ACLU
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
Southern California

Elder Law & Disability Rights Center

September 10, 2021

Honorable Members of the City Council, City of Orange
Mayor Mark A. Murphy, mayor@markamurphy.com
Mayor Pro Tem Kim Nichols, knichols@cityoforange.org
Councilmember Chip Monaco, councilmanmonaco@gmail.com
Councilmember Arianna Barrios, abarrios@cityoforange.org
Councilmember Jon Dumitru, jdumitru@cityoforange.org
Councilmember Kathy Tavoularis, ktavoularis@cityoforange.org
Councilmember Ana Gutierrez, anagutierrez@cityoforange.org
Fax: 714.744.5523

Pamela Coleman, City Clerk
pcoleman@cityoforange.org
Fax: 714.744.5515

Gary A. Sheatz, City Attorney
attyinfo@cityoforange.org
Fax: 714.538.7157

*Via E-mail and Facsimile Transmission*

RE: Brown Act Violations During July 13, 2021 Consideration of Mary's Kitchen Lease Termination, CPRA Request

Dear Members of the Orange City Council, City Clerk, and City Attorney:

On July 13, 2021, the Orange City Council deliberated and voted on a central public issue—whether to terminate the lease[1] of City property with a service provider which will almost certainly result in unhoused residents of the City of Orange losing crucial social services later this month—in private, during closed session, without prior notice to the public that it was doing so. We are concerned this behavior violates the Brown Act in several ways and urge you to cure or correct these violations prior to September 18, the date that Mary's Kitchen—a nonprofit that has served unhoused people at its current location since 1994—is expected to vacate City property.

The Brown Act demands city council meetings be "open and public," generally prohibits "tak[ing] action by secret ballot," and requires all "item[s] of business" to be briefly described in

[1] Since the characterization of the land use agreement is irrelevant to the Brown Act issues, we refer to it as a lease.

an agenda posted 72 hours before a city council meets. Gov. Code § 54953(a); § 54953(c); § 54954.2.[2] The Council failed to meet these requirements when it deliberated and took an action, not noticed to the public on an agenda, in closed session. *See* § 54952.6 (defining "action taken" broadly to include collective decisions, collective commitments, or actual votes by a majority of the local body's members).

Further, even if the Council claims it properly invoked its closed session privileges to discuss the threat of litigation resulting from the lease termination, it failed to properly notice its closed session discussions, denying an interested public the chance to "retain control" over "the people's business." *See* § 54956.9 (listing disclosure requirements for closed session meetings discussing litigation exposure); § 54950.

Because of these issues, and pursuant to California Government Code sections 54960.1 and 54960, respectively, we urge the Council to (1) cure or correct these violations by reversing support of the lease termination and holding open deliberation, vote, and public comment about this item before any lease termination takes place; and (2) cease and desist from such violations of the Brown Act during your future meetings.

The Orange City Council's recent actions violate the public's right of government access in an important community issue implicating—at minimum—human dignity, public health, and City transparency. Thus, we hope the City urgently addresses this issue.

Finally, pursuant to the California Public Records Act (CPRA), Gov. Code §§ 6250, *et seq.*, and Article I, section 3(b) of the California Constitution, we request any records[3] created during the July 13, 2021 closed session meeting that relate to the Council's deliberation and vote on the Mary's Kitchen lease termination. Should you find any records exempt from disclosure, we recognize that that a public body bears the burden of demonstrating an exemption applies and respectfully request a written communication explaining the legal authority relied upon to deny the requested records.[4] If you claim exemptions, we ask that you redact those records for the time being and make the rest available as requested. We also request a fee waiver.[5]

## I. Background

Mary's Kitchen is a day-shelter in the City of Orange. It is the legacy of Mary McAnena who began feeding the poor in the park, developed the full-service center, and continued her calling to

