



Memorandum

TO: HONORABLE MAYOR
AND CITY COUNCIL

FROM: Dan McFadden
Deputy City Manager

SUBJECT: SEE BELOW

DATE: May 23, 2007

Approved

Diana Faber

5/23/07

COUNCIL DISTRICT: City-Wide

SUBJECT: STAFF'S PRELIMINARY COMMENTS ON SUNSHINE REFORM TASK FORCE'S PHASE 1 REPORT AND RECOMMENDATIONS

RECOMMENDATION

1. Accept staff's preliminary response to the Sunshine Reform Task Force's (SRTF) Phase 1 Report and Recommendations.
2. Direct staff to conduct outreach and solicit feedback on the SRTF's Phase 1 recommendations and report back to the City Council in September 2007, regarding their adoption and implementation.

BACKGROUND

Since June 2006, the Sunshine Reform Task Force has been meeting regularly to review a variety of initiatives related to open government with the goal of drafting a comprehensive Sunshine Ordinance.

Although the SRTF considered a variety of proposals from the City Council and the public, its Phase 1 recommendations include only those proposals which a majority of the Task Force recommended that the Council consider. The SRTF's Phase 1 report includes recommendations for: (1) public meetings; (2) closed session; and (3) public information. Staff attended all of the SRTF's meetings as it developed the Phase 1 recommendations to provide background information, legal analysis, and staff's perspective on the potential financial and administrative challenges of the proposed reforms.

An internal team comprised of staff from key departments, the City Manager's Office the City Attorney's Office, and City Clerk's Office began meeting in April 2007 to review the SRTF's preliminary Phase 1 recommendations issued March 19, 2006. The following are staff's primary concerns about the proposed Sunshine Ordinance; staff believes these particular items merit further discussion and consideration before implementation.

ANALYSIS

This report provides staff's preliminary analysis on the SRTF's recommendations for public meetings, closed session, and public information, and proposes an outreach strategy to solicit additional input from a larger group of stakeholders to better understand the impact to their work and to identify areas of potential concern.

I. Public Meetings

The recommendations on public meetings relate primarily to three types of bodies: policy, ancillary, and non-governmental. The SRTF's proposals relating to the work of these bodies extends beyond what the Brown Act requires and differs significantly from current City practice. A matrix detailing the requirements to be imposed on policy bodies and ancillary bodies is included as Attachment 1.

1. Policy Bodies (Ref: SRTF Phase I Report, pg. 6)

The SRTF recommends extending the requirements for policy bodies to the City Council, Redevelopment Agency Board, the City's boards, commissions, and committees; any body that exists primarily to exercise authority delegated to it; any body that receives City funds and has appointed to its governing board a member of the policy body or his or her designee with voting rights; and bodies that advise on significant amounts of grant funding. In all, staff estimates the SRTF's proposal for policy bodies captures approximately 80 entities.

Staff Concerns

Staff notes that many of these bodies do not make policy, but rather provide advice to department heads and City Council. In essence, these bodies would be required to conduct their meetings as the City Council conducts its meetings. Staff is concerned about extending longer notice, posting, and minute-taking requirements to bodies that are actually advisory, and do not make policy decisions. Staff estimates that of the 80 bodies currently captured by the policy body definition, 16 of these actually make policy decisions (See Attachment 2).

Moreover, staff has concerns about the SRTF's recommendations about supplemental memorandums, public testimony, and minutes for policy bodies.

- a. Agenda Requirements (Ref: SRTF Phase I Report, pg. 9) - The Task Force recommends that when a policy body reports to another policy body, the item should go through at least 2 ten-day noticing periods (i.e. 10 days notice for Council Committee, Commission or Board and 10 days for City Council) not to exceed 45 days total.

Staff notes that this recommendation conflicts with the Council Committee procedures approved by Rules and Open Government Committee on January 31, 2007, requiring: 1) agendas and reports to be posted 5 days in advance of the Rules and Open Government Committee, and 2) agenda and staff reports for all other Council Committees to be posted 7 days in advance. In addition, the proposed agenda requirements will significantly impact the cycle time needed for staff to support the work of these bodies.

