



LOS ANGELES COUNTY DISTRICT ATTORNEY'S OFFICE  
BUREAU OF FRAUD AND CORRUPTION PROSECUTIONS  
PUBLIC INTEGRITY DIVISION

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August 14, 2015

Honorable Members of the City Council:

Michael Higgins, Mayor  
Kyle Miller, Mayor Pro Tem  
Brian Bergman, Council Member  
Roy Francis, Council Member  
Jane Williams, Council Member

City of La Habra Heights  
1245 N. Hacienda Road  
La Habra Heights, CA 90631

Re: Brown Act violation, January 2, 2015  
PID Case Number P15-0019

Honorable Council Members:

We have received a complaint alleging a violation of the Brown Act by the La Habra Heights City Council (the City Council). The complaint alleges the Council improperly redrafted the Ballot Title for Measure A in closed session during a Special Meeting on January 2, 2015. Based upon a review of the agenda, meeting minutes, meeting video and the relevant law, it is our opinion that the Council did in fact violate the Brown Act.

**RELEVANT FACTS**

**December 12, 2014**

La Habra Heights Oil Watch (HOW) filed a verified Petition for Writ of Mandate, case number BS152800. The HOW petition included the following Causes of Action: First Cause of Action – Inaccurate and Misleading Ballot Question, Elections Code §§ 9203 and 13314. Second Cause of Action – Improper Submission of Ballot Argument, Elections Code §§ 9282 and 13314. Third Cause of Action – Inaccurate and Misleading Ballot Argument, Elections Code §§ 9282 and 9295. This was the second in a series of two lawsuits brought against the City of La Habra Heights regarding the Measure A Ballot Title. The first petition brought by James Pigott in LASC

case number BS152700, resulted in a dismissal after the City Council re-drafted the Ballot Title in an open session meeting on December 1, 2014, in Resolution number 2014-22.

December 31, 2014

The Judge in BS152800 issued a ruling finding that the Ballot Title was misleading. Thereafter, the judge granted in part the Petition for Writ of Mandate directing the city clerk "... to amend the ballot title of Measure A consistent with the Court's ruling, pursuant to Elections Code §9204." The Judge also ruled the remaining claims were time barred.

December 31, 2014

The City noticed a Special Meeting on January 2, 2015, with the following closed session agenda:

5. CLOSED SESSION

A. CONFERENCE WITH LEGAL COUNSEL – EXISTING LITIGATION G.C. 54956.9(d)(1)

The City Council finds, based upon advice from legal counsel, that discussion in open session will prejudice the position of the local agency in the litigation. La Habra Heights Oil Watch.... LASC Case #BS152800.

January 2, 2015

A Special Meeting was convened at 9:00 a.m. on January 2, 2015. During the meeting, the following statements were made:

Minute 20:08 William Priest: "The court disagreed with the wording of the ballot question. That's why we are here this morning."

Minute 21:33 William Priest: "We are here only as to the language of the ballot question."

Minute 24:01 William Priest: "The only issue that remains is the issue of the wording of the ballot question and that's why we are here today."

Minute 27:08, the report of action after the completion of the closed hearing, William Priest: After discussion, the City Council made the following decision by a 5-0 vote to change the language to remove the word "any," and then read the entire ballot question into the record as amended.

City Councilman Hogan then stated "in clarification, the judge ordered the first 'any' to be removed not both 'anys.' "

William Priest responded "That is correct."

As indicated from the comments above and recorded in the minutes, the City Council voted in closed session to amend the Ballot Title. This is the Brown Act violation and will be discussed further below.

January 5, 2015

The City of La Habra Heights filed a return to the court's writ with the language adopted by the City Council during the January 2, 2015, closed session.

January 6, 2015

HOW Petitioners filed an objection to the revised language.

January 6, 2015

Intervenor, James Pigott, objected to the new ballot language.

January 7, 2015

The court sustained the Petitioner's objection voiding the action taken in closed session on January 2, 2015, and ordered all parties to meet and confer providing a status to Department 86 by 11:00 a.m. Thereafter, the Petitioner, the Real Parties, the City of La Habra Heights, and the Intervenor, through their respective counsels, met and conferred regarding the proposed language for the Ballot Title. An agreement was reached with all parties, with the exception of the City of La Habra Heights, agreeing to and signing the judgment amending the Ballot Title. Thereafter, the judge approved the agreement and the Petition for Writ of Mandate was discharged.

**LEGAL ANALYSIS**

The Brown Act provides for limited exceptions to the open meeting requirement. Because the quintessential policy behind the Brown Act is for legislative bodies to hold open and frank discussions, these exceptions are narrowly construed. One exception provided for in the Brown Act is the pending litigation. This exception is contained in Government Code §54956.9 which states the following:

(a) Nothing in this chapter shall be construed to prevent a legislative body of a local agency, based on advice of its legal counsel, from holding a closed session to confer with, or receive advice from, its legal counsel regarding pending litigation when discussion in open session concerning those matters would prejudice the position of the local agency in the litigation.

(d) For purposes of this section, litigation shall be considered pending when any of the following circumstances exist:

(1) Litigation, to which the local agency is a party, has been initiated formally.

