

**Closed Session  
Draft Provisions 12-21-06**

**NOTE:** The “headers” are taken from the San Francisco Sunshine Ordinance, except for “Certification of Closed Session Discussions and Actions” since there is no comparable provision in San Francisco’s ordinance. The content is modeled on the Milpitas Open Government Ordinance.

1. Agenda Disclosures: Closed Sessions.
  - A. Items described on the written agenda for closed session must use the following format:
    - (1) With respect to a closed session to discuss and determine whether an applicant for a license or license renewal, who has a criminal record, is sufficiently rehabilitated to obtain the license (Government Code Section 54956.7):

**LICENSE/PERMIT DETERMINATION**

Applicant(s): (Specify number of applicants)

- (2) With respect to a closed session with a policy body’s negotiator before the purchase, sale, exchange, or lease of real property or for the policy body to grant authority to its negotiator regarding the price and terms of payment for purchase, sale, exchange, or lease (Government Code Section 54956.8):

**CONFERENCE WITH REAL PROPERTY NEGOTIATORS**

Property: (Specify street address, or if no street address, the parcel number or other unique reference, of the real property under negotiation)

Agency negotiator: (Specify names of negotiators attending the closed session)

(If circumstances necessitate the absence of a specified negotiator, an agent or designee may participate in place of the absent negotiator so long as the name of the agent or designee is announced at an open session held prior to the closed session.)

Negotiating parties: (Specify name of party (not agent))

Under negotiation: (Specify whether instruction to negotiator will concern price, terms of payment, or both)

(3) With respect to a closed session to confer with or receive advice from a policy body's legal counsel regarding pending litigation when discussion in open session concerning those matters would prejudice the position of the policy body in the litigation (Government Code Section 54956.9):

- (a) CONFERENCE WITH LEGAL COUNSEL--EXISTING LITIGATION  
(Subdivision (a) of Government Code Section 54956.9)

Name of case: (Specify by reference to claimant's name, names of parties, case or claim numbers)

or

Case name unspecified: (Specify whether disclosure would jeopardize service of process or existing settlement negotiations)

- (b) CONFERENCE WITH LEGAL COUNSEL  
--ANTICIPATED LITIGATION  
Significant exposure to litigation pursuant to subdivision (b) of Government Code Section 54956.9:

(Specify number of potential cases)

(In addition to the information noticed above, the agency may be required to provide additional information on the agenda or in an oral statement prior to the closed session pursuant to subparagraphs (B) to (E), inclusive, of paragraph (3) of subdivision (b) of Government Code Section 54956.9.)

- (c) CONFERENCE WITH LEGAL COUNSEL  
--ANTICIPATED LITIGATION  
Initiation of litigation pursuant to subdivision (c) of Government Code Section 54956.9:

(Specify number of potential cases)

(4) With respect to a closed session to discuss a claim for the payment of tort liability losses, public liability losses, or workers' compensation liability incurred by a joint powers agency or a local agency member of a joint powers agency (Government Code Section 54956.95):

#### LIABILITY CLAIMS

Claimant: (Specify name unless unspecified pursuant to Government Code Section 54961)

Agency claimed against: (Specify name)

(5) With respect to a closed session with the Attorney General, district attorney, agency counsel, sheriff, or chief of police or their respective deputies, or a security consultant or a security operations manager, on matters posing a threat to the security of public buildings, or a threat to the security of essential public services, including water, drinking water, wastewater treatment, natural gas service, and electric service, or a threat to the public's right of access to public services or public facilities (Government Code Section 54957(a)):

#### THREAT TO PUBLIC SERVICES OR FACILITIES

Consultation with: (Specify name of law enforcement agency and title of officer, or name of applicable agency representative and title)

(6) With respect to a closed session to consider the appointment, employment, evaluation of performance, discipline, or dismissal of a public employee or to hear complaints or charges brought against the employee by another person unless the employee requests a public session (Government Code Section 54957(b)):

#### PUBLIC EMPLOYEE APPOINTMENT

Title: (Specify description of position to be filled)

#### PUBLIC EMPLOYMENT

Title: (Specify description of position to be filled)

#### PUBLIC EMPLOYEE PERFORMANCE EVALUATION

Title: (Specify position title of employee being reviewed)

#### PUBLIC EMPLOYEE DISCIPLINE/DISMISSAL/RELEASE

(No additional information is required in connection with a closed session to consider discipline, dismissal, or release of a public employee. Discipline includes potential reduction of compensation.)

