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BUREAU OF FRAUD AND CORRUPTION PROSECUTIONS
PUBLIC INTEGRITY DIVISION

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September 30, 2010

The Honorable Members of the Carson City Council
701 East Carson Street
Carson, California 90745

Subject: Allegations of Brown Act Violations
PID Case10-0067

Dear Council Members,

We received a complaint alleging that the use of a "mute" button by the Mayor of Carson, to end audible public comment violates the Brown Act. We reviewed recordings of numerous meetings to determine (1) whether the mute button was, in fact used, and (2) whether the circumstances which gave rise to the use of the mute button are consistent with the Brown Act. We considered the evidence obtained, including the information provided by the Carson City Attorney in response to our inquiries earlier this year, along with the applicable law. We conclude that the mute button was, in fact used, and that in some circumstances, the Mayor's use of the mute button was an impermissible exercise of content-based restriction of speech, in violation of the Brown Act.

ANALYSIS
The Brown Act permits reasonable limitations on the time, place and manner of public comments. These limitations are permissible because public meetings constitute limited public fora.

> "Citizens are not entitled to exercise their First Amendment rights whenever and wherever they wish. . .There are three recognized categories of permissible regulation of expressive activity. Public forum (usually a street or park) non-public forum (not by tradition or designation a forum for public communication) and the limited public forum. The state creates a limited public forum when it 'open[s] for use by the public. . .a place for expressive activity.'"

Perry Education Association v. Perry Local Educators' Association, 460 U.S. 37, 45 (1983), *Kindt v. Santa Monica Rent Control Board* 67 F.3d 266, 269.

> "Although a State is not required to indefinitely retain the open character of the facility, as long as it does so, it is bound by the same standards as

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> apply in a traditional public forum. Reasonable time, place, and manner regulations are permissible, and a content-based prohibition must be narrowly drawn to effectuate a compelling state interest."

Perry, supra, at 46, *Kindt, supra* at 270.

Consistent with these constitutional principles, the Brown Act provides for public comment before or during consideration of any matter and on any matter within the subject matter jurisdiction of the legislative body.

> (a) Every agenda for regular meetings shall provide an opportunity for members of the public to directly address the legislative body on any item of interest to the public, before or during the legislative body's consideration of the item, that is within the subject matter jurisdiction of the legislative body. . .
>
> (b) The legislative body of a local agency may adopt reasonable regulations to ensure that the intent of subdivision (a) is carried out, including, but not limited to, regulations limiting the total amount of time allocated for public testimony on particular issues and for each individual speaker.
>
> (c) The legislative body of a local agency shall not prohibit public criticism of the policies, procedures, programs, or services of the agency, or of the acts or omissions of the legislative body. Nothing in this subdivision shall confer any privilege or protection for expression beyond that otherwise provided by law.

Government Code Section 54954.3 (in pertinent part)

> Public forum or not, the usual first amendment antipathy to content-oriented control of speech cannot be imported in the Council chambers intact. In the first place, in dealing with agenda items, the Council does not violate the first amendment when it restricts public speakers to the subject at hand. While a speaker may not be stopped from speaking because the moderator disagrees with the viewpoint he is expressing, it certainly may stop him if his speech becomes irrelevant or repetitious. . . The fact remains that limitations on speech at those meetings must be reasonable and viewpoint neutral, but that is all they need to be."

Kindt, supra, at 271.

The law requires that the language of the Brown Act should be broadly construed. While some suggest that the statute prohibits only criticism of the "legislative body" as a whole, we believe such restrictive reading of the statute is not supported by case

authorities, and undermines the very precepts of the Brown Act. In our view, and consistent with the case authorities interpreting the Brown Act, "any item of interest to the public. . . that is within the subject matter jurisdiction of the legislative body" necessarily includes comments regarding a single member of the body as well as matters, statements or comments to the body as a whole. Political speech, however uncomfortable or unpleasant, is constitutionally protected. It cannot be avoided by some hyper-technical interpretation of a phrase in the Brown Act as the basis for a city council rule when such interpretation undermines the fundamental precepts of the Brown Act and the Constitution, both of which protect the right of the public to be heard, and to participate in the decision making process.