- b. Supplemental Memorandums (Ref: SRTF Phase I Report, pg. 11) - The SRTF recommends that supplemental staff reports be issued no later than 5 calendar days before a meeting. At times, however, staff acquires last minute information that is important to the decision-making process, but does not change the staff recommendations. Council may wish to retain the ability to obtain supplemental information if the recommendations remain unchanged.
- c. Public Testimony (Ref: SRTF Phase I Report, pg. 16) – One of the original 22 Sunshine reform referrals is to expand the speaking time from 2 minutes to 4 minutes for "Neighborhood Group or Community Association Designees." The SRTF recommends that up to 4 minutes be extended to any representative of an organization to provide public testimony if: (1) two or more members are in attendance; and (2) one representative is willing to yield his or her time.

The Council Rules of Conduct Resolution provides the Mayor the discretion to set the time limits for City Council meetings. While staff believes additional time would be appropriate for speakers representing Council-appointed advisory bodies, the City Attorney is concerned about the constitutional implications of extending additional time to certain groups. In any event, the City generally strives to permit all persons equal time to speak, with the exception of applicants or appellants in land use matters, who are permitted a total of 5 minutes.

- d. Minutes (Ref: SRTF Phase I Report, pg. 16) - The SRTF recommends that all policy bodies provide written minutes within 10 days after a meeting. The administrative challenges associated with completing minutes and posting them within this time frame for all 80 of the proposed policy bodies identified by the Task Force would be a significant staffing impact.

In addition, the City Clerk notes that a ten-day turnaround time for Council Meeting minutes is impractical. Although improvements have been made by going to an "action" minutes format, since the City Council meets weekly and considers numerous agenda items, the accurate preparation of meeting minutes (which, unlike other cities, contain important information relating to documents filed with each agenda item) takes time and skill. Moreover, staff notes the findings from a recent report released by the Santa Clara County Civil Grand Jury on May 3, 2007, titled "State of Minutes: An Inquiry into the Availability, Timeliness and Retention of the Minutes of the San Jose City Council." The Grand Jury concluded the procedures the

City has developed for the retention of video recordings, printed transcripts, and synopses give the public the ability to access information detailing the decisions of the City Council in a timely manner.

2. Ancillary Bodies (Ref: SRTF Phase I Report, pg. 3)

The SRTF recommends that committees that serve as an advisor to a member of a policy body, the Mayor, a City Councilmember, the Mayor's Chief of Staff, the Mayor's Budget and Policy Director, Council Appointees or a Department Head be considered ancillary bodies.

Staff Concerns

Extending the requirements for ancillary bodies to informal and ad hoc advisory committees created by department heads may impair staff's ability to work effectively. Department heads frequently seek input in forming recommendations by meeting with non-City staff members. The requirement to notice, agendaize, and provide for public participation in such meetings will be burdensome.

Staff is also concerned about permitting public participation in certain committees due to the sensitive nature of their topics, e.g. the Independent Police Auditor's Advisory Committee, hiring committees, and committees reviewing competitive solicitations. In addition, staff is concerned about the practicality of extending the requirements for ancillary bodies to ad hoc committees that meet only a few times, or sporadically.

Staff further notes the position of the "Mayor's Budget and Policy Director" is no longer utilized.

3. Non-governmental Bodies (Ref: SRTF Phase I Report, pg. 9)

The SRTF recommends applying certain requirements to "non-governmental bodies" (NGBs) – essentially any private or non-profit entity that operates and maintains a community center, a city facility or provides a direct service for a fee through contracts with the City. NGBs would be assigned to a policy body and required to provide written reports indicating compliance with contract requirements annually. Supplemental reports would also be required whenever a contractor made a significant policy or program change, as defined by the SRTF.

Staff Concerns

Staff agrees with the minority opinion submitted by Task Force member Margie Mathews for NGBs (see minority opinion provided in Attachment 3). Staff is very concerned that transferring oversight of contracts from staff to policy bodies would be duplicative, costly and counterproductive to the professional administration of contracts. Staff believes the SRTF definition will apply to a number of our non-profit partners and may be a disincentive to future partnerships and business transactions. In addition, having the non-governmental bodies report to a policy body will place an undue burden on the workload of policy bodies.

