(This letter was revised by one also dated 4/3/92)

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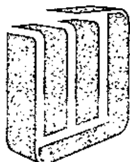


MWD

METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA

April 3, 1992

To Board of Directors (Legal and Claims Committee --Information)
(Special Comm. on Legislation --Information)

From General Counsel

Subject Proposed Revisions to the Ralph M. Brown Act in Senate Bill 1538 (Senators Kopp-San Francisco, San Mateo, Ayala-Los Angeles, San Bernardino, Marks-Marin, San Francisco, and Rosenthal-Los Angeles) and Assembly Bill 3476 (Burton-San Francisco)

Report

Both Senate Bill 1538 and Assembly Bill 3476 would make major changes to the Ralph M. Brown Act ("Brown Act", Gov. Code § 54950 et seq.). Both bills were the same when originally drafted; however the Senate Bill has been subsequently amended and is now different in several respects from the Assembly Bill. Senate Bill 1538 was the subject of a prior letter to the Legal and Claims Committee dated March 2, 1992. The principal proposed changes to the Brown Act that are common to both bills are summarized in Attachment A. Copies of the two bills, which total 72 pages, are available upon request.

The major differences between the two bills relate to the number of organizations to which the Brown Act would apply and the penalties associated with violations of the Brown Act. The Brown Act now applies to any board, commission, committee or other body supported in whole or in part by public funds on which officers of the local agency serve in their official capacity, whether or not the body is formed or organized by the local agency or a private corporation. While the Senate Bill would clarify the meaning of "official capacity," the Assembly Bill would delete the requirement that an officer serve in his or her official capacity, making many more organizations subject to the Brown Act. Under the Assembly Bill, any organizations on which Metropolitan or other public officers serve, which are supported in part by public funds, would be subject to the Brown Act.

Under current law, members of a legislative body are guilty of a misdemeanor if they attend a meeting where they have knowledge that an action is being taken in violation of

the Brown Act. Under both bills, the knowledge requirement is deleted; however, the penalties for violations differ. The Assembly Bill provides that members of a legislative body will be guilty of a misdemeanor if they attend or participate in a meeting violating the Brown Act. The Senate Bill provides for civil penalties against members and requires training in the law for the first and second violations of the Act, with a misdemeanor violation occurring after the third violation. The Senate Bill also provides that no public funds may be used to pay the penalties.

Board Committee Assignments

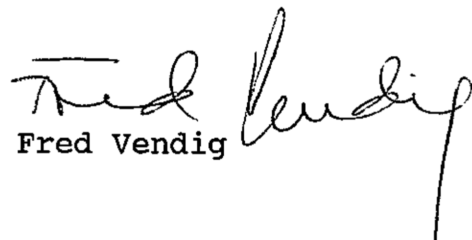
This letter was referred for information to:

The Legal and Claims Committee because of its authority concerning legislation dealing with public agencies, pursuant to Administrative Code section 2461 (f);

The Special Committee on Legislation because of its authority over legislation concerning Metropolitan, pursuant to Administrative Code section 2581 (a) and (b).

Recommendation

For information only.



Fred Vendig

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bdbrown

Attach.

ATTACHMENT A
Summary of the Changes Proposed by Senate Bill 1538 and Assembly Bill 3476

1. Under the Assembly Bill, the Act would be made applicable to all private nonprofit organizations with respect to meetings of their boards concerning programs or activities supported by grants, contracts, or other funding from federal, state, or local public agencies. It would also apply to any board, commission, committee, or other body on which officers of a local agency serve and which is supported in whole or in part by the funds of that local agency. As a result of these provisions, organizations such as ACWA and the State Water Contractors would become subject to the Brown Act. The Senate Bill would only extend application of the Brown Act to private corporations specifically created to exercise delegated authority of the legislative body of the public agency. (AB 3467, sections 1 and 3; SB 1538, sections 1 and 3.)

2. Advisory committees of a legislative body would be required to post agendas in the same manner as the legislative body. The bills would apply to all standing committees, regardless of their composition, but would not cover limited duration ad hoc committees consisting of less than a quorum of the body. MWD's standing committees already post their agendas and are subject to the Brown Act; however, the bills could impact an ad hoc committee or a special committee not previously subject to the agenda requirement if, in fact, that committee is not for a limited duration. (AB 3476, section 5; SB 1538, section 4.)

