From: Page, Leon
Sent: Friday, March 31, 2017 3:50 PM
To: 'Brendan Hamme'
Cc: Braun, Carrie
Subject: RE: Brown Act and First Amendment Violations at Board of Supervisors' Meetings

Hi Brendan,

Thank you for the email. With respect to the other issues you identified in your letter, we did take a very close look and (respectfully) came to the conclusion that many of your arguments were misplaced or lack merit. I outline our thoughts on these issues below.

Public Comments at Regular Meetings

In our view, the plain language of Government Code section 54954.3 supports the Board's policy of providing for public comment at the beginning of each regular meeting wherein members of the public may comment on any matter on the Board's meeting agenda, or on any matter within the Board's subject-matter jurisdiction. Government Code section 54954.3(a) requires:

> Every agenda for regular meetings shall provide **an opportunity** for members of the public to directly address the legislative body on any item of interest to the public, **before or during** the legislative body's consideration of the item, that is within the subject matter jurisdiction of the legislative body, provided that no action shall be taken on any item not appearing on the agenda unless the action is otherwise authorized by subdivision (b) of Section 54954.2.

(Emphasis added.) As I am sure you will agree, the statute, by its plain terms, regulates the *content* of the regular meeting agenda. The statute (1) requires that the regular meeting agenda include "an" opportunity – singular – for members of the public to address the legislative body; (2) specifies that members of the public may use this (singular) opportunity to address the legislative body on any item of interest to the public, provided that the matter is within the subject matter jurisdiction of the legislative body; and (3) mandates that the agenda provide for this (singular) opportunity for the public to address the legislative body either "before or during" the legislative body's consideration of the item. We think our regular meeting agendas satisfy these statutory requirements.

Notably, the statute does *not* require that a regular meeting agenda include multiple "opportunities" to address the Board. With respect to the timing of public comment, the statute's use of the disjunctive "before or during" expressly permits the option of allowing comment on an agenda item at either (1) the beginning of the meeting, before legislative body's consideration of items of business (i.e., before consideration of the consent and discussion calendars), or (2) when the item is being considered. The statute does not require public comment "before and during" consideration of the agenda item. And if a legislative body could not receive comment on specific agenda items at the beginning of the meeting, the Legislature would have had no reason to include the word "before" in the statute.

Nor is there any language elsewhere in the Brown Act (outside of section 54954.3) that expressly requires legislative bodies to provide both a "public comment" period as well an opportunity for the public to comment on each agenda item at the time it is taken up by the legislative body. Indeed, if public comment on specific agenda items was required during the legislative body's consideration of the

item, the additional requirement that "public testimony" be allowed at scheduled public hearings (such as the public hearings required prior to increasing general taxes or assessments, per section 54954.6) would appear to be entirely superfluous.

The Language of The Cases Cited in Your Letter is *Dicta*

While the authorities you cited appear to require an opportunity for comment as each agenda item is being considered, we did review the cases and concluded that the language you cited is merely "dicta" – and not the actual holdings of the two cases cited. Therefore, those cases are not controlling interpretations of Government Code section 54954.3.

You quoted *Galbiso v. Orosi Pub. Util. Dist*., 167 Cal.App.4th 1063 (2008), as defining the public comment requirements of section 54954.3(a)) to mean "that for each agenda of a regular meeting, there must be a period of time provided for general public comment on any matter within the subject matter jurisdiction of the legislative body, as well as an opportunity for public comment on each specific agenda item as it is taken up by the body." *Galbiso, supra*, at 1079 (emphasis added). While this language can be found in the *Galbiso* opinion, the quoted language does not represent *the holding* of the case, and, thus, is not controlling on future courts that may be called upon to interpret section 54954.3.

We concluded that the above-quoted language is *dicta* for several reasons. First, the appeal was taken from the trial court's denial of Galbiso's motion for attorney's fees after the Orosi Public Utility District ("the District") had entered a settlement agreement relating to Galbiso's lawsuit alleging violations of the Brown Act and the Public Records Act. *Galbiso*, 167 Cal.App.4th at 1072-74. In other words, it was an attorney's fees case, not a Brown Act case. The trial court denied Galbiso's attorneys fees finding that she had failed to prove a violation of the Brown Act. *Id.* at 1078. While the appellate court held that there had, in fact, been a violation of the Brown Act warranting consideration of an award of attorney's fees, the violation related to the District's refusal to allow Galbiso to speak during the public comment period on a closed session item relating to pending litigation where Galbiso was a party. *Id.* at 1079. Thus, the violation of the Brown Act was the legislative body's denial of Galbiso's right to speak on an issue clearly within the subject matter jurisdiction of the District. The issue before the court had nothing to do with time limits on speakers, time limits on public comment, or whether the Brown Act requires a speaker to be allowed an opportunity to speak during a public comment section of the meeting as well as on each agenda item as called. Accordingly, the language you quoted must be considered *dicta*—nothing more than the opinion of Justice Stephen J. Kane on matters that were beyond the facts presented to the court.

