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OFFICE OF THE ATTORNEY GENERAL
State of California

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OPINION	:	No. CV 78-103
of	:	April 10, 1979
GEORGE DEUKMEJIAN Attorney General	:	
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SUBJECT: RALPH M. BROWN ACT—No express provision of this Act authorizes two legislative bodies accompanied by their attorneys to meet in executive session to discuss settlement of potential litigation unless these matters are already privileged or confidential by law. Section 54960 was not intended to give either the district attorney or county counsel authority to act as "civil prosecutor" in matters relating to this Act.

The Honorable Stanley M. Roden, District Attorney, Santa Barbara County, has requested an opinion on the following questions:

1. Is it a violation of the Ralph M. Brown Act for the full legislative bodies of a city and a water district, each accompanied by its legal adviser, to meet in a properly noticed executive session to discuss the settlement of potential litigation?

2. In counties which have a County Counsel, does the district attorney have the authority to bring civil actions provided for in section 54960 of the Government Code?

The conclusions are:

1. No express provision of the Ralph M. Brown Act would authorize two legislative bodies accompanied by their attorneys to meet in executive session to discuss the settlement of potential litigation, nor would any implied exception to the open meeting requirements of that act appear to grant blanket authority for such a meeting; however, if matters to be discussed are already privileged or confidential by law, an executive session might be authorized to discuss these particular matters only.

2. Section 54960 was not intended to give either the district attorney or the county counsel the authority to act as "civil prosecutor" in matters relating to the Ralph M. Brown Act.

ANALYSIS

The facts which gave rise to this request for our opinion were set forth briefly in the District Attorney's request, and were elaborated upon by the City of Santa Barbara and the Goleta County Water District.

Thus, the District Attorney set forth the facts as follows:

> "The factual setting of the immediate problem is rather simple. The City of Santa Barbara and the Goleta County Water District, a district organized pursuant to the California Water Code, have for years serviced overlapping geographical areas. The current agreement by which both the city council and the water district provide service is about to expire. A dispute exists as to service deployment once the agreement does expire. Litigation has been threatened.
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> "In order to teach a solution to this problem, the city council and the Goleta water board, accompanied by their attorneys, met in masse in executive session to attempt to resolve the issues. (Copies of the agendas of the respective agencies are enclosed.) This joint meeting was held on June 13, 1978. The substance of the meeting was later to disclose (sic) to have been a proposed settlement of the legal dispute that could very well have led to litigation. (The precise nature and/or minutes of the meeting have been held confidential by the agencies, however.)"

The city and the water district submitted the following "Additional Factual Matters" for our consideration in resolving the question of the legal ty of the executive session:

"1. The subject matter of the dispute and the alternative proposals for settlement were extremely complex and involved far-reaching water service, land use planning, economic and political considerations to both entitles.

"2. Long before the joint executive session of the governing bodies was held, representatives of each entity had met on numerous occasions over an extended period of time in settlement negotiations. The negotiating team from each entity included a member or two of the governing body, the entity's attorney, the entity's manager and other staff members.

"3. The representatives were not able to reach any settlement agreement. Representatives of each entity were of the opinion that settlement was being impeded because the settlement positions of the parties were nor being correctly communicated by the representatives back to their respective governing bodies. Accordingly, as a last resort, it was agreed that the only way to ensure that the settlement discussions were being effectively communicated was to have a joint meeting of the governing bodies.

"4. The joint meeting was held in executive session and the reasons for the prior impasses and a basis for resolving them were discussed. No agreement was reached during the executive session, but as a result of it, additional meetings of the negotiating teams took place and ultimately a tentative settlement agreement was reached.

"5. In addition to the litigation considerations requiring the joint meeting to be held in executive session, each entity was concerned that the public's interest was best served by conducting the meeting in privacy, for the reason that the proposals for modifications in water service between the two entitles could have led to a substantial amount of land-investment speculation and panic sales and purchases.

"6. The entitles made it clear in public announcements at the time of the joint executive session that any settlement agreement arrived at between the two entitles would be only 'tentative' in nature, and subject to further public hearings and input, environmental impact studies and the review by other governmental agencies having jurisdiction over the subject matter, including the local Agency Formation Commission of Santa Barbara County and perhaps the Regional Coastal Commission."

I. The Legality of The Executive Session

The first question presented is whether the above described executive session held jointly by the city council and the water district, accompanied by their legal advisers, was proper under the terms of the Ralph M. Brown Act, section 54950 *et seq*. of the Government Code (hereinafter 'Brown Act"). The city and the district would justify the executive session under one or all of the following rationale since all agree that no express provision of the Brown Act provides for such an executive session:[1] (1) the attorney-client privilege (Evid. Code, §§ 952–954) (2) the exclusionary rule relating to negotiations in compromise of litigation (Evid. Code, § 1152) and (3) the "official information" privilege (Evid. Code, § 1040). Each will be discussed below in that order.

A. The Attorney-Client Privilege

Despite the fact that the Brown Act contains no express provision permitting a legislative body to meet with its attorney in executive session, both the courts and this office have implied such an exception to the act. In 1960, this office recognized the necessity for such meetings in 36 Ops. Cal. Atty. Gen. 175 (1960). Ultimately, case law engrafted such an exception on the Brown Act. Thus, *in Sacramento Newspaper Guild v. Sacramento County Bd. of Suprs*. (1968) 263 Cal. App. 2d 41, the Court held that a legislative body of a local entity, in that case a county board of supervisors, could meet with its attorney within the proper limits of the attorney-client privilege.

The scope of the attorney-client privilege is presently codified in sections 950 through 962 of the Evidence Code (all unidentified section references in Part I are to the Evidence Code.) As codified, it is a rule of evidence. The main operative provision is section 954 of that Code, which essentially provides that a client may refuse to disclose a *confidential communication* with his attorney, and the attorney may likewise claim the privilege unless otherwise instructed by the client. However, the privilege is not restricted to a court or similar hearing where it is to be raised as a shield against testimonial compulsion. In response to a suggestion that it should be so restricted, the court in the *Sacramento Newspaper Guild* case stated that such a "view is too narrow" (263 Cal. App. 2d at p. 53) and it permitted the privilege in a Brown Act context to assure private consultation between a local agency and its attorney.

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[1] The Brown Act, of course, requires all meetings of "legislative bodies" of "local agencies" as defined therein to be open to the public unless expressly otherwise provided therein. Express exceptions to the open meeting requirements are found in Government Code sections 54957 and 54957.6. The usual ones utilized are the "personnel exception" found in the former section, and the exception permitting closed meetings to instruct an entity's labor negotiator found in the latter section.

The section which is perhaps most germane to our inquiry is section 952, which defines what constitutes a "confidential communication":

> "As used in this article, 'confidential communication between client and lawyer' means information transmitted between a client and his lawyer in the course of that relationship and in confidence by a means which, so far as the client is aware, discloses the information to no third persons *other than those who are present to further the interest of the client in the consultation or those to whom disclosure is reasonably necessary for* the transmission of the information or *the accomplishment of the purpose for which the lawyer is consulted,* and includes a legal opinion formed and the advice given by the lawyer in the course of that relationship." (Emphasis added.)

The emphasized language, permitting the presence of certain specified third persons appears even more germane when examined in conjunction with the Law Revision Commission Notes to section 952. These state in part:

> "The words 'other than those who are present to further the interest of the client in the consultation' indicate that a communication to a lawyer is nonetheless confidential even though it is made in the presence of another person—such as a spouse, parent, business associate, or joint client—who is present to further the interest of the client in the consultation. *These words refer, too, to another person and his attorney who may meet with the client and his attorney in regard to a matter of joint concern.* This may change existing law, for the presence of a third person sometimes has been held to destroy the confidential character of the consultation, even where the third person was present because of his concern for the welfare of the client. . . ." (Emphasis added.)

