

TO BE PUBLISHED IN THE OFFICIAL REPORTS

OFFICE OF THE ATTORNEY GENERAL
State of California

JOHN K. VAN DE KAMP
Attorney General

OPINION	:	No. 86-203
	:	
of	:	<u>OCTOBER 22, 1986</u>
	:	
JOHN K. VAN DE KAMP	:	
Attorney General	:	
	:	
CLAYTON P. ROCHE	:	
Deputy Attorney General	:	
	:	

THE HONORABLE LLOYD G. CONNELLY, MEMBER OF THE CALIFORNIA ASSEMBLY, has requested an opinion on the following questions:

1. Does section 54956.9 of the Government Code, a provision in the Ralph M. Brown Act, authorize closed sessions of a city council for the purpose of discussing a proposed or tentative cease and desist order issued by a regional water quality control board?

2. Where one city agency has discussed in open session a proposed or tentative cease and desist order issued by a regional water quality control board, may the city council thereafter invoke section 54956.9 of the Government Code to discuss the same cease and desist order with its city attorney in closed session?

CONCLUSIONS

1. When a proposed or tentative cease and desist order has been served upon a city by a regional water quality control board, an "adjudicatory proceeding" has been commenced within the meaning of section 54956.9 of the Government Code. Accordingly, that section would authorize closed sessions of the city council with its city attorney to receive his or her advice and to discuss the legal options and strategies available to the city with respect to such "adjudicatory proceeding."

2. Where one city agency has discussed in open session a proposed or tentative cease and desist order issued by a regional quality control board, the city council may nevertheless invoke the adjudicatory proceeding exception to the open meeting law to hold closed session meetings with its city attorney to receive his or her advice and to discuss the legal options and strategies open to the city with respect to such adjudicatory proceedings.

ANALYSIS

The Ralph M. Brown Act (Gov. Code, § 54950 et seq.) requires "legislative bodies" of "local agencies," as defined therein, to conduct their meetings in public session unless specifically excepted by the act or impliedly excepted by some other provision of law. (See generally Gov. Code, §§ 54951, 54951.1, 54951.7, 54952, 54952.2, 54952.3, 54952.5, 54953, 54956.7, 54957, 54957.6; *Sacramento Newspaper Guild v. Sacramento County Bd. of Supr.* (1968) 263 Cal.App.2d 41.)

In this opinion we deal with two city agencies, the city council and the city public works board, both of which are "legislative bodies" of "local agencies" within the provisions of the Ralph M. Brown Act. We also deal with section 54956.9 of the Government Code, which was added to the Ralph M. Brown Act at the 1984 session of the State Legislature (Stats. 1984, ch. 1126), and which specifically authorizes "legislative bodies" to confer with their attorney in closed session to discuss "pending litigation" as defined in that section. Section 54956.9 provides:

"Nothing in this chapter shall be construed to prevent a legislative body of a local agency, based on advice of its legal counsel, from holding a closed session to confer with, or receive advice from, its legal counsel regarding pending litigation when discussion in open session concerning those matters would prejudice the position of the local agency in the litigation.

"For purposes of this section, litigation shall be considered pending when any of the following circumstances exist:

(a) An adjudicatory proceeding before a court, administrative body exercising its adjudicatory authority, hearing officer, or arbitrator, to which the local agency is a party, has been initiated formally.

(b)(1) A point has been reached where, in the opinion of the legislative body of the local agency on the advice of its legal counsel, based on existing facts and circumstances, there is a significant exposure to litigation against the local agency; or

(2) Based on existing facts and circumstances, the legislative body of the local agency is meeting only to decide whether a closed session is authorized pursuant to paragraph (1) of this subdivision.

(c) Based on existing facts and circumstances, the legislative body of the local agency has decided to initiate or is deciding whether to initiate litigation.

"Prior to holding a closed session pursuant to this section, the legislative body of the local agency shall state publicly to which subdivision it is pursuant. If the session is closed pursuant to subdivision (a), the body shall state the title of or otherwise specifically identify the litigation to be discussed, unless the body states that to do so would jeopardize the agency's ability to effectuate service of process upon one or more unserved parties, or that to do so would jeopardize its ability to conclude existing settlement negotiations to its advantage.

"The legal counsel of the legislative body of the local agency shall prepare and submit to the body a memorandum stating the specific reasons and legal authority for the closed session. If the closed session is pursuant to subdivision (a), the memorandum shall include the title of the litigation. If the closed session is pursuant to subdivision (b) or (c), the memorandum shall include the existing facts and circumstances on which it is based. The legal counsel shall submit the memorandum to the body prior to the closed session if feasible, and in any case no later than one week after the closed session. The memorandum shall be exempt from disclosure pursuant to Section 6254.1.