II. Closed Session

There are eight bodies that are permitted to conduct closed session. These bodies include: City Council, Board of the Redevelopment Agency, Civil Service Commission, Elections Commission, Police and Fire Retirement Board, Federated Employees Retirement Board, Deferred Compensation Advisory Board, and the San Jose Arena Authority. Staff's comments below relate primarily to the City Council's conduct of closed session. Staff proposes conducting outreach to the remaining bodies that are permitted to conduct closed session to better understand the impact of the specific recommendations to their work.

Staff has concerns about the SRTF's recommendations about audio taping, certification, and disclosure

1. Audio Taping (Ref: SRTF Phase I Report, pg. 19)

The SRTF recommends the recording of closed session. Recordings must be made available unless the City Attorney certifies that the need to keep the tapes confidential outweighs the public's interest in disclosure.

Staff Concerns

Staff is concerned about the audio taping of discussions in closed session related to labor, real property, and litigation, particularly until a process is established and the City can be clear about how and when the tapes would be released.

In the case of labor negotiations, the Brown Act allows closed session with the City's labor negotiator for the purpose of seeking direction in the negotiations. Since negotiating strategy is frequently similar for all bargaining units, staff does not foresee any circumstance where the tapes would be released.

In the case of real property negotiations, the purpose of closed session is for the negotiator to get direction on the price and terms of payment. Similar to the concerns raised above regarding labor negotiations, it is not foreseeable that disclosure of discussions about the strategy about a real estate transaction would occur at any time. Instead, once the parties agree upon price, the final approval of the transaction is subject to the public meeting noticing and hearing requirements and all information (including price and terms of payment) would be disclosed.

The City Attorney's Office notes that the same concerns about audio taping labor and real estate negotiations apply to discussions about lawsuits in closed session, because litigation strategy in one case may apply to similar cases. Moreover, closed session discussions about workers' compensation settlements are specifically prohibited from disclosure by federal and state privacy laws.

As noted by the Task Force members who have served on City Councils, Margie Matthews and Judy Nadler, recording closed session will likely reduce candor and increase the role of politics in closed session discussions.

2. Certification (Ref: SRTF Phase I Report, pgs. 19 and 22)

The SRTF recommends that after an item has been discussed in closed session, the City Attorney may certify that the recording of the closed session on that matter should not be made available if he or she makes a specific finding that the public interest in non-disclosure outweighs the public interest in disclosure. The Task Force will make recommendations about the process of appealing the City Attorney's certification of a recording of closed session in its Phase II recommendations under the Enforcement Section.

Staff believes that while that while the meetings were noticed and conducted in accordance with the law, the majority of closed session discussions concern attorney-client communications. The holder of that privilege is the City Council and not the City Attorney. It is only proper for the Council, and not the City Attorney, to decide whether to waive any privilege and release audio tapes on a case-by-case basis. The role envisioned for the City Attorney may be inconsistent with the role of the City Attorney as defined in the City Charter.

Again, the primary concern of staff is that closed session not be recorded until a protocol for releasing the tape is adopted by Council.

3. Disclosure (Ref: SRTF Phase I Report, pg.20)

The SRTF recommends that before going into closed session on a real estate matter, the body meet in open session and disclose not only the property at issue (which is consistent with current law) but any proposed development for the property and the sources of payment for the purchase.

Staff Concerns

This proposal may put the City at a disadvantage by requiring greater disclosure than what is necessary to acquire the property. It could affect the ultimate price (if the plans for development are disclosed) or timing (if the source of payment is disclosed) on any proposed development. Ultimately, all desired information will be disclosed at a properly noticed public meeting once the negotiations have concluded.

III. Public Information

1. Release of Oral Information (Ref: SRTF Phase I Report, pg.23)

The SRTF recommends that public employees must not be discouraged from or disciplined for the expression of their personal opinions on any matter of public concern while on duty.

Staff Concerns

The City Attorney's Office notes this recommendation is contrary to both the San Jose Municipal Code and case law, which permits employers to regulate the speech of employees while on duty.

2. Public Review File (Ref: SRTF Phase I Report, pg.23)

The SRTF recommends that the City Clerk maintain a public review file that is accessible to any person during normal office hours and that contains a copy of any letter, memorandum or other communication which the Clerk has distributed to or received from a quorum of a policy body concerning a matter calendared by the body within the previous 30 days "or likely to be calendared within the next 30 days."

