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## MEMORANDUM

TO: Elections Commission

FROM: Burk E. Delventhal *BEU*  
Chief Deputy, Government Division  
Linda M. Ross *LMR*  
Chief Labor Attorney  
Julie Moll *JM*  
Deputy City Attorney

DATE: April 22, 2002

RE: Closed Session To Evaluate Performance and Discuss Possible Action Regarding  
Dismissal Of A Public Employee Under the Open Meeting Laws

Before the special Elections Commission meeting on April 22, 2002, you asked for legal advice regarding the following item on the agenda:

Closed Session pursuant to Ralph Brown Act, Section 54957 and Sunshine Ordinance Section 67.8: Discussion and possible action regarding PUBLIC EMPLOYEE PERFORMANCE EVALUATION Director of Elections, Tammy Haygood. Discussion and possible action regarding PUBLIC EMPLOYEE DISMISSAL. Number of employees affected 1. Discussion and possible action regarding PUBLIC EMPLOYEE APPOINTMENT/HIRING Interim Director of Elections.

This memorandum confirms the oral advice this office gave you and Director Haygood on this item before the meeting.

### Question Presented

Does the Director of Elections have the right to request that the Elections Commission discuss her performance evaluation or dismissal in an open rather than a closed session?

### Short Answer

No. Under the Sunshine Ordinance and Brown Act, the Elections Commission is entitled to conduct a performance evaluation and discuss dismissal of the Director of Elections in closed session. A public employee has the right to demand that a public body evaluate performance and discuss dismissal in open session only if the public body is hearing evidence on complaints or

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charges of misconduct against the employee brought by another person or employee. Here, no one has brought any complaints or charges of misconduct against the Director.

**Background**

In November 2001, the voters amended the San Francisco Charter to establish a new Elections Commission to oversee the Department of Elections. (Charter § 13.103.5). The Elections Commission has the authority to appoint the Director of Elections for a five-year term. (Charter § 13.104). The Commission must make the appointment under the civil service provisions of the Charter, which require the Department of Human Resources to post a job announcement and create a list of eligible candidates from which the Commission makes an appointment. The appointee must serve a one-year probationary period.

Before the Elections Commission was created, the City Administrator appointed Tammy Haygood to serve as Director of Elections. When she assumed office in August, 2001, Ms. Haygood signed an acknowledgement that her appointment was subject to a one-year probationary period. The Elections Commission could chose to retain Ms. Haygood or select another candidate in accordance with the procedures described above.

The Commission did not need to bring or consider complaints or charges against Ms. Haygood to dismiss her. There are two reasons the Commission did not need just cause. First, when the voters amended the Charter to create the Elections Commission, they intended that the Commission have the authority to appoint a director. Second, Ms. Haygood was still serving her one-year probationary period. After the Commission appoints a new Director, and the Director completes a probationary period, the Commission would need just cause to remove its appointee before the end of the Director's five-year term.

The Elections Commission scheduled the April 22, 2002 special meeting to consider, in closed session, the performance of Ms. Haygood and discuss possible dismissal. Ms. Haygood requested that the Commission hold an open rather than a closed session. The Elections Commission decided to discuss performance and dismissal in a closed session. After the Elections Commission decided in closed session to dismiss Ms. Haygood, it reported such action in open session at the same public meeting and disclosed the vote of each member present at the closed session. The Elections Commission decided not to disclose the discussion in the closed session.

**Analysis**

Under both the Brown Act and San Francisco's Sunshine Ordinance, meetings of a legislative body of a local agency shall be open and public unless otherwise authorized." (Gov't. Code § 54953(a); S.F. Admin. Code § 67.5.) As defined in the Brown Act, the term "legislative body" includes commissions of a local governmental agency. (Gov't. Code § 54952(b).) The

