Orange County District Attorney Report

Investigation into Allegations
of Violations of the Ralph M. Brown Act
by the Board of Trustees
of the Capistrano Unified School District

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I. INTRODUCTION

In early 2011, the Orange County District Attorney's Office (OCDA) received complaints against the Board of Trustees (Board) of the Capistrano Unified School District (CUSD). One was from an attorney for two members of the governing board of trustees. The complaints alleged that the Board had violated the open meeting and agenda requirements of the Ralph M. Brown Act (Govt. Code § 54950 *et seq.*) As a result of inquiry into these complaints, the OCDA issued a notice to CUSD indicating that violations of the Brown Act had been found in three meetings conducted by the Board. Those meetings occurred on Dec. 13, 2010, Jan. 26, 2011, and March 16, 2011. CUSD responded with a request to provide the OCDA with additional information that could affect these findings and asked that particular attention be made to the Dec. 7, 2010 meeting which had not been a subject of the previous findings. The OCDA agreed to conduct additional inquiry.

All members of the Board, as well as executive management, gave recorded statements regarding the subject of the inquiry including matters that were discussed in closed session. As a result of this additional information, the OCDA's initial findings have been modified. Although an appearance of violations of the Brown Act occurred, the evidence developed has not been sufficient to establish their actual occurrence. Accordingly, the OCDA is issuing this public report detailing the results of the inquiry in lieu of any further action on the matter.

II. THE EVIDENCE ADDUCED

In the spring of 2010, after going through fractious labor negotiations, and a strike, CUSD signed labor contracts with the various collective bargaining organizations representing its employees. These contracts provided for unpaid furlough school days and salary reductions to address budget shortfalls. Among these was a contract with the organization representing its teachers, the Capistrano Unified Education Association (CUEA). This contract contained "Restoration Language" consisting of "trigger" clauses. These "triggers" provided that, if expected funding revenue from the state budget were to increase, furlough days and salary cuts were to be restored through a calculation formula. Two furlough school days were to be restored before any monies were applied to salary restoration. Finally, if the current funding system was modified by the state, either party could reopen the agreement "for the purpose of making the calculation consistent with the stated intentions of the parties…."

In October 2010, the state budget was adopted. It included an increase in revenue for CUSD. The Superintendent felt that the additional revenue met and exceeded the "triggers" required for restoring the school furlough days. The Superintendent began to get "pressure" from employee associations, which were aware that CUSD had received the additional income. These organizations inquired if CUSD was "going to adhere to what had already been negotiated." The Superintendent believed that the associations "were going to file a PERB [Public Employee Relations Board] complaint if [CUSD] did not honor the [contract] language."

On Nov. 2, 2010, in a vigorously contested recall election, three new trustees were elected to replace others on the Board. During the re-opened inquiry the Superintendent indicated that these three had been actively supported by the teachers and CUEA.

On **Dec. 7, 2010**, the CUSD Board held its first meeting since the recall. This was their first meeting for the new members, and none had received formal training on the Brown Act, other than being given a "booklet." One of the new trustees, an attorney, had some prior "experience" with the Brown Act as a member of a city's department of parks.

The agenda included three items for a closed session: agenda item No. 48F contained the title "Conference with Labor Negotiators" and listed the Superintendent and two other CUSD negotiators, in addition to four labor organizations. The agenda also indicated that the closed session was being held pursuant to Govt. Code § 54957.6. That section is discussed below and entitled, "Closed sessions regarding employee matters." Although the agenda stated that "all regular board meetings will be audio recorded," closed sessions are not, and it is "Board policy" that no minutes are taken for closed sessions. The participants had differing recollections which, therefore, could not be always resolved.

The closed session was scheduled by the Superintendent, who desired guidance from the newly-reconstituted board on complying with the previously-negotiated labor agreements. Although in his view compliance required restoring the school furlough days and salary reductions, there was disagreement among the Board as to whether the "triggers" had been met. One trustee suggested that the attorney who had negotiated the contract for CUSD be retained to advise the Board if the triggers had been met. This suggestion was rejected, with one trustee allegedly stating either that, "We wouldn't want to get an answer that we didn't want to hear," or "He'll just say what you want to hear." Some trustees stated there was a vote taken first to reject the proposal to retain outside counsel followed by another vote to authorize

the Superintendent to reinstate the furlough days. Others said there was no "formal" vote, only an informal "polling" of the trustees. Another trustee, although unsure if a vote was taken, stated that *if* one was taken, the decision was to comply with the restoration language regarding the furlough days. The Superintendent recalled no vote on the proposal to retain outside counsel but did recall a motion and a second followed by a vote. This vote was to "respect the previously ratified contractual language which said that if the district received an increase in income from what it had received previously, that furlough days and or salary would be restored."

The trustees also had differing recollections on the Superintendent's instructions. These recollections included giving "direction" to move forward with labor negotiations regarding the reinstatement of furlough days, authorizing the restoration of the days, restoring the furlough days, and enforcing the contract as he saw fit. One trustee believed that this was "action taken," by the Board. Another trustee, though acknowledging that there was a vote to "give direction" to the superintendent to "play for time," (i.e. delay restoring the salary reductions) didn't think that the Board had agreed to do anything, since by the terms of the contract, restoration was automatically to occur. Thus, only "timing" needed to be negotiated and the Board wanted CUEA to "work with [them]" in delaying salary restoration.

There was no immediate public report of what had been decided and the amended minutes contained no entry of any action taken for agenda topic number 48F. In addition to feeling that there was no requirement to report, the Superintendent wanted to first consult with the CUEA representatives before any public report was made. One trustee stated that reporting the vote would violate confidentiality of labor negotiations. In addition, this trustee stated that, due to the labor dispute the previous year culminating in the "largest strike in 40 years in education in the State of California," there was a desire to "settle it down." Letting it be known that there was a split vote "would've enabled the union to really fire the flame."

During the investigation of this matter, the Superintendent and some trustees felt that the dissenting trustees were trying to abrogate a contract they themselves had previously approved. The dissenting trustees disagreed, stating that all they wanted was a review of the evidence by the person who had negotiated the contract to receive his opinion as to whether the triggers had been met. One of the dissenting trustees alleged that the new Board members did not want to hear from this negotiator "because they're elected by the union," and

he “was aligned against the union.” This trustee accordingly suggested that someone else be brought in, but that too was rejected.

