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VIA ELECTRONIC & U.S. MAIL

November 5, 2013

Ms. Adrianna Barrios,
President of the Board of Trustees
Rancho Santiago Community College District
2323 North Broadway, Suite 410-2
Santa Ana, CA 92706-1640

Dr. Raul Rodriquez,
Chancellor
Rancho Santiago Community College District
2323 N. Broadway, Suite 410
Santa Ana, CA 92706

RE: *Violation of the Ralph M. Brown Act by the Board of Trustees*
"Closed" Session meeting of the Board of Trustees regarding negotiations with Labor Unions for "Project Labor Agreements"

Dear President Barrios and Dr. Rodriquez,

This office has been retained by Member of the Board of Trustees Phillip Yarbrough regarding the possible violation of the Ralph M. Brown Act by the Board of Trustees of the Rancho Santiago Community College District. Specifically the apparent decision of the Board to hold its meetings regarding the negotiations with the AFL-CIO Labor Council over the Project Labor Agreement(s) ("PLA") also known as a Community and Student Workforce Project Agreement ("CSWPA") in "closed" sessions.

This office is acting as Trustee Yarbrough's counsel in both my capacity as an individual attorney and as an affiliate attorney of the Pacific Justice Institute of Sacramento, CA (http://www.pacificjustice.org/). As such, this letter to the Chancellor and Board cannot be classified as "confidential" or "attorney client communication."

BROWN ACT VIOLATIONS BY THE BOARD OF TRUSTEES IN HOLDING "CLOSED" SESSION MEETINGS ON THE NEGOTIATIONS FOR THE PLA / CSWPA

In reviewing the specific circumstances of this matter and the requirements of the Ralph M. Brown Act (the "Brown Act"), it is our conclusion that the Board of Trustees in having closed session meetings of the Board of Trustees concerning PLAs (or CSWPAs) is violating the Brown Act's specific requirements that its sessions being held in "open" meetings – meaning open to the public with all of the Board's presentations and deliberations being conducted during "open session."

As you know, the Brown Act requires that the Board of Trustees hold its meetings only after proper and timely notices of those meetings are made by the Board (except for very rare emergency situations that are not at issue here). Further that a general description of the items the Board will consider at its meetings must be a part of that notice to the public and the Board is not allowed to consider or make any decision on an item not on the meeting notice.

THE ABILITY OF THE BOARD TO HOLD "CLOSED" SESSION MEETINGS IS NARROWLY CONSTRUED UNDER THE BROWN ACT

Importantly for our discussion, the Brown Act only allows for the Board to meet and discuss a very few items in "closed" session that are specifically authorized by the legislature. The Courts, in ruling on a Board's decision to exercise its ability to meet in "closed" sessions, have stated that the public policy of this state (as expressed in the Brown Act) is to construe narrowly the list of items a Board of Trustees (or other public entity's Board or Council) is allowed to meet in closed session on.

In the Attorney General's 2003 handbook on the Brown Act www.ag.ca.gov/publications/2003_Main_BrownAct.pdfat at page one it states:

> To these ends, the Brown Act imposes an "open meeting" requirement on local legislative bodies. (§ 54953 (a); Boyle v. City of Redondo Beach (1999) 70 Cal.App.4th 1109, 1116.)
>
> However, the Act also contains specific exceptions from the open meeting requirements where government has a demonstrated need for confidentiality. These exceptions have been *construed narrowly*; thus if a specific statutory exception authorizing a closed session cannot be found, the matter *must* be conducted in public regardless of its sensitivity. (§ 54962; Rowen v. Santa Clara Unified School District (1981) 121 Cal.App.3d 231, 234; 68 Ops.Cal.Atty.Gen. 34, 41-42 (1985).) [Emphasis added]. [Emphasis added].

