



Folsom City Council Staff Report

MEETING DATE:	4/12/2022
AGENDA SECTION:	New Business
SUBJECT:	Consideration of Letter in Response to Demand Letter Received from Scott Rafferty Regarding Alleged Non-Compliance with the Brown Act
FROM:	City Attorney's Office

RECOMMENDATION / CITY COUNCIL ACTION

Staff recommends that the City Council consider and approve the attached reply to Scott Rafferty (Attachment 1) providing an unconditional commitment to continue to comply with the Brown Act.

BACKGROUND / ISSUE

On March 25, 2022, the City received a cease and desist letter from Scott Rafferty dated March 24, 2022 alleging the following violations of the Brown Act:

1. The failure to make available all non-exempt documents relating to council districts that were distributed to the council in advance of its February 11, 2022, meeting. A copy is attached to the electronic transmission of this letter.
2. The redaction of the time and date of electronic communications to conceal when they were received and when they became subject to public disclosure.
3. The continuing failure, even after the meeting, to allow inspection of writings subject to §54957.5, including the data files presented at those meetings.
4. The repeated failure to notify the public of the change in procedure for public comment, which no longer provided for text messages to be relayed by the City Manager.

While staff disagrees with the alleged non-compliance, the Brown Act provides a process for issues such as these to be resolved without further legal action. To that end, the Brown Act provides a prescribed form letter that the City Council may consider approving and sending in response to Mr. Rafferty's correspondence.

POLICY / RULE

The Brown Act provides that a response to the cease and desist letter shall be in substantially the form provided in Government Code section 54960.2(c)(1). The fact that the City Council provides an unconditional commitment shall not be construed or admissible as evidence of violation of the Brown Act. Government Code section 54960.2(c)(4).

ANALYSIS

Government Code section 54960.2 allows any interested person to submit a "cease and desist" letter to the City as a prerequisite to filing a lawsuit over alleged past non-compliance with the Brown Act. Pursuant to Section 54960.2(b), the City Council may respond to the "cease and desist" letter within thirty (30) days by providing an "unconditional commitment" not to repeat any or all of the actions challenged. By law, an "unconditional commitment" **does not** constitute admission of a violation, but it does bar a potential plaintiff from pursuing litigation and collecting attorneys' fees with respect to past non-compliance related to the specific action the City has "unconditionally committed" not to repeat.

The City Council's reply must be approved in open session as a separate item of business, not under the "Consent" portion of the agenda, and in substantially the form as prescribed by the Brown Act. Once approved, the Brown Act prohibits legal action by the potential plaintiff; however, if such an action is nonetheless filed, the court is required to dismiss the lawsuit with prejudice if it finds that the City Council has provided an unconditional commitment pursuant to the Brown Act.

FINANCIAL IMPACT

There is no legal expense associated with this item as the City Council has always complied with the Brown Act. In addition, providing the attached reply may reduce the chance of litigation and any associated legal costs.

ENVIRONMENTAL REVIEW

The California Environmental Quality Act (CEQA) does not apply to activities that will not result in a direct or reasonably foreseeable indirect physical change in the environment (CEQA Guidelines §15061(c)(3)), or is otherwise not considered a project as defined by Public Resources Code §21065 and CEQA Guidelines §15060(c)(3) and §15378. The City Council's consideration of a reply to the Brown Act cease and desist letter meets the above criteria and is not subject to CEQA. No environmental review is required.

ATTACHMENTS

1. Cease and desist letter dated March 24, 2022
2. Proposed reply from the City Council

Respectfully submitted,

Steven Wang, City Attorney

ATTACHMENT 1

SCOTT J. RAFFERTY

ATTORNEY AT LAW

1913 WHITECLIFF COURT
WALNUT CREEK CA 94596

(202)-380-5525
RAFFERTY@GMAIL.COM

March 24, 2022

Ms. Christa Freemantle
Clerk, City of Folsom
50 E. Natoma Street
Folsom CA 95630

by electronic and postal mail
cc: Mayor Kerri Howell, members of
the City Council, City Attorney

Dear Ms. Freemantle:

This letter constitutes a demand specified by Section¹ 54960.1(b) that the City of Folsom cease and desist from violations of the Brown Act committed in connection with the public hearing the Council conducted on February 22, 2022. The Council purported to conduct these hearings pursuant to Elections Code, Section 10010. This letter also satisfies the requirement of Section 54960.2 and enables my clients to file an additional action to determine that the actions specified herein were taken in violation of the Brown Act. To the extent set forth herein, the City of Folsom may respond to this demand by making an unconditional commitment to cease and desist from the challenged practices.

