



Think Inside the Triangle™

NOTICE OF SPECIAL MEETING

Pursuant to Section 54956 of the Government Code of the State of California, a Special meeting of the **Tracy City Council** is hereby called for:

Date/Time: **Thursday, February 8, 2024, 4:15 p.m.**
(or as soon thereafter as possible)

Location: **Tracy City Hall**
333 Civic Center Plaza, Tracy, CA.

Government Code Section 54954.3 states that every public meeting shall provide an opportunity for the public to address the Tracy City Council on any item, before or during consideration of the item, however no action shall be taken on any item not on the agenda.

This meeting will be open to the public for in-person and remote participation pursuant to Government Code Section 54953(e)

For Remote Public Comment:

During the Items from the Audience, public comment will be accepted via the options listed below. If you would like to comment remotely, please follow the protocols below:

- *Comments via:*
 - **Online by visiting <https://cityoftracyevents.webex.com>** and using the following **Event Number: 2556 319 4517** and **Event Password: TracyCC**
 - ***If you would like to participate in the public comment anonymously***, you may submit your comment via phone or in WebEx by typing “Anonymous” when prompted to provide a First and Last Name and inserting Anonymous@example.com when prompted to provide an email address.
 - Join by phone by dialing +1-408-418-9388, enter 25563194517#8722922# Press *3 to raise the hand icon to speak on an item

- *Protocols for commenting via WebEx:*
 - *If you wish to comment under “Items from the Audience/Public Comment” portion of the agenda:*
 - *Listen for the Mayor to open “Items from the Audience/Public Comment”, then raise your hand to speak by clicking on the Hand icon on the Participants panel to the right of your screen.*
 - *If you no longer wish to comment, you may lower your hand by clicking on the Hand icon again.*
 - *Comments for the “Items from the Audience/Public Comment” will be accepted until the public comment period is closed.*

1. Call to Order
2. Actions, by Motion, of City Council pursuant to AB 2449, if any
3. Roll Call and Declaration of Conflicts
4. Items from the audience - *In accordance with Council Meeting Protocols and Rules of Procedure*, adopted by Resolution No. 2019-240, and last amended by Resolution No. 2021-049, a five-minute maximum time limit per speaker will apply to all individuals speaking during "Items from the Audience/Public Comment". For non-agendized items, Council Members may briefly respond to statements made or questions posed by individuals during public comment; ask questions for clarification; direct the individual to the appropriate staff member; or request that the matter be placed on a future agenda or that staff provide additional information to Council.
5. DISCUSSION ITEMS
 - 5.A Consider and Determine, by Motion, Response to Notice of Brown Act Violation and Request to Cure or Correct from Steve Nicolaou dated January 11, 2023
6. Council Items and Comments
7. Adjournment

Posting Date: February 7, 2024

The City of Tracy is in compliance with the Americans with Disabilities Act and will make all reasonable accommodations for the disabled to participate in employment, programs and facilities. Persons requiring assistance or auxiliary aids in order to participate, should contact the City Manager's Office at (209) 831-6000 at least 24 hours prior to the meeting.

February 8, 2024

Agenda Item 5.A

RECOMMENDATION

Consider and Determine, by Motion, Response to Notice of Brown Act Violation and Request to Cure or Correct from Steve Nicolaou dated January 11, 2023

EXECUTIVE SUMMARY

At its regular meeting of December 19, 2023, the City Council approved an amendment to the City Attorney's Employment Agreement through a properly agendaed item. On January 11, 2024, Steve Nicolaou sent the City Council and the City Attorney a Notice of Brown Act Violation and Request to Cure or Correct ("Demand Letter"). Under the Ralph M. Brown Act, the City has 30 days from receipt of the letter to provide a written response informing Mr. Nicolaou of "its actions to cure or correct" or of "its decision not to cure or correct the challenged action." This special meeting is being held for the City Council to consider and determine a written response by the deadline of February 10, 2024.

BACKGROUND AND LEGISLATIVE HISTORY

Mr. Nicolaou's specific allegations are the following:

- 1) The City Council unlawfully discussed the salary increase of the City Attorney in closed session under the personnel exemption set forth in Government Code Section 54957;
- 2) The City Council took unlawful action on the City Attorney's salary increase in closed session by directing staff to prepare an amendment to her employment agreement; and
- 3) The City Council unlawfully considered the compensation of the City Attorney at a special meeting in violation of Government Code Section 54956.

Mr. Nicolaou's requested cures for the above alleged are that:

- 1) The City Council formally recognize that such discussions occurred;
- 2) The City Council rescind its December 19th Resolution authorizing the amendment of the City Attorney's employment agreement;
- 3) The City Council enter into an agreement to record all "personnel evaluation" closed sessions in the future; and
- 4) Both the City Council and the City Attorney enter into an agreement to attend a two-hour Brown Act presentation.

ANALYSIS

The City Council's discussions identified in the Demand Letter concerned the evaluation of the City Attorney's performance, which is an appropriate topic of discussion in closed

session under the Brown Act. (Gov. Code section 54957.) As a direct outcome of this extensive process of performance evaluation, the City Council gave direction to the Human Resources Director to bring back, for consideration at a regular meeting, a proposed amendment to the Employment Agreement regarding a salary increase. However, no final action on a contract was taken during any closed session.