The first discussion with CUEA representatives occurred on Dec. 9, 2010, at which time the Superintendent acknowledged that the trigger for restoration of the furlough days had been met and told them “we’re going to honor the agreement.” While pleased with the restoration of the furlough days, CUEA wanted the salaries also restored immediately.

On **Dec. 13, 2010**, the Board met in closed session under an agenda topic entitled, “Public Employee Evaluation-Superintendent.” Again, memories of the participants differed. One trustee had no recollection at all of the Dec. 13, 2010, closed session. Another recalled discussing the Superintendent’s evaluation and did not recall any discussion regarding furlough or salary restoration. Another remembered the discussions as confined to matters relevant to the Superintendent’s performance, and that no vote was taken, nor did any labor discussions occur. Still another, while not recalling details, remembered that while the Superintendent’s evaluation and goals were discussed, so too had been furlough days.

One trustee stated that an argument ensued as to whether the furlough restoration trigger had been met. This trustee stated that this discussion was brief, occurred towards the end of the closed session, and was initiated by this same trustee as a final attempt to have the Board reconsider the restoration of the furlough days. This trustee recalled that the Superintendent asked the remainder of the Board if it wanted to remain with their previous position to go forward with the restoration of the furlough days. A majority of the Board indicated a desire to go forward with restoring the furlough days. This was disputed by another trustee, who stated that neither a vote nor a request for reaffirmation of the previous decision to restore furlough days occurred, only a criticism of the Superintendent’s handling of issue at the Dec. 7, 2010, meeting. The minutes of the meeting, under that agenda topic, indicated that “no action was taken.”

Other circumstances, however, gave the impression that substantive discussions on the furlough days had occurred in the Dec. 13, 2010, meeting and that action on them had been taken. Evidence indicated that the Superintendent consulted with the Orange County Department of Education (OCDE) regarding the furlough day restoration the same day, Dec. 13, 2010. A Dec. 14, 2010, letter from OCDE purported to respond to the Superintendent’s “inquiry on December 13, 2010 regarding increase in base revenue limit funding for Capistrano

Unified School district (CUSD) as a result of the 2010-11 Enacted State Budget." The letter warned that, "Should the District decide to restore furlough days at this time, we strongly encourage the District to develop a contingency plan in the event that there are further cuts to the District's revenue…." A Dec. 15, 2010, e-mail from the Superintendent to the trustees stated, "We are in the process of announcing the restoration of two instructional furlough days." The message advised that the announcement would "eventually include" news releases, telephone messages to parents, an all-district email message to staff members, the OC Register and other newspaper coverage, website postings, Capo Talk (a CUSD web site for announcements) and KSBR (a local community college radio station). Between Dec. 15 and 17, 2010, the Superintendent sent e-mail messages to several bloggers' websites that discussed CUSD affairs, announcing the restoration of furlough days, and "the reinstatement of two days of instruction into the 2010-2011 school calendar." A local radio station reported the reinstated days citing as the source of the story the CUSD website. A search of the OC Register and other South Orange County newspapers in mid-December 2010 disclosed no other announcements concerning the restoration of furlough days. The Superintendent maintained that the decision to restore furlough days had been made on Dec. 7, 2010, not December 13, 2010, but could recall no reason for the announcements' delay until after the Dec. 13, 2010, meeting.

In addition to these circumstances, an internal CUSD memo dated Jan. 11, 2011, recorded approval of reinstatement of the two school furlough days as having occurred on "Monday, December 13, 2010." A later memo, dated May 23, 2011, repudiated this statement, stating that it was in error. It was prepared after CUSD had received a complaint that the Board had violated the Brown Act at its Dec. 13, 2010, closed session.

The agenda for the **Jan. 11, 2011,** open meeting contained an entry entitled, "Revised School Calendar: Approval, revisions to the 2010-2011 School Calendar restoring two instructional days." At the meeting, two trustees questioned whether the triggers for the restoration had been met. One stated that the "Trustees and the public needed more information as to the costs and the consequences of approving the item," and was "concerned about the costs," and "if the trigger has actually occurred…." The other trustee complained at not having seen "the cost analysis for restoring the furlough days…if indeed the trigger language had been set off." The Superintendent recalled having provided this information and felt that this Board member

was not being entirely honest. (The OCDA's inquiry indicated that the Board member was more likely to have been forgetful than dishonest.)

A transcript of the meeting prepared by the Board's secretary recorded the Superintendent advising the Board that the action on the restoration of the furlough days had already occurred.

> I think we need some clarification here. **The furlough days *action* has already been taken to reinstate these days.** There was extensive discussion on their costs in closed session so it is not correct to say that you did not receive that data. I would be happy to give it to anyone who asks for it again as we have it all delineated and articulated as it was presented to you in closed. I am not able to discuss that in detail in an open session but it was gone over with the entire Board and **I ask the other Trustees to confirm that my recollection is correct but you have already reinstated the days, they will be part of the calendar there so it is finished.** As to the other discussions I think it is very—and you have to be very careful about sharing some of the deliberations that occur as we prepare for our negotiations but I would ask the other Trustees to just confirm my recollection of [*sic*] this is correct. (Emphasis Added)

One trustee responded, "Your recollection is 100% correct." Another said, "I agree." (In an interview with OCDA investigators, however, this latter trustee stated the Superintendent had merely been instructed to "move forward with labor negotiations.")

On **Jan. 26, 2011**, at a closed session described as a "Conference with Labor Negotiators," the Superintendent advised the Board that the salary restoration triggers had occurred. CUEA was still pushing for salary restoration and also arguing that CUSD was delaying compliance with the contract. An unfair labor practice complaint was threatened. One trustee recalled that, because of the threat of that complaint, "We felt our hands were tied." Another remembered discussing "negotiation strategies regarding delay of pay increases." The Superintendent asked for a formal vote as to whether the Board agreed that the trigger for restoration of the pay cuts had been met. The Board, by a vote of 5-2, concluded that the pay cuts should be restored for CUEA and directed the Superintendent to implement them. There had been no discussion as to when the salary restoration was to be reported. The minutes of this closed session, under Agenda Item 3B reported, "No action was taken."

