October 18, 2017

Bakersfield City Council
1600 Truxtun Ave.
Bakersfield CA 93301
City_Council@bakersfieldcity.us

Via U.S. Mail and Email

NOTICE OF VIOLATIONS OF THE BROWN ACT (GOV. CODE § 54950 *et seq*.)
DEMAND TO CEASE AND DESIST BROWN ACT VIOLATIONS
REQUEST FOR PUBLIC RECORDS (GOV. CODE § 6250 *et seq*.)

Dear City Council:

I write on behalf of the First Amendment Coalition ("FAC") regarding multiple failures by the Bakersfield City Council ("City Council") to comply with the requirements of California's open meetings law, the Ralph M. Brown Act, Government Code section 54950 *et seq*. ("Brown Act"). This letter serves as a demand to cease and desist the practices constituting such violations. This letter also constitutes a request for records pursuant to the California Public Records Act ("CPRA"), Government Code section 6250 *et seq*.

Please direct all correspondence to me at the following email address:
dsnyder@firstamendmentcoalition.org

The City Council met in closed session on July 9, September 6 and September 20, 2017[1] to consider and discuss wide-ranging issues relating to potential tax increases in the City of Bakersfield (the "City"), as well as potential significant staffing cuts. As set forth in the documents enclosed with this letter, city staff presented detailed and thorough information regarding the City's finances, its financial outlook, the effect of

[1] While FAC is presently aware of these three closed sessions, it appears that similar closed sessions may have taken place numerous times, dating back to the beginning of the 2017. Any other similar closed sessions held by the City Council would be unlawful for the same reasons set out herein.

various forms of tax increases on the city's financial outlook, and the effect of layoffs on the city's financial outlook.

The agendas for the July 9, September 6 and September 20 City Council meetings contain no reference to any of these topics. Instead, the City Council apparently attempted to justify its wide-ranging discussion, in closed session, of the city's finances and tax issues by agendizing such discussion under the "anticipated litigation" exception to the Brown Act's open meetings requirement.

These closed-session meetings violated the Brown Act in a number of ways.

First, the City Council violated the Brown Act by failing to properly provide notice of the items it discussed in closed sessions. The City's agendas for the July 9, September 6, and September 20 meetings are devoid of any reference to any discussion regarding the City's finances. The Brown Act requires every agenda to contain a description of ***each*** item of business to be discussed. (Gov. Code section 54954.2(a).) This is also required for any item to be discussed in closed session. (Gov. Code section 54957.7). "No action or discussion shall be undertaken on any item not appearing on the posted agenda," and the body "may only consider those matters" that were included in its statement of items to be discussed in closed session. (§§ 54957.7(a), 54954.2(a)(2).)

Second, any general discussion regarding the City's finances, such as the discussion held in closed session at the July 9, September 6 and September 20 City Council meetings, must be done in open session. Except were expressly authorized by statute, "no closed session may be held by any legislative body of any local agency." (Gov. Code section 54962.) "These exceptions have been construed narrowly; thus if a specific statutory exception authorizing a closed session cannot be found, the matter must be conducted in public regardless of its sensitivity." (California Attorney General, *The Brown Act: Open Meetings for Local Legislative Bodies* (2003) at pg. 1.) As described by the Attorney General, "The Legislature's addition of section 54962 effectively eliminated the possibility of finding an implied authorization for a closed session." (88 Ops.Cal.Atty.Gen. 16 (2005).)

There is no exception to the Brown Act's open-meetings requirement which would allow for the general financial discussion the City held in its closed sessions on July 9, September 6 and September 20.

The City's reference to "anticipated litigation" provides no cover for such discussion. "The purpose of the [litigation] exception is to permit the body to receive legal advice and make litigation decisions only; it is not to be sued as a subterfuge to reach nonlitigation oriented policy decisions." (71 Ops. Cal. Atty. Gen. 96, 104-105 (1988).)

