

City of Los Alamitos

Agenda Report Discussion Items

February 18, 2014
Item No: 11C

To: Mayor Graham-Mejia & Members of the City Council

Via: Bret M. Plumlee, City Manager

From: Cary S. Reisman, City Attorney

Subject: Rescission of City Council Action Against Council Member Warren Kusumoto and Reimbursement for Legal Fees Expended

Summary: In 2011, the City Council voted to refer a claimed Brown Act violation to the appropriate authorities for criminal prosecution. The Statute of Limitations on any criminal violations expired and criminal prosecution would not be possible. Civil action would also be difficult and an unnecessary waste of municipal resources. Reimbursement of Council Member Kusumoto's legal fees is permissible but not mandatory.

Recommendation: Consider: 1) reversing the stigmatizing recommendation for City Attorney referrals for prosecution, and/or 2) reimbursing Council Member Kusumoto for his legal fees incurred.

Background

On January 17, 2012, the City Council voted to instruct then City Attorney Sandra Levin to take certain actions in an effort to have Council Member Warren Kusumoto criminally prosecuted and enjoined for alleged violations of the Ralph M. Brown Act, California Government Code section 54950, et seq. The allegation was that Council Member Kusumoto disclosed matters that were discussed in closed session in violation of section 54963 (attached).

The 2012 Council instructed the then City Attorney to:

1. Retain a City Prosecutor to seek a court order, writ of mandate, or injunction against Council Member Kusumoto preventing him from repeating the alleged violation, and/or barring him from future closed sessions regarding the trash contract litigation.
2. Refer the matter to the Orange County District Attorney for investigation and possible criminal prosecution.
3. Refer the matter to the California Attorney General for investigation and possible criminal prosecution.
4. Refer the matter to the Orange County Grand Jury for investigation and possible filing of an action to remove Council Member Kusumoto from office.

Although the City retained outside counsel to investigate, no lawsuits were ever filed against Council Member Kusumoto for writ of mandate, injunction, or anything else. It is unknown whether City Attorney Levin referred the matter to the District Attorney, Attorney General or Grand Jury. However, it is known that no criminal actions were filed.

It has now been two years since the alleged violations occurred, therefore it is too late to pursue any of the remedies directed by the City Council.

Council Member Kusumoto states that he retained an attorney to assist him in fighting the charges against him and seeks reimbursement for his attorney's fees in an unstated amount.

The City retained an outside law firm to investigate the alleged violations by Council Member Kusumoto. While that law firm commenced an investigation and prepared a draft report, the report was apparently never presented to the City Council. However, whether or not that report was completed, given the passage of time since the alleged violation, the remedies intended by the Council majority in 2012 were not then pursued, and in all likelihood could not be successfully pursued at this time. That is, even if the alleged violations were actual violations of California law,¹ the immediacy having passed, most courts of equity would not be willing to grant equitable relief such as an injunction. In addition, there have been no allegations of new violations of the Brown Act by Council Member Kusumoto, thereby rendering injunctive or similar relief unnecessary. As for criminal prosecution, the statute of limitations for prosecution of misdemeanor offenses is one year. Since two years have passed, it is not possible to successfully prosecute the alleged violations as criminal violations.

The last issue is the reimbursement of attorney's fees expended by Council Member Kusumoto in defending against the City's threatened action. Council Member Kusumoto has requested reimbursement, but did not state the amount he expended or explain why he expended any attorney's fees without any court proceedings pending against him. Council Member Kusumoto believes that the City Council's decision to refer the matter to the State Attorney General, the Grand Jury, the Orange County District Attorney, and the hiring of an outside law firm with Brown Act expertise, necessitated his retention of an attorney prior to any case actually having been filed against him.

Discussion

Since the statute of limitations has expired without any governmental authority (including the City) filing charges against Council Member Kusumoto, it is not possible to do so now. The reasons for the failure to file may have been that the investigating authorities determined that no crime was committed, or that there was insufficient evidence to secure a conviction. As a relatively new Council Member, it is understandable that Council Member Kusumoto may not have believed his actions to be violative of the Brown Act (if they even were). At this point, there is little the City Council can do to unwind the series of events that led to the referral for prosecution, other than to reverse the recommendation and reimburse Council Member Kusumoto for his legal expenses, if any were properly incurred.