On Feb. 1, 2011, CUSD issued a news release limited to "Cabinet Members and Cabinet Secretaries both at capousd." The release, entitled, "District Adjusts Reduction to Teachers' Salaries Benefits," announced an adjustment to teachers' pay cuts resulting in a reduction in the previous pay cut. The release stated that, "This adjustment stems from a negotiated

settlement that required instructional days and salaries be restored should there be any changes in the adopted state budget."

On Feb. 2, 2011, CUSD's Communication's Officer sent an internal memo to the President of the Board explaining the limited release. It stated, "Just a clarification. To minimize publicity, the news release is being sent only to members of the media who inquire about possible changes to employee salaries." This limitation was initially imposed under the instructions of the Superintendent, but was rescinded the following day to allow for unlimited press release. The Board had not participated in deciding to limit the press release but was informed "after the fact." One trustee commented that he understood the philosophy behind the decision as, "While we weren't going to hide it we weren't going to advertise it either." The issue of restoring pay cuts was a "politically charged issue" and the "focus was on trying to restore calm."

On Feb. 22, 2011, a private party contacted the OCDA requesting an investigation of the CUSD Board for violation of the Brown Act. On Feb. 28, 2011, that private party delivered a letter to CUSD alleging that the Board had violated the Brown Act. The letter alleged these violations had occurred on the Dec. 7 and 13, 2010, meetings and the meeting on Jan. 11, 2011. The letter noted that the Jan. 11, 2011, memo from the Assistant Superintendent indicated that the restoration of the furlough days had occurred on Dec. 13, 2010, under the evaluation of the Superintendent agenda heading. On March 26, 2010, this party filed a lawsuit against CUSD alleging violations of the Brown Act.

On **March 16, 2011,** the Board held an open meeting to publicly report on and discuss its decisions on salary and furlough day restoration. There were three agenda items on this topic: No. 2, "Report on the Restoration of Furlough Days and Pay for Four Employee Organizations," No. 3, "Response to Demand to Cure and Correct Alleged Brown Act Violations," and No. 4, Reaffirmation of Previously Considered Restoration of Furlough Days and Pay for Four Employee Organizations." Before the Board considered these items, two of the trustees left in protest over what they considered to have been the Board's prior violation of the Brown Act. The meeting continued with the remaining five members.

The Report, under agenda item No. 2, was from the Superintendent to the Board. In responding to the Brown Act complaint, the report stated that, "The Board did not approve the agreements to restore the furlough days or pay cuts at its meetings in December and January."

The Report described the Dec. 7, 2010, meeting as a meeting "with the labor negotiators to discuss whether there was anything that the Board could do to avoid the implementation of the previously accepted agreements and to discuss the ramifications of any decision to delay such implementation on upcoming negotiations." The Report noted that there are "legal defenses that might be raised to prevent implementation," in any agreement, but that the Superintendent had "discussed the issue with legal counsel and there did not appear to be any defenses that could avoid the terms of the agreement."

In describing the results of the Dec. 7, 2010, closed session the Report concluded:

> After discussion, the Board determined not to breach the agreement, not to dispute the validity of the agreement, or otherwise take any action to interfere with the previously adopted agreement, and instructed the superintendent to comply with the agreement as written. The Board also gave other instructions to the labor negotiator, consistent with that instruction. It merely decided at the December 7, 2011, Board meeting that **it did not intend to take any action** to delay implementation of the agreement, or withdraw from the agreements, and instructed the labor negotiator to proceed with implementation of the previously approved agreement. (Emphasis Added)

The Report then concluded that, "There was no requirement to report out that vote after the closed session," on the grounds that there "is no duty to report out after closed sessions with the labor negotiators until the negotiations are completed." The Report contained no description as to what the uncompleted "negotiations" concerned.

Under this last agenda item was the following recommendation: "It is recommended that the Board reaffirm its earlier vote concerning restoration of furlough days and pay for employee organizations after providing any member of the public an opportunity to address the Board on this matter." At the meeting the Board voted to restore the furlough days and salaries.

During the meeting a member of the Board made what appeared to be a facetious motion. According to the minutes of the meeting, the motion was for the Board "to disregard the rule of law, subject CUSD to an unfair labor practice and unnecessary litigation, incur unnecessary legal expenses, and needlessly waste tax dollars on attorneys and legal costs, throw this District back into turmoil, cause further erosion of home values…and affirmatively breach our agreement with CUEA." Apparently unexpectedly, another trustee seconded the motion. The trustee making the original motion immediately requested a recess.

At the recess, several trustees appeared to gather together behind the dais. The trustee who had made the motion and the trustee who had seconded it appeared to engage in conversation. One of the other trustees began to approach the two, but the Superintendent intervened, asking that trustee to sit back down. Before doing so, this trustee heard one of the other trustees say, "Oh my gosh, I can't believe we have seconded it." The Superintendent remembered the moving trustee saying something to the seconding trustee about the motion. The Superintendent advised all three trustees to "break up," as it would look like they were discussing district business. After several seconds, they dispersed.

The trustee who'd made the motion told OCDA Investigators that the motion had been "procedurally correct," however, he was not "expecting a second." Although there may have been other trustees nearby, this trustee maintained that he'd only spoken to the one trustee who'd seconded his motion, notifying him that he'd seconded two conflicting motions and suggesting he not support the second (i.e. "facetious") one. After leaving the dais, this trustee was observed approaching members of the audience, saying words to the effect that, "some people don't recognize a joke." The audience members joined this trustee in laughter. When questioned about this comment, the trustee had "no recollection" of it.

When the recess ended, the trustee who had seconded the motion withdrew his second. The trustee who had made the motion then indicated that, in the absence of a second, his motion failed. The remaining Board then voted to confirm its earlier decisions. The trustee who had seconded the motion could not recall its substance or that the seconding of the motion had been rescinded.