The language emphasized above with respect to the Law Revision Commission's comments, if taken literally, would appear to justify the executive session under consideration herein. Both the city council and the water district board could urge that they and their attorney met with each other "in regard to a matter of joint concern" within the meaning of section 952, and the explanation thereof.[2]

[2] We note parenthetically that the initial negotiations between representatives of each governing body constituting less than a quorum of the body and staff members can be justified under the "less than a quorum exception" to the Brown Act. Similar meetings to discuss joint water problems between two adjoining counties were held to be proper in letter opinion I.L. 76–174 on that basis.

Such a construction, however, would present the anomalous and essentially absurd result that a client could claim a privilege as to a communication with his attorney which was made *in the presence of his adversary*. In our opinion, the Legislature did not intend such a result in enacting section 952.

The essential element in the attorney-client privilege is the intent on the part of the client that the communication be made in confidence. The presence of an adversary, with or without his own attorney, would nullify that essential element. This is exemplified in the case of *Murphy v. Waterhouse* (1896) 113 Cal. 467, 470–471 wherein the Court held:

> ". . . Where two persons are negotiating with each other in the presence of the attorney of one of the parties, the very nature of the transaction, and the circumstances surrounding it, are inconsistent with the notion of a confidential communication between one of the parties and his attorney who happens to be present. . . ."

This reasoning would he applicable to the facts under consideration herein where two parties (the city and the water district) meet with each other in the presence of each of their attorneys to negotiate a settlement of potential litigation. "[T]he circumstance surrounding . . . [the meeting] are inconsistent with the notion of a confidential communication between . . . [either] of the parties and . . . [its] attorney who happens to be present." (*Cf. Mission Film Corp. v. Chadwick P. Corp.* (1929) 207 Cal. 386, 391, a statement furnished by client to attorney for submission to opposing counsel is not privileged; *Scherb v. Nelson* (1957) 155 Cal. App. 2d 184, 187–188, "statements made by the parties to an attorney in the presence of each other, respecting an agreement . . . not privileged.")

Accordingly, it is concluded that the city and the water district herein may not rely upon the attorney-client privilege to justify the executive session in which their legislative bodies met to settle potential litigation.[3]

B. Negotiations In Compromise Of Litigation

As another suggested ground for justifying the executive session between the city council and the water district board, these entitles cite section 1152 of the Evidence Code. That section relates to "settlement conferences" and other offers of compromise, and

[3] Interestingly, the county board of supervisors in *Sacramento Newspaper Guild v. Sacramento County Bd. of Suprs., supra*, 263 Cal. App. 2d 41, 51–52. also sought unsuccessfully to justify its meeting with its opponents on the basis of the attorney-client privilege as presently codified. The facts as found by the court, however, completely nullified any possibility of invoking such privilege.

provides:

> "(a) Evidence that a person has, in compromise or from humanitarian motives, furnished or offered or promised to furnish money or any other thing, act, or service to another who has sustained or will sustain or claims that he has sustained or will sustain loss or damage, as well as any conduct or statements made in negotiation thereof, is inadmissible to prove his liability for the loss or damage or any part of it.
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> "(b) This section does not affect the admissibility of evidence of:
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> "(1) Partial satisfaction of an asserted claim or demand without questioning its validity when such evidence is offered to prove the validity of the claim; or
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> "(2) A debtor's payment or promise to pay all or a part of his preexisting debt when such evidence is offered to prove the creation of a new duty on his part or a revival of his preexisting duty."

This section is clearly an exclusionary rule of evidence with respect to a "settlement conference" held between parties to a potential lawsuit. In order to claim that it also justifies an executive session as an "implied exception" to the Brown Act, this section would also have to have, as its underlying policy or basic purpose, the protection of confidential communications analogous to the attorney-client privilege. However, the purpose of the section is not to foster confidential communications but merely to encourage settlement of disputes with the knowledge that any offers of compromise will not later be used against the offeror in litigation. Thus section 1152 would appear to be *solely* an exclusionary rule of evidence, with no particular purpose to be served therefrom outside a courtroom setting. That this is so is made clear in *Fieldson Associates, Inc. v. Whitecliff Laboratories, Inc.* (1969) 276 Cal. App. 2d 770, 773, where the court stated:

> *"The rule excluding offers of settlement has not generally been regarded as creating a class of privileged communication* (4 Wigmore on Evidence (3d ed.) § 1061). . . . [T]he obvious policy of the statute is to avoid deterring parties from making offers of settlement and to facilitate candid discussion which may lead to settlement of disputes. Negotiations might well be discouraged if a party knew that statements made by him (or his failure to make certain statements) might later be used to prove the invalidity of some other claim which he wished to assert. . . ." (Emphasis added.)

Accordingly, since no "class of privileged communication" is created by section 1152, we conclude that this section may not be relied upon by the city and the water district herein as justification for the executive session held by them to discuss settlement of potential litigation. In short, section 1152 does not, *propria vigor*, give rise to privileged or confidential matters which need to be protected from disclosure by holding closed meetings of public agencies.

C. The Official Information Privilege

As a third ground for justification of the executive session under consideration herein, the city and the water district cite the official information privilege as set forth in section 1040 of the Evidence Code previously found in section 1881 (5) of the Code of Civil Procedure. That section provides:

> "(a) As used in this section, 'official information' means information acquired in confidence by a public employee in the course of his duty and not open, or officially disclosed, to the public prior to the time the claim of privilege is made.
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> "(b) A public entity has a privilege to refuse to disclose official information, and to prevent another from disclosing such information, if the privilege is claimed by a person authorized by the public entity to do so and:
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> "(1) Disclosure is forbidden by an act of the Congress of the United States or a statute of this state; or
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> "(2) Disclosure of the information is against the public interest because there is a necessity for preserving the confidentiality of the information that outweighs the necessity for disclosure in the interest of justice; but no privilege may be claimed under this paragraph if any person authorized to do so has consented that the information be disclosed in the proceeding. In determining whether disclosure of the information is against the public interest, the interest of the public entity as a party in the outcome of the proceeding may not be considered."

Initially, we note that the requester herein essentially asks that we reconsider our prior holdings in which we have implied an exception to the open meeting requirements of the Brown Act to protect privileged or confidential information other than that which falls within the attorney-client privilege.

In a relatively recent letter opinion of this office, we had occasion to review completely a number of these holdings and the interrelationship between the Brown Act and other confidentiality provisions applicable to state and local agencies. In letter opinion I.L. 76–20 1 we held: (1) that an individual county supervisor may not legally divulge the contents of an executive session, and (2) that under the then existing law,[4] a majority of the board could divulge such information, being watchful however, not to divulge information made confidential by statute. In so holding, we reviewed and synthesized almost two decades of holdings of this office as follows:

> "Though this office has not ruled specifically on the question of disclosure of the details of an executive session generally, we have rendered opinions which are of aid in resolving the question.
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> "As early as 1958 we ruled upon the question whether the minutes of an executive session were open to public inspection. 32 Ops. Cal. Atty. Gen. 240, 245 (1958). In this opinion, it was noted that as a general proposition, public records were open to inspection. However, it was further noted that confidential information could be withheld under the 'official privilege' then set forth in Code of Civil Procedure, section 1881(5). See now, Evid. Code, § 1040. We then held:
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> > 'In the course of their fact-finding activities committees of a public agency may obtain information which would come within the privilege of subdivision 5 of section 1881. If the public interest would suffer by the disclosure the agency should invoke the privilege provided for by section 1881, subdivision 5 (*City and County of San Francisco v. Superior Court,* 38 Cal. 2d 156, 161–164; 18 Ops. Cal. Atty. Gen. 231, 234).' 32 Ops. Cal. Atty. Gen. at 245.

"Then in 1961 this office, in a letter opinion, considered the question of public disclosure by a *school board* of material which was presented in an executive session. I.L. 61–93, L.B. 370, p. 49. This opinion concluded: (1) that care had to be taken not to violate section 10751 of the Education Code prohibiting the disclosure of certain 'personnel information' regarding pupils, except as provided therein; (2) that the school board could properly refuse to make public evidentiary material under the 'official privilege' contained

[4] See now Gov. Code, § 54957.2 which provides for a minute book of executive sessions, or recordings thereof, which are confidential and available only to the legislative body. We additionally ruled that under the theory of our prior opinions not even a majority of the board of supervisors could release information otherwise made confidential by this statute which was contained in the minutes.

in section 1881(5) of the Code of Civil Procedure; and (3) that the minutes or other records of the executive session should be kept confidential.