Although Government Code §54956.9 does not, by its terms, provide for entry into or approval of settlements in closed session, courts have construed the pending litigation section to allow agencies to deliberate, receive advice, and take action upon a settlement offer, (75 Ops. Cal. Atty. Gen. 14 (1992); *Southern California Edison Co. v. Peevey*, (2003) 31 Cal. 4<sup>th</sup> 781, at pp. 813–814 (conc. & dis. opn. of Baxter, J.)) But this implied exemption is subject to narrow construction. (*Shapiro v. Board of Directors* (2005) 134 Cal.App.4th 170, 185.) The Attorney General's manual on the Brown Act states “the purpose of section 54956.9 is to permit the body to receive legal advice and make litigation decisions only; it is not to be used as a subterfuge to reach non-litigation oriented policy decisions.” (Cal. Dept. of Justice, Off. of Atty. Gen., *The Brown Act* (2003), p. 40). See also, *Trancas Property Owners Assn. v City of Malibu*, 138 Cal. App. 172 (Cal. App. 2d Dist. 2006) which held “Although Gov. Code, § 54956.9, permitted approval of settlements in closed session, it did not empower a city council to take or agree to take, as part of a non-publicly ratified litigation settlement, action that by substantive law could not be taken without a public hearing and an opportunity for the public to be heard.” In other words, the legislative body cannot use the closed session as an artifice to take legislative action under the guise of pending litigation. This is a position that has been entrenched in Attorney General Opinions on the Brown Act dating back to 1988. (71 Ops. Cal. Atty. Gen. 96, 104-105 (1988) and followed by *Page v. MiraCosta Community College Dist.*, 180 Cal. App. 4th 471 (Cal. App. 4th Dist. 2009).)

In our opinion, the Brown Act allows for the agency to confer with legal counsel regarding litigation, to deliberate, to receive advice, and to consider the strengths and weaknesses of the case, making litigation decisions only. In the instant case, it is clear from the public comments prior to the closed session on January 2, 2015, some of which included speakers who are the named Petitioners in the HOW litigation, that a settlement offer between HOW and the City was not pending. Thus, the only decision before the City Council was the next action to be taken in response to the court's writ of mandamus, that is whether to: 1. Accept the court's mandate to re-write the ballot language; or 2. Appeal the writ. To this end, the City Council was permitted to receive advice from counsel in closed session as to the strengths and weaknesses of the course of action to be taken in the litigation. Thus, the Council was entitled to hear advice from legal counsel as to the strength and weaknesses of the case in deciding whether to accept the court's mandate or appeal.

Regardless, as noted above in *Trancas*, where an action is required by substantive law to have a public hearing allowing for public comment, the legislative body cannot take such action in closed session as part of the pending litigation exemption. In the instant case, that substantive law requiring public hearing is embodied in Elections Code §9203, which places the duty of drafting the ballot language in a fair and impartial manner as a task for the city attorney. Thereafter, that draft is to be approved by the City Council via a Council Resolution. This, in fact, was the procedure undertaken by The City Council on November 13, 2014, in Resolution number 2014-21, and again on December 1, 2014, in Resolution number 2014-22, when the Ballot Title was amended in response to BS152700, the Pigott Petition.

Therefore, when the City Council took it upon itself to re-draft the ballot question language in closed session on January 2, 2015, a Brown Act violation occurred as this was a non-litigation oriented policy decision. Drafting of language for the ballot question is a function the City has a duty to accomplish pursuant to Elections Code §9203. In our opinion, once the City Council decided that the next course of action would be to amend the ballot language, the closed session should have ended with a report out on that action in public session. Since there were no items on the open session agenda for this special meeting, the meeting should have been adjourned and the action noticed for a subsequent regular or special meeting. Instead, the City Council circumvented this process by immediately holding its discussion and vote to amend the ballot language in closed session.

It is also our belief that the City was aware that it was improper to amend the ballot language in a closed session as evidenced by the fact that previously the City was faced with a similar scenario related to *Piggot v. Clark et al*, BS152700. On November 25, 2014, the City held a special meeting to discuss the Piggott litigation against the Measure A Ballot Title. As a follow up to that closed session, a special meeting was held on December 1, 2014. The sole agenda item for the special meeting on December 1, 2014, was for open session consideration of Resolution 2014-22 - *Resolution to Amend Ballot language*. At that special meeting, the public was noticed as to the City's intent to amend the ballot language and given the opportunity to join in the deliberation process via public comment. In our opinion, the procedure followed by the City in both the November 25 and December 1, 2014, meetings was the proper approach under the Brown Act to address the necessary amendment to the ballot language.

### **Voidability of Action**

Though the general procedure to void an action taken in violation of the Brown Act is to first send a demand letter to cure and correct, and thereafter, file suit if no corrective action is taken by the legislative body. In this particular situation, any cure was rendered moot on January 7, 2015, when the court voided the City Council action as it sustained the Petitioner's objection to the City's return on the Writ of Mandate revising language for the Ballot Title. Despite this fact, our office feels the inappropriate action taken by the City of La Habra Heights warrants attention in an effort to maintain transparency in policy making decisions made by the City Council in the future.

It is essential that every member of the legislative body understands that the Brown Act works to foster public confidence in the decision making process by ensuring advance notice of meetings, public presence and input at those meetings. The Brown Act assists legislative bodies by ensuring that the public's rights are balanced with an agency's obligations in best serving the public's interest. Ultimately, compliance with the letter and the spirit of the Brown Act ensures greater public confidence in the integrity of the decision making process.

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Should you have any questions, I can be reached at [ttengels@da.lacounty.gov](mailto:ttengels@da.lacounty.gov) or (213) 257-2475.

Very truly yours,

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By



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CC:

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John Brown  
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