

From: Goldberg, Susan [mailto:SGoldberg@mercurynews.com]
Sent: Thursday, October 12, 2006 5:47 PM
To: 'Sheila.Tucker@sanjoseca.gov'
Subject: Comments on Closed Sessions

Sheila: [here are comments on closed sessions, including two attachments. I'd appreciate it if you would distribute it to the task force. Thanks, Susan.](#)

To the Task Force:

Here are some thoughts on the high points of the "Closed Session" provisions. I've organized them under the headings used in the outline provided by staff, and tried to explain some of ways local officials have used loopholes in the Brown Act to conduct the public's business in private. Thanks for considering these ideas. Susan.

A. Closed Sessions: Permitted Topics

We don't need to hash out every topic about which a closed session may be held. The Brown Act already spells out the circumstances in which meetings can be closed to the public. There's no problem - in principle -- with the topics that the Brown Act allows to be closed.

The problem comes in the application of these exemptions, which are often abused. That means that all kinds of things get discussed in private that should be discussed in public. I'll suggest some language that would limit the scope of the exemptions, and, when possible, try to give you real-life examples of times in which these closed meetings have been abused. (Real-life example: when the San Jose City Council [closed a session to discuss a real estate deal - and ended up having a closed-door, wide-ranging discussion about giving a large public subsidy to a professional sports team.](#))

1. Official misconduct.

As it now stands, the Brown Act allows local governments to hold closed sessions on the hiring, firing, discipline, or complaints about city officials and employees. Only the conduct of **elected** officials cannot be discussed in closed session. (Real-life example: [the private discipline against high-level employees involved in the City Hall/Cisco technology scandal vs the public censure of Mayor Gonzales.](#))

I think this is a flaw in the Brown Act because misconduct by city officials and public employees is a matter of intense public import and interest. This exemption also allows a level of secrecy at odds with the state's Public Records Act, which allows the public to see to all records regarding misconduct by a public employee who has been disciplined, or against whom "well-founded" charges have been made.**

In a place like San Jose, where much of the power of government is held by such officials as department heads and the city manager, I believe misconduct should not be allowed to hide behind closed doors. The public deserves a full explanation when misconduct by public employees happens. (Real-life example: City officials never fully described the misconduct of Wandzia Grycz, who ran the city's Information Technology Department, or their interactions with her, in the wake of the Cisco scandal. Nor was the public informed of Grycz's explanation for her conduct, which favored Cisco in the bid process. Instead, the city took the position that it was protecting Grycz's privacy, but forced this top city official - earning over \$100,000 a year -- to resign.)

The Task Force should push for language that closes this loophole and parallels the Public Records Act to require public discussion of any misconduct that is the subject of well-founded charges or that results in discipline.

**The courts have said "well-founded" charges are those in which there are "sufficient indicia of reliability to support a reasonable conclusion that the complaint was well-founded." (Perhaps we could come up with our own, less-vague definition, but this is what the courts say it means now.)

2. *Compensation.*

The issue of whether compensation of public employees is public information will come up far more directly in our discussion over public records. The San Francisco ordinance, to name one example, has explicit language that makes all employee salaries public. It might make more sense to get into this topic during our discussion of public records.

3. *Real Estate Negotiations.*

Real estate negotiations are some of the most important transactions that the City undertakes. They can involve hundreds of millions of the dollars, commitments spanning decades and public financial support from bonds or taxes.

Under the Brown Act, only the price and terms of a proposed real estate transaction are allowed to be discussion in closed session - and then only in the context of a meeting in which the government body instructs its negotiator on its position.

Yet too often, discussions behind closed doors are much broader than what is allowed. (Real-life example: in discussing a proposal for a downtown soccer stadium, the City Council discussed such items as a campaign to win public support for the project. Please [see attached story](#) about that meeting, as well as the actual minutes from that meeting, which detail what was talked about.)

Clearly, this exception is being applied much too broadly. The Sunshine Ordinance needs to spell out even more clearly than the Brown Act that **only** price and terms of the actual real estate transaction can be discussed in closed session -- nothing else.

When it comes to the real estate exemption, we would propose this language, taken from the model ordinance crafted by the League, neighborhood groups and the Mercury News:

"Such closed sessions shall be for the purpose of reviewing the City's position with respect to the price or terms of payment and instructing its negotiator regarding such terms only. No discussion of any other aspects of the purchase, sale, exchange, or lease of real property may take place in closed session. In particular, any consideration or discussion of plans or proposals for the development of real property must take place in an open and public session."

B. Agenda Disclosures: Closed Sessions

This area can be improved from the Brown Act, but it's more a matter of making minor changes to make the disclosures clearer and more complete. I don't believe that major changes are required.

Here's a quick example of the kind of thing we'd want to change: If the city council is meeting in closed session to discuss "anticipated litigation," Milpitas and San Francisco require the council to reveal whether the city expects to be the plaintiff or defendant. Milpitas and San Francisco also require that the employee be named when a performance evaluation is discussed in a closed session.

C. Statement of Reasons for Closed Sessions

Again, there is room for improvement, but major changes are probably not necessary.

Here is a quick example of the kind of thing we'd want to change: The Brown Act requires government to disclose the items to be discussed. The Milpitas ordinance also requires government to list the specific sections of the law that justify a closed-door discussion of those items.

D. Additional Requirements for Closed Sessions

Right now, the Brown Act does not require that *any* record of a closed session be made. Local governments do not even have to keep minutes.

This is an important area for change. Members of the public in other cities with Sunshine Ordinances have strongly supported recording of public sessions, because it acts as an incentive for compliance with the law. Tape or video recording is the only way to ensure that the actual content of closed sessions is retained. Minutes are subject to approval and can be manipulated. I think that closed session should be recorded.

There also should be routine disclosure of closed sessions once the need for secrecy has passed. For example, when a real estate transaction is concluded, the recordings of the closed session about that transaction should be made public. This is the best assurance that the City will keep closed session discussions to a minimum, and not violate the law.

E. Disclosure of Closed Session Discussions and Actions

We can definitely improve on the Brown Act with respect to the disclosures required after the City has taken action in a closed session. First, the Brown Act allows local government to complete a real estate transaction in closed session, and tell the public about it only afterward. It is possible under the Brown Act that the first time the public will learn about a major real estate transaction is after the contract is signed.

At a minimum, the public almost never learns about the details of the contract until it is too late to do anything about it. That makes no sense. The public should be given information about a transaction before it is final, so that it can weigh in on the deal before the City is committed.

In general, after the City and the other party to the transaction have tentatively approved the contract, the public should be given at least 15 days to see the contract and provide input. This is already done with respect to a narrow category of public contracts, and there is no indication that it causes any problems for the government.