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May 11, 2020

Honorable Tani Cantil-Sakauye, Chief Justice
and the Associate Justices
California Supreme Court
350 McAllister Street
San Francisco, CA 94102

Re: *Fowler, et al. v. City of Lafayette*, Case No. S261744
First Appellate District Court of Appeal, Case No. A156525 (46 Cal.App.5th 360)
Request for Partial Depublication

To the Chief Justice and the Associate Justices of the California Supreme Court:

Pursuant to rule 8.1125(a), the League of California Cities (the "League") and the California Special Districts Association ("CSDA") hereby respectfully request that this Court issue an order depublishing Part I.C of the Court of Appeal's opinion in the above-entitled cause for two reasons.[1] First, Part I.C fundamentally misinterprets the Ralph M. Brown Act ("Brown Act"),[2] upending the careful balance the Legislature struck in determining the specific circumstances under which a local agency's interest in its legislative body conferring privately with legal counsel over threatened litigation outweighs the strong public policy in favor of transparency and public participation in local government decision making. Second, if Part I.C remains a citable precedent, it threatens to impose overwhelming burdens on local agencies statewide, and expose them to costly and pointless litigation.[3]

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[1] This request was originally due on April 10, 2020 because the Court of Appeal's decision, which was issued on February 10, 2020, became final on March 11, 2020. (See Cal. Rules of Court, rule 8.1125(a)(4).) In light of the COVID-19 pandemic, this Court issued orders "extend[ing] by 30 days the time periods specified by the California Rules of Court for acts or events in proceedings before this court otherwise due to occur between March 20, 2020 and April 20, 2020, inclusive." (Administrative Order 2020-04-10; see also Administrative Order 2020-03-20.) Because May 10th falls on a Sunday, the new deadline for submitting this request is May 11, 2020. (See Cal. Rules of Court, rule 1.10(b).)

[2] (Gov. Code, § 54950 et seq.) Statutory references are to the Government Code unless otherwise noted.

[3] The League and CSDA believe that the faulty analysis and erroneous legal conclusion in Part I.C warrant partial depublication. If the Court is disinclined to issue a partial depublication order, however, the League and CSDA request that the entire opinion be depublished.

STANDARD FOR DEPUBLICATION

"The Supreme Court may order that an opinion certified for publication is not to be published or that an opinion not certified is to be published." (Cal. Rules of Court, rule 8.1105(e)(2).) "Any person may request the Supreme Court to order that an opinion certified for publication not be published." (*Id.*, rule 8.1125(a)(1).) The "request must concisely state the person's interest and the reason why the opinion should not be published." (*Id.*, rule 8.1125(a)(3).)

Lower court decisions may be depublished when "a majority of the justices consider the opinion to be wrong in some significant way, such that it would mislead the bench and bar if it remained as a citable precedent." (Joseph R. Grodin, *The Depublication Practice of the California Supreme Court* (1984) 72 Cal. L. Rev. 514, 515.)

INTEREST OF THE LEAGUE OF CALIFORNIA CITIES AND THE CALIFORNIA SPECIAL DISTRICTS ASSOCIATION

The League is an association of 478 California cities dedicated to protecting and restoring local control to provide for the public health, safety, and welfare of their residents, and to enhance the quality of life for all Californians. The League is advised by its Legal Advocacy Committee, comprised of 24 city attorneys from all regions of the State. The League monitors litigation of concern to municipalities statewide.

The CSDA is a California non-profit corporation consisting of over 900 special district members throughout California that was formed in 1969 to promote good governance and improved core local services through professional development, advocacy, and other services for all types of independent special districts. These special districts provide a wide variety of public services to urban, suburban and rural communities, including water supply, treatment and distribution, sewage collection and treatment, fire suppression and emergency medical services, recreation and parks, security and police protection, solid waste collection, transfer, recycling and disposal, library, cemetery, mosquito and vector control, road construction and maintenance, pest control and animal control services, and harbor and port services. CSDA is advised by its Legal Advisory Working Group, comprised of attorneys from all regions of the state with an interest in legal issues related to special districts. CSDA monitors litigation of concern to special districts statewide.

