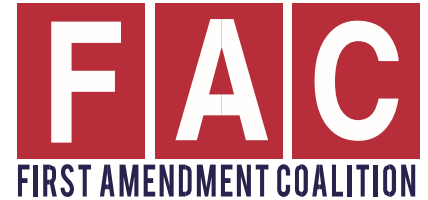




Northern
California



Sent Via E-Mail

September 05, 2023

Honorable Members of the Fresno City Council
c/o Todd Stermer, Clerk of the City Council
2600 Fresno Street
Fresno, CA 93721

Re: Cease and Desist, Fresno City's Budget Committee

Dear Honorable Members of the Fresno City Council:

We write on behalf of FresnoLand Media, the American Civil Liberties Union of Northern California and the First Amendment Coalition to express concern regarding the recent reports that the Fresno City Council engaged in ongoing closed-door deliberations about its budget process and to notify the Council of several related violations of the Ralph M. Brown Act. Cal. Gov't Code §§ 54950 *et seq.*¹ The Council's conduct—namely holding secret committee meetings about Fresno's budget process without any notice or opportunity for the public to comment on such process—flies in the face of democratic principles. This letter serves as a demand to **cease and desist** the practice of conducting budget deliberations in secret.

Fresno's Budget Process

On August 16, 2023, *FresnoLand* published a news article reporting that during the final rush to adopt a budget before its deadline, Fresno Mayor Jerry Dyer's team "met with the budget subcommittee several times over eight days behind closed doors."² Behind those closed-door discussions, "[m]ore than 75 changes and amendments to the proposed budget emerged from those meetings totaling almost \$30 million."³ As the mayor admitted, "A lot of sausage was being made in the back room."

¹ All further references are to the California Government Code, unless otherwise noted.

² Omar Shaikh Rashad, *Fresno's budget subcommittee doesn't meet in public. Legal experts say it's a 'major problem'*, *FresnoLand* (Aug. 16, 2023), <https://fresnoland.org/2023/08/16/fresno-budget-subcommittee/>; see also Omar Shaikh Rashad, *Which Fresno streets should be repaved first? Why most of the debate will happen behind closed doors*, *FresnoLand* (June 19, 2023), <https://fresnoland.org/2023/06/19/budget-subcommittee-will-balance-budget-in-private/>.

³ Omar Shaikh Rashad, *Fresno's budget subcommittee doesn't meet in public. Legal experts say it's a 'major problem'*, *FresnoLand* (Aug. 16, 2023).

American Civil Liberties Union Foundation of Northern California

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The budget committee is composed of three of the seven City councilmembers and has been repeatedly meeting in secret since at least 2018 during each year's budget process.⁴ As reported by *Fresnoland*, there is no paperwork that confirms the dissolution of the committee following the passage of a budget every year.⁵

The budget committee meets every January for a "mid-year review" and "again during June for the budget process."⁶ The primary purpose of the committee is to reconcile the mayor's budget priorities with the Council's budget priorities.

During the 2023 budget process, the budget committee started its secret committee meetings on or around June 16, 2023.⁷ The task of the committee, as described by Councilmember Tyler Maxwell, was to "either remove some of the mayor's items and replace them with [the council's items] or take out some of the council motions."⁸

Similarly, Councilmember Luis Chavez described the subcommittee's purpose as taking the Council's budget priorities "into the back room and negotiat[ing] on behalf of the council."⁹ The backroom deals culminated in the adoption of a record-breaking \$1.87 billion City budget that was approved by the Council on June 22, 2023.

Regardless of whether the budget committee is formally an advisory body, its detailed deliberations are effectively the final word on the complex policy and financial decisions embodied in the City's budget. As Councilmember Chavez said of the committee's discussions, "The council has outlined the vision, the mayor has brought forward his recommendation, and now it's time to actually reconcile those two but also make sure you're including key investments.... So by the time it came back, it was pretty spot on, and there was not a lot of discussion or debate out on the dais" at the City Council meeting where the budget was approved.¹⁰

The City of Fresno is one of the largest cities in California by population that does not utilize an open, public budget committee. The budget committees of the Los Angeles, San Diego, San Francisco, Sacramento, Long Beach, Oakland, Anaheim, and Bakersfield city councils all hold their meetings in public.¹¹ Thus, it is troubling that Fresno's budget committee deliberated in secret on a record-breaking budget that impacts all its residents.

⁴ The budget committee is currently composed of Councilmember Tyler Maxwell, Councilmember Annalisa Perea, and Councilmember Mike Karbassi.

⁵ Omar Shaikh Rashad, *Fresno's budget subcommittee doesn't meet in public. Legal experts say it's a 'major problem'*, *Fresnoland* (Aug. 16, 2023).

⁶ *Id.* (quoting Councilmember Maxwell).

⁷ Although city officials may call it a "subcommittee," it is more properly deemed a committee of the City Council because it is not a subsidiary body of another committee.

⁸ Omar Shaikh Rashad, *Which Fresno streets should be repaved first? Why most of the debate will happen behind closed doors*, *Fresnoland* (June 19, 2023).

⁹ Omar Shaikh Rashad, *"Fresno's budget subcommittee doesn't meet in public. Legal experts say it's a 'major problem'"*, *Fresnoland* (Aug. 16, 2023).

¹⁰ *Id.*

¹¹ *Id.*

The Brown Act

Our state constitution could not be clearer on the fundamental right to open government. “The people have the right of access to information concerning the conduct of the people’s business, and, therefore, the meetings of public bodies and the writings of public officials and agencies shall be open to public scrutiny.” Cal. Const., Art. I, § 3(b)(1).