"Several years later, in 44 Ops. Cal. Atty. Gen. 147 (1964), the questions were presented as to (1) whether the *minutes* of an executive session held under the 'personnel exception' of section 54957 should be open to public inspection and as to (2) whether these minutes could be made public by a majority decision of the governing board.

"As to question (1), it was held:

> 'The provisions of Government Code section 54957 constitute a general exception to the requirements of Education Code, section 966, including subdivision (a) thereof which provides that the minutes of all meetings shall be taken and may constitute public records available for public inspection.
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> 'To require that the minutes of an executive session held pursuant to Government Code section 54957 for the limited purpose of considering the appointment, employment or dis missal of employees or to hear charges or complaints against an employee must be open to public inspection would destroy the very purpose of section 54957.
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> 'Section 1002.5 of the Education Code relates only to the formal action of the governing board. The official act of the board, i.e., to appoint, employ or dismiss an employee must be entered in the minutes and he a matter of public record.' 44 Ops. Cal. Atty. Gen. at 148.

"As to question (2), after it was noted that the *employee* has no right to a closed hearing under section 54957, the opinion held:

> 'It is solely within the discretion of the board as to whether all or any portion of the minutes other than the formal action (decision) of the board shall be made public. The board, in making such determination, should consider whether the communication was made in confidence and that the public interest would suffer from disclosure. If it so finds it should invoke the privilege granted under Code of Civil Procedure section 1181 (5). See *City and County of San Francisco v. Superior Court* 38 Cal. 2d 156, 162–163 (1951); *Brotsky v. State Bar*, 57 Cal. 2d 287, 302–303 (1962); 32 Ops. Cal. Atty. Gen. 240, 245 (1958). On the other hand, if there is no compelling legal reason for keeping the minutes of the executive session confidential and disclosure would not be contrary to the intent of Government Code section

> 54957, the board's policy should be to make the minutes available for public inspection. See Government Code section 54950.' 44 Ops. Cal. Atty. Gen. at 149.

"In 1968, we wrote an opinion regarding a confidentiality matter in the context of the Ralph M. Brown Act with a little different twist. In our prior opinions we in effect held that the records which memorialized confidential action or information were themselves confidential. In 51 Ops. Cal. Atty. Gen. 201 (1968) we confronted essentially the opposite situation, and held that where records are made confidential by State law, the actions which the records memorialize should also be confidential. Thus, it was held, as to employer-employee negotiations of a local agency which involved a state conciliator of the Department of Industrial Relations, whose records were confidential:

> 'We would assume that the "records" of the department relating to investigation, mediation and arbitration of labor disputes pursuant to section 65 of the Labor Code could differ tremendously from case to case and as between particular conciliators. Such records might vary from sketchy notes to a complete memorial of what transpired at the negotiations. Regardless, section 65 of the Labor Code and section 1040 of the Evidence Code make such records privileged. By analogy to the *Sacramento Newspaper Guild* case, *supra*, we believe that in order that such privilege have meaning, and the confidentiality required by law be maintained, that the deliberations which such records memorialize must also be privileged and confidential.
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> 'We therefore conclude that under the Ralph M. Brown Act as it is presently constituted, the "full board" may discuss and negotiate in private once a state conciliator has intervened in the proceedings by virtue of the privilege attached to the records of the department.'" 51 Ops. Cal. Atty. Gen. at 206–207.

Cf. 1.1. 72–185: Presentation made by Organized Crime Unit of Department of Justice to CCCJ of its activities, where material is based upon confidential records, may be in executive session under State Agency Act, § 11120, *et seq*.

> "And finally, in 1975 in 58 Ops. Cal. Atty. Gen. 273 (1975), this office held that the records of executive sessions held by the Board of Regents of the University of California to discuss real estate and other fiscal transactions as permitted by section 23101 of the Education Code [fn. omitted] were not open to the public under the California Public Records Act, noting:

'. . . If the records of these sessions became public as they were made, then the very success of the transaction might be placed in jeopardy by circumstances changed by the disclosure of information. The most obvious example is that property values might fluctuate. Thus, the whole purpose of the Legislature in providing for executive sessions would be undermined, for there would be no effective confidentiality of matters which it took more than one executive session to conclude.' 58 Ops. Cal. Atty. Gen. at 278.

"From the foregoing authorities of this office, it would appear clear under current law:

"1. The purpose of executive sessions is to permit discussions of matters which are of a privileged or confidential nature. [fn. omitted]

"2. The memorialization of such sessions into minutes or other written form requires that such records also be treated as confidential.

"3. Where by law, records themselves are confidential, then the actions which they memorialize, or a discussion of them, should be in executive session.

"4. It, therefore, is immaterial whether the disclosure is of records of executive sessions, or is by verbal disclosure of the details of executive sessions. Either would constitute a disclosure of potentially confidential information. As was stated in 51 Ops. Cal. Atty. Gen. 201, 203 (1968), *supra*, quoting from a prior informal opinion:

'"Although oral testimony may not strictly be a record, it is clear that the purpose of the [confidential record] statute is to prevent disclosure of what transpires during conciliation proceedings. There is no point in making the record confidential if oral testimony as to the representative's recollection of the proceedings is to be allowed. *cf: Carpenter v. Gibson,* 80 CA. (2d) 269, 275."'

"5. If information is specifically made confidential by statute, care should be exercised by the legislative body not to disclose such information except as expressly provided by law. As to other information from an executive session, it is within the discretion of a majority of the legislative body to determine whether such matters may be made public, keeping in mind the 'official privilege' and the possible need for continuing

confidentiality."

(See also 61 Ops. Cal. Atty. Gen. 220, 226 (1978), "unless there is some other provision such as a specific or general independent confidentiality provision (e.g. the Public Records Act, [Government Code] §§ 6254 and 6255) upon which to base an executive session, the Board [of Police Commissioners] may not meet with the Chief of Police in private; The 'official privilege' found in Evidence Code Section 1040 [might be of aid in this respect.]"; 58 Ops. Cal. Atty. Gen. 839 (1975), board of supervisors may meet with grand jury in executive session which is held in the exercise of the grand jury's confidential investigatory powers.)

After careful consideration of arguments submitted by the requester, and other interested parties whose views were submitted herein, we reaffirm our prior opinions and the approach taken by this office with respect to the intermeshing of the Brown Act and other confidentiality provisions found in our laws, including the "official information" privilege found in section 1040 of the Evidence Code. We note the reasoning of the Court in the *Sacramento Newspaper Guild* case, *supra*, 263 Cal. App. 2d 41, pointing out such matters as the following:

> "[The Brown Act] is not a microcosm, however, but one element in a structure of constitutional and statutory policies covering the powers, duties and procedures of local agencies of government." (*Id*. at p. 52)
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> ". . . The courts assume that in enacting a statute [the Brown Act] the Legislature was aware of existing, related laws and intended to maintain a consistent body of statutes . . . ." Thus there is a presumption against repeals by implication; they will occur only where the two acts are so inconsistent that there is no possibility of concurrent operation, or where the later provision gives undebatable evidence of an intent to supersede the earlier; the courts are bound to maintain the integrity of both statutes if they may stand together . . . ." Also relevant when the seeming inconsistencies appear in separate codes is the rule declaring that the codes blend into each other and constitute a single statute for the purposes of statutory construction. . . ." (*Id*. at pp. 54–55)

And finally,

> In recommending the bill which became the Brown Act, the Assembly Interim Committee on Judiciary gave no que that it had even considered the statutory lawyer-client privilege of public boards. *Indeed, the committee professed no attempt to cope with the entire gannet of disclosure problems*

in local government. [fn. omitted.]

