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PRIVILEGED ATTORNEY-CLIENT COMMUNICATION

MEMORANDUM

VIA EMAIL

To: Denise Standridge, Esq. and Jill Sprague, Esq.

From: Robin B. Johansen and James C. Harrison

Date: December 19, 2019

Re: Disclosure of Closed Session Materials

You have asked whether a member of the Alameda-Contra Costa Transit District Board of Directors may disclose materials distributed to the Board in a closed session held to discuss labor negotiations pursuant to Government Code section 54957.6. Specifically, you have asked whether the prohibition on such disclosure in Government Code section 54963 applies to Board member Harper's disclosure of factual material compiled for the Board's November 13, 2019 closed session even though some of the contents of that material might otherwise be subject to a Public Records Act request outside of the context of the closed session. You have also asked what remedies are available to the Board if it decides that Mr. Harper improperly disclosed closed session materials in violation of section 54963, including whether the Board may exclude him from future closed session discussions of labor negotiations. For the reasons stated below, we believe that factual material compiled for the Board for discussion in closed session is confidential and must be kept confidential unless a majority of the Board votes to disclose it.

Given that the Board does not have a policy permitting exclusion for violations of the confidentiality of closed session and the lack of any direct authority authorizing exclusion under these circumstance, it is not clear that the Board may exclude Mr. Harper from future closed session discussions of labor negotiations. However, the Board may consider censuring Mr. Harper for his disclosure of confidential information. In addition, we recommend that the Board adopt a policy that, with the

exception of what is reported out following the closed session, no member of the Board may disclose anything that was said or reviewed in closed session without the approval of a majority of the Board and that the Board has the authority, by a majority vote, to exclude a member who fails to comply with the policy from future closed session discussions of the same matter. Second, the Board should consider requiring all Board members, including Mr. Harper, to certify that they will comply with the Board policy about seeking approval for any disclosure and to acknowledge that a majority of the Board may exclude a member who violates the policy from future closed sessions of the matter under consideration.

BACKGROUND

On November 13, 2019, the AC Transit Board met in closed session to discuss labor negotiations with its negotiator. The closed session was properly noticed under the Brown Act, and there is no dispute that Government Code section 54957.6 allows a local agency board to meet in closed session to discuss labor negotiations.

In preparation for the closed session, the District's labor negotiator prepared a PowerPoint presentation for the Board members, each of whom was given a hard copy of the slides immediately prior to the presentation. Although the District had access to the statistics contained in the PowerPoint, the District had not compiled the information in the form prepared for the closed session. This is also true of the public, which could have obtained some of the information contained in the PowerPoint in response to a Public Records Act request, but not in the form that it was presented to the Board.

Director Greg Harper apparently kept his hard copy of the presentation and later provided four pages of the presentation to at least two people, one of whom was a reporter.

We have not seen the entire slide presentation, but the four pages at issue here deal with:

1. The negotiation schedule;
2. The number of employee work days lost over the past four years due to unprotected absences;
3. Barriers to the leave management process; and

4. The effect of long-term absences by employees who opt not to use the leave management process.[1]

The Board did not authorize disclosure of the closed session document, and it has asked you to seek opinions from outside counsel and from the Attorney General and the Fair Political Practices Commission as to whether the disclosure violated Government Code section 54963.

A. The Disclosure Violates Government Code Section 54963

Government Code section 54963 reads:

> (a) A person may not disclose confidential information that has been acquired by being present in a closed session authorized by Section 54956.7, 54956.8, 54956.86, 54956.87, 54956.9, 54957, 54957.6, 54957.8, or 54957.10 to a person not entitled to receive it, unless the legislative body authorizes disclosure of that confidential information.
>
> (b) For purposes of this section, "confidential information" means a communication made in a closed session that is specifically related to the basis for the legislative body of a local agency to meet lawfully in closed session under this chapter.
>
> (c)Violation of this section may be addressed by the use of such remedies as are currently available by law, including, but not limited to:
>
> (1)Injunctive relief to prevent the disclosure of confidential information prohibited by this section.
>
> (2)Disciplinary action against an employee who has willfully disclosed confidential information in violation of this section.
>
> (3)Referral of a member of a legislative body who has willfully disclosed confidential information in violation of this section to the grand jury.
>
> (d)Disciplinary action pursuant to paragraph (2) of subdivision (c) shall require that the employee in question has either received training as to the requirements of this section or otherwise has been given notice of the requirements of this section.
>
> (e) A local agency may not take any action authorized by subdivision (c) against a person, nor shall it be deemed a violation of this section, for doing any of the following:
>
> (1) Making a confidential inquiry or complaint to a district attorney or grand jury concerning a perceived violation of law, including disclosing facts to a district attorney or grand jury that are necessary to establish the illegality of an action taken by a legislative body of a local agency or

[1] Copies of the four pages that were disclosed appear as Attachment A.

