper published the comments the next day.

The employee sued for slander, among other things. The elected officials tried to get the action summarily dismissed as an exercise of their protected rights to free expression.<sup>11</sup> The elected officials lost unequivocally at both the trial and appellate court levels, which underscores just how strongly embedded the concept of preserving closed session confidentiality is. This occurred even though the Brown Act did not at the time include the language mentioned earlier expressly forbidding disclosure of closed session information.

Accordingly the employee was allowed to pursue his case, which was settled shortly thereafter, with the employee receiving \$372,000 *plus* retirement benefits as well as \$300,000 to reimburse the employee’s attorney fees in pursuing the matter. The settlement also included an apology to the employee.<sup>12</sup>

### **Disclosure to Redress Wrongdoing Is a Different Matter**

There are exceptions to the ban against disclosing confidential closed session information. The exception allowing an official to share his or her opinion concerning the propriety or legality of actions taken in closed session has already been mentioned.<sup>13</sup>

Disclosure of confidential information is lawful if the official is making a *confidential* inquiry or complaint to a district attorney or grand jury concerning a perceived violation of law.<sup>14</sup> Similarly, disclosures that would be protected under the whistle-blower protection laws do not violate the ban.<sup>15</sup> (For more information about whistle-blower protections, see the April 2005 “Everyday Ethics” column titled [“For Whom the Whistle Blows”](#)).

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## Brown Act Remedies: Injunctions And Grand Juries

The Brown Act offers a variety of remedies<sup>16</sup> for unauthorized disclosure of confidential information, including:

- A court injunction (violation of which would be punishable as contempt of court) to prevent disclosure of confidential closed session information; and<sup>17</sup>
- Referral to the grand jury for an examination of whether the official should be removed from office for willful and corrupt misconduct.<sup>18</sup>

It is worth noting that the attorney general has opined that a public agency may *not* make it a misdemeanor to disclose closed session leaks.<sup>19</sup>

Pursuing such remedies in any given instance requires proof that an individual did indeed disclose confidential information.

### Preserving Closed Session Confidentiality: Other Steps

As with most ethics issues, there is no silver bullet to prevent leaks. The best way to discourage misbehavior is to take steps to create a strong organizational culture of ethics. This means promoting both decision-makers' and the public's full understanding of and support for the concepts underlying the open meetings law, including the public interest rationale for closed sessions.

Some steps to consider include:

- Annual Brown Act training for major decision-making bodies (above and beyond that required by AB 1234);
- Distributing information about the Brown Act to all agency decision-making bodies (see "Brown Act Resources"), and
- Creating an ethics/transparency section of the agency's website to offer both voluntary disclosures and mandated disclosures (for more information, see the June 2009 "Everyday Ethics" column titled ["The Gift That Keeps on Giving: Changes to the Gift Rules, Part 2 of 2"](#)).

### Other Closed Sessions: Privacy and Security Concerns

Another kind of permissible closed session relates to privacy concerns. For example, closed sessions may also be used to consider the appointment, employment, performance evaluation, discipline or dismissal of a public employee or to hear complaints or charges brought against an employee.<sup>20</sup> Considering license applications submitted by people with criminal records is another type of privacy-motivated permissible closed session.<sup>21</sup>

The Legislature's goal in providing for closed sessions under these circumstances is to protect people from embarrassment and encourage candid discussion among decision-makers. In addition, as it relates to applicants for a position, it can create issues for a candidate at his or her current agency if it becomes known that the candidate is interested in alternative employment. If an agency has a reputation for closed session leaks, the agency may not attract the best candidates when it has vacancies to fill.

Public safety concerns motivate the Brown Act provision allowing local officials to meet in closed session with law enforcement regarding public security.<sup>22</sup>

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Additional types of information that could be posted on an ethics/transparency section of a public agency website include:

- Ethics-oriented mission and values statements;
- Any agency-adopted code of ethics;
- Signed statements from public officials agreeing to abide by the code of ethics;
- Statements of economic interests filed by public officials; and
- The resolution of items that were discussed and approved in closed session but were not reported out because consummation of the agreement rested with someone else. Such a site can also link to basic information on the Brown Act.

A community that is convinced its leaders work hard to promote the public’s interests and operate transparently will be less inclined to support leaders who leak closed session information under the guise of transparency.

This column is a service of the Institute for Local Government’s Ethics Project, which offers resources on public service ethics for local officials. For more information, visit [www.ca-ilg.org/trust](http://www.ca-ilg.org/trust). Special thanks to Burke, Williams & Sorensen for its support of this column. Juli C. Scott, chief assistant city attorney, Burbank, and Rob Ewing, city attorney, Danville, also contributed to this article.