> *"Parallel to the lawyer-client privilege is that of a public officer to refuse disclosure of communications made to him in official confidence when "[d]isclosure of the information is against the public interest. . . ."*
> *(Evid. Code, § 1040, subd. (a)(b) (2), replacing former Code Civ. Proc., § 1881, subd. 5; see Jessup v. Superior Court, supra, 151 Cal. App. 2d at pp. 107–108.) The interim committee voiced no criticism of the latter privilege, although it too is a possible tool of official secrecy.* Neither the Brown Act nor its history supplies undebatable evidence of a legislative intent to supersede the assurance of private legal consultation stemming from the statutory lawyer-client privilege." (*Id*, at p. 57; emphasis added.)

It is this approach, exemplified in the *Sacramento Newspaper Guild* case, *supra*, that this office has followed, both before and after the decision in that case, to insure that the Brown Act does not "swallow up" all other essential confidentiality provisions applicable to governmental agencies where they hold meetings subject to the Brown Act, or the similar act applicable to state agencies (Gov. Code, § 11120 *et seq*.)[5]

> In affirming our prior holdings, we find support in the recent case of *Henderson v. Board of Education* (1978) 78 Cal. App. 3d 875. That case stated, after quoting extensively from this office's publication "Secret Meeting Laws Applicable To Public Agencies" at the point wherein we summarized our opinions on the "less than a quorum exception":

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[5] It has been suggested that we are in error in applying the *Sacramento Newspaper Guild* case to the "official information" privilege found in section 1040(b) (2) of the Evidence Code, pointing out that as a rule of evidence the party objecting to the claim of privilege may have a hearing and ruling thereon by the court pursuant to section 915 of the Evidence Code.

However, as a general proposition, agendas of public meetings are distributed which should give a que to "interested parties" as to the scope of executive sessions, and the reasons therefor, so as to permit an action in mandamus, injunction or declaratory relief (Gov. Code, § 54960). Section 915 of the Evidence Code may be brought into play with respect to this "civil enforcement" of the Brown Act. Similarly, if a claim of confidentiality is made pursuant to the California Public Records Act, section 6259 provides for an "in camera" hearing pursuant to section 915 of the Evidence Code.

Insofar as one might argue that situations will arise where it cannot be determined in advance that privilege or confidentiality will be claimed, our response is that that is a problem which is not peculiar to such a claim but is just as applicable to any alleged violation of the Brown Act which might arise on the spur of the moment.

> ". . . The Attorney General's position in this respect has consistently adhered to the less than a quorum exception (*Cf*. 51 Ops. Cal. Atty. Gen. 201 (1968); 57 Ops. Cal. Atty. Gen. 209 (1974).) True the opinions of the Attorney General are not binding on the courts (*Lucas v. Board of Trustees,* 18 Cal. App. 3d 988 1196 Cal. Rptr. 4313), *but in the absence of controlling authority we deem the rationale thereof persuasive since the Legislature is presumed to be cognizant of that construction of the statute. . . ."* (*Id*. at p. 883; emphasis added)

In sum, we affirm this office's consistent approach for two decades that the Brown Act is not, in the words of Justice Friedman in the *Sacramento Newspaper Guild* case, *supra*, "a microcosm" but interacts with, and must be read in conjunction with, other provisions in our laws relating to privilege and confidentiality.[6]

Returning to the specific question at hand-the executive session between the city and the water district—we fail to see how section 1040 of the Evidence Code, set forth in

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[6] In so concluding we are mindful of the Court's language in *Pitchess v. Superior Court* (1974) 11 Cal. 3d 531, 540, a criminal discovery case, followed in *Shepherd v. Superior Court* (1976) 17 Cal. 3d 107, 123–124, a civil discovery case, that "Evidence Code section 1040 represents the exclusive means by which a public entity may assert a claim of governmental privilege based on the necessity for secrecy."

Section 1040 of the Evidence Code is applicable "only to information acquired in confidence by a public employee." (See also discussion in *Shepherd*, *supra*, 17 Cal. 3d at p. 124 *et seq*.) However, there are certainly numerous records which are specifically made confidential by statute, *but may not have been received in confidence,* and may in fact be generated by the public agency itself. For example, minutes of executive sessions under the Brown Act itself are specifically made confidential, and are available only to the legislative body, or a court if a violation of the Brown Act is alleged to have occurred (Gov. Code, § 54957.2). Also, section 6254 of the Government Code sets forth many items which need not be disclosed to the public, but may not have been acquired "in confidence." Finally, section 6255 of the Public Records Act sets forth a general exemption from disclosure, which is broader in scope than anything contained in section 6254 (which itself would incorporate by reference through subdivision (k) Evidence Code section 1040), and would include records other than those "received in confidence." See *Los Angeles Police Dept. v. Superior Court* (1977) 65 Cal. App. 3d 661, 664; *Black Panther Party v. Kehoe* (1974) 42 Cal. App. 3d 645, 649–650, 657; *Yarish v. Nelson* (1972) 27 Cal. App. 3d 893, 902.

Since the *confidentiality* provisions of the Public Records Act are broader in scope than the "official information" privilege of Evidence Code, section 1040, we believe that the Public Records Act should control when a discussion of sensitive records is to be undertaken by a public agency, as to whether the discussion should be in executive session. We doubt that the Court in the *Pitchess* and *Shepherd* cases intended to require that legitimate state secrets be broadcast to the public if not within the scope of section 1040 of the Evidence Code.

full above, could provide a *blanket authorization* for the legislative bodies of these two entitles to have met in executive session to discuss settlement of their potential lawsuit. We assume that the city and water district are correct in their statement of additional facts that "[t]he proposals for modifications in water service between the two entitles could have led to a substantial amount of land-investment speculation and panic sales and purchases" and that, therefore, "[t]he public's interest was best served by conducting the meeting in private." However, the "public's best interest" is not an exception to the Brown Act unless that interest may be related to material *already privileged, or already confidential* by statute.

Thus, section 1040, the "official information" privilege in the Evidence Code, grants in subdivision (a) thereof an absolute privilege from disclosure, and in subdivision (b) a conditional privilege from disclosure with regard to "information acquired in confidence by a public employee in the course of his duty and not open, or officially disclosed to the public prior to the time the claim of privilege be made." The language of section 1040 clearly presupposes that the "official information" has already been acquired before the privilege can be claimed. Therefore, a public body, or two public bodies, could not predicate a joint executive session on the basis of "official information" which they were about to acquire from each other *unless that information was already independently privileged or confidential.*

Apropos is the similar problem we ruled upon in 61 Ops. Cal. Atty. Gen. 220 (1978), *supra*. In that opinion a chartered city's board of police commissioners was required to meet with the chief of police to direct his activities. Despite the board's belief that it would be against the public interest to hold these meetings in open sessions, we held, after discussing the Brown Act and prior opinions of this office, as follows:

> "Applying these principles to the question of meetings between the Board and the chief of police, we hold that unless there is some other provision such as a specific or general independent confidentiality provision (e.g., the Public Records Act, §§ 6254 and 6255) upon which to base an executive session, the Board may not meet with the chief of police in private. Section 6254, subdivision (f), regarding police investigations and section 6255, a general codification of the 'official privilege,' would appear to be of appreciable aid in this respect. (*Cf.* letter opinion cited in 58 Ops. Cal. Atty. Gen., *supra*, 839, 840, to CCCJ, 72–185.) Likewise, so might the 'official privilege' found in Evidence Code section 1040.
>
> "In so concluding we note that the result reached herein may appear harsh. However, 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. (*Cf. Bailey v. Superior Court* (1977) 19 Cal. 3d 970, 977.) Authority for executive sessions 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. [fn. omitted]"

Whether any of the information discussed by the city and the water district could have qualified for executive session treatment based upon an *already existing* privilege, or an *already existing* public records act confidentiality, is beyond the scope of this opinion and beyond the scope of this office to determine. As we noted in a letter opinion several years ago, wherein we were asked whether a particular meeting could qualify for executive session under the attorney client privilege, where it was allegedly held to discuss "potential litigation":

> "The function of this office is not to resolve factual disputes, or disputes as to conflicting inferences which may arise from such facts, but to render opinions on legal questions." (*Id*. at I.L. 75–282 p. 3)

Nor do we believe that it is the function of this office to investigate in detail all matters which may have occurred at an executive session and then rule upon whether any of the matters discussed therein may have qualified for executive session treatment as privileged or confidential material. We believe that in such cases we should merely provide the guidelines, which we have attempted to do herein.

