

# **DIFFICULT CONVERSATIONS**

## **Ethics Complaints Against a Council Member**

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# A Fairy Tale About Ethics And Local Government

# Once Upon A Time



**Yesterday at 5:45 PM, you were copied on an anonymous email to all councilmembers from citizen3467@gmail.com that says:**

“Councilmember Smith is running her private business out of City Hall—using City computers, City secretarial staff, desks, and file cabinets—and not paying any rent. Plus, she puts her business logo on City emails and uses her City email account for her business activities.”

# OUR STORY BEGINS

- The email was cc'd to the local newspaper, the City Manager, as well as several active residents who frequently speak at council meetings.
- At 6:30 PM, you are cc'd on a records request from the local newspaper for all emails and other correspondence, to or from any councilmember, that relate to use of City property, as well as all emails to and from Councilmember Smith's City email address on any topic over the last year. The request specifically states that it wants records that are stored on personal devices as well as City servers.
- That night at 10:00 PM, you get a phone call from the Mayor. You don't answer the phone, and the Mayor leaves a message saying he wants to discuss this complaint. The Mayor is traditionally NOT aligned with Councilmember Smith on most issues.

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# Conversation with Mayor

- Mayor says “let me handle this—I’m going to talk to Councilmember Smith about this and work this out—I’ll tell her to stop if it turns out the accusations are correct. We don’t want to spend too much time on this anonymous email complaint, and I want to nip this in the bud.”
- Mayor says he wants a special meeting next week to report to the council in closed session what he has done to manage the complaint.
- You explain your concerns about the justification for closed session, but the Mayor insists that the City Manager agendize a closed session under the anticipated litigation exception.
- You explain that such a closed session requires participation by the city attorney, and that you are unwilling to participate.
- The Mayor does not care.



# Response to Newspaper's Records Request

- City invokes the PRA 10-day extension.
- City sends a request to councilmembers to check their personal accounts for any responsive records.
  - 1 councilmember does not respond at all.
  - 1 councilmember refuses to provide any records.
  - 2 councilmembers say they have checked and have nothing.
  - Councilmember Smith says that just yesterday her computer crashed and she lost all data and so has nothing to provide.
- The 10-day extension period expires and the City does not respond at all. You have had three meetings with city staff, who complain that they have spent so much time on this records request, they can't do their "actual work."



# Closed session at Special Council Meeting

- You do not participate so you don't know what happens.
- After the closed session, the Mayor says, "we met in closed session and there is nothing to report."
- Councilmember Smith says, "I was not allowed to participate in this closed session and think the Mayor has violated the Brown Act. I am reporting the Mayor to the DA."



## Then What Happens – Phase 1 (1-3 Months)

- Article in Newspaper
  - “What is the Council Hiding?”
- Additional Public Records Act Requests
- Angry Emails to Staff
- One hour of Public Comment at the next Council Meeting(s)—comment on items not on the agenda
- Items on the agenda also receive additional, negative, public comment
- At Council Meeting:
  - Councilmember A says, “Attorney Miller, please advise the Mayor that she is violating the Brown Act.”
  - The Mayor says, “I think Councilmember A has a conflict of interest and should recuse himself.”
  - Councilmember B says, “Attorney Miller, was last month’s closed session permissible under the Brown Act?”



## Then What Happens – Phase 2 (4-9 Months)

- Councilmember A sends a nasty email to the City Manager regarding the records request from the newspaper.
- The City Manager files a harassment complaint against Councilmember A.
- Councilmember Smith files a harassment complaint against the Mayor.
- The Newspaper sends additional records requests, including regarding additional matters that have nothing to do with this complaint.
- The City gets triple its normal volume of records requests from the public.
- Long angry Council meetings become the new normal.
- The Deputy City Manager goes on medical leave.
- A member of the public files a complaint with the FPPC and with the DA.



## Then What Happens – Phase 3 (10-18 Months)

- 3 key staff members leave the City.
  - 1 files harassment/wrongful termination lawsuit.
- The DA starts investigating the Brown Act complaint.
- Newspaper initiates PRA litigation.
  - Lots of negative press.
- Lots of work gets done late or not at all.
- Election season doesn't solve the problem.
- Culture of defensiveness and anger and fear is the new normal.
- Lost public trust.
- Difficult to govern effectively.



# All From One Small Ethics Complaint?

HUH?

- A “successful” resolution to a complaint does not (only) mean that the City dodges legal liability and/or avoids litigation.
- Consider the risk of losing public trust when evaluating the risks presented by an ethics complaint.
  - Once lost, very very difficult to regain.
- SO...What to do different?



