



Memorandum

TO: THE HONORABLE MAYOR
and CITY COUNCIL

FROM: Richard Doyle
City Attorney

SUBJECT: Possible Disclosure of
Closed Session Information

DATE: 6/2/2006

BACKGROUND

Item 3.4 on the June 6th agenda is a request that the Council discuss and/or take action related to the San José Mercury News' Public Record Act request for information associated with the November 29, 2005 Closed Session Council discussion and direction to staff regarding Silicon Valley Sports & Entertainment and the Earthquakes. The San José Mercury News had requested from the City Attorney the release of information about the direction and vote of the Council during the November 29, 2005 Closed Session that authorized staff to make the City's offer to SVS&E. Because, with limited exceptions, which are not applicable here, Closed Session discussions, direction, and votes are confidential pursuant to the Brown Act this office was not able to provide the requested information.

The November 29, 2005 Closed Session notice stated that there would be a conference with the City's and the Redevelopment Agency's designated real estate representatives regarding real property referred to as the Santa Clara Street Development Site (Northside of Santa Clara Street between Fourth and Fifth Streets) and the Training Facility Site (Southwest corner of Park Avenue/Montgomery Street). The City/Agency designated representatives were Joe Guerra, Paul Krutko, Jr. and Harry Mavrogenes, and they were authorized to negotiate with Greg Jamison and Don Gralnek of SVS&E. The Council/Board ("Council") was meeting to provide direction to the City's negotiators regarding price and terms of payment.

Pursuant to a prior public Records Act request, the City released all documents related to the City's negotiations with SVS&E regarding the Earthquakes.

This memorandum provides an overview of the Brown Act, a discussion of whether the information sought by the Mercury News can be disclosed, and if so, some of the factors that should be considered in determining whether to disclose the information.

THE BROWN ACT

The Ralph M. Brown Act (Government Code § 54950, *et seq.*, "The Brown Act")¹ governs meetings conducted by local legislative bodies, such as city councils, board of supervisors, and commissions. The Brown Act represents the Legislature's determination of how to balance public access to meetings of multi-member public bodies on the one hand, and the occasional need for confidential candor, debate and information gathering on the other hand. The Brown Act imposes an "open meeting" requirement on local legislative bodies, but also contains specific exceptions from the open meeting requirements where government has demonstrated a need for confidentiality.

There are several closed session exceptions to the open meeting requirements. For example, there is a personnel exception which allows for a closed session regarding the appointment, employment, evaluation of performance, discipline or dismissal of a public employee. There is a pending litigation exception which authorizes a body to conduct closed sessions with its legal counsel to discuss pending litigation, including litigation which has been initiated formally, as well as when there is significant exposure to litigation, and when the body is considering whether to initiate litigation. Another permissible closed session exception is the real property negotiations exception discussed in greater detail below.

REAL PROPERTY NEGOTIATIONS EXCEPTION

The closed session exception for real property negotiations permits the Council to meet in closed session with its negotiators prior to the purchase, sale, exchange, or lease of real property by or for the City, to instruct its negotiators regarding the price and terms of payment for the proposed transaction. Prior to the closed session, the Council must identify the real property involved in the negotiations, its negotiators, the persons with whom its negotiators may negotiate and the purpose of the closed session. The obvious reason for this exception is to allow the Council to privately meet with its negotiators to confidentially discuss and provide direction and authority to its negotiators with regard to price and terms of payment for the real property involved in the negotiations. As noted recently by the Sixth District Court of Appeal: "The need for executive [closed] sessions in this circumstance is obvious. No purchase would ever be made for less than the maximum amount the public body would pay if the public (including the seller) could attend the session at which that maximum was set, and the same is true for minimum sale prices and lease terms and the like." Kleitman v. Superior Court (1999) 74 Cal.App.4th 324, 331.

With regard to real property negotiations, the Council is required to publicly report the closed session approval of an agreement concluding real estate negotiations, including the vote or abstention of every member present, after the agreement is final, as follows:

¹ The sections referenced hereafter are sections of the Government Code.

- A. If its own approval renders the agreement final, the Council shall report that approval and the substance of the agreement in open session at the public meeting during which the closed session is held; and
- B. If final approval rests with the other party to the negotiations, the City shall disclose the fact of that approval and the substance of the agreement upon inquiry by any person, as soon as the other party or its agent has informed the City of its approval. (Section 54957.1.)