3. Under the Assembly Bill, the definition of "meeting" in the Act would be expanded to comport with judicial definitions of the term. For example, the Assembly Bill specifically states that a meeting covers a series of gatherings of less than a majority of a legislative body to hear, discuss, or deliberate upon an item within its subject matter jurisdiction if the cumulative result is that a majority of members have become involved in the gatherings. The Senate Bill would change this definition of meeting to include a series of communications of less than a quorum of the legislative body if the communications are planned by or held with the collective concurrence of a quorum of the body either directly, or indirectly through the agency of a nonmember or through the use of writings or technological devices. Both bills specify certain contacts which do not constitute a meeting. (AB 3476, section 9; SB 1538, section 8.)

4. The Senate Bill would prohibit a legislative body from taking any action by secret ballot. (SB 1538, sections 10 and 10.5)

5. The Act now permits the recording of open and public meetings by any person. The bills would provide that any such recording made at the direction of a local agency is a public record under the California Public Records Act. The Senate Bill also provides that a legislative body cannot prohibit or restrict the broadcast of its proceedings in the absence of a reasonable finding that the broadcast would constitute a persistent disruption of the proceedings. (AB, section 11; SB 1538, sections 11 and 11.5.)

6. All meetings of a local agency would have to be held within the territory of the agency unless otherwise required by state or federal law or necessary to inspect real property or personal property which cannot be conveniently brought within the boundaries of the territory. If necessary to meet outside of the area because of an emergency, such as an earthquake, an alternate place can be selected by the presiding legislative officer or his or her designee. As a result of this change, except for the specified exceptions, all MWD meetings, including workshops, would have to held within MWD's territorial area. (AB 3476, section 12; SB 1538, section 12.)

7. The Act now requires agendas to briefly describe an item of business. Both bills would require a meaningful description of each item that is brief, concise and nontechnical. They would provide that no action may be taken on any item not posted on an agenda, except that members could respond to statements made or questions posed by people exercising their public testimony rights by directing staff or others to clarify the issue or to report back on the matter at a subsequent meeting. (AB 3476, section 13; SB 1538, section 13.)

8. Both bills would require the agendas for special meetings to provide for an opportunity for the public to speak prior to action on the item. This right is now limited to regular meetings. (AB 3476, section 14; SB 1538, section 14.)

9. Both bills would specify that a legislative body could not abridge or prohibit public criticism of the policy, procedures, programs or services of the agency, any acts or omissions of that agency or the performance of one or more of its public employee. This restriction would not cover personalized attacks which make unsubstantiated allegations of crime, immorality or unethical behavior. Although this provision seems to be directed at limitations on the substance of what is said, it should be clarified to ensure that reasonable time, procedure and order rules for speaking at meetings are permitted. (AB 3476, section 14; SB 1538, section 14.)

10. For closed session meetings, in addition to the usual agenda requirements, the bills, in detail, specify additional information which would have to be provided when a closed meeting is held for a particular reason. The Assembly Bill sets forth the particular forms to be used for conveying this information, while the Senate Bill just describes the required information. (AB 3476, section 15; SB 1538, section 15.)

11. Under the Senate Bill, notice of the adjournment or continuance of a regular or special meeting must be communicated, within one hour of the adjournment or continuance, by telephone or facsimile transmission to each local newspaper and radio or television station which has requested notice of special meetings and which has provided the required telephone and facsimile numbers for this purpose. (SB 1538, section 15.5)

12. The authority for holding a closed session to consult with or receive the advice of legal counsel would be revised to clarify the meaning of "pending litigation". Litigation would not be deemed pending for purposes of a closed session if contingent on some future action of the legislative body, including things such as the entry into a contract, adoption of a policy or procedure, or the approval of an ordinance or other rule. Any legal advice given regarding potential, but not yet pending litigation, would be required to be given at a public meeting. (AB 3476, section 16; SB 1538, section 16.)

13. Both bills set forth a detailed format for reporting on the results of a closed session. For any action taken, the vote, or abstention, of each member present would have to be reported. Exceptions to the immediate reporting of any action are specified for situations where the release of the information might harm the agency. For example, direction or approval given regarding real estate negotiations would have to be reported as soon as the agreement is final. Settlement authority for pending litigation would not be required to be reported until the settlement is final. The requirement for public reporting of a final settlement could potentially harm Metropolitan in cases involving multiple parties where settlement with one party could affect Metropolitan's ability to resolve the case with other parties. It also could harm Metropolitan in situations involving multiple similar cases. (AB 3476, section 18; SB 1538, section 18.)

