LOS ANGELES COUNTY DISTRICT ATTORNEY'S OFFICE
BUREAU OF FRAUD AND CORRUPTION PROSECUTIONS
PUBLIC INTEGRITY DIVISION

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January 24, 2011

The Honorable Members of the Los Angeles County Board of Supervisors
Hall of Administration
500 West Temple Street
Los Angeles, California 90012

Subject: Allegation of Brown Act Violations by the Los Angeles County Board of Supervisors
PID Case 11-0629

Dear Board Members:

The Public Integrity Division received a complaint alleging that the Los Angeles County Board of Supervisors ("the Board") violated the Brown Act when it met with a number of public officials from state and local agencies, including the Governor of the State of California, in closed session on September 26, 2011, to conduct a "conference regarding potential threats to public services or facilities" arising from the impact of AB 109, legislation that is commonly referred to as "realignment" of the criminal sentencing and corrections system in California. We have concluded our inquiry, which involved review of a recording of the closed session conference that was made available to this office for the sole purpose of this review by county counsel, along with documentary evidence and the applicable law. Our analysis and findings are set forth below.

FACTUAL BACKGROUND

An agenda was posted on September 23, 2011, for a special meeting to be held on Monday, September 26, 2011, at 2:00 p.m. It provided:

> NOTICE OF CLOSED SESSION
> CS-1. CONFERENCE REGARDING POTENTIAL THREATS TO PUBLIC SERVICES OR FACILITIES
> (Subdivision (a) Government Code Section 54957)
> Consultation with the Sheriff, Chief Probation Officer, Department of Mental Health, Secretary of California Department of Corrections and Rehabilitation, and the Secretary of California Health and Human Services Agency, or their respective deputies, and other appropriate and necessary County and State officials, on matters posing a potential threat to the public's right of access to public services or public facilities to the impact of AB 109. (11-4198).

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The information reviewed demonstrates that the meeting was attended by a number of persons, including the Governor, the Honorable Jerry Brown. The meeting was also publicized on the Governor's website:

> 9-26-2011
> LOS ANGELES – Governor Edmund G. Brown Jr. today will meet with Armenian President Serzh Sargsyan at a luncheon hosted by Los Angeles City Councilmember Paul Krekorian and will later meet with the Los Angeles County Board of Supervisors to discuss realignment and other issues impacting the county.
>
> **Lunch with Armenian President**
> When: Today, Monday, September 26, 2011 at 12:30 p.m.
> Where: Los Angeles City Hall, 200 N. Spring St., Los Angeles, CA 90012
>
> **Meeting with L.A. County Board of Supervisors**
> When: Today, Monday, September 26, 2011 at 2:00 p.m.
> Where: Kenneth Hahn Hall of Administration, 500 W. Temple St., Los Angeles, CA 90012
>
> **NOTE: These meetings are closed to the press.

The information appearing on the Governor's website indicating that the "meetings are closed to the press" is consistent with the official posting of the agenda item for the Board of Supervisors meeting in closed session on the subject of AB109, and the same date, place and time are identified.

On the date and time posted, the Board of Supervisors met with a variety of other government officials, including the Governor and other representatives from state agencies, in closed session. The general topic of discussion was realignment.

ANALYSIS

The Los Angeles County Board of Supervisors is a legislative body as defined by Government Code Section 54952. All meetings of the legislative body of a local agency shall be open and public, and all persons shall be permitted to attend any meeting of the legislative body of a local agency, except as otherwise provided in this chapter. *Government Code Section 54953.* No closed session may be held by any legislative body of any local agency except as expressly authorized by the Brown Act or other statutory exceptions listed in Government Code Section 54962. Because the closed session exceptions limit the public's right of access, the legal authority must be narrowly construed. *See Shapiro v. San Diego City Council, 96 Cal.App.4th 904, 917, see also Cal.Const. art I, section 3(b)(2).*

Government Code Section 54957 permits closed sessions with the Attorney General, district attorney, agency counsel, sheriff, or chief of police, or their respective deputies, or a security consultant or a security operations manager, on matters posing a threat to the security of public buildings, a threat to the security of essential public services, including water, drinking water, wastewater treatment, natural gas service, and electric service, or a threat to the public's right of access to public services or public facilities.

In an opinion dated May 4, 1978, the Attorney General considered whether a Board of Police Commissioners was permitted to meet in closed session to hear reports from and issue instructions to the chief of police regarding the conduct of confidential police investigations, the deployment of police personnel, the utilization of particular police tactics and similar matters, the public discussion of which would impair the ability of the police force to effectively carry out its duties. In short, "the question is whether the Legislature has authorized the Board to conduct all its 'sensitive' business with the chief of police in private. In our view, it has not. Authority for executive session must therefore be found in the explicit terms of the Act, or implied from some other confidentiality provision such as that which attaches to confidential records. Insofar as this may be deemed an inadequate solution, the problem appears to be one for legislative resolution." *61 Ops. Cal.Atty.Gen. 220* (1978).

A review of the legislative history of the Brown Act demonstrates the consistent intent of the legislature to permit closed session consideration by local legislative bodies for recognized areas of privilege, such as the attorney-client privilege, real estate and labor negotiations, employee privacy rights, and matters related to the protection of critical public services and infrastructure, like water and electrical services, as well as public buildings and employees, from security threats like riots, violent protests, or terrorist attacks. Notably, the Legislature has never revised the law to permit closed session consideration of "sensitive business" as discussed in the 1978 opinion of the Attorney General cited above. Rather, the Legislature has consistently adhered to narrow definitions of permissible closed session exceptions of the Brown Act, provided suggested language for purposes of ensuring sufficient public notice of such matters, and articulated the process by which public comment on such matters and public disclosure of action taken in closed session must be accomplished.

