



TO THE HONORABLE MAYOR AND COUNCIL:

DATE: February 23, 2016

SUBJECT: AUTHORIZE MAYOR TO SEND CEASE AND DESIST RESPONSE LETTER UNDER THE BROWN ACT FOR INADVERTENT VIOLATION OF ACT ON DECEMBER 8, 2015

Report in Brief

On February 4, 2016, the City Council received a fax entitled “Brown Act Section 54960.2 Request re 1/26/16 Meeting.” The letter is a request that the City Council “cease and desist from violations of the Brown Act during public meetings.” The letter complains that Council comments at the end of the meeting constituted an unagendized discussion of matters that had to be agendized, and were not “brief.” No action is required regarding this allegation because Council comments are not “actions” under the Brown Act and section 54960.2.

A second allegation is that a member of the public was not allowed to speak on an agenda item on December 8, 2015. It does appear from a review of the tape that a member of the public was inadvertently not allowed to speak on an agendized item. It is recommended that the Mayor send the attached letter to the complainant, warranting that the Council will adhere to its long-standing commitment to allow members of the public to speak on each agendized item. The language in the letter is required by statute, and insulates the City from a lawsuit based on Section 54960.2 based on the past conduct.

Background

One of the duties of the Mayor is to select and appoint other Councilmembers to serve on various standing committees. Agenda Item 9.A for the City Council’s December 8, 2015 meeting was entitled “Mayor’s appointments of Councilmembers to serve for terms ending December 2016.” As the Mayor was about to announce her appointments, she said “Joe Partansky, you asked for this item to be pulled, it is part of it, so let me get the report and then I’ll call you up.” The recital of the appointments, and the reasons therefore, took the next five minutes, after which one Councilmember posed a question. At that point the Mayor forgot that Mr. Partansky had wanted to speak on the item, and called the next item of business – Council Reports. Mr. Partansky did not renew his request to speak, and it is unknown whether he was still in the room. Neither the City Attorney, City Clerk, nor the City Manager reminded the Mayor that she had forgotten to re-call Mr. Partansky to the podium.

**AUTHORIZE MAYOR TO SEND CEASE AND DESIST RESPONSE LETTER UNDER
THE BROWN ACT FOR INADVERTENT VIOLATION OF ACT ON DECEMBER 8,
2015**

March 8, 2016

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Discussion

Under section 54954.3 of the Brown Act, “(a) Every agenda for regular meetings shall provide an opportunity for members of the public to directly address the legislative body on any item of interest to the public, before or during the legislative body’s consideration of the item, that is within the subject matter jurisdiction of the legislative body, provided that no action shall be taken on any item not appearing on the agenda unless the action is otherwise authorized by subdivision (b) of Section 54954.2....” Because a member of the public was inadvertently not allowed to speak regarding the Mayor’s appointments of other councilmembers to their various committees, this section of the Brown Act was violated. The Act gives the City Council a chance to cure this violation without litigation by authorizing a letter promising to cease and desist from the violation. Since the violation was unintentional, and contrary to the City’s long-standing practice of allowing every member of the public to speak, it is recommended that the attached letter, reaffirming the City’s commitment to comply with the Act, be sent.

Fiscal Impact

No fiscal impact.

Public Contact

Posting of the Council Agenda.

Recommendation for Action

Staff recommends that the City Council authorize the Mayor to send the attached letter.

Prepared by: Brian M. Libow
Interim City Attorney


Valerie J. Barone
City Manager
valerie.barone@cityofconcord.org

Attachment 1: February 4, 2016 fax
Attachment 2: Draft Response Letter

From: Hope Johnson [<mailto:hope.johnson@earthlink.net>]
Sent: Tuesday, February 02, 2016 4:13 PM
To: Concord City Council; Brian.Libow@cityofconcord.org
Cc: Barone, Valerie; Brown, Susanne
Subject: Brown Act Section 54960.2 Request re 1/26/16 Meeting

Attn: Mayor Hoffmeister, Vice Mayor Leone, Councilmember Helix, Councilmember Grayson, and Councilmember Birsan, and Interim City Attorney Brian Libow

Dear Concord City Council and Mr. Libow:

Pursuant to Section 54960.2 of California's Brown Act, this correspondence is a request for Concord's City Council to cease and desist from violations of the Brown Act during public meetings. A copy of this correspondence will also be faxed via the city clerk to meet the service requirement of that section of the code.