The Brown Act requires that city councils hold their meetings open to the public except as expressly authorized by the Act. (Gov. Code sections 54953 & 54962). An agency fulfills its obligations under the Brown Act so long as it substantially complies with statutory requirements, where “substantial compliance” means actual compliance in respect to the substance essential to every reasonable objective of the statute. (Gov. Code section 54954.2(d)(1).)

Under the personnel closed exception in the Brown Act, city councils may properly discuss the appointment, employment, evaluation of performance or dismissal of a public employee. . . .” (Gov. Code section 54957(b)(1)). However, this exception also precludes any “discussion or action on proposed compensation except for a reduction of compensation that results from the imposition of discipline” (Gov. Code section 54957(b)(4)). Courts have determined to narrowly define this exclusion, so that no discussion of salary (other than a reduction of salary) may occur in closed session under this exception.

Another exception for open session discussions is the labor negotiations exception, which allows the City Council to hold a closed session with its designated representative to discuss “salaries, salary schedules or compensation paid in the form of fringe benefits of employees.” (Gov. Code section 54957.6(a)). To utilize this exception, the designated representative must be identified by the City Council in an open session prior to the closed session. Closed sessions held pursuant to this section may not include final action on the proposed compensation.

Regarding the Demand Letter, a review of the agendas for the subject closed sessions reveals that no closed session was held under Section 54957.6. Therefore, no discussion of salary increases or compensation was authorized.

With a strict reading of the above Brown Act exceptions, Mr. Nikolaou has correctly identified that the City Council’s preliminary discussions of salary, regardless of substance or intent, technically violated the Brown Act. However, these violations were effectively cured by the final action taken by the City Council on the proposed amendment on December 19, 2023. Attached to the agenda (which was published 72 hours in advance) was the resolution as well as the proposed amendment to the Employment Agreement. As a part of this open session item, an agenda report was orally prepared and presented. The public was afforded an opportunity to provide comment (and did so) on the contract amendment and opine on whether the Council should enter into the amendment. After public comment, the City Council had a robust deliberation on the contract amendment, which yielded arguments for and against its execution. Ultimately, the Council voted 3-2 in favor of adopting the resolution which amended the Employment Agreement.

It is also worth noting that actual prejudice is required to prove a violation of the Brown Act. (*Fowler v. City of Lafayette* (2020) 46 Cal.App.5th 360, 372; *North Pacifica LLC v. California Coastal Comm.* (2008) 166 Cal. App. 4th 1416, 1433 (“a technical violation does not automatically nullify or invalidate the actions taken at that meeting.”) As noted above, the public has not been prejudiced in this instance, as information about the proposed amendment to the City Attorney’s Employment Agreement was made available to the

public in a comprehensive agenda packet, at least 72 hours prior to the December 19, 2023, meeting. Further, the proposed item was considered as a regular item—not a consent item—and a full report and discussion occurred. At that meeting, members of the public had a fair opportunity to provide comments to the City Council prior to the City Council's deliberation and final action on the proposed amendment.

Regarding the special meeting allegation, the City held a lawful closed session regarding performance evaluation under Government Code section 54957. The City Council did not consider and take action on the City Attorney's salary at a special meeting. As discussed in detail above, the City's salary and contract amendment was discussed and voted upon at an open session during a regular meeting. Therefore, there was no violation of Government Code section 54956.

A proposed letter response documenting the above is attached for the City Council's consideration and action.

Prepared by: John Natalizio, Best, Best & Kreiger LLP

Attachments:

Attachment A: Draft Response to Notice of Brown Act Violation and Request to Cure or Correct from Steve Nicolaou dated January 11, 2023

ATTACHMENT A

February 8, 2024

VIA ELECTRONIC MAIL ONLY

Steve Nicolaou

E-mail: stevenicolaou@yahoo.com

Re: Response to Notice of Brown Act Violation and Request to Cure or Correct

Dear Mr. Nicolaou:

This letter is on behalf of the City Council of the City of Tracy (“City Council” or “Council”) in response to your “Notice of Brown Act Violation and Request to Cure or Correct,” dated January 11, 2024. Your correspondence alleged that the City Council violated the Ralph M. Brown Act (“Brown Act”) by discussing the salary of the City Attorney in closed session on October 17, 2023, November 7, 2023, December 5, 2023, and December 19, 2023, and directing staff to prepare an amendment to City Attorney’s Employment Agreement. You also allege that the City violated the Brown Act by having closed session discussions on the salary of the City Attorney at a special meeting.

You requested that the City Council cure and correct these violations by (1) formally recognizing that such discussions occurred, (2) rescinding the City Council’s December 19, 2023, Resolution to amend the City Attorney’s employment agreement, (3) an agreement to record all “personnel evaluation” closed sessions in the future, and (4) an agreement for the City Council’s and City Attorney’s offices to attend a two-hour Brown Act presentation. Your demand letter was brought pursuant to Government Code section 54960.1.