(7) With respect to a closed session with the policy body's designated representatives regarding the salaries, salary schedules, or compensation paid in the form of fringe benefits of its represented and unrepresented employees, and, for represented employees, any other matter within the statutorily-provided scope of representation (Government Code Section 54957.6):

## CONFERENCE WITH LABOR NEGOTIATORS

Agency designated representatives: (Specify names of designated representatives attending the closed session)

(If circumstances necessitate the absence of a specified designated representative, an agent or designee may participate in place of the absent representative so long as the name of the agent or designee is announced at an open session held prior to the closed session.)

Employee organization: (Specify name of organization representing employee or employees in question)

or

Unrepresented employee: (Specify position title of unrepresented employee who is the subject of the negotiations)

(8) With respect to a closed session to discuss the case records of any ongoing criminal investigation of a multi-jurisdictional drug law enforcement agency, hear testimony from persons involved in the investigation, and to discuss courses of action in particular cases (Government Code Section 54957.8):

## CASE REVIEW/PLANNING

(No additional information is required in connection with a closed session to consider case review or planning.)

(9) With respect to a closed session to discuss hearings on the reports of hospital medical audit or quality assurance committees, deliberate matters pertaining to the hearings, or discuss or deliberate reports involving hospital district trade secrets (Sections 1461, 32106, and 32155 of the Health and Safety Code or Sections 37606 and 37624.3 of the Government Code):

## REPORT INVOLVING TRADE SECRET

Discussion will concern: (Specify whether discussion will concern proposed new service, program, or facility)

Estimated date of public disclosure: (Specify month and year)

## HEARINGS

Subject matter: (Specify whether testimony/deliberation will concern staff privileges, report of medical audit committee, or report of quality assurance committee)

(10) With respect to a closed session to hear a charge or complaint from a member enrolled in its health plan if the member does not wish to have his or her name, medical status, or other information that is protected by federal law publicly disclosed (Government Code Section 54956.86):

**CHARGE OR COMPLAINT INVOLVING INFORMATION PROTECTED BY FEDERAL LAW**

(No additional information is required in connection with a closed session to discuss a charge or complaint pursuant to Section 54956.86.)

(11) With respect to a closed session of the legislative body of a joint powers agency in order to receive, discuss, and take action concerning information obtained in a closed session of the joint powers agency (Government Code Section 54956.96):

**CONFERENCE INVOLVING A JOINT POWERS AGENCY (Specify by name)**

Discussion will concern: (Specify closed session description used by the joint powers agency)

Name of local agency representative on joint powers agency board: (Specify name)

(Additional information listing the names of agencies or titles of representatives attending the closed session as consultants or other representatives.)

(12) With respect to closed session to discuss a policy body's response to a confidential final draft audit report from the Bureau of State Audits (Government Code Section 54956.75):

**AUDIT BY BUREAU OF STATE AUDITS**

B. In addition to describing items on the written agenda for closed session in the format set out in Section 1(A)(3)(a), when describing existing litigation, the written agenda must identify the court, case number and date the case was filed, unless disclosing the information would jeopardize service of process or existing settlement negotiations.

2. Additional Requirements for Closed Session.

A. All closed sessions of any policy body must be audio recorded in their entirety. Closed session recordings are confidential unless and until they are made available as provided in this section. All recordings must be retained for at least 2 years from the date of (1) disclosure required in Section 5(A); or (2) certification of non-disclosure permitted in Section 6.