REASONS WHY PART I.C OF THE DECISION BELOW SHOULD NOT BE PUBLISHED

The portion of the Court of Appeal's decision regarding the "Availability of Agendas and Other Writings" (Part I.C) should be depublished because it erroneously interprets the Brown Act to require a local agency—such as a city or special district—to include in its public meeting agenda packet a written record documenting threatened litigation that the legislative body plans to

discuss in closed session with its legal counsel, when the Brown Act merely requires that the agency make that record available for public inspection "upon request without delay." The issue may appear narrow. But its implications for local agencies are neither narrow nor benign.

I. The Brown Act Provisions at Issue: Sections 54956.9(e)(5) and 54957.5(a)

The Brown Act permits a legislative body of a local agency to "hold[] a closed session to confer with, or receive advice from, its legal counsel regarding pending litigation when discussion in open session concerning those matters would prejudice the position of the local agency in the litigation." (§ 54956.9, subd. (a).) Litigation is considered "pending" under a variety of circumstances, including when "[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, subd. (d)(2).)

Only five types of "existing facts and circumstances" justify holding a closed session to discuss potential litigation against the agency. (§ 54956.9, subd. (e).) The fifth category is at issue here:

> (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*.
> . . .

(§ 54956.9, subd. (e)(5) [emphasis added].)

By its terms—"which record shall be available for public inspection pursuant to Section 54957.5"—this fifth category justifying holding a closed session brings into play Section 54957.5. Section 54957.5 provides, in pertinent part:

> (a) Notwithstanding Section 6255 or any other law, agendas of public meetings and any other writings, when distributed to all, or a majority of all, of the members of a legislative body of a local agency by any person in connection with a matter subject to discussion or consideration at an open meeting of the body, are disclosable public records under the California Public Records Act (Chapter 3.5 (commencing with Section 6250) of Division 7 of Title 1), and shall be made available upon request without delay. However, this section shall not include any writing exempt from public disclosure under Section 6253.5, 6254, 6254.3, 6254.7, 6254.15, 6254.16, 6254.22, or 6254.26.

(§ 54957.5, subd. (a).)

II. The Court of Appeal Erroneously Interpreted Sections 54956.9(e)(5) and 54957.5

In Part I.C of the opinion, the Court of Appeal erroneously interpreted the language in Section 54956.9(e)(5) stating that the record the agency must create to document a verbal threat of litigation "be *available for public inspection pursuant to Section 54957.5*" (§ 54956.9, subd. (e)(5) [emphasis added]), to mean that the record must be *distributed* to members of the legislative body and the public with the agenda packet, as opposed to merely "available for public inspection upon request without delay." (Typed opn. at p. 9.)

But Section 54956.9 says simply that the record documenting the litigation threat must be "made available for public inspection pursuant to Section 54957.5." (§ 54956.9, subd. (e)(5).) It is, self-evidently, a rule governing public access to the record. In turn, Section 54957.5(a) provides that agendas for public meetings and, subject to certain exemptions, documents that a public agency distributes to a legislative body regarding an agenda item for an open meeting are subject to public disclosure under the California Public Records Act and must be "made available upon request without delay." That provision, too, is self-evidently a rule governing public access to records—and records relating to an open session agenda item, not a closed session item. Subdivisions (b) and (c) of Section 54957.5 then provide when and how written materials distributed to the legislative body just before or during the open meeting must be made available to members of the public upon request. (See § 54957.5, subds. (b)(1) & (2) [requiring writings distributed to the legislative body "less than 72 hours prior" to a meeting to be "available for public inspection" at the time distributed to the legislative body at a location designated by the agency]; (c) [establishing when and where writings distributed to the legislative body "during a public meeting" must be "available for public inspection"].)

