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: **Tuesday, March 19, 2024, 5:00 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: 2557 906 5534** 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 25579065534#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. Request to Conduct Closed Session

   5.A. CONFERENCE WITH LEGAL COUNSEL – ANTICIPATED LITIGATION

      i. Significant exposure to litigation pursuant to Gov. Code §54956.9, subd. (d)(2) and (e)(3): (One case).

      Attachment A – Government Claims Act claim made available pursuant to (e)(3)

   5.B. CONFERENCE WITH LEGAL COUNSEL —EXISTING LITIGATION
   (Paragraph (1) of subdivision (d) of Gov. Code Section 54956.9)

   Name of case: J*ohn Arrington, Sr., v. City of Tracy*, San Joaquin County Superior Court, Case No. STK-CV-UCP-2024-0000531

   5.C. CONFERENCE WITH LEGAL COUNSEL – EXISTING LITIGATION
   (Paragraph (1) of subdivision (d) of Gov. Code Section 54956.9)

   Name of Case: *Barrio v. Tracy City Center Association, John Oh and City of Tracy*, San Joaquin County Superior Court, Case No. STK-CV-UWT-2023-11324

6. Reconvene to Open Session

7. Report of Final Action, if Any

8. Council Items and Comments

9. Adjournment

Posting Date: March 15, 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.

Steve Nicolaou
Attorney At Law

445 W. 11th Street, Suite C
Tracy, California 95376
January 11, 2024

VIA ELECTRONIC MAIL ONLY

City of Tracy City Council
E-mail: tracycitycouncil@cityoftracy.org

Bijal M. Patel, City Attorney
E-mail: attorney@cityoftracy.org

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

Dear City Council and City Attorney Patel,

On behalf of myself as a resident and business owner in the City of Tracy, I write to the City of Tracy to inform you of several violations of the California Open Meeting Law, also known as the Ralph M. Brown Act (the "Brown Act", Gov. Code § 54950, et seq.) that have occurred during recent meetings of the City Council. In compliance with the Brown Act, please consider this a formal demand that the City Council cure or correct these violations by (1) a formal recognition that the City Council did discuss the proposed salary increase of the City Attorney in closed session on October 17, 2023, November 7, 2023, December 5, 2023, and December 19, 2023; (2) rescission of the Resolution (a) authorizing amendments to the City Attorney's employment agreement and (b) amending the master salary schedule relating to the City Attorney (which was adopted on December 19, 2023) (3) an agreement to record all "personnel evaluation" closed sessions in the future; and (4) an agreement that the entire City Council and City Attorney's office will attend a two-hour Brown Act presentation by a qualified nonprofit legal services organization (such as the First Amendment Coalition, California League of Cities, etc.) within 90 days. You have 30 days from the receipt of this demand to take the above actions.

The Brown Act requires that the meetings of local legislative bodies be open to the public, except as otherwise provided. (Gov. Code § 54950.) Further, the general rule is deliberations and actions must occur in public. Transparency is the rule, not the exception. Further, violations of the Brown Act may constitute misdemeanors as to those elected officials who conduct the people's business in secret, as this Council has done repeatedly. The Brown Act does allow for legislative bodies to meet in closed session to discuss a limited set of topics. One such topic is a performance evaluation of certain employees pursuant to Government Code section 54957(b)(1). This is often known as the "personnel exception." "The purposes of the personnel exception are (1) to protect employees from public embarrassment and (2) to permit free and candid discussions of personnel matters by a local governmental body. This exception should be **narrowly construed**." (*Fischer v. Los Angeles Unified School Dist.* (1999) 70 Cal.App.4th 87, 96, emphasis added.)

I recognize the personnel exception can be used to consider the performance of either the city attorney or city manager, as they are both "officers" and serve at the discretion of the City Council. However, the text of the Brown Act is crystal clear that a closed session under the "personnel exception" cannot "include **discussion or action** on proposed compensation except for a reduction of compensation that

results from the imposition of discipline." (Gov. Code § 54957(b)(4), emphasis added.) "Salaries and other terms of compensation constitute municipal budgetary matters of substantial public interest warranting open discussion and eventual electoral public ratification. . . . It is difficult to imagine a more critical time for public scrutiny of its governmental decision-making process than when the latter is determining how it shall spend public funds." (*San Diego Union v. City Council* (1983) 146 Cal.App.3d 947. 955.) As will be discussed below, clearly the City Council illegally deliberated in secret a number of times in recent months.

In *San Diego Union,* 146 Cal.App.3d at 954-956, the Court of Appeal held that the Brown Act permitted a city council to discuss, in closed session, the performance of various city management employees, but that any discussion or decision about salary increases for those employees must take place in open session. The court rejected the argument that salary fell within the exception for discussions of "employment" or "evaluation of performance" because an employee's salary was a term and condition of the employee's continued employment and closely related to performance.