**Question: What is the appropriate length of time to retain the recordings?**

- **The Task Force’s attorney believes 2 years is too short.**
- **The City Clerk determined that 2 years is the amount of time other California cities that record closed session – Monterey, Santa Clarita, Riverside and Hayward – retain the recordings.**

B. Consistent with the certification process described in Section 6, closed session recordings must be made available whenever the rationale for closing the session is no longer applicable, including, but not limited to, the conclusion of negotiations or litigation.

**Question: Should there be a mechanism to determine when the “rationale is no longer applicable”?**

**Question: Should the public be notified when the closed session recording becomes available?**

- **If so, how?**

C. When the justification for closed session is “anticipated litigation”, the recording must be made available: (1) If a lawsuit is not filed, upon expiration of the statute of limitations; or (2) if a lawsuit is filed, as soon as the controversy leading to anticipated litigation is settled or concluded. In any event, the policy body or the City Attorney’s Office must disclose upon request (1) whether anticipated litigation developed into a lawsuit; and (2) the court, case number and date the lawsuit was filed.

3. Closed Sessions: Permitted Topics.

Any policy body that holds closed session is permitted to discuss the following topics:

- A. License and permit determinations for rehabilitated criminals;
- B. Real property negotiations;
- C. Conferences with legal counsel about:
  - (1) Existing litigation;
  - (2) Anticipated litigation where there is significant exposure to the policy body;  
or
  - (3) Anticipated litigation where the policy body will be initiating litigation;

- D. Liability claims;
- E. Threats to public services or facilities;
- F. Actions concerning public employees such as:
  - (1) Public employee appointment;
  - (2) Public employment;
  - (3) Public employee performance evaluation; or
  - (4) Public employee discipline or release;
- G. Conferences with labor negotiators;
- H. Case review or planning;
- I. Reports of proposed new service, program or facility involving trade secrets;
- J. Public hearings on staff privileges, reports of medical audit committee or report of quality assurance committee;
- K. Charge or complaint involving information protected by federal law;
- L. Conference involving a joint powers agency; or
- M. Audit by bureau of state audits.

4. Statement of Reasons for Closed Sessions.

- A. Before any closed session a policy body must meet in open session to (1) state the reason for closed session for each item on the agenda; and (2) cite the statutory authority for closed session for each item on the agenda, including the specific section of the Brown Act or other legal authority.
- B. If an item is added to the agenda (1) upon a determination by a majority vote of the policy body that an emergency situation exists; (2) upon a determination by a 2/3 vote of the members of the policy body present at the meeting, or if less than 2/3 of the members are present, on a unanimous vote of those members present, that there is a need to take immediate action and that the need for action came to the attention of the policy body after the agenda was posted; or (3) the item was posted for a prior meeting of the policy body occurring not more than five calendar days before the date action is taking on the item and at the prior meeting the item was continued to the meeting at which action is being taken, the

policy body must state in open session the fact of the addition to the agenda and why the item is being added.

- C. Only items on the written agenda or added pursuant to Section 4(B) can be considered during closed session. Any action taken on an item that is not described in accordance with this section is subject to invalidation pursuant to the provisions of Government Code Section 54960.1.

5. Disclosure of Closed Session Discussions and Actions.

- A. After every closed session, a policy body must meet in open session to make the following disclosures:

- (1) Approval of an agreement concluding real estate negotiations as follows:

- (a) If its own approval renders the agreement final, the policy body must report that approval and the substance of the agreement in open session at the public meeting during which the closed session is held.

- (b) If final approval rests with the other party to the negotiations, the policy body must disclose the fact of that approval and the substance of the agreement upon inquiry by any person, as soon as the other party or its agent has informed the policy body of its approval.

