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MEMORANDUM

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**TO:** KEVIN HUNT  
**FROM:** MCCORMICK, KIDMAN & BEHRENS, LLP, RUSSELL G. BEHRENS, DANIEL J. PAYNE  
**DATE:** JANUARY 12, 2011  
**RE:** BROWN ACT; LETTER FROM "CALIFORNIANS AWARE"; BOARD OF SUPERVISORS' DISCUSSION RE ELECTRONIC COMMUNICATIONS

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CalAware Letter

By letter dated November 29, 2010 (see attached), a group named "Californians Aware: The Center for Public Forum Rights" ("CalAware") sent a warning to public agencies in California that it would soon take "a more aggressive stance in both publicizing and litigating" certain violations of the Ralph A. Brown Act ("Brown Act"; Gov. Code §§ 54950-54963.) The letter was addressed to the executive directors of the following six organizations:

- League of California Cities
- Association of California Water Agencies
- Association of California Healthcare Districts
- California School Boards Association
- California Special Districts Association
- California State Association of Counties

According to its own website, CalAware is a California non-profit corporation with the mission of fostering the improvement of, compliance with, and understanding of "public forum law." Public forum law means, primarily, the Brown Act and the California Public Records Act. The group has been involved in a small number of lawsuits in the past, both as plaintiff and as *amicus curiae*.

The attached letter from CalAware states that its enforcement efforts will target four particular Brown Act violations that the group believes are "common." Three of the four violations involve closed sessions, and all four are described briefly below.

1. Closed Session, Conference with Legal Counsel  
*Targeted Violation:* Failure to list on the agenda or announce prior to closed session the correct section of the Brown Act and the "existing facts and circumstances" that justify a closed session for conference with legal counsel to discuss anticipated litigation against the agency. (Gov. Code § 54956.9(b).)
2. Closed Session, Personnel  
*Targeted Violation:* Using closed sessions to take action on compensation for unrepresented employees and to conduct face-to-face negotiations between the legislative body and its executive officer. (Gov. Code §§ 54957, 54957.6.)
3. Closed Session, Real Property Negotiations  
*Targeted Violation:* Improper designation on the agenda of the real property under negotiation and improper designation of the "price and terms of payment" to include matters outside the scope of that phrase. (Gov. Code § 54956.8.)
4. "Walk On" Items to Posted Agenda  
*Targeted Violation:* Improper addition of a late item to an agenda, either without the required findings or as an addition to a special meeting.

Brown Act enforcement actions can be commenced by the district attorney or "any interested person," including CalAware. Briefly, the Brown Act contains two separate enforcement provisions with slightly different procedures. Government code section 54960 provides generally for an action by mandamus, injunction or declaratory relief to stop or prevent violations or threatened violations of the Brown Act, or to determine the applicability of the Brown Act to certain actions of the governing body. Section 54960.1 applies specifically to legal actions that seek to invalidate actions taken by a governing body, which is a possible remedy for Brown Act violations.

The Brown Act expressly provides that costs and reasonable attorney fees "may" be awarded when the court finds a legislative body violated the Brown Act. This would apply to an action brought under either 54960 or 54960.1. It also contains a provision for awarding costs and fees to a successful defendant, but only when the court makes a finding that the lawsuit was "clearly frivolous and totally lacking in merit." (Gov. Code § 54960.5.)

Board of Supervisors' Discussion --  
Electronic Communications

On November 23, 2010, Orange County Supervisor Bill Campbell led a discussion of the Board of Supervisors on the subject of "Communication Between the Public and Supervisors during Board of Supervisors meetings." The discussion raised questions about how the use of e-mail, computers and other means of electronic communications during Board meetings might have implications for the Board under the Brown Act and the Public Records Act, and it raised

the issue for the Board of Supervisors whether its rules should be modified to address the use of electronic communication devices during Board meetings.

This subject has been written about frequently, and positions vary regarding the need to regulate the use of electronic communications during meetings. The Brown Act does not expressly address the use of electronic communications, but many cities and public agencies have discussed these issues and some have adopted rules of order to address them. San Francisco's Board of Supervisors, for example, adopted a rule that prohibits "Usage and ringing of cell phones, pagers, or other electronic communication devices in its Board and Committee meetings." (Rule of Conduct 6.8.4.)