Indeed, the leading Brown Act Treatise published by the California League of Cities, of which I assume you are aware, also states the same in its most basic councilmember training publication:

> The personnel exception specifically **prohibits** discussion or action on proposed compensation in closed session, except for a disciplinary reduction in pay. **Among other things, that means there can be no personnel closed sessions on a salary change (other than a disciplinary reduction)** between any unrepresented individual and the legislative body.

(Open & Public V, A Guide to the Brown Act, League of California Cities, pg. 47, emphasis added)

Here, there can be no doubt that the City Council illegally both (1) discussed and (2) took action on the proposed compensation of the City Attorney in closed session.

First, the closed session agendas for the October 17, 2023, November 7, 2023, December 5, 2023, and December 19, 2023, **all** list the performance evaluation of the City Attorney. Notably, there is no other related labor negotiation or other type of closed session listed for the City Attorney. Nor is there an open session item listed for a discussion of the salary of the City Attorney (until the December 19, 2023 meeting).

Second, in the staff report published in advance of your December 19, 2023 amendment to the City Attorney's employment agreement, the staff report **admits** that the City Council has **already** discussed the compensation changes for the City Attorney and previously directed the preparation of an amendment to the employment agreement to account for the additional compensation:

> For various reasons, such goals were not established, and Employee has not received an annual performance evaluation or salary increase, as provided to other employees of the City and required under the Agreement. **The parties have agreed** to amend the terms of the Agreement to modify the date by which the performance goals shall be established, reflect a retroactive salary increase, and modify other terms to better align the Agreement with the employment agreement between the City and its other appointed official, the City Manager. Based on the

> determination of outstanding performance, the City Council directed the preparation of an amendment of the Employment Agreement to reflect a base salary increase representing a 5% merit increase and 3.9% market equity adjustment, retroactively to April 23, 2023 (the first annual period), from $9,882.28 to $10,761.81 biweekly.

(Staff Report, Item 3D, emphasis added.) Pursuant to standard City practice, this staff report was made available to you at least 72 hours before the December 19, 2023, City Council meeting. Further, the video recording contains no reference to any correction to this staff report during the meeting, by either the Council or staff, and was read verbatim by Councilmember Evans reflecting the illegal action (City Meeting Video. 12/19/24, at 2:10:29). There is only one logical conclusion to be drawn: City staff was **directed** before December 19th to prepare an amendment to the City Attorney's contract with a retroactive salary increase. It is clear changes to the City Attorney's salary were discussed and decided in previous closed sessions, as recited by Councilmember Evans, and no Councilmember refuted this statement. Further, the statement "the parties have agreed" admits direct negotiations between the City Council and the City Attorney of the City Attorney's compensation occurred, illegally, in secret.

The discussion (which took place in closed session) and direction to staff (which is a form of action) were both in clear violation of The Brown Act, were conducted in secret and are therefore illegal. They must be corrected. Further, the open session action – the approval of the amendment to the City Attorney's employment agreement - which took place on December 19, 2023, should never have occurred since it was based on an unlawful, secret "agreement" and a motion that directed staff to prepare the amendment and bring it back to the Council. The City Council cannot approve a literal "backroom deal" and then bring it for a cursory vote to remove the stench of illegality. Therefore, any cure of this series of illegal actions must include a recission of the Resolution approved on December 19, 2023, approving the amendments to the City Attorney's employment agreement and amending the master salary schedule. Further, because a Court will likely require that the City Council record closed sessions[1], I request that the City Council agree to do so for all personnel evaluations. To be clear, any future proposal to increase the City Attorney's salary must be properly agendized and considered in public.

Compounding the above violations, the Brown Act also prohibits any discussion of the salaries or compensation of local agency executives (as defined by Government Code section 3511.1) at a **special meeting**. (See Gov. Code § 54956(b).) The City Attorney is both "a head of a department" and subject to an "employment contract" with the City and this is such a "local agency executive." (Gov. Code § 3511.1(d)(2), (3).) Here, the closed sessions for both the December 5, 2023, and December 19, 2023, meetings were called as **special** meetings. Therefore, not only were these discussions illegal under Government Code section 54957(b)(4), but also under Section 54956(b). The policy behind this requirement is to no allow significant actions increasing official's pay to be heard at a hastily-called and therefore poorly-attended special meeting. Clearly, the City Council and City Attorney require additional Brown Act training to assure that no similar violations occur again.

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[1] See Gov. Code § 54960.

The above actions demonstrate flagrant and possibly willful violations of the Brown Act and its requirements by the City Council and the City Attorney. The City must take corrective actions within thirty days, as described above, both to comply with the Brown Act and to restore public trust. The citizens of the City of Tracy deserve that much.

As provided by Government Code section 54960.1, you have 30 days from the receipt of this demand to either cure or correct the challenged action or inform me of your decision not to do so. If you fail to cure or correct as demanded, such inaction may leave me with no recourse but to seek a judicial invalidation of the challenged action pursuant to Government Code section 54960.1, in which case I would also ask the Court to order you to pay my court costs and reasonable attorney fees in this matter, pursuant to Government Code section 54960.5.

Sincerely,

STEVE NICOLAOU

SN/sn

cc: State Bar of California
District Attorney, County of San Joaquin