



Memorandum

TO: HONORABLE MAYOR
AND CITY COUNCIL

FROM: RICHARD DOYLE
City Attorney

SUBJECT: Disclosure and Sharing of
Material Facts

DATE: March 3, 2006

Background

On December 13, 2005, as part of the City Council Agenda item on the Mayor's Biennial Ethics Review, Councilmember Reed recommended by memorandum (attached) that staff bring back to Council, specific recommendations for clarifying the Council's duty to disclose material facts and for changing close session procedures. On February 15, 2006, the Rules Committee referred Councilmember Reed's recommendations to the City Attorney for analysis and forwarded the recommendations to the City Council for discussion.

The following issues in Councilmember Reed's memorandum were referred to the City Attorney:

- A. Staff recommendations for clarifying the Council's duty to disclose material facts with draft language.
- B. Closed Session Agenda Disclosures
- C. Limits on Closed Sessions - City board, commissions, committees and other groups
- D. Disclosure of Actions and Votes - Closed Sessions

Discussion

A. City Council Duty to Disclose Material Facts

Councilmember Reed's recommendation is to make it clear that Councilmembers have a duty to one another to disclose material facts. While the City Charter and the City's Code of Ethics generally provide that City officials and employees must act responsibly in the performance of their duties and be accountable to members of the public, there is no specific requirement that Councilmembers share material facts with one another.

1. Other Jurisdictions

Written "Disclosure of information or facts" policies for legislative bodies are not common among major cities in the state. The city of Sunnyvale has adopted a code of ethics for its members on the council and boards and commissions which includes a statement concerning "communications".

The Sunnyvale statement provides that "Members shall publicly share substantive information that is relevant to a matter under consideration by the Council or boards and commissions, which they may have received from sources outside of the public decision-making process."

2. Draft Policy for City Council Consideration

The City Council may consider adopting a Council policy which also addresses the issue of "material facts" such as the following draft language for review and discussion:

The Mayor and Members of the City Council have a duty and responsibility to publicly disclose all substantive information and material facts related to an item on the City Council Agenda to each Member of the City Council after the information and material facts are obtained or received from sources outside of the public decision-making process. The information shall be disclosed prior to Council taking any action on the item. Substantive information and material facts means information or facts that are relevant and necessary for a member of the City Council to make an informed and knowledgeable decision on a pending legislative matter or an item of business before the City Council.

B. Close Session Issues

1. Agenda Disclosures

The Brown Act (Gov. Code Sections 54950-54962) requires that legislative bodies must prepare an agenda containing a brief general description of each item to be transacted or discussed including items which will be handled in closed session. The Act establishes a model format for closed session agendas for use by agencies on a voluntary basis. These are referred to as the "safe harbor provisions" of the Brown Act. Substantial compliance with the model format provides assurance that an agency would not be found in violation of the Act's agenda requirements (Safe Harbor Agenda for Closed Sessions, Gov. Code Section 54954.5).

Councilmember Reed recommended that the more specific descriptions permitted under the Act should be required. The City Attorney's Office has consistently applied the permitted "safe harbor" descriptions to closed session agenda descriptions and will continue to use these descriptions in the future. We are not aware of any instances where the safe harbor closed agenda descriptions would not be used. However, in order to provide flexibility to address circumstances where the voluntary agenda descriptions specified in the Brown Act could not be applied, an absolute requirement is not, in our opinion, necessary.

2. Limits on Closed Sessions - City Commissions, Committees and other Groups

Councilmember Reed recommended that all City boards, commissions, committees, advisory groups and private entities which receive City funding and have one or more City representatives as voting members be prohibited from meeting in closed session unless authorized by the City Council upon formation or by Council resolution. The Brown Act limits the ability of a "legislative body" as defined in the Act from meeting in closed sessions.

City boards and commissions cannot meet in closed sessions unless expressly authorized to do so in the Act. City boards, commissions and committees do not meet in closed session, with the limited exception of the Civil Service Commission, Deferred Compensation Advisory Committee and the Retirement Boards. Further, the Brown Act does not apply to committees, advisory groups or private entities which do not meet the definition of a "legislative body." If an advisory group is covered by the Act, we are not aware of a circumstance that would authorize such an advisory group to meet in closed session.

3. Disclosure of Actions and Votes after Closed Sessions

Councilmember Reed has recommended that the disclosure of actions taken in closed session be done at the beginning of the public session, instead of at the end as currently done. The Brown Act requires that after any closed session, the legislative body reconvene into open session prior to adjournment and make any legally required disclosures under the Act. The Act does not specify whether the disclosure is done at the beginning or at the end of the public session. As currently practiced, the disclosure is done at the end of the public session. However, this practice can be changed to be consistent with the Council's Rules Resolution.

4. Other recommendations

Other recommendations include the following:

a. In addition to the disclosures required by state law, information regarding claims rejected and the votes of Councilmembers be reported in the first open session after action has been taken in closed session.

b. In addition to the disclosures required by state law, the name of the action, the parties and the substance of the litigation initiated by the City and the vote of the Councilmembers be reported in the first open session after the action is formally commenced.

Although most of these procedures are being currently done, additional information regarding the name of the action, parties and the substance of initiated litigation can be reported by the City Attorney with the vote of each of the Councilmembers who were present reported out with specificity.



RICHARD DOYLE
City Attorney

cc: Les White
Lee Price



Memorandum

TO: Mayor and City Council
FROM: Chuck Reed
SUBJECT: Mayor's 2005 Biennial Ethics Review:
Duty to Disclose Material Facts
and Closed Session Changes
DATE: December 13, 2005

RECOMMENDATION:

Direct staff to bring back to the Council specific recommendations for clarifying our duty to disclose material facts and for changing closed session procedures as described below.

BACKGROUND:

The Independent Investigator in the Norcal matter (Item 3.8 on the 12-13-05 agenda) has concluded that the Mayor had a duty to disclose all material facts regarding the Norcal relationship. (Initial Report, page 25) By implication, Councilmembers have the same duty. On June 28, 2005, (Item 10.1), the Council directed the City Attorney to bring back some language to consider regarding our duty to disclose material facts. That has not yet been done and should be included in the direction to the staff.

The Blue Ribbon Task Force referred some open items to the Council, which were discussed on June 28, 2005. The City Attorney and the City Manager stated that they would be brought back to the Council for action. In addition to the items listed in the Mayor's memo, the following items should be included in the direction to the staff.

Closed Session Agenda Disclosures

In addition to the brief general description of items to be discussed or acted upon in closed session, the more specific descriptions permitted under the Brown Act (Government Code Section 54954.5) should be required.

Limits on Closed Sessions

Except for committees made up entirely by city staff and consultants, all city boards, commissions, committees, advisory groups and private entities which receive city funding and have one or more city representatives as voting members shall not meet in closed session unless authorized to do so by the City Council upon formation or by specific resolution.

Disclosure of Actions and Votes after Closed Sessions

Disclosure of actions taken in close session should be done at the beginning of the public session, instead of at the end.

In addition to the disclosures required by state law, information regarding claims rejected and the votes of the Councilmembers shall be reported in the first open session after action has been taken in closed session.

In addition to the disclosures required by state law, the name of the action, the parties and the substance of litigation initiated by the City, and the vote of the Councilmembers in closed session, shall be reported in the first open session after the action is formally commenced.

Chuck Reed
Councilmember

cc: City Clerk, City Attorney