
From: Jason Bezis <bezis4law@gmail.com>
Sent: Wednesday, December 1, 2021 9:04 PM
To: Ziegler, Donna, County Counsel
Cc: Campbell-Belton, Anika, CBS
Subject: Re: Urgent Action Needed - Government Code sec. 54957.5 Request for Documents - Nov. 16th Regular BOS Meeting - Item No. 58

Dear County Counsel Ziegler:

[LITIGATION HOLD/DOCUMENT PRESERVATION HOLD requested concerning Item no. 58 at November 16, 2021 regular meeting agenda. Please see below.]

[Please see Public Records Act request in the final paragraph. The Alameda County Taxpayers' Association can re-submit it in a separate message or on a form or through a designated forum/platform if County Counsel so requests.]

Thank you for providing a copy of a two-page letter dated November 15, 2021 "RE: Alameda County District 3 Appointment" and addressed to "President Carson and Honorable Members of the Board of Supervisors." This letter was discussed during Item No. 58 at the November 16, 2021 regular Board of Supervisors meeting. Supervisor Haubert appeared to read from it at 2:36:10 of the official video recording.

As you may know, California courts are more robustly enforcing violation of Brown Act Government Code sec. 54957.5 rights. See e.g., *Sierra Watch v. Placer County* (2021) 69 Cal.App.5th 1, 13-14 ("[W]e find the County violated section 54957.5 when, as a result of its own conduct, it failed to make the Schwab Memorandum available for public inspection at the time it distributed the memorandum to the Board."). Your County of Alameda has very serious problems with Government Code sec. 54957.5 compliance and records management, but my clients want to work cooperatively in good faith with the County, possibly to improve its practices, and to avoid litigation. My clients understand that sec. 54957.5 compliance has gotten more challenging in the current electronic age.

My clients are baffled as to why the Board Clerk did not have a copy of this letter that was "available upon request without delay," consistent with sec. 54957.5. The letter is clearly addressed to the entire Board. It states "VIA EMAIL TRANSMISSION." My clients want to know as soon as possible how this letter was received. Did President Carson alone receive a copy by e-mail? Did Assemblywoman Mia Bonta and/or Attorney General Bonta transmit it by e-mail to all four supervisors? Can the e-mail(s) transmitting the letter to the County be released to the public in order to see who was on the circulation list? The letter is dated November 15, 2021, the day before the meeting (apparently not "last minute"). So why wasn't a copy in the possession of the Board Clerk? You have no legal requirement to answer these specific questions, but we expect to receive a responsive document (or documents) that will provide answers (such as copies of the actual transmittal e-mail(s)).

What other letters/communications/documents were relied upon by the Board majority to make their Item no. 58 decisions that are still being concealed from public view? My clients expect that question to be answered through public record compilations that your Clerk should do to comply with my clients' sec. 54957.5 request, as discussed below.

At some local government meetings, the Presiding Officer, a Board member, the Board Clerk or City Attorney/Agency Counsel will interrupt the meeting when discussion of an unexpected writing begins and ask that a copy be provided for the Clerk and that at least one copy be placed at the back of the meeting room for the public to study. That should have happened during Item no. 58 at the November 16, 2021 regular meeting.

Brown Act Government Code sec. 54957.5 was enacted to address the very problem that has occurred with the County's inexcusably delayed production of this letter. Prior to its enactment, too many legislative bodies were receiving secretive last-minute communications, especially from "political insiders," and leaving the general public (the "non-

insiders") to deduce the existence of those last-minute communications from meeting deliberations and overheard conversations in the audience or in lobbies. In some public entities, elected officials and staff would coyly force the general public (the "non-insiders") to submit Public Records Act requests for those "late communications" and then string along the requesters for as long as possible by creating more impediments to access. That explains the clear legislative command in sec. 54957.5: "shall be made available upon request without delay." Unfortunately for Board Clerks in the modern electronic era, this means that writings can be distributed to Board members by outside parties at the last minute (or even during a meeting) that are difficult for Board Clerks to monitor. Therefore, the Board members themselves need to be cognizant of Brown Act obligations and to assist Board Clerks with Brown Act compliance.

Your Board of Supervisors apparently has an ingrained culture of non-transparency and a cavalier disregard for the express legal requirements of the Ralph M. Brown Act. The "better practice" (which I regularly encounter in countless other public entities) is for electronic communications addressed to a "City Council" or "Board of Supervisors" or "Governing Board" to be encouraged to be sent to a joint e-mail address that in turn distributes the communications to the legislative body members and the board/city clerk. This practice ensures that the board/city clerk receives most electronic communications and therefore the board/city clerk can efficiently group them and respond to sec. 54957.5 requests "without delay." "Best practices" with other legislative bodies is to train elected officials and their staff members to immediately forward any electronic communications to the board/city clerk that are addressed to an entire board/council/body, but are sent to just one member (usually the mayor/board president). In the absence of a group e-mail address, many citizens assume that e-mailing the mayor/board president alone is the equivalent of e-mailing the entire body because they simply assume that the mayor/board president will give the copy to the board/city clerk, who in turn will distribute copies to other board members, while retaining an archival copy as the public entity's "public record." Some citizens assume that a clerk prints out their electronic communications and physically delivers paper copies to each board member. The main problem, city clerks and board secretaries tell me, is that sometimes the mayors and board presidents never circulate the electronic copies to the entire board (despite the writer's intent) and never get around to forwarding them to city clerks/board secretaries. This usually all gets sorted out when a Government Code sec. 54957.5 request is made.