Continuing at page 30 the Attorney General's handbook states:

> Under the Brown Act, closed sessions must be expressly authorized by explicit statutory provisions. Prior to the enactment of section 54962, the courts and this office had recognized impliedly authorized justifications for closed sessions. (Sutter Sensible Planning, Inc. v. Board of Supervisors (1981) 122 Cal.App.3d 813; Sacramento Newspaper Guild v. Sacramento County Bd. of Suprs. (1968) 263 Cal.App.2d 41.) However, that legislation made it clear that closed sessions cannot be conducted unless they are expressly authorized by statute. Although confidential communication privileges continue to exist in other statutes such as the Public Records Act and Evidence Code section 1040, these provisions no longer can impliedly authorize a closed session.
>
> Since closed sessions are an exception to open meeting requirements, the authority for such sessions has been narrowly construed. The law evinces a *strong bias in favor of open meetings*, and court decisions and opinions of this office have buttressed that legislative intent. (§ 54950.) The fact that material may be sensitive, embarrassing or controversial does not justify application of a closed session unless it is authorized by some specific exception. (Rowen v. Santa Clara Unified School District (1981) 121 Cal.App.3d 231, 235.) Rather, in many circumstances these characteristics may be further evidence of the need for public scrutiny and participation in discussing such matters. (See Civ. Code, § 47(b) [regarding privileged publication of defamatory remarks in a legislative proceeding].) [Emphasis added].

THE BOARD'S MEETINGS REGARDING THE NEGOTIATIONS BETWEEN THE BOARD OF TRUSTEES AND THE AFL-CIO REGARDING THE PLA IS NOT AUTHORIZED TO BE HELD IN "CLOSED" SESSIONS

Importantly at page 43 of the Attorney General's handbook, in discussing the Labor Negotiations exception set forth in Government Code section 54957.6 it states:

> For purposes of section 54957.6, the term "employee" not only refers to rank and file, but also includes an officer *or an independent contractor who functions as an officer or employee*. The term "employee" does not include any elected official, member of a legislative body, or other independent contractors. (§ 54957.6(b).) [Emphasis added].

We note that the Attorney General's office published this handbook 10 years after the 1993 amendments to the Brown Act – more than enough time for the AG's office to consider the impact of those changes.

THE LEGISLATIVE INTENT FOR THE 1993 AMENDMENTS TO GOVERNMENT CODE SECTION 54957.6(A) & (B) DO NOT SUPPORT A FINDING THAT THE EMPLOYEES OF CONSTRUCTION CONTRACTORS ARE "EMPLOYEES" FOR THE PURPOSES OF THE BROWN ACT

In reviewing the language of Govt. Code section 54957.6(a) & (b), including the 1993 legislative history, there is nothing to indicate the legislature intended to grant a broad exemption to the open meeting requirement by the inclusion of the term independent contractor to section 54957.6(a) – in fact the addition of sub-section (b) to that code which reads: "...but shall not include any elected official, member of a legislative body or other independent contractor..." would strongly indicate a limit to that exception (an "exception to the exception"). There was no legislative intent added to or included in the record of the passage of the 1993 amendments to Govt. Code section 54957.6 that expanded the definition of "employee" to include the employees of construction contractors and sub-contractors to allow for the deliberations of the Board to be conducted in closed sessions.

In other words, just because there is no published legislative intent to exclude from section 54957.6's definition of an employee the employees of construction contractors, does not mean the legislature intended to include them either - **absent a specifically stated intent to do so**. Given the strong public policy of open meetings and the requirement that closed sessions must fall within very specifically stated exceptions from the legislature, the conclusion that there is a legislative intent to allow for closed sessions for the negotiations the Board of Trustees over a PLA is not a logical interpretation of the statute or the public policy behind the Brown Act.

In addition, as noted above, the addition of sub-section (b) and the term "independent contractor" a second time as an "exception to the exception" shows an intent by the legislature to exclude from the ability of a public body to hold closed session meetings when discussing the work of an independent contractor who is not acting as an employee or officer of the District. Therefore if a construction contractor or sub-contractor does not fall within the definition of an employee under section 54957.6, the definition certainly cannot be artificially extended to include employees of these same independent contractors who will also not be acting as an employee or officer of the District.

