

County of Santa Clara

Office of the District Attorney

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Jeffrey Rosen
District Attorney

November 10, 2022

President Mike Wasserman
Vice President Susan Ellenberg
Supervisor Cindy Chavez
Supervisor Otto Lee
Supervisor Joe Simitian
Santa Clara County Board of Supervisors
c/o Tiffany Lennear, Clerk of the Board of Supervisors
70 West Hedding Street
East Wing, 10th Floor
San Jose, CA 95110

VIA EMAIL TO: BoardOperations@cob.sccgov.org and tiffany.lennear@cob.sccgov.org

Re: Demand to Cure or Correct Violations of the Ralph C. Brown Act Related to the Appointment of the Next County Executive

Dear President Wasserman and fellow members of the Board of Supervisors:

This letter is a demand that the Santa Clara County Board of Supervisors (“Board”) cure or correct its action taken in violation of the Ralph M. Brown Act (Gov. Code §§ 54950, et seq.) (“Brown Act”) related to the recent appointment of the next County Executive.

Statements made by several Supervisors, as well as the current County Executive, during an open session of the November 1, 2022, regular board meeting reveal that, during the Board’s October 17, 2022, closed session, Supervisors discussed, and took action to appoint, the next County Executive, which appointment is anticipated to be effective in July 2023.

Although the main purpose of the Brown Act is to allow the public to attend, observe, monitor, and participate in the decision-making process of local government, the law permits certain deliberations and decisions to be made outside the public’s view in closed sessions. These exceptions to the general open meeting requirements are expressly set forth in the Brown Act and are to be narrowly interpreted to fulfill this legislative purpose. To maintain the public’s engagement as much as possible, the Brown Act requires that topics for discussion in a closed session be described beforehand in a publicly available agenda so that community members can offer public comment on them before the legislative body retires to deliberate in private. The Brown Act also requires the prompt public reporting of any action taken during a closed session.

The appointment of a public employee is something that the Brown Act permits to be considered in closed session. (Gov. Code § 54957, subdiv. (b).) However, the matter must be listed as an item in an agenda made available to the public beforehand. (Gov. Code § 54954.2, subdiv. (a).) Because the purpose of the

agenda is to provide sufficient notice for community members to decide whether to attend and make comment, the item descriptions must be specific. For each type of matter permitted to be heard in closed session, the Brown Act provides suggested wording for agenda item descriptions that will provide the public with fair and legal notice. (Gov. Code § 54954.5.) For consideration of the appointment of a public employee in closed session, the wording is as follows:

PUBLIC EMPLOYEE APPOINTMENT

Title: (Specify description of position to be filled)

(Gov. Code § 54954.5, subdiv. (e).) Significantly, this statute distinguishes the consideration of public employee appointment from the consideration of other types of employment matters, such as public employment, public employment performance evaluation, and public employee discipline/dismissal/release, and offers different wording for each of these matters. (*Ibid.*)

Nowhere in the agenda for the October 17 closed session is there any indication that the Board would be considering the appointment of a public employee, let alone the appointment of the next County Executive. Item 3 on the agenda for the October 17 closed session appeared exactly as follows:

3. Public Employee Performance Evaluation and Public Employment (Government Code Section 54957(b)):

It is the intention of the Board to meet in Closed Session to consider the following positions of public employment:

Chief of Correction
Clerk of the Board
County Counsel
County Executive
Public Defender

Plainly, this does not alert the public that the Board would be considering, and might even appoint, the next County Executive. Without fair notice, community members—who later proved eager to weigh in—were unable to offer their comments prior to the closed session. This was a violation of the Brown Act.

The Brown Act also requires a legislative body to report any action taken in closed session to appoint a public employee “at the public meeting during which the closed session is held.” (Gov. Code § 54957.1, subdiv. (a)(5).) Importantly, “action taken” means not just a formal vote, but any collective decision made by a majority of the members. (Gov. Code § 54952.6.) Given the Board’s practice of holding its closed sessions on the day before its regular open session meetings, it is perhaps reasonable and practical to delay the report of any action taken in closed session until the next day’s open session. However, in this case, the report by County Counsel at the October 18th open session was “that there were no reportable actions taken at the October 17, 2022 Closed Session meeting.” The failure to report that the Board had appointed the next County Executive during the October 17, 2022 closed session was a violation of the Brown Act.


The Brown Act contemplates that sometimes mistakes will be made and violations will occur. For that reason, before a lawsuit may be filed, a complainant is required to make a written demand to the legislative body to cure or correct the action taken in violation of the Brown Act. The legislative body then has 30 days to cure or correct the action or respond in writing with its decision not to do so.

In this case, curing the action taken in violation of the Brown Act requires, at a minimum, that the Board properly describe in an agenda, for an upcoming open or closed session, its intended consideration of the appointment of the next County Executive. The public would then be permitted to comment on this matter

either before or during the Board's deliberations, and any action taken by the Board in closed session would be promptly reported to the public.

Should the Board fail to cure or correct these violations of the Brown Act within 30 days of receiving this letter, the Santa Clara County District Attorney's Office will file a lawsuit seeking the civil remedies set forth in Government Code section 54960.1, as well as costs and attorney fees pursuant to Government Code section 54960.5.

Sincerely,

A handwritten signature in black ink, appearing to read "Jeffrey F. Rosen". The signature is fluid and cursive, written over a white background.

Jeffrey F. Rosen
District Attorney

JFR/dm
c: Robert M. Coelho, Assistant County Counsel