The City Council takes the Brown Act seriously and has given substantial consideration to your concerns. The City Council’s goal is to ensure that the public is given a full opportunity to participate and is committed to transparency, good governance, and compliance with the Brown Act. In furtherance of adhering to and promoting the intent and substance of the Brown Act, the City Council responds as follows:

- 1. The City Cured Any Brown Act Violation Resulting From Closed Sessions Held Pursuant to Government Code section 54957 During The December 19, 2023 Regular City Council Meeting**

The City Council’s discussions at the meetings you’ve identified concerned the evaluation of the City Attorney’s performance, which is an appropriate topic of discussion in closed session under the Brown Act. (Gov. Code section 54957.) As a direct outcome of this extensive process of performance evaluation, the City Council gave direction to the Human Resources Director to bring

back, for consideration at a regular meeting, a proposed amendment to the Employment Agreement regarding a salary increase. However, no final action on a contract was taken during any closed session.

To the extent that the City Council technically violated the Brown Act by discussing salary under a closed session held pursuant to Government Code section 54957, the City effectively cured that violation during the December 19, 2023 Regular Council Meeting. On the open session agenda was Item 3.D, which was entitled:

Adopting a Resolution authorizing: 1) Amendments to the Employment Agreement dated April 5, 2022, between Bijal Patel and the City of Tracy, to reflect an increase in bi-weekly base salary from \$9,882.28 to \$10,761.81 for merit and equity adjustments and other term modifications, and 2) Amending the Master Salary Schedule relating to the City Attorney to reflect such amendment.

Attached to the agenda (which was published 72 hours in advance) was the resolution as well as the proposed amendment to the Employment Agreement. As a part of this open session item, an agenda report was orally prepared and presented. The public, including yourself, was afforded an opportunity to provide comment (and did so) on the contract amendment and opine on whether the Council should enter into the amendment. After public comment, the City Council had a robust deliberation on the contract amendment, which yielded arguments for and against its execution. Ultimately, the Council voted 3-2 in favor of adopting the resolution which amended the Employment Agreement. This final action by the City Council on the proposed amendment was therefore done at an open session of a regular meeting, consistent with Government Code section 54593(c)(3).

Therefore, the City provided the public an opportunity to review the proposed contract amendment ahead of the meeting in compliance with the Brown Act. The Council held an open session discussion on the terms of the amendment to the Employment Agreement, which included the salary increase. The public was afforded an opportunity to comment on all the terms of the contract amendment and did so (including yourself). The Council diligently deliberated the merits and finally took action, which resulted in approving the contract amendment. Thus, to the extent that some form of salary was discussed in a closed session held under Government Code section 54957, the Council's open session action on December 19, 2023, on Item 3.D cured any violations. Additionally, even if there was a violation, there is no need to void the contract as Section 54960.1(d)(3) applies because the contract was lawfully entered into in good faith, which the parties have detrimentally relied upon.

It is also worth noting that actual prejudice is required to prove a violation of the Brown Act. (*Fowler v. City of Lafayette* (2020) 46 Cal.App.5th 360, 372; *North Pacifica LLC v. California Coastal Comm.* (2008) 166 Cal. App. 4th 1416, 1433 (“a technical violation does not automatically nullify or invalidate the actions taken at that meeting.”)) It is hard to see how the public has been prejudiced in this instance. As noted above, the information about the proposed amendment to the City Attorney's Employment Agreement was made available to the public in a comprehensive agenda packet, at least 72 hours prior to the December 19, 2023, meeting. Further, the proposed

item was considered as a regular item—not a consent item—and a full report and discussion occurred. At that meeting, members of the public had an opportunity to provide comments to the City Council prior to the City Council’s deliberation and final action on the proposed amendment.

2. The City Did Not Improperly Discuss Matters At A Special Meeting

You allege that the City unlawfully considered compensation of City Attorney at a special meeting in violation of Government Code section 54956. That section governs special meetings. Specifically, Subsection (b) provides in relevant part: “Notwithstanding any other law, a legislative body shall not call a special meeting regarding the salaries, salary schedules, or compensation paid in the form of fringe benefits, of a local agency executive, as defined in subdivision (d) of Section 3511.1.”

The City held a lawful closed session regarding performance evaluation under Government Code section 54957. The City Council did not consider and take action on the City Attorney’s salary at a special meeting. As discussed in detail above, the City’s salary and contract amendment was discussed and voted upon at an open session during a regular meeting. Therefore, there was no violation of Government Code section 54956.

3. Response to Your Requested Remedies

In response to your letter, the City Council has acknowledged the violation. Because the City has already cured any violations resulting from discussion of salary during a closed session held pursuant to Government Code section 54957, the City will not rescind the resolution or the amendment to the Employment Agreement.

However, in an effort to demonstrate the City’s continued dedication to adhering to the Brown Act, the City Council hereby acknowledges and commits that it will not discuss salary or compensation which violates a closed session held pursuant to Government Code section 54957.

With respect to the other remedies requested in your letter, they are beyond the scope of a “cure” necessary to correct the alleged violation.

Please reach out with any questions.

Regards,
