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May 6, 2011

Dr. Joseph M. Farley
Superintendent
Capistrano Unified School District
33122 Valle Road
San Juan Capistrano, CA 92675

RE: NOTICE OF VIOLATIONS OF THE RALPH M. BROWN ACT

Dear Dr. Farley:

This office has completed an inquiry into recent conduct of the Board of Trustees prompted by complaints that that recent conduct included violations of the Ralph M. Brown Act. (Govt. Code § 54940 *et seq,*) The preamble to the Brown Act forcefully states its intent:

> In enacting this chapter the Legislature finds and declares that the public commissions, boards and councils and the other public agencies in this State exist to aid in the conduct of the people's business. It is the intent of the law that their actions be taken openly and their deliberations be conducted openly. The people of this state do not yield their sovereignty to the agencies which serve them. The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may retain control over the instruments they have created. (Govt. Code § 54950.)

Courts and the Attorney General have reaffirmed the intent of the Brown Act:

> The Brown Act…is intended to ensure the public's right to attend the meetings of public agencies.

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The Act thus serves to facilitate public participation in all phases of local government decision-making 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. 4th 354, 358).

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The Attorney General has also noted that:

> The purposes of the Brown Act are thus to allow the public to attend, observe, monitor, and participate in the decision-making process at the local level of government. Not only are the actions taken by the legislative body to be monitored by the public but also the deliberations leading to the actions taken. (84 Ops.Atty.Gen.Cal. 30 (2001), p. 2)

Opinions of the Attorney General, though not binding authority, are entitled to "great weight," especially in this area of the law. (*Shapiro v. Board of Directors* (2005) 134 Cal. App. 4th 170, 185)

To fulfill these purposes, with only limited exceptions, the Act requires that, "All meetings of the legislative body of a local agency shall be open and public, and all persons shall be permitted to attend…" (Govt. Code § 54953) "Meeting" is broadly defined, and "includes any congregation of a majority of the members of a legislative body at the same time and location…to hear, discuss, or deliberate, or take action on any item of business that is within the subject matter jurisdiction of the legislative body." Govt. Code § 54952.2(a) There are exceptions to these open meeting requirements, however, the exceptions are to be narrowly interpreted to fulfill the Brown Act's Intent.

> Statutory exceptions authorizing closed sessions of legislative bodies are construed narrowly and the Brown Act "sunshine law" is construed liberally in favor of openness in conducting public business.
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> [T]he Brown Act should be interpreted liberally in favor of its open meeting requirements, while the exceptions to its general provisions must be strictly, or narrowly, construed. (*Shapiro v. San Diego City Council* (2002) 96 Cal.App.4th 904, 917, 920)

In conformity with these principles the Brown Act expressly states that in the absence of applicable exceptions, "no closed session may be held by any legislative body of any local agency." (Govt. code § 54962)

The findings of this inquiry are that multiple violations of the Brown Act have occurred at several recent meetings of the Board. These findings are discussed in detail below along with the applicable law. ***This letter serves as a formal notice of these violations.*** Should the Board, by formal action, accept the findings of this inquiry and institute corrective action, no further action by this office will be necessary. Should the Board fail or refuse to do so the Office of the District Attorney reserves the right to institute formal enforcement proceedings under applicable law to compel the Board to comply with the Brown Act.

Finding of Violation No. 1

On December 13, 2010, at a Special Meeting the Board violated the Brown Act during a closed session held under an agenda item labeled "Public Employee Performance Evaluation – Superintendent," by discussing topics outside the Agenda topic.

During the Closed Session of the meeting, the Board authorized Superintendent Joseph M. Farley to reinstate two previously mandated furlough days for teachers and staff. This action was taken in violation of Govt. Code § 54954.2(a), which requires the posting of an agenda containing a "brief general description of each item of business to be transacted or discussed at the meeting, including items to be discussed in closed session," and "no action or discussion shall be undertaken on any item not appearing on the posted agenda…." This provision has been held to apply to Special Meetings (*Moreno v. City of King* (2005) 127 Cal. App. 4th 17, 26), and to closed meetings as well. (Shapiro v. San Diego City Council (2002) 96 Cal. App. 4th 904, 923) The purpose of the general description is to inform interested members of the subject matter under consideration so that they can determine whether to monitor or participate "in the meeting of the body." (The Brown Act, Open Meetings for Legislative Bodies, Office of the Attorney General, 2003 Edition, at page 16) The description should therefore contain enough detail to fulfill this function. No items pertaining to reinstating furlough days were on the agenda for that meeting. Accordingly, discussion of this topic violated the Brown Act. (*Ibid*)