Nowhere does Section 54956.9(e)(5) or Section 54957.5 state that the record created to document a litigation threat to be discussed in closed session must be affirmatively distributed to anyone absent a request for that document. On the contrary, the process set forth in Section 54957.5 for allowing public inspection of certain types of "*disclosable* public records" requires that the relevant document be "available *upon request without delay*." (§ 54957.5, subd. (a) [emphasis added].) That process ensures that members of the public seeking to inspect certain public records pertaining to items to be addressed at a public meeting have the opportunity to do so before the meeting rather than under the longer timetable provided in the Public Records Act. (See § 6253, subds. (c) [requiring agencies to notify the requestor no later than 10 calendar days after receipt of request whether records will be disclosed and, if so, "the estimated date and time when the records will be made available"]; (c)(1-4) [allowing a 14-day extension of the 10-day notification deadline under specified circumstances].) In effect, this Brown Act provision is an exception to the Public Records Act.

Section 54956.9(e)(5)'s cross-reference to Section 54957.5 ensures *timely* public access to records documenting threats of litigation to be discussed in closed session. Indeed, without

Section 54956.9's reference to Section 54957.5, a member of the public who reviews a properly noticed agenda containing a closed session item regarding threatened litigation and makes an immediate request for public records documenting the litigation threat, may not obtain access to the record until well *after* the closed session under the process in the Public Records Act.

The legislative history of these two provisions confirms this interpretation. The Legislature added the current language of Section 54956.9(e)(5)[4] referencing Section 54957.5 in a series of three bills enacted during the 1993-1994 Regular Session. (See Stats. 1993, ch. 1136, §§ 11, 14; Stats. 1993, ch. 1137, §§ 11, 14; Stats. 1994, ch. 32, §§ 13, 16.) Prior to that legislation, Section 54957.5(a) merely provided that agendas of public meetings and other writings distributed to members of a legislative body "are public records under the California Public Records Act [citation] as soon as distributed, and shall be made available *pursuant to Sections 6253 and 6256"* of the Public Records Act. (Former § 54957.5, subd. (a), Stats. 1981, ch. 968, § 32 [emphasis added].) At the time, Section 6256 allowed public agencies 10 days to respond to a Public Records Act request. (See former § 6256, Stats. 1981, ch. 968, § 3.1.)[5]

In the 1993-94 legislative session, however, the Legislature broadened the public's right to inspect public records under Section 54957.5(a), amending the statute to provide that these documents "are *disclosable* public records under the California Public Records Act [citation], and shall be made available *upon request without delay*." (Stats. 1994, ch. 32, § 16 [emphasis added]; see also Stats. 1993, ch. 1136, § 14; Stats. 1993, ch. 1137, § 14.) By replacing "pursuant to Sections 6253 and 6256" with "upon request without delay," the Legislature gave the public the right to inspect certain types of public records relating to an open meeting *at the time requested* rather than under the longer timeline in the Public Records Act. The fact that the Legislature added the cross-reference requiring records documenting litigation threats to be "available for public inspection pursuant to Section 54957.5" in the same legislative session provides strong evidence of that purpose.

The Court of Appeal overlooked this straightforward interpretation based on the clear language and legislative history of Sections 54956.9(e)(5) and 54957.5. Instead, the Court of Appeal concluded, without support in the statutory text or legislative history, that Section 54956.9(e)(5)'s reference to Section 54957.5 must be read to require the record documenting a litigation threat to be distributed to legislative bodies and then, having been so distributed, would make its way to all members of the public without any member of the public requesting that

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[4] Subdivision (e)(5) was previously labeled subdivision (b)(3)(E) but was renumbered in 2012 as part of a non-substantive technical amendment. (41 Cal.L.Rev.Comm. Reports 285 (2011).)

[5] In 1998, the Legislature repealed Section 6256 and reenacted the 10-day deadline in Section 6253(c), adding circumstances justifying an extension of that deadline. (See Stats. 1998, ch. 620, §§ 5, 7.)

document. In doing so, the Court of Appeal concluded that Section 54956.9(e)(5)'s reference to Section 54957.5 requires the record of the litigation threat to be included in the agenda packet the agency distributes to the legislative body and members of the public who have requested copies of agenda packets. (See Typed opn. at pp. 9-11.)