Similarly, the language in the case that the *Galbiso* court cites, *Chaffee v. San Francisco Library Com'n.*, 115 Cal.App.4th 461 (2004), is also *dicta*. The issue presented in Chaffee was "whether general public comment is required at both the original and the continued session" of a meeting of the San Francisco Library Commission. *Chaffee*, 115 Cal.App.4th at 467. The City and County of San Francisco had adopted a "sunshine ordinance," that imposed additional requirements above and beyond those of the Brown Act. *Ibid*. In *Chaffee*, the Commission noticed a public meeting, which had to be continued as the meeting ran long and the Commission lost quorum. *Id*. at 465. In accordance with the Commission's rules, there was a public comment period (for general comments) scheduled at the end of the agenda. Thus, when the meeting was continued, no public comment period occurred on the originally scheduled date for the meeting and instead was allowed at the continued meeting. *Ibid*. Chaffee, the plaintiff, sued the Commission claiming that the Brown Act and the sunshine ordinance required a public

comment at each session of a regularly scheduled meeting. The Court of Appeal disagreed with the plaintiff, holding that the Brown Act and the sunshine ordinance only require that "each agenda" of a public meeting allow for general public comment. Even if the meeting is continued, the court held that only one such public comment period need appear on the agenda and be entertained by the body. *Id.* at 468.

Simply put, our close reading of both *Galbiso* nor *Chaffee* revealed that neither case is controlling on the issue you raised.

Three Minute Limitation

In your letter, you also argued that allowing three minutes per individual speaker at a meeting, as provided in Rule 47 of the Rules of Procedure, is "insignificant" and not reasonable. You identified no cases in support of this claim. Instead, you cited Government Code section 54954.3(b) which allows "reasonable" regulations to be adopted by the local agency "limiting the total amount of time allocated by public testimony." You contended that a three-minute time limit is unreasonable, and you pointed to a 1992 California Attorney General opinion that concluded that a limit of five minutes per speaker was "reasonable" and allowable under the Brown Act. Upon review, we determined that your reliance on this opinion was problematic because the question presented to the Attorney General was specific to five minutes; the Attorney General did not have occasion to consider whether other time limits might also be reasonable. The opinion is not authority for a question not considered by the Attorney General. *Flatley v. Mauro*, 39 Cal. 4th 299, 320 (2006).

The Brown Act's reference to "reasonable regulations" in section 54954.3(b) relates back to the language in subdivision (a) requiring the agenda of regular meetings to include an opportunity for public comment "before or during" the legislative body's consideration of the item: "The legislative body of a local agency may adopt reasonable regulations to ensure that the intent of subdivision (a) is carried out, including, but not limited to, regulations limiting the total amount of time allocated for public testimony on particular issues and for each individual speaker." Subdivision (b), on its face, appears to be permissive ("may adopt") and expansive ("including, but not limited to") in its grant of authority to the legislative body to adopt regulations, not restrictive.

In any event, the County of Orange is not the only jurisdiction with a three-minute limitation on public comments. As I am sure you are aware, the City of Anaheim also has a three-minute limitation on public comment, and except for scheduled public hearings, also receives all public comment (including specific agenda item comment) near the beginning of its regular meetings. To our knowledge, Anaheim's policy has not been successfully challenged.

Speaker Request Forms

On this issue, you argued that the County's use of a speaker request form violates Government Code section 54953.3. It does not. That section provides, in pertinent part:

> A member of the public shall not be required, **as a condition to attendance** at a meeting of a legislative body of a local agency, to register his or her name, to provide other information, to complete a questionnaire, or otherwise to fulfill any condition precedent to his or her attendance.

(Emphasis added.) The speaker request form used by the County is not a condition of *attendance*; indeed, someone who merely wishes to attend a Board meeting may do so in complete anonymity. The Board's practice, as evidenced in its meetings and demonstrated by speakers who have not identified their real names on speaker request forms, is to allow members of the public to speak irrespective of whether or how they identify themselves.

Rather than violating section 54953.3, Rule 44 and the speaker request form appears to be reasonable regulations adopted by the Board, as authorized by section 54954.3(b)(1), which allow the public the opportunity to speak as required by section 54954.3(a). Without the speaker request form, the Clerk of the Board would have no practical way of calling speakers to make public comment. Also, the Chair of the Board would not know how many individuals were still planning to speak, thereby rendering him or her without important information for organizing and conducting the meeting. The speaker request forms enable the orderly conduct of the meetings while still allowing the public the opportunity to speak. Our review indicated that these forms are a common procedural tool used by most Brown Act bodies to allow public participation and still maintain an orderly meeting.