As the Attorney General opined within the first decade of the Brown Act's enactment, advice as to the lawfulness or legal implications of a proposed action not yet taken is not appropriate for a closed session, because the public is entitled to know what this

advice is in order to evaluate the performance of the body. (36 Ops.Cal.Atty.Gen. 175 (1960).) The mere possibility that a body's action might be challenged in court provides no basis to discuss the proposed action in closed session, since virtually any proposed action could result in litigation – and, thus, under such a rationale virtually all proposed actions would justify excluding the public. (71 Ops.Cal.Atty.Gen 96 (1988) ["to conclude that an exception would exist because there is always the possibility of judicial review…would be tantamount to saying that any legislative body of a local agency would meet in private on any matter, since, if they do not proceed in the manner required by law, or somehow abuse their discretion in doing so, they are subject to a lawsuit to correct their action. Such a mere possibility is not what is contemplated in [the potential litigation exception]".)

If litigation has not been initiated, the agency may hold a closed session regarding "anticipated litigation," but only where a point has "been reached where, in the opinion of the legislative body of the local agency on the advice of its legal counsel, based on ***existing facts and circumstances***, there is a significant exposure to litigation against the local agency." (§ 54956.9(d)(2).) Under Section 54956.9(e), for purposes of holding such a closed session, "***existing facts and circumstances***" are expressly limited to only one of the following situations:

(1) Facts and circumstances that might result in litigation against the local agency but which the local agency believes are not yet known to a potential plaintiff or plaintiffs, which facts and circumstances need not be disclosed.

(2) Facts and circumstances, including, but not limited to, an accident, disaster, incident, or transactional occurrence that might result in litigation against the agency and that are known to a potential plaintiff or plaintiffs, which facts or circumstances shall be publicly stated on the agenda or announced.

(3) The receipt of a claim pursuant to the Government Claims Act…or some other written communication from a potential plaintiff threatening litigation, which claim or communication shall be available for public inspection pursuant to Section 54957.5.

(4) A statement made by a person in an open and public meeting threatening litigation on a specific matter within the responsibility of the legislative body.

(5) A statement threatening litigation made by a person outside an open and public meeting on a specific matter within the responsibility of the legislative body so long as the official or employee of the local agency receiving knowledge of the threat makes a contemporaneous or other

> record of the statement prior to the meeting, which record shall be available for public inspection pursuant to Section 54957.5.

Therefore, any time a closed session is scheduled because there is a "significant exposure to litigation," the facts and circumstances must be made known to the public, unless the facts and circumstances creating the threat are not yet known to the potential plaintiff. The Attorney General summarizes the disclosure requirements as follows:

- If there has been no kind of communication yet from the likely plaintiffs but the agency is aware of something that is likely to prompt a litigation threat—some accident, disaster, incident or transaction such as a contract dispute—"the facts must be publicly stated on the agenda or announced" prior to the closed session.

- If a claim or some other written threat of litigation has been received, the document is a public record and "reference to the claim or communication must be publicly stated on the agenda or announced" prior to the closed session.

- When the closed session is triggered by a litigation threat made in an open and public meeting, "reference to the statement must be publicly stated on the agenda or announced" prior to the closed session.

- When an oral threat of litigation is made outside a meeting, it may not be made the basis of a closed session unless the official who became aware of it makes a memo explaining what was said. The memo is a public record and "reference to the claim or communication must be publicly stated on the agenda or announced" prior to the closed session.

(California Attorney General*, The Brown Act: Open Meetings for Local Legislative Bodies* (2003) at pg. 23.)

The disclosure requirements serve an important purpose:

> [T]he important balance which the Brown Act attempts to draw between the requirement that public business be conducted in public and the practical need public agencies have for confidentiality when attempting to make rational decisions about the legal strength of argument asserted by an actual or probably adversary…The Brown Act attempts to draw that balance by, among other devices, requiring disclosure to the public of facts and circumstances which show that a public discussion of a particular matter is prejudicial to the agency's interests.

(CAUSE v. City of San Diego (1997) 56 Cal.App.4th 1024, 1030.)

Even before the codification of the exemption expressly permitting certain closed sessions related to litigation, the court in *Sacramento Newspaper Guild v. Sacramento County Bd. Of Supervisors* (1968) 263 Cal.App.2d 41, held "[n]either the attorney's presence nor the happenstance of some kind of lawsuit may serve as the pretext for secret consultations whose revelation will not injure the public interest."