III. APPLICABLE LAW: INTENT BEHIND THE BROWN ACT

"The general purpose of the Brown Act is to increase public awareness of issues bearing on the democratic process…." (*Morrow v. Los Angeles* (2007) 149 Cal. App. 1424, 1438) "The Brown Act is intended to ensure the public's right to attend public agency meetings to facilitate public participation in all phases of local government decisionmaking, and to curb misuse of the democratic process by secret legislation of public bodies." (*Chaffee v. San Francisco Library Com.*(2004) 115 Cal. App. 4th 461, 469)

To fulfill this intended purpose, with only limited exceptions, the Act requires that: "**All meetings of the legislative body of a local agency *shall be open and public*, and all**

persons shall be permitted to attend…" (Govt. Code § 54953 (emphasis added).)

Compliance with the Brown Act is considered of great importance by the Legislature. "The Legislature hereby finds and declares that complete, faithful, and uninterrupted compliance with the Ralph M. Brown Act (citation) is a matter of overriding public importance." (Government Code § 54954.4) (Emphasis added).)

IV. APPLICABLE LAW: AGENCIES AND LEGISLATIVE BODIES SUBJECT TO THE BROWN ACT

The Brown Act broadly defines the types of local public agencies subject to the open meeting requirements. It provides that "'local agency' means a county, city…town, **school district**, municipal corporation, district, political subdivision, or any board, commission or agency thereof, or other local public agency." (Govt. Code § 54951) A "legislative body" subject to the requirements of the Brown Act is also broadly defined to include, "The governing body of a local agency or… a…board, or other body of a local agency, whether permanent or temporary, decisionmaking or advisory…." (Govt. Code § 54952) Not only has the Attorney General (AG) opined that school districts and their boards of trustees are subject to the Brown Act (80 Op. Atty Gen. Cal. 308), the Education Code § 35145, also mandates compliance.

V. APPLICABLE LAW: MEETINGS SUBJECT TO OPEN MEETING REQUIREMENTS

"Meeting" is broadly defined to mean "any congregation of a majority of the members of a legislative body at the same time and location, including teleconferencing…to hear, discuss, or deliberate, or take action on any item of business that is within the subject matter jurisdiction of the legislative body." (Govt. Code § 54952.2(a)) Thus it is not only those meetings where decisions are made or votes taken which are subject to the Brown Act's open meeting requirements. Meetings where only discussions occur may also be subject to these requirements.

VI. APPLICABLE LAW: EXCEPTIONS TO OPEN MEETING REQUIREMENTS

A. Exceptions are to be *Narrowly* Construed

The provisions of the Brown Act that provide for open meetings are to be construed broadly, while the **exceptions, allowing closed meetings are to be narrowly construed.**

> Statutory exceptions authorizing closed sessions of legislative bodies are construed narrowly and the Brown Act "sunshine law" is construed liberally in favor of openness in conducting public business**.** [Citations]
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> [T]he Brown Act should be interpreted liberally in favor of its open meeting requirements, while the exceptions to its general provisions must be strictly, or narrowly, construed. (*Shapiro v. San Diego City Council* (2002) 96 Cal.App.4th 904, 917, 920)

This comports with provisions of the California Constitution favoring interpretations of statutes that broaden rather than limit public access to government. "A statute, court rule, or other authority, including those in effect on the effective date of this subdivision, shall be broadly construed if it furthers the people's right of access, and narrowly construed if it limits the right of access." (Cal. Const. Art I, § 3(b)(2)

B. Specific Applicable Exceptions

1. Closed sessions regarding employee matters (Labor negotiations) (Govt. Code §§ 54957.6 and 3549.1):

Under the Brown Act, closed sessions may be held with an agency's labor representative to discuss salaries, salary schedules, or compensation paid in the form of fringe benefits, or any other matter within the statutorily provided scope of representation. (Govt. Code § 54957.6(a)) The purpose must be to review the agency's position and instruct its representative, but may include discussion of an agency's available funds and funding priorities, but only insofar as these discussions relate to providing instructions to the local agency's designated representative. (*Ibid*)

The Educational and Employment Relations Act, (Govt. Code § 3540 *et seq*) known as the Rodda Act after its author, governs collective bargaining in California's public schools. It *exempts* from the provisions of the Brown Act, 1) "any meeting and negotiating discussion" between a public school employer and a representative of an employee organization (Govt.

Code § 3549.1(a)); and 2) "Any executive session of the public school employer or between the public school employer and its designated representative for the purpose of discussing its position regarding any matter within the scope of representation and instructing its designated representatives." (Govt. Code § 3549.1(d)) The term "Scope of Representation," includes "all matters relating to employment conditions and employer-employee relations, including, but not limited to, wages, hours, and other terms and conditions of employment…." (Govt. Code § 3504)

2. Closed Sessions Regarding Employees (Evaluation of Performance)

In addition, an agency may hold a closed session to "consider the appointment, employment, evaluation of performance**,** discipline, or dismissal of a public employee or to hear complaints or charges brought against the employee by another person or employee…." (Govt. Code § 54957(b)(1)) As with other exceptions to the Brown Act, this one is to be narrowly construed. (*Duval v. Board of Trustees* (2001) 93 Cal. App 4th 902, 909) An, "evaluation of performance" encompasses a review of an employee's job performance including "particular instances of job performance…." (*Ibid*)

VII. APPLICABLE LAW: AGENDA AND DISCLOSURE REQUIREMENTS

A. General Requirements

The agenda of regular meetings must be posted in advance and describe topics to be discussed at the meetings.

> At least 72 hours before a regular meeting, the legislative body of the local agency, or its designee, shall post an agenda containing a brief general description of each item of business to be transacted or discussed at the meeting…. A brief general description need not exceed 20 words.
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> **No action *or discussion* shall be undertaken on any item not appearing on the posted agenda**…. (Govt. Code § 54954.2(a) (Emphasis Added).)

