



COUNTY OF FRESNO

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NEWS RELEASE

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2019 AUDIT BY THE CITY OF FRESNO REGARDING GRANITE PARK REMAINS WITH THE FEDERAL BUREAU OF INVESTIGATION AND THE UNITED STATES ATTORNEY'S OFFICE

THE FRESNO COUNTY DISTRICT ATTORNEY'S OFFICE WILL NOT PURSUE CHARGES AGAINST CITY COUNCILMEMBERS FOR BROWN ACT OR MUNICIPAL CODE VIOLATIONS

Today, March 1, 2022, the Fresno County District Attorney's Office provided updates to the 2019 City of Fresno Audit and announced that no criminal charges will be filed for violations of the Brown Act or Municipal Code violations that were alleged by complaints made to the DA's Public Integrity Unit.

2019 Audit by the City of Fresno regarding Granite Park

In late 2019, the Fresno County District Attorney's Office received a request from a City of Fresno official to conduct a public integrity investigation regarding Granite Park. Before the investigation could be complete, the Federal Bureau of Investigations (FBI) contacted the District Attorney's Office indicating that they would like to take over the investigation, as one of the potential involved parties was a sitting Congressman in the United States House of Representatives. Thus, the local investigation was terminated, and the case was handed over to the FBI and the United States Attorney's Office in the Eastern District of California.

At present, it is the understanding of the District Attorney's Office that the Federal investigation is still ongoing and active.

Brown Act

On or about June 21, 2021, the District Attorney's Office received a request to investigate an allegation that Fresno City Councilmember Esmeralda Soria may have violated the Brown Act by asking three other Fresno City Councilman (Councilman Nelson Esparza, Councilman Tyler Maxwell and Councilman Miguel Arias) in a personal office and after a closed session hearing, if a "deal" had been reached between the City of Fresno and Terance Frazier for an operational agreement involving Granite Park. Councilmember Soria is alleged to have asked this question despite specifically recusing herself from the issue due to her personal relationship with Mr. Frazier.

All of the named City Council members were given an opportunity to give a statement to Fresno County DA Investigators, and all declined to do so in a written letter from their joint attorney, Verna Santos.

In reviewing cases for the filing of criminal charges, prosecutors are required to follow certain ethical considerations.

Charges may only be filed when:

- (1) there has been a complete investigation and thorough consideration of all pertinent data;
- (2) there is legally sufficient, admissible evidence of a corpus delicti;
- (3) there is legally sufficient, admissible evidence of the accused's identity as the perpetrator of the crime; and
- (4) the prosecutor has considered the probability of conviction by an objective factfinder hearing the admissible evidence.

In assessing this matter for a potential Brown Act violation, the District Attorney's Office considered the requirements of Government Code section 54959.

To prosecute an individual for a violation of Government Code section 54953, it must be proved beyond a reasonable doubt that:

- (1) a person that was a member of a legislative body;
- (2) willfully attended a meeting of that legislative body;
- (3) at that meeting, action was taken in violation of any provisions of Government Code sections 54950 through 54962; and
- (4) that person specifically intended to deprive the public of information and knew or had reason to know that the public was entitled to the information sought to be withheld.

After carefully reviewing the investigative reports, statements and other confidential information, the Fresno County District Attorney's Office has reached the legal conclusion that the prosecution cannot prove, beyond a reasonable doubt, that Councilmember Esmeralda Soria violated Government Code section 54959.

Several important factors weighed heavily in this decision, including insufficient evidence to establish that Councilmember Soria knew that enough Councilmembers were present in the office to form a majority of the City Council when she asked the question, the lack of any evidence that actions were taken based upon the meeting by a majority of the City Council, and the lack of information that Councilmember Soria specifically intended to deprive the public of information.

Because the subject at issue dealt with a matter about which Councilmember Soria had recused herself, the District Attorney's Office remains troubled by the allegation that Councilmember Soria made such an inquiry. However, based upon the nature of the evidence and confidential information received, the Councilmember's conduct does not support a prosecution given the standard of proof for a criminal offense. As a result, a criminal charge for a violation of the Brown Act will not be filed in this case.

Nonetheless, based upon an analysis of the other code sections with the Brown Act, including Government Code Section 54960, the appropriate response in this situation, where there is insufficient proof of illegal action taking place but there was a potential violation of the procedural provisions of the Brown Act, is to remind the Councilmember to be cognizant of when other members of the legislative body may be present,

such that a majority is constituted, and to **refrain from discussing matters within their subject matter jurisdiction.**

The Fresno County District Attorney's Office Public Integrity Unit has sent letters to numerous elected officials since its inception in 2015, reminding them of their ethical and legal responsibilities as elected officials, and will continue to enforce these laws when the required evidence is obtained.