Staff Concerns

The City Clerk notes that implementation of this recommendation is a resource and process issue; the ease of doing so depends on what is ultimately defined as a policy body. Moreover, staff questions the necessity of duplicating documents already maintained by policy bodies e.g. like the Planning Commission, for example, and is concerned that implementing a requirement to keep copies of items that are "likely to be calendared" places an impossible requirement on the office.

3. Calendars (Ref: SRTF Phase I Report, pgs.23 and 24)

The SRTF recommends changing the City's current practice regarding the disclosure of calendars for City officials by: (1) expanding the list of individuals required to maintain calendars and make them available upon request; (2) increasing the frequency of posting calendars for certain officials from quarterly to weekly; (3) prescribing the content the calendar must provide; and (4) proposing exceptions for activities that may be excluded from calendars.

Staff Concerns

The SRTF's recommendation does not provide an exemption for meetings of the Police Chief that may compromise police investigations, pose security concerns, or deter community involvement. Staff is also concerned about descriptions of meetings that concern personnel matters, and proposes exempting those meetings as well.

4. Lobbyist on Behalf of the City (Ref: SRTF Phase I Report, pg. 24)

The SRTF recommends that individuals or organizations that lobby in Sacramento or Washington, DC on behalf of the City report expenditures that advance lobbying efforts on behalf of the City on a quarterly basis. In addition, the SRTF recommends prohibiting the use of City funds to support any lobbying effort to restrict public access to records, information, or meetings, except where such effort is solely for the purpose of protecting the identity and privacy rights of private citizens.

Staff Concerns

The SRTF's recommendation to prohibit the City from taking a position on legislation prospectively is not prudent. This provision may limit the City's ability to respond to future legislation. It is essential that the City maintain the ability to analyze future legislation and amendments to bills on a case-by-case basis and to respond based on the merits of the proposed legislation. In addition, the provision provides an exception if the effort is solely for the purpose of protecting the identity and privacy rights of private citizens, but staff is concerned that "private citizens" is not intended to include public employees.

Moreover, the City Clerk notes the additional administrative burden of overseeing compliance with the increased reporting requirements.

SUMMARY

Other Related Council Referrals

Staff is working on a related referral from the Rules and Open Government Committee to consolidate the open government reforms. This analysis will examine all open government initiatives and identify the referrals that have been integrated into the SRTF's proposed Sunshine Ordinance. Staff anticipates submitting this analysis to the Rules and Open Government Committee in early June 2007.

In addition, at the April 3, 2007, City Council Meeting, Council approved actions related to the Mayor's Transition Subcommittee on Government Reforms and Ethics related to public subsidies with staff direction to: (1) work expeditiously with the Sunshine Reform Task Force to receive and analyze the Task Force's recommendations within three weeks of the Task Force's submission of recommendations; and (2) return with what the City can legally require private entities to divulge about wages and benefits. Staff's review of the SRTF's recommendations will be responded to under separate cover within the timeframe established by the City Council.

Implementation

The Task Force discussed and considered the staff, financial, and administrative challenges that the City might face in implementing the Phase I recommendations. Staff recognizes there will be unintended consequences of the proposed Sunshine Ordinance, and therefore recommends that the provisions identified in this SRTF report be implemented on a pilot basis. The pilot program will allow for more complete review of effectiveness, impacts on resources, workload and City processes. Staff is eager to move forward with the goal of adopting an ordinance that is clear and balances the benefits of open government with legitimate concerns for effective public management.

POLICY ALTERNATIVES

Not applicable

PUBLIC OUTREACH/INTEREST

Criteria 1: Requires Council action on the use of public funds equal to \$1 million or great.

Criteria 2: Adoption of a new or revised policy that may have implications for public health, safety, quality of life, or financial/economic vitality of the City.

Criteria 3: Consideration of proposed changes to service delivery, programs, staffing that may have impacts to community services and have been identified by staff, Council or a Community group that requires special outreach.