This provision has been held to apply to closed meetings (*Shapiro v. San Diego City Council*, supra, 96 Cal. App. 4th 904, 923) and special meetings. (*Moreno v. City of King* (2005) 127 Cal. App. 4th 17)

The California Attorney General has stated that, “The purpose of the general description is to inform interested members of the public of the subject matter under consideration so that they can determine whether to monitor or participate in the meeting of the body.” (The Brown Act, Open Meetings for Legislative Bodies, Office of the Attorney General, 2003 Edition, at page 16) The agenda, however, need not provide “special notice” of what action may be taken as long as the “subject matter is “sufficiently defined to apprise the public of the matter to be considered.” (*Phillips v. Seely* (1974) 43 Cal. App. 3rd 104, 120)

Early cases addressed what detail an agenda should contain. In *Moreno v. City of King, supra*, 127 Cal. App. 4th 17, a city council met in closed session to discuss the termination of a public employee. “The agenda description stated, ‘Public Employee (employment contract)’” (*Id* at 27) In ruling that description inadequate, the court noted that, “The agenda's description provided no clue that the dismissal of a public employee would be discussed at the meeting.” (*Ibid*) *Carlson v. Paradise Unified Sch. Dist.* (1971) 18 Cal. App. 3rd 196 addressed an agenda item which stated "Continuation school site change." At the meeting, however, the governing board not only changed the location of the district’s continuation high school, but closed down an elementary school transferring its students to another school. In ruling the agenda description inadequate, the court indicated:

> [I]t is imperative that the agenda of the board's business be made public and in some detail so that the general public can ascertain the nature of such business. It is a well-known fact that public meetings of local governing bodies are sparsely attended by the public at large unless an issue vitally affecting their interests is to be heard. To alert the general public to such issues, adequate notice is a requisite. In the instant case, the school board's agenda contained as one item the language "Continuation school site change." This was entirely inadequate notice to a citizenry which may have been concerned over a school closure.
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> [T]he agenda item, though not deceitful, was entirely misleading and inadequate to show the whole scope of the board's intended plans. (*Id* at 199-200)

Relying on *Carlson,* another district court of appeals reached a similar result in *Campbell Elementary Teachers Assn. v. Abbott* (1978) 76 Cal. App. 3rd 796. In that case, the agenda contained an item entitled "Resolution Regarding Certificated Employees." The court found that description inadequate to alert the public that the discussions in fact were to center around the reduction in and termination of such employees.

> The agenda item, "Resolution Regarding Certificated Employees," could have referred to any number of routine resolutions concerning certificated employees and cannot be said to have given fair warning that a reduction in staff or termination of employees would be considered. (*Id* at 805)

As will be discussed more fully below, since these cases were decided, the Legislature has added "Safe Harbor" provisions for agenda descriptions for closed sessions, which if followed preclude a Brown Act violation. These "Safe Harbor" descriptions are fairly generic and do not always serve to fully describe what is being specifically discussed. As a result, there is some tension between them and the earlier cases requiring more specific agenda descriptions. They also create tension with the continuing requirement of providing an opportunity for public comment, which will be discussed next.

1. Opportunity for Public Comment

Every agenda for regular meetings "shall provide an opportunity for members of the public to directly address the legislative body on any item of interest to the public *before or during the legislative body's consideration of the item.*" (Govt. Code § 54954.3(a)) Likewise, every notice for a special meeting shall similarly provide an opportunity for members of the public to "directly address the legislative body concerning any item that has been described in the notice of the meeting *before or during consideration of that item."* (*Ibid*)

> This language has been construed to mean that for each agenda of a regular meeting, there must be a period of time provided for general public comment on any matter within the subject matter jurisdiction of the legislative body, **as well as an opportunity for public comment on each specific agenda item as it is taken up by the body.** (*Galbiso v. Orosi Public Utility District* (2008) 167 Cal. App. 4th 1063, 1079) (Emphasis Added)

In accord is *Chaffee v. San Francisco Library Com*., supra, 115 Cal. App. 4th 461, 469, which held that the Brown Act "mandated that a single general public comment period be provided per agenda, in addition to public comment on each agenda item as it is taken up by the body."

This rule is equally applicable to agenda items discussed in closed session. *Galbiso* held that, while pending litigation could be discussed in closed session (Govt. Code § 54946.9), the opportunity for public comment on that closed session agenda item is still required.

> It is true that section 54956.9 permits a legislative body to hold a closed session in order to privately discuss pending litigation with its legal counsel when it is deemed necessary to do so. However, we must construe the exceptions to the

> open meeting provisions of the Brown Act narrowly and the provisions calling for open meetings and public participation broadly to effectuate the important purposes of the Brown Act. (Citations) Thus, the fact that the public body is entitled to meet and confer privately with its attorney to discuss legal issues and receive confidential legal advice in connection with pending litigation does not preclude a member of the public from expressing comments or concerns relating to the pending litigation during a public session. (*Id* at 1080)

Courts have rendered similar rulings on the analogous personnel exception. (See*, Leventhal v. Vista Unified School Dist.* (S.D.Cal. 1997) 973 F.Supp. 951, 958–959; *Morrow v. Los Angeles Unified School Dist.* (2007) 149 Cal.App.4th 1424, 1437–1439)

While a legislative body is permitted to develop regulations limiting the total amount of time for public comment, each topic as well as the total time allotted for each individual speaker (Govt. Code § 54954.3(b)), it cannot prohibit public criticism of its policies, procedures, acts or omissions. (Govt. Code § 54954.3(c)) For school districts, the Education Code also mandates that agendas provide "an opportunity for members of the public to directly address the governing board on any item of interest to the public before or during the governing board's consideration of the item…." (Ed. Code § 35145.5) The "Safe Harbor" provisions for closed sessions, discussed next, may not fully alert the public regarding what will be the subject matter of the closed session, so the opportunity for public input and debate mandated by other sections of law may not be fully realized.

B. Agenda and Disclosure Requirements for Closed Sessions

1. Before Closed Meeting Requirements

a) General Disclosure (Agenda) Requirement

Generally, prior to holding any closed session, the legislative body must disclose those matters which will be discussed at the closed session. A reference to a properly described agenda item may suffice.

> **Prior to holding any closed session, the legislative body of the local agency shall disclose, in an open meeting, the item or items to be discussed** in the closed session. The disclosure may take the form of a reference to the item or items as they are listed by number or letter on the agenda. In the closed session, **the legislative body may consider only those matters covered in its statement.** (Govt. Code § 54957.7(a)) (Emphasis Added)

b) "Safe Harbor" Provisions

A 1993 amendment to the Brown Act added a list of suggested agenda descriptions for closed sessions which, if followed with "substantial compliance," preclude an agency from being found in violation of the Brown Act. (Govt. Code § 54954.5) The nature of the disclosure and agenda requirements depend upon which open meeting exception authorizes the closed session. As noted this has resulted in some tension with earlier cases as well as other sections of law that suggest an agenda should be in sufficient detail to provide the public with an appropriate opportunity to be heard. Simply using the "Safe Harbor" descriptions may not always do this.

