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TRINITY COUNTY
SUPERIOR COURT

TRINITY COUNTY GRAND JURY
2016-2017

FINANCIAL and ADMINISTRATIVE COMMITTEE
FINAL REPORT
FAR 2016-2017-003

KEEPING THE PUBLIC'S BUSINESS PUBLIC

Approved May 26, 2017

Reviewed 6/23/17
Jose Arrango

Board of Supervisors

Keeping the Public's Business Public

SUMMARY

Elected officials are charged with the honorable and vital role of representing their constituents and making decisions that are in the best interests of the populace.

The Ralph M. Brown Act requires the governing body of any local government to hold open and noticed meetings so that the public may observe the body's deliberations and actions. It also requires the governing body to allow public participation in meetings. Meetings must be open to the public with specific exceptions set out in California Government Code § 54950-§54963.

The Grand Jury has examined policies, practices and procedures of the Trinity County Board of Supervisors (BOS), County Counsel (CC), and County Administrative Officer (CAO) in regards to agendas, open meetings, and closed or executive sessions.

The Grand Jury has found that the Board of Supervisors has held 11 meetings under the closed session agenda item of "Evaluation of County Counsel" in the last 12 months. We have learned that during these Executive session meetings, guidance and direction has been given, legal advice has been sought and received, and performance of other county employees has been discussed.

The County Counsel contract calls for specific criteria and standards to be developed by the CC and BOS for evaluating the CC's performance. No such criteria or standards were able to be produced for the Grand Jury, nor were the BOS members nor CC aware of such an evaluation instrument.

The Grand Jury recommends the BOS and CC always discuss and act on the County's business in public unless the Brown Act clearly allows discussion of such items in closed session.

BACKGROUND

The Grand Jury acknowledges up front that Trinity County and the Trinity County Board of Supervisors face perilous times. The obvious main issue is cannabis, both in itself and in the indifference of many of its growers to the welfare and good health of the County and its residents. There also seems to be a multitude of issues and problems just as vexing and important. We wish the BOS and the County strength, wisdom, and success. However, we remind the BOS that while working for success it operates in the rule of law and that the people are entitled to know what is going on in local government, even if it is not pretty.

METHODOLOGY

Grand Jury members interviewed the five supervisors who sat in 2016, the County Counsel (in her capacity as County Counsel and pertaining to her activities carrying out certain, but not always clearly defined, duties usually performed by the County Administrative Officer), and several staff members.

We read or reviewed the Brown Act, other State laws, County Codes, the California Constitution, treatises and training documents available from the County Supervisors Association of California, the League of California Cities, and the California Attorney General.

We reviewed agendas and related minutes for BOS regular meetings for the period January 1, 2016 – December 31, 2016

For certain definitions we relied on the Google and businessdictionary.com online dictionaries. For help understanding employee evaluation generally, we referred to Performance Appraisal at BusinessDictionary.com.

DISCUSSION

One of the laws that control the BOS is the Brown Act. At the beginning of that long and complex set of laws the State Legislature declared,

“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.” *Gov. Code 54950, in part.*

California’s Brown Act regulates procedures and content of meetings by local agencies such as the BOS. The underlying purpose of the Brown Act is to require public agencies to conduct the public’s business in public.

“All meetings of the legislative body of a local agency shall be open and public, and all persons shall be permitted to attend any meeting of the legislative body of a local agency, except as otherwise provided in this chapter.” *Gov. Code section 54953 (a).*

Except in carefully described circumstances the BOS cannot meet privately or secretly or sequentially to make a decision or conduct County business. Regarding closed sessions, the California Attorney General has written the following:

“Since closed sessions are an exception to open meeting requirements, the authority for such sessions has been narrowly construed. The law evinces a strong bias in favor of open meetings, and court decisions and opinions of this office have buttressed that legislative intent. (§ 54950.) The fact that material may be sensitive, embarrassing or controversial does not justify application of a closed session unless it is authorized by some specific exception. (*Rowen v. Santa Clara Unified School District* (1981) 121

Cal.App.3d 231, 235.) Rather, in many circumstances these characteristics may be further evidence of the need for public scrutiny and participation in discussing such matters.”
California Attorney General’s pamphlet regarding the Brown Act, Chapter VI, I. A.

One such exception set out in the Brown Act allows a closed session to hear a complaint about or evaluation of a County employee.

The Brown Act goes so far as to tell local agencies what language to use in their agendas to schedule a closed session. For evaluation of an employee, the agenda must contain language as follows:

“PUBLIC EMPLOYEE PERFORMANCE EVALUATION
Title: (Specify position title of employee being reviewed)”
See Government Code section 54954.5(e).

