

AMENDED IN ASSEMBLY AUGUST 13, 2012

AMENDED IN ASSEMBLY JUNE 19, 2012

AMENDED IN SENATE MAY 3, 2012

AMENDED IN SENATE APRIL 11, 2012

SENATE BILL

No. 1003

Introduced by Senator Yee

(Principal coauthor: Assembly Member Alejo)

February 6, 2012

An act to amend Sections 54960 and 54960.5 of, and to add Section 54960.2 to, the Government Code, relating to local government.

LEGISLATIVE COUNSEL'S DIGEST

SB 1003, as amended, Yee. Local government: open meetings: cease and desist letters.

Existing law, the Ralph M. Brown Act (Brown Act), requires each legislative body of a local agency to provide the time and place for holding regular meetings and requires that all meetings of a legislative body be open and public and all persons be permitted to attend unless a closed session is authorized. Existing law authorizes the district attorney or any interested person to file an action by mandamus, injunction, or declaratory relief to, among other things, determine the applicability of the act to actions or threatened future ~~action~~ *actions* of the legislative body.

This bill would prohibit a district attorney or an interested person from filing an action for an alleged violation of the Brown Act for past actions of a legislative body, unless certain conditions are met, including, but not limited to, a requirement that the district attorney or interested person submit a cease and desist letter to the legislative body being

accused of the violation setting forth the alleged violation, and the legislative body has failed to issue an unconditional commitment to cease and desist from the alleged past action within 30 days of receiving the letter. The bill would require the unconditional commitment to cease and desist from the alleged past action to meet certain requirements. The bill would require that an action filed to challenge an alleged violation of the Brown Act pursuant to these provisions be dismissed with prejudice if the legislative body enters into an unconditional commitment to cease and desist from the alleged past action. The bill would authorize the legislative body to enter into an unconditional commitment to cease and desist from the alleged action at any time, unless the plaintiff succeeds in a civil action against the legislative body and is awarded attorney's fees. The bill would provide that if an action filed to challenge an alleged violation of the Brown Act pursuant to these provisions is dismissed with prejudice because the legislative body has entered into an unconditional commitment to cease and desist from the alleged action after the 30-day period described above, and if the filing of that action caused the legislative body to enter into the unconditional commitment, then a court shall award costs and reasonable attorney's attorney fees to the plaintiff. The bill would require a legislative body that wishes to rescind a commitment to do so by a majority vote of the membership of the legislative body.

Vote: majority. Appropriation: no. Fiscal committee: no.
State-mandated local program: no.

The people of the State of California do enact as follows:

1 SECTION 1. Section 54960 of the Government Code is
2 amended to read:
3 54960. (a) The district attorney or any interested person may
4 commence an action by mandamus, injunction, or declaratory relief
5 for the purpose of stopping or preventing violations or threatened
6 violations of this chapter by members of the legislative body of a
7 local agency or to determine the applicability of this chapter to
8 ongoing actions or threatened future-action actions of the legislative
9 body, or to determine the applicability of this chapter to past actions
10 of the legislative body, subject to Section 54960.2, or to determine
11 whether any rule or action by the legislative body to penalize or
12 otherwise discourage the expression of one or more of its members
13 is valid or invalid under the laws of this state or of the United

1 States, or to compel the legislative body to audio record its closed
2 sessions as hereinafter provided.

3 (b) The court in its discretion may, upon a judgment of a
4 violation of Section 54956.7, 54956.8, 54956.9, 54956.95, 54957,
5 or 54957.6, order the legislative body to audio record its closed
6 sessions and preserve the audio recordings for the period and under
7 the terms of security and confidentiality the court deems
8 appropriate.

9 (c) (1) Each recording so kept shall be immediately labeled
10 with the date of the closed session recorded and the title of the
11 clerk or other officer who shall be custodian of the recording.

12 (2) The audio recordings shall be subject to the following
13 discovery procedures:

14 (A) In any case in which discovery or disclosure of the audio
15 recording is sought by either the district attorney or the plaintiff
16 in a civil action pursuant to Section 54959, 54960, or 54960.1
17 alleging that a violation of this chapter has occurred in a closed
18 session that has been recorded pursuant to this section, the party
19 seeking discovery or disclosure shall file a written notice of motion
20 with the appropriate court with notice to the governmental agency
21 that has custody and control of the audio recording. The notice
22 shall be given pursuant to subdivision (b) of Section 1005 of the
23 Code of Civil Procedure.

