



# Memorandum

**TO:** RULES AND OPEN  
GOVERNMENT COMMITTEE

**FROM:** RICHARD DOYLE  
City Attorney

**SUBJECT:** CITY ATTORNEY'S RESPONSE  
TO LETTER FROM BOB  
BROWNSTEIN DATED  
SEPTEMBER 9, 2009

**DATE:** September 24, 2009

## BACKGROUND

On September 9, 2009, Bob Brownstein sent a letter to the Mayor and Members of the City Council requesting that the Rules and Open Government Committee hold a hearing on a complaint about a violation of the city's Sunshine Policy. Specifically, Mr. Brownstein proposed that:

1. The City Council make a formal finding that the Sunshine policies require that public testimony be allowed on any motion before a policy or ancillary body with the exception of ceremonial items; and
2. The City Council admonish the Mayor for denying Mr. Brownstein the right to address the City Council on August 4<sup>th</sup> and alert the Chairs of all policy bodies and ancillary bodies that the Sunshine regulations guaranteeing the public the right to present testimony will be strictly enforced in San Jose.

This memorandum will provide a review of the allegations and set out the reasons why the remedial action by the City Council as proposed by Mr. Brownstein is not required.

## ANALYSIS

Mr. Brownstein asserts that a violation occurred at the Council meeting of August 4, 2009. Mr. Brownstein states in his letter:

During the Agenda Item, Orders of the Day, Councilmember Nora Campos made a motion to drop Agenda Item 5.3. The reason she stated for her motion was that the memorandum requesting that the item be placed on the agenda had arrived late, thereby failing to meet the standards of San Jose's Sunshine Policy. The motion was seconded by Councilmember Kalra, and councilmembers began debate on her motion. Immediately upon hearing a second for the motion, Mr. Neil Struthers and I [Mr. Brownstein] both submitted cards to the City Clerk requesting to speak on this matter. A city staff person approached the Mayor to indicate our desire to speak. He returned and informed us that the Mayor refused to allow public testimony on the

motion.

Mr. Brownstein further states in his letter that "Because of Mayor Reed's action, public participation in a debate over a key goal of the Sunshine Policy, its enforceability, was denied in total. His refusal to allow testimony violated any reasonable interpretation of the Public Meetings section of the City's Sunshine Policy."

1. Sunshine Recommendations and Public Testimony.

Section 2.7(A) of the Sunshine Reform Task Force Phase I Report and Recommendations, located on page 15, states:

Any person attending an open meeting of a policy body or ancillary body must be provided an opportunity to directly address the body, during the body's consideration of the item and during the open forum session, on any item of interest to the public that is within the body's subject matter jurisdiction. . . .

This language requires only that members of the public be provided an opportunity to address the body during (a) the body's consideration of an agenda item; and (b) during open forum. This language does not require public testimony on every motion, including motions made during Orders of the Day.

Mr. Brownstein argues:

In the case of San Jose's Sunshine Policy, however, we have ample information about the more expansive legislative intent of the city's policy because the Sunshine Task Force which drafted that policy specifically adopted 10 Sunshine Reform goals as the "over-arching philosophical framework" that guided their efforts. Goal 3 states, "The public should have a meaningful opportunity to participate in public decisions." Goal 4 states, "The public should have both easy access and sufficient time to fully review all information that is relevant to an item being discussed at a public meeting." Goal 6 states, "Stakeholders should be provided with an opportunity to be fully engaged before significant items are brought to a public body for consideration." Goal 10 states, "Reforms should be enforceable..." These goals demonstrate a strong intent to maximize the ability of citizens to impact City Council decisions.

The primary intent of the Task Force in meeting the goals articulated above was to increase the notice of meetings of the City Council, Council Committees and City Boards and Commissions (from 72 hours to 10 days), the amount of information made available to the public (requiring staff memos to be posted with the agenda and memos signed by more than one member of the body to be posted as supplemental memos 4 days before a meeting) and the accessibility of the agenda and supporting documents (requiring posting on the City's website). Our review of the Task Force meetings indicates that there was no discussion about expanding public testimony beyond that provided by the Brown Act and

the meaning of the language of the Task Force's Phase I report does not comport with the interpretations as presented by Mr. Brownstein.