1/ Conference with Labor Representative

To enter the "Safe Harbor" for closed sessions regarding employee matters, held under the exemption of Govt. Code § 54957.6(a), the agenda should contain the heading, "Conference with Labor Negotiators," along with the names of the designated representative(s) and the employee organization that is involved. (Govt. Code § 54954.5(f))

2/ Evaluation of Performance

For a closed session to evaluate the performance of an employee, held under the exception of Govt. Code § 54957(b)(1), the agenda should contain the heading, 'Public Employee Performance Evaluation," and specify the position and title of the employee being reviewed. (Govt. Code § 54954.5(e))

2. Post Meeting Requirements

a) Generally

If there was "action taken" during the closed session, there may be additional disclosure requirements that must be made in open session following the closed sessions. The term "'action taken' means a collective decision made by a majority of the members of a legislative body, a collective commitment or promise by a majority of the members of a legislative body to make a positive or a negative decision, or an actual vote by a majority of the members of a legislative body when sitting as a body or entity, upon a motion, proposal, resolution, order or ordinance." (Govt. Code § 54952.6) Disclosures are mandated only for particular actions

taken and depend upon the open meeting exception under which the closed sessions are held. The applicable ones are addressed below.

1/ Conference with Labor Representative

"Approval of an agreement concluding labor negotiations with represented employees pursuant to Section 54957.6 shall be reported as soon as the agreement is final and ratified by the other party." In addition "the report shall identify the item approved and the other party or parties to the negotiation." (Govt. Code § Code § 54957.1(a)(6))

2/ Evaluation of Performance

For evaluating an employee's performance, there are no disclosure requirements for closed sessions properly held pursuant to this exception. However, "action taken to appoint, employ, dismiss, accept the resignation of, or otherwise affect the employment status of a public employee in closed session…shall be reported at the public meeting during which the closed session is held." (Govt. Code § 54957.1(a)(5)) Excepted from this requirement is a report of dismissal or non-renewal of an employment contract, which may be delayed until after exhaustion of the employee's administrative remedies. (*Ibid*)

3/ Disclosures may be orally or in writing

The post-meeting public disclosures may be made orally or in writing. (Govt. Code § 54957.1(b)) They are required, however, to be made in a location where the public is allowed to be present. (Govt. Code § 54957.7(c))

VIII. CONCLUSIONS

As noted in this report, none of the closed sessions were recorded, nor were minutes taken. Variations in the recollections of the participants have not been fully resolved by available written records as they too have been contradicted, and in one case repudiated by the author. While definitive findings could not be made, conclusions were nevertheless drawn on each of the meetings reviewed as detailed below.

A. The Dec. 7, 2010 Meeting

The Brown Act permits closed session discussions on any matter within the statutory scope of representation of the employee association. (Govt. Code § 54957.6(a)) The Rodda Act provides an additional and broader exemption for any executive session of a school employer or between the employer and its representative "for the purpose of discussing its position regarding any matter within the scope of representation and instructing its designated representative." (Govt. Code § 3549.1(d)) The un-contradicted purpose of the Dec. 7, 2010, meeting was to discuss and ascertain the newly reconstituted Board's position with respect to the previously negotiated labor contracts, their trigger clauses, and to instruct the Board's representative accordingly. These matters were clearly within the "statutory scope of representation" of CUSD's represented employees. The Dec. 7, 2010, closed session was, therefore, permissible under the exceptions contained in both the Brown and Rodda Acts.

The agenda listing is more problematic. As noted earlier, court decisions have held that agenda descriptions must be adequate to "apprise the public of the matter to be considered." Earlier cases interpreting the former analogous sections of the Education Code also ruled that agendas must give "fair warning" and contain sufficient "detail so that the general public can ascertain the nature of …business" that is being discussed. The agenda description, "Conference with Labor Negotiators," did not apparently do that, as evidenced by the complaints made both in the media and to this office. Having complied with the "Safe Harbor" provisions, however, no violations can be assessed.

The final issue regarding the Dec. 7, 2010, meeting concerns what disclosures, if any, was the Board required to make for "action taken" in closed session. Under the Brown Act, disclosure requirements are limited to those specified in Govt. Code § 54957.1. The only relevant disclosure requirement is that requiring the reporting of an agreement "concluding labor negotiations," and then only "after the agreement is final." (Govt. Code § 54957.1(a)(5)) Labor negotiations had been concluded the previous spring and duly reported at that time. Under the Brown Act there is no specific requirement that the Board's "action" on Dec. 7, 2010, be reported. Moreover, if a contrary conclusion could be reached, as noted above, the Rodda Act (Govt. Code § 3549.1) exempted the Board from the requirements of the Brown Act for the closed session conference with the Superintendent. Accordingly, no violation of the Brown Act can be assessed for failing to disclose "action taken" at the Dec. 7, 2010, meeting.

While no violations can be affixed for the Dec. 7, 2010, meeting, the conduct and sometimes contradictory statements of CUSD officials created an appearance of impropriety. For example, in his report issued March 16, 2011, the Superintendent justified the failure to report what had occurred in the Dec. 7, 2010, meeting on the grounds that there was "no duty to report out after closed sessions with the labor negotiators until the negotiations are completed." Elsewhere in the same report, however, the Superintendent suggested that the negotiations had already been completed. He said that no action had been taken, characterizing the "decision" as one "not to dispute the validity of the agreement, or otherwise take any action to interfere with the previously adopted agreement," or to "withdraw from the agreements," or to "delay implementation of the agreement." In subsequent interviews, the Superintendent described the Board's "action" as a decision "not…to take any action," followed by instructions "to comply with the agreement and other instructions… consistent with that instruction." These descriptions appeared to contradict statements in the Jan. 11, 2011, meeting where the Superintendent stated, "The furlough days *action* has already been taken to reinstate these days."