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Brown Act authorizes a legislative body to hold a closed session to consider "appointment, employment, evaluation of performance, discipline, or dismissal of a public employee or to hear complaints or charges brought against the employee by another person or employee unless the employee requests a public session." (Gov. Code § 54957.) The Brown Act limits the right of a public employee to request an open session to situations where there are specific complaints or charges: "[a]s a condition to holding a closed session on specific complaints or charges brought against an employee by another person or employee, the employee shall be given written notice of his or her right to have the complaints or charges heard in an open session rather than a closed session..." (Gov't. Code § 54957; see *Fischer v. Los Angeles Unified School District* (1999) 70 Cal.App.4<sup>th</sup> 87, 97.) The purpose of this exception is to "protect the employee from public embarrassment and to permit free and candid discussions of personnel matters by a local governmental body . . ." (*Bell v. Vista Unified School Dist.* (2000) 82 Cal.App.4<sup>th</sup> 672, 682 (quotations omitted).)

Similarly, the San Francisco Sunshine Ordinance permits a policy body - which includes a City commission - to hold a closed session to "consider the appointment, employment, evaluation of performance, or dismissal of a City employee, if the policy body has the authority to appoint, employ, or dismiss the employee, or to hear complaints or charges brought against the employee by another person or employee unless the employee complained of requests a public hearing. The body may exclude from any such public meeting, and shall exclude from any such closed meeting, during the comments of a complainant, any or all other complainants in the matter." (Admin. Code § 67.10(b).)

An employee who is the subject of the proposed closed session has the right to demand an open session only if the public body is hearing evidence of complaints or charges brought against the employee by another person or employee. Applying this standard, in *Fischer, supra*, 70 Cal.App.4<sup>th</sup> at p 100, the court found that: "Section 54957 [of the Brown Act] distinguishes between 'personnel matters' -- one of which is 'evaluation of performance' -- and 'specific complaints or charges brought against an employee by another person or employee.'" (*Id.* at p. 100.) "Only as to 'specific complaints and charges' does section 54957 require notice of the right to request an open session." (*Ibid.*)

The facts in *Fischer* are similar to those here. In *Fischer*, four probationary teachers contended that a Board of Education had violated the Brown Act by making a decision to dismiss the teachers in a closed session without giving the teachers an opportunity to request an open session. (*Id.* at p. 92.) The Board had received a package of documents concerning job performance for each probationary teacher and a staff recommendation not to reelect the probationary teachers. (*Ibid.*) The court concluded that the Board meeting involved "matters of the employment, evaluation of performance, or dismissal of a public employee." (*Id.* at p.102.) The court held that the Board did not "hear specific complaints or charges brought against the

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probationary teachers by another person or employee." (*Ibid.*) Accordingly, the court held that the probationary teachers did not have the right to demand an open session.

The following types of personnel actions do not constitute complaints or charges against an employee:

- negative comments in a performance evaluation (*Furdato v. Sierra Community College*, 68 Cal App.4<sup>th</sup> 876, 882);
- allegations of misconduct considered as part of a performance evaluation (*Fischer, supra*, 70 Cal.App. 4<sup>th</sup> at p. 100); and
- a performance review "even if that review involves particular instances of job performance rather than a comprehensive review of such performance" (*Duval v. Board of Trustees* (2001) 93 Cal. App.4<sup>th</sup> 902, 909).

In contrast, "[b]oth 'complaint' and 'charge' connote an accusation, something which is 'brought against' an individual." (78 Ops. Cal.Atty.Gen. 218, 223 (1995).)

Here, the Elections Commission, which has authority to appoint and dismiss the Director of Elections, considered the performance of Ms. Haygood and chose to dismiss her. It did not hear any complaint or charges that any person made against her. Accordingly, it was within the discretion of the Commission to consider Ms. Haygood's performance and employment in closed session.

**Conclusion**

Under the Sunshine Ordinance and Brown Act, the Elections Commission had the authority - but was not required - to conduct the performance evaluation of the Director and discuss dismissal in closed session. Whether to discuss such matters in closed session and exclude the Director, and whether to decide to disclose the closed session under Brown Act section 54957.1 and Sunshine Ordinance section 67.12, were policy decisions for the Elections Commission.