The other side of the coin is that what is said and done in a closed session is confidential, at least most of the time. Sometimes confidentiality must give way. There are some allowed disclosures to the District Attorney or the Grand Jury.

“The duty of maintaining confidentiality, of course, must give way to the obligation to disclose improper matters or discussions that may come up in closed sessions. In recognition of this public policy, the Brown Act exempts from its prohibition against disclosure of closed session communications disclosure of closed session information to the district attorney or the grand jury due to a perceived violation of law, expressions of opinion concerning the propriety or legality of actions taken in closed session, including disclosure of the nature and extent of the illegal action, and disclosing information that is not confidential.” *From League of California Cities pamphlet on Brown Act at page 42, citing California Government Code section 54963.*

Discussing and acting in front of the public is not always easy. Here we fear the BOS is slipping into expediency. The BOS’s resort to expediency has resulted at times in a lack of transparency with County residents because the public’s business is not conducted in public.

The spirit and the letter of the Brown Act clearly and strongly instruct elected public officials to do business in public. The Grand Jury is concerned that the BOS may be failing the Brown Act’s purpose and admonition. Here is what we observed:

1. In December 2015, the County Administrative Officer left County employment. She was not replaced. From January 2016 to January 2017 (when this report was written), the BOS assigned to the CC certain duties usually carried out by the CAO. Some CAO duties were assigned to members of the BOS.
2. From January 2016 through January 2017, the CC was responsible for and carried out duties of both the CC and the CAO, a dual role indicated by CC/CAO. The CC, or the firm she works for, was paid an additional amount for performing the additional duties. See the Glossary for brief descriptions of the offices and duties of these two County officers.

3. During the period from January 2016 through January 2017, BOS meeting agendas 11 times (basically once a month) scheduled an executive or closed session (i.e. a meeting of the BOS that excludes members of the public and the press) to evaluate the performance of the CC. Each agenda read, "Government Code Section 54954.5(e) – Public Employee Evaluation: County Counsel".
4. The corresponding minutes of each of those BOS meetings record the fact of the executive session by restating the language in the agenda but adding the cryptic statement, "Evaluation was held" with the exception of the minutes for March 2016 which say, "Direction was given to staff".
5. As the Brown Act allows an employee evaluation in executive session, what is the problem? It is just this: it appears that during the "evaluation," the BOS and the CC discussed, gave direction, and solicited and received legal advice on other County business. The BOS advised a County employee how and when to deal with those other matters in closed sessions, and not just once, or twice, but many times.

Why does the Grand Jury believe this to be the case? Here are some facts:

- a) In 2016, the BOS "evaluated" the CC every month for 11 months,
- b) In 2016, the BOS evaluated only one other county department head during that period, and that was only once, in the month of August 2016,
- c) In March 2016 the BOS minutes report that during that month's evaluation session for the CC, the BOS gave direction to staff (none of those interviewed could remember what the "direction" was),
- d) In 2015, the BOS held closed sessions to "evaluate" the CAO (Wendy Tyler) on 6 occasions.
- e) During Grand Jury interviews, most, but not all, of the supervisors were relatively open about what was discussed in the "evaluation" closed sessions.
- f) During Grand Jury interviews, at least three supervisors told the Grand Jury that being both CC and CAO is a tough job (yes, it is) so the BOS felt it appropriate to give that person guidance and direction outside the open board meetings; they were clear to the Grand Jury that the BOS and CC/CAO engaged in this guidance and direction routinely during closed sessions advertised as County Counsel evaluation.
- g) During Grand Jury interviews, at least three supervisors told the Grand Jury that during more than one closed session advertised as County Counsel evaluation, the BOS discussed with the CC/CAO the performance of other County employees.
- h) During Grand Jury interviews, at least three supervisors told the Grand Jury that the CC gave legal advice on a variety of subjects to the BOS during closed sessions advertised as County Counsel evaluation.
- i) During Grand Jury interviews, at least four supervisors told the Grand Jury that during closed sessions advertised as CC evaluation the BOS solicited and received from the CC legal advice regarding preparation and adoption of the "urgency" ordinance regarding cannabis cultivation.
- j) The contract between the County and the CC calls for the creation of specific criteria for annual evaluation of the CC's performance. No Supervisor recollected seeing or discussing such criteria, the CC did not produce such criteria, despite inquiry, and the Grand Jury was unable to obtain such criteria from anyone at the County.