We note that it may be that a meeting such as the one between the city and the water district herein could conceivably qualify to be held partially in executive session and partially in public, depending upon the matters under discussion. If, however, such a severance would be impractical, then, absent a change in the law with respect to the requirements of the Brown Act, public agencies attempting to settle such disputes will be required to find means to do so other than holding meetings in executive session between their full legislative bodies.

II. Civil Actions Under Government Code, Section 54960

The second question presented involves section 54960 of the Government Code (all unidentified section references in Part II are to the Government Code), the civil enforcement provisions of the Brown Act. That section provides:

> "Any interested person may commence an action by mandamus, injunction or declaratory relief for the purpose of stopping or preventing

> violations or threatened violations of this chapter by members of the legislative body of a local agency or to determine the applicability of this chapter to actions or threatened future action of the legislative body."

The question is whether in counties which have a county counsel, the district attorney has authority to bring the actions provided for in section 54960. However, more specifically, the requester District Attorney desires a ruling on whether the district attorney or the county counsel may act as civil prosecutor" pursuant to section 54960. Any contemplated action would, therefore, not be on behalf of the county or any of its officers but would he in the nature of a quasi-criminal action brought in the name of the People in aid of the enforcement of the criminal laws.

The request for our opinion on this point was apparently precipitated by a misunderstanding of our holding in 61 Ops. Cal. Atty. Gen. 283 (1978) wherein we ruled, *inter-alia*, that "[t]he district attorney in a county which also has a county counsel may not in his official capacity bring an action pursuant to section 54960 of the Government Code" (*Id*. at pp. 284, 293–295.) In that opinion, however, we did not intend to meet or to decide the issue as to whether the district attorney or county counsel shall act as 'civil prosecutor." We presumed that the *county, or its officers*[7] were substantively interested in the matter discussed or to be discussed in an executive session, allegedly erroneously held, and we ruled that in a true civil action (not in one *nominally* civil but actually quasi-criminal brought to test the legality of the executive session on behalf of the county, or its officers, the county counsel and not the district attorney was to bring the action.

That this was the case is evident from the conclusion as to question three of that opinion (*Id*. at p. 295) where we stated:

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[7] Indeed, a reading of the opinion in its entirety will disclose that the district attorney requester therein appeared to be substantively interested in the matters discussed in executive session by the board of supervisors, that is, salaries and job performance of elected and other county officers.

We can envision situations where a matter to be discussed in executive session might vitally affect the district attorney's office. In such situations, we see no particular legal objection to the district attorney bringing an action pursuant to section 54960 as an "interested party," although a court, reading section 26529 strictly, might decree otherwise. The district attorney essentially would be bringing the action "in pro per" qua district attorney and would not be acting on behalf of the People as public prosecutor.

Likewise, we see no particular legal objection to the district attorney bringing an action pursuant to section 54960 as a private citizen. Again, the district attorney would not be acting on behalf of the People as public prosecutor.

These types of situations, however, are not at issue herein.

> "Accordingly, it is concluded that any civil action which may properly be *brought by the county or any of its officers in their official capacity pursuant to section 54960* cannot be brought by the district attorney in a county such as Del Norte which also has a county counsel." (Emphasis added.)

The underscored language, we believe, demonstrates that the actions which were discussed therein were true civil actions; therefore, the county counsel would be bringing them as the civil attorney in the name of the county or its officers and not as "civil prosecutor" in the name of the People of the State of California.

It has been suggested, however, that any action involving the county that was brought under the Brown Act would find the county in the position of the *defendant*. This supposition may account for part of the misunderstanding regarding our ruling above. We acknowledge that an action *by the county* (or its officers) would not be the usual case. This is evident from our language quoted above wherein we wrote in terms of any civil action "*which may be properly brought*" by the county or its officers. However, we do not believe that it would be beyond the realm of possibility that a county could and would *properly bring* an action pursuant to section 54960 of the Government Code. We will discuss some examples after noting that the term "person" may include the state and its subdivisions. (See *People v. Centr-O-Mart* (1950) 34 Cal. 2d 702, and cases cited therein.)

1. The instant opinion request presents an excellent example of a potential lawsuit at the instance of a county under section 54960. A city and a water district have met in executive session to discuss water problems—a matter we would presume of vital interest to the county and its citizens. The board of supervisors might very well instruct the county counsel to bring an action pursuant to section 54960 of the Government Code to test the legality of that meeting, and to prevent further meetings of that nature if they are declared to have been improper by the court.

2. The prior opinion which gave rise to the instant request presents another example. In that opinion we were asked to rule on the propriety of the board of supervisors discussing job performance of county officers and employees in executive session. Conceivably, the county counsel, as the legal representative of county officers as well as the board of supervisors, could bring an action as attorney for these officers to test the legality of the board's actions with respect to executive sessions.[8]

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[8] It has been suggested that such a suit would involve a clear conflict of interest on the part of the county counsel in that he is appointed by the board, and may be removed by them for "misconduct." (See Gov. Code, § 27640.)

It is possible that such a suit, however, could be brought with the full "blessing" of the board

3. As a final example, we can conceive of the possibility that a subsidiary and sensitive county board or commission which is subject to the Brown Act, such as the planning commission (see Gov. Code, § 54952.5) has been holding questionable executive sessions, much to the alarm of the board of supervisors, the public and the media. The board of supervisors might instruct the county counsel under such circumstances, to sue the planning commission under section 54960.[9]

With these preliminary comments, we reach the issue actually presented in the instant request: whether the district attorney or the county counsel is to act as the "civil prosecutor" under section 54960 of the Government Code. It is the conclusion of this office that the Legislature intended that neither was to be "civil prosecutor" under section 54960. Therefore, any suits brought at the county level would be brought nor as "quasi-criminal actions" but as true civil actions, with the county counsel acting merely as the attorney for the county or its officers. In short, the county counsel would not bring the actions upon his initiative but upon request of the board of supervisors, or some other county office or

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of supervisors in order to clarify its duties. Also, that a suit by the county counsel as attorney for county officers on an opposite side from the *board of supervisors* is not an impossibility is exemplified in a recent action in San Diego County precipitated by Proposition 13. In *Board of Supervisors of the County of San Diego v. Gerald I. Lonergan, Auditor and Controller, et al.* San Diego Super. Ct. No. 421865, the county counsel apparently opted to represent the county auditor-controller and treasurer-tax collector in a suit brought by the board against such officers. The board was represented by outside counsel.

Of course, no statutory "conflict of interest" would arise under Gov. Code, §§ 1090 *et seq.*, 87100 *et seq*., or 1125 *et seq*. Nor would the common law concept of conflict of interest arise in the sense that a public officer (the county counsel would be using his office for his private gain. (See, e.g., 26 Ops. Cal. Atty. Gen. 5 (1955).)

Whether it would be "unethical" for the county counsel to be involved in such a Suit would appear to depend upon the facts of each case—including such matters as prior advice given to the board of supervisors.

Finally, even if a conflict would be deemed to exist, this would not transfer the "civil functions" to the district attorney. The board could authorize outside counsel for the county officers in appropriate cases.

See also 28 Ops. Cal. Atty. Gen. 293 (1956), county counsel and not district attorney is to pass upon legality of claims of boards of supervisors, and no conflict of interest exists; 62 Ops. Cal. Atty. Gen. 54 (1979), Opinion No. CV 77/243 (2/6/79), the County Counsel and not the district attorney may bring an action to recover alleged salary increases paid to members of a county board of supervisors and no conflict of interest exists.