[2] Unless otherwise stated, all statutory references are to the California Government Code.
[3] "Records" covered by this request include but are not limited to: internal and external correspondence (including email), memoranda, drafts, notes, outlines, policies, procedures, regulations, directives, instructions, orders, bulletins, pamphlets or brochures, scripts, handouts, analyses, evaluations, reports, summaries, writings, logs and other written records or records by any other means, including but not limited to records kept on computers, computer source and object code, electronic communications, computer disks, CD-ROM, video tapes or digital video disks.
[4] We request that the explanation include the interests relied upon to find the public interest is outweighed in the context of any conditional exemption.
[5] As non-profits making a request regarding a matter of public concern—a vote at a public meeting pertaining to a cherished community organization—we request a fee waiver. We further ask that documents be provided in electronic format, if possible, to eliminate the need to copy materials (providing another basis for our fee waiver). However, if such a waiver is denied, please provide a signed notification citing the legal basis for the denial. We also ask that any denial of a fee waiver explain the interests relied upon to find the public interest is outweighed.

help those in need until she died at 100 years old. After her death, her good friend and surviving family picked up where she left off, continuing to provide critical life-saving support with no help from the City of Orange beyond a lease with the City allowing it to use City land to operate on. Guests received nutritious food, water, hygiene, showers, bathrooms, access to medical care, charging stations, clothes, laundry, and more. As the only service in the City for unhoused adults without minor children, it is one of the last no-barrier service providers anywhere in Orange County. Because it is a religious entity, it operates using donations and grants and does not receive funding from the City.

On June 18, City Manager Rick Otto reportedly sent Mary's Kitchen a demand letter, terminating its lease three years early and requiring it to vacate the property by September 18.[6] In the letter, Otto also suggested that Mary's Kitchen "enable[d] homelessness."[7]

On July 13, the City Council met in closed session. On the closed session agenda, no item specifically referenced Mary's Kitchen, and the only item appearing applicable to a discussion of Mary's Kitchen was Item 3(c), "Conference with Legal Counsel – Anticipated litigation pursuant to Government Code Section 54956.9(d)(2)-(4). (One case)." After the Council had already deliberated and voted in closed session, and during the regular meeting, twenty-three people spoke in support of Mary's Kitchen, including relatives of founder Mary McAnena, as well as employees, volunteers, and patrons of Mary's Kitchen. No one spoke against.

At the end of the regular meeting, Mayor Mark Murphy began to adjourn the meeting but was interrupted by City Attorney Gary Sheatz who reminded the mayor of "one thing before we adjourn." Sheatz then reported that during closed session, the City Council unanimously confirmed the termination of the Mary's Kitchen lease. The July 13 City Council Regular Meeting minutes state the following: "Report on Closed Session Actions: City Attorney Sheatz reported that the City Council unanimously confirmed the actions of the City Manager and staff in terminating the license agreement between the City and Mary's Kitchen."

## II. Legal Framework

The First Amendment to the U.S. Constitution establishes the right of the people to speak and publish freely, peaceably assemble, and petition their governments for the redress of grievances; in addition, Article 1, section 3 of the California Constitution guarantees Californians' rights of access to government information, requiring public meetings to be "open to public scrutiny." U.S. Const., amend. 1; Cal. Const., Art. 1 § 3(b)(1). The Ralph M. Brown Act, Cal. Gov. Code § 54950 *et seq.*, concretizes these rights, establishing procedures to ensure that public bodies deliberate and take actions openly. § 54950.

Under the Brown Act, members of the public must be given notice of public meetings through posted agendas describing "each item" of potential business, including those to be discussed in closed session. § 54954.2. Further, the Brown Act requires that members of the public be given the opportunity to address the governing body on any item of interest within the body's jurisdiction and grants members of the public the right to comment on items of business "before

[6] Ben Brazil, *A closure of Mary's Kitchen, a sanctuary for the homeless, would be a 'tragedy' for those who rely on it*, LA TIMES: DAILY PILOT (July 14, 2021), https://www.latimes.com/socal/daily-pilot/entertainment/story/2021-07-14/marys-kitchen.
[7] *Id.*

or during" the body's consideration of them. § 54954.3(a). Thus, the Brown Act's structure favors openness in both deliberations and actions, even though a small subset of business may be done in private.