"For the purposes of this section, litigation includes any adjudicatory proceeding, including eminent domain, before a court, administrative body exercising its adjudicatory authority, hearing officer, or arbitrator."¹

We are presented with two questions in the context of this new provision of the Ralph M. Brown Act. The first is whether a city council is authorized by this section to discuss in closed session a proposed or tentative regional water quality control board cease and desist order against the city. The second is whether the city council can be precluded from invoking this section where a subordinate city agency, in our case the city public works board, has already discussed this particular tentative cease and desist order in an open session.

We conclude that a city council may discuss such a proposed or tentative cease and desist order with its city attorney pursuant to section 54956.9 within the ground rules set forth in that section. We further conclude that the prior public discussion of the proposed or tentative cease and desist order by the city's public works board would not prevent the city council from invoking section 54956.9.

1. The Status Of A Tentative Cease And Desist Order

The factual background for this request for our opinion is briefly as follows: A regional water quality control board sent to the city public works director a notice that it would hold an evidentiary hearing at a specified time and place and on a specified date to consider an enforcement order against the city with respect to raw sewage which was being discharged by the city. Alternative enforcement actions were specified, including a possible cease and desist order to be issued against the city. The notice also stated that the board's staff, the city and other interested parties would be given the opportunity to present evidence at the scheduled hearing and that additional materials concerning the hearing would be sent to the city beforehand.

¹ Prior to the enactment of section 54956.9 of the Government Code, both the courts and this office implied an exception to the open meeting requirements of the Ralph M. Brown Act to permit local bodies to consult with their attorneys within the confines of the attorney-client privilege. (See *Sutter Sensible Planning, Inc. v. Board of Supervisors* (1981) 122 Cal.App.3d 813, 825; *Sacramento Newspaper Guild v. Sacramento County Bd. of Suprs.*, *supra*, 263 Cal.App.2d 41; 67 Ops.Cal.Atty.Gen. 111 (1984); 36 Ops.Cal.Atty.Gen. 175 (1960); Cal.Atty.Gen.Unpubl.Opns. I.L. 75-282; I.L. 71-5; compare 62 Ops.Cal.Atty.Gen. 150 (1979).) Senate Bill 2173 (1986), which would have added a paragraph to section 54956.9 stating that except as otherwise permitted by the section the lawyer-client privilege shall not be used as the basis for a closed session of a legislative body of a local agency, was vetoed by the Governor on September 30, 1986.

Within a week the regional water quality control board then sent to the city public works director a proposed or tentative cease and desist order to require the city to cease and desist violating discharge requirements previously ordered by the regional board (hereinafter "tentative cease and desist order"). The tentative cease and desist order set forth seven specific tasks to be completed by the city and a time schedule for the completion of each of these tasks. For example, Task I required increasing sewage treated at a particular water reclamation plant; Task VI required the engineering and design work for, and the construction and operation of, a new outfall relief sewer. The tentative cease and desist order concluded with the following warning:

"If the City . . . fails to comply with any provisions of this Order, the Executive Officer is authorized to request the Attorney General to take the appropriate action against the discharger, including injunction and civil monetary remedies, pursuant to appropriate California Water Code sections, including but not limited to Sections 13331, 13350, 13385, and 13386."

The accompanying cover letter from the regional board's executive director to the city's public works director set forth the previously noticed date, time and place where "the Board would hold a hearing on the proposed enforcement action."

The city engineer then prepared a report on the tentative cease and desist order for the city's public works board. That report recommended that the city's designated representative should agree to only three of the seven tasks specified in the tentative cease and desist order at the hearing before the regional board. The city's public works board then held a public meeting at which it discussed in open session the tentative cease and desist order and the engineer's report, and adopted such report with additional comment.

Later the same day, the city council met and discussed the tentative cease and desist order with the city attorney in closed session. The authority specified for the closed session was subdivision (a) of section 54956.9 of the Government Code, *supra*. The propriety of such a closed meeting is the basis for question one of this request.

An examination of section 54956.9 of the Government Code discloses that there are a number of conditions precedent to the holding of a closed session pursuant to that section. Initially, there must be "pending litigation" as defined in the section. Secondly, the local agency's legal adviser must advise the legislative body that an open session to confer with, or receive advice from him or her with respect to the "pending litigation" would prejudice the position of the local agency in the litigation. In so doing the local agency's legal adviser must "prepare and submit to the body a memorandum stating the specific reasons and legal authority for the closed session." The memorandum must also contain other appropriate information to justify the session as falling within

subdivision (a), (b), or (c) of the section. For example, with respect to subdivision (a), "the memorandum shall include the title of the litigation", or "otherwise specifically identify the litigation."