Mr. Brownstein also argues that because the Mayor did not allow the public comment following Councilmember Campos' motion under Orders of the Day the "the public had no opportunity to participate in a review of the Clerk's decision or to participate in the discussion over the Clerk's decision and comment on its implication for the administration of Sunshine Policy in San Jose." In fact, the public had ample opportunity to discuss the Clerk's decision when the Motion for Reconsideration was debated. Both Mr. Brownstein and Mr. Struthers spoke during that public debate.

Because the recommendations from the Sunshine Reform Task Force do not require public testimony on every matter on an Agenda, the Mayor did not violate the Sunshine Reform Task Force's recommendations.

2. Request to Admonish the Mayor.

Mr. Brownstein proposes that the Mayor be admonished for not allowing him to address the City Council on August 4<sup>th</sup> during the Council discussion on Orders of the Day as he believes he was permitted under the Sunshine Reform Task Force recommendations. As stated above, because the recommendations from the Task Force do not require public testimony on every matter on an Agenda, the Mayor did not violate the Sunshine Reform Task Force's recommendations. The Committee should note, however, that even if the failure to provide the public with an opportunity to comment under Orders of the Day were a violation of the Task Force's recommendations, a request to admonish the Mayor would require a formal action by a member of the Council under City Council Conduct Policy 0-28 and not by a member of the public.

Council Conduct Policy 0-28 was revised on November 28, 2004 and superseded the original City Council Censure Policy. The Council Conduct Policy states in part:

It is the Policy of the City Council that all of its members shall abide by federal and state law, City ordinances and City policies, including the Code of Ethics. Violations of such law or policy tends to injure the good name of the City and to undermine the effectiveness of the City Council as a whole.

Depending on the circumstances of alleged violations or law or policy, the Council may initiate an investigation of the allegations prior to the filing of a request for any of the actions described in this policy.

Nothing in this policy shall preclude individual Councilmembers from making public statements regarding such alleged conduct.

The Council Conduct Policy provides the process for such an allegation to be addressed by the Rules Committee. The Council Conduct Policy process for an admonition is as

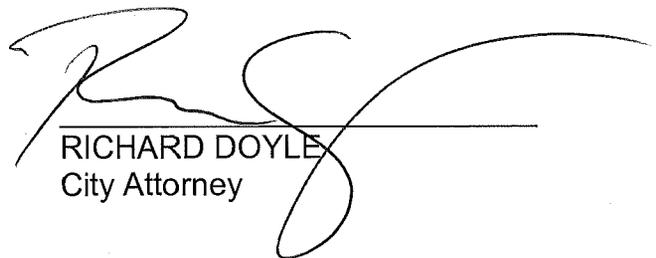
follows:

1. A request for an admonition must be submitted to the Rules Committee in writing by a member of the Council. The request should contain the specific language of the proposed admonition.
2. The Rules Committee shall determine whether to forward the proposed admonition to the full Council for consideration as part of the Rules Committee report agenda item at the appropriate subsequent Council meeting.
3. An admonition can be approved by a majority vote of the Council.

As is apparent from the Council Conduct Policy 0-28, only a member of the Council can request that a member of the Council, including the Mayor, be admonished.

### **CONCLUSION**

While the City Council could adopt a policy permitting public testimony on every matter under a Council Agenda, including motions made during Orders of the Day, the recommendations of the Sunshine Reform Task Force, adopted in part by the Council on June 10, 2008, do not include such a requirement. Pursuant to the Council Conduct Policy, only a member of the City Council may initiate a request that a member of the City Council, including the Mayor, be admonished.



RICHARD DOYLE  
City Attorney