

Stand Up For California!
“Citizens making a difference”

www.standupca.org

P.O. Box 355
Penryn, CA 95663

December 29, 2010

John Lollis, City Manager
City of Porterville (City)
291 North Main Street
Porterville, Ca. 93257
Phone: (559) 782-7466
Email: mgr-office@ci.porterville.ca.us

RE: Public Act Reply by City Unresponsive to Request

Dear Mr. Lollis:

On November 1, 2010, *Stand Up For California* made a Public Records Act (PRA) request under (Government Code Section 6250 et. seq.) and the California Constitution, as amended by passage of Proposition 59 on November 2, 2004. (*See-attached PRA Request*)

The City’s response to Items I and III of the November 1, 2010 PRA are not responsive to the request. Our organization wishes to alert the City to the PRA process requirements. The City’s PRA response is flawed in the following ways:

- The City’s response was not received until December 2, 2010. Clearly, a violation of (Government Code Section 6253 (c)) which mandates an initial response within ten days.
- The City’s response did not identify who made the decision as to what information would be provided. It is unclear if information is being withheld as an exempt item or being provided as the public interest in confidentiality is outweighed by the public interest in disclosure. (Government Code Section 6255)
- The response did not accurately respond to items I and III.

Item I requested:

“...any and all correspondence between the City Staff, elected officials and the Tribal representatives that relate to the Tribe’s pending Fee to Trust application concerning property within the City with emphasis on any and all documents that

identify “*contemplated potential legal action*”. From Dec. 23, 2009 to the date of this letter (Nov. 1, 2009).”

Item III requested:

“...any and all documents that details, explains or addresses the dispute between the City and the Tribe which was the subject that initiated the City’s “*contemplated potential legal action*”.”

- The PRA response did provide information or at least a response to items II, IV, and V. However, the City’s response raises serious and critical concerns regarding actions and inactions taken by the city.

Response to items I and III:

The documents received in the PRA request are emails between City Staff, Tribal Representatives and City Attorney Julia Lew. The emails evidence an ongoing dialogue of negotiation for the development of a cooperation agreement. These emails cover a relatively short time span from Feb. 25, 2010 through March 17, 2010. More than one email contains a subject line of “cooperation agreement” or “Revised cooperation agreement” further confirming an ongoing dialogue of negotiation for a cooperative agreement.

These emails do not validate an argument of “*contemplated potential legal action*”. It is understandable that records concerning agency litigation are exempt, but only until the claim is resolved or settled. The emails provided by the City do not indicate a complaint, claim or records filed in court. (Section 6254(b), 6254.25)

In the October 13, 2010 letter sent to the City by the Coalition of Retailers, it is pointed out that:

“...the approval of the MOU between the City and the Tribe on March 16, 2010 in closed session does not meet the statutory definition of matters appropriate for closed session. The approval of the MOU in closed session is not in compliance with the Brown Act because there was no adequate notice to the public on the posted agenda for the meeting that the matter was to be acted upon or would be discussed. Further, there was no finding of fact made by the City Council that urgent action was necessary on a matter unforeseen at the time the March 16, 2010 agenda was posted.”

The City responded on October 22, 2010 stating that:

“Consequently, the matter was appropriately discussed and acted upon in closed session.”

The emails provided in response to *Stand Up For California’s* PRA request make clear that the City and the Tribe were in a brief but ongoing communication negotiating a cooperative agreement. A cooperative agreement does not indicate “*contemplated potential legal action*.”

The fee to trust application submitted to the Bureau of Indian Affairs began a federal process in which the Tribe and the City and other affected parties were participating. This is NOT an

adversarial process – rather a fact finding process regarding, environmental concerns, land use, taxation and the administration of justice issues. What is the “*contemplated potential legal action*”?

The Brown Act only provides for “closed sessions” or “executive sessions”, to confer with, or receive advice from its legal counsel regarding pending litigation when discussion in open session concerning those matters would prejudice the position of the local agency in the litigation. Or potential litigation to be placed on the agenda in closed session when the identity of the potential party to be sued is only “contemplated”.

The emails provided in response to the PRA indicate and make clear beyond doubt that each party, the Tribe and the City knew each other. Thus, there was no legitimate reason for placing an MOU negotiated between these two parties in closed session. The MOU between the City and the Tribe was then and is now an inappropriate topic for a closed session item.

