



OFFICE OF THE DISTRICT ATTORNEY

COUNTY OF VENTURA, STATE OF CALIFORNIA

GREGORY D. TOTTEN
District Attorney

JANICE L. MAURIZI
Chief Assistant District Attorney

MICHAEL K. FRAWLEY
Chief Deputy District Attorney
Criminal Prosecutions

W. CHARLES HUGHES
Chief Deputy District Attorney
Administrative Services

MICHAEL D. SCHWARTZ
Special Assistant District Attorney
Justice Services

R. MILES WEISS
Chief Deputy District Attorney
Special Prosecutions

MICHAEL BARAY
Chief Investigator
Bureau of Investigation

October 9, 2013

Mr. Arleigh Kidd
Clerk of the Board of Education
Simi Valley Unified School District
875 East Cochran Street
Simi Valley, CA 93065

Re: Brown Act Cease and Desist Letter

Dear Mr. Kidd:

Pursuant to Government Code section 54960.2, subdivision (a), the Ventura County District Attorney hereby submits this cease and desist letter to the Simi Valley Unified School District (SVUSD) Board of Education with respect to the Brown Act violations discussed below.

The SVUSD board may respond within 30 days of receiving the letter (Gov. Code, § 54960.2, subd. (b)) or “elect[] to respond to [this] cease and desist letter with an unconditional commitment to cease, desist from, and not repeat the past action[s] that [are] alleged to [have] violate[d] this chapter.” (Gov. Code, § 54960.2, subd. (c)(1).) The format for such a commitment is laid out in section 54960.2, subdivision (c)(1). The unconditional commitment must be approved by the SVUSD board in open session at a regular or special meeting as a separate item of business. (Gov. Code, § 54960.2, subd. (c)(2).) The board need not admit that a violation occurred, and providing an “unconditional commitment shall not be construed or admissible as evidence of a violation.” (Gov. Code, § 54960.2, subd. (c)(1) and (4).)

The District Attorney’s Office previously informed the SVUSD Board of Education of complaints we received regarding Brown Act violations. To determine the validity of these allegations, our office reviewed SVUSD board meeting minutes, agendas, and video; correspondence provided by SVUSD’s counsel, Robert Thurbon; applicable statutory and case authority; and interviewed SVUSD Board Member Dan White and SVUSD Board President Rob Collins. Our office has reached the following conclusions.

Mr. Arleigh Kidd
October 9, 2013
Page 2

Closed Session Discussion of Proposed Compensation

The SVUSD Board of Education violated Government Code section 54957, subdivision (b)(4), by discussing the proposed compensation of Superintendent Kathryn Scroggin during closed session of the May 28, 2013, SVUSD board meeting. During closed session, the board discussed whether Superintendent Scroggin would be offered an early retirement bonus if she decided to retire early. Because of Superintendent Scroggin's administrative position, that bonus was not compulsory, but was instead within the discretion of the SVUSD board. Closed session discussions "shall not include *discussion* or action on proposed compensation." (Gov. Code, § 54957, subd. (b)(4), emphasis added.) Closed session discussions of "salaries and other terms of compensation" conflict with the purpose and mandate of section 54957. (*San Diego Union v. City Council* (1983) 146 Cal.App.3d 947, 955.) "There is no question that ... retirement benefits constitute a form of 'compensation.'" (*Arizona Governing Committee for Tax Deferred Annuity and Deferred Compensation Plans v. Norris* (1983) 463 U.S. 1073, 1079.) Regardless of whether action was taken regarding Superintendent Scroggin's proposed compensation, the mere discussion in closed session as to whether she would be offered the early retirement incentive violated the Brown Act.

Your counsel has taken the position that an early retirement bonus is not compensation and that closed session discussions of such a benefit are therefore permissible. We disagree with this conclusion. Accordingly, a cease and desist letter is appropriate to ensure that future closed session discussions of such benefits do not occur.

Serial Meeting

The Brown Act prohibits serial meetings. "A majority of the members of a legislative body shall not, outside a meeting authorized by this chapter, use a series of communications of any kind, directly or through intermediaries, to discuss, deliberate, or take action on any item of business that is within the subject matter jurisdiction of the legislative body." (Gov. Code, § 54952.2, subd. (b)(1).)

This provision was violated here when a majority of the SVUSD board members used a series of communications outside a meeting authorized by the Brown Act to discuss an item of business within the subject matter jurisdiction of the SVUSD Board of Education. Following the publication of a newspaper article regarding the disclosure of Superintendent Scroggin's purported resignation, SVUSD Board President Rob Collins spoke with two other board members, via telephone, regarding whether they had disclosed Superintendent Scroggin's letter to the newspaper. The issue of whether information was improperly disclosed in violation of the closed-session confidentiality requirement of section 54963 could potentially result in various actions by the school

board and is an item of business within the subject matter jurisdiction of the SVUSD. In this case, the board took action by reporting the disclosure to the grand jury. As such, the discussion of that issue by three of the five SVUSD board members constituted an unlawful serial meeting in violation of the Brown Act.