[9] The fact that the county counsel is attorney for both the board of supervisors and the planning commission would not appear any different than the situation faced by this office many times, where we are requested by one client to represent them against another client. See, e.g., *Dittus v. Cranston* (1959) 53 Cal. 2d 284.

officer, as its attorney. (See 61 Ops. Cal. Atty. Gen. 283 (1978), *supra*, and our explanation of our holding in that opinion, set forth above.)

Initially, we note that the Brown Act was originally enacted in 1953 (Stats. 1953, Ch. 1671, § 1). As originally enacted, it contained no specific civil or criminal enforcement provisions. In 1960 the District Court of Appeal, Second District, decided the case *Adler v. City Council* (1960) 184 Cal. App. 2d 763. The action was brought by a taxpayer for declaratory relief and for an injunction to invalidate a rezoning ordinance and to prevent its enforcement. Part of the action was based upon alleged violations of the Brown Act by the planning commission. With respect thereto, the Court held:

> "We think *Turk v. Richard, supra*, 47 So. 2d 543, correctly reflects the spirit of our Brown Act and we conclude that the dinner gathering of June 13, 1958, did not violate the statute, even upon the assumption that that law did apply to charter cities at the time in question.
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> But if the contrary were true it would not follow that the action of the zoning commission (much less that of the city council) in granting a conditional zone change was invalidated by the commission's violation of the act.
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> "*It provides no penalty for infraction and no method of enforcement*. Ordinarily this implies absence of intent to make the statute mandatory, existence of intent to leave it in the discretionary class. 'The requirements of a statute are directory, not mandatory, unless means be provided for its enforcement.' (*Gowanlock v. Turner*, 42 Cal. 2d 296, 301 [267 P.2d 310].) See also *Whitley v. Superior Court*, 18 Cal. 2d 75, 80 [113 P.2d 449]; *Abbott v. City of San Diego*, 165 Cal. App. 2d 511, 522, 524 [332 P.2d 324]; *Jefferson Union Sch. Dist. v. City Council*, 129 Cal. App. 2d 264, 266 [277 P.2d 104]. Of course, violation of a directory statute does not result in invalidity of the action so taken (see 82 C.J.S., § 374, p. 869).
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> "However, in view of the public purpose of the Brown Act, which is directed toward the conduct of public officials, we believe that section 1222, Government Code, and section 177, Penal Code, are here applicable and give mandatory complexion to the act. Government Code, section 1222: 'Every willful omission to perform any duty enjoined by law upon any public officer, or person holding any public trust or employment, where no special provision is made for the punishment of such delinquency, is punishable as a misdemeanor.' Penal Code, section 177: 'When an act or omission is declared by a statute to be a public offense and no penalty for the offense is

prescribed in any statute, the act or omission is punishable as a misdemeanor.'

"This is one of those instances in which the prescribed penalty for violation of the law precludes all others, . . . and leaves private persons, though taxpayers, without any right to declaratory relief or injunction incidental thereto. . . ."

"Specifically we hold that the dinner gathering of June 13, 1958, was not a meeting within the purview of the Brown Act, and that the two public hearings held after filing of Blanco's application for zone change fully complied with the act, assuming it to govern meetings of a charter city." (Emphasis added.)

Thus, the court in *Adler* held that despite the absence of enforcement provisions in the Brown Act, any willful violation thereof was a misdemeanor under the omnibus provisions of section 1222 of the Government Code and section 177 of the Penal Code, that the criminal penalty was exclusive and that, therefore, clearly *interested persons* such as county taxpayers had no civil remedy in declaratory relief or injunction.[10]

Immediately after the decision in the *Adler* case the Legislature enacted amendments to the Brown Act to *modify* the holdings therein, including, inter alia, the holding with respect to civil and criminal remedies, by the addition of sections 54959 and 54960 of the Government Code. These sections provide (additions subsequent to the original enactment are in parenthesis and deletions are in brackets; see Stats. 1961, ch. 1671, §§ 5–6) as follows:

Section 54959:

"Each member of a legislative body who attends a meeting of such legislative body where action is taken in violation of any provision of this chapter, with knowledge of the fact that the meeting is in violation thereof, is guilty of a misdemeanor."

Section 54960:

[10] The court's holding in Adler with respect to what is a meeting has, of course, long since been nullified. (See discussion in *Sacramento Newspaper Guild v. Sacramento County Bd. of Suprs., supra*, 263 Cal. App. 2d at pp. 46–51.)

> "Any interested person may commence an action by [either] mandamus, [or] injunction (or declaratory relief) for the purpose of stopping or preventing violations or threatened violations of this chapter by members of the legislative body of a local agency (or to determine the applicability of this chapter to actions or threatened future action of the legislative body."

Thus section 54960 was enacted to provide a civil remedy to "any interested person"—the civil remedy that was denied to such a person by the holding in *Adler*. Significantly, section 54959, providing a *specific* criminal sanction, was enacted in terms which provide that a violation of the Brown Act is a crime *in only very limited circumstances*. Whereas under *Adler* any willful violation of the Brown Act would have been a misdemeanor, not so under section 54959. "Action" must be taken at such meeting and, more importantly for our purposes, the member must attend an illegal meeting "with knowledge of the fact that the meeting is in violation thereof."[11] We take official notice of the fact that public officers will, in most instances, perform their duties in good faith. Additionally we presume that in questionable cases, a board or commission will seek the advice of counsel before acting. This being the case, it is clear that the Legislature intended that only in the most flagrant case would a violation of the Brown Act be a crime. In short, the purpose and scope of the civil remedies are much broader than the purpose and scope of the criminal sanction.

In construing the present intent of section 54960 "it is proper to consider the history and purpose of the enactment[ ]" (*Stafford v. Realty Bond Service Corp*. (1952) 39 Cal. 2d 797, 805; see also *People v. Ventura Refining Co.* (1928) 204 Cal. 286, 291). The history and purpose of the enactment of section 54960 leads to the conclusion that its purpose was to fill the void and provide a true civil remedy as well as to insure that public officers would not be branded criminals for guessing-wrong" with respect to their duties under the Brown Act. Its purpose was not to provide a civil remedy of a quasi-criminal nature in aid and furtherance of the enforcement of the criminal law, as was the case with the abatement proceedings found in the Red Light Abatement Act discussed in *Board of Supervisors v. Simpson* (1951) 36 Cal. 2d 671.

Citation to the *Simpson* case brings us to the point of discussion of the case law and our prior opinions as to who may or should properly bring a civil action under a particular law, the district attorney or the county counsel. It has been suggested that our holding in 61 Ops. Cal. Atty. Gen. 283 (1978), *supra*, with respect to the county counsel bringing civil actions pursuant to section 54960 of the Government Code, is in conflict with both our

[11] "See 12 Assem. Interim Com. Rep, on Government Organization, The Right To Know (Jan. 11, 1965) pp. 48–49, 59–61. See also *Sacramento Newspaper Guild v. Sacramento County Bd. of Suprs., supra*, 263 Cal. App. 2d 41 (1968).

prior and current opinions in this area, as well as with case law, particularly *Board of Supervisors v. Simpson*, *supra*, and *People v. Centr-O-Mart* (1950) 34 Cal. 2d 702. We disagree with that suggestion.