- (2) Approval given to its legal counsel to defend, or seek or refrain from seeking appellate review or relief, or to enter as an amicus curiae in any form of litigation shall be reported in open session at the public meeting during which the closed session is held. The report shall identify, if known, the adverse party or parties and the substance of the litigation. In the case of approval given to initiate or intervene in an action, the announcement need not identify the action, the defendants, or other particulars, but shall specify that the direction to initiate or intervene in an action has been given and that the action, the defendants, and the other particulars shall, once formally commenced, be disclosed to any person upon inquiry, unless to do so would jeopardize the policy body's ability to effectuate service of process on one or more unserved parties, or that to do so would jeopardize its ability to conclude existing settlement negotiations to its advantage.

- (3) Approval given to its legal counsel of a settlement of pending litigation at any stage prior to or during a judicial or quasi-judicial proceeding shall be reported after the settlement is final, as specified below:

- (a) If the policy body accepts a settlement offer signed by the opposing party, the policy body shall report its acceptance and identify the substance of the agreement in open session at the public meeting during which the closed session is held.

(b) If final approval rests with some other party to the litigation or with the court, then as soon as the settlement becomes final, and upon inquiry by any person, the policy body shall disclose the fact of that approval, and identify the substance of the agreement.

(4) Disposition reached as to claims shall be reported as soon as reached in a manner that identifies the name of the claimant, the name of the policy body claimed against, the substance of the claim, and any monetary amount approved for payment and agreed upon by the claimant.

(5) Action taken to appoint, employ, dismiss, accept the resignation of, or otherwise affect the employment status of a public employee in closed session shall be reported at the public meeting during which the closed session is held. Any report required by this paragraph shall identify the title of the position. The general requirement of this paragraph notwithstanding, the report of a dismissal or of the nonrenewal of an employment contract shall be deferred until the first public meeting following the exhaustion of administrative remedies, if any.

**Question: The Brown Act does not require disclosure of closed session discussions about employee discipline (short of dismissal). What should happen to recordings of closed sessions about employee discipline matters?**

- **The Task Force's attorney suggests that the recordings could become accessible if the charges are substantiated or reasonably supportable (or something similar).**
- **The City's legal staff notes that the City has a duty to protect the private information of its employees and thus could be subject to lawsuits by its employees for disclosure of disciplinary information as suggested by the Task Force's attorney.**

(6) Approval of an agreement concluding labor negotiations with represented employees shall be reported after the agreement is final and has been accepted or ratified by the other party. The report shall identify the item approved and the other party or parties to the negotiation.

(7) Pension fund investment transaction decisions shall be disclosed at the first open meeting of the policy body held after the earlier of the close of the investment transaction or the transfer of pension fund assets for the investment transaction.

- B. In addition to the requirements under Section 5(A), a policy body may, upon a determination that disclosure is in the public interest and by motion and majority vote in open session, disclose any portion of its discussion that is not confidential under federal or state law. The disclosure must be made through the presiding officer of the policy body or his or her designee who was present in the closed session.
- C. Disclosures required to be made immediately by Section 5(A) may be made orally or in writing, but must be supported by copies of any contracts, settlement agreements, or other documents related to the transaction that was approved in the closed session. The supporting documents that embody the information required to be disclosed, except for documents otherwise protected by state or federal law, must be provided to any person who has made a written request about that item or who has made a standing request for all such documentation as part of a request for notice of meetings.
- D. A written summary of the disclosures required to be made immediately by Section 5(A) must be posted by the close of business on the next business day after the open session in the place where the agendas of the policy body are posted.
6. Certification of Closed Session Discussions and Actions.
- A. 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 finding must be specific enough for the public to understand the reason for the certification without disclosing confidential information.
- B. After every closed session, a policy body must meet in open session to report any certifications.
- C. To contest the City Attorney's certification of a recording of closed session on a matter, any interested person may file an action by mandamus or injunction for the purpose of obtaining a judicial determination that the certification should be overruled. The City has the burden of proving that the certification is appropriate.

**Question: How should the appeal process be structured?**

- **The City's legal staff suggests that the process follow the Brown Act – i.e. the challenger of certification files a complaint in Superior Court and the Superior Court Judge decides the matter.**
- **The Task Force's attorney has suggested that a retired judge or attorneys from the Bar Association or both should decide.**