Accordingly, it is seen that the legal adviser to a local agency makes the initial determination as to whether a closed session may be legally justified under section 54956.9 of the Government Code. Thereafter, under the wording of the section, the legislative body is free to make its own determination as to whether to meet in closed session. Such is not mandated. The section merely specifies that "[n]othing in this chapter [the Ralph M. Brown Act] shall be construed to prevent a legislative body of a local agency, based on advice of its legal counsel, from holding a closed session to confer with, or receive advice from, its legal counsel regarding pending litigation."

Since we have been advised that the city herein was operating pursuant to subdivision (a), we assume that the memorandum required from the City Attorney had been properly prepared and submitted to the city council. The issue then resolves itself into whether an "adjudicatory proceeding" had been formally commenced against the city before a court or an administrative agency exercising its adjudicatory authority within the meaning of subdivision (a) of section 54956.9 of the Government Code.

An adjudicatory proceeding is one "in which 'the government's action affecting an individual [is] determined by facts peculiar to the individual case.'" (*Horn v. County of Ventura* (1979) 24 Cal.3d 605, 613.) As such, it is one which is "subject to procedural due process principles", that is due notice and the opportunity to be heard. (*Id.*, at p. 612.) Likewise, it is one where findings will be made and judicial review will be available through administrative mandamus (*Id.*, at p. 614.) In short, "adjudicatory" matters are essentially to be distinguished from "quasi-legislative" matters. The latter "involve the adoption of a 'broad generally applicable rule of conduct on the basis of general public policy.'" (*Id.*, at p. 613; see also, e.g., *Griffis v. County of Mono* (1985) 163 Cal.App.3d 414, 427.)²

We conclude from an examination of the relevant provisions of the Water Code that by at least the time of service of a tentative cease and desist order by the regional

² See also, Ballentine's Law Dictionary (3d ed. 1969), page 32:

"adjudicatory. A term employed in speaking of the quasi-judicial functions of an administrative agency."

and Black's Law Dictionary (5th Ed. 1979), pages 39-40:

"Adjudicatory hearing. A proceeding before an administrative agency in which the rights and duties of particular persons are adjudicated after notice and opportunity to be heard."

water quality control board on the city, an adjudicatory proceeding had been commenced. By that time the matters at issue before the board were drawn and the city advised of them so that it could prepare any defense it wished to present to the board concerning the proposed enforcement order.

Section 13300 *et seq.* of the Water Code sets forth the provisions for the "Administrative Enforcement and Remedies By Regional Board" with respect to actual or threatened violations of requirements prescribed by regional boards or the state water quality control board. One of such enforcement remedies is the issuance of cease and desist orders. Section 13301 of the Water Code provides:

"When a regional board finds that a discharge of waste is taking place or threatening to take place in violation of requirements or discharge prohibitions prescribed by the regional board or the state board, the board may issue an order to cease and desist and direct that those persons not complying with the requirements or discharge prohibitions (a) comply forthwith, (b) comply in accordance with a time schedule set by the board, or (c) in the event of a threatened violation, take appropriate remedial or preventive action. In the event of an existing or threatened violation of waste discharge requirements in the operation of a community sewer system, cease and desist orders may restrict or prohibit the volume, type, or concentration of waste that might be added to such system by dischargers who did not discharge into the system prior to the issuance of the cease and desist order. *Cease and desist orders may be issued directly by a board, after notice and hearing, or in accordance with the procedure set forth in Section 13302.*" (Emphasis added.)

Section 13302 provides an alternative hearing procedure whereby a panel of the regional board, after due notice and hearing, will hold an evidentiary hearing as to whether a cease and desist order shall issue. The panel then will report its proposed decision to the board which "after making such independent review of the record and taking such additional evidence as may be necessary, may adopt, with or without revision, the proposed decision and order of the panel." Section 13303 of the Water Code then provides that "[c]ease and desist orders shall become effective and final upon issuance thereof."

Section 13320 of the Water Code thereafter provides an appeal procedure to the state water quality control board from actions of regional boards, including enforcement proceedings taken by the issuance of cease and desist orders, by any aggrieved party. It provides:

"(a)

"(b) The evidence before the state board shall consist of the record before the regional board, and any other relevant evidence which, in the judgment of the state board, should be considered to effectuate and implement the policies of this division.