Board members themselves differed on what happened, variously describing it as "action taken," a decision to take "no action," giving "direction," "no agreement to do anything," and so forth. Regardless, the fact remains at the Dec. 7, 2010, meeting, a majority consensus decided that the triggers for restoration of the furlough days had been satisfied and the Superintendent was instructed to proceed accordingly. While the CUEA representatives were informed as early as Dec. 9, 2010, the first notification to the public was not until a week later on Dec.15, 2010, and then limited to only a few websites. The contradictions and limited delayed disclosures could not help but to create a bad impression.

B. The Dec. 13, 2010 Meeting

The broad exemption of the Rodda Act is inapplicable to the Dec. 13, 2010, meeting since it was ostensibly for the purpose of Evaluation of the Superintendent, not for holding an executive session to discuss school employer matters. The true nature of the meeting, however, has been more difficult to resolve given the conflict in the available evidence. Some evidence indicated that the substantive decision to restore furlough days was made at that meeting instead of the earlier Dec. 7, 2010, meeting.

For example, inquires made to the OCDE regarding the budget implications of restoring the furlough days were made on that same date. Press notifications announcing the furlough day restorations were made *after* the Dec. 13, 2010, meeting as opposed to after the earlier Dec. 7, 2010, meeting. There was no explanation for the delay. In addition, an internal memo indicated that the decision to restore the furlough days had been made *at the Dec. 13, 2010, meeting*. This memo was not overtly repudiated until months later in May 2011, *after* CUSD had already been served with a complaint alleging a Brown Act violation. In the past, in violation of the Brown Act, a prior Board had repeatedly discussed and decided substantive issues under the auspices of the "Evaluation of Superintendent" exception to the Brown Act. These facts and past practices, together with seemingly contradictory statements of CUSD officials, created the clear appearance of Brown Act violations. Subsequent investigation, however, did not develop evidence sufficient to establish that the appearance was reality.

While it appears that there may have been some discussion concerning the restoration of the furlough days, all but one of the trustees indicated that any such discussion was solely in connection with evaluating the Superintendent and that no vote on any issue was taken. One trustee indicated that the Superintendent had asked the Board if it wished to revisit the furlough days issue, but that a majority of the Board declined to do so. The Superintendent was then instructed to proceed forward with restoring the furlough days. Had this occurred, a violation of the Brown Act would be established. No other participant corroborated this account, however, and neither minutes nor recordings of the closed sessions existed to do so. By all accounts, the discussion, whatever its nature, was very brief and at the end of the session. Despite appearances, therefore, no violation of the Brown Act could be sustained on this evidence.

C. The Jan. 26, 2011, Meeting

As with the Dec. 7, 2010, meeting, the Jan. 26, 2011, closed session was held under the agenda description, "Conference with Labor Negotiators." The evidence established that a formal vote occurred, by which a majority of the Board decided to partially restore pay cuts. The minutes of the Jan. 26, 2011, meeting, however, reported that "No action was taken." No other announcement of the Board's decision was made until Feb. 1, 2011, when a "limited" press release was issued. An internal memo indicated the purpose of limiting the press release was to "minimize publicity," the reason apparently being because it was "a politically

charged issue," and there was a need to "restore calm." This decision was made by the Superintendent. No evidence of *prior* knowledge or participation in this decision by the Board was uncovered.

As noted, closed sessions to meet with labor negotiators are permissible under exceptions provided in both the Brown and Rodda Acts. The Jan. 26, 2011, meeting falls within these exceptions. In addition, unless the action is the final approval of a labor agreement, the Brown Act provides no requirement for reporting out any action taken in closed sessions under this exception. That was not the case in this meeting. No violation of the Brown Act can therefore be shown.

Again, however, appearances served to raise suspicions of wrongdoing. Unlike Dec. 7, 2010, after the Jan. 26, 2011, closed session the Board's minutes reported that, "No action was taken." "Action taken" is broadly defined in the Brown Act and includes "any collective commitment…to make a positive or a negative decision." The decision of the Board, whether it is described as an "affirmative" decision to restore salaries or a "negative" decision to take no action and let the contract "automatically" restore them, clearly met this broad definition of "action taken." Whether or not this decision was reportable, the minutes' entry indicating that "no action was taken," had a misleading effect. When coupled with the internal memo to "limit publicity," this furthered the appearance of intentional concealment.

D. The March 16, 2011 Meeting

As a result of complaints concerning its conduct, the Board held an open meeting on March 16, 2011, to re-address the issues of restoring the furlough days and pay cuts. An opportunity for public comment was provided. Two Board members refused to participate, theatrically leaving the meeting room when that agenda item was called. At this meeting, the Superintendent indicated that there *had* been a vote at the Dec. 7, 2010, meeting. This comment appeared to contradict another statement at the Jan. 11, 2011, meeting, where the Superintendent stated that "at the December 7, 2011, Board meeting that [the Board] did not intend to take any action…." These apparently contradictory statements added to the confusion of what had transpired and augmented the appearance of impropriety.

If the meeting was to convey the impression that the Board would seriously consider public input and comment *before* it made its decision, it did not entirely fulfill this purpose. The

agenda stated the purpose was a "Reaffirmation of Previously Considered Restoration of Furlough Days and Pay…." The Superintendent's report, "recommended that the Board reaffirm its earlier vote…." This conveyed the impression that the decision of the Board was preordained, with or without public comment, giving the appearance that any public input would be meaningless.

During the meeting one trustee made what was viewed a facetious motion. When another trustee unexpectedly seconded the motion, creating an apparent quandary for the moving trustee, he called for a recess. At the recess, at least two trustees, the one who'd made the motion and the one who'd seconded it, appeared to briefly confer behind the dais while others either approached, stood nearby, or otherwise appeared to participate in the conversation. When the recess ended, the second was withdrawn and the motion accordingly failed. These events gave the clear appearance of an "off-the-record" meeting behind the dais, the purpose of which was to undo a motion that had been made in public session.

That the moving trustee was observed jokingly discussing his motion with audience members served only to strengthen the impression that the Board had no intention of seriously considering public input. Instead, it appeared that the Board was predetermined to rebuff any opposition to what it had already decided, an ironic impression to convey at a meeting ostensibly held to invite meaningful public input and comment in an effort to correct past perceived improprieties.