- k) The County has developed and uses a “Trinity County Department Head Performance Review”. The CC and CAO are department heads. None of the supervisors we interviewed remembered using this form for any of the many “evaluations” conducted for the CC.
- l) The Grand Jury specifically asked for criteria used by the BOS to evaluate the CC/CAO both in the employment agreement and in the County’s evaluation form. The Grand Jury received none in writing or orally.
- m) Some supervisors said some evaluations were of behavioral matters, though no particular behavior was called out, nor did the Grand Jury persist in questioning this further.
- n) Some supervisors maintained that “evaluation” and “direction” are the same thing. This probably reveals most about the BOS approach. Please see the Glossary for definitions of these terms. They are not the same.
- o) The Grand Jury did not request information related to evaluation of the County Counsel, only criteria. The Grand Jury acknowledges that discussions related to evaluation are proper subjects of a closed session. The Grand Jury did not request access to the County Counsel’s personnel file.

The perceived issue, confirmed during interviews of individual supervisors, the CC/CAO, and other staff is that the BOS and the CC/CAO are using the guise of an evaluation not only to evaluate performance in private but to allow them to discuss and conduct the public’s business in private.

Several supervisors commented to the Grand Jury that the Grand Jury members do not understand or appreciate what a difficult job the BOS and the CC /CAO have. Yes, supervisors, we do, and we applaud your efforts, even where we may not agree. But no matter how difficult the job, or how laudable the work, elected and appointed officials must respect the Brown Act.

The Grand Jury fears that the BOS has put good intentions and the pressures of difficult issues ahead of the clear mandates of the Brown Act. The BOS seems to have lost sight of the main purpose of the Brown Act, protecting the public’s right to know what its public servants are doing. The Grand Jury believes the course of conduct as observed and described in this report is a classic example of exalting form over substance. The Grand Jury strongly recommends that the BOS and CC change its practice and its attitude. Difficult as it sometimes can be, the County should and must follow the requirements of the Brown Act and conduct the County’s business in public.

FINDINGS

- F1. The BOS scheduled on its posted agendas a closed session pursuant to Government Code section 54954.5(e) for an employee evaluation of the CC at 11 regular meetings of the BOS for the Calendar Year 2016 (January 1, 2016 thru December 31, 2016).
- F2. During the calendar year 2016, the CC was also employed by contract to perform certain duties of the CAO, receiving \$5,000.00 each month for that work.
- F3. During the calendar year 2016, the BOS evaluated only one other County department head, and that person only once.

- F4. BOS minutes, for each meeting held during the calendar year 2016, where an evaluation of the CC was scheduled, indicate, "Evaluation was held," except the meeting on March 1, 2016, where the minutes report, "Direction was given to staff."
- F5. Evaluation of employees in closed session under Government Code section 54957(b)(1) are limited to frank evaluation of that employee's performance.
- F6. The contract between the BOS and the CC called for creation of criteria and standards for evaluating the CC's performance. Under the contract, performance reviews are to be conducted annually.
- F7. The BOS and CC have not created such criteria and standards.
- F8. The County has a form for department head performance review that applies to all County department heads. It is called "Trinity County Department Head Performance Review". That form has established the questions and issues suitable and useful for evaluation of County employees, including the CC and the CAO.
- F9. During the evaluation sessions named in previous Findings, the BOS and the CC did not use or discuss the agreed upon criteria or standards for CC's performance (because none existed) and did not use or discuss the performance review form named in previous Findings.
- F10. The duties and obligations of the CAO, CC, and BOS are many, varied, complex, and difficult.
- F11. Interviews with persons present at the agendized evaluations of the CC revealed that the BOS and CC discussed the performance of other County employees, including department heads.
- F12. Interviews with persons present at the agendized evaluations of the CC revealed that the BOS and CC discussed advice and counsel the BOS thought helpful to the CC in her dual role of interim or acting CAO because, the BOS suggested to the Grand Jury, the dual role presented problems too complex for a person without previous CAO experience to handle without BOS assistance.
- F13. Interviews with persons present at the agendized evaluations of the CC revealed that the BOS and CC discussed advice on legal matters affecting the County that was not a proper subject in a closed session.
- F14. Interviews with persons present at the agendized evaluations of the CC revealed that the BOS and CC discussed advice regarding drafting an urgency ordinance affecting cannabis cultivation in the County that was not a proper subject in a closed session.
- F15. The BOS and CC used Government Code section 54957(b)(1) to disguise as employee performance review what was really wide-ranging discussions of County issues and County business.
- F16. There are important, inherent, and unavoidable conflicts between the responsibilities of the CC and the CAO.
- F17. The BOS has failed its responsibility to employ a CAO who has the knowledge and experience to run the county with a professional understanding of how all county functions operate together to their best effect. The CAO is a position of leadership.

