LAW UPDATE
EDUCATION

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BE CHOOSY ABOUT WHOM YOU INVITE TO CLOSED SESSION
THE "OFFICIAL OR ESSENTIAL" ROLE TEST

The California Attorney General recently issued an opinion on the question of "semi-closed" meetings.[1] Semi-closed meetings happen when people who don't have a proper role in the meeting are permitted to come into a closed session; while not specifically referenced in the Brown Act, the concept has been developed over the years in a series of opinions from the California Attorney General. As explained below, according to the Attorney General, participants in a closed session must not include those who do not have an "official" or "essential" role to play in the proceedings, even if their presence might be beneficial. The rationale is based on the concept that the Brown Act is meant to be liberally interpreted in favor of open meetings, and exceptions must be narrowly construed.

The Attorney General first referenced this concept in a 1965 opinion.[2] Not surprisingly, that opinion concluded that certain interested members of the public (including the press) could not be admitted to a closed session discussion regarding a personnel investigation. The opinion made clear that the Brown Act does not authorize "semi-executive" sessions where people without a proper role are permitted to attend, and the concept came to be included in the Attorney General's Brown Act materials.[3]

Over the years, the Attorney General continued to revisit the issue,[4] eventually concluding in the most recent opinions that persons without an official or essential role should not be admitted even if their presence might be beneficial.

In this most recent opinion, the Attorney General was asked if individual staff members assigned to city council members could attend a closed session, on the theory that they could help administer the

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[1] See Attorney General Opinion No. 21-1102 (May 26, 2022)

[2] 46 Opinions of the California Attorney General 34 (1965).

[3] The Attorney General's *Brown Act Pamphlet* provides that as a general rule, closed sessions can involve only the members of the "legislative body" (board members) plus any additional required support staff, such as an attorney required to provide legal advice, a supervisor of witnesses who may be required in connection with a disciplinary proceeding, or a labor negotiator required for consultation. (California Attorney General, *Brown Act Pamphlet*, page 31).

[4] In 1999, the Attorney General held that a local agency could not adopt a rule allowing alternate members of its legislative body to attend a closed session unless serving in place of an absent member, even though attendance by the alternate member would allow them to be fully informed when they are called upon to replace regular members and "would enhance a fuller discussion and consideration of each proposal." (82 Opinions of the California Attorney General 29.) The following year, the Attorney General concluded that a mayor who was not identified as the labor negotiator for a redevelopment agency, whose members are appointed by the mayor, could not attend a closed session to discuss real property negotiations, even though the project at issue included a publicly financed conference center and city approval would be required, although his presence and a coordinated strategy between the redevelopment agency and the city may have been beneficial. (83 Opinions of the California Attorney General 221 (2000).)

meetings and might have unique knowledge that would assist council members. The Attorney General opined that those present should have either an "official" role (i.e., one provided for in statute, such as those found in the Brown Act closed session authorizations – attorneys present to confer on litigation, labor or real estate negotiators, etc.), or an "essential" role (someone whose presence is necessary to conduct closed session business). The Attorney General concluded these individual staffers were neither official nor essential since the council members themselves were "fully capable of performing their official legislative duties" without the staffers, and while the agency as a whole could appoint a note-taker as authorized in the Brown Act, the staffers were not required for that purpose. The opinion emphasizes that the determination of who may attend will always depend on the particular context and whether the person has a qualifying role to play in a particular closed session. The opinion gives as an example an essential witness with personal knowledge relevant to a particular closed session topic.

The opinion goes on to say that council members cannot disclose closed session information to support staff to assist them in performing their duties.

In light of this series of opinions, districts are advised to carefully tailor the invitation list for closed session to those people who have an official or essential role, rather than, for example, allowing the entire administrative team to remain throughout the closed session. For example, in a closed session discussion regarding a special education litigation matter, the presence of the chief business official or the human resources officer would need to be justified by some official or essential role under the unique circumstances of the case. In a closed session to instruct labor negotiators,[5] the chief business official may play an essential role in providing information critical to the Board's ability to direct the negotiations, but an assistant superintendent for educational services might not. These are only examples; the determination should be based on your unique circumstances.

Please contact our office if you need further information on this topic.

- Grant Herndon

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[5] When a closed session is held to meet with labor or real property negotiators, those negotiators must have been previously designated in open session (Brown Act, Government Code sections 54956.8, 54957.6).