



# Folsom City Council Staff Report

<b>MEETING DATE:</b>	3/8/2022
<b>AGENDA SECTION:</b>	New Business
<b>SUBJECT:</b>	Consideration of Letter in Response to Demand Letter Received from Scott Rafferty Regarding Alleged Non-Compliance with the Brown Act
<b>FROM:</b>	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 February 22, 2022, the City received a cease and desist letter from Scott Rafferty dated February 21, 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.
2. The failure to permit the public to inspect the written slides presented on February 11, 2022 during the meeting.
3. The redaction of the time and date of electronic communications to conceal when they were received and when they became subject to public disclosure.
4. The continuing failure, even after the meeting, to allow inspection of writings subject to §54957.5, including those identified in (1)-(3) and the data files presented at those meetings.

5. The reception during the February 11, 2022 meeting of text messages relayed by the City Manager, even though her telephone number had not been published as identified as a means for providing public input.

While staff disagrees with the alleged non-compliance, the Brown Act does provide 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 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.

**ATTACHMENT**

1. Cease and desist letter received on February 21, 2022
2. Proposed reply from the City Council

Respectfully submitted,

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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

February 21, 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 Section<sup>1</sup> 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 11, 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:

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<sup>1</sup> "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.
2. The failure to permit the public to inspect the written slides presented on February 11, 2022 during the meeting.
3. The redaction of the time and date of electronic communications to conceal when they were received and when they became subject to public disclosure.
4. The continuing failure, even after the meeting, to allow inspection of writings subject to §54957.5, including those identified in (1)-(3) and the data files presented at those meetings.
5. The reception during the February 11, 2022 meeting of text messages relayed by the City Manager, even though her telephone number had not been published as identified as a means for providing public input.

These violations are exceptionally flagrant. 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.

Ms. Anderson knew that her cellphone had not been provided in the public notice, let alone in each instance in which the time of the teleconference was given. She acted with the specific intent of depriving Plaintiffs and other advocates of district elections equal access to the limited public forum created by the Brown Act, based on their viewpoint, in violation of civil rights guaranteed the First Amendment.

Similarly, deputy city clerk Lydia Konopka refused to provide the staff report and comments distributed to a majority of the City Council, which must be provided "without delay" under the Brown Act. Instead, she committed to "be in contact when the records are available for review." That was on February 10, 2022.

The failure to produce these records invalidates actions taken on February 8 and February 15, 2022, and make it inappropriate to continue the hearing on February 22, 2022. This letter demands that you cure and correct the violations by restarting any hearing process, which may not be possible given statutory deadlines. However, there is no other basis to continue the hearing, since the documents were not made available in time for the public to make meaningful comment on the selection of the preferred maps.

Rafferty to Freemantle, Brown Act Demand Letter, February 15, 2022, page 3

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,

A handwritten signature in black ink that reads "Scott Rafferty". The signature is written in a cursive, slightly slanted style.

## **ATTACHMENT 2**



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 February 21, 2022 on February 22, 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.
2. The failure to permit the public to inspect the written slides presented on February 11, 2022 during the meeting.
3. The redaction of the time and date of electronic communications to conceal when they were received and when they became subject to public disclosure.
4. The continuing failure, even after the meeting, to allow inspection of writings subject to §54957.5, including those identified in (1)-(3) and the data files presented at those meetings.
5. The reception during the February 11, 2022 meeting of text messages relayed by the City Manager, even though her telephone number had not been published as identified as a means for providing public input.

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,

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Kerri Howell, Mayor

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