Likewise, this topic did not constitute one properly discussed under the listed closed session exemption of Govt. Code § 54957(b)(1). This section provides that an agency may hold "closed sessions during a regular or special meeting to consider the appointment, employment, evaluation of performance, discipline, or dismissal of a public employee . . . ." The purpose of this exception is very limited and the contents of any discussions must be kept within those limitations.

> [T]he underlying purposes of the 'personnel exception' are to protect the employee from public embarrassment and to permit free and candid discussions of personnel matters by a local governmental body. [W]e must construe [it] narrowly and the 'sunshine law' liberally in favor of openness."
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> Feedback to the employee is a traditional part of a formal performance evaluation. (Citation) A determination of whether an employee's performance is satisfactory and establishment of goals for future improvement are the primary objectives of a formal performance evaluation." (*Duval v. Board of Trustees* (2001) 93 Cal. App. 4th 902, 908, 910)

While the term "evaluation of performance" could include such factors as "a review of an employee's job performance," "particular instances of job performance," "a comprehensive review of such performance," "consideration of the criteria for such evaluation, consideration of the process for conducting the evaluation,' or "preliminary matters, to the extent those matters constitute an exercise of defendant's discretion in evaluating a particular employee," the discussion of restoring furlough days to a collective bargaining unit cannot be reasonably construed to fall within any of these. (*Id* at 909)

Under Govt. Code § 54957.6, closed sessions may be held with the agency's designated labor representative to discuss "salaries, salary schedules or compensation paid in the form of fringe benefits" of its employees, and for employees represented by a collective bargaining unit, "may include any other matter within the statutorily provided scope of representation." Closed sessions involving these matters "may include discussion of an agency's available funds and funding priorities." However, the closed session must be for the purpose of reviewing [the agency's] position and instructing [its] designated representative," and discussions of available funds and funding priorities" may be undertaken, "only insofar as these discussions relate to providing instructions to the local agency's designated representative. (Govt. Code § 54957.6) Closed sessions held pursuant to this exception must be preceded by "an open and public session in which [the agency] identifies its designated representative." (*Ibid*)

While it is not entirely clear whether the topic of the restoration of furlough days could have been properly discussed in closed session under the exception provided by Govt. Code § 54957.1, the requirements for using that exception were clearly not met. The agenda did not contain a brief description of that topic, "restoration of furlough days," as required by Govt. Code § 54954.2(a). The description "Public Employee Performance Evaluation – Superintendent" clearly did not alert the public that the restoration of furlough days was going to be discussed. In addition, the closed session was not preceded by the *identification* of the agency's designated representative as required by Govt. Code § 54957.6. The conduct of the Board in committing these violations of the Brown Act effectively deprived the public of their right to be afforded reasonable opportunity to comment on the proposed action as required by Govt. Code §54954.3 and 3547.

Moreover, even had the Board accurately described in the agenda the subject matter that was to be discussed, it failed to comply with the applicable disclosure requirements that must be made following closed sessions. The nature of the disclosures required after a closed session, depend upon the exception authorizing the closed session. "After any closed session, the legislative body shall reconvene into open session prior to adjournment and shall make any disclosures required by Section 54957.1 of action taken in the closed session." (Govt. Code § 54957.7 (b)) The evaluation of performance employee exception requires that "Action taken to appoint, employ, dismiss, accept the resignation of, **or otherwise affect the employment status of a public employee** in closed session pursuant to Section 54957 shall be reported at the public meeting during which the closed session is held." (Govt. Code § 54957.1(a)(5)) (Emphasis Added) The restoration of previously ordered furlough days certainly 'affected" the employment status of the public employees involved. But the decision to do so was not subsequently reported in the public meeting in which the closes session had been held. This constituted an additional violation of the Brown Act.

Finding of Violation No. 2

At a Special Meeting on January 26, 2011, the Board violated the Brown Act by holding a closed session held under an agenda item labeled "Conference with Labor Negotiators," during which, the Board voted to reinstate teachers' salaries.