Response to Item II:

In response to request item II, Patrice Hidreth, CMC, Administrative Services Manger replied in an email dated Dec. 2, 2010 stated the following:

“Ms. Schmit, to follow up on our telephone conversation this afternoon, please be advised I anticipate completing the compilation of the requested documents by tomorrow afternoon. Again I apologize for the delay in responding to you! With regard to Item No. 2 in your request, **please be advised that the record of the closed session vote** on Item No. A-6 on March 16, 2010 was as follows: MOVED by Vice Mayor Brian Ward, SECONDED by Council Member Felipe A. Martinez that the Council approves the proposed settlement agreement with the Tule River Indian Tribe. Vice Mayor Brian Ward: Yes Council Member Felipe A. Martinez: Yes Mayor Pete V. McCracken: Yes Vote Total: 3-0 Council Members Cameron Hamilton and Pedro R. Martinez were absent.”

The email provided by the City demonstrates an action was taken in closed session. This email is a **recitation** of a recorded vote. It makes clear that the action was not reported when the council returned from closed session. The City is required prior to meeting in closed session to orally announce that the MOU would be discussed in closed session (Government Code section 54957.7(a)). The City is required to report on any closed session final decisions. (Government Code Section 54957.1) A vote is a final decision by the City Council.

Further, the PRA entitles our organization to the actual document or record in which the recording of this vote was made, **not a recitation of the result.**

Response to items IV and V:

In response to items IV and V, Patrice Hidreth, CMC, Administrative Services Manger replied by email dated Dec. 7, 2010, stating the following:

“As I indicated yesterday when we spoke, the City **is not in possession** of "a Tribal Resolution that supports the Chairman signing the Cooperative Agreement" or the "Tribe's Constitution."

Stand Up For California's request of this information is unrelated to the Brown Act violations of the City. The Cooperative Agreement negotiated between the City and the Tribe appears to be judicially unenforceable. Section 8 of the Cooperative Agreement is potentially an incomplete waiver of sovereignty and requires the City's immediate review.

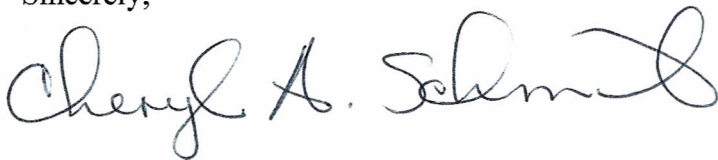
Federal Indian law drastically affects and changes any contractual agreement. There is no Tribal Resolution that accompanies the final document reported to the public on April 20, 2010, under the Consent Calendar as item #10a. Tribal governments must pass a resolution to bind its government today and into the future to a contractual agreement. However, when a tribe waives its sovereignty certain criteria must appear in both the waiver and tribal resolution to ensure that it will be judicially binding and enforceable.

Besides a tribal resolution to bind a tribe to a contract and waive its immunity to suit, the City should have also reviewed the Tribe's Constitution to discover if a Resolution is offered it is adopted in a manner consistent with that document. Does the Tribe's Constitution address waivers of immunity? Some do and some do not. If not, it will require a vote of the entire tribal membership in order to waive the tribe's immunity to civil liability and make the contract judicially enforceable protecting the interests of the City. There is also the possibility that the contract will require the review of the Secretary of the Interior if the contract exceeds seven years and limits a tribal government's authority over the use of the land or impairs the title to the land. (25 CFR Part 81)

The City must immediately review the enforceability of the MOU and acquire if it has not already done so a supporting Tribal Resolution. Importantly, the City must review the Tribal Constitution to ensure it addresses waivers of immunity. This review must occur before land is taken out of the States regulatory authority. Failure to do so leaves elected officials of the City of Porterville without the necessary political power to correct the failings of the MOU.

Stand Up For California anticipates a timely reply.

Sincerely,



Cheryl Schmit – Director
916-663-3207
cherylschmit@att.net
www.standupca.org

Attachments: Nov. 1, 2010 PRA Request

CC: County of Tulare Board of Supervisors
Asst. DA Gallian
Californians Aware
2218 Homewood Way
Carmichael, CA 95608
Coalition of Business Retailers
Honorable Governor Arnold Schwarzenegger
Honorable Jerry Brown, Governor Elect State of California