"(c) The state board may find the regional board action or inaction to be appropriate and proper. Upon finding that the action of the regional board, or the failure of the regional board to act, was inappropriate or improper, the state board may direct that the appropriate action be taken by the regional board, refer the matter to any other state agency having jurisdiction, take the appropriate action itself, or do any combination of the foregoing. In taking any such action, the state board is vested with all the powers of the regional boards under this division. . . . "

And finally with respect to the Water Code provisions in this sequence or process, section 13330 provides that "any aggrieved party may file with the superior court a petition for a writ of mandate for review thereof." "The evidence before the court shall consist of the record before the state board, including the regional board's record, and any other relevant evidence which, in the judgment of the court, should be considered to effectuate and implement the policies of . . . [the Water Code]."

It is patent that the Water Code provisions outlined above set forth a classic example of administrative agencies, the regional board and the state board, acting adjudicatively or quasi-judicially with the usual recourse to the courts through administrative mandamus. (Cf. Code Civ. Proc. § 1094.5.) It is seen that this process included the mailing to the city of a tentative or proposed cease and desist order, in essence the accusation or complaint, with a notice of hearing thereon. The city had the choice of acquiescing in the proposed cease and desist order, or contesting it through the foregoing hearing process, where its individual rights could be adjudicated. Accordingly, by the time the regional board mailed the tentative cease and desist order to the city, an "adjudicatory proceeding" had been clearly commenced within the meaning of section 54956.6.

2. Application Of The Tentative Cease And Desist Order To The Provisions Of Section 54956.9 Of The Government Code

We have established that the *sine qua non* for the operation of subdivision (a) of section 54956.9 of the Government Code herein is (1) the commencement of an "adjudicatory proceeding" and (2) the general requirement that the closed session "is to confer with, or receive advice from, its legal counsel regarding pending litigation [in our case, the cease and desist order proceeding] when discussion in open session concerning

those matters would prejudice the position of the" city in the pending litigation, based upon the advice of the city attorney.

This latter general requirement is essentially one requiring the exercise of judgment on the part of both the city council and the city attorney. We believe that the requirement of section 54956.9 of the Government Code that the attorney for the legislative body shall state "the specific reasons" for the closed session requires an articulation by him or her as to why the facts and circumstances are such that an open session would prejudice the local agency in the litigation. In the context of the tentative cease and desist order discussed herein, we can certainly envision the need to have discussed the strength and weaknesses of the city's position with respect to the four out of seven tasks the public works board recommended should be contested at the hearing before the regional board. This is particularly true since not only could the city have been faced with a cease and desist order as proposed, but the city could also have been subject to civil penalties for failure to comply with the cease and desist order (either administratively or court imposed, see Water Code, § 13350), or could have been the subject of an injunction action brought by this office at the request of the local board (see Water Code, § 13331).³

Whether the city attorney and the city council made the proper "judgment call" under section 54956.9 is beyond the scope of our opinion function, being essentially a question of fact. In this respect, however, we note the competing policy considerations set forth by the court in the *Sacramento Newspaper Guild* case, *supra*. These would appear to be as germane to the codified litigation exception as they were when the court implied the exception to the open meeting requirements of the Ralph M. Brown Act in that case.

Thus, with regard to a public agency's need to confer with its attorney in private, the court stated:

". . . Government should have no advantage in legal strife; neither should it be a second-class citizen. We reiterate what we stated in the supersedeas aspect of this suit, *Sacramento Newspaper Guild v. Sacramento County Board of Supervisors*, *supra*, 255 Cal.App.2d at page 54:

'Public agencies face the same hard realities as other civil litigants. An attorney who cannot confer with his client outside his opponent's presence may be under insurmountable handicaps. A panoply of constitutional,

³ These additional remedies available to the local board could also possibly have justified a closed session under subdivision (b) of section 54956.9 since failure to acquiesce in the regional board's decision would appear to have constituted "a significant exposure to litigation against the" city within the meaning of subdivision (b)(1).

statutory, administrative and fiscal arrangements covering state and local government expresses a policy that litigating public agencies strive with their legal adversaries on fairly even terms. We need not pause for citations to demonstrate the obvious. There is a public entitlement to the effective aid of legal counsel in civil litigation. Effective aid is impossible if opportunity for confidential legal advice is banned.'

