



Memorandum

TO: RULES AND OPEN
GOVERNMENT COMMITTEE

FROM: RICHARD DOYLE
City Attorney

SUBJECT: CITY ATTORNEY'S RESPONSE
TO REFERRAL DATED
AUGUST 29, 2007 FROM RULES
AND OPEN GOVERNMENT
COMMITTEE

DATE: September 27, 2007

RECEIVED
San Jose City Clerk
2007 SEP 27 PM

BACKGROUND

The Sunshine Reform Task Force issued its Phase I Report and Recommendations in May, 2007. The Phase I Recommendations include provisions that all closed session discussions be audio recorded and that the recordings be made available unless the City Attorney certifies otherwise. The Task Force's recommendations also provide that the City Attorney may certify closed session recordings only if he or she makes a specific finding that the public interest in non-disclosure outweighs the public's interest in disclosure.

The Rules and Open Government Committee began reviewing and discussing the Task Force's Phase I Report and Recommendations at meetings on May 30, June 6 and June 27, 2007.

At its meeting on June 27, 2007, the Rules and Open Government Committee did not reach consensus about recording closed session. Consequently, the Committee agreed to ask the Council whether it wanted to audio record closed session for the purpose of having the recording available to review for possible violations of the Brown Act. The Committee also agreed that no action would be taken to record closed session until the Council discusses its intentions and takes some action.

On August 21, 2007, the City Council approved a number of actions related to the Phase I Report and Recommendations for Closed Session and Public Information. The Council referred back to the Rules and Open Government Committee the question about audio recording closed session.

On August 29, 2007, the Rules and Open Government Committee discussed the question about audio recording closed session. The Committee rejected the Task Force's recommendation that the City Attorney certify closed session recordings; the Committee believes that the decision to disclose closed session discussions rests with the Council exclusively. The Committee asked that the City Attorney's Office prepare a

matrix listing the types of matters that are discussed in closed session, when, if ever, the need for confidentiality might end on those discussions, and, if the recordings were to be disclosed after the need for confidentiality ended, what, if any, information should be redacted. In addition, the Vice-Mayor questioned whether producing a transcript of closed session discussions, with sensitive information redacted, would be appropriate.

The Mayor also noted that the Council had to decide whether closed session should be recorded (1) for the purpose of having the recording available to review for possible violations of the Brown Act; or (2) for possible future release. And, in the event that the Council decided that the recordings should be available for future possible release, whether the Council could decide that recordings would be released on more than a majority vote.

ANALYSIS

Attached to this memo is the matrix requested by the Committee.

The Attorney's Office recommends that closed session be recorded only for the purpose of having the recording available to review for possible violations of the Brown Act. As listed in the matrix attached to this memo, closed session discussions include information about very sensitive subjects, including the City's strategy in labor negotiations, litigation and real estate negotiations as well as private information about City employees, Council Appointees and third parties. Release of the recordings would compromise this information, even after the negotiations or litigation has ended. Moreover, the other jurisdictions that record closed session – San Francisco and Milpitas – do so without the intention of releasing the recordings.

In the event that the Council chooses to record closed session for possible future release, the Attorney's Office recommends that disclosure of the discussions be in the form of a transcript, with the appropriate information redacted. Transcription of the recordings will ensure that necessary redaction is accurate and thorough.

Finally, the Brown Act prohibits disclosure of confidential information "acquired by being present in a closed session" "unless the legislative body authorizes disclosure of that confidential information" by a majority vote.¹ The Brown Act permits legislative bodies only to "impose requirements upon themselves which allow greater access to their meetings...."² If the Council decided that recordings could be released only on more than a majority vote, the requirement would permit less access to its meetings. Consequently, we do not believe that the Council may enact any provision that would require more than a majority vote to release closed session information.

¹ Government Code Section 54963.

² Government Code Section 54953.7.

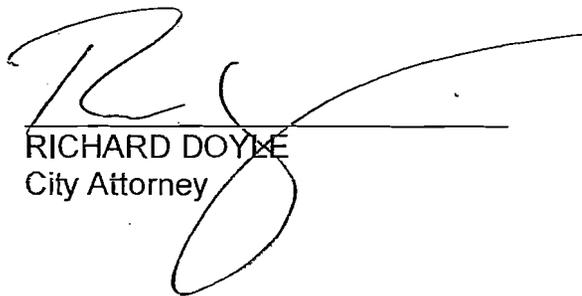
CONCLUSION

The matrix attached to this memo lists the types of matters that are discussed in closed session, when, if ever, the need for confidentiality might end on those discussions, and, if the recordings were to be disclosed after the need for confidentiality ended, what, if any, information should be redacted.

The Attorney's Office recommends that closed session be recorded only for the purpose of having the recording available to review for possible violations of the Brown Act. We believe that release of closed session recordings would compromise information about the City's strategy in labor negotiations, litigation and real estate negotiations as well as private information about City employees, Council Appointees and third parties.

If the Council chooses to disclose closed session recordings when the need for confidentiality has ended, the Attorney's Office recommends that disclosure of the discussions be in the form of a transcript, with the appropriate information redacted.

Finally, we believe that the Council may not enact any provision that would require more than a majority vote to release closed session information.



RICHARD DOYLE
City Attorney