

A Closed Session May Violate the Brown Act Where Litigation Threat Is Not Identified in the Publicly Available Agenda Packet

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Under the Brown Act, public agencies must disclose certain threats of litigation prior to discussing them in closed session. These closed session disclosure requirements were recently reinforced by the Court of Appeal in *Fowler v. City of Lafayette*.

In Fowler, a developer's attorney publicly threatened to sue the City of Lafayette if the City did not approve his client's project. Based on this threat, the City Council met in closed session to discuss the controversial project at three separate meetings. The nature of the litigation was neither noted in the agenda packet nor made publicly available. Instead, the agenda merely stated that the Council would consider one unidentified case of anticipated litigation. A City planner's note in the planning department's project file was the only documentation of the attorney's threat. The City Council ultimately approved the project, and several project opponents filed a petition for writ of mandate to overturn the decision because the Council's closed sessions violated the Brown Act.

The Brown Act authorizes legislative bodies to meet in closed session under five circumstances when "based on existing facts and circumstances, there is a significant exposure to litigation against the local agency." The City argued that two of the five scenarios – both based on threats of litigation – authorized the disputed closed sessions. However, the City did not disclose the facts or circumstances of the threats or make a record of the threats publicly available. The court found a violation where the City had merely identified the threat in the project file, rather than in the agenda packet made available upon request before the meeting. The public would have no way of knowing to ask for the project file if it sought information about the threat of litigation identified in the closed session agenda.

The court ultimately declined to nullify the City's decision because the City Council had approved the project in a properly agendaized public meeting, rather than the closed sessions. Nevertheless, the case serves as an important reminder that public agencies should carefully follow the Brown Act disclosure provisions applicable to closed session discussions of pending litigation.

If you have any questions, or would like more information about the Brown Act, please contact **Nick Ghirelli** or any other attorney in our Public Law Department.