A letter of this kind will be sent to Councilmember Soria based on the allegation made advising her of the law, once again.

Personal Protective Equipment (PPE) Investigation

The Fresno County District Attorney's Office has also reviewed and investigated an allegation regarding the procurement and distribution of Personal Protective Equipment (PPE) by Fresno City Councilmembers, and will not pursue violations of Fresno Municipal Code Section 4-107(e), based on an insufficiency of the evidence associated with the lack of cooperation from a witness in the DA's investigation.

City Councilmembers have authority under the Fresno Municipal Code and Resolution 2017-67 for each Councilmember to enter into purchase contracts, for up to \$50,000, without a competitive process. Pursuant to Municipal Code Section 4-107(e), however, it is prohibited to split contracts to avoid Charter and Municipal Code limits – with the Charter bid threshold being \$143,000 at the time of the purchases currently in question.

To prosecute an individual for a violation of Fresno Municipal Code Section 4-107(e), the prosecution must prove beyond a reasonable doubt that an individual made a purchase, either in the form a single contract exceeding \$50,000, or in a series of contracts with the specific intent to avoid Charter bidding thresholds. Numerous other municipal codes and resolutions deal with the purchase and bidding process for contracts in excess of the Councilmember purchasing authority.

Fresno Municipal Code 4-107(e) does not, by itself, contain any provision with regards to punishment for any violations. While a violation could conceivably be punished under Government Code section 36900, which provides that violations of a city ordinance is a misdemeanor, the same code also provides that violation of a city ordinance may be prosecuted by city authorities in the name of the People of the State of California or redressed by civil action. This is important because while the District Attorney and the City Attorney are co-equal actors regarding their legal ability to prosecute violations of city ordinances, this does not mean that the two agencies are equal regarding the practical considerations of enforcing a city's municipal code.

While the City Attorney works closely with individual Councilmembers in implementing their vision, guiding them in what they can or cannot legally do in the pursuit of their civic goals, the District Attorney is a separate entity and therefore should not and cannot act as an unofficial council member or as check on their actions absent substantial evidence of criminality.

The PPE allegation is instructive in this regard. After a careful review of the evidence gathered in this case, including investigative reports, witness statements, and the existing documentation, which included the purchase orders in this case, the District Attorney's Office discovered that individual Councilmembers had made purchases of PPE from MPG Global, some more than once, and that one Councilmember had overspent the delegated purchasing authority in once instance by \$18,024.25. However, it was determined that city authorities knew about the purchases, that they were allowed to go through, and that no disciplinary

action was taken against the Councilmember who had exceeded his purchase authority, other than to be reminded that purchases over \$50,000 and under \$143,000 must be made through the Purchasing Manager. Finally, the product which was ordered from MPG Global was confirmed to have been received and distributed in the various Councilmember districts at various events.

The authority of the District Attorney is limited in scope and does not extend to matters of civic governance unless there are violations of the law. In this case, the District Attorney's Office is also mindful of the extraordinary circumstances of the time-period surrounding these purchases, which were for items that were in short supply and extreme demand during the COVID-19 pandemic. While there appears to be a violation of the Fresno Municipal Code, these actions were known to city authorities, a co-equal actor with the District Attorney's Office with regard to violations of the municipal code. The matter appeared to have been addressed in the form of reminders about the parameters of each Councilmember's purchasing authority. Therefore, considering the separate roles of the District Attorney and the City Attorney, the District Attorney's Office is declining to pursue charges for a violation of Municipal Code Section 4-101.

District Attorney Lisa Smittcamp stated, ***“It would be beneficial for the people of the City of Fresno if the Fresno City Council, the Fresno Mayor/Staff, and the Fresno City Attorney’s Office would consider re-establishing their legal advisement process. Currently, the sitting Fresno City Attorney is hired and fired by the City Council that he/she appointed to serve. An inherent conflict can be assumed from this format. Similar to other important City Administrative positions, it would be well-advised for the City Council to consider changing the City of Fresno Charter to have the City Attorney be hired by the City Manager and Mayor, and be approved by the City Council.”***

The Fresno County District Attorney's Office will have no further comment on this matter.

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