To that end, the Brown Act declares, “The people of this State do not yield their sovereignty to the agencies which serve them. The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may retain control over the instruments they have created.” § 54950.

A law such as the Brown Act “shall be broadly construed if it furthers the people’s right of access, and narrowly construed if it limits the right of access.” Cal. Const., Art. I, § 3(b)(2); *see also, e.g., Julian Volunteer Fire Co. Assn. v. Julian-Cuyamaca Fire Prot. Dist.*, 62 Cal. App. 5th 583, 601 (2021) (noting Brown Act’s provisions must be “construed liberally in favor of openness in conducting public business”).

The Brown Act’s central purpose is to ensure that the public has an opportunity to oversee the actions of its representatives and provide informed and meaningful input to a legislative body before that body can take any action. The Act therefore mandates, “All meetings of the legislative body of a local agency shall be open and public, and all persons shall be permitted to attend any meeting of the legislative body of a local agency,” except for limited provisions authorizing closed sessions. § 54953(a).

The Act also requires that all meetings conducted by legislative bodies must—absent any emergency situation—be publicized in advance, follow a noticed agenda, be accessible, and provide an opportunity for the public to comment. §§ 54954–54954.3, 54954.5–54956.5, 54956.7–54957.10, 54962.

Nowhere are these requirements more important than in the budget process, given “the strong public interest in knowing how the government spends its money.” *International Fed’n of Pro. & Tech. Engineers, Local 21, AFL-CIO v. Superior Court of Alameda Cnty.*, 42 Cal. 4th 319, 333 (2007). Disregarding the compelling public interest in transparency, the City of Fresno has repeatedly violated the Brown Act by conducting budget committee deliberations in secret, without any notice, agenda, or opportunity for the public to comment.

The available facts demonstrate that the budget committee is a “legislative body” subject to the Brown Act because it was “created by charter, ordinance, resolution, or formal action” and is a “standing committee[]” with “a continuing subject matter jurisdiction,” if not “a meeting schedule fixed by charter, ordinance, resolution, or formal action of a legislative body,” regardless of whether it is “advisory” or composed of “less than a quorum” of the City Council, § 54952(b).

As evidenced in a document cited by *Fresnoland*, the budget committee was apparently created by the City Council on or about June 21, 2018, and its members are appointed by the City Council.¹² That is more than sufficient to establish “formal action” creating the committee. See *Frazer v. Dixon Unified School Dist.*, 18 Cal. App. 4th 781, 792-93 (1993); *Joiner v. City of Sebastopol*, 125 Cal. App. 3d 799, 801 (1981).

Under any construction of the Brown Act, broad or otherwise, the facts show that the budget committee has been a standing committee with continuing subject matter jurisdiction over budget matters since its formation, regardless of whether it has had a regular meeting schedule. In reality, the budget committee has regularly exercised “the responsibility of providing advice on budgets” to the City Council, and therefore it is “subject to the notice, agenda, and public participation requirements of the Act.” 79 Ops. Cal. Att’y. Gen. 69 (1996).

Given the “purposes and requirements” of the Brown Act, courts “must follow function over form in carrying out the Legislature’s purposes” to guarantee open government and accountability. *Id.* Any disclaimer that the budget committee is ad hoc or does “not exercise continuing subject matter jurisdiction,” is not “determinative” of whether the committee is subject to the Brown Act. *Id.* actual function, the budget committee is a legislative body that has routinely violated the Brown Act’s core requirements of open public meetings with notice, agenda, and opportunity for public comment.

Cease and Desist Demand

To address and remedy the concerns expressed in this letter, we demand that the Council ensure that the budget committee ceases and desists from conducting its deliberations in secret and in violation of the Brown Act. The Council must acknowledge the Brown Act violation set forth in this letter by making an unconditional commitment to refrain from keeping its budget committee closed to the public and to conduct all future budget committee meetings in accordance with the Act’s requirements set for legislative bodies. The Council has 30 days from receiving this cease and desist letter to provide the unconditional commitment, which must be approved by the Council in open session during a regular or special meeting as a separate item of business on the non-consent agenda. If the Council fails or refuses to ensure that the budget committee ceases and desists its secret meetings, we may file an action pursuant to § 54960.2, in which case, we will seek an award of court costs and reasonable attorney fees pursuant to § 54960.5.

The Council should also take note that the City is potentially exposed to Brown Act liability to the extent its other standing committees are also violating the Brown Act by meeting in secret. If such issues are not addressed, they may become the subject of a future cease and desist letter or Brown Act litigation.

* * *

¹² Organizational Form for City of Fresno Boards, Commissions, Committees, and Similar Bodies, <https://fresnoland.org/wp-content/uploads/2023/08/2018-Org-Form-Budget-Subcommittee-1.pdf>.

Governance shrouded in secrecy is an anathema to the democratic ideal. We urge you to stop hiding behind closed doors when deliberating on important issues concerning the residents of Fresno. Your constituents can provide necessary and valuable insight. They are not obstacles to be avoided.

Please let us know by September 15, 2023 if you intend to cease and desist from the violations raised in our letter.

Sincerely,

s/Angélica Salceda

Angélica Salceda

ACLU Foundation of Northern California

s/David Loy

David Loy

First Amendment Coalition

s/Danielle Bergstrom

Danielle Bergstrom

Fresnoland Media