As previously noted Govt. Code § 54957.6 authorizes closed sessions with an agency's designated labor representative to discuss "salaries, salary schedules or compensation paid in the form of fringe benefits" of its employees, and for employees represented by a collective bargaining unit, "may include any other matter within the statutorily provided scope of representation." Restoration of teachers' salaries would constitute a "matter within the scope of representation of the teachers' bargaining unit, authorizing discussion of that topic in a closed session. However, as noted above, closed sessions, whether within a regular or special meeting must be accompanied by adequate notice on an agenda and appropriate post closed session disclosures of any action taken. Those requirements of the Brown Act were not met.

Moreno v. City of King, supra, 127 Cal. App. 4th 17, cited above, is instructive on this issue. In that case a city council met in closed session to discuss the termination of a public employee. "The agenda described the business as 'Public Employee (employment contract)'" (*Id* at 27) The court ruled that the agenda description was inadequate: "The agenda's description provided no clue that the dismissal of a public employee would be discussed at the meeting." (*Ibid*) Similarly, in this case the board's agenda's description, "Conference with Labor Negotiators," "provided no clue" that the topic of the restoration of teacher's salaries was to be discussed at the meeting. While it is true that "[w]here the subject matter is sufficiently defined to apprise the public of the matter to be considered and notice has been given in the manner required by law, the governing body is not required to give further special notice of what action it might take" (*Phillips v. Seely* (1974) 43 Cal. App. 3rd 104, 120), the agenda description was inadequate to "apprise the public of the matter to be considered," in this case the restoration of teachers' salaries. Accordingly, the discussion of that topic and the action taken at that meeting in restoring teachers' salaries violated the Brown Act, specifically the agenda requirements Govt. Code § 54954.2.

In addition the post closed session disclosure requirements of Govt. Code §§ 54957.1 and 54957.7 (b)) discussed above were not followed. The Board took action to restore teachers' salaries in the closed session yet did not report that action taken in the open meeting wherein the closed session occurred. Restoration of teachers' salaries clearly is a matter that would "otherwise affect the employment status of a public employee," requiring disclosure under Govt. Code § 54957.1(a)(5). Failing to report that action constituted a violation of the Brown Act. More egregiously, however, the Board not only failed to report this action, but published minutes of the meeting which incorrectly stated that "no action" had been taken on that agenda item. The conduct of the Board at this meeting in not properly noticing the topic deprived the public of an opportunity to comment on the proposed action before or at the time the action was taken as required by Govt. Code §§54954.3 and 3547. [The Board's subsequent failure to apprise the public of its action and the issuance of minutes that incorrectly stated that no action had been taken, served to hide the nature of the action taken.]

Finding of Violation No. 3

On March 16, 2011, during an open meeting the Board violated the Brown Act by conferring about a matter within the subject matter jurisdiction of the Board outside of the hearing of the public.

At the open meeting on March 16, 2011, during a discussion on Agenda Item No. 4, Trustee John Alpay offered a substitute motion which was seconded by Trustee Jack Brick. Trustee John Alpay then requested a brief recess which was granted, without a vote, by Trustee Gary Pritchard, who was chairing the meeting. During the recess, the remaining trustees present, Jack Brick, Gary Pritchard, John Alpay, Anna Bryson and Lynn Hatton, a clear quorum of the Board, conferred amongst themselves "off the record," behind the dais, and outside of the hearing of the public attendees. The meeting then resumed and Trustee Brick withdrew his second to the substitute motion offered by Trustee John Alpay.

As noted above, "[a]ll meetings of the legislative body of a local agency shall be open and public, and all persons shall be permitted to attend…" (Govt. Code § 54953) There are no exceptions that authorized, this impromptu "closed session" undertaken while a motion was pending. As such the conduct of the Board constituted a clear violation of the open meeting requirements contained in Govt. Code §§ 54953 and 54962. That this violation was done in the presence of the Board's legal counsel, and that no attempt was apparently made to prevent it, renders it even more troubling.

CONCLUSION

While there is insufficient evidence, at this time, to conclude that any of these violations are criminal in nature, the failure of the Capistrano Unified School District's Board Trustees to comply with the provisions of the Brown Act, the actions of the Board, as detailed above, constitute a pattern of conduct which is similar to past violations of the Board. For example, the use of the "Evaluation of Employee Performance" exception to improperly conduct closed session discussions and decision making mirrors the past history of violations of the Board. A brief review of this history and the Board's response is in order.