But Section 54954.1, which requires local agencies to mail copies of the agenda and "documents constituting the agenda packet" to any person who makes an annual request for such documents, is the only provision in the Brown Act that references an agenda packet. And even that provision did not refer to an "agenda packet" until 1997, *four years after* the Legislature added the reference to Section 54957.5 in Section 54956.9(e)(5). (Compare Stats. 1997, ch. 253, § 4, and Stats. 1990, ch. 1198, § 1, with Stats. 1993, ch. 1136, §§ 11, 14; Stats. 1993, ch. 1137, §§ 11, 14; Stats. 1994, ch. 32, §§ 13, 16.) Thus, when the Legislature linked Section 59456.9(e)(5) to Section 54957.5 by providing that the record of the litigation threat "shall be available for public inspection pursuant to Section 54957.5," (§ 59456.9(e)(5)), the Legislature could not have meant that the record must be included in the meeting materials the agency distributes to the legislative body.

Moreover, Section 54956.9(e)(5) references Section 54957.5, not Section 54954.1, and Section 54957.5 does not define what documents agencies must distribute to members of the legislative body. Rather, Section 54957.5 provides that *if a* writing is distributed *by any person* to a majority of the legislative body in connection with an open meeting item, then subject to narrow exceptions that writing is a "disclosable public record[]" that must be "available for public inspection upon request without delay." And there is nothing in the text or legislative history of the Brown Act to suggest, as the Court of Appeal assumes, that agency staff must include in "agenda packets" documents that *members of the public* provide to the legislative body about open meeting agenda items. (Typed opn. at p. 10.)

In addition to ignoring both the text and legislative history of the applicable Brown Act provisions, the Court of Appeal overlooked *Poway Unified School Dist. v. Superior Court (Copley Press)* (1998) 62 Cal.App.4th 1496, which harmonized the Public Records Act and the Brown Act in the closely related context of closed sessions held to discuss written litigation threats. (See § 54956.9(e)(3).) Like subdivision (e)(5), subdivision (e)(3) requires the writing containing the threat of litigation to be made "*available for public inspection pursuant to Section 54957.5*." (§ 54956.9, subd. (e)(3) [emphasis added].)

In *Poway*, a newspaper sued a school district for refusing to disclose in response to a Public Records Act request a claim form submitted to the district under the Government Claims Act. (62 Cal.App.4th at pp. 1499-1500.) The district contended that the claim form was exempt from disclosure under the Public Records Act, but the Court of Appeal disagreed, holding that the asserted exemption did not encompass the claim form itself. (*Id.* at p. 1505.)

The *Poway* court reached this conclusion by invoking the principle of *in pari materia*, which provides that "two statutes touching upon a common subject are to be construed in reference to each other so as to 'harmonize the two in such a way that no part of either becomes surplusage.'" (62 Cal.App.4th at pp. 1503-1504.) Using that canon to harmonize the Public Records Act with the Brown Act, the *Poway* court looked at Section 54956.9(e)(3) for guidance because that provision "expressly acknowledges the availability of the Claims Act claims themselves for public inspection, referencing the Public Records Act." (*Id.* at p. 1503.)

The *Poway* court further explained that the link to Section 54957.5 in Section 54956.9(e)(3) was intended to ensure that records of litigation threats the Brown Act requires to justify a closed session are available to the public upon request *faster* than the Public Records Act requires:

> The District contends these Brown Act provisions have no bearing on this case, because they apply only upon distribution of a Claims Act claim to the members of a legislative body of a local agency, in a closed session; and the mere act of distributing the claim at a closed meeting effects a waiver of the exemption from disclosure. We find this distinction untenable, because *section 54956.9 simply announces the preexisting status of the Claims Act claim itself as a disclosable public record. It is merely a matter of convenience to have the claim available to the public at the time of the meeting*.