Except for the disclosure provided above, no other disclosure is required by the Brown Act with regard to a closed session concerning real estate negotiations.

CONFIDENTIALITY OF CLOSED SESSION DISCUSSIONS

Except for the required disclosures under Section 54957.1, closed session discussions are confidential. In 2002, the Legislature added Section 54963, which essentially codified existing court decisions. It provides that communications made in a closed session that are specifically related to the basis for the legislative body meeting lawfully in closed session are "confidential information" which **cannot be disclosed by any person** that acquired the information by being present at a closed session to a person not entitled to receive it, unless the legislative body authorizes disclosure of that confidential information. Thus, except for a statutorily required disclosure, or a disclosure authorized by the legislative body, communications made in closed session are confidential and may not be disclosed. Section 54963 includes several remedies which are available with regard to a violation of the prohibition against disclosure of confidential information from a closed session, including injunctive relief, disciplinary action against an employee who willfully disclosed confidential information, and referral of a member of a legislative body who has willfully disclosed closed session confidential information to the grand jury.

The courts have made it clear that the confidentiality of a closed session is such that in a civil action, a councilmember's recollection of a closed session discussion cannot be obtained through discovery, even in a case claiming a violation of the Brown Act. Kleitman v. Superior Court (1999) 74 Cal.App.4th 324.

AUTHORIZED DISCLOSURE OF CONFIDENTIAL CLOSED SESSION INFORMATION

While Section 54963 makes it clear that discussions in closed session are confidential except for the required disclosures, it also provides that the legislative body may authorize disclosure of the confidential information. The statute, however, does not specify under what circumstances the legislative body may authorize disclosure of the confidential information.

To our knowledge, authorizing the release of confidential closed session real estate negotiation information of the Council to the general public has not been done before. The Council has not established criteria for determining when it is appropriate to make confidential closed session real estate negotiation information publicly available.

The reason that has been expressed for considering the disclosure of the closed session real estate negotiation information is to provide greater transparency into San Jose government. Release of the closed session Council direction given to the City's negotiators and the Council vote would certainly further that consideration. However, release of the confidential closed session information raises a number of other issues which should also be considered by the Council. The issues include, but are not necessarily limited to the following:

1. What precedent will the Council be setting by releasing confidential information in this instance? If the Council decides to disclose confidential real estate negotiation information from a closed session in this instance, the Council may be opening the door to other requests for release of confidential closed session real estate negotiation information.
2. What criteria will the Council utilize in determining when to release closed session discussions? It is suggested that a release could be based upon the matter being "concluded". However, merely because no agreement was reached between the City and one party with regard to the purchase, sale, or lease of specific real estate, does not mean that another party will not be interested in negotiating a deal with the City for that real property. Release of the confidential information with regard to the first set of negotiations may adversely affect the City's second set of negotiations. Even if the matter could be deemed finally concluded, the Council must decide whether this is the only criteria that should be considered.
3. What effect will the release of confidential closed session information have on future closed session discussions? It is possible that the voluntary public disclosure of confidential closed session information may have an adverse affect on the Council having full and open discussions in future closed sessions. Such discussions were apparently contemplated by the Legislature in allowing closed sessions to occur and declaring those closed sessions to be confidential with only limited disclosure requirements.
4. What precisely will be released to the public and how will the determination of what to release be made? In authorizing the release of all or some portion of the Closed Session discussion, the Council will need to decide what it will make public. As a practical matter, this is problematic because a public discussion of the content of the closed session to determine what to release may result in disclosure of confidential information. The Brown Act does not

June 2, 2006

Subject: Possible Disclosure of Closed Session Discussion

Page 5

provide a closed session exception for the limited purpose of determining what portions of a closed session, if any, should be made public.

These are some of the issues raised and that should be considered in determining whether to make public the confidential closed session information requested by the San José Mercury News. In view of the issues raised, the Council may want to consider having the issues fully discussed by the Sunshine Reform Task Force prior to the release of the confidential closed session real estate negotiations information.

RICHARD DOYLE
City Attorney

By 
GEORGE RIOS
Assistant City Attorney

cc: Les White, City Manager
Harry Mavrogenes, Executive Director, Redevelopment Agency