> the potential illegality of an action that has been the subject of deliberation at a closed session if that action were to be taken by a legislative body of a local agency.
>
> (2) Expressing an opinion concerning the propriety or legality of actions taken by a legislative body of a local agency in closed session, including disclosure of the nature and extent of the illegal or potentially illegal action.
>
> (3) Disclosing information acquired by being present in a closed session under this chapter that is not confidential information.

Director Harper believes that the information he disclosed was not confidential information under section 54963, pointing to subdivisions (b) and (e)(3), and that the information he disclosed would be subject to a Public Records Act request.

The fact that the information in the PowerPoint might otherwise be available to the public, however, does not deprive the PowerPoint of its confidentiality. The selection of what statistics to present to the Board for discussion can reveal a great deal about what was discussed in closed session. In this case, the four pages that Director Harper distributed reveal that the negotiator wanted to focus the Board's attention on the issue of unprotected employee absences and its effect on the operation of the District. Whatever else was discussed in the closed session, it is now clear that employee absences and the leave management policy were part of that discussion. Because subdivision (b) clearly provides that "'confidential information' means a communication made in a closed session that is specifically related to the basis for the legislative body of a local agency to meet lawfully in closed session," the four pages at issue here meet the definition of confidential information. Both the legislative history of section 54963 and case law involving the legislative and deliberative process privileges support this interpretation.

1. <u>The legislative history of section 54963</u>

Prior to passage of Assembly Bill 1945 in 2002, there was no statute that directly prohibited disclosure of closed session discussions. AB 1945 added section 54963 to the Government Code in order to clarify that closed session materials could not be disclosed and to specify the remedies available for improper disclosure.

The Senate Judiciary Committee Report on AB 1945 refers to the Court of Appeal's opinion in *Kleitman v. Superior Court*, 74 Cal. App. 4th 324 (1999), which the committee report describes as "confirming the presumption that information received during a closed session and records thereof are confidential." Sen. Jud. Comm. Analysis of AB 1945 (Aug. 6, 2002), p. 2. In *Kleitman,* the Court of Appeal refused to require members of the Mountain View City Council to answer six interrogatories about

what was discussed in an unrecorded closed session regarding negotiation of a lease of city property. The underlying action in that case alleged that the closed session violated the Brown Act because the members discussed property not properly identified in the closed session agenda item description. Because the session was unrecorded, the only way the plaintiff could learn whether the discussion went beyond the property identified in the agenda was to ask those present about their recollections. Notwithstanding the fact that discovery was necessary in order for plaintiff's lawsuit to proceed, the Court of Appeal held that the plaintiff's interrogatories improperly intruded on the confidentiality of the closed session and denied the request.

2. <u>The legislative and deliberative process privileges</u>

The critical question here is what subdivision (e)(3) means when it says that it is not a violation of section 54963 to disclose "information acquired by being present in a closed session under this chapter that is not confidential information." One can certainly argue that the number of unprotected employee absences in the District over the past four years is not a confidential piece of information. But that is not the only information that disclosure of the PowerPoint reveals. As discussed above, such disclosure reveals that the District's labor negotiator wanted the Board to focus on that issue for purposes of obtaining guidance in future negotiations, particularly in the context of the leave management process, which was probably at issue in the negotiations.

At a minimum, the disclosure reveals that the leave management process and employee absenteeism were discussed in closed session. The disclosed slides suggest that the negotiator drew a link between the leave management process and the 56% increase in unprotected absences between 2016 and the first 10 months of 2019 and that the Board almost certainly discussed that issue. *This* is the confidential information that those present in the closed session received, and it is protected by section 54963.

Although we have found no case law specifically addressing whether disclosure of factual information of the sort contained in the PowerPoint is covered by section 54963, there is such case law in the context of the legislative privilege, which applies to bodies like the District Board, and the deliberative process privilege, which applies generally to the executive branch.