"Settlement and avoidance of litigation are particularly sensitive activities, whose conduct would be grossly confounded, often made impossible, by indiscriminating insistence on open lawyer-client conferences. In settlement advice, the attorney's professional task is to provide his client a frank appraisal of strength and weakness, gains and risks, hopes and fears. If the public's 'right to know' compelled admission of an audience, the ringside seats would be occupied by the government's adversary, delighted to capitalize on every revelation of weakness. A lawyer worth his salt would feel a *sense of treachery* in disclosing that kind of appraisal. (8 Wigmore *op. cit.* 2291, p. 553.). . . ." (Fn. omitted.) (263 Cal.App.2d at pp. 55-56.)

On the other side of the coin the court, however, cautioned:

"The two enactments [the Ralph M. Brown Act and the attorney-client privilege] are capable of concurrent operation if the lawyer-client privilege is not overblown beyond its true dimensions. As a barrier to testimonial disclosure, the privilege tends to suppress relevant facts, hence is strictly construed. (*Greyhound Corp. v. Superior Court, supra*, 56 Cal.2d at p. 396.) As a barrier against public access to public affairs, it has precisely the same suppressing effect, hence here too must be strictly construed. As noted earlier, the assurance of private legal consultation is restricted to communications 'in confidence.' Private clients, relatively free of regulation, may set relatively wide limits on confidentiality. Public board members, sworn to uphold the law, may not arbitrarily or unnecessarily inflate confidentiality for the purpose of deflating the spread of the public meeting law. Neither the attorney's presence nor the happenstance of some kind of lawsuit may serve as the pretext for secret consultations whose revelation will not injure the public interest. To attempt a generalization embracing the occasions for genuine confidentiality would be rash. The Evidence Code lawyer-client provisions may operate concurrently with the Brown Act, neither superseding the other by implication." (263 Cal.App.2d at p. 58.)

Accordingly, we conclude on question number one that the mailing to the city of a tentative cease and desist order with the hearing date thereon by a regional water quality control board constitutes the commencement of an "adjudicatory proceeding" before that agency within the meaning of section 54956.9. As such it is pending litigation which may be discussed by the city council and its city attorney in closed session under section 54956.9 in the Ralph M. Brown Act. However, those discussions must be confined to those authorized by section 54956.9, namely to receive advice from the city attorney and to confer with him or her regarding the pending litigation when discussion of those matters in open session would prejudice the position of the city in the litigation. This would include such matters as discussing the legal options open to the city and the legal strategies to be employed by the city in the litigation, but would not include discussion on any matters which would not prejudice the city in the litigation.

3. The Question Of Possible Waiver By A Subsidiary City Agency Of Section 54956.9

The second question presented for resolution herein is whether when one city agency has discussed a tentative cease and desist order in open session, the city council may thereafter invoke section 54956.9 of the Government Code to discuss the same cease and desist order with its city attorney. In the context of the facts under consideration herein, the question is essentially whether the city public works board could have waived or nullified the city council's rights under section 54956.9 of the Government Code. We conclude that it could not have done so.

Initially, we note that the usual rule is that once confidential information is disclosed to the public or to unauthorized third parties, confidentiality as to such information can no longer be claimed. It has been "waived." (See *Black Panther Party v. Kehoe* (1974) 42 Cal.App.3d 645; and, e.g., Evid. Code, § 912, waiver of attorney-client privilege.)

We do not, however, have such a situation herein with respect to the city public works board and the city council. Section 54956.9 of the Government Code, in permitting closed sessions, seeks to protect confidential communications between attorney and client, not the mere discussion of a matter such as the tentative cease and desist order. Accordingly, when the public works board met and discussed the tentative cease and desist order, it in no way invoked section 54956.9, nor discussed confidential information *in open session*, nor waived confidential information. It was not until the city council met with its attorney to receive its attorney's advice and consultation relative to the tentative cease and desist order that section 54956.9 was even invoked.

Stated otherwise, although both bodies may have coincidentally discussed the tentative cease and desist order, the right to have met in closed session and resultant confidentiality arising from section 54956.9 related only *to the attorney-client communication with respect thereto*. In short, insofar as section 54956.9 of the Government Code is concerned, the two bodies were considering different information. Accordingly, no question of waiver could have arisen.

Furthermore, under section 54956.9 of the Government Code, the city council had the absolute right to confer with its attorney with respect to "pending litigation" in closed session under the ground rules set forth in that section. We see no way such right could have been nullified by what others might have done, whether they were a subordinate or advisory board, the city attorney or individual council members.

We therefore conclude on question two that where one city agency has discussed in open session a proposed or tentative cease and desist order issued by a regional quality control board, the city council may nevertheless invoke the adjudicatory proceeding exception to the open meeting law to hold closed session meetings with its city attorney to receive his or her advice and to discuss the legal options and strategies open to the city with respect to such adjudicatory proceedings.