# Make decisions that engender public trust

- Choose sunshine and transparency.
  - Even if awkward or difficult in the short-term.
- Choose neutral and independent investigation.
  - Even if time consuming and expensive.
- Make a complaint an opportunity to evaluate ethical hygiene.
  - Training
  - Code of Conduct
  - Council and Public Involvement

# What does this look like? – Rewind our Story

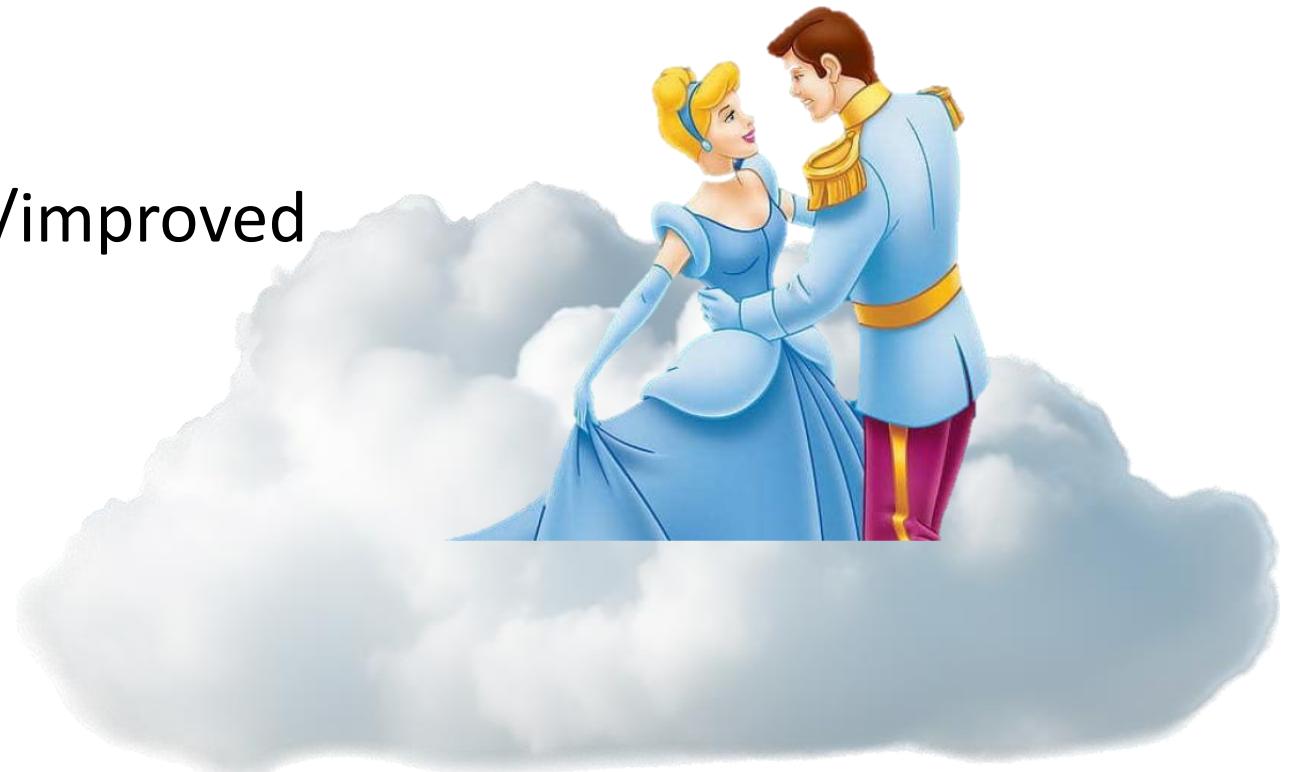
- **Difficult Conversations** with Mayor who wanted to work this out quickly himself and discuss in closed session
  - Recommend hiring an independent investigator
  - Recommend discussing in Open Session—under these facts, a closed session probably is not allowed under the Brown Act in any event
- **Difficult Conversations** with Newspaper
  - Either work with recalcitrant councilmembers, or frankly share their response with the Newspapers. The City should not suffer the consequences of councilmembers' failure to allow transparency.
  - Share investigator report with newspaper—don't wait for a records request

# What does this look like? – Rewind our Story (cont.)

- **Difficult Conversations** in Open Session
  - May need to enforce (or adopt) Councilmember Code of Conduct
- **Difficult Conversations** re “Ethical Hygiene”
  - Consider ethics training above and beyond minimum AB 1234—establish an ethical culture that includes staff AND council
  - Consider including “5-minute ethics” session at each council meeting
  - Encourage and support City Staff

# The Whole Point of the Difficult Conversations

- Avoid legal issues—time and money
- City preserves/or restores, culture of highest ethical standards
- Staff can do their work
- Council can govern
- Public trust preserved/restored/improved



# Thank You!

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