In *Times Mirror Co. v. Superior Court*, 53 Cal. 3d 1325 (1991), the California Supreme Court held that the Governor's appointment calendars are protected by the deliberative process privilege and are not subject to disclosure under the Public Records Act. The Court acknowledged that the information in the appointment calendars was purely factual and did not contain specific information

about the Governor's thought processes. Nevertheless, the Court held that disclosure of the calendars would intrude into the Government's deliberative process:

> Disclosing the identity of persons with whom the Governor has met and consulted is the functional equivalent of revealing the substance or direction of the Governor's judgment and mental processes; such information would indicate which interests or individuals he deemed to be of significance with respect to critical issues of the moment. The intrusion into the deliberative process is patent.
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> 53 Cal. 3d at 1343.

Two years after *Times Mirror,* the Court of Appeal in *Rogers v. Superior Court*, 19 Cal. App. 4th 469 (1993) held that phone numbers on the telephone bills of the members of the Burbank City Council and other city employees were exempt from disclosure for the same reasons stated in *Times Mirror*:

> Disclosing the telephone numbers of persons with whom a city council member has spoken discloses the identity of such persons and is "the functional equivalent of revealing the substance or direction" of the judgment and mental processes of the city council member. (*Times Mirror Co. v. Superior Court*, *supra*, 53 Cal.3d at p. 1343.) There is no meaningful distinction between the appointment calendars and schedules of the Governor and the telephone bills of a city council member. In both cases, disclosure of the records sought will disclose the identity of persons with whom the government official has consulted, thereby disclosing the official's mental processes.
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> 19 Cal. App. 4th at 479-80.

Finally, it is important to note that the *Kleitman* court, whose opinion was cited in the legislative history for section 54963, stated that "procedural safeguards seem particularly appropriate when the discovery sought concerns matters which may impinge on the legislative privilege." *Kleitman v. Superior Court*, *supra*, 74 Cal. App. 4th at 335-36.

If merely disclosing the names or telephone numbers of people with whom legislative or executive officials have communicated violates recognized privileges under California law, it seems clear that distributing materials prepared specifically for a closed session of a legislative body would violate that privilege as well.

B. The Attorney General Is Not Authorized to Give an Opinion to the Board or Its General Counsel

You have also asked us to discuss the Board's suggestion that you request an opinion from the Attorney General about the propriety of Director Harper's disclosure.[2] As an initial matter, Government Code section 12519 limits the officials who may request opinions from the Attorney General to "any Member of the Legislature, the Governor, Lieutenant Governor, Secretary of State, Controller, Treasurer, State Lands Commission, Superintendent of Public Instruction, Insurance Commissioner, any state agency, and any county counsel, district attorney, or sheriff when requested, upon any question of law relating to their respective offices." It also provides that the Attorney General "shall give his or her opinion in writing to a city prosecuting attorney when requested, upon any question of law relating to criminal matters." The Attorney General's website states that these are the only officials to whom his office may provide an opinion.[3]

We have seen instances where a local official or board may ask a member of the Legislature or a county counsel to request an opinion, and the Attorney General has done so. *See*, *e.g.*, 44 Ops. Cal. Atty. Gen. 147 (1964) (County Counsel asked whether a school district's closed session minutes on personnel matters may be made public). Thus, it would be possible for you to get an opinion this way, but we would caution that the District would not necessarily be able to control how the question was presented or how questions from the Attorney General's opinion unit might be answered.

Even if the District would have adequate control over these matters, there may be unintended consequences of making such a request. Although the courts give great respect to Attorney General opinions, they are not bound by those opinions. *See Kleitman*, *supra*, 74 Cal. App. 4th at 333-34 ("While the opinions of the Attorney General are not binding on this court, they may be persuasive.") Thus, it is entirely possible that the Attorney General may issue an opinion that is later overturned by the courts. If the Attorney General were to hold that documents like those at issue here *could* be disclosed but a court were to disagree later, even many years later, directors might have violated the statute. Worse, staff would be reluctant to use written materials to guide closed session discussions because of what those written materials would reveal about the subjects discussed.

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[2] We understand that the Board also asked you to request an opinion from the Fair Political Practices Commission, but as we discussed, that body does not have jurisdiction over issues involving disclosure of confidential information under the Brown Act.

[3] Office of the Attorney General, https://oag.ca.gov/opinions/faqs.

Section 54963 provides that a majority of the Board may authorize disclosure of materials discussed in closed session. We believe that the decision to disclose particular documents is more properly left to the sound discretion of the Board, which can assess the degree to which disclosure of a particular document would affect the Board's need for confidentiality in any given situation.