RECOMMENDATIONS

- R1. The BOS and CC and CAO always discuss and act on the County's business in public unless the Brown Act clearly allows discussion of such items in closed session.

- R2. The BOS and CC discuss and act on in closed session only those matters clearly within the Government Code section cited on the BOS agenda to justify the closed session.
- R3. The BOS and CC and CAO acknowledge by their actions in future that the Brown Act requires them to conduct the public's business in the open.
- R4. The BOS and CC promptly develop and adopt criteria for evaluation of the CC as the employment agreement for the CC requires.
- R5. The BOS should promptly hire and maintain a competent and qualified CAO.

REQUEST FOR RESPONSES

Pursuant to Penal Code section 933.05, the grand jury requests responses as follows:

Required Responses

Trinity County Board of Supervisors

- Findings (all) F1 through F17
- Recommendations (all) R1 through R8

Trinity County Administrative Officer or any person assigned CAO duties in the absence of a full-time CAO

- Findings F1, F3, F10, F11, F12, F13, F14, F15, F16
- Recommendations R1, R2, R4, and R7

Trinity County Counsel

- Findings F1, F3, F5, F6, F7, F8, F9, F10, F11, F12, F13, F14, F15, and F16
- Recommendations R1, R2, R3, R4, R6, and R7

GLOSSARY

- **Board of Supervisors (BOS):** Unlike the separation of powers that characterizes the federal and state governments, the Board of Supervisors is both the legislative and the executive authority of the county. It also has quasi-judicial authorities. The Board performs its executive role when it sets priorities for the county. The Board oversees most county departments and programs and annually approves their budgets; supervises the official conduct of county officers and employees; controls all county property; and appropriates and spends money on programs that meet county residents' needs. As the legislative body of the county, the Board of Supervisors may act by resolution, by board order, or by ordinance. A resolution of a Board is usually a declaration about future purposes or proceedings of the Board or a policy statement by the Board. A board order is usually a directive from the Board of Supervisors to its subordinate county officers. An ordinance is a local law adopted with all the legal formality of a statute. In its quasi-judicial role, the Board of Supervisors may settle claims made against the county and may examine and audit the accounts of all county officers as they relate to the

Required Responses for Board of Supervisors, Keeping the Public's Business Public

Updated June 27, 2017

Trinity County Board of Supervisors

- Findings (all) F1 through F17
- Recommendations (all) R1 through R5

■ **Trinity County Administrative Officer or any person assigned CAO duties in the absence of a full-time CAO**

- Findings F1, F3, F10, F11, F12, F13, F14, F15, F16
- Recommendations R1, R3 and R4

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■ **Trinity County Counsel**

- Findings F1, F3, F5, F6, F7, F8, F9, F10, F11, F12, F13, F14, F15, and F16
- Recommendations R1, R2, R3, and R4

management and disbursement of funds. The Board also sits as a quasi-judicial body in the case of appeals of land use decisions and tax issues. A county supervisor may serve in other capacities on various boards, commissions, or special districts.

- **County Administrative Officer (CAO):** is the chief executive officer for the County of Trinity. The CAO is employed by the County under a contract and reports directly to the Board of Supervisors. CAO is charged with carrying out the policies adopted by the Board and the laws of the State and County. Generally, all department heads report to the CAO. Duties include employee welfare and discipline. The CAO is responsible to create the County's budget for approval each year. The CAO is entrusted to run the county with a professional understanding of how all county functions operate together to their best effect. It is a position of leadership.
 - **County Counsel (CC):** is the County's legal advisor employed by the County under a contract. The CC reports directly to the Board of supervisors. Generally, the County Counsel reviews all policies, proposals, and actions of the BOS and the CAO for conformity with Federal, State, and local law. See California Government Code sections 26520 and following, and section 995 for examples.
- a) The term "**evaluation**" in the context of evaluation of employees by an employer means measurement of an employee's performance. "The process by which a manager or consultant (1) examines and evaluates an employee's work behavior by comparing it with preset standards, (2) documents the results of the comparison, and (3) uses the results to provide feedback to the employee to show where improvements are needed and why. Performance appraisals are employed to determine who needs what training, and who will be promoted, demoted, retained, or fired."
businessdictionary.com
- b) The verb "**to direct**" means control the operations of; manage or govern. "An economic elite directed the nation's affairs." synonyms: manage, govern, run, administer, control, conduct, handle, be in charge/control of, preside over, lead, head, rule, be at the helm of.
Google online dictionary
- c) The noun "**direction**" means the management or guidance of someone or something. "Under his direction, the college has developed an international reputation." synonyms: administration, management, conduct, handling, running, supervision, superintendence, regulation, orchestration. *Google online dictionary*