California Law permits cities to reimburse their elected and appointed officials for expenses incurred by them in defending themselves against lawsuits arising out of their official duties. Government Code section 825, which deals primarily with civil actions against government employees, requires the employer to defend and indemnify officials who are sued because of activities occurring in the course and scope of their employment. While the City may defend under a reservation of rights, reserving the right to pursue the employee for the judgment amount if the case is lost, it may not do so if the employee is found to have been acting in the course and scope of employment. The same section allows a governmental employer to indemnify and defend an employee against whom punitive damages are awarded under certain circumstances.

Under Government Code section 825.6, a public entity may even reimburse an employee or former employee for acts resulting in felony convictions – except for convictions of offenses involving bribes, extortion and similar felonies.

Conflict of Interest Analysis

It is noted that Council Member Kusumoto recused himself from participation in the decision to refer his alleged violations to various authorities. He should do so again regarding the decision to reverse that referral. However, the FPPC has ruled in a similar situation that there is no conflict of interest requiring a Council Member to recuse himself from the vote on whether or not to reimburse him for legal fees he incurred in connection with such proceedings.

Conclusion

The City Council may rescind its January 2012, action instructing the City Attorney to take various actions against Council Member Kusumoto. There is no prohibition against reimbursing Council Member Kusumoto for his legal fees incurred in defending against the City's actions to prosecute him. However, the latter should not occur without City Staff reviewing Council Member Kusumoto's bills for legal fees and determining that they were necessary, reasonable, and related to defense of the City's actions.

Submitted By:



Cary S. Reisman
City Attorney

Approved By:



Bret M. Plumlee
City Manager

- Attachments:* 1. Government Code Section 54963
2. City Council Staff Report and Minutes – January 17, 2012

¹ The current City Attorney has not been asked to render an opinion as to whether the alleged disclosures regarding matters discussed in closed session would rise to the level of Brown Act violations, and has therefore refrained from rendering an opinion on the subject.

GOVERNMENT CODE - GOV

TITLE 5. LOCAL AGENCIES [50001 - 57550]

(Title 5 added by Stats. 1949, Ch. 81.)

DIVISION 2. CITIES, COUNTIES, AND OTHER AGENCIES [53000 - 55821]

(Division 2 added by Stats. 1949, Ch. 81.)

PART 1. POWERS AND DUTIES COMMON TO CITIES, COUNTIES, AND OTHER AGENCIES [53000 - 54999.7]

(Part 1 added by Stats. 1949, Ch. 81.)

CHAPTER 9. Meetings [54950 - 54963]

(Chapter 9 added by Stats. 1953, Ch. 1588.)

54963.

(a) A person may not disclose confidential information that has been acquired by being present in a closed session authorized by Section 54956.7, 54956.8, 54956.86, 54956.87, 54956.9, 54957, 54957.6, 54957.8, or 54957.10 to a person not entitled to receive it, unless the legislative body authorizes disclosure of that confidential information.

(b) For purposes of this section, "confidential information" means a communication made in a closed session that is specifically related to the basis for the legislative body of a local agency to meet lawfully in closed session under this chapter.

(c) Violation of this section may be addressed by the use of such remedies as are currently available by law, including, but not limited to:

(1) Injunctive relief to prevent the disclosure of confidential information prohibited by this section.

(2) Disciplinary action against an employee who has willfully disclosed confidential information in violation of this section.

(3) Referral of a member of a legislative body who has willfully disclosed confidential information in violation of this section to the grand jury.

(d) Disciplinary action pursuant to paragraph (2) of subdivision (c) shall require that the employee in question has either received training as to the requirements of this section or otherwise has been given notice of the requirements of this section.

(e) A local agency may not take any action authorized by subdivision (c) against a person, nor shall it be deemed a violation of this section, for doing any of the following:

(1) Making a confidential inquiry or complaint to a district attorney or grand jury concerning a perceived violation of law, including disclosing facts to a district attorney or grand jury that are necessary to establish the illegality of an action taken by a legislative body of a local agency or the potential illegality of an action that has

been the subject of deliberation at a closed session if that action were to be taken by a legislative body of a local agency.

(2) Expressing an opinion concerning the propriety or legality of actions taken by a legislative body of a local agency in closed session, including disclosure of the nature and extent of the illegal or potentially illegal action.