14. The current law provides that a minute book may be kept of closed sessions. The Senate Bill would require that all closed sessions be audiotaped and that the tapes be kept for one year. The clerk of a district would keep these tapes. The Assembly Bill would only require the audiotaping of closed

sessions if a tape recorder and blank tapes for 356 hours of recording are donated to an agency. If the donations are made, the tape recorder belongs to the agency. Any tape made would have to be sent to the District Attorney for the jurisdiction, or a designated person, and kept for one year. After that year, the tape could be reused. Under both bills, the tapes would not be public records, but would be subject to inspection by the District Attorney, Grand Jury or superior court if an accusation regarding a Brown Act violation is made with regard to the meeting taped. (AB 3476, section 19; SB 1538, section 19.)

15. Under current law only writings actually distributed to members of a legislative body in connection with a public meeting are identified as public records, unless specifically exempt from these provisions. The Senate Bill would identify all writings intended for distribution to the legislative body public records. Under both bills, if a request for copying of records is made prior to a meeting, all writings intended for such distribution prior to the commencement of the meeting public records are public records, whether or not they are actually distributed or received by that body. (AB 3476, section 20; SB 1538, section 20.)

16. The closed session exception for collective bargaining would be restricted to periods of active consultation or discussion. Any employees directly or indirectly interested in the outcome of the negotiation would be required to be excluded from the closed session. Mandatory subjects for labor negotiation would still be covered by the closed session exception. (AB 3476, section 21; SB 1538, section 21.)

17. The reasons for a closed session may now be stated either prior to or after a closed session. Under the bills, the reasons for the closed session would have to be stated prior to the closed session. (AB 13476, section 22; SB 1538, section 22.)

18. Under current law, members of the legislative body are guilty of a misdemeanor if they attend a meeting where they have knowledge that an action is being taken in violation of the Brown Act. Under both bills, the knowledge requirement is deleted and mere attendance or participation in such a meeting would subject members to penalties. Under the Assembly Bill, a violation of the Act provisions qualifies as a misdemeanor. Under the Senate Bill, a first violation results in a penalty of up to $250 and a required training session on the Open Meeting Law. A second violation results in a penalty of up to $500 and another training session. A third violation results in a misdemeanor violation, punishable by a fine of up to $1000 and/or six months in jail. No public funds may be

used to pay these fines. (AB 3476, section 23; SB 1538, section 23.)

19. Under current law any person may bring an action for mandamus or injunction to obtain a judicial determination that a Brown Act violation has occurred. Before an action can be brought, there must be a prior demand to cure or correct the violation. The Assembly bill would provide that an alleged violation taken with sufficient secrecy to prevent its reaching public attention within 30 days is subject to immediate challenges upon discovery, without the necessity of a demand to cure or correct the violation. If a violation is found, subject to exceptions, the action taken is null and void ab initio. Also, no members who participated in the decision could participate in a subsequent action on the item. The Senate Bill just extends the time deadline for making a demand to cure or correct a challenged action from 30 days from the date the action was taken to 180 days after that date. (AB 3476, section 24; SB 1538, section 24.)

20. Under both bills, a court would be required to award court costs and reasonable attorneys' fees to a plaintiff where a violation is found and to a defendant where the defendant has prevailed in the final determination and the court finds that the action was clearly frivolous and lacking in merit. Under current law such awards are discretionary. (AB 3476, section 25; SB 1538, section 25.)

21. Both bills would provide that no meetings could be conducted in facilities inaccessible to wheelchairs or which require the public to make a payment or purchase. It is noted that the meaning of "payment" or "purchase" needs to be clarified in this provision. For example, if MWD has meetings in a hotel, it is unclear whether a hotel fee for parking would constitute a "payment" under this provision. (AB 3476, section 26; SB 1538, section 26.)

22. Both bills would prohibit local agencies from adopting or enforcing any rules that penalize or discourage the free speech of its members, including utterances in open and public sessions or disclosures of matters discussed in closed session which, in the judgment of the member, were or will be improperly discussed. Although the language of this provision seems to be directed at limitations on the substance of what is said, the provision should be clarified to ensure that reasonable time, procedure and order rules for speaking at meetings are permitted. (AB 3476, section 27; SB 1538, section 27.)

23. Both bills would limit the remedies for breach of the confidentiality of a closed session by a member. If the breach occurs regarding a matter involving the attorney-client

privilege or with negotiations, the legislative body would be limited to securing injunctive relief if a court finds that the public harm outweighs the public benefit. The remedy of a person harmed by a disclosure would be limited to an action for damages for invasion of privacy against the member, or members, who made the disclosure. A majority of the legislative body could elect to make a disclosure of an action or discussion occurring in closed session. (AB 3476 section 27; SB 1538, section 27.)