Lawmakers want limits on executive sessions

By SIGRID BATHEN
Recorder Capital Correspondent

SACRAMENTO — In 1984, the Corona City Council denied reporters access to its annual "retreat" in nearby Pomona.

Council members insisted the meeting did not violate California's open-meeting laws because they took no action and the discussion was of a general nature. Reporters disagreed.

In 1985, the Danville Town Council held a retreat in Monterey. A reporter from the Valley Times in Pleasanton journeyed 200 miles for the two-day meeting, at which several key city issues were discussed or decided. Though open and legal, the meeting was not readily accessible to Danville residents.

In a recent analysis, Contra Costa Times special projects editor Daniel Borenstein cited both instances as examples of increasing conflict over the state's open-meeting laws.

"The Brown Act has provisions aimed at ensuring people will be able to attend public agency meetings if they choose, such as prohibitions against race or sex discrimination and bans on admission fees," Borenstein wrote in an article for the California Journal. "Yet the law allows board members to travel hundreds of miles to hold a meeting, which could prove a deterrent to those who want to drop by a council meeting after work."

"Both [examples] were retreats but each posed a different issue," Borenstein said. "If you're really talking about open government, you make meetings accessible."

Oakland attorney Judith Epstein ruefully calls such sessions the "retreat exception" to the Brown Act, California's landmark 1953 open-meeting law. A media law specialist with the Oakland firm Crosby, Heafey, Roach & May, Epstein likens the "retreat exception" to other common efforts by governing agencies to circumvent the open-meeting laws.

"It's hard for me to believe that all the members of the boards are such close personal friends that they don't discuss public business at these retreats," Epstein said.

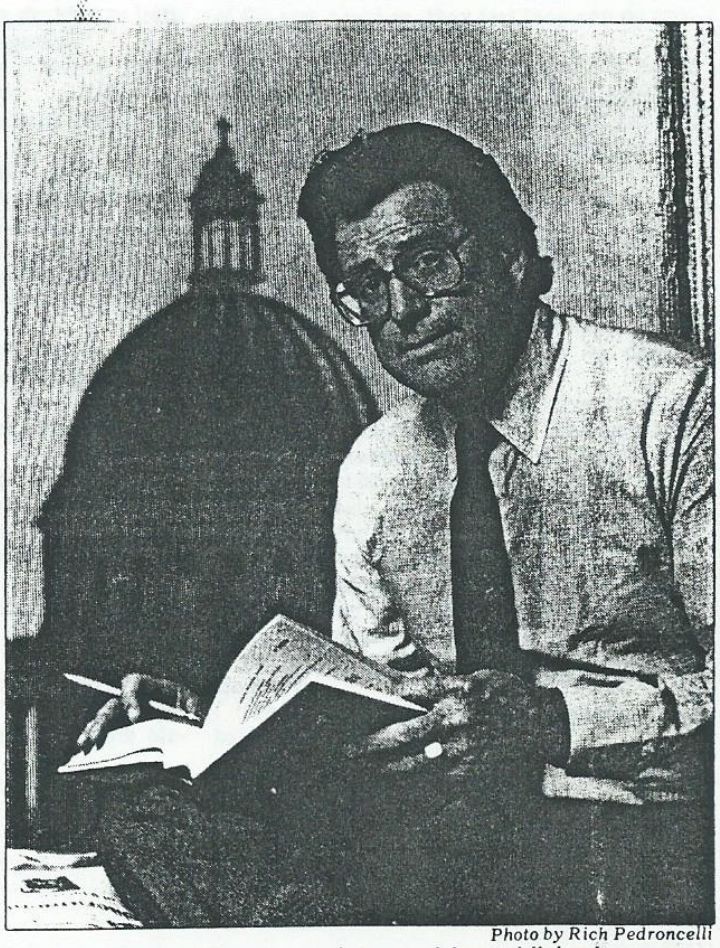

Photo by Rich Pedroncelli

Michael Dorais, director and counsel for publisher's group, says loopholes in open-meeting law are 'very serious.'

Other examples of efforts to circumvent the open-meeting laws, Epstein said, include noticed special meetings in expensive restaurants, or "50 cents-a-page for copying" — ploys to deter public participation in public meetings.

"It's a constant pressure to avoid the [Brown] Act," Epstein said. "The pressure is always, always there."

Pending litigation

One of the most frequently claimed reasons for retiring to executive session is the need for legal advice on "pending litigation," which critics say is so vague a phrase as to be meaningless in today's litigious society.

What constitutes pending litigation, exactly? Does it include the potential for litigation, actual litigation or the mere fear that a local or state agency might be sued? At what stage in the progress of litigation, actual or potential, can a public body legally go into closed session to talk the matter over with its lawyer?

In an effort to answer some of those questions, the California Newspaper Publishers Association is again pressing legislators this session to tighten what CNPA attorneys believe are serious loopholes in the law.

