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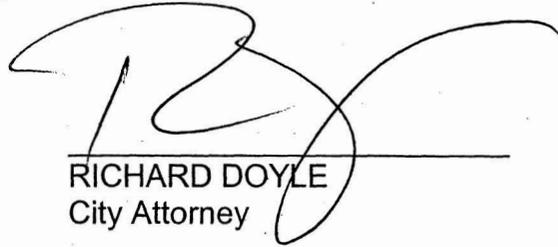
TO: HONORABLE MAYOR
AND CITY COUNCIL

FROM: RICHARD DOYLE
City Attorney

SUBJECT: Closed Session

DATE: January 12, 2007

Attached please find an outline regarding Closed Session as background for the presentation on January 23, 2007.



RICHARD DOYLE
City Attorney

cc: Les White

For questions please contact Richard Doyle, City Attorney at (408) 535-1900.

CLOSED SESSION

Under the Brown Act, the purpose of closed session is to permit a policy body in limited circumstances to exclude the public in order to (1) protect the privacy of third parties; (2) protect the position of the policy body in claims or litigation, real estate negotiations or labor negotiations; and (3) discuss issues of public safety and security.

In San Jose, not every policy body is entitled to go into closed session. The only bodies that hold closed session are: (1) City Council; (2) Redevelopment Agency; (3) Civil Service Commission; (4) Elections Commission; (5) Federated Employees Retirement Board; (6) Police and Fire Retirement Board; and (7) Deferred Compensation Advisory Committee.

A. Closed Sessions: Permitted Topics

1. The Brown Act

The Brown Act permits the following topics to be discussed in closed session:

a. Licensing of Rehabilitated Criminals

Whether an applicant for a license or a license renewal with a criminal record is sufficiently rehabilitated to obtain the license. (Government Code Section 54956.7.)

b. Real Property Negotiations

The price and terms of payment for purchase, sale, exchange or lease of real property with the policy body's negotiator. (Government Code Section 54956.8.)

c. Pension Funds

To consider the purchase or sale of particular specific pension fund investments. (Government Code Section 54956.81.)

d. Health Plans

1. To hear a charge or complaint from a member enrolled in the local agency's health plan if the member does not wish to have publicly disclosed his or her name, medical status, or other information that is protected by federal law. (Government Code Section 54956.86.)

2. To take action on health plan trade secrets as defined in the Health and Safety Code. (Government Code Section 54956.87(b).)

3. To consider and take action on contracts by the health plan with health care services providers. (Government Code Section 54956.87(c).)

e. Litigation

To confer with or receive advice from its legal counsel when discussion in public would prejudice the position of the body in the litigation. (Government Code Section 54956.9.)

f. Joint Powers Agency - Insurance Pooling

To allow a joint powers agency, formed for purposes of insurance pooling, to discuss a claim for the payment of tort liability losses, public liability losses, or workers' compensation liability. (Government Code Section 54956.95.)

g. Threats to Public Buildings or Services

To meet with the Attorney General, district attorney, agency counsel, sheriff or chief of police or a security consultant on matters posing a threat to the security of public buildings or a threat to the security of essential public services including water, drinking water, wastewater treatment, natural gas service, and electric service or a threat to the public's right of access to public services or public facilities. (Government Code Section 54957(a).)

h. Public Employees

To consider the appointment, employment, evaluation of performance, discipline or dismissal of a public employee or to hear complaints or charges brought against the employee by another person. (Government Code Section 54957(b).)

i. Salaries and Benefits – Labor Negotiations

To meet with the policy body's designated representatives regarding the salaries, salary schedules, or compensation paid in the form of fringe benefits of its represented and unrepresented employees, and for represented employees, any other matter within the scope of representation. (Government Code Section 54957.6.)

2. San Jose's Practice

San Jose permits closed session on the topics listed above consistent with the Brown Act.

B. Agenda Disclosures: Closed Sessions

1. The Brown Act

The Brown Act suggests a format for describing specific types of items on the closed session agenda. The format includes capitalizing the header describing the topic of closed session, specifying the Government Code Section that permits closed session

on that topic and listing other identifying information. For example, to describe a litigation matter on the closed session agenda, the Brown Act suggests the following format:

CONFERENCE WITH LEGAL COUNSEL--EXISTING LITIGATION
(Subdivision (a) of Section 54956.9)

Name of case: (Specify by reference to claimant's name, names of parties, case or claim numbers)

or

Case name unspecified: (Specify whether disclosure would jeopardize service of process or existing settlement negotiations)

The Brown Act does not require that policy bodies follow the suggested format exactly; instead, "substantial compliance" with the format, regardless of form, is the standard under the Brown Act.

2. San Jose's Practice

San Jose follows the suggested format of the Brown Act when describing closed session topics on the agenda.

C. Statement of Reasons for Closed Sessions

1. The Brown Act

The Brown Act requires that, before going into closed session, a policy body disclose, in an open meeting, the item or items to be discussed in the closed session. The disclosure may take the form of a reference to the item or items as they are listed by number or letter on the agenda. In the closed session, the policy body may consider only those matters covered in its statement.

2. San Jose's Practice

San Jose follows the Brown Act.