The work of the Sunshine Reform Task Force has been well-publicized in the community. In addition to coverage by the local media, an early advertising campaign invited suggestions from the community and over 50 reform proposals were received. All meetings are televised and all documents are available online.

While some entities have engaged in discussions with the Sunshine Reform Task Force as it considered these recommendations, the final recommendations of the Sunshine Reform Task Force for Public Meetings, Closed Session, and Public Information are just now being completed for Council consideration. Because some of the definitions and requirements to be imposed for Public Meetings will affect our City's boards, commissions, committees, and private partners, some of whom may not think of themselves as entities impacted by these proposals, staff believes an additional opportunity for public input and reaction to these proposals would provide helpful information to the City Council before it acts on the proposals. Staff proposes holding two public meetings before the end of the July furlough to seek this input. As noted above, these proposals will bring changes to all of the City's boards, commissions, and committees, as well as to a number of non-governmental bodies that contract with the City. Outreach for these meetings would be accomplished through direct contact with the potentially affected entities as well as advertisements placed in our local newspapers.

COORDINATION

This report has been coordinated with the City Attorney's Office, the City Clerk's Office, the Redevelopment Agency, the City Manager's Office, and City departments.

FISCAL POLICY ALIGNMENT

N/A

COST SUMMARY/IMPLICATIONS

To address new requirements growing out of both the Sunshine Reforms and Reed Reforms, the recently released *2007-2008 Proposed Operating Budget* recommended \$1.1 million (\$350,000 ongoing) to meet technology needs and improve access to information. An MBA distributed to the

City Council on May 9, 2007, provides the details of this expenditure and is currently being considered in the 2007-2008 Budget. The proposal would fund a Public Records Manager, a Video Producer for meeting coverage, and an Analyst position for posting notices and agendas, along with additional electronic storage capacity, and an audit of the City's website to identify improvements to enhance access to online information. Both the Reed Reforms and Sunshine Reforms focus attention on improving public access to information about the City. Generally, these efforts are focused on two areas: (1) better access to City records; and (2) better access to information about public meetings. The proposals contained in the MBA addresses many of the needs that have been identified to date.

BUDGET REFERENCE

2007-2008 Proposed Operating Budget, pg. IX-16.

A handwritten signature in black ink, appearing to read "Dan McFadden", written in a cursive style.

Dan McFadden
Deputy City Manager

For questions, please contact Sheila Tucker, City Manager's Office 408.535.8115.

Attachment 1

Summary of Primary Requirements for Policy Bodies and Ancillary Bodies (extending beyond current practice or the Brown Act)

	Policy Body	Ancillary Body
1. Agenda Posting	10 calendar days	4 calendar days
2. Staff Reports	10 calendar days	4 calendar days
3. Staff Reports – Expenditures of \$1M or More	14 calendar days	4 calendar days
4. Public Subsidy – \$1M or More	30 calendar days	N/A
5. Supplemental Staff Reports	5 calendar days	2 calendar days
6. Council Memos	4 calendar days No more than 2 signatories	2 calendar days
7. Agenda Posting (Special Meeting)	4 calendar days	24 hours
8. Recording and Photography	City Council, Rules and Open Government Committee, Planning Commission, and Elections Commission must video record meetings; all other Policy Bodies must audio record meetings; Recordings to be kept for 2 years.	Audio record meetings or provide action minutes Recordings to be kept for 2 years
9. Public Testimony	Up to 4 minutes may be extended to a representative of an organization to provide public testimony if: 1) two or more members are in attendance, and 2) one representative is willing to yield his or her time.	Brown Act
10. Minutes	Current practice for Council meetings extended to all Policy Bodies; minutes provided no later than 10 days after the meeting.	Action minutes or audio recording

Attachment 2. Policy Bodies

The following boards, commissions and committees were established by the City Charter, created by some formal action of the City Council (or by some formal action of the board, commission or committee), or meet some other criteria for Policy Bodies as recommended by the SRTF. The bodies identified in bold text make decisions about policy.