Otherwise the inclusion of sub-section (b)'s term "independent contractor" would be superfluous: a result that Courts have consistently avoided ("Statutes must be interpreted, if possible, to give each word some operative effect." (*Walters v. Metropolitan Educational Enterprises, Inc.* (1997) 519 U.S. 202, 209.) "We do not presume that the Legislature performs idle acts, nor do we construe statutory provisions so as to render them superfluous." (*Shoemaker v. Myers* (1990) 52 Cal.3d 1, 22)).

As noted above the Attorney General's office, at page 43 of the AG's Handbook, has interpreted section 54597.6's definition of an "employee" to include a person "...*who functions as an officer or employee.*" It is without question that the employees of the contractors, sub-contractors and others who will work under the PLA are not going to perform their functions as officers or employees of the District.

Thus it would appear that the legislative intent surrounding the 1993 amendment to Govt. Code section 54957.6 did not intend to cover the situation of truly independent employees of a separate entity (here a construction contractor) who will perform

construction services for the District. This is vastly different from the situation where an "independent contractor" is hired directly by a District / public entity to provide services as an *officer or employee of the district.*

As noted above there is a very, very strong public policy of public entities conducting their meetings in open session; that subjects to be discussed in "closed" sessions are narrowly construed and are only to be those specifically authorized by the legislature. Any doubt is to be decided in favor of open sessions by the public body on that topic. When this is juxtaposed against the absence of a specific statement in the statute itself (54957.6) or the legislature history to allow for a Board of Trustee to discuss PLA negotiations in closed sessions, the "safe harbor" for the Board is to follow the clear public policy of the Brown Act and hold all of its deliberations on this topic in open session.

THE *HOFMAN RANCH* CASE IS FACTUALLY DISTINGUISHABLE FROM THIS MATTER

The case of *Hofman Ranch v. Yuba County Local Agency Formation Commission* (2009) 172 Cal. App. 4th 805 falls squarely within the Attorney General's interpretation of the statute as expressed at page 43 of the handbook and is factually distinguishable from the situation before this Board. In *Hofman* the Court reviewed a situation where the affected "independent contractor" was 1. directly employed by the Commission to perform services for the Commission and 2. He was retained to perform executive functions for the public agency apparently as an officer of the agency.

In the matter before this board, the employees of the contractors and sub-contractors under the PLA will not even remotely be considered either employees or officers of the District or perform officer/executive functions for the Board. Therefore the *Hofman* case is at best confirming the type of "independent contractor" the legislature intended to cover under the amended 54957.6 statute. The situation in the *Hofman* case is vastly different from the one facing the District in this matter.

THE DECISIONS OF THE PUBLIC EMPLOYMENT RELATIONS BOARD DO NOT SUPPORT A FINDING THAT THIS BOARD MAY CONDUCT MEETINGS IN CLOSED SESSIONS ON THIS TOPIC

Reliance upon the decisions of the Public Employment Relations Board does not assist the Board of Trustees in this matter. First, it is purely speculative to assume that a Court, if called upon to interpret the ability of the Board to discuss PLA negotiations with the labor unions in closed sessions, would rely on or consider the decisions of the PERB. The PERB's decisions are not binding upon the Court and do not deal with the obligations of a public entity under the Brown Act.

Also, and more importantly, the PERB decision of County of Ventura, PERB Dec. 2067-M (2009) is factually very different from the situation the Board of Trustees is facing in regard to the PLA negotiations. At pages 4 & 5 of the PERB

decision the PERB panel found: "...The joint employer analysis is focused on the relationship between the County and the physician employees. Specifically, the question is whether or not the County retains the right to 'control both what shall be done and how it is done,' such that it retains the 'right to control and direct the activities of the person rendering service, or the manner and method in which the work is performed.'" Citing *Service Employees Internat. Union v. County of Los Angeles* (1990) 225 Cal. App. 3d 761, 769.