(*Poway*, *supra*, 62 Cal.App.4th at p. 1503-1504 & fn. 3 [emphasis added].) It follows that a written threat of litigation under subdivision (e)(3)—just like a record documenting a verbal litigation threat under subdivision (e)(5)—is not required to be included in the agenda packet described in Section 54954.1 but instead must be available "upon request without delay."

In concluding instead that "a record of the threat should have been included in the agenda packet" (Typed opn. at p. 10), the Court of Appeal overlooked *Poway*'s interpretation of an identical portion of Section 54956.9 as well as its use of the *in pari materia* canon to harmonize the Brown Act and Public Records Act. Indeed, the decision makes no mention of *Poway*.

This error is critical. "The balance between the competing interests in open government and effective administration of justice has been struck for local governing bodies in the Public Records Act and the Brown Act," and courts should be cautious before "disturb[ing] the equilibrium achieved by that legislation." (*Roberts v. City of Palmdale* (1993) 5 Cal.4th 363, 381.) To preserve this equilibrium, the phrase "available for public inspection" in the Brown Act must be understood within the context of the Public Records Act, where similar phrasing is used to mean that a record is made available only *upon a request* that reasonably describes identifiable disclosable records. (See, e.g., § 6253, subd. (a) ["Any reasonably segregable portion of a record *shall be available for inspection* by any person requesting the record after deletion of the portions that are exempted by law"], emphasis added; § 6253, subd. (b) ["each state or local

agency, *upon a request for a copy of records that reasonably describes an identifiable record or records, shall make the records promptly available* to any person upon payment of fees covering direct costs of duplication, or a statutory fee if applicable"], emphasis added.)

Recognizing that the Legislature has described the procedures governing access to public records "in exceptionally careful detail," this Court has repeatedly refused to impose additional requirements on public agencies by inference. (*Haynie v. Superior Court* (2001) 26 Cal.4th 1061, 1073-1074 [refusal to infer requirement that agencies create for requesters a privilege log detailing withheld records]; *Williams v. Superior Court* (1993) 5 Cal.4th 337, 355, 361-362 [refusal to infer that exemption for law enforcement investigative records terminates upon end of investigation].) Although these cases interpret the Public Records Act, the principle applies equally to its open government partner, the Brown Act, especially as to the Brown Act provisions relevant here, which also are written "in exceptionally careful detail" using language borrowed from and referencing the Public Records Act to address public access to records.

Finally, contrary to the Court of Appeal's view, a straightforward interpretation of Sections 54956.9 and 54957.5 does not render the public availability of a record documenting threatened litigation "illusory" because "an interested person would not know the question to ask." (Typed opn. at p. 11.) A member of the public need not employ magic words or know the exact location of the record documenting a litigation threat to request it as the Court of Appeal suggests. The Brown Act clearly and specifically defines what notice the public must receive about threatened litigation to be discussed in closed session. (See § 54956.9, subd. (g) [requiring agencies to "state on the agenda or publicly announce the paragraph of subdivision (d) that authorizes the closed session" before holding a closed session under Section 54956.9]; § 54954.5, subd. (c) [specifying agenda language for describing closed session items relating to threatened litigation].) Based on that notice, a member of the public is free to ask simply for public records documenting the litigation threat to be discussed in closed session. In any event, it "is not [the courts'] role, but rather that of the Legislature, to strike an appropriate balance between the competing interests of openness and efficiency in the context of the Brown Act." (*Shapiro v. Board of Directors* (2005) 134 Cal.App.4th 170, 185.)

Part I.C of the opinion should be depublished because it overlooks the plain language of the statute, the clear legislative history showing that the reference to Section 54957.5 was meant to allow public inspection of records documenting litigation threats sooner than the Public Records Act requires, *Poway*'s construction of an identical Brown Act provision, and this Court's decisions refusing to impose public records obligations on public agencies by inference.

III. The Court of Appeal's Faulty and Unsupported Opinion Will Impose Extraordinary Burdens on Public Agencies and Expose Them to Needless and Costly Litigation

Should it remain a citable precedent, the faulty decision below puts local agencies in an untenable dilemma. The standard practice of public agencies statewide does not conform to the Court of Appeal's opinion. Rather, the common practice is for the agenda to indicate that there is a litigation threat, and then, if someone requests the record documenting that threat, to provide a copy readily.