As to our opinions, it has been suggested that a letter opinion issued November 8, 1977 (I.L. 77–159) sets forth the correct approach and our 1978 published opinion is in conflict with it. That letter opinion considered the question of whether section 91001, subdivision (b) of the Government Code, contained in the Political Reform Act of 1974, insofar as it designates the district attorney as the "civil prosecutor" under that act, was intended to mean district attorney or county counsel in a county which has both officers. That letter opinion relied primarily upon the comprehensive analysis contained in 38 Ops. Cal. Atty. Gen. 121 (1961) with respect to the analytical framework drawn from prior case law and opinions of this office on the question of whether the district attorney or the county counsel should bring a particular action in questionable situations. In that 1961 opinion, we stated:

> "The first question is whether the county counsel may be authorized to bring actions under Welfare and Institutions Code section 2603 [fn. omitted] which provides in part that a county's claim against a county supported indigent who acquires property shall be 'enforced by action against him by the *district attorney* of the county on request of the board of supervisors.' (Italics added.) This question arises because of Government Code section 26529 which provides in part for prosecution by the county counsel, instead of the district attorney, of 'all civil actions and proceedings in which the county or any of its officers is concerned or is a party.' [fn. omitted] Noncriminal actions are not necessarily 'civil actions' under this statute. The courts have held in several instances that cases which might normally be considered civil are actually the responsibility of the district attorney. Primary responsibility for noncriminal actions or proceedings turns on whether they would be 'in aid of and auxiliary to the criminal law' (*Board of Supervisors v. Simpson*, 36 Cal. 2d 671, 674) because the district attorney, as public prosecutor, must closely supervise transactions related to enforcement of the criminal law. Thus in Simpson and in 8 Ops. Cal. Atty. Gen. 110, the district attorney rather than the county counsel was held responsible for bringing 'civil' red light abatement actions. In 28 Ops. Cal. Atty. Gen. 239 the district attorney was deemed responsible for preparing the papers in proceedings to determine mental illness since the commitment procedures and the problems of sanity defenses are closely related to criminal law enforcement. By contrast, in 28 Ops. Cal. Atty. Gen. 293, the county counsel was deemed responsible for passing on mileage and similar claims presented by members of the board of supervisors. The important factors

> emphasized in the above opinions are the existence of a single course of wrongful conduct which requires both criminal and civil remedies, the similarity of the evidence to that required in a criminal prosecution, the bringing of the action in the name of the people rather than the county, the placement of responsibility for similar actions, and the practice, if any, of district attorneys or county counsels in accepting a particular responsibility." 38 Ops. Cal. Atty. Gen. at pp. 121–122, footnotes omitted.[12]

It would, therefore, appear appropriate to analyze section 54960 of the Government Code as to the "important factors" emphasized by the courts and our prior opinions. This analysis follows:

1. "Existence of a single course of wrongful conduct which requires both criminal and civil remedies." This factor appears to be lacking with respect to section 54960. As explained at length above, the scope of the civil and criminal violations of the Brown Act are completely different. This factor, coupled with the rather unique "mens tea" or "scienter" requirement for a criminal violation of the act (actual knowledge that the meeting attended violated the act) demonstrates that very seldom would "a single course of wrongful conduct . . . require[ ] both criminal and civil remedies." (Compare, e.g., *Board of Supervisors v. Simpson, supra*, 36 Cal. 2d at 675, "In general, any person maintaining a public nuisance is guilty of a misdemeanor"; *People v. Centr-O-Mart*, *supra*, 34 Cal. 2d at 703, "Section 17100 makes any violation of the provisions of the (Unfair Practices) act a misdemeanor"; I.L. 65–131, both civil and criminal enforcement of county ordinances pertaining to building, zoning and health functions of district attorney; I.L. 61–13, LB 369/678, abatement of public nuisances under county zoning ordinances, violations of which are misdemeanors, is responsibility of district attorney.)[13]

2. "[T]he similarity of the evidence to that required in a criminal prosecution." For the reasons just enumerated above with respect to the first factor there would in most cases be "no similarity of the evidence," because the scope of sections 54959 and 54960 are completely different and in most cases the Legislature intended that there would be no crime.

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[12] Footnote 2 of this opinion contains a detailed analysis of the interrelationship between the district attorney provisions and the county counsel provisions of the Government Code, and an explanation with respect to apparent inconsistencies therein as to the division of duties between these officers. See also in this respect, 56 Ops. Cal. Atty. Gen. 53, 54–55 (1973).

[13] "On abatement of nuisances, see however 15 Ops. Cal. Atty. Gen. 231 (1950), county counsel in specified chartered county brings nuisance abatement proceedings; I.L. 69–118. "abatement of a public nuisance by civil action rests with the County Counsel."

3. "[T]he bringing of the action in the name of the people rather than the county." Section 54960 of the Government Code contains nothing indicating that any action thereunder shall be in the name of the people. Compare *Board of Supervisors v. Simpson*, *supra*, 36 Cal. 2d at p. 673; *People v. McKale* (1978) 148 Cal. Rptr. 181, 184–185 and Bus. & Prof. Code, §§ 17204, 17206, 17535, 17536.[14] As we have demonstrated at the outset herein, a county or its officers could be interested in an alleged Brown Act violation. Thus, any action properly brought by the county or its officers would be in its or their name. (Compare Gov. Code, § 100 subd. (b).)

4. "[T]he placement of responsibility for similar actions." The only actions similar to those provided in section 54960 of which we are aware are found in the acts requiring open meetings of "state agencies" (Gov. Code § 11120 *et seq*.) and of the Legislature and its committees (Gov. Code § 9027 *et seq*.). Sections 11129 and 9031 of the Government Code provide identical civil remedies for "any interested person" in mandamus, injunction or declaratory relief as to alleged violations of these open meeting requirements as are found in the Brown Act. One significant difference, however, is readily apparent in these acts. *There are no specific criminal enforcement provisions*. The inclusion of the specific criminal enforcement provision in the Brown Act and the later omission of any such provision in these other acts strongly indicates an intent on the part of the Legislature to make the civil remedies exclusive. 'Where a statute, with reference to one subject contains a given provision, the omission of such provision from a similar statute concerning a related subject is significant to show that a different intention existed." (*Richfield Oil Corp. v. Crawford* (1952)39 Cal. 2d 729, 735; see also, e.g., *Hennigan v. United Pacific Ins. Co.* (1975) 53 Cal. App. 3d 1, 8.)[15] Since criminal sanctions are absent with respect to these "similar actions" at the state level, the strong inference arises that section 54960 as well as sections 11129 and 9031 of the Government Code were intended as only true civil actions, in no way quasi-criminal in nature, and consequently in no way within the prosecutorial functions of the district attorney.[16]

This fourth factor, "the placement of responsibility for similar action," suggests another factor considered of significance by both the courts and this office; that is, whether

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[14] A hearing was granted in this case by the California Supreme Court, and was argued before that court on January 11, 1979. It, however, is illustrative of the particular Business & Professions Code provisions cited.

[15] But compare *Adler v. City Council*, *supra*, 184 Cal. App. 2d at pp. 774.775, quoted in the text above with respect to the omnibus misdemeanor provisions of section 1222 of the Government Code, and section 177 of the Penal Code.

[16] We are not aware of the district attorney of Sacramento County asserting jurisdiction to civilly enforce these acts against the Legislative, or the multitude of state boards and commissions subject to the "state agency act."

the civil enforcement statute, or other statutes, actually name the "district attorney" as the officer who is to bring a particular action. If it does, this is considered indicative of a legislative intent that the district attorney and not the county counsel shall bring the action, or be at least primarily responsible for doing so. (See, e.g., *Board of Supervisors v. Simpson*, *supra*, 36 Cal. 2d at 673: 'That is a factor with some significance as a particular statutory provision should prevail over a general one"; 61 Ops. Cal. Atty. Gen. 40, 42–43 (1978). See also generally the statutes dealt with in 56 Ops. Cal. Atty. Gen. 53, 54 (1973); 28 Ops. Cal. Atty. Gen. 239 (1956); 8 Ops. Cal. Atty. Gen. 110 (1946); IL. 77–159.) Section 54959, of course, does not name the district attorney, but names only "interested parties."

In this regard, it is also interesting to note the Court's observation in *Safer v. Superior Court* (1975) 15 Cal. 3d 230, 236, wherein the Court held that a district attorney did not have the power to bring a civil contempt proceeding arising from private litigation:

> "By the specificity of its enactments the legislature has manifested its concern that the district attorney exercise the power of his office only in such civil litigation as that lawmaking body has, after careful consideration, found essential. An examination of the types of civil litigation in which the Legislature has countenanced the district attorney's participation reveals both the specificity and the narrow perimeters of these authorizations."