Here it is our understanding that by the nature of a PLA the Board of Trustees is not establishing any control over the manner or method of how the construction contractors / sub-contractors' work or how the work of their employees is to be performed. In fact, the District is hiring the contractors and sub-contractors (who in turn hire their employees) precisely for them to provide specialized services to the District in the area of construction that the District does not usually employ in house. The District only wants a result – that its construction projects be done on time and on budget and once those projects are done – these contractors and sub-contractors will move onto other projects not owned by the District. This is very unlike the situation that 54957.6 was intended for – the negotiation between the District and its employees or the union representatives for the employees for employment positions with the District.

Thus the decisions of the PERB is not applicable to this situation. If a Court did look to the interpretation of a "joint employer" from the PERB board's *County of Ventura* decisions, it would conclude that there is no "joint employer" relationship between the District and the construction contractors.

THE BOARD OF TRUSTEES IS IN VIOLATION OF THE BROWN ACT AND NEEDS TO HOLD ALL FURTHER MEETINGS ON THIS MATTER IN OPEN SESSION

For the reasons stated above, we believe the Board is actually in violation of the Brown Act by the conducting of these meetings in closed session. Further that there is no credible argument that Government Code section 54957.6 can be stretched to apply it to a situation like the one being faced by the Board of Trustees in its negotiations with the AFL-CIO for the PLA / CSWPA. The proper application of this statute was set forth in the Attorney General's handbook at page 43 which is that the term "independent contractor" in sub-section (a) of 54957.6 is limited to those situations regarding a person who will function as an employee or an officer of the District. Not those of employees of someone else which appears to be the "independent contractor" the legislature was intending to exclude from the employee definition by the "exception to the exception" in sub-section (b) of 54957.6. Thus these deliberations must be held in open sessions.

We do not believe that this is a "close question" but one that is plain and obvious with the conclusion that the Board is in violation of the Brown Act at this time. We respectfully submit that the Board must cease having these meetings in closed session in violation of the Brown Act.

THE BEST "SAFE HARBOR" FOR THE BOARD IS TO HOLD ITS MEETINGS ON THE PLA / SCWPA IN OPEN SESSION

Further, even if this circumstance was a "close" question (which we believe it is not), the "safe harbor" for the Board is to hold these meetings in open session. This eliminates *any* possible penalties for Brown Act violations for future Board actions / meetings / determinations on this matter.[1] Also, holding the meetings in open session allows the District's residents, the media and other interested parties to know and understand the nature and course of the negotiations between the trade unions and the Board.

In closing our client Trustee Phillip Yarbrough wishes to follow the law and not have the District have to engage in lawsuits from citizens for Brown Act violations that it would very, very likely lose and, possibly, cause the Board to have its decisions made in closed session to be found by a Court to be null and void.

The legal, obvious and best manner to correct and avoid future violations on this matter is to simply hold all future meetings of the Board of Trustees on this topic in open session.

We ask that you advise us if the Board of Trustees will take action to correct this violation of the Brown Act or not. If the Board decides to continue to meet in closed session on this matter, we ask that you address to us in writing the reasons why the Board believes it is authorized to continue the closed session meetings.

We look forward to hearing from you soon.

Very truly yours,

Craig P. Alexander
Attorney At Law

cc: Trustee Phillip Yarbrough (via e-mail only)

Kevin Snider, Pacific Justice Institute (via e-mail only)

[1] At this time we are not in possession of any notes or minutes from prior meetings of the Board of Trustees on this issue to opine if any prior meetings or decisions on this matter need to be "cured and corrected" via re-holding the meeting in open session and re-holding a vote(s) as permitted under the Brown Act (see generally Govt. Code section 54960.1).