

Lenzi, Chelsea

Subject: FW: Agenda A-23 Item # 15-00758: OPPOSE by Santa Ynez Band of Chumash Indians

Dear Chair Wolf and Members of the Board of Supervisors.

It is my understanding that on the Tuesday Board of Supervisors agenda is an item seeking to remove the Ad Hoc Committee from the purview of the Brown Act.

ISSUE: Question can the Board of Supervisors create a new form of Ad Hoc Committee that is subject to the public access requirements of the Brown Act and then create exceptions to such public access for such Ad Hoc Committee.

Answer: No. Because the Board initially created the Ad Hoc Committee (consisting of Supervisors Farr and Adam) to meet with the Tribe as a Brown Act compliant committee, the Board cannot now attempt to exempt the Ad Hoc Committee as if it had been created as "non-Brown Act" Ad Hoc Committee. The Brown Act has a presumption of public access and the Board cannot create any new exceptions under the law. The only permitted exemptions are statutory.

Some Research from the Office of Attorney General, The Brown Act (2003) ("hereinafter referred to as "AG 2003"):

The Brown Act creates a presumption of Public Access

The Ralph M. Brown Act (Gov. Code, § 54950¹ et seq., hereinafter "the Brown Act," or "the Act") governs meetings conducted by local legislative bodies, such as boards of supervisors, city councils and school boards. The Act represents the Legislature's determination of how the balance should be struck between public access to meetings of multi-member public bodies on the one hand and the need for confidential candor, debate, and information gathering on the other. As the rest of this pamphlet will indicate, the Legislature has established a presumption in favor of public access. (AG 2003, p. 1)

Any Exemptions to Public Access are construed narrowly

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).) (AG 2003, p. 2)
There is a Specific Exemption for "Non-Brown" Act Ad Hoc Committees:

However, there is a specific exemption for an advisory committee which is comprised solely of less than a quorum of the members of the legislative body that created the advisory body. (§ 54952(b).) (AG 2003, p. 5)

That exception simply does not apply here because the Ad Hoc Committee was created as being compliant with and under the Brown Act, not pursuant to any exception.

There is no Implied Authority for any Closed Sessions

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.** (AG 2003, p. 30)

Finally, any deliberations or exchanges of information including Supervisors Farr and Adam about the deliberations and meeting of the Ad Hoc Committee that are in any form of closed session or not in a public meeting violate the Brown Act as a form of prohibited Serial Meeting

The express language of the statute concerning serial meetings largely codifies case law developed by the courts and the opinions issued by this office in the past. In *Frazer v. Dixon Unified School District* (1993) 18 Cal.App.4th 781, 796-798, the court concluded that the Act applies equally to the deliberations of a body and its decision to take action. If a collective commitment were a necessary component of every meeting, the body could conduct most or all of its deliberation behind closed doors so long as the body did not actually reach agreement prior to consideration in public session. Accordingly, **the court concluded that the collective acquisition of information constituted a meeting.** The court cited **briefing sessions as examples of deliberative meetings which are subject to the Act's requirements,** and contrasted these sessions with activities that fall outside the purview of the Act, such as the passive receipt of an individual's mail or the solitary review of a memorandum by an individual board member. (AG 2003, p. 13)

In *Stockton Newspapers, Inc. v. Redevelopment Agency* (1985) 171 Cal.App.3d 95, 105, the court concluded that a series of individual telephone calls between the agency attorney and the members of the body constituted a meeting. In that case, the attorney individually polled the members of the body for their approval on a real estate transaction. The court concluded that even though the meeting was conducted in a serial fashion, it nevertheless was a meeting for the purposes of the Act. (See also, 65 Ops.Cal.Atty.Gen. 63, 66 (1982); 63 Ops.Cal.Atty.Gen. 820, 828-829 (1980). (AG 2003, p. 13)

What the above means is that the Supervisors cannot evade the Brown Act with respect to this Ad Hoc Committee by the device of having the Committee members consult privately and individually with each (or any) other supervisor about what is transpiring or what position to take. That would constitute a "serial meeting" and be in violation of the Brown Act. Adopting some sort of resolution permitting such conduct or attempting to authorize it will not exempt the Board from the Brown Act.

Please call me if you have any questions.

Sincerely,
Sam Cohen
Santa Ynez Band of Chumash Indians