24 (B) The notice shall include, in addition to the items required
25 by Section 1010 of the Code of Civil Procedure, all of the
26 following:

27 (i) Identification of the proceeding in which discovery or
28 disclosure is sought, the party seeking discovery or disclosure, the
29 date and time of the meeting recorded, and the governmental
30 agency that has custody and control of the recording.

31 (ii) An affidavit that contains specific facts indicating that a
32 violation of the act occurred in the closed session.

33 (3) If the court, following a review of the motion, finds that
34 there is good cause to believe that a violation has occurred, the
35 court may review, in camera, the recording of that portion of the
36 closed session alleged to have violated the act.

37 (4) If, following the in camera review, the court concludes that
38 disclosure of a portion of the recording would be likely to
39 materially assist in the resolution of the litigation alleging violation
40 of this chapter, the court shall, in its discretion, make a certified

1 transcript of the portion of the recording a public exhibit in the
2 proceeding.

3 (5) ~~Nothing in this~~ This section shall *not* permit discovery of
4 communications that are protected by the attorney-client privilege.

5 SEC. 2. Section 54960.2 is added to the Government Code, to
6 read:

7 54960.2. (a) The district attorney or any interested person may
8 file an action to determine the applicability of this chapter to past
9 actions of the legislative body pursuant to subdivision (a) of Section
10 54960 only if all of the following conditions are met:

11 (1) The district attorney or interested person alleging a violation
12 of this chapter first submits a cease and desist letter by postal mail
13 or facsimile transmission to the clerk or secretary of the legislative
14 body being accused of the violation, as designated in the statement
15 pertaining to that public agency on file pursuant to Section 53051,
16 or if the agency does not have a statement on file designating a
17 clerk or a secretary, to the chief executive officer of that agency,
18 clearly describing the past action of the legislative body and nature
19 of the alleged violation.

20 (2) The cease and desist letter required under paragraph (1) is
21 submitted to the legislative body within nine months of the alleged
22 violation.

23 (3) The time during which the legislative body may respond to
24 the cease and desist letter pursuant to subdivision (b) has expired
25 and the legislative body has not provided an unconditional
26 commitment pursuant to subdivision (c).

27 (4) Within 60 days of receipt of the legislative body's response
28 to the cease and desist letter, other than an unconditional
29 commitment pursuant to subdivision (c), or within 60 days of the
30 expiration of the time during which the legislative body may
31 respond to the cease and desist letter pursuant to subdivision (b),
32 whichever is earlier, the party submitting the cease and desist letter
33 shall commence the action pursuant to subdivision (a) of Section
34 54960 or thereafter be barred from commencing the action.

35 (b) The legislative body may respond to a cease and desist letter
36 submitted pursuant to subdivision (a) within 30 days of receiving
37 the letter. This subdivision shall not be construed to prevent the
38 legislative body from providing an unconditional commitment
39 pursuant to subdivision (c) at any time after the 30-day period has
40 expired, except that in that event the court shall award court costs

1 and reasonable ~~attorney's~~ *attorney* fees to the plaintiff in an action
2 brought pursuant to this section, in accordance with Section
3 54960.5.

4 (c) (1) If the legislative body elects to respond to the cease and
5 desist letter with an unconditional commitment to cease, desist
6 from, and not repeat the past action that is alleged to violate this
7 chapter, that response shall be in substantially the following form:

8
9 To _____:

10
11 The [name of legislative body] has received your cease and desist
12 letter dated [date] alleging that the following described past action
13 of the legislative body violates the Ralph M. Brown Act:

14
15 [Describe alleged past action, as set forth in the cease and desist
16 letter submitted pursuant to subdivision (a)]

17
18 In order to avoid unnecessary litigation and without admitting
19 any violation of the Ralph M. Brown Act, the [name of legislative
20 body] hereby unconditionally commits that it will cease, desist
21 from, and not repeat the challenged past action as described above.