Inadequate Description of Closed Session Items

Currently, SVUSD board agendas describe closed session items held in accordance with section 54957 as “Public Employment Matters – Appointment, Employment, Performance Evaluation, Discipline, Dismissal, Release: Employment Matters Employee # ____.” This description provides the public with inadequate notice regarding which positions are being discussed in closed session. Section 54954.5, subdivision (e) provides guidance regarding the descriptions that may be used for closed sessions held pursuant to section 54957. Where the closed session involves the appointment or employment of public employees, the agenda may describe the item as, “Title: (Specify description of position to be filled).” Where the closed session involves the performance evaluation of public employees, the agenda may describe the item as, “Title: (Specify position title of employee being reviewed).” Where the closed session involves the discipline, dismissal, or release of public employees, including the potential reduction of compensation, no additional information is required. The SVUSD’s current practice of merely listing an employee’s number, rather than the position or title, does not provide the public with an adequate description of the closed session items. The public cannot readily determine the employee’s position from the employee number. Inclusion of the descriptors proposed by section 54954.5, subdivision (e) will ensure future SVUSD board agendas comply with the Brown Act.

No Reportable Action Was Taken to Accept Superintendent Scroggin’s Resignation

An issue has been raised as to whether the board took action at the closed session of May 28, 2013, to accept Superintendent Scroggin’s resignation, and whether that action should have been publicly reported. We answer both questions in the negative. Although our cease and desist demand does not include this issue, it is discussed briefly below for purposes of completeness.

From the available evidence, the SVUSD Board of Education did not take any reportable action during closed session of the May 28, 2013, SVUSD board meeting to accept the resignation of Superintendent Scroggin. Although Superintendent Scroggin did deliver notice of her intent to resign during the aforementioned closed session, she did not provide an irrevocable, immediate resignation that could have been accepted by the SVUSD board. Further, “only actions taken in closed session which *immediately* affect the employment status of a public official are to be reported the same day.” (*Gillespie v.*

Mr. Arleigh Kidd
October 9, 2013
Page 4

San Francisco Public Library Com. (1998) 67 Cal.App.4th 1165, 1175, original italics.) Accordingly, even if action had occurred, a decision to later accept an employee's future resignation would not require reporting pursuant to section 54957.1, subdivision (a)(5).

Disclosure of Closed Session Information

It is unclear whether SVUSD board member Dan White violated the Brown Act by disclosing information acquired during closed session of the May 28, 2013, SVUSD board meeting. Subdivision (e)(2) of section 54963 states it shall not be deemed a violation to "[e]xpress[] an opinion concerning the propriety or legality of actions taken ... in closed session, including disclosure of the nature and extent of the illegal or potentially illegal action." (Gov. Code, § 54963, subd. (e)(2).) It is uncertain how a court would resolve the issue of how much information may be revealed in disclosing the "nature and extent" of potentially illegal closed session action. It is also unclear whether, if a member believed action had been taken in closed session, the board's failure to publicly report the action would render the closed session action illegal for purposes of section 54963, subdivision (e)(2). No appellate authority has previously ruled on these issues. The legality of Board Member White's disclosure is too uncertain to warrant a conclusion by the District Attorney's Office that his actions were in violation of the Brown Act.

Cease and Desist Demand


Pursuant to Government Code section 54960.2, the District Attorney hereby demands the SVUSD Board of Education cease and desist from the following:

1. Any closed session discussions of, and closed session actions taken regarding, proposed employee compensation, including offering an employee a retirement bonus, except for a reduction of compensation that results from the imposition of discipline, or except as provided by section 54957.6.
2. Any serial meetings and other series of communications of any kind, outside a meeting authorized by the Brown Act, directly or through intermediaries, that discuss, deliberate, or take action on any item of business that is within the subject matter jurisdiction of the Simi Valley Unified School District Board of Education.
3. Providing inadequate board agenda descriptions of closed session items held in accordance with section 54957, including the failure to provide the position title of employees being reviewed for performance evaluation.

Mr. Arleigh Kidd
October 9, 2013
Page 5

The SVUSD Board of Education may respond to this demand as provided in section 54960.2. The District Attorney's Office has the authority to file a civil lawsuit to enforce the Brown Act. (Gov. Code §§ 54960, 54960.1, 54960.2.) We are hopeful that the board will agree to comply, and will comply, with the Brown Act, and that no legal action will be necessary.

Very truly yours,



MICHAEL D. SCHWARTZ
Special Assistant District Attorney

MDS:ck

cc: Robert Thurbon, Attorney at Law
Rob Collins, Board President
Jeanne Davis, Member of the Board
Debbie Sandland, Member of the Board
Dan White, Member of the Board
Kathryn Scroggin, Board Superintendent