Although the Brown Act allows public officials to hold meetings in closed session, the Act provides detailed procedures for when closed sessions are permissible and what information must be publicly reported following closed session. *See, e.g.*, § 54954.5; § 54956.9 (detailing procedures for closed sessions involving potential litigation). The purpose of using closed session to discuss litigation is "to permit the body to receive legal advice and make litigation decisions only; it is not to be used as a subterfuge to reach nonlitigation oriented policy decisions." *Trancas Property Owners Assn. v. City of Malibu*, 138 Cal. App. 4th 172, 186 (2006) (cleaned up). Additionally, the Act requires that local agencies disclose, in an open meeting and *prior* to holding a closed session, the item(s) to be discussed in closed session. § 54957.7. The entity then "may consider only those matters covered in its statement." *Id.*

Despite the existence of closed session rules that allow some government discussions to take place in private, such rules still must be interpreted narrowly, in light of the general intent of the Brown Act, which favors openness. *See, e.g.*, *Shapiro v. San Diego City Council*, 96 Cal. App. 4th 904, 919-20 (2002). Notably, under the California Constitution, rules that limit the right of access must be narrowly construed, while those that further the right of access must be construed broadly. Cal. Const., Art. 1 § 3(b)(2).

A council may be safe from Brown Act violations only if it substantially complies with Government Code section 54954.5's closed session disclosure requirements, which, for anticipated litigation, involve additional requirements enumerated in section 54956.9. However, this safe harbor provision requires that, for anticipated litigation, required disclosures be made "on the agenda or in an oral statement *prior to* the closed session." § 54954.5(c) (emphasis added).

## III. Brown Act Violations

Under the Brown Act, "[n]ot only are the actions taken by the legislative body to be monitored by the public but also the deliberations leading to the actions taken." 84 Ops. Cal. Atty. Gen. 30 (Cal. A.G.), 2001 WL 175919, at *1 (Feb. 20, 2001). A city council may not "use the Brown Act as a shield against public disclosure of its consideration of important public policy issues . . . ." *Shapiro*, 96 Cal. App. 4th at 924. Yet, the City of Orange appears to have done just that, violating the Brown Act in at least two ways.

First, the substance of the Council's discussion and vote regarding the Mary's Kitchen lease termination was a "nonlitigation oriented policy decision" that had to be made in open session with appropriate notice to the public on the Council's agenda. Section 54956.9 does allow the Council to hold closed session to confer with or receive advice from legal counsel about pending litigation when an open discussion "would prejudice the position of the local agency in the litigation." § 54956.9(a); § 54956.9(d) (describing what circumstances qualify as pending litigation). However, any discussion that would *not* prejudice the Council in potential litigation must be properly described on an agenda, take place publicly, and be subject to public comment, even if the Council or its attorney believes the decision may result in litigation. *See Shapiro*, 96 Cal. App. 4th at 922 (rejecting a city council's contention that its "background discussions,

questions and answers during closed session" are permissible if "reasonably related" to permitted closed session topics under the Brown Act); *see also* § 54954.2; § 54954.3.

Holding a public vote and deliberation on a nonlitigation decision that would later be reported publicly does not prejudice the Council—and thus should have been properly noticed to the public with a description of the subject matter to be discussed. § 54954.2(a)(1). The Brown Act recognizes that such violations are severe, granting the courts authority to declare agency actions that violate the agenda and public comment provisions of the law "null and void," unless they are timely cured or corrected by the agency. § 54960.1[8]

Second, even assuming the Council properly deliberated about and voted on whether to affirm the City Manager's termination of the lease in a closed session, the Council failed to meet the Brown Act's reporting requirements, found in Government Code section 54956.9, when it discussed the lease termination under the banner of anticipated litigation but failed to disclose the subject of that discussion: the termination of the Mary's Kitchen lease.[9]

Government Code section 54956.9(d) allows a council to meet in closed session to discuss anticipated litigation in just four instances. §54956.9(d)(1)-(4). On its closed session agenda, the Council justified its closed meeting on the grounds of three of these, (d)(2)-(4), which include, "based on existing facts and circumstances," that there is a significant litigation risk; the body is meeting only to decide whether closed session is authorized; and the body is considering initiating litigation.[10] *Id.*

The statute then places further requirements in section (e) for what "existing facts and circumstances" local bodies must disclose if they decide to invoke this closed session privilege. Local agencies are relieved from disclosing facts and circumstances when they believe they are not yet known to a potential plaintiff or when a litigation threat is made during a public meeting. *See* § 54956.9(e)(1), (e)(4). This provision is inapplicable here as the potential plaintiff, Mary's Kitchen, was itself notified by the City of the facts that might result in litigation, and we are not aware of a litigation threat made orally at a public meeting.

