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State of California

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OPINION	:	No. 84-405
	:	
of	:	<u>NOVEMBER 20, 1984</u>
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THE HONORABLE CHARLES O. LAMOREE, COUNTY COUNSEL,
SOLANO COUNTY, has requested an opinion on the following question:

Are the meetings of the board of directors and executive committee of the Solano Economic Development Corporation (SEDCORP), a private nonprofit corporation, subject to the open meeting requirements of the [Ralph M.] Brown Act (Gov. Code, § 54950 et seq.) because its board of directors and executive committee may be partially composed of members of the Board of Supervisors of Solano County and the various city councils of cities within Solano County, which public bodies have also made financial contributions to the corporation?

CONCLUSION

The meetings of the board of directors and executive committee of the Solano Economic Development Corporation (SEDCORP) are not subject to the open meeting

requirements of the Ralph M. Brown Act, Government Code section 54950 et seq. since members of the board of supervisors and various city councils do not serve upon the board of directors in their "official capacity."

ANALYSIS

The Ralph M. Brown Act, Government Code section 54950 et seq.,¹ requires meetings of "legislative bodies" of "local agencies" as defined therein, to be open and public except as may be expressly provided in the act or as may be implied from other provisions of law. (See generally §§ 54951, 54951.1, 54951.7, 54952, 54952.2, 54952.3, 54952.5, 54953, 54957, 54957.6; *Sacramento Newspaper Guild v. Sacramento County Bd. of Suprs.* (1968) 263 Cal.App.2d 41.) Cities and counties are "local agencies" within the requirements of the act. (§ 54951.)

Our opinion is requested as to whether the meetings of the board of directors and the executive committee of the Solano Economic Development Corporation (SEDCORP), a private nonprofit corporation, are subject to the Ralph M. Brown Act. We conclude they are not.

We are advised by the requester that SEDCORP's "principal purpose is to attract new and diversified commerce and industry to the Solano County area" and further that it "was not created as an instrument of public agencies, and its incorporator is a private citizen doing business in Solano County." The requester sets forth the following "Factual Background" with respect to SEDCORP which demonstrates its relationship to the County of Solano and the cities therein. This "relationship" will determine whether SEDCORP is to be considered a "legislative body" of the county or of the cities within the meaning of the Ralph M. Brown Act.

"FACTUAL BACKGROUND"

"SEDCORP is a private, nonprofit corporation with 36 directors established under Corporation Code § 5000 *et seq.* Seven of the directors are appointed by (but not necessarily from) the city councils of the seven incorporated cities of Solano County, and two of the directors are appointed by (but not necessarily from) the Solano County Board of Supervisors. The cities and county also contribute funds to SEDCORP which comprise approximately 25% of SEDCORP's financing. The power of the county and cities to appoint members of the board of directors is not expressly made dependent upon whether those public bodies contribute funds to the

¹ All section references are to the Government Code unless otherwise indicated.

corporation. Three directors are appointed by the Private Industry Council, a nonprofit corporation with its principle office in Solano County. The remainder of the directors are elected by the general membership of SEDCORP, which is composed of persons and businesses doing business in Solano County, and who pay dues to finance SEDCORP's activities. The executive committee of SEDCORP has the general power and authority of the board of directors and is elected by and composed of board members. A member of the Solano County Board of Supervisors and a member of the Vacaville City Council currently serve as directors and as members of the executive committee."

Additionally, the request points out that SEDCORP "receives no funds pursuant to the Economic Opportunity Act of 1974" nor was it "created by a local agency nor formed to acquire, construct, reconstruct, maintain or operate any public work project."² Also, the county and cities need not appoint as their representatives city officers or employees, but may at their option appoint *private citizens*.

Finally, we are advised that SEDCORP's bylaws provide as follows:

"There is no requirement that a director designated by a City Council be a member of that City Council . . .

"There is no requirement that a director designated by the Board of Supervisors be a member of the Board of Supervisors . . .

"A director designated by a City Council or the Solano County Board of Supervisors who is also a member of the City Council or Board of Supervisors that designates him/her shall serve in his/her capacity as a private citizen and not in his/her official capacity as a member of the City Council or Board of Supervisors designating him/her."

This bylaw and its purpose is explained in greater detail by the requester as follows:

"The purpose of SEDCORP's granting the County and Cities authority to appoint directors was to ensure that its board of directors was composed of a county-wide cross-section of prominent citizens of the Solano County

² These additional facts preclude SEDCORP from being considered a "legislative body" within the definitions thereof found in sections 54951.1 and 54951.7. The definitions of "legislative body" found in section 54952.3 (advisory bodies of local agencies) and 54952.5 (permanent boards and commissions of local agencies) are also clearly inapplicable.

business community. Its intent was thus to grant the County and Cities an *appointing* authority only and not any authority to control or influence SEDCORP policy by giving any directions to or exercise any control over the directors that are appointed. The SEDCORP board members appointed by the County and Cities thus do not serve in a representative capacity for the County and Cities, and once they are appointed the authority of the Board of Supervisors and City Council ends. The limitation of this appointing authority is so understood and followed by the Board of Supervisors and City Councils."

