



Memorandum

TO: HONORABLE MAYOR AND
CITY COUNCIL

FROM: RICHARD DOYLE
City Attorney

SUBJECT: CITY ATTORNEY'S RESPONSE
TO REFERRALS DATED
APRIL 1, 2008 FROM RULES
AND OPEN GOVERNMENT
COMMITTEE

DATE: May 14, 2008

BACKGROUND

The Sunshine Reform Task Force issued its Phase I Report and Recommendations in May, 2007. The Phase I Recommendations include provisions that closed session discussions be audio recorded and that the recordings be made available unless the City Attorney certifies otherwise.

In June, 2007, the Rules and Open Government Committee (ROGC) 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 City Council referred back to the ROGC the question about audio recording closed session and at the same time directed staff to work with the Task Force on developing a protocol about recording closed session. Shortly after the Council's referral, the ROGC rejected the Task Force's recommended protocol that the City Attorney certify closed session recordings because the ROGC believes that the decision to disclose closed session discussions rests exclusively with the Council.

The ROGC then asked that the City Attorney's Office prepare a matrix listing (a) the types of matters that are discussed in closed session, (b) when, if ever, the need for confidentiality might end on those discussions, and, (c) if the recordings were to be disclosed after the need for confidentiality ended, what, if any, information should be redacted. The ROGC also noted that the Council had to decide whether closed session should be recorded either (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 possible future release, the ROGC wanted the Attorney's Office to advise whether the Council could decide that recordings would be released on more than a majority vote.

The City Attorney's Office issued a memo dated September 27, 2007, recommending that closed session be recorded only for the purpose of having the recording available to review for possible violations of the Brown Act. The memo also includes 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. The memo also recommended that, in the event that the Council chooses to record closed session for possible future release, disclosure of the discussions be in the form of a transcript, with the appropriate information redacted since transcription of the recordings will ensure that necessary redaction is accurate and thorough. Finally, to respond to the question about a greater than majority vote, the Attorney's Office advised the ROGC that the Council cannot decide that recordings be released on more than a majority vote, since that requirement would permit less access than is permitted under the Brown Act. The Brown Act permits release of confidential information acquired by being present in closed session only on a majority vote.

The ROGC discussed the memo from the Attorney's Office and considered recording closed session on litigation and real estate matters and not recording labor and personnel matters. The ROGC decided to send the question about recording closed session to the Council and asked for the following additional information from the Attorney's Office: (1) What remedy is available to a closed session participant who believes a Brown Act violation has occurred? (2) What are other communities doing? This memo responds to those two referrals.

ANALYSIS

What Remedy is Available to a Closed Session Participant Who Believes a Brown Act Violation Has Occurred?

If a closed session participant (or any interested person, including the District Attorney) believes that a matter discussed in closed session was not timely noticed or described on the agenda consistent with the Brown Act, he or she may challenge the action taken.¹ First, however, the person alleging that the action was not timely noticed or properly described on the agenda must make a written demand to the Council to cure or correct the action.² If the Council does not act in a manner that satisfies the person who demanded the cure or correction, within 15 days of receiving written notice of the Council's decision, he or she must file a lawsuit directly in the Superior Court.³

If a closed session participant (or any interested person) believes that some other violation of the Brown Act occurred in closed session, that person may either make a complaint to the District Attorney or file a lawsuit directly in the Superior Court.⁴

¹ California Government Code Section 54960.1(a).

² California Government Code Section 54960.1(b).

³ California Government Code Section 54960.1(a) and (c)(4).

⁴ California Government Code Section 54960.

What Are Other Communities Doing?

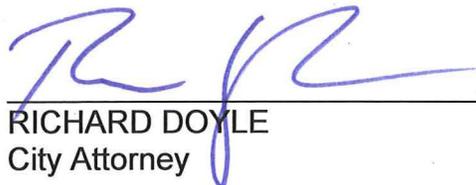
We have reviewed the following ordinances: San Francisco Sunshine Ordinance, Oakland Sunshine Ordinance, Milpitas Open Government Ordinance, Contra Costa County Better Government Ordinance and Benicia Open Government Ordinance. Only San Francisco and Milpitas require that closed session be recorded. Although both ordinances state that "recordings shall be made available whenever all rationales for closing the session are no longer applicable", we are not aware of any instance in which either city has done so. We believe that due to the limited and sensitive nature of discussions held in closed session, it is likely that there never will be a time when the rationale for closing the session is no longer applicable.

CONCLUSION

A closed session participant – like any interested person, including the District Attorney – may challenge action taken in closed session by filing a complaint in Superior Court. If the claim is that a matter discussed in closed session was not timely noticed or described on the agenda consistent with the Brown Act, he or she first must make a written demand to the Council to cure or correct the action.

The San Francisco and Milpitas ordinances require that closed session be recorded but we are not aware of any instance in which either city has ever disclosed any recordings. Moreover, 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.

The City Attorney and City Administration continue to recommend that closed session meetings not be recorded in order to preserve the integrity of the closed session process. If the Council chooses to record closed session, the City Attorney recommends that it be recorded only for the purpose of determining whether a Brown Act violation has occurred.


RICHARD DOYLE
City Attorney