22
23 The [name of legislative body] may rescind this commitment
24 only by a majority vote of its membership taken in open session
25 at a regular meeting and noticed on its posted agenda as
26 “Rescission of Brown Act Commitment.” You will be provided
27 with written notice, sent by any means or media you provide in
28 response to this message, to whatever address or addresses you
29 specify, of any intention to consider rescinding this commitment
30 at least 30 days before any such regular meeting. In the event that
31 this commitment is rescinded, you will have the right to commence
32 legal action pursuant to subdivision (a) of Section 54960 of the
33 Government Code. That notice will be delivered to you by the
34 same means as this commitment, or may be mailed to an address
35 that you have designated in writing.

36
37 Very truly yours,

38
39 _____
[Chairperson or acting chairperson of the legislative body]

40

1 (2) An unconditional commitment pursuant to this subdivision
2 shall be approved by the legislative body in open session at a
3 regular or special meeting as a separate item of business, and not
4 on its consent agenda.

5 (3) An action shall not be commenced to determine the
6 applicability of this chapter to any past action of the legislative
7 body for which the legislative body has provided an unconditional
8 commitment pursuant to this subdivision. During any action
9 seeking a judicial determination regarding the applicability of this
10 chapter to any past action of the legislative body pursuant to
11 subdivision (a), if the court determines that the legislative body
12 has provided an unconditional commitment pursuant to this
13 subdivision, the action shall be dismissed with prejudice. Nothing
14 in this subdivision shall be construed to modify or limit the existing
15 ability of the district attorney or any interested person to commence
16 an action to determine the applicability of this chapter to ongoing
17 actions or threatened future actions of the legislative body.

18 (4) Except as provided in subdivision (d), the fact that a
19 legislative body provides an unconditional commitment shall not
20 be construed or admissible as evidence of a violation of this
21 chapter.

22 (d) If the legislative body provides an unconditional commitment
23 as set forth in subdivision (c), the legislative body shall not
24 thereafter take or engage in the challenged action described in the
25 cease and desist letter, except as provided in subdivision (e).
26 Violation of this subdivision shall constitute an independent
27 violation of this chapter, without regard to whether the challenged
28 action would otherwise violate this chapter. An action alleging
29 past violation or threatened future violation of this subdivision
30 may be brought pursuant to subdivision (a) of Section 54960,
31 without regard to the procedural requirements of this section.

32 (e) The legislative body may resolve to rescind an unconditional
33 commitment made pursuant to subdivision (c) by a majority vote
34 of its membership taken in open session at a regular meeting as a
35 separate item of business not on its consent agenda, and noticed
36 on its posted agenda as “Rescission of Brown Act Commitment,”
37 provided that not less than 30 days prior to such regular meeting,
38 the legislative body provides written notice of its intent to consider
39 the rescission to each person to whom the unconditional
40 commitment was made, and to the district attorney. Upon

1 rescission, the district attorney or any interested person may
2 commence an action pursuant to subdivision (a) of Section 54960.
3 An action under this subdivision may be brought pursuant to
4 subdivision (a) of Section 54960, without regard to the procedural
5 requirements of this section.

6 SEC. 3. Section 54960.5 of the Government Code is amended
7 to read:

8 54960.5. A court may award court costs and reasonable attorney
9 fees to the plaintiff in an action brought pursuant to Section 54960,
10 54960.1, or 54960.2 where it is found that a legislative body of
11 the local agency has violated this chapter. Additionally, when an
12 action brought pursuant to Section 54960.2 is dismissed with
13 prejudice because a legislative body has provided an unconditional
14 commitment pursuant to paragraph (1) of subdivision (c) of that
15 section at any time after the 30-day period for making such a
16 commitment has expired, the court shall award court costs and
17 reasonable ~~attorney's~~ attorney fees to the plaintiff if the filing of
18 that action caused the legislative body to issue the unconditional
19 commitment. The costs and fees shall be paid by the local agency
20 and shall not become a personal liability of any public officer or
21 employee of the local agency.

22 A court may award court costs and reasonable attorney fees to
23 a defendant in any action brought pursuant to Section 54960 or
24 54960.1 where the defendant has prevailed in a final determination
25 of such action and the court finds that the action was clearly
26 frivolous and totally lacking in merit.

27 SEC. 4. The provisions of this act shall not apply to past actions
28 of a legislative body that occurred before January 1, 2013.