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OPINION	:	No. 79-316
of	:	<u>June 7, 1979</u>
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	:	

SUBJECT: GOVERNMENT CODE SECTION 54957.2—Government Code section 54957.2 does not provide to the clerk of a legislative body of a local agency a defense to a charge of unlawfully recording a confidential communication under Penal Code section 632.

The Honorable Byron C. Morton, District Attorney, Riverside County, has requested an opinion on the following question:

Does Government Code section 54957.2 provide to the clerk of a legislative body of a local agency a defense to a charge of violating Penal Code section 632 where the clerk uses a tape recorder to record an executive session without the knowledge of all persons present?

CONCLUSION

Government Code section 54957.2 does not provide to the clerk of a legislative body of a local agency a defense to a charge under Penal Code section 632 where the clerk uses a tape recorder to record an executive session without the knowledge of all persons present.

ANALYSIS

Penal Code section 632, subdivision (a), states in part:

“Every person who, intentionally and without the consent of all parties to a confidential communication, by means of any . . . recording device, . . . records such confidential communication, . . . shall be punishable by fine not exceeding two thousand five hundred dollars . . . or by imprisonment in the county jail not exceeding one year, or by imprisonment in the state prison, or by both such fine and imprisonment . . .”

Penal Code section 632, subdivision (b), excludes from the term “person,” “. . . an individual known by all parties to a confidential communication to be overhearing or recording such communication.”

Penal Code section 632, subdivision (c), defines a “confidential communication” as follows:

“[A]ny communication carried on in such circumstances as may reasonably indicate that any party to such communication desires it to be confined to such parties, but excludes a communication made in a public gathering or in any legislative, judicial, executive or administrative proceeding open to the public, or *in any other circumstance in which the parties to the communication may reasonably expect that the communication may be overheard or recorded.*” (Emphasis added.)

Government Code section 54957.2,¹ which is part of the Ralph M. Brown Act (§ 54950 *et seq.*), states:

“The legislative body of a local agency may, by ordinance or resolution, designate a clerk or other officer or employee of the local agency who shall then attend each executive session of the legislative body and keep and enter in a minute book a record of topics discussed and decisions made at the meeting. The minute book made pursuant to this section is not a public record subject to inspection pursuant to the California Public Records Act . . . and shall be kept confidential. The minute book shall be available only to members of the legislative body, or, if a violation of this chapter is alleged to have occurred at an executive session, to a court of general jurisdiction wherein the local agency lies. *Such minute book may, but need not, consist*

¹ Except as otherwise indicated, section references are to the Government Code.

of a recording of the executive session.” (Emphasis added.)²

We must interpret statutes in accordance with applicable rules of statutory construction, fundamental among which are those which counsel that the aim of such construction should be the ascertainment of legislative intent so that the purpose of the law may be carried out and that a statute should be construed with reference to the entire statutory system of which it is a part in such a way that harmony may be achieved among the parts. (*People ex rel. Younger v. Superior Court* (1976) 16 Cal. 3d 30, 40.)

Section 54957.2 authorizes the recording of an executive session of the legislative body of a local agency under specified circumstances. The method of recording is not specified. It may be done surreptitiously or with full knowledge of all persons present. No reason is apparent why a recording of such meetings with notice to all present would not serve the legislative purposes of section 54957.2 as fully as surreptitious recordings of such meetings. There is no indication in the language or history of section 54957.2 that the Legislature intended to restrict the protection of the right to privacy (see Pen. Code, § 630) afforded by the enactment of Penal Code section 632. It is assumed the Legislature has in mind existing laws when it passes a statute and a failure of the Legislature to change the law in a particular respect when the subject is generally before it and changes in other respects are made is indicative of an intent to leave the law as it stands in the aspects not amended. (*Estate of McDill* (1975) 14 Cal. 3d 831, 837–838.)

To interpret section 54957.2 to authorize surreptitious recordings of executive sessions would repeal by implication the application of Penal Code section 632 to the recording of such sessions. “Repeals by implication are not favored and are recognized only when there is a conflict between two or more legislative enactments. [Citation.] They are recognized only when there is no rational basis for harmonizing two potentially conflicting statutes, [Citation] and the statutes are irreconcilable, clearly repugnant, and so inconsistent that the two cannot have concurrent operations. The courts are bound, if possible, to maintain the integrity of both statutes if the two may stand together.” [Citation.] (*In re White* (1969) 1 Cal. 3d 207, 212.)

We believe there is a rational basis for harmonizing section 54957.2 and Penal Code section 632 in a way which will accomplish the legislative purpose of both statutes. This is done by construing section 54957.2 to authorize the recording of an executive session only in a manner which does not violate the provisions of Penal Code section 632. This

² Under the provisions of the Ralph M. Brown Act, all meetings of local agencies must be open and public unless otherwise provided. Sections 54957 and 549576 permit a legislative body of a local agency to meet for certain purposes in executive sessions which are private and closed to the public. (46 Ops. Cal. Atty. Gen. 34 (1965).)

will permit the recording of executive sessions under circumstances in which those present may reasonably expect that the communication may be recorded. (See Pen. Code, § 632, subd. (c).)

The circumstances of a particular situation could, of course, demonstrate that all parties have a reasonable expectation that a session may be recorded. For example, if the clerk or a member of the legislative body announced to all present at the session that it was being recorded there would be a reasonable expectation that it was being recorded. Other facts short of express notice might also show a reasonable expectation that the session may be recorded. If the tape recorder being used were in plain sight of all present that might, in a particular case, provide such a reasonable expectation.

In conclusion, section 54957.2 does not provide to the clerk of a legislative body of a local agency a defense to a charge of unlawfully recording a confidential communication under Penal Code section 632.