The foregoing facts posit the basic issue whether SEDCORP is a "legislative body" within the meaning of section 54952, which provides:

"As used in this chapter, 'legislative body' means the governing board, commission, directors or body of a local agency or any board or commission thereof, *and shall include any board, commission, committee, or other body on which officers of a local agency serve in their official capacity as members and which is supported in whole or in part by funds provided by such agency, whether such board, commission, committee or other body is organized and operated by such local agency or by a private corporation.*"³

Since SEDCORP's board of directors has "officers of a local agency" on it, and receives funds "provided by such agency," the determinative question is whether such officers serve "in their official capacity" on the board of directors.

We are aware of no case law or opinion of this office which would aid in resolving this question. The question presented in this or a similar context appears to be one of first impression. We believe, however, that the following facts are determinative: (1) there is nothing in the law which *requires* county or city officers to serve on the board of directors of SEDCORP; (2) there is nothing in the charter or bylaws of SEDCORP which imposes such a requirement; and (3) appointees of the county or of cities are not appointed to represent the interests of their appointing entities. It, therefore, is difficult to say that a member of the board of supervisors or a city councilperson serves on the board in his or her "official capacity."

³ The requester points out that if SEDCORP's board of directors falls within this definition of "legislative body," then its executive committee would also be a "legislative body" within the meaning of section 54952.2 which provides:

"As used in this chapter, 'legislative body' also means any board, commission, committee, or similar multimember body which exercises any authority of a legislative body of a local agency delegated to it by that legislative body."

Although neither the act nor any California cases we have found define the term "official capacity", we believe that at a minimum an appointee to serve in such capacity would have to be appointed to represent the interests of his appointing entity. Then, at least arguably, it could be said that despite the disclaimer in the bylaws that supervisors or councilpersons may serve only in their private capacity, they serve in their "official capacity." Stated otherwise, it is at least arguable that a supervisor or councilperson can never serve in a private capacity when he or she is appointed to an outside board to represent the interests of his or her appointing entity. While so doing, he or she of necessity is cloaked with the mantle of his or her official position, despite any unilateral disclaimer made by the private body such as is made in SEDCORP's bylaws.

However, as explained by the requester, appointees to SEDCORP's board, whether privately appointed or publicly appointed, whether private citizen or public official, serve to provide a broad base of prominent citizens from throughout the country. They represent no particular constituency and hence are essentially fungible, having as their common role only the fostering and funding of *SEDCORP's* purposes and goals. This is highlighted by the fact that a supervisor or councilpersons, once appointed, are not directed, controlled or instructed by that appointing authority and this limitation "is so understood and followed by the Board of supervisors and City Councils." In short, the board of supervisors or city councils are *at most* a partial appointing authority for a private organization's board of directors.

Thus viewed, the requisite link or connection between the position of corporate director and the appointee's public office is missing. And from the point of view of SEDCORP, the fact that some directors may also be public officers is a matter of pure coincidence.

Finally, the conclusion that members of the board of supervisors and city council members serve unofficially on SEDCORP's board of directors does not appear to contravene the legislative policy behind the enactment of the Ralph M. Brown Act. That policy is set forth in section 54950 as follows:

"In enacting this chapter, the Legislature finds and declares that the public commissions, boards and councils and the other public agencies in this State exist to aid in the conduct of the people's business. It is the intent of the law that their actions be taken openly and that their deliberations be conducted openly.

"The people of this State do not yield their sovereignty to the agencies which serve them. 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. The people insist on remaining informed so that they may retain control over the instruments they have created."

This policy is to be contrasted with the fact (1) that only a few of the directors are appointed by public agencies; (2) that SEDCORP is primarily privately financed (3) that public entities need not even make financial contributions to retain their appointing authority; (3) that no public functions have been delegated to or are performed by SEDCORP; (4) that SEDCORP is not an "instrument" which has been created by the People but is of private origin; and (5) any public officials appointed to the board of directors are not appointed to represent their entities' interests. Such facts in the aggregate militate against the need for public monitoring of SEDCORP's meetings.

Accordingly, we conclude that the meetings of the board of directors and the executive committee of SEDCORP are not subject to the open meeting requirements of the Ralph M. Brown Act.