5. Finally, with respect to the factors in 38 Ops. Cal. Atty. Gen. 121 (1961) *supra*, we reach a consideration of "the practice, if any, of district attorneys or county counsels in accepting a particular responsibility." This office is not aware of any practice with respect to the civil enforcement provisions of the Brown Act -vis a vis the district attorney or the county counsel. We have outlined Instances where an action by the county counsel may be possible as a true civil action at the behest of the county or its officers. However, insofar as either acting as civil prosecutor as an "interested party" within the meaning of section 54960, we were not aware of the fact that either district attorneys or county counsels even contemplated that they had standing to do so until we received the instant request for our opinion. The absence of such assertion of standing for almost two decades under the act would itself appear to be an administrative construction by district attorneys and county counsels that no such authority was intended by the enactment of section 54960.[17]

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[17] Interestingly, Assem. Bill No. 3221 (1977–1978 Reg. Sess.) sponsored by the requester herein, would have amended the Brown Act to appoint the Attorney General, District Attorneys, County Counsels and City Attorneys as civil prosecutors, with appropriate concurrent jurisdiction. This bill died in committee.

This bill also would have deleted the unique "mens tea or scienter" requirement found in section 54959 of the Brown Act. As to this latter point, this was apparently the third time legislation

However, without even considering the factors discussed above, we find a comparison of *the differences as to the purpose* of the Red Light Abatement Act ruled upon in the leading case of *Board of Supervisors v. Simpson*, *supra*, 36 Cal. 2d 671, and the purpose of section 54959 of the Brown Act virtually controlling herein. In *Simpson* the question was whether the district attorney or county counsel should bring an action under the Red Light Abatement Act. The Court reasoned:

> ". . . While actions to abate nuisances are considered civil in nature the abatement of houses of prostitution is in aid of and auxiliary to the enforcement of the criminal law. . . ." (*Id*. at p. 674.)

However, as to section 54960 of the Brown Act, it is clear from its history, explained at length above, that its purpose was to provide a civil remedy where one had been denied to a taxpayer by the Court in *Adler v. City Counsel*, *supra*, 184 Cal. App. 2d 763. The court, as noted, believed the omnibus criminal sanction provisions (Gov. Code § 1222 and Pen. Code § 177) completely excluded any civil remedy. In short, the purpose of section 54959 was not to be in aid of and auxiliary to the enforcement of the criminal laws, but was to be in aid of the enforcement of the *civil laws*.

One further matter requires some extended discussion, that is, the case *People v. Centr-O-Mart*, *supra*, 34 Cal. 2d 702. That case held that the district attorney could bring an action in the name of the People of the State of California to enjoin violations of the Unfair Practices Act under section 17070 of the Business and Professions Code which provides that "any person" may bring such an action.[18] It has been suggested that this case additionally supports the conclusion that a district attorney may bring an action on behalf of the People under the civil enforcement provisions of section 54960 of the Brown Act. It is to be recalled, however, that section 54960 does not provide that "any person" may bring the actions provided therein, but rather provides that "any interested person" may do so. Considering the background of section 54960, *to provide a civil remedy* where it had been denied by case law (the *Adler* case) we believe this difference in language is significant and that it was not intended to appoint either the district attorney or the county counsel as "civil prosecutor" thereunder. For example, under the wording of section 17070 of the Business & Professions Code ("any person") a resident of Del Norte County clearly could bring an action to enjoin unfair business practices in San Diego County. However,

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was unsuccessfully introduced to expand the criminal sanctions of the Brown Act. See: "The Brown Act, Sunshine Law Clouded By Loophole" by Henry Drager, *Los Angeles Daily Journal*, January 25, 1979.

[18] Business & Professions Code, sections 17200 *et seq*. now provide specific enforcement provisions for that law, including specific authority for the district attorney to bring actions thereunder. (See Bus. & Professions Code, §§ 17204, 17205.)

under the Brown Act, that would not in our opinion have been the legislative intent.[19] As noted in *Sacramento Newspaper Guild v. Sacramento County Bd. of Suprs*., *supra*, 263 Cal. App. 2d at 46:

> "A provision of the Brown Act, section 54960, authorizes any 'interested person' to seek legal restraint against violations or threatened violations. Defendants do not question the Newspaper Guild's standing to sue. The complaint alleges that the Newspaper Guild is a labor organization composed of professional working newspaper men and women. Whether that allegation makes our adequate standing to sue is at least questionable. (See *United States ex rel. Stowell v. Deming* (1927) 19 F.2d 697, 698, cert. den. 275 U.S. 531 [72 LEd. 410,48 5 Cr. 28]; *Adler v. City Council of Culver City* (1960) 184 Cal. App. 2d 763, 775 [7 Cal. Rptr. 805]; *Associated Boat Industries v. Marshall* (1951) 104 Cal. App. 2d 21, 22 [230 P.2d 379].) The right to disclosure is an attribute of citizenship, not possessed in any increased degree by persons or groups whose interest in access to news is economic. (See *Oxnard Publishing Co. v. Superior Court* (1968) (Cal. App.) [68 Cal. Rptr. 83*].) Section 54950's broad declaration of the public's right to disclosure should logically extend standing to any county elector*. Had the county raised the issue in the trial court, amendment of the complaint to add appropriate parties and allegations would have been little more than a matter of mechanics. Under the circumstances, there is substantial compliance with section 54960." (Emphasis added.)

Thus, the Court "extended" the standing under section 54960 "to any county elector." We can also envision a "special interest" in the subject matter to be discussed by a public board which would give a nonresident of the local jurisdiction standing as an "interested person." However, as a general proposition, the "interest" intended by the Legislature *in enacting section 54960* would appear to have been co-existent with the jurisdiction of the board or body holding the meeting. (Compare *Bozung v. Local Agency Formation Co.* (1975) 13 Cal. 3d 263, 272; *Bd. of Soc. Welfare v. County of L.A.* (1945) 27 Cal. 2d 98, 100–101.)

In short, it is the opinion of this office that section 54960 was intended by the Legislature only to provide a true civil remedy for "interested persons," the same as is found in Code of Civil Procedure, sections 526 (injunction), 1060 (declaratory relief) and

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[19] "Our grounds for distinguishing *People v. Centr-O-Mart*, *supra*, would also apply to distinguish our holding in 41 Ops. Cal. Atty. Gen. 178 (1963) wherein it was held that a district attorney could bring an action under the provisions of then section 391 of the Elections Code to compel cancellation of an illegal voting registration. That section permitted "any person" to do so.

1085 (mandamus). To our knowledge, the fact that one of these remedies may be available against a public officer, or a public body, does not mean that the district attorney, as public prosecutor, may bring the action. This appears to be true as to such civil remedy even if the failure of the public officer to perform his or her duties is also a misdemeanor.[20]

In summary, we conclude that section 54960 of the Government Code was not intended to invest *either* the district attorney or the county counsel with powers as "civil prosecutor" under the Brown Act. The section was not intended to be in aid and futherance of and auxiliary to the criminal laws. It was intended to be in aid of the civil law-to provide a civil remedy after one was denied by judicial decision in *Adler v. City Council*. That section 54960 was not intended to be "quasi-criminal" in nature is manifest from the fact that the scope of civil actions under section 54960 is broader than criminal actions under section 54959 of the Brown Act; therefore, only in the unusual case will a violation of the act also be a misdemeanor. This conclusion is also manifest from the fact that the open meeting requirements of the laws applicable to "state agencies" and the Legislature both contain similar civil enforcement provisions as are found in the Brown Act. Yet *neither* of these laws contain criminal sanctions. This is a further indication that these remedies, whether found in the Brown Act or the similar state acts, were not intended to fall within the prosecutorial functions of the district attorney. We so conclude.

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[20] It is to be recalled that *Adler v. Superior Court*, *supra*, 184 Cal. App. 2d at pp. 774–775 pointed out that under Government Code, section 1222, any willful failure of a public officer to perform his or her duty is a misdemeanor. An action in mandate would lie for "any interested person" to require the officer to perform the duty. Yet, we do not expect that the District Attorney of Sacramento would claim it was his prosecutional prerogative to bring mandate actions against the Governor, and all state officers, departments, and boards and commissions, every time he believed they were not properly performing their duties. Nor do we believe the district attorneys of the other 57 counties would believe they had such powers with respect to all local officers.