(3) Disclosing information acquired by being present in a closed session under this chapter that is not confidential information.

(f) Nothing in this section shall be construed to prohibit disclosures under the whistleblower statutes contained in Section 1102.5 of the Labor Code or Article 4.5 (commencing with Section 53296) of Chapter 2 of this code.

(Added by Stats. 2002, Ch. 1119, Sec. 1. Effective January 1, 2003.)

City of Los Alamitos

Agenda Report January 17, 2012 Mayor & Council Business Item No: 10A

To: Mayor Troy D. Edgar & Members of the City Council

From: Sandra Levin, City Attorney
Angie Avery, City Manager

Subject: Discussion of Violations of Law Related to Published Letter Regarding Closed Session and Possible Action Regarding Same

Summary: On December 5, 2011, Council Member Kusumoto publicly released a letter which contained references to conduct in Closed Session and opinions on the Council related to litigation discussed in Closed Session. The City Council requested that the City Attorney provide an opinion for discussion in open session regarding whether the letter violated the Brown Act or other confidentiality laws by exposing information and discussions that were confidential. Attached is a memorandum that presents the City Attorney's opinion, concludes that violations occurred, and sets forth a range of options for responding to those violations.

Recommendation:

1. Discuss and provide direction; or,
2. Receive and file.

Background and Discussion

Until December 5, 2011, Council Member Kusumoto participated in Closed Session meetings concerning ongoing litigation over the City's award of a waste disposal contract. On December 5, Council Member Kusumoto sent a letter to the Mayor and local press announcing his desire to cease participation in these Closed Session meetings. The letter contained a number of references to the majority and minority opinions on the Council related to litigation. The City Council requested that an evaluation of whether the letter violated the Brown Act or other confidentiality laws by exposing information and discussions that were confidential be brought back for discussion in open session.

The attached memorandum presents the City Attorney's opinion with citations to authority and sets forth the following options for responding to those violations.

The City may undertake some or several of the following options:

1. Take no further action.
2. Establish a policy or "code of conduct" for the handling of confidential Closed Session information and adopt specific rules for all future meetings.
3. Retain a City Prosecutor to seek a court order, writ of mandate, or injunction preventing further disclosure of confidential Closed Session information by Council Member Kusumoto and/or barring him from further Closed Sessions regarding the litigation at issue.
4. Direct the City Attorney to refer the matter to the District Attorney. The matter may be investigated and may or may not be prosecuted under state law.
5. Direct the City Attorney to refer the matter to the Attorney General. The matter may be investigated and may or may not be prosecuted under state or local law.
6. Direct the City Attorney to refer the matter to the Grand Jury. The Grand Jury may investigate the matter and determine whether to initiate removal proceedings.
7. Direct a City Prosecutor to prosecute the matter as a misdemeanor under the Municipal Code. This option is not recommended as there is a potential bar to prosecution due to pre-emption.

Fiscal Impact

The fiscal impact depends upon the option selected and ranges from none to the cost of a City Prosecutor.

Submitted By:



Angie Avery, City Manager

Attachments: Memorandum from City Attorney

**EXCERPT FROM THE
MINUTES OF THE CITY COUNCIL
OF THE CITY OF LOS ALAMITOS
January 17, 2012**

1. CALL TO ORDER

The City Council met in Regular Session at 7:00 p.m., Monday, January 17, 2012, in the Council Chambers, 3191 Katella Avenue, Mayor Edgar presiding.

2. ROLL CALL

Present: Council Members: Graham-Mejia, Kusumoto, Stephens,
Mayor Pro Tem Poe, Mayor Edgar

Absent: Council Members: None

10. MAYOR AND COUNCIL INITIATED BUSINESS

A. Discussion of Violations of Law Related to Published Letter Regarding Closed Session and Possible Action Regarding Same

On December 5, 2011, Council Member Kusumoto publicly released a letter which contained references to conduct in Closed Session and opinions on the Council related to litigation discussed in Closed Session. The City Council requested that the City Attorney provide an opinion for discussion in open session regarding whether the letter violated the Brown Act or other confidentiality laws by exposing information and discussions that were confidential.

Council Member Kusumoto recused himself and left the dais.

City Attorney Levin summarized the staff report referring to the information contained therein and answered questions from the City Council.

