



California Fair Political Practices Commission

February 23, 1990

Terry E. De Wolfe
1142 Kenton Drive
Monterey Park, CA 91754

Re: Our File No. 89-721

Dear Mr. De Wolfe:

We have received your letter, dated December 17, 1989, concerning a possible violation of the open meeting laws.

The Fair Political Practices Commission does not provide enforce or provide advice concerning open meeting laws. These laws are not part of the Political Reform Act (Government Code Sections 81000-91015), and thus are outside of the Commission's jurisdiction. The open meeting laws are enforced and interpreted by your district attorney and the Attorney General's office. We suggest that you contact one of those offices concerning this matter.

Sincerely,

A handwritten signature in cursive script that reads "Kathryn E. Donovan".

Kathryn E. Donovan
General Counsel

cc: Anthony Canzoneri

DEC 21 8 03 AM '89

December 17, 1989

State of California
Fair Political Practices Commission
P.O. Box 807
428 "J" Street, Suite 800
Sacramento, CA 95804

Dear Commissioners:

The enclosed letter relative to our City Council's violation of the Brown Act, was sent to each of Monterey Park's Councilpersons on December 13, 1989. A receipt was secured for its delivery.

Can you advise if there is any way, short of an expensive and time consuming law suit (which, under the circumstances would be a terrible irony), to get our City to conform to the conditions of the Brown Act?

Yours very truly,



Terry E. De Wolfe
1142 Kenton Drive
Monterey Park, CA 91754
(818) 280-0479

TED: bs
Attachment (1)

BROWN, WINFIELD & CANZONERI

INCORPORATED

ATTORNEYS AT LAW

CALIFORNIA PLAZA

300 SOUTH GRAND AVENUE, SUITE 1500

LOS ANGELES, CALIFORNIA 90071-3125

TELEPHONE:

(213) 687-2100

TELECOPIER:
(213) 687-2149

FILE NO:

DIRECT DIAL NO:

J. KENNETH BROWN
THOMAS F. WINFIELD III
ANTHONY CANZONERI
VICKI E. LAND
JAMES C. CAMP
STEPHANIE ROSE SCHER
STEVEN ABRAM
THOMAS D. GREEN
DENNIS S. ROY
ANTHONY P. PARRILLE
THOMAS I. MCKNEW, JR.
MARK W. STERES
MARK GARRETT
DAVID R. KING
KATHARINE A. MILLER
JONATHAN C. RIESE
TERI E. LAWSON
EDWARD O. LEAR
CARA E. SILVER
BRADLEY R. HOGIN
JUDITH M. FLOYD

December 20, 1989

Mr. Terry DeWolfe
1142 Kenton
Monterey Park, California 91754

Mr. Saul Leff
318 North New Avenue
Monterey Park, California 91754

Dear Messrs. DeWolfe and Leff:

I am writing this letter to you on behalf of the Honorable Mayor of the City of Monterey Park, Patricia Reichenberger, as her response to your December 13, 1989 letter and in my capacity as the City Attorney.

The assertion in your letter that the November 27, 1989 Closed Session held by the Monterey Park City Council violated the Ralph M. Brown Act is based on erroneous facts and interpretations of law.

First, I would direct your attention to the 1989 publication by the California Attorney General's Office which is entitled OPEN MEETING LAWS. Beginning on page 35, the Attorney General discusses the provision of the Brown Act which provides for a Closed Session to consider the job performance of an employee. At page 36, the Attorney General recognizes that this personnel exception does not apply to independent contractors except for "persons who are defined as employees under Section 54957 (e.g., non-elected City Attorney, City Manager), who are retained by a City under a consulting contract . . .".

The reference in your letter to Section 41801 of the California Government Code and Volume 28 of the Opinions of the Attorney General at page 362 is not at all on point. That 1956 Attorney General's opinion deals with whether or not a City Attorney is a city officer and an employee for social security purposes and various other issues which do not relate to your

Messrs. Terry DeWolfe and Saul Leff
December 20, 1989
Page 2

assertion regarding the propriety of the Closed Session. Your further citation to Rowen v. Santa Clara Unified School District is irrelevant because the question in that case did not involve a position listed in Section 54957, but rather the hiring of real estate specialists on an independent contractor basis.

Your reference to Government Code Section 54956.9 as the basis for holding a Closed Session with the City Attorney is also in error. That section relates to meetings with the City Attorney regarding pending litigation and not to the personnel performance evaluation which was the basis for the November 27, 1989 Closed Session.

You next state in your letter that the central subject matter of the Closed Session was a revised compensation schedule for the City Attorney and that therefore the Closed Session was inappropriate. That statement is incorrect; the Council did not in any way deal with the issue of revising the City Attorney's compensation schedule. The purpose of the meeting was to evaluate the City Attorney's performance to determine whether or not the City should request proposals from others to be the city attorney.

You next reference a publication entitled GUIDE TO OPEN MEETINGS for the proposition that it was improper for Stephanie Scher and I to attend the Closed Session. Your GUIDE TO OPEN MEETINGS reference is misleading and inaccurate. Government Code Section 54957 provides that the Council may exclude witnesses from a closed session but does not state that the Council must exclude the employee being evaluated. The reference you cite to the GUIDE TO OPEN MEETING LAWS is intended to alert public employees of their right to demand that meetings pertaining to them be held in public. If you refer to the 1989 publication by the Attorney General, OPEN MEETING LAWS at page 35, you will find that an employee has the right to a public hearing where the purpose of the Closed Session is to discuss the specific charges or complaints against the employee. This does not, however, mean that the employee may not be present during a closed performance evaluation if the employee does not demand a public hearing. In fact, it would be difficult if not impossible to hold the Closed Session for the purpose of performance evaluation as is permitted by Government Code Section 54957 if the employee could not be present. OPEN MEETING LAWS at page 34 states that Closed Sessions may involve any additional support staff which may be required by the Council for the purpose of the Closed Session.