1. **City Council**
2. **SJ Redevelopment Agency Board**
3. **San Jose Financing Authority**
4. **San Jose Parking Authority**
5. Advisory Commission on Rents
6. Airport Commission
7. Airport Noise Advisory Committee
8. **Appeals Hearing Board**
9. Arena Management Corporation
10. Arts Commission
11. Arts Commission, Executive Committee
12. Arts Commission, Public Art Committee
13. Bicycle and Pedestrian Advisory Committee
14. Bringing Everyone's Strength's Together Evaluation Panel
15. Children's Discovery Museum of San Jose
16. Citizens Corps Council
17. **Civil Service Commission**
18. Community Action and Pride Grant Program Evaluation Panel
19. Community and Economic Development Committee
20. Convention and Visitors Bureau
21. Council Assistants Meeting
22. Council Salary Setting Commission
23. Coyote Valley Task Force
24. **Deferred Compensation Advisory Committee**
25. Disability Advisory Committee
26. Domestic Violence Advisory Board
27. Downtown Parking Board
28. Early Care and Education Commission
29. **Elections Commission**
30. **Federated Employees Retirement Board**
31. Federated Employees Retirement Board, Investment Committee
32. Federated Employees Retirement Board, Investment Committee of the Whole
33. Federated Employees Retirement Board, Real Estate Committee
34. Friends of the Guadalupe
35. GreenTeam of San Jose
36. Happy Hollow Park and Zoo Corporation
37. Healthy Neighborhoods Venture Fund
38. Healthy Neighborhoods Venture Fund Evaluation Panel
39. Historic Landmarks Commission
40. History San Jose
41. Housing & Community Development Advisory Committee
42. Human Rights Commission
43. **Independent Hearing Panel (LEA)**
44. Library Commission
45. Mexican Heritage Corporation
46. Mobile Home Advisory Commission
47. Neighborhood Services & Education Committee
48. Norcal Waste Systems of San Jose
49. Our City Forest
50. Parks and Recreation Commission
51. **Planning Commission**
52. Police Activities League
53. **Police and Fire Retirement Board**
54. Police and Fire Retirement Board, Investment Committee
55. Police and Fire Retirement Board, Investment Committee of the Whole
56. Police and Fire Retirement Board, Real Estate Committee
57. Public Safety Bond Citizen Oversight Committee
58. Public Safety, Finance & Strategic Support Committee
59. Rules and Open Government Assistants Meeting
60. Rules & Open Government Committee
61. San José Arena Authority
62. San José Beautiful
63. San José Beautiful Evaluation Panel
64. San José Conservation Corp
65. **San José Housing Authority**
66. San José Museum of Art
67. San José Sports Authority
68. Senior Citizen Advisory Commission
69. Silicon Valley Workforce Investment Network
70. **SJ/SC Clean Water Financing Authority**
71. **SJ/SC Treatment Plant Advisory Committee**
72. Small Business Development Commission
73. Strong Neighborhoods Initiative Project Advisory Committee (SNI PAC)
74. Sunshine Reform Task Force
75. Taxi San José
76. Team San José
77. The Tech Museum of Innovation
78. **Traffic Appeals Commission**
79. Transportation & Environment Committee
80. Youth Commission

Attachment 3. Minority Opinion
Submitted by Task Force Member Margie Mathews on Non-governmental Bodies

The organizations as defined are not policy bodies. Rather, they are private and non-profit entities that maintain buildings, operate programs, or provide a service for an agreed upon fee as detailed in contracts with the City of San Jose.

The conditions and terms of these contracts are public documents approved by the City Council and managed by the City's administrative staff. Placing oversight of thousands of contracts into a parallel political arena would be duplicative, costly, and counterproductive to the professional administration of contracts.

The recent financial difficulties of a number of non-profit organizations are not the result of poor contract administration. Rather, they are symptoms of the general economic decline of the region – a condition that the City itself is suffering from along with most businesses.

The concept of establishing public-private partnerships to assist the city in its mission has been embraced whole-heartedly by the City and the larger community. This method of providing what the City can no longer provide cannot be sustained if the private partners are not given the authority to fulfill and oversee their own missions. A basic principle of non-profit management is that the board of directors must be given real authority if it is expected to bring money and other resources to the organization.

The City is not in the financial position to increase staffing and/or consulting contracts to put such a system of political oversight in place. Furthermore, if the City creates unnecessary scrutiny and bureaucratic hoops for private partners, the very resources and savings the City benefits from could be jeopardized.