C. The Board's Remedies Include Adopting a Policy Against Disclosure and Authorizing Exclusion for Violations

Without advance notice that violations of the prohibition against disclosure of confidential information may result in exclusion from future closed session discussions, it is not clear that the Board has authority to exclude Mr. Harper from future closed session discussions. Furthermore, Mr. Harper has stated his belief that the materials he disclosed were not confidential. Under these circumstances, in our opinion, section 54963's provision for referral to a grand jury for members of a legislative body is not appropriate.

The Board may, however, consider censuring Mr. Harper and should take action to safeguard the confidentiality of its closed sessions in the future. The best way to do that is to confirm unequivocally that, with the exception of what is reported out, everything said or provided in closed session is confidential unless a majority of the Board agrees that it can be disclosed. That policy puts every Board member and anyone else who participates in closed session on notice that they cannot disclose what happened and that if they wish to disclose something, they need approval from a majority of the Board. For these reasons, we suggest that the Board amend its Board Policy No. 702 to read as follows:

> E. Confidential Information
>
> Information received in a closed session meeting, or confidential information received, acquired by or made available to anyone covered by this Code of Ethics or any employee or agent of the District, shall not be disclosed, except as required or authorized by law. No one shall use any confidential information for speculation or personal gain for himself/herself or another.
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> *No member of the Board of Directors or any other individual who has participated in a closed session shall disclose any information provided or obtained in closed session without the approval of a majority of the Board of Directors. In the event that a Director violates this policy, the Board of Directors, may by majority vote, (1) exclude the Director from future closed session discussions of the same matter, or (2) exclude the Director from all future closed session discussions until it obtains guidance from a court.*

> *All documentary* information received in closed session shall be returned to the General Counsel. The General Counsel shall maintain a file on information provided in closed session which may be reviewed by Board Members during normal business hours.

We assume that members of the Board will agree to comply with such a policy in good faith. If they do not agree, however, what little case law there is on the subject indicates that the Board has two alternatives in addition to referral to the grand jury. First, the board may seek injunctive relief pursuant to section 54963(c)(1). A lawsuit may be time-consuming and expensive, however, and the Board may feel that it needs to take immediate action.

The second alternative, therefore, would be to authorize the Board to exclude the member who refuses to comply with Board policy on the confidentiality of closed session material. Such exclusion could be limited to certain topics or only until the Board can get guidance from the courts, or both.

We have found no California law that permits exclusion, except in the case of disqualification for conflicts of interest, or that even fully discusses the issue. *See* Government Code §§ 1090, 87100. However, there is a federal district court case from Southern California with facts very similar to those at issue here. In *Page v. Tri-City Healthcare Dist.*, 860 F.Supp.2d 1154 (S.D.Cal. 2012), a healthcare district excluded a member of its board who had released closed session materials, including some that the board described as protected by the attorney-client privilege and the trade secret privilege. The board member had also refused to sign a confidentiality agreement that was required of all board members. The federal court did not reach the merits, because it determined that the plaintiff taxpayer lacked standing to sue and it remanded the case to the state superior court.[4] Although the court did not resolve the case on the merits, it recognized that the board probably had immunity from suit because "[i]n policing its own ethics violations, the Board engages in a core legislative activity." 860 F.Supp.2d at 1170.

The *Page* court also relied on *Whitener v. McWatters,* 112 F.3d 740 (4th Cir. 1997), which held that a county board of supervisors acted in its legislative capacity when it voted to discipline a member for using abusive language. In *Whitener,* the Fourth Circuit quoted Joseph Story's early commentary on constitutional law:

> No person can doubt the propriety of the provision authorizing each house to determine the rules of its own proceedings. If the power did not

[4] We have found no report of the outcome of the superior court case. According to a May 24, 2013 article in the *San Diego Union-Tribune*, the board member who prompted the case resigned, but not until a year after the federal court remanded the case.

> exist, it would be utterly impracticable to transact the business of the nation, either at all, or at least with decency, deliberation, and order. The humblest assembly of men is understood to possess this power; and it would be absurd to deprive the councils of the nation of a like authority. But the power to make rules would be nugatory, unless it was coupled with a power to punish for disorderly behavior, or disobedience to those rules.
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> *Id.* at 744, quoting Joseph Story, Commentaries on the Constitution of the United States § 419 (court's emphasis deleted).

We believe that in the extreme situation of a board member who refuses to comply with board policy regarding the confidentiality of closed session information, the best course for the Board would be for it to have a policy that permits the Board to exclude that member from future closed session discussions of the same topic, or if the Board desires to exclude the member from all future closed session discussions, that the policy allow it to do so until it can obtain guidance from a court.

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