November 29, 2010

Chris McKenzie, Executive Director
League of California Cities
1400 K Street, Sacramento CA 95814

Tim Quinn, Executive Director
Association of California Water Agencies
910 K Street, Suite 100, Sacramento, CA 95814

Ralph Ferguson. Executive Director
Association of California Healthcare Districts
2969 Prospect Park Drive
Rancho Cordova, CA 95670

Jeff Vaca, Interim Executive Director
California School Boards Association
3100 Beacon Bl., West Sacramento, CA 95691

Neil McCormick, Executive Director
California Special Districts Association
1112 "I" St., Ste 200, Sacramento, CA 95814

Paul McIntosh, Executive Director
California State Association of Counties
1100 K Street, Suite 101
Sacramento, CA 95814

Subject: Notice of Strict Enforcement Concerning Certain Common Brown Act Violations

Gentlemen:

Over the past several years, Californians Aware has identified four clusters of Brown Act issues that arise repeatedly. While we view our mission as primarily educational, the time spent correcting these violations has taxed our resources and often comes after the public has been shut out of the decision-making. There is no doubt that each of these should have been entirely avoided by the local agency's use of knowledgeable and alert legal counsel to both counsel client bodies and train the appropriate staff. Thus, this communication is to inform you of these issues before our organization begins a more aggressive stance in both publicizing and litigating these common violations.

The four issues are:

Agendizing/announcing closed sessions for anticipated litigation – subdivision (b) of Gov't Code § 54956.9.

Prior to a closed session for pending litigation, the Brown Act requires the authorizing subdivision to be stated on the agenda or announced. For subdivision (b), the "existing facts and circumstances" must appear on the agenda or be announced prior to the closed session, which would allow interested members of the public to comment on these before the legislative body holds its private discussion with legal counsel. (Subparagraphs (B)-(E) of § 54956.9(b)(3).) Here, only one exception to this announcement requirement is offered by subparagraph (A), when the facts and circumstances are not yet known to potential plaintiffs. We have found subparagraph (A) circumstances to apply very, very rarely. However, agencies seldom make any facts-and-circumstances announcement and often fail to designate the subdivision authorizing the closed session. (e.g., *The Brown Act, Open Meetings for Local Legislative Bodies*, Cal. Attorney General, pages 23-24; *McKee v. Chino Valley USD* (2005) SBSC Case No. RCV079704.)

Labor negotiations for unrepresented employees - Gov't Code § 54957.6.

Both § 54957 and § 54957.6 ban legislative bodies from using closed sessions to take action on compensation for unrepresented employees and from conducting face-to-face negotiations between the body and its CEO. Yet, we repeatedly encounter violations of these prohibitions. (e.g., *Open & Public IV*, pages 35-36; *McKee v. Orange County Board of Supervisors* (2007) OSC Case No. 07CC03010.)

Real property negotiations - Gov't Code § 54956.8.

Among the information required to be announced prior to this closed session is the identification of the subject real property. The "safe harbor" description, assuring substantial compliance, requires the agenda to include: "Property: (Specify street address, ***or if no street address***, the parcel number or other unique reference, of the real property under negotiation)." We frequently observe property identified on agendas as: northeast corner of 1st and Main; or portion of Johnson City Park; or site for New High School. Similarly, we see Under Consideration: Terms of Development Agreement or Terms of Sale, despite the Brown Act's authorization for only "price and/or terms of payment." (e.g., *Open & Public IV*, page 33; *McKee v. Orange USD* (2003) OSC Case No. 01CC13046.) Nowhere in California statutes or case law is the phrase "terms of payment" used as synonymous with "consideration"; instead it is consistently used and understood to refer to the *form and manner* of payment. Giving the phrase a broader construction is not only a conspicuous aberration in this regard but contrary to the constitutional requirment added by Proposition 59 of 2004 that provisions limiting access to meetings of public bodied be interpreted narrowly.

Adding items of business to a posted agenda less than 72-hours prior to a meeting - Gov't Code § 54954.2.

We frequently see legislative bodies adding items to regular meeting agendas without the required findings that (a) there is a need to take immediate action and (b) the need came to the agency's attention subsequent to the agenda posting. Instead we see items added because someone forgot to place it on the agenda or there is some perceived need to pass a resolution in support of some pending legislation. Additionally, we see additions to Special Meeting agendas, a practice expressly forbidden by § 54956. (e.g., *Open & Public IV*, pages 24-25; *The Brown Act, Open Meetings for Local Legislative Bodies*, Cal. Attorney General, page 18; *McKee v. Fillmore City Council* (2009) VSC Case No. 56-2009-00357966-CU-WM-VTA.)

We are sending you this notice to give your organizations time adequately to inform your members that, from here on, we intend to commence litigation promptly when we find violations of these obvious requirements meant to protect the public's involvement in the decision-making of its local agencies. That is, since § 54960 does not require a challenger to allow 30 days for correction as does § 54960.1, absent an acknowledgement of violation and correction at the next regular meeting or within seven days, whichever occurs sooner, we will file an action to stop these practices so obviously forbidden by the Brown Act.

In this way we hope to educate those who willfully, or through an unwillingness to recognize their responsibilities, violate the open meetings law, by strongly reinforcing the point that such acts will not be tolerated.

Nevertheless, we remain eager to assist those who may ask Californians Aware to help them in gaining a thorough understanding of open government laws. Education is still our primary mission.

Sincerely,

Terry Francke,
General Counsel

Richard McKee,
Vice President for Open Government Compliance