Introduced last year by Senate President Pro Tem David Roberti, D-Los Angeles, the bill was passed by the Legislature but vetoed by Gov. George Deukmejian.

This year, Roberti and the CNPA are back with SB 200, which would restrict closed sessions for discussion of pending litigation. The bill would not affect government task forces — a provision included in last year's version that in part prompted the Governor's veto.

In addition, supporters say, this year's bill received more careful preparation than last year's hurried measure, which was introduced in response to an informal Attorney General's opinion that existing law permitted executive session for wide discussion of pending litigation.

SB 200 is supported by the Attorney General's office and by numerous media and public interest organizations.

See LAWMAKERS, Page 6

State lawmakers seek more limits on closed 'executive' sessions

Continued From Page 1

Michael Dorais, executive director and general counsel for the CNPA, said the "pending litigation" exception to the Brown Act is "a very serious problem" for news organizations attempting to cover meetings of public agencies.

"It's such an overwhelming problem that we feel like we're sitting on top of a volcano," he said. "Some city councils, boards of supervisors and school boards believe they may meet secretly on any legal matter with their counsels, even if no litigation is filed or threatened."

Such so-called "preventive" counseling "could apply to contracts, leases or even proposals for policy changes such as ordinances."

Roberti said the bill clarifies the attorney-client privilege by requiring a local or state governing body to "be discussing pending and possible litigation or a significant exposure to litigation" in order to cite the attorney-client privilege to justify a closed session.

Attorney General John Van de Kamp said the measure is needed to "protect the people's right to know what is being done in their name."

"There is a possibility that governing bodies could use attorney-client privilege as a shield for private discussion of almost any sensitive issue which might conceivably become the subject of litigation," Van de Kamp said.

Current law gives government agencies murky guidelines on what may be discussed in executive session, the Attorney General said.

But the bill has its critics. Assemblyman Phillip Isenberg, D-Sacramento, a former Sacramento mayor, insists the problem of secrecy in government is overblown. Legislators may be reacting out of simple fear because of the enormous political clout of the publishers association.

"Most politicians are terrified of newspaper publishers, particularly on knee-jerk issues like this one," he said. "Legislators aren't governed by the law so they can sound terrific in support of it."

Isenberg said local governments forced to air legal strategy in public sessions are placed at a disadvantage in litigation. Existing laws cover potential abuse, and well enough should be left alone, he said.

Don Benninghoven, executive director of the League of California Cities, which opposed the bill last year, said his organization is "desperately trying to come out neutral" on this year's bill by working with legislators and the CNPA "in a joint effort to interpret the practical use of the Brown Act."

SB 200 clarifies language in 1984 legislation designed to clarify the "pending litigation" exception to the Brown Act.

Roberti's bill, which will come before the Senate Judiciary Committee May 5, applies to the Brown Act, which affects local agencies, as well as the Bagley-Keene Open Meeting Act, which extended the Brown Act to state agencies. It would permit discussions of pending litigation in executive session when:

- The local or state agency is already a party to litigation.
- The legislative body "has decided to initiate or is deciding to initiate litigation."
- "A point has been reached where, in the opinion of the legislative body . . . there is a significant exposure to litigation against the local or state agency."

Assemblyman Lloyd Connelly, D-Sacramento, a lawyer, former Sacramento City Councilman and longtime open-meeting advocate, recently told a reporter that executive sessions might begin appropriately, concentrating on pending litigation, but then would "wander" into other areas.

Connelly aide Gene Erbin confirmed the strongly held beliefs of news organizations that inappropriate or illegal use of closed sessions by governing bodies is growing.

"It's the potential abuse that bothers us more than anything," he said.

Some news organizations say the problem is more serious in smaller communities, where agencies may not have the legal advice or the sophistication to know when a meeting is improperly closed or inaccessible. But reliable measures of the perceived increase are not available.

"There is no doubt that it's a problem, particularly at smaller papers," said San Francisco Examiner Managing Editor Frank McCulloch, former chairman of the California Freedom of Information Committee. "In some of the cow counties, they feel they can do anything they damn well please."

McCulloch said closed sessions of public bodies are "invoked for absolutely anything and cloaked in personnel matters or pending litigation — all or some of which might be true."

Borenstein, of the Contra Costa Times, said closed meetings rarely are challenged.

"Until we challenged the Contra Costa County Board of Supervisors, they were using attorney-client privilege as the major reason for going into executive session," Borenstein said. "It was sort of an open door to discuss whatever they wanted."

After the paper objected in December 1985, Borenstein said, the board has been careful to specify the subject — pending litigation, for example — of its meetings with counsel.

Mike Corbett, lobbyist for the County Supervisors Association of California, conceded that abuses of open-meeting laws do occur.

"But there is probably a pretty good chance that no matter how open we made the law," he said, disagreements will still exist between news organization and the public agencies they cover.

"There will always be that conflict," he said.