The unlawfully conducted hearings are already the subject of litigation before the Superior Court. Because Elections Code, Section 10010 precludes actions designed to mislead the public, to prevent their active participation, or to exhaust their attention by conducting hearings over a protracted period, the City Council cannot effectively cure or correct the effects of these violations simply by redoing the hearing. This would burden the public with attending more hearings, after "actions" (as defined in the Brown Act) have been taken and when the underlying decisions can only be reversed in by a judicial decree from the Superior Court (or the District Court for the Eastern District of California). Therefore, I will be writing the City Attorney separately to propose additional actions that are necessary to prevent an expansion of the current litigation.

The violations include:

¹ "Section" refers to the Government Code, except as noted.

1. The failure to make available all non-exempt documents relating to council districts that were distributed to the council in advance of its February 11, 2022 meeting. A copy is attached to the electronic transmission of this letter,
2. The redaction of the time and date of electronic communications to conceal when they were received and when they became subject to public disclosure.
3. The continuing failure, even after the meeting, to allow inspection of writings subject to §54957.5, including the data files presented at those meetings.
4. The repeated failure to notify the public of the change in procedure for public comment, which no longer provided for text messages to be relayed by the City Manager.

These violations are exceptionally flagrant.²

As we noted in previous letters, the failure to produce records distributed to the Board invalidates actions taken on February 8 and February 15, 2022, and made it inappropriate to continue the hearing to February 22, 2022. The documents were not made available in time for the public to make meaningful comment on the selection of the preferred maps. This letter demands that you cure and correct the violations by restarting any hearing process. Since that is no longer possible given statutory deadlines, these actions should be invalidated.

This letter also demands that the City cease and desist from failing to make Brown Act documents available to the public at the meeting, which includes posting them in the case of a teleconferenced meeting and making them available on paper in the council chambers.

Thank you for your prompt attention to these matters.

Sincerely,



Scott J. Rafferty

² A.B. 361 recently amended Section 54953(e)(2)(B) to require that in each instance in which notice of the time of the teleconferenced meeting is otherwise given or the agenda for the meeting is otherwise posted, the legislative body shall also give notice of the means by which members of the public may access the meeting and offer public comment. Numerous public postings referring to this meeting failed to advise members of the public that they could no longer telephone Ms. Anderson and have her relay the comments. This caused extensive confusion and showed deliberate disregard for unambiguous instructions from the Legislature.

ATTACHMENT 2

April 13, 2022

Scott J. Rafferty
1913 Whitecliff Court
Walnut Creek, CA 94596

Re: Brown Act Cease and Desist Letter

To Mr. Rafferty:

The Folsom City Council has received your cease-and-desist letter dated March 24, 2022, alleging that the following described past action of the legislative body violates the Ralph M. Brown Act:

1. The failure to make available all non-exempt documents relating to council districts that were distributed to the council in advance of its February 11, 2022, meeting. A copy is attached to the electronic transmission of this letter.
2. The redaction of the time and date of electronic communications to conceal when they were received and when they became subject to public disclosure.
3. The continuing failure, even after the meeting, to allow inspection of writings subject to §54957.5, including the data files presented at those meetings.
4. The repeated failure to notify the public of the change in procedure for public comment, which no longer provided for text messages to be relayed by the City Manager.

While the Folsom City Council strongly disputes and denies those allegations, in order to avoid unnecessary litigation and without admitting any violation of the Ralph M. Brown Act, the Folsom City Council hereby unconditionally commits that it will cease, desist from, and not repeat the challenged past action as described above.

The Folsom City Council may rescind this commitment only by a majority vote of its membership taken in open session at a regular meeting and noticed on its posted agenda as “Rescission of Brown Act Commitment.” You will be provided with written notice, sent by any means or media you provide in response to this message, to whatever address or addresses you specify, of any intention to consider rescinding this commitment at least 30 days before any such regular meeting. In the event that this commitment is rescinded, you will have the right to commence legal action pursuant to subdivision (a) of Section 54960 of the Government Code. That notice will be delivered to you by the same means as this commitment or may be mailed to an address that you have designated in writing.

Very truly yours,

Kerri Howell, Mayor

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