D. Additional Requirements for Closed Sessions

1. The Brown Act

The Brown Act states that a policy body may designate a clerk to attend each closed session and "keep and enter in a minute book a record of topics discussed and decisions made at the meeting. The minute book ... is not a public record subject to inspection pursuant to the California Public Records Act" and must be kept confidential. (Government Code Section 54957.2(e).)

2. San Jose's Practice

San Jose follows the Brown Act and keeps minutes of topics discussed and decisions made at the meeting.

E. Disclosure of Closed Session Discussions and Actions

1. The Brown Act

After closed session has adjourned, the Brown Act requires that the policy body reconvene into open session and make any disclosures of action taken in closed session that are required to be disclosed (see list of topics required to be disclosed below) as well as the vote or abstention of every member present thereon.

Reports may be made orally or in writing.

If a person has submitted a written request to the policy body within 24 hours of the posting of the agenda or has a standing request for all documentation as part of a request for notice of meetings the policy body must provide to those persons all documents finally approved or adopted in the closed session.

If the documents require retyping because of substantive amendments, the presiding officer of the policy body must orally summarize the substance of the amendments for the benefit of the document requester or any other person present and requesting the information.

In any event, all documents must be available to any person on the next business day after the meeting in which the action is taken or, in the case of substantial amendments, when any necessary retyping is complete.

The following topics must be reported in the following manner:

a. Real Estate Negotiations – Final Agreement

1. If the policy body's approval in closed session makes the agreement final, the policy body must report that approval and the substance of the agreement in open session at the public meeting during which the closed session is held.

2. If final approval of the agreement rests with the other party to the negotiations, the policy body must disclose that the agreement was finally approved and the substance of the agreement if asked by any person as soon as the other party has approved the agreement.

b. Litigation – Action in Lawsuit

If in closed session the policy body approves defending a lawsuit, filing or refraining from filing an appeal or filing a brief in litigation to which the policy body is not a party as a "friend of the court" then the policy body must report the action in open session at the public meeting during which the closed session is held. The report must identify, if known, the opposing party or parties and the substance of the litigation.

If the policy body approves filing of or intervening in a lawsuit, the announcement does not need to identify the case, the defendants, or other particulars, but must specify that the direction to initiate or intervene in a lawsuit has been given and that the case, the defendants, and the other particulars will, once the litigation has formally begun, be disclosed to any person who asks, unless doing so would jeopardize the policy body's ability to complete service of process on one or more unserved parties, or that to do so would jeopardize its ability to conclude existing settlement negotiations to its advantage.

c. Litigation – Final Settlement

1. If the policy body's approval in closed session makes the agreement final, the policy body must report that approval and the substance of the agreement in open session at the public meeting during which the closed session is held.

2. If final approval of the agreement rests with the other party to the litigation or with the court, as soon as the settlement becomes final, and if asked by any person, the policy body must disclose that the agreement was approved and the substance of the agreement.

d. Claims – Joint Powers Agency – Insurance Pooling

Claims discussed in closed session by a joint powers agency, formed for purposes of insurance pooling, must be reported as soon as a decision about the claim is reached. The report must identify the name of the claimant, the name of the policy body claimed against, the substance of the claim, and any monetary amount approved for payment and agreed upon by the claimant.

e. Public Employees

Action taken in closed session to appoint, employ, dismiss, accept the resignation of, or otherwise affect the employment status of a public employee must be reported at the public meeting during which the closed session is held. The report must also state the employee's title or position.

If the public employee has a right to appeal his or her dismissal or non-renewal of employment contract, the report of the dismissal or of the non-renewal of the employment contract will be deferred until the first public meeting after the public employee has exhausted his or her administrative remedies.

f. Labor Negotiations – Final Agreement

A policy body must report approval of an agreement concluding labor negotiations with represented employees after the agreement is final and has been accepted or ratified by the other party. The report must identify the item approved and the other party or parties to the negotiation.

g. Pension Fund Investments

Pension fund investment decisions must be disclosed at the first open meeting of the policy body held after the earlier of the close of the investment transaction or the transfer of pension fund assets for the investment transaction.

2. San Jose's Practice

San Jose follows the Brown Act.

F. Prohibitions on Disclosure of Confidential Information

1. State Law

Gov. Code Section 54963 provides that a person may not disclose confidential information that has been acquired by being present in a closed session unless the legislative body authorizes disclosure of that confidential information.

Violation of these provisions may be addressed by the use of remedies that are currently available by law, including, but not limited to:

1. Injunctive relief to prevent the disclosure of confidential information under these provisions;
2. Disciplinary action against an employee who has willfully disclosed confidential information; and
3. The referral of a member of a legislative body who has willfully disclosed confidential information to the grand jury for investigation and possible accusation under specified procedures.

A local agency may not take any of these actions against a person for:

1. Making a confidential inquiry or complaint to a district attorney or grand jury concerning a perceived violation of law;
2. Expressing an opinion concerning the propriety or legality of actions taken by a legislative body in closed session, including disclosing specified facts to a district

attorney or grand jury to establish the illegality of action taken or potential illegality of action deliberated upon that would be illegal if the action is taken; or

3. Disclosing information acquired by being present in a closed session that is not confidential information.