Otherwise, local bodies must disclose the subject of their potential litigation. When the facts and circumstances involve transactional occurrences that are known to potential plaintiffs, they must be disclosed on the agenda or announced. § 54956.9(e)(2). When the facts or circumstances involve a written threat of potential litigation, that communication must be disclosed at the meeting. § 54956.9(e)(3); § 54957.5(c). And when litigation threats are made outside of a public meeting, the official receiving the threat must make "a contemporaneous or other record of the statement prior to the meeting, which record shall be available for public inspection" at the meeting. § 54956.9(e)(5); § 54957.5(c).

Because the Council did not list the subject of its "anticipated litigation" in Item 3(c) on the July 13 closed session agenda, it likely violated the Brown Act. The effect of this violation was

[8] We note that our demand under this section is timely because it involves a closed session violation and is made within 90 days of the action taken. *See* § 54960.1(c)(1).
[9] Because no mention of Mary's Kitchen appeared on the closed session agenda, and all other agenda items referenced unrelated matters, we can only assume this was the Council's justification.
[10] This, to be clear, broadly encompasses all possible grounds for closed session except for § 54956.9(d)(1), which requires formal litigation to have been initiated.

substantial. The public was not aware that the Council was going to meet in closed session to determine whether to authorize termination of the lease and thus was denied the opportunity to comment on the termination or "before or during" the body's consideration of that issue. § 54954.3(a). In other words, the Council's failures deprived the public of the opportunity to address the Council before it made its decision thereby undercutting one of the principal purposes of the Brown Act.

Absent an "unconditional commitment to cease, desist from, and not repeat" this past action, the Council is subject to liability, including a court order that it "audio record its closed sessions and preserve the audio recordings." § 54960.2(c); § 54960(a), (b).[11]

Because the City discussed items in closed session that were outside of the permitted scope, and because it did not properly disclose the subject of its potential litigation prior to discussing it, the City of Orange denied the public its right of access and likely violated the law. *See* § 54954.5(c) (explaining that an agency cannot claim a safe harbor when it does not substantially comply with disclosure requirements).

## IV. Request for the City to Cure or Correct and Cease and Desist

Significant issues, especially when they affect the livelihoods of those living in Orange, must be deliberated upon in open session with the public's input. Thus, we request you (1) cure or correct these violations by reversing your prior closed session decision and holding open session deliberations with public comment on the Mary's Kitchen item, and (2) cease and desist from future, similar abuses of the Brown Act in your meetings.

Please inform us as soon as possible, but no later than September 14, whether you intend to cure or correct these Brown Act violations and cease and desist from future violations prior to the termination date of Mary's Kitchen's lease. In addition, under the CPRA, a response to our records request is required within 10 days. For any questions or clarifications, you may contact Sari Zureiqat at szureiqat@aclusocal.org and Brooke Weitzman at bweitzman@eldrcenter.org. Please furnish all applicable records to us at szureiqat@aclusocal.org and bweitzman@eldrcenter.org if in electronic format or, if in physical form, at 1313 W 8th Street, Suite 200, Los Angeles, CA 90017.

Sincerely,

Sari Zureiqat
Legal Fellow, First Amendment
and Democracy
ACLU Foundation of Southern California

Brooke Weitzman
Directing Attorney and Co-Founder
ELDR Center

cc: Rick Otto, City Manager
cminfo@cityoforange.org
Fax: 714.744.5523

[11] We note that our demand under this section is timely because it is made within nine months of the alleged violation. *See* § 54960.2(a)(2).