Subsequent investigation could not establish that, in fact, a "meeting" of a quorum of the Board took place behind the dais. All that could be established was that two of the trustees conversed about the motion. Since the seconding trustee did not recall anything of that event, only the statement of the moving trustee was available. Others denied participating in any discussion behind the dais during the recess. While the appearance of a violation was again manifest, the evidence developed in the inquiry was not sufficient to sustain a finding that a Brown Act Violation had occurred

IX. FINAL OBSERVATIONS

As has been noted, the investigation in this case was hampered by the lack of written records (minutes) or recordings of the closed sessions. As a result of a court settlement with a private party in February 2007, the Board had commenced recording its closed sessions. In addition,

in October 2007, after the OCDA had issued its report finding numerous violations of the Brown Act and suggesting that closed sessions be recorded, CUSD responded as follows:

> Capistrano Unified has been audio-recording all closed session Board meetings since February 22, 2007 as a result of a legal settlement with a private citizen. The Trustees voted last night to continue the practice of recording closed session meetings while protecting the privacy interests of students and other parties with issues before the Board.

A reasonable conclusion from this response was that the Board had elected to record its closed sessions independent of the court settlement. That was the conclusion of the OCDA at the time and seemed to be confirmed by the notice on the Board's agendas that "all regular school Board Meetings will be audio recorded." Some of the trustees themselves were under the impression that the closed sessions were still being recorded.

It was only during the course of the investigation that the OCDA learned that this practice had been terminated by the Board on the grounds that it was no longer required by the prior court settlement. The Superintendent noted that recording had not been required, only recommended, by the OCDA. One trustee reiterated there was no obligation to follow the recommendation of the OCDA because, "that was just a recommendation." It is recommended that the Board return to recording its closed sessions and taking written minutes.

There appeared to be a need for a more formalized training of Board members on the Brown Act. Simply providing a booklet upon their assuming office is not sufficient. An earlier report by the OCDA had recommended more formal training. It is again recommended that CUSD institute such training.

The agenda descriptions, while complying with the "Safe Harbor" provisions, did not fully apprise the public of what the Board would be considering during closed sessions. As a result, public knowledge and participation was curtailed. When combined with the contradictory statements of CUSD officials, this too added to an impression that the Board's intent was to conceal its decisions behind closed doors. That impression was not entirely unfounded.

There appeared to be a desire on the part of some CUSD officials to minimize public attention and input in its decisions to restore the furlough days and salaries. This was borne from a perception that there would be substantial community opposition to the decision, and that such opposition could be expected at any meeting wherein the issue was to be publicly discussed.

The Superintendent feared that a public discussion of the restoration of the furlough days and pay cuts would potentially intimidate the new Board into reneging on the contract, resulting in more labor strife. There was a desire to avoid such contention and to restore calm in the wake of last year's labor disputes and the charged political atmosphere of the recall.

While such feelings are certainly understandable, it bears noting that democracy, with limited exception, does not contemplate elected officials making decisions behind closed doors to avoid public participation with its potential for loud opposition. It may be natural human nature to wish to avoid such unpleasantness, but democratically elected governments demand public officials of sterner stuff.

The courts have long noted the vital public interest that "an active and critical audience" plays in the debate of public issues. If such participation is to be fostered, agendas need to do more than comply with the "Safe Harbor" provisions of the Brown Act. Instead, they should more fully describe what the Board intends to discuss. Simply complying with the "Safe Harbor" provisions, while avoiding violations of law, is not likely to engender a public trust that has already been frayed.

Avoiding an opportunity to garner additional evidence or public input on the grounds that one might either "get an answer we didn't want to hear," or an answer that favors an opposing viewpoint, is an unwise attitude to adopt. Elective offices are not for the purpose of benefiting their holders, nor any particular group of supporters, but for serving the interests of the entire constituency. Avoiding the full participation of the public or the input of additional information does not further that purpose.

The OCDA's investigation also revealed what can be described as a seemingly toxic atmosphere within the halls of CUSD. Evidence revealed examples of condescension or disdain for other Board members or dissenting members of the public. Meaningful discussion was replaced by facetious motions and political theatre. Accusations and recriminations were repeatedly recounted. The motivations of colleagues and others were questioned or impugned. While mutual recriminations and concerns for contractual obligations, professional positions, political agendas, and labor peace were expressed, one was left with the impression that the very object of the entire organization, the education of the community's children, had been allowed to fade into the background. The public has a right to expect that those charged

with educating their children lay aside their personal animosities and agendas to focus on the true *purpose* of the positions they occupy.

Events during the course of the reopened investigation did not remove all grounds for concern. When the OCDA issued its initial findings, phone calls from the media were received recounting allegations that the OCDA's investigation and findings were "politically motivated," on the grounds that the CUSD Board was now "controlled by the teachers' unions." No evidence of such control had theretofore been adduced. While the source of these allegations was not disclosed, correspondence and comments from CUSD officials reiterated the suspicion that the complaints were "politically motivated."

Some Board members appeared less than enthusiastic in their cooperation with the reopened investigation. One Board member questioned why the OCDA was committing resources to the investigation. Another Board member initially refused to provide a statement if it was to be recorded. After agreeing to do so, this Board member would then only reiterate the contents of written documents prepared by the Superintendent, claiming a failure of recollection in response to questions. Others initially refused to be interviewed if CUSD's attorney was present. Still another initially refused to discuss the conversations that had taken place behind the dais at the March 16, 2011, meeting. Though these objections were eventually set aside, the experience did not engender confidence that CUSD officials were unreservedly prepared to put aside personal antagonisms or agendas.

Ultimately, this case illustrates that the avoidance of the appearance of impropriety is just as vital as the avoidance of its reality. Public confidence in government is adversely affected by both. Whenever there is official secrecy, behind closed door meetings, or attempts to avoid public attention, suspicion of wrongdoing will invariably arise. Once it arises it is most difficult to dispel. Responding with political theatre, disdainful condescension, or procedures where the appearance is one of predetermined decisions are not likely to dispel that suspicion. Elected officials may then discover their jobs have become far more frustrating than would have been the case had they openly embraced the "active and critical" participation of the public they're elected to serve.