



Folsom City Council Staff Report

| | |
|------------------------|---|
| MEETING DATE: | 1/23/2024 |
| 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 January 10, 2024, the City received a cease and desist letter from Scott Rafferty (Attachment 2) alleging the following violations of the Brown Act on December 12, 2022¹:

1. The failure to make available all non-exempt documents relating to council districts that were distributed to the council in advance of its December 12, 2023 meeting;
2. The failure to permit the public to inspect the Agenda Packet and leaflet during the meeting; and
3. The receipt of special-interest communications during the meeting without contemporaneous disclosure to the public, including the identification of the individuals directing the Council's actions.

¹ While Mr. Rafferty's letter specified December 12, 2022, it is assumed that he made a mistake on the date. The date of the City Council meeting pertinent to his letter should be the meeting on December 12, 2023.

Although 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. Proposed reply from the City Council
2. Cease and desist letter dated January 10, 2024

Respectfully submitted,

Steven Wang, City Attorney

Attachment 1

January 24, 2024

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 January 10, 2024, 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 December 12, 2023 meeting;
2. The failure to permit the public to inspect the Agenda Packet and leaflet during the meeting;
and
3. The receipt of special-interest communications during the meeting without contemporaneous disclosure to the public, including the identification of the individuals directing the Council's actions.

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,

Michael D. Kozlowski, Mayor

Attachment 2

SCOTT J. RAFFERTY

ATTORNEY AT LAW

1913 WHITECLIFF COURT
WALNUT CREEK CA 94596

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

January 10, 2024

Ms. Christa Freemantle
Clerk, City of Folsom
50 E. Natoma Street
Folsom CA 95630
by electronic and postal mail

Dear Ms. Freemantle:

Mayor Rodriguez convened the regular meeting of the Folsom City Council on December 12, 2022, after I protested to the City Attorney that the agenda packet, which had been distributed to a majority of the council, was not available for inspection. Actions taken at this meeting will have dramatic, long-term effects on the safety of Folsom residents, the integrity of its social services, and the confidence of its Jewish residents in the impartiality of the incumbent council members.

Had the packet been available as required by law, the public could have instructed the council against transferring reserves needed to protect public safety and social services into an infrastructure fund that benefits special interests (item 17). The full import of this agenda item became apparent only after it was no longer possible to register for comment.

The agenda description for item 5 does not indicate that it has anything to do with Israel or Gaza. Had the public had access to the wording of the related resolution, they could have added balance to offensive and anti-semitic comments of one speaker. While the remaining speakers demonstrated respect and sensitivity, Mr. Rias Mohamed claimed that Israel "openly stated that they are conducting genocide." (25:10) He mischaracterized the resolution as calling for a cease fire. His final words attacked the creation of the State of Israel as "Original Sin."¹ (25:26) Mayor Rodriguez broke faith with the Jewish community and their many supporters when she failed to call this speaker out, instead thanking him. (25:30). The resolution did not call for a cease fire;

¹ "Forcibly displacing and murdering Palestinian citizens to establish a state on top of an existing state is the Original Sin." 25:39. It is factually inaccurate to claim that Israel was created "on top of an existing state."

Israel has not openly stated that they are conducting genocide; and to equate the creation of the State of Israel with Original Sin is offensive to all people of faith.

Prior to the meeting, an individual appeared to be distributing an additional campaign leaflet "Folsom Takes Action," which Mr. Kozlowski later promoted in connection with a ballot question promoted by some of the same special interests who demanded that the City draw down its reserves. Mr. Kozlowski admitted: "This was passed to us on the dais while we were talking." (1:33:54). Had the leaflet been disclosed, members of the public would have had the information necessary during the public comment period to protest the unlawful promotion of this pro-development ballot question, to warn against Mr. Kozlowski's impending violation of council neutrality, and to oppose his appointment as mayor.² Even when the impropriety of this communication was brought to Mayor Kozlowski's attention, he defiantly announced: "Please feel free to join me on Monday for trivia at the Red Bus," adding that he was "always at" this bar. (1:34:27). The people of Folsom deserve a mayor who can conduct the people's business without relying on secret communications from special interests.

The violations of the Brown Act include:

1. The failure to make available all non-exempt documents relating to council districts that were distributed to the council in advance of its December 12, 2023 meeting.
2. The failure to permit the public to inspect the Agenda Packet and leaflet during the meeting.
3. The receipt of special-interest communications during the meeting without contemporaneous disclosure to the public, including the identification of the individuals directing the Council's actions. This is, of course, redolent of the anonymous cellphone communications that you read into the record in 2022.

This letter constitutes a demand specified by Section 54960.2(a)(1) that the City of Folsom cease and desist from violations of the Brown Act committed in connection with the regular meeting of the Council held on December 12, 2022. 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 the cease and desist demand by making an unconditional commitment to cease and desist from

² Only one speaker addressed item 14 (1:40).

the challenged practices. This letter further constitutes a demand, pursuant to 54960.1(b) that the Council cure and correct the violation by annulling each action taken at this meeting.

We have already demanded that the Council cease and desist from failing to provide the agenda packet and from its receipt of special-interest communications during the meeting.³ We reserve the right to seek immediate enforcement of the previous Council commitments.

As the City Attorney indicated, Mayor Kozlowski's defiant promotion of a special-interest ballot measure violates additional laws. The City should immediately disclose the source of this leaflet and identify the individual who unlawfully distributed it to the dais. This letter constitutes a public records request for all communications to and from Mr. Kozlowski regarding the Red Bus event and the ballot question it promoted.

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.

Scott J. Rafferty

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." Rafferty to Freemantle 4/20/2022.

FOLSOM TAKES

ACTION



DECEMBER

WEDNESDAY

20

4 PM TO 7 PM

- ★ Learn about the challenges facing Folsom.
- ★ Sign the signature petition for a solution.
- ★ Join us in Taking Action!

Enjoy Cousins Maine Lobster Food Truck
\$2 off any drink

AND MORE!!

Support a Local Business!

Red Bus Brewing Company

802 Reading Street, Unit A, in Folsom

For more information

Lorraine Poggione 916-220-4899

.....

**Sponsored by Folsom Residents Supporting
Public Safety and Quality of Life**

*This page is intentionally left blank
to facilitate double-sided printing.*