We reviewed recordings of several meetings to determine whether the council's regulation of comments was reasonable. Our evaluation included identifying the factors that resulted in use of the mute button. The Mayor chairs the council meetings, and appears to have sole discretion and authority to regulate comments during City Council meetings. We observed that the general time limit of three minutes per speaker was not strictly enforced at any of the meetings reviewed. Speakers were generally permitted to complete their thoughts when the allocated time expired before the speaker had finished. The Brown Act does not require strict enforcement of time limitations, and we do not believe that the fundamental purpose of the Brown Act would be served by such a policy.

In one instance, the Mayor stopped a speaker during their public comment, and declared that the speaker was violating the Council rule requiring that public speakers address the entire council. We do not find any support for such a regulation in the law or published authorities. The Brown Act permits public comment on any matter within the subject matter jurisdiction of a legislative body. If a member of the public seeks to comment on the fact that a member of the legislative body appeared to be unable or unwilling to participate in the discussion, the subject would appear to fall within the subject matter jurisdiction of the legislative body. If a member of the public seeks to comment on the effectiveness of a council member to represent the constituents, such comment falls within the subject matter jurisdiction of the council. Both comments address the efficacy of representation by the council member as the advocate for his or her constituency. If a member of the public accuses a council member of being untruthful, such comment similarly falls within the subject matter jurisdiction of the council, because it goes to the ability of that council person to effectively represent the constituents. These types of comments are, in our view, fair political speech regardless of whether they are addressed to the entire council or to a single member because the gist of the comments go to the subject matter of a council. "Debate over public issues, including the qualifications and performance of public officials lies at the heart of the First Amendment." Levental v. Vista Unified School District (1997) 973 F. Supp 951, 958.

Since the limitations on speech in a limited public fora like a city council meeting must be rationally related to a compelling state interest, and cannot be content based, we considered what rational basis exists for the rule requiring members of the public to address the entire council. We found none.

In another instance, when the Mayor activated the mute button to prevent the comments of his colleague from being heard, his action was not based upon any apparent time restriction, but appeared instead to be based upon the content of the colleague's comments. When the Mayor activated the mute button to silence the broadcast of comment being made by Robert Pressley, a member of the public, he did so before the three minute time period expired**.** Mr. Pressley was commenting on the accuracy of the council member's ballot designation, which, he reported, was deemed impermissible by a Court**.** The circumstances suggest that the reasons for use of the mute button were (1) Mr. Pressley was addressing a single member of the council, and (2) the matter was not within the subject matter jurisdiction of the Council. Neither is a permissible ground for silencing the comments of a member of the public. We do not believe that a rule requiring public comment to be addressed to the entire council is supported by the law because it does not constitute a reasonable time, place and manner regulation. Second, we believe that Mr. Pressley's comments do, in fact, fall within the subject matter jurisdiction of the City Council because the comments go to the fitness and credibility of a member of the council. Nor are we convinced that use of a mute button to silence the broadcast of public comment is the least restrictive means by which to accomplish the important governmental interest of orderly and efficient decision making. Were that the case, then a trap door might be a reasonable alternative to the mute button. The anomalous result need not be illustrated further.

We therefore find that the Mayor's use of the mute button has, at least on some occasions, been based upon the content of the speaker's speech, and not a reasonable time, place and manner restriction. Content based restrictions are simply not permissible, absent a compelling state interest. None exists in any of the scenarios we reviewed.

We urge the council to reconsider its rules, and to take whatever measures are necessary to ensure that its regulation of public comment is limited to the time, place, and manner of those comments. The City must ensure that the rules are enforced fairly and equally among all who seek to participate in the public discussion, regardless of the point of view of the speaker or the content of their speech. While we acknowledge the results of the informal "poll" submitted by the Carson City Attorney in apparent support of the use of a mute button, we nonetheless hope that the council will carefully consider other less restrictive, less draconian, and perhaps less demonstrative means for enforcing permissible time, place and manner restrictions. We urge the Carson City Council, and every legislative body to seek to support and encourage full and fair public participation in the decision making process, enforcing rules that are steadfastly viewpoint neutral.

Very truly yours,
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District Attorney
By

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