Here, even had there been an actual threat of litigation which could have met the defined set of "facts and circumstances" necessary to hold a closed session under Section 54956.9, the City Council was not permitted to take action in closed session under the guise of "anticipated litigation" on an issue which must be discussed in open session.

In *Trancas Property Owners Assn. v. City of Malibu* (2006) 138 Cal.App.4th 172, the Court invalidated a settlement agreement adopted in closed session; the settlement agreement included the City's commitment to approve a development agreement. Because the city's decision to discuss the settlement agreement in closed session usurped the public's right to participate in the decision-making process regarding the development agreement, the City's action violated the Brown Act.

> **[W]hatever else it may permit, the exemption cannot be construed to empower a city council to take or agree to take, as part of a non-publicly-ratified litigation settlement, action that by substantive law may not be taken without a public hearing and an opportunity for the public to be heard.** As a matter of legislative intention and policy, a statute that is part of a law enacted to assure public decision-making, except in narrow circumstances, may not be read to authorize circumvention and indeed violation of other laws requiring that decisions be preceded by public hearings, simply because the means and object of the violation are settlement of a lawsuit.

(*Id*. at 186; internal citations omitted; emphasis added.)

Finally, a review of the City's agendas shows that the City routinely notices closed sessions pursuant to Government Code section 54956.9(d)(2), which allows a legislative body of a local agency to enter closed session to confer with legal counsel when there is a "significant exposure to litigation" based upon "existing facts and circumstances. However, the City Council routinely fails to disclose such existing facts and circumstances. To avoid its disclosure requirements, the City repeatedly relies on Government Code section 54956(e)(1), which would allow the District to refrain from disclosing "existing facts and circumstances" if the facts and circumstances are "not yet known to a potential plaintiff or plaintiffs." Because it would be highly unusual for a potential plaintiff to not know the ***facts*** that would give rise to possible litigation, the routine use of this section appears to be a pro forma way for the City Council to avoid its disclosure requirements.

CEASE AND DESIST DEMAND

The Brown Act section 54960 provides that any interested person may "commence an action by mandamus, injunction, or declaratory relief for the purpose of stopping or preventing violations or threatened violations," "to determine the applicability of this chapter to ongoing actions or threatened future actions of the legislative body, or to determine the applicability of this chapter to past actions of the legislative body."

In order to avoid litigation to force the District into compliance, FAC demands that the City Council cease and desist from the practices set forth above, which impair the public's ability to participate in its government. Namely, the City Council must acknowledge the Brown Act violations set forth above, and must agree unconditionally to refrain from the following practices in the future:

1. Failing to identify the topics to be discussed in closed session;

2. Discussing matters, including but not limited to the general state of the City's finances, in closed session where no closed session exemption provides a basis for the closed session discussion;

3. Failing to disclose the facts and circumstances that justify holding closed sessions pursuant to Government Code section 54956.9(d)(2); and,

REQUEST FOR RECORDS PURSUANT TO CPRA

Pursuant to the CPRA, the California Constitution (Article I, section 3) and FAC's rights of access under California common law, FAC hereby requests:

(1) All communications or other documents that were created, sent or received by the City Council and/or its individual members and that relate to or reference the materials enclosed with this letter;
(2) All communications or other documents that were created, sent or received by the City Council and/or its individual members before or after the City Council meetings of July 9, September 6 and September 20, 2017 and that concern actions to be taken as a result of any items discussed during closed session on those dates.

If any portion of the records requested is exempt from disclosure by express provisions of law, Government Code Section 6253(a) requires segregation and redaction of that material in order that the remainder of the information may be released. If you believe that any express provision of law exists to exempt from disclosure all or a portion of the records FAC has requested, you must notify FAC of the reasons for the determination

not later than 10 days from your receipt of this request letter. (Gov. Code § 6253(c).) Any response to this request that includes a determination that the request is denied, in whole or in part, must be in writing. (Gov. Code § 6255(b).)

Please contact me to obtain my consent before incurring copying costs, chargeable to FAC, in excess of $100.

Thank you for your prompt attention to these important matters.

Sincerely,

David Snyder
Executive Director
First Amendment Coalition

cc: City Attorney Virginia Gennaro via fax at (661) 852-2020

Enclosures