Specifically, this request refers to the council's lengthy discussion toward the end of its regularly scheduled meeting on January 26, 2016, that combined several topics related to the current proposed ballot measure to directly elect Concord's mayor and that continued for over 20 minutes. All of topics discussed at length are items of business under the jurisdiction of the council but none were listed on the agenda for the meeting, a violation of Section 54954.2(a) of the Brown Act.

During Item 8 ("Council and Staff Reports") of the January 26 meeting, Councilmember Helix commented on a recent Contra Costa Times article that offended him regarding Councilmember Birsan's proposed ballot measure to directly elect the mayor. A heated and lengthy discussion involving all members of the council quickly ensued that included discussion of the article, Councilmember Birsan and his comments in the article, the merits of a directly elected mayor, council's recent vote for a new mayor, and the proposed mayoral ballot measure itself. Even after Interim City Attorney Brian Libow advised the council that it should not further discuss the ballot measure or its merits until the topic was properly posted on an agenda, the council's discussion on those very topics continued for some time.

By engaging in the discussion described, the council is in violation of Section 54954.2(a)(2) of the Brown Act.

Section 54954.2(a)(2) provides that "[n]o action or discussion shall be taken on any item not appearing on the posted agenda." The section allows only the following exceptions for council to speak on an item not on the agenda: "*briefly* respond" to public comment, "ask a question for clarification," "make a *brief* announcement," "make a *brief* report on his or her own activities," "provide a reference to staff or other resources for factual information," "request staff to report back," and "direct staff to place a matter of business on a future agenda" (*emphasis added*).

The council's discussion of its recent vote for the new mayor and the ballot measure and its merits was not posted on the agenda, as was noted by the Interim City Attorney during

the meeting at issue. In addition, those topics cannot reasonably be considered to have been adequately noticed under the very general description of Item 8, "Council and Staff Reports." By discussing these items without notice, the council is in violation of Section 54954.2(a)(2). The violation is particularly onerous because the issues involved are of significant public interest.

In addition to the violation described above, the council has recently lapsed into a pattern of violating the Brown Act. For example, the Interim City Attorney advised that the council could discuss the newspaper article at length during the January 26 meeting despite the Brown Act allowing only a "brief report" unless the item is posted on the agenda. In another instance, Mayor Hoffmeister failed to allow a member of the public to speak during an item announcing committee assignments on December 8, 2015, even though he had completed a speaker's card and was told he could speak after the announcement. These violations now require action.

With this correspondence, I respectfully request the council cease and desist from discussing items at meetings that are not posted on the agenda and I preserve my right to take any further action allowed under Section 54960.2 of the Brown Act.

Thank you,
Hope Johnson
Concord resident

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CITY COUNCIL
Laura M. Hoffmeister, Mayor
Ronald E. Leone, Vice Mayor
Edi E. Birsan
Timothy S. Grayson
Daniel C. Helix

Tim McGallian, City Treasurer
Valerie J. Barone, City Manager

February 24, 2016

Ms. Hope Johnson
Concord, CA

Dear Ms. Johnson:

The City Council has received your cease and desist letter dated February 4, 2016 alleging in part that the following described past action of the Council violates the Ralph M. Brown Act:

“...Mayor Hoffmeister refused to let a member of the public speak during an item announcing committee assignments on December 8, 2015, even though he had completed a speaker’s card and was told he could speak after the announcement.”

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

The 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,

Laura M. Hoffmeister
Mayor