Finally, your letter suggests that the published Agenda "to discuss legal matters" was not sufficient to cover the

Messrs. Terry DeWolfe and Saul Leff
December 20, 1989
Page 3

subject matter of the meeting, citing a requirement that pertains solely to Closed Sessions held to discuss litigation. As discussed above, this was not the basis for the November 27 Closed Session. Your assumption that "the meeting centered around the City Attorney contract, and, more specifically, the compensation therein", is not correct. As stated previously, the purpose of the meeting was to evaluate the performance of the City Attorney. This necessitated a general discussion of the historical and current status of the numerous lawsuits and other legal matters which we are handling for the City. The published Agenda statement met all requirements of the Brown Act.

Please feel free to contact me directly if you have any questions regarding this response to your letter or if you feel that we have left any of your points unanswered.

Very truly yours,



ANTHONY CANZONERI

AC/caw [AC-97.300]

cc: Honorable Mayor and Members of the City Council
Mr. Mark Lewis, City Manager
Common Cause
Fair Political Practices Commission

We, the undersigned Monterey Park residents, hereby request that the Monterey Park City Council set aside the decisions reached in its closed session of November 27, 1989, and that the agenda for that meeting be rescheduled as part of an open City Council meeting within the next 30 days.

This request is made on grounds that the November 27 meeting violated several provisions of the Ralph M. Brown Act (Section 54950 et seq. of the California Government Code). To wit:

Brown Act criteria for a closed session were not met.

The Brown Act mandates (Section 54953) that "all meetings of the Legislative Body (City Council) of a local agency (City of Monterey Park), shall be open and public, and all persons shall be permitted to attend any meeting of a local agency, except as provided in this chapter."

Among the exceptions to the open meeting requirement, the Act does make provision for a closed session for the "...evaluation of performance, or dismissal of a public employee..." (emphasis added). It is our contention that the City Attorney (Anthony Canzoneri) and Assistant City Attorney (Stephanie Scher) are contract employees, not public employees:

"Section 41801 California Government Code, 28 Ops Atty. Gen. 362 - Where a city contracts with a private attorney for the performance of certain legal services, such attorney does not, because of the contract, become a city officer, and he is not an employee for Social Security purposes."

"Rowen vs. Santa Clara Unified School District (1981) 175 Cal. Rptr. 292, 121 C.A. 3rd 231 - Where real estate specialists who met with school board in closed session to discuss their qualifications to assist board in disposing of surplus real property, were not public employees but were independent contractors, this section (54957 Gov't Code) was inapplicable, and thus board violated Sec. 54953."

Meetings between City Attorney and City Council are required specifically to be open:

"42 Ops. Atty. Gen. 61 - All meetings of city council with city manager, assistant city manager, city attorney, and planning director, are, with certain exceptions, subject to provisions of secret meeting law as stated in Section 54950 et seq., and the public is entitled to notice of meeting and to the right to attend even if no 'action' is contemplated."

The exception to this rule for the city attorney is outlined essentially in Government Code Section 54956.9:

"54956.9. 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."

The central subject matter of the closed session - a revised compensation schedule for the City Attorney - is inappropriate for closed session discussion:

"61 Ops. Atty. Gen. 10, 1-4-78 - The Board of Supervisors is prohibited from holding executive sessions the primary purpose of which is to discuss salaries...."

"Guide to Open Meetings (State Committee on Local Government, p. 10) Specific employee matters regarding public employees (like a review of the city manager's performance) can be held in a closed session. The city manager's salary increase, however, must be debated and decided in an open meeting."

Attendance by the employee(s) being discussed at the closed session is not allowed.

Anthony Canzoneri and Stephanie Scher attended the November 27 closed session. According to the Guide to Open Meetings:

"If you are a public employee who may be the subject of a closed session discussion, you have the option of calling for an open meeting of the agency to discuss the matter. You may not attend the closed session meeting, however."

The agenda for the closed session did not describe the business being conducted.

Though the agenda for the closed session was published as "To Discuss Legal Matters," it seems clear tha the body of the meeting centered around the City Attorney contract, and, more specifically, the compensation therein. This violates Government Code Section 54957.7.

"54957.7....In the closed session, the legislative body may consider only those matters covered in its statement...."

These are the chief legal issues defining the November 27 closed session impropriety. These issues are critical and they are governing. Yet, at the same time, they beg the issue which is moreover one of ethics and civic obligation.

In order to discourage complacency and maintain conversancy with the market place, city contract business should be opened to competitive bidding at regular frequent intervals - probably at least every other year.

Our present City Attorney has been installed in that function for over 3 years (by a resolution, incidentally, accomplished at an open session). Presumably, over that period positive relationships have developed along with at least a modicum of mutual trust. Under those circumstances, the natural inclination is to resist change.

At the same time, any suggestion of favoritism serves all parties poorly, and, in this instance, is overriding.

Winfield, Brown and Canzoneri may indeed be providing the City the best possible legal service at the best possible price, but this can only be established, to the satisfaction of all, through a fair and dispassionate competitive bidding process. We urge you to bring the matter out into the sunshine and accomplish this.

We look forward to your response (please see Government Code Section 54960.1 for legal requirements for response time.)

Yours very truly,

Terry E. De Wolfe

Saul Leff

TED:bs

cc: Common Cause
Fair Political Practices Commission

Attachments (2)