Given the decision below, however, any local agency that indicates a threat of litigation as a closed session item on a meeting agenda but does not include the record of the threat with the agenda materials distributed to the members of the legislative body may face a Brown Act suit and possible liability for attorney's fees to a successful plaintiff. (See § 54960.5 [allowing "court costs and reasonable attorney fees" for certain Brown Act violations].)

Moreover, if local agencies change their current practice and distribute documents memorializing litigation threats along with the agenda packet materials many agencies statewide routinely make available online, then enterprising attorneys could survey agenda packets across the state to find potential plaintiffs and theories of liability. Local agencies could face an unprecedented increase in "copycat" litigation threats, and ultimately litigation. Such a risk would discourage local legislative bodies from meeting with counsel in closed session about many types of litigation threats, disrupting the "important balance" the Legislature has struck "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 arguments asserted by an actual or probable adversary." (*Cal. Alliance for Utility etc. Ed. v. City of San Diego* (1997) 56 Cal.App.4th 1024, 1030.)

Further, as discussed above, the Court of Appeal's decision rests on its unsupported and faulty assumption that if anyone distributes a document pertaining to an open meeting agenda item to a majority of the legislative body, that record must be included in the agenda materials the agency distributes to the body. But that would mean that the agency would lose control over what documents are included in agenda packets, stripping the agency of the discretion to limit those materials to those most conducive to an informed and productive consideration of the agenda item. Instead, members of the public, by submitting materials related to agenda items directly to members of the legislative body, could transform the agenda packet into a grab bag of dubious value, while expanding the size of the packet, possibly exponentially. And arguably all materials transmitted by agency staff to a majority of the legislative body in connection with an agenda item—no matter how tangential, repetitious, or subject to misconstruction—would also need to be included in the agenda packet.

Finally, if similar requirements under the Public Records Act or other statutes that public agencies make records "available to the public" or "available for inspection" are likewise construed to require agencies take affirmative steps to provide ready access to public records to the public without a specific request for identifiable records—for example, by posting disclosable public records online—overwhelming burdens would be placed on public agencies statewide. Under such an erroneous and unfounded interpretation of the Public Records Act, for example, agency staff would be obligated to collect the countless physical and electronic records each department, employee and official create or receive on an ongoing basis, determine whether each document is subject to public disclosure, where possible redact non-disclosable information contained in otherwise disclosable records, and then create and maintain a system for providing all members of the public ready access to all disclosable public records. That undertaking would require a staggering commitment of public resources that would threaten to derail ongoing agency operations and create a significant potential for errors and endless litigation.

* * *

For the reasons set forth above, the League and CSDA respectfully request the Court to issue an order depublishing Part I.C of the opinion below.

Sincerely,

Teresa L. Stricker (SBN 160601)
Ryan P. McGinley-Stempel (SBN 296182)

Attorneys for the League of California Cities and California Special Districts Association

PROOF OF SERVICE

Case Name: ***Fowler, et al. v. City of Lafayette***
Case No.: **S261744**

I am not a party to the within action, am over 18 years of age. My business address is 350 Sansome Street, Suite 300, San Francisco, California 94104.

On May 11, 2020, I served the following document(s): **Request for Partial Depublication t**o the parties listed below by electronic service through TrueFiling:

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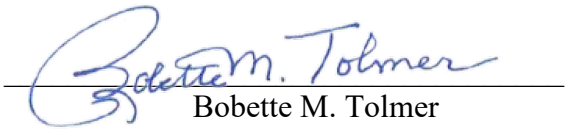
And by U.S. Mail to:

Rendering Court	Court of Appeal First Appellate District 350 McAllister Street San Francisco, CA 94102

I declare, under penalty of perjury that the foregoing is true and correct. Executed on May 11, 2020, in Dublin, California.



Bobette M. Tolmer