In October 2007, the District Attorney issued a Report which found the then Board to have committed numerous violations of the Brown Act many under the ostensible authority of the "Evaluation of Employee-Superintendent," exception. The Chairperson of the Board had testified before the Orange County Grand Jury that in her view stated in its findings in pertinent part that:

> Everything and all operations and all financial issues of the District are pertinent to the role of the superintendent and therefore that is how we evaluate him. The issue of the superintendent, all issues about his performance, are reflective of the job he has done in all respects of the District operations.
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> How the District operates on every aspect, whether its building, whether it's education of children, whether it's our funding sources, directly relates to the performance of the superintendent of schools (See Report of the Orange County District Attorney—Investigation into Allegations of violation of the Ralph M. Brown Act by the Board of directors of the Capistrano Unified School District—October 2007, page 16.)

The Report noted that such an expansive interpretation of this limited exception to the open meeting requirements of the Brown Act "would effectively mean this exception would swallow not just the "open meeting rule," but the entire Brown Act as well. Since essentially "everything" could now be discussed in closed sessions labeled as an 'Evaluation of Superintendent,' there is no need for any other exception nor any rule. The Brown Act would be effectively repealed." The District Attorney rejected this interpretation and in his findings stated:

> **The Practice of the Board in Discussing a Wide Range of Policy Topics in Closed Session Ostensibly Under the "Evaluation of Performance" Exception to the Open Meeting Requirements of the Brown Act Violates the Brown Act.**
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> **It is the position of the District Attorney that this practice of the Board violates the Brown Act and must cease forthwith.** (Report of the Orange County District Attorney—Investigation into Allegations of violation of the Ralph M. Brown Act by the Board of directors of the Capistrano Unified School District—October 2007, Finding No 13, pages 31-32, Emphasis in original)

In this same Report the District Attorney also stated that:

> **If the District Attorney's findings are formally accepted by the Board, and a commitment made by the Board to cease such violations and to institute "complete, faithful and uninterrupted compliance" with the Brown Act, further action by the District Attorney will be rendered moot. In the event his findings are disputed, the District Attorney reserves the right and the authority to commence such further enforcement actions as are authorized by law.** (Report of the Orange County District Attorney—Investigation into Allegations of violation of the Ralph M. Brown Act by the Board of directors of the Capistrano Unified School District—October 2007, page 37, Emphasis in original)

On October 23, 2007, the District Attorney received a letter from the then Superintendent containing the following statement:

> Please accept this response as official notification of the Board of Trustees' acceptance of the finding of the District Attorney's Report.
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> After deliberation over the content of your report in open session, the Trustees took two separate votes in open session:
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> 1. The Trustees voted 4-0-3 (the three new trustees who were not on the Board when these violations occurred voted to abstain) to accept the findings of the report and to commit to cease these violations in the future.
> 2. The Trustees voted 7-0 to institute "complete, faithful and uninterrupted compliance" with the Brown Act.

The letter concluded with the assurance that, "Henceforth the Capistrano Unified School Board will diligently guard against Brown Act violations."

On the basis of these assurances, and to avoid undue expense to the public, whose taxes support both the School District and the District Attorney's Office, the District Attorney refrained from instituting formal legal enforcement proceedings against the District. After several years of conforming with these assurances of compliance with the Brown Act, made to this Office, it is troubling that the District Attorney has now received evidence of additional Brown Act violations whose pattern emulates the unlawful practices of a past Board

Given this history, the pattern of violations detailed above cannot be allowed to continue. If the Board accepts the findings detailed above and provides assurances that these violations will cease and be lawfully corrected no further action by this office will be deemed necessary. Failing this, the District Attorney will consider the Board to be in abrogation of its earlier agreement, thereby justifying the institution of formal enforcement proceedings against the District to compel its compliance with the Brown Act and to prevent any further violations of that law.

Sincerely,

RAYMOND S. ARMSTRONG
Senior Deputy District Attorney
Special Prosecutions Unit

WILLIAM J. FECCIA
Senior Assistant District Attorney
Special Projects

RSA/WJF:vlb
cc: Jack Sleeth, Esq.
Wayne Tate, Esq.
Craig Alexander, Esq.