Mayor Edgar gave a brief background of the process to date pertaining to the City's trash contract with Consolidated Disposal.

Mayor Edgar opened the meeting for public comment.

City Attorney Levin clarified Council Member Kusumoto could address the Council as a resident from the podium.

The following residents stated opposition for item 10A:

- Shane Cozie
- Rodney Phillips

- Richard Murphy
- JM Ivler

The following residents stated support for item 10A:

- Lissette Gabler
- Chuck Sylvia

Council Member Stephens requested explanation of City Attorney fees and cost related to litigation.

City Attorney Levin stated there may be more than one month's fees being reported and indicated Council was within the adopted budget for legal fees. She indicated litigation fees regarding the trash contract were reimbursed by Consolidated.

Council Member Stephens requested an explanation of the FPPC opinion regarding the named Council Members participating in Closed Session.

City Attorney Levin summarized the FPPC had stated the allegation in the complaint did not create a Conflict of Interest and there was no Conflict of Interest by virtue of the fact Consolidated would reimburse the City for defense costs.

Council Member Stephens and Mayor Pro Tem Poe stated support for moving forward as stated in the City Attorney's memo.

Council Member Graham-Mejia stated opposition for moving forward. She commented on her perception of former Council Member Grose's Brown Act Violation.

Dean Grose, resident, stated such comments were out of order as he had not committed a Brown Act violation and he did not appreciate being slandered.

Mayor Edgar clarified Public Comment was closed.

Council Member Graham-Mejia recalled potential Brown Act violations by former Council Member Grose during Police Officer Association contract negotiations and with Mayor Edgar during the Orange County Sanitation District Board meeting.

Mayor Edgar inquired if Council Member Kusumoto would like to address the Council as a resident.

City Manager Avery indicated he declined.

Mayor Edgar stated his belief that there was a Brown Act violation and felt the City needed to move forward with prosecution.

Mayor Edgar and Council Member Graham-Mejia discussed the action taken during the Orange County Sanitation District meeting.

Council Member Graham-Mejia expressed frustration that the item appeared to be retaliation for the lawsuit and supported giving Council Member Kusumoto a second chance, as was past practice for new Council Members.

Council Member Stephens stated the City Council had an obligation to report these matters to the proper agencies. He pointed out the action was not retaliation, but an effort to get the facts and expert opinion.

Mayor Pro Tem Poe stated she did not see the relevance of the Dean Grose allegations made by Council Member Graham-Mejia since three members of the current Council were not present at the time. She expressed her opinion that it was the Council's obligation to ensure regulations were followed and all citizens were represented.

Mayor Pro Tem Poe asked for clarification regarding the options presented in the City Attorney's memo. City Attorney Levin provided explanation.

Mayor Pro Tem Poe made a motion to move forward with options 2, 3, 4, 5, and 6, as stated in the City Attorney's memo.

Council Member Graham-Mejia supported option 2 and inquired if the Council could wait for a response from the Attorney General before moving forward with all agencies and if the Attorney General or District Attorney would see different reasons to prosecute.

City Attorney Levin stated the Council could proceed as it deemed appropriate and all agencies could reach different outcomes.

Mayor Pro Tem Poe made a motion, seconded by Council Member Stephens, to move forward with options 2, 3, 4, 5 and 6, as presented in the City Attorney's memo.

Council Member Graham-Mejia made a substitute motion to move forward with options 2 and 5, and proceed further if needed at a later date. Motion died for lack of a second.

Motion/Second: Poe/Stephens

Carried 3/1 (Kusumoto recused himself and Graham-Mejia cast the dissenting vote): The City Council provided the following direction:

2. Establish a policy or "code of conduct" for the handling of confidential Closed Session information and adopt specific rules for all future meetings.
3. Retain a City Prosecutor to seek a court order, writ of mandate, or injunction preventing further disclosure of confidential Closed Session information by Council Member Kusumoto and/or barring him from further Closed Sessions regarding the litigation issue.
4. Direct the City Attorney to refer the matter to the District Attorney. The matter may be investigated and may or may not be prosecuted under state law.
5. Direct the City Attorney to refer the matter to the Attorney General. The matter may be investigated and may or may not be prosecuted under state or local law.
6. Direct the City Attorney to refer the matter to the Grand Jury. The Grand Jury may investigate the matter and determine whether to initiate removal proceedings.