Therefore, the Alameda County Taxpayers' Association (ACTA) hereby repeats its request for all sec. 54957.5 "public records" relating to Item no. 58 on the November 16, 2021 Board of Supervisors regular meeting agenda. By ACTA's reading of sec. 54957.5(a), the County Clerk must immediately collect all "writings" relating to Item no. 58 that were "distributed to all, or a majority of all, of the members of the [Board of Supervisors] by any person in connection with a matter subject to discussion or consideration" during Item no. 58 of the November 16, 2021 regular meeting agenda. "Writings" presumably includes all letters, e-mails, text messages, social media exchanges, etc. that were distributed to at least three county supervisors. It is the Clerk's regular duty to do so. A section 6250 et seq. Public Records Act request (and waiting at least 10 days) is not necessary.

As part of your Clerk's collection efforts for Government Code sec. 54957.5(a) records, ACTA suggests that the start date be the date of Supervisor Chan's tragic accident (on or about November 3, 2021) and the end date/time be November 16, 2021 (up to 11:59 p.m. because the exact time of the final Board vote to appoint putative Supervisor Brown might be difficult to determine). Based upon supervisors' verbal statements during Item no. 58, discussion about filling the vacant seat District 3 began as early as November 3, 2021. Your Clerk, perhaps with County Counsel's assistance, needs to compel every county supervisor and every chief of staff to produce every "writing" that they received during that date range that relates to the filling of the District 3 Board vacancy. This includes not only e-mails received at County official addresses, but also e-mails received at personal e-mail addresses. This includes the staff of District 3. Your Clerk, after compiling this body of "writings" from each supervisor, needs to compare "writings" received by each supervisor and determine if at least three supervisors received that "writing."

My clients are patient. They realize that this sec. 54957.5 documents compilation will take time. But they expect that the compilation will be substantially completed at an earlier date than if they had made a Public Records Act request for the same information.

Based upon my more than twenty years of experience with the Ralph M. Brown Act, I see many warning signs that a **possible "serial meeting" might have occurred relating to Item no. 58 at the November 16, 2021 regular meeting.** Your County's monitoring of incoming communications/writings to ensure that all supervisors and the Clerk receive copies of writings circulated to a bare Board majority is shockingly lax. My clients suspect that Supervisors and "political insiders" are exploiting and abusing the County's lax Brown Act enforcement (for example, communicating with three supervisors but intentionally leaving off a fourth or fifth supervisor). This document compilation by the Clerk's office, which is a routine practice in many other California public entities that apply "best practices," would have the added benefit of ensuring that supervisors and their staff members have not circumvented the "serial meeting" prohibition and have not impermissibly reached a "collective consensus" outside of public view before the Item no. 58 public deliberations during the November 16, 2021 regular meeting.

Upon viewing the official video recording of the November 16, 2021 regular meeting, my clients were especially disturbed that many supervisors were off camera for much of the Item no. 58 deliberations. They are especially concerned that supervisors might have been conducting a "serial meeting" or otherwise communicating electronically with outside handlers while off camera. That is why they especially have requested all sec. 54957.5(c) writings that were distributed by any party to a Board majority during the November 16, 2021 regular meeting. My clients are very worried that supervisors and their staff members might be destroying those records or otherwise engaging in spoliation of evidence.

Therefore, my clients request that County Counsel issue a **"litigation hold/document preservation hold"** type of memorandum as soon as possible to all County supervisors, all County supervisor chiefs of staff, and all other County supervisor staff members instructing them to retain and not to delete any and all physical writings (including telephone conversation notes), any electronic writings, e-mails, text messages and other "public records" (broadly defined) effective immediately. As Supervisors themselves stated during the November 16, 2021 regular meeting, Item no. 58 was among the most controversial agenda items in the past 20-30 years that has been before the Board of Supervisors. The public has a right to access any and all public records that shed light on how a Walnut Creek resident ended up being ostensibly seated on the Alameda County Board of Supervisors.

My clients hereby request, pursuant to Public Records Act, Government Code sec. 6250 et seq., for **all public records, including but not limited to communications, including but not limited to e-mails and text messages, including District 3 Chief of Staff/ District 3 putative Supervisor Dave Brown as a sender and/or a recipient, dated November 2, 2021 to present, concerning the filling of the vacant seat on the Alameda County Board of Supervisors for District 3.** Consistent with *City of San Jose v. Superior Court* (2017) 2 Cal.5th 608, this request includes all accounts and devices, both official County ones and "private" accounts and devices. Records sent by or to Dave Brown that are entirely condolence messages are not covered by this request, but any record that pertains in any respect to the filling of the vacant seat is covered. If it is simplest or easiest just to produce all messages that Dave Brown sent or received during the time period concerning the District 3 vacancy, including messages that are entirely condolences and do not contain any discussion about filling the District 3 vacancy, then my clients would accept that. If identification of keywords for electronic searches of records databases would be helpful, ACTA's attorney would be willing to work with County Counsel to compile a list. If County Counsel would prefer a separate document making this Public Records Act request or that it be submitted on a certain form or through a particular forum or portal, then ACTA's attorney would be willing to do so.

Sincerely,
Jason Bezis
Law Offices of Jason A. Bezis
attorney for Alameda County Taxpayers' Association