



CLIENT NEWS BRIEF

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ATTORNEY GENERAL ADDRESSES SCOPE OF BROWN ACT EXCEPTION FOR CLOSED SESSION DISCUSSIONS ABOUT REAL ESTATE NEGOTIATIONS

On December 27, 2011, the California Attorney General issued an opinion addressing what matters may be discussed in closed session under the Brown Act's exception for real estate negotiations. (Ops.Cal.Atty.Gen. (2011, Op. No. 10-206.)) While the Attorney General opinion concluded that this exception is relatively narrow, thus potentially limiting what may be addressed in closed session, it also recognized the reality that discussion of certain topics should not be forced into open session if doing so would reveal information otherwise allowed to be kept confidential under the Brown Act. In the end, the Attorney General left the determination of whether a particular aspect of a real estate transaction may be discussed in closed session to a case-by-case analysis.

Under the Brown Act generally, a quorum of a legislative body must conduct its business in open session. There are a number of statutory exceptions that allow for closed session consideration of particular issues. One such exception provides that:

(A) legislative body of a local agency may hold a closed session with its negotiator prior to the purchase, sale, exchange, or lease of real property by or for the local agency to grant authority to its negotiator regarding the price and terms of payment for the purchase, sale, exchange, or lease.

(Gov. Code §54956.8.)

Prior to going into such a closed session, the legislative body must identify "its negotiators, the real property or real properties which the negotiations may concern, and the person or persons with whom its negotiators may negotiate." (Id.) This is ordinarily accomplished by use of the specific "safe harbor" agenda language for conference with real property negotiators as set forth in Government Code section 54954.5(b).

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In her opinion, the Attorney General considered the range of topics that can be discussed in closed session under this exception. Emphasizing that the Brown Act's closed session exceptions must be construed narrowly, the Attorney General found that a discussion under the real estate negotiations exception must be limited to payment-related issues, and is not "meant to authorize closed-session discussions of any and all terms of the transaction as a whole." The Attorney General also looked to appellate court decisions for support of the notion that the real estate negotiations exception "simply cannot be read so broadly as to incorporate any and every topic that might have a bearing on a public real estate transaction."

While the Attorney General thus avoided a broad reading of the real estate negotiations exception, the opinion also recognizes that the construction of the exception should not be so narrow as to force into open session topics that would otherwise be confidential. To do so would risk exposing the agency's strategy for price and thus impact the potential financial return to the agency: "Among the purposes at play in this situation is the need to conserve scarce public resources through effective negotiation of real estate transactions." The opinion goes on to state that "a closed-session discussion regarding price or terms of payment must allow a public agency to consider the range of possibilities for payment that the agency might be willing to accept, including how low or how high to start the negotiations with the other party, the sequencing and strategy of offers or counteroffers, as well as various payment alternatives." The Attorney General also recognized that information intended to assist with determining the value of a property may also be discussed in closed session, "because that information is often essential to the process of arriving at a negotiating price."

Putting these considerations together, the Attorney General concluded that the real estate negotiations exception allows for closed session discussion of (1) the amount that the local agency is willing to pay or accept; (2) the "form, manner, and timing" of how the payment will be made; and (3) "items that are essential to arriving at the authorized price and payment terms, such that their public disclosure would be tantamount to revealing the information that the exception permits to be kept confidential." This third category of information appears broad enough to provide public agencies with at least some flexibility when conferring with their real property negotiators in closed session.

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This opinion from the Attorney General is advisory only, but provides some insight into how a court might interpret the issue. In the end, the Attorney General concluded that each case would have to be decided on its own facts. As a result, each time a public agency places discussion of a real estate matter on a closed session agenda, it should consider the circumstances carefully, with the unique facts of the particular situation taken into account.

For assistance on Brown Act issues, including regarding real estate negotiations, please contact any of our [eight offices](#) located statewide, visit our [website](#), or follow Lozano Smith on [Facebook](#).

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