November 29, 2010

Chris McKenzie, Executive Director  
League of California Cities  
1400 K Street, Sacramento CA 95814

Jeff Vaca, Interim Executive Director  
California School Boards Association  
3100 Beacon Bl., West Sacramento, CA 95691

Tim Quinn, Executive Director  
Association of California Water Agencies  
910 K Street, Suite 100, Sacramento, CA 95814

Neil McCormick, Executive Director  
California Special Districts Association  
1112 "I" St., Ste 200, Sacramento, CA 95814

Ralph Ferguson, Executive Director  
Association of California Healthcare Districts  
2969 Prospect Park Drive  
Rancho Cordova, CA 95670

Paul McIntosh, Executive Director  
California State Association of Counties  
1100 K Street, Suite 101  
Sacramento, CA 95814

**Subject: Notice of Strict Enforcement Concerning Certain Common Brown Act Violations**

Gentlemen:

Over the past several years, Californians Aware has identified four clusters of Brown Act issues that arise repeatedly. While we view our mission as primarily educational, the time spent correcting these violations has taxed our resources and often comes after the public has been shut out of the decision-making. There is no doubt that each of these should have been entirely avoided by the local agency's use of knowledgeable and alert legal counsel to both counsel client bodies and train the appropriate staff. Thus, this communication is to inform you of these issues before our organization begins a more aggressive stance in both publicizing and litigating these common violations.

The four issues are:

**Agendizing/announcing closed sessions for anticipated litigation – subdivision (b) of Gov't Code § 54956.9.**

Prior to a closed session for pending litigation, the Brown Act requires the authorizing subdivision to be stated on the agenda or announced. For subdivision (b), the "existing facts and circumstances" must appear on the agenda or be announced prior to the closed session, which would allow interested members of the public to comment on these before the legislative body holds its private discussion with legal counsel. (Subparagraphs (B)-(E) of § 54956.9(b)(3).) Here, only one exception to this announcement requirement is offered by subparagraph (A), when the facts and circumstances are not yet known to potential plaintiffs. We have found subparagraph (A) circumstances to apply very, very rarely. However, agencies seldom make any facts-and-circumstances announcement and often fail to designate the subdivision authorizing the closed session. (e.g., *The Brown Act, Open Meetings for Local Legislative Bodies*, Cal. Attorney General, pages 23-24; *McKee v. Chino Valley USD* (2005) SBSC Case No. RCV079704.)

**Labor negotiations for unrepresented employees - Gov't Code § 54957.6.**

Both § 54957 and § 54957.6 ban legislative bodies from using closed sessions to take action on compensation for unrepresented employees and from conducting face-to-face negotiations between the body and its CEO. Yet, we repeatedly encounter violations of these prohibitions. (e.g., *Open & Public IV*, pages 35-36; *McKee v. Orange County Board of Supervisors* (2007) OSC Case No. 07CC03010.)

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**Real property negotiations - Gov't Code § 54956.8.**

Among the information required to be announced prior to this closed session is the identification of the subject real property. The "safe harbor" description, assuring substantial compliance, requires the agenda to include: "Property: (Specify street address, or if no street address, the parcel number or other unique reference, of the real property under negotiation)." We frequently observe property identified on agendas as: northeast corner of 1<sup>st</sup> and Main; or portion of Johnson City Park; or site for New High School. Similarly, we see Under Consideration: Terms of Development Agreement or Terms of Sale, despite the Brown Act's authorization for only "price and/or terms of payment." (e.g., *Open & Public IV*, page 33; *McKee v. Orange USD* (2003) OSC Case No. 01CC13046.) Nowhere in California statutes or case law is the phrase "terms of payment" used as synonymous with "consideration"; instead it is consistently used and understood to refer to the *form and manner* of payment. Giving the phrase a broader construction is not only a conspicuous aberration in this regard but contrary to the constitutional requirement added by Proposition 59 of 2004 that provisions limiting access to meetings of public bodies be interpreted narrowly.

**Adding items of business to a posted agenda less than 72-hours prior to a meeting - Gov't Code § 54954.2.**


We frequently see legislative bodies adding items to regular meeting agendas without the required findings that (a) there is a need to take immediate action and (b) the need came to the agency's attention subsequent to the agenda posting. Instead we see items added because someone forgot to place it on the agenda or there is some perceived need to pass a resolution in support of some pending legislation. Additionally, we see additions to Special Meeting agendas, a practice expressly forbidden by § 54956. (e.g., *Open & Public IV*, pages 24-25; *The Brown Act, Open Meetings for Local Legislative Bodies*, Cal. Attorney General, page 18; *McKee v. Fillmore City Council* (2009) VSC Case No. 56-2009-00357966-CU-WM-VTA.)

We are sending you this notice to give your organizations time adequately to inform your members that, from here on, we intend to commence litigation promptly when we find violations of these obvious requirements meant to protect the public's involvement in the decision-making of its local agencies. That is, since § 54960 does not require a challenger to allow 30 days for correction as does § 54960.1, absent an acknowledgement of violation and correction at the next regular meeting or within seven days, whichever occurs sooner, we will file an action to stop these practices so obviously forbidden by the Brown Act.

In this way we hope to educate those who willfully, or through an unwillingness to recognize their responsibilities, violate the open meetings law, by strongly reinforcing the point that such acts will not be tolerated.

Nevertheless, we remain eager to assist those who may ask Californians Aware to help them in gaining a thorough understanding of open government laws. Education is still our primary mission.

Sincerely,

  
Terry Francke,  
General Counsel

  
Richard McKee,  
Vice President for Open Government Compliance