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## Endnotes

<sup>1</sup> See *Sacramento Newspaper Guild v. Sacramento County Board of Supervisors*, 263 Cal. App. 2d 41, 46 (1968) , noting in the context of settlement discussions that “If the public’s ‘right to know’ compelled admission of an audience, the ringside seats would be occupied by the government’s adversary, delighted to capitalize on every revelation of weakness.”

<sup>2</sup> See Cal. Gov’t Code §§ 54954.2, 54956. See also Cal. Gov’t Code §54954.5 (“safe harbor” closed session agenda descriptions).

<sup>3</sup> See Cal. Gov’t Code §§ 54954.3(a).

<sup>4</sup> See Cal. Gov’t Code §§ 54957.7(b). See also Cal. Gov’t Code §§ 54957.1.

<sup>5</sup> See, e.g., Cal. Gov’t Code §§ 54954.1(a)(1)(B) (agreement concluding real estate negotiations—other party needs to act), 54957.1(a)(3) (settlement negotiations—other party needs to act), 54957.1(a)(6) (labor negotiations—disclose after agreement has been accepted).

<sup>6</sup> See Cal. Gov’t Code §§ 54957.1.

<sup>7</sup> See Cal. Gov’t Code § 54963.

<sup>8</sup> See Cal. Gov’t Code §54963(a) (emphasis added). This language specifically refers to the following kinds of closed sessions: section 54956.7 (applications for a license by those with a criminal record), 54956.8 (real property negotiations), 54956.86 (complaints regarding health plans), 54956.87 (county-operated health plans), 54956.9 (conference with legal counsel regarding litigation), 54957 (personnel closed sessions and conference with law enforcement officials regarding threats to public), 54957.6 (labor negotiations), 54957.8 (pending investigations/cases of multi-jurisdictional law enforcement authorities, or 54957.10 (requests for early withdrawal of deferred comp).

<sup>9</sup> See Cal. Gov’t Code §54963(e)(2).

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<sup>10</sup> See *Harron v. Bonilla*, previously published at 125 Cal. App. 4<sup>th</sup> 738 (2005), rev. granted and then dismissed (2006). Note that review was granted in conjunction with *Flatley v. Mauro*, 39 Cal. 4<sup>th</sup> 299 (2006), in which the California Supreme Court held that a defendant may not claim the benefits of the Anti-SLAPP laws (see footnote 15 below) if the underlying speech or activity was illegal as a matter of law.

<sup>11</sup> See Cal. Code Civ. Proc. § 425.16 (known as the Anti-Strategic Litigation against Public Participation law, or anti-SLAPP law).

<sup>12</sup> Lawyers and Settlements, <http://www.lawyersandsettlements.com/settlements/09548/district-attorney-fired.html> ; *San Diego Union Tribune*, October 4, 2007, <http://legacy.signonsandiego.com/news/metro/20071004-9999-1m4b2briefs.html>

<sup>13</sup> See Cal. Gov't Code §54963(e)(2).

<sup>14</sup> See Cal. Gov't Code §54963(e)(1).

<sup>15</sup> See Cal. Gov't Code §54963(f) (referring to section 1102.5 of the Labor Code and Article 4.5 (commencing with Section 53296) of Chapter 2 of the Government Code).

<sup>16</sup> Note too that employee leaks may result in disciplinary action, see Cal. Gov't Code §54963(c)(2), if the employee has been made aware of the prohibition. See Cal. Gov't Code §54963(d).

<sup>17</sup> See Cal. Gov't Code §54963(c)(1). See also Cal. Code Civ. Proc. §§ 1209(a)(5), 1218 (The disobedience of a lawful judgment or order of a court constitutes a contempt punishable by a fine of up to \$1000, imprisonment not exceeding five days, or both.)

<sup>18</sup> See Cal. Gov't Code §54963(c)(3). See also Cal. Gov't Code § 3060; see *People v. Tice*, 146 Cal. App. 2d 750, 754 (1956); *Steiner v. Superior Court*, 50 Cal. App. 4th 1771 (1996).

<sup>19</sup> 76 Cal. Ops. Att'y Gen. 289 (1993).

<sup>20</sup> See Cal. Gov't Code § 54957(b)(1).

<sup>21</sup> See Cal. Gov't Code § 54956.7.

<sup>22</sup> See Cal. Gov't Code § 54957.

<sup>23</sup> See Cal. Gov't Code §54963(b).

<sup>24</sup> See Cal. Gov't Code §54963 (e)(3).