

CLIENT NEWS BRIEF

New Brown Act Case Clarifies Brown Act's Pending Litigation Exception When Litigation is Orally Threatened

On February 10, 2020, the California Court of Appeal decided *Fowler v. City of Lafayette* (2020) __ Cal.App.5th __, concluding a five-year dispute among neighbors involving the construction of a tennis court cabana on private residential property. Neighbors opposing the project challenged it at every stage in the review process. In the end, the disagreement embroiled the City of Lafayette (the City) in Brown Act litigation. On appeal, the case established new precedent governing the Brown Act.

The Brown Act generally requires that governing bodies, such as a city council, conduct their business in open session allowing for public participation. Under certain exceptions, governing boards may conduct business in "closed session," out of the view and participation of the public. One such exception allows governing boards to discuss pending or threatened litigation in closed session, provided that the closed session discussion is properly noticed and any action taken during closed session is "reported out" once the board returns to open session.

One of the issues in *Fowler* was whether the City violated the Brown Act by discussing in closed session an oral threat of future litigation communicated by the project applicant's attorney. The applicant's attorney had told City planning department staff that he would sue the City if the City continued its refusal to allow the project to move forward. The City planner made a digital note of the threat in the relevant project application file in the City's computer system. He also informed the City attorney.

The timing of the threat coincided with the City council's review of the project application. Because of this, the City attorney discussed the litigation threat with the council in closed session. The City attorney did not provide the council with the City planner's note of the communicated threat, and the note was not placed within the meeting agenda packet. Rather, to provide notice of the closed session discussion, the agenda contained a general reference that the City Council would "confer with legal counsel in closed session about one case of anticipated litigation," without identifying the facts and circumstances of that case. When the Council held the closed session and thereafter approved the project application, the neighbors sued the City, petitioning the court to overturn the City's approval on the theory that the City council committed a Brown Act violation by not including the City planner's note of the threat in the publicly-posted agenda for the meeting.

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The trial court ruled in favor of the City. However, the Court of Appeal reversed that decision. According to the Court of Appeal, Government Code section 54956.9, subdivision (e)(5) (Section (e)(5)), required the City to provide the litigation threat to the public with the meeting agenda packet.

Under Section (e)(5), a contemporaneous note or other record of “a statement threatening litigation made by a person outside an open and public meeting on a specific matter” constitutes a basis for a closed session discussion pursuant to the Brown Act’s pending litigation exemption. The plain language of Section (e)(5) also requires the note to be made available for public inspection upon request.

However, the Court of Appeal took into consideration that the document containing the litigation threat was buried within the City planner’s notes, in the applicant’s file, located within a password-protected computer database. The court reasoned that, based on these facts, the public would not have access to the document unless it knew exactly what to request. According to the court, “This *availability* is illusory if an interested person would not know the question to ask.” And, citing to well-settled case law, the court said “the Brown Act must be construed liberally” to achieve government transparency.

Accordingly, the court held the public is entitled to rely on the agenda packet made available upon request, and in order to base the need for closed session discussion on a staff note memorializing a verbal threat of litigation, the note must be provided within the agenda packet.

Despite the court’s finding that the City did in fact commit a Brown Act violation, the neighbors did not prevail in stopping the tennis cabana project. The court held that the project application approval was a separate and distinct issue from the threatened litigation and closed session discussion. According to the court, the City complied with the Brown Act when it held open meetings to discuss the project application. Therefore, the neighbors were not prejudiced by the City’s violation of the closed session requirement.

Takeaways

Under *Fowler*, a local agency that receives a verbal threat of litigation that is memorialized by the agency in writing must now make that writing available in a public meeting agenda packet before going into closed session under Section (e)(5). If the threat was in writing, the agency similarly would presumably have to include that writing if relying on Section (e)(5) to allow for a closed session. We note that Government Code section 54956.9, subdivision (d)(3) (Section (d)(3)) allows for a closed session to consult with legal counsel when there are “existing facts and circumstances” that might result in litigation. There are specific rules about how to agenzize the matter and what must be on the agenda or disclosed verbally if relying on Section (d)(3), but this may be an alternative to agendizing under Section (e)(5) in certain circumstances that would not require making a record of threatened litigation publicly available with the agenda.

If you would like more information about this case or have any questions related to the Brown Act and closed sessions for potential litigation matters, please contact the authors of this Client News Brief or an attorney at one of our [eight offices](#) located statewide. You can also subscribe to our [podcast](#), follow us on [Facebook](#), [Twitter](#) and [LinkedIn](#) or download our [mobile app](#).

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