



OFFICE OF THE DISTRICT ATTORNEY

COUNTY OF SAN LUIS OBISPO, STATE OF CALIFORNIA

DAN DOW
District Attorney

SPECIAL PROSECUTIONS UNIT
KENNETH JORGENSEN
Deputy District Attorney

May 18, 2021

By e-mail message only

Carmel & Naccasha LLP
Mr. Timothy J. Carmel
Counsel for Cambria Community Services District
tcarmel@carnaclaw.com

RE: March 11, 2021, Closed Session Item | Ralph M. Brown Act | Withdrawal of Brown Act violation

Dear Mr. Carmel:

Thank you for a letter of May 12, 2021, explaining why the District participated in a closed session on March 11, 2021, without providing Mr. Drayer's communications in the Board's meeting packet. After reviewing your letter, this office accepts the District's explanation and withdraws its Notice of Violation of the Brown Act.

In sum, you stated that the District did not violate the Brown Act because Mr. Drayer is not a resident of Cambria, a requirement to filing a lawsuit under the Voting Rights Act. Further, you indicated the District went into a closed session without providing public notice because the District feared that a resident of Cambria could take the initiative before the District could take corrective steps. Specifically, you cited Government Code section 54956.9, subdivision (e)(1), as the legal authority to for the closed session. Subdivision (e)(1) permits a public agency to discuss a litigation threat without any notice to the public. But to do so under this subdivision, the District must reasonably believe the potential plaintiff does not yet know of the threat. (Government Code section 54956.9, subd. (e)(1).)

This office concurs with your analysis: when a public agency enters a closed session under subdivision (e)(1) of section 54956.9, the agency is not required to provide notice to the public.

However, we would be remiss by not commenting concerning the central tenet of the Brown Act, which provides that the People's business be conducted "openly and transparently." In addition to subdivision (e)(1) under section 54956.9, four other subdivisions would have permitted a closed session. See subdivisions (e)(2) through

(e)(5). Three of the five subdivisions, if selected by the District, would have required the District to advise the public of Mr. Drayer's threat. By selecting subdivision (e)(1), the District avoided a disclosure requirement to the public.

Here, it appears the District could have also conducted a closed session under subdivision (e)(5). This subdivision provides the facts and circumstances authorizing a closed session include:

A statement threatening litigation made by a person outside an open and public meeting on a specific matter within the responsibility of the legislative body so long as the official or employee of the local agency receiving the knowledge of the threat makes a contemporaneous or other record of the statement prior to the meeting, **which record shall be available for public inspection** pursuant to Section 54957.5.

(Gov. Code § 54956.9, subd. (e)(5); **bolding** added for emphasis.)

The *Fowler v. City of Lafayette*, previously cited, does an excellent job of fleshing out the nuances public agencies can undertake when selecting the appropriate subdivision to conduct a closed session. The Court described that a public agency could "stretch" the facts and circumstances so as to fit a threat of litigation into a particular subdivision and avoid disclosure. (*Fowler v. City of Lafayette* (2020) 46 Cal.App.5th 360, 368.)

In the *Fowler* case, the City of Lafayette contended it entered under subdivision (e)(5), but because the written threat was not physically provided to the councilmembers but only discussed orally, it did not need to include the written threat in the Board's meeting packet. (A nuanced argument, to say the least) The plaintiff, on the other hand, contended the facts and circumstances indicated that the city chose the incorrect subdivision, that the proper subdivision was subdivision (e)(2). Under subdivision (e)(2), the city was required to make an oral disclosure before the closed session, unlike subdivision (e)(5).

The *Fowler* Court brushed aside the subtle arguments of the plaintiff and the city. Ultimately, the Court held the city could not rely on such a restrictive interpretation of subdivision (e)(5). While it held the city was correct to cite subdivision (e)(5) as the basis for the closed session, it held the city would not be permitted to "thwart its duty of public disclosure" by conveying the threat orally to the councilmembers and avoid producing the written threat in the Board meeting packet. (*Fowler v. City of Lafayette* (2020) 46 Cal.App.5th 360, 370.) The Court stated:

We reiterate that the Brown Act is intended to 'facilitate public participation in all phases of local government decision making [citation omitted] and that we must construe it *liberally* to accomplish its purpose [citation omitted]. Members of the public are entitled to rely on the agenda and packet made available upon request (see § 54957.5, subd. (a)), and the City has drawn our attention to no authority suggesting an interested citizen must [make a public records request] to determine whether the

legislative body has received a litigation threat that might be the basis of a closed session.

(*Fowler v. City of Lafayette* (2020) 46 Cal.App.5th 360, 370. *Italics* in original.)

Here, just as in the *Fowler* case, a member of the public could have obtained Mr. Drayer's communications through a public records request. (That is how the complainant first learned of Mr. Drayer's communication.) Thus, had the request been made in February, the threat would have been produced to the community before March 11, 2021.

Moreover, the statements made by Mr. Drayer fall within subdivision (e)(5), which provides a statement threatening litigation made by a person outside an open public meeting. This subdivision does not get into the intricacies of who can be a plaintiff under the Voting Rights Act. Mr. Drayer's communications to the District, made in a public records request, are clearly "outside a public meeting" and were "noted contemporaneously" by the District staff handling public records requests. While you contend he did not threaten litigation, we do not find that to be the case. He wrote:

"Do you plan to hire a demographer or enter into a safe harbor to prevent **legal liability** & regulatory scrutiny? Arroyo Grande lost \$30,000 because they didn't do their due diligence **to prevent legal liability** to taxpayers of the county."

(**Bolding** added for emphasis.)

Hence, the Drayer communications could reasonably fall under subdivision (e)(5).

Moreover, the risk of a lawsuit appears to have been very low. It seems unlikely that the District would need to be concerned about a resident of Cambria seizing upon Mr. Drayer's communications to file a lawsuit. I doubt the average citizen of Cambria would understand that Mr. Drayer could not bring suit because he was not a resident of the District. Also, it appears the threat of litigation was relatively short. The retention of the demographic consultant eliminated the threat within 60 days of Mr. Drayer's communications.

Finally, the District could have further diminished the risk by reporting out of the closed session that the District intended to retain a demographic consultant. In fact, that is what you did the following day after the closed session, e-mailing Mr. Drayer to advise him that "a demographic study of the District's service area is being initiated, as referenced in your previous letter."

But again, this office respects the District's decision to enter under subdivision (e)(1). However, we trust that in the District's decision-making of which subdivision to conduct a closed session, it will consider the Brown Act's intent to facilitate public participation in all phases of local government decision-making.

Thank you for responding to my original letter, as I believe this has resulted in a productive discussion of promoting an open and transparent government.

Very truly yours,

Dan Dow
District Attorney



Kenneth Jorgensen
Deputy District Attorney
Special Prosecutions Division

Cc: John F. Weigold, District General Manager