Section 54957 of the Brown Act was amended in 1971 (SB 833) to authorize local legislative bodies to hold executive sessions with the Attorney General, district attorney, sheriff or police chief or their respective deputies on matters posing a threat to the public's right of access to public services or public facilities. Sponsors of the bill argued that high security trials, bombings of public buildings, and potentially violent mass protests all require planning for the protection of the public and public employees. The impetus for the amendment was the threat of violence facing the public and public employees from riots, violent protests, bombings, and other dangerous activities that marked the early part of the 1970's, particularly in Alameda County.

In 1993, legislation that significantly expanded the Brown Act closed session language was adopted (*AB1426*), which specifically articulated the exceptions for closed session consideration previously established by the appellate courts regarding matters within existing, recognized legal privileges (*Government Code Section 54956.9, 54957*), and which provided the "safe harbors" language by which such matters should be agendized (*Government Code Section 54954.5*).

Section 54957 was amended in 2001, to permit a security consultant or security operations manager in closed session regarding a threat to the safety and delivery of essential public services, including water, drinking water, wastewater treatment, natural gas service, and electrical services. The expansion of this section came in response to the events on September 11, 2001. In his signing message, Governor Davis stated:

> "I am signing Assembly Bill 2645, which expands the scope of closed meetings for local government agencies under the Ralph M. Brown Act, to include matters involving the security of water and electricity infrastructure and services.
>
> In the wake of the terrorist attacks on September 11, 2001 greater confidentiality for local and state public meetings is warranted when issues of public safety are being discussed. Though I am signing this bill, I am concerned that state agencies cannot meet in closed session to address security issues relating to the state's critical infrastructure. Therefore, I am directing the State and Consumer Services Agency, in consultation with the Office of Emergency Services, to work with the Legislature on legislation that would permit all public entities to meet in closed session when discussing certain security issues that, if revealed, would compromise public safety and the state's critical infrastructure."

Governor Davis's comments illustrate the true intent of the legislature, not to provide closed session sanctuary for discussions of "sensitive business", but rather to ensure that public agencies, both local and state, have the ability to adequately and securely prepare for impending threats to critical infrastructure components and to the safety of the public.

Despite repeated amendments, many in response to appellate decisions upholding closed session meetings on matters involving established areas of privilege like attorney-client discussions, and employee privacy rights, the Legislature has never taken action to permit closed session consideration of "sensitive business" as discussed in the 1978 opinion of the Attorney General cited above. Rather, the legislature has consistently adopted statutory language that defines closed session exceptions of the Brown Act for recognized areas of privilege and matters of public necessity, like threats to critical public services and public facilities.

It is indisputable that AB109, which mandates realignment of the criminal justice system, is a matter of significant concern at the state and local level. There is no evidence that concerns about implementation of AB109 included threats of riots, violent outbursts, terrorist activities, or other threats to the security of public buildings, essential public services, or the public's right of access to services or facilities. Realignment does not pose a threat to essential public services like the water supply, electrical services, or access to public buildings, nor has there been any indicia of any anticipated civil uprising or violent protest related to AB109 that threatens public safety, public employees or public facilities.

By letter dated November 22, 2011, to Steve Cooley, District Attorney, the office of County Counsel explained, on page 3, that the meeting in question was needed because "October 1 was quickly approaching and *the inadequate actions by the state in both describing the AB 109 population and in providing funding for that population constituted a potential threat to the public's access to public services and facilities*, which needed to be frankly discussed outside of a public meeting." (Emphasis added). No one can reasonably challenge the accuracy of those statements. But the inability to accurately predict how many prisoners, parolees, probationers and potential defendants will be impacted by the implementation of AB109, and the likelihood that the County will not have sufficient funds for the costs of the implementation are financial issues. There is no doubt that implementation of AB109 will force the county to make hard budgetary choices, the impact of which will likely impact the quality and quantity of services available to residents. However unpredictable the population, and however likely a reduction in services may be, such circumstances lack the urgency and magnitude of a threat to public access to services and facilities contemplated by Government Code Section 54957.

Moreover, the matters discussed in closed session pertained to implementation of the newly enacted laws, including budgetary matters, allocation of resources, and introduction of persons at the state level who will be responsible for handling the challenges, both practical and budgetary, that all parties anticipate will develop as realignment of the criminal justice sentencing and corrections systems is implemented.

Matters like the deployment of personnel and implementation of programs, and concerns about the ability of local agencies to adequately respond to this legislative overhaul of the criminal justice system of sentencing and corrections are "sensitive business," and the impact of this enormous change in the criminal justice system will undoubtedly be profound. However, implementation of the realignment laws does not constitute a potential threat to public services or facilities as articulated by Government Code Section 54957. Consequently, the closed session conducted was simply not permissible under the law.

We agree with County Counsel that the circumstances that gave rise to this meeting are unlikely to recur with regard to the subject of AB 109. We do not believe the risk of recurrence is sufficient to warrant resort to further court process. However, we strongly urge the Board to recall the public's absolute right to open meetings, even in the face of "sensitive business" like realignment. These are difficult and challenging times as the many permutations of AB 109 and the realignment of criminal sentencing and corrections in California take shape. Nonetheless, "The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know." *Government Code Section 54950.* It is imperative, that legislative bodies avoid the temptation of retreating behind closed doors as a means of deflecting public access especially when faced with the challenge of dealing with matters that involve "sensitive business" and instead be willing to tackle such issues in an open and public forum. By so doing, their actions encourage confidence in the integrity of the decision making process, a critical component of effective governance. We urge this Board to demonstrate a renewed commitment to the letter and the spirit of the Brown Act, especially in circumstances that involve "sensitive business."

Very truly yours,

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By

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