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DIRECTOR  
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June 28, 2010

Mr. Chris Prevatt  
The Liberal OC.com

Re: Allegations of Brown Act Violations by the Westminster City Council in Relation to the Black April Commemorative Events on April 30, 2010

Dear Mr. Prevatt:

We are in receipt of your complaint alleging a violation of the Brown Act by members of the Westminster City Council. The Orange County District Attorney (OCDA) carefully reviewed all the information you provided and conducted an independent investigation. The OCDA reviewed records of the Westminster City Council meetings and obtained additional information from the Westminster City Attorney. The evidence we obtained does not show a Brown Act violation.

**THE LAW**

The Brown Act [codified in Government Code §54950 *et seq*] is intended to ensure the public's right to attend the meetings of public agencies.... The Act thus serves 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." (*Mckee v. Los Angeles Interagency Metropolitan Police Apprehension Crime Task Force* (2005) 134 Cal. App. 4<sup>th</sup> 354, 358.)

With limited exceptions, the Act requires that the actions of public commissions and boards be made only during meetings that are open to the public and that their deliberations are conducted openly. The act has been legally construed, with limited exceptions, to prohibit a majority of the members of a city council from meeting privately to decide, or even deliberate about matters that are, or will come, before the city council.

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## CRIMINAL SANCTION

Criminal sanctions for violation of the Brown Act are applicable only to elected members of a legislative body and only in limited circumstances. The Act requires knowledge, intent and “action taken” at a particular meeting. Mere discussions, even where done in knowing violation of the Brown Act, will not support criminal prosecution unless accompanied by concurrent “action taken” at a meeting. “Criminal penalties are available only where some action is taken by the legislative body in knowing violation of the Act.” (*Ingram v. Flippo* (1999) 74 Cal.App.4<sup>th</sup> 1280, 1287.) Government Code § 54959 states:

Each member of a legislative body who **attends a meeting** of that legislative body where **action is taken** in violation of any provision of this chapter, and where the member **intends** to deprive the public of information to which the member **knows or has reason to know** the public is entitled under this chapter, is guilty of a misdemeanor. (emphasis added.)

The Brown Act has a two tier requisite for the knowledge requirement: The member of the legislative body must 1) either know or have reason to know that the public is entitled to know certain information, and 2) have a specific intent to deprive the public of that information.

The legal definition of “Action Taken”:

[M]eans 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.” (Government Code § 54952.6.)

## CIVIL ACTION

The Brown Act authorizes legal action to undo or declare null and void, decisions or actions taken in violation of the Brown Act, also in limited circumstances.

The district attorney or any interested person may commence an action by mandamus or injunction for the purpose of obtaining a judicial determination that an action taken by a legislative body of a local agency in violation of [the Act] is null and void under this section. Nothing in this chapter shall be construed to prevent a legislative body from curing or correcting an action challenged pursuant to this section. (Govt. Code §54960.1(a) added.)

The Brown Act also provides limited authority to bring legal action to prevent the reoccurrence of such violations where they have occurred in the past and where there is a continuing or future threat of their reoccurrence.

The district attorney or any interested person may commence an action by mandamus, **injunction or declaratory relief for the purpose of stopping or preventing violations or threatened violations**

of this chapter by members of the legislative body of a local agency or to determine the applicability of this chapter to actions or threatened future action of the legislative body.... (Government Code § 54960(a), (emphasis added.)

## **ANALYSIS OF THE FACTS AND LEGAL APPLICATION**

The open letter in question, authored by Councilman Tyler Diep, was written in Vietnamese. The letter was translated into English by the OCDA and refers to a discussion and decision which occurred at a previous city council meeting, at which two community groups wanted to commemorate Black April, or the fall of Saigon in 1975, on the same date. The Black April commemoration issue was on the agenda and open for public comment in compliance with the Brown Act. The discussion, public comments, and the council's decision to ask the city manager to work with the two community groups to resolve the conflict were done in an open, public meeting as reflected in the minutes of the meeting. The letter appears to reiterate the sentiment expressed by the council in that meeting by urging the involved parties and the community to work together to resolve the dispute and not place the city in the position of having to decide between the two groups.

There is nothing in the letter which shows the intent of the signatories to deprive the public of information the public had a right to know. In fact, the evidence shows that they wished to enlist community support to resolve a scheduling conflict between two community groups who wished to commemorate a historical event on the same day. There is no evidence to support a criminal prosecution.

There is no evidence to sustain a civil action for multiple reasons. First, the sending of the letter itself does not demonstrate that a majority of the members of the council agreed to any decision on the matter, or even discussed it, at any time other than at the publicly held city council meeting referred to above. The OCDA's inquiry did not reveal any evidence to the contrary. The letter simply reiterated the sentiment of the Westminster Council expressed at the public meeting. Second, the sending of the letter did not constitute "action taken," because it did not signify a "collective commitment or promise by a majority of the members of a legislative body to make a positive or a negative decision." It only requested community members themselves to attempt resolving their differences. Third, even assuming the act of sending a letter constituted "action" as defined above, given the specific nature of the conflict the letter sought to resolve, there is no evidence or threat that it is likely to reoccur in the future.

Action by the council undertaken at a subsequent public meeting supports these conclusions. The meeting on

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April 21, 2010, was scheduled *specifically* to address the matter of the conflicting commemorative events. At the meeting, the council indicated that the city manager had been unable to resolve the issue with the two groups informally. After an appropriate period of public comment, the city council voted to amend the permit previously issued by the city to one of the groups to resolve the conflict in the timing of the two competing events. The April 21, 2010 meeting was noticed in compliance with the Brown Act and the discussions, public comment, and decision of the council are all reflected in the minutes of the publicly held meeting.

There is no evidence to indicate the occurrence of a violation of the Brown Act to support a criminal charge or a civil action. Should anyone provide new evidence to contradict our findings or support another result, the OCDA will review any such evidence.

Very truly yours,

/s/

Raymond S. Armstrong  
Senior Deputy District Attorney  
Special Prosecutions Unit

cc: Richard D. Jones, Esq.