Moreover, the forms created by the Clerk of the Board specifically indicate that it is "optional" for an individual to complete the portions of the form that ask for the speaker's name and other identifying information. (Did you not see the fine print?) This information is requested for the purpose of enabling staff to follow up with the speaker if the Board so desires. Thus, a member of the public could (and, in some cases, will) turn in a form with no name – or an obviously fictitious name – so long as there is something on the form that enables the clerk to call the individual at the appropriate time. A person may turn in a form with "anonymous" as their name, or "prefer not to state" or some other moniker of his or her choosing to remain anonymous. (I would also note that you have, on at least one occasion, written only your first name on the form, and yet you were still provided an opportunity to speak.)

Decorum Rules

You also challenged aspects of Rule 46. Rule 46 regulates the manner in which members of the public should address the Board. First, we believe this is a proper procedural regulation that ensures the orderly conduct of the Board's meetings. After all, the *Board* is the legal entity taking action; individual members of the Board only have legal authority to act when they come together in duly-noticed, open and public meetings. Thus, as a matter of proper decorum, when someone speaks to the Board, the comments are (or at least should be) directed to the Board (as a whole) "through the Chair." Indeed, the Brown Act requires that the public be entitled to "address the legislative body" – not individual members of the body. Gov't Code § 54954.3(a). The language of Rule 46 (requiring each person who addresses the Board to refrain from making personal, impertinent, slanderous or profane remarks to any member of the Board, staff or the general public) does not (as you suggest) preclude a speaker from making pertinent comments about an individual Board member. Indeed, the Rule does not preclude a member of the public from criticizing a particular Board member's vote and it also does not prohibit criticism of the policies, procedures, programs, or services of the agency or body. The rule simply directs – in an effort to preserve decorum – that such comments be directed to the Board through the Chair. In compliance with the Brown Act, the rule pertains to procedure; it does not control *the substance of speech* and thus appears to be a valid content-neutral restriction on the "manner" of speech at the Board meeting.

Security Video

Lastly, you claimed that the part of Rule 48 which declares the security video of Board meetings to be "confidential", and not a matter of public record, violates section 54953.5(b). That statute provides, in pertinent part:

> Any audio or video recording of an open and public meeting made for whatever purpose by or at the direction of the local agency shall be subject to inspection pursuant to the California Public Records Act (Chapter 3.5 (commencing with Section 6250) of Division 7 of Title 1).

In my view, your argument here also lacks merit. By cross-referencing the California Public Records Act (CPRA), as opposed to simply declaring the security video subject to public inspection, the Legislature intentionally incorporated the procedures and exemptions found in the CPRA. Accordingly, the exemptions of the CPRA will apply to any request to inspect video pursuant to section 54953.5(b). In response to any such request for the security video, the County would likely assert an exemption from public inspection under both section 6254(f) and the public interest exemption, at section 6255, as the security videos depict law enforcement security procedures and are records of intelligence information. Obviously, public access to the security video might reveal "blind spots" in the Sheriff's monitoring of the Board room from which an assailant could fire a weapon or place an explosive device with less likelihood of detection. As the (public) video of Board meetings dating back to 2007 is readily available on line, we think a court would probably agree with us on this point that the public interest in nondisclosure of the security video substantially outweighs the public interest in disclosure.

Further Conversation is Welcome

As you might imagine, I have an interest in providing the Board with sound advice on these issues. Likewise, I believe that the members of the Board are united in their strong desire to encourage public participation while complying with any and all legal and constitutional requirements. At the same time, a meeting of the Board is a governmental process with a governmental purpose. The Board has an agenda to be addressed and the Board must be able to accomplish the people's business in a reasonably efficient manner. I would welcome your consideration of the arguments above, and if you believe that I am mistaken on any point – if you think that there are authorities I am missing – would you please let me know?

Thanks again for your email.

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From: Brendan Hamme [mailto:BHamme@ACLUSOCAL.ORG]
Sent: Thursday, March 30, 2017 12:21 PM
To: Page, Leon
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Subject: RE: Brown Act and First Amendment Violations at Board of Supervisors' Meetings

It was my pleasure, Leon. Thank you for the kind words!

We definitely appreciate the positive impact of having a time certain when community members can make their voices heard and support that aspect of the rule change. That said, the Board can certainly have both an established start time for public comments on anything within the Board's subject matter jurisdiction, as well as providing an opportunity for the public to comment on each agendized item as the Board calls them for consideration. This would provide an opportunity for those constituents who need to make their remarks early to do so and leave, as well as for those who may need to come later in the day or prefer to speak to the item closer to when the Board will consider it. Importantly, this would also allow individuals to fully comment on multiple items, which is extraordinarily difficult in only three minutes. Moreover, the case law is clear that the Brown Act requires the Board to provide both public comment and the opportunity for members of the public to comment on each specific agenda item. Is this a change the Board is willing to make?

We also appreciate your willingness to reconsider the Board's policies re the 20 minute limit and to clarify its policy on signs. I look forward to seeing your proposals. Your letter didn't mention the other pieces we flagged though, including addressing individual supervisors, anonymous speech, the security recordings, or the applause issue I mentioned the other day. Does the Board intend to address those issues as well or are they only willing to address the 20 minute public comment cap and sign policy?

Thanks for your work on this.

Regards,
Brendan