

**Closed Session
Draft Provisions 2-20-07**

NOTE: The “headers” are taken from the San Francisco Sunshine Ordinance, except for “Approval in Open Session of Certain Closed Session Discussions” and “Certification of Closed Session Discussions and Actions” since there are no comparable provisions in San Francisco’s ordinance.

1. Agenda Disclosures: Closed Sessions.

A. The information required to be provided under this section is in addition to the “brief, general description” of each agenda item that is required by the Ralph M. Brown Act. The format set out below is the minimum amount of information that should be provided and agenda disclosures may include additional information. Agenda disclosures cannot be misleading. No discussion may take place in closed session that has not been disclosed on the agenda.

(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)

License or permit at issue: (Identify type of license or permit at issue)

(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)

Likely purchase price: (Identify a likely value or range of values for the transaction)

(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)

Relief requested: (Specify the amount of money or other relief sought in the lawsuit)

- (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)

Relief requested: (Specify the amount of money or other relief sought in the claim)

(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)

Department or Agency: (Specify department or agency to which the appointment will be made)

PUBLIC EMPLOYMENT

Title: (Specify description of position to be filled)

Department or Agency: (Specify department or agency with which the position will be employed)

PUBLIC EMPLOYEE PERFORMANCE EVALUATION

Title: (Specify position title of employee being reviewed)

Name: (Identify the name of the employee being reviewed if the evaluation is routine)

PUBLIC EMPLOYEE DISCIPLINE/DISMISSAL/RELEASE

Number of Employees:

Department or Agency: (Specify department or agency involved)

(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)

Nature of negotiations: (Specify issues to be discussed – wages/salaries, hours, working conditions, benefits or some combination thereof)

Existing contract: (If an existing contract is being renewed or renegotiated, the name of the contract and information on how to obtain a copy)

(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 5 years from the date of (1) disclosure required in Section 6(A); or (2) certification of non-disclosure permitted in Section 7.
- B. Consistent with the certification process described in Section 7, closed session recordings must be made available unless the City Attorney has certified the recording of the matter. All closed session recordings that are available must be listed on the City's website.
- 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.

- A. Only the following policy bodies are permitted to hold closed session: 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. No other policy bodies are permitted to hold closed session.
- B. The policy bodies listed above are permitted to hold closed session under the following authority:
- (1) City Council: Government Code Sections 54956.7 (licensing exception), 54956.75 (audit exception), 54956.8 (real estate negotiations exception), 54956.81 (pension fund investments exception), 54956.86 (charge or complaint involving information protected by federal law exception), 54956.9 (litigation exception), 54956.95 (liability claims exception), 54956.96 (joint powers exception), 54957 (personnel and threats to public services or facilities exceptions), 54957.6 (labor negotiations exception), 54957.8 (case review and planning exception), 54957.10 (withdrawal from deferred compensation plan exception); Health and Safety Code Sections 1461, 32106 and 32155 and Government Code Sections 37606 and 37624.3 (report involving trade secret and hearings exception).
 - (2) Board of the Redevelopment Agency: Government Code Sections 54956.75 (audit exception), 54956.8 (real estate negotiations exception), 54956.9 (litigation exception), 54956.95 (liability claims exception), 54956.96 (joint powers exception), 54957 (personnel and threats to public services or facilities exceptions) and 54957.6 (labor negotiations exception).
 - (3) Civil Service Commission: Government Code Section 54957 (personnel exception).
 - (4) Elections Commission: San Jose Municipal Code Section 4.24.050; Government Code Section 54956.9 (litigation exception).
 - (5) Police and Fire Retirement Board: Government Code Sections 54956.8 (real estate negotiations exception), 54956.81 (pension fund investments exception), 54956.9 (litigation exception) and 54957 (personnel exception); Opinion No. 04-408, 88 Ops.Cal.Atty.Gen. 16, 2005 WL 429690 (interpreting the personnel exception to include review of an applicant's medical records for disability retirement).
 - (6) Federated Employees Retirement Board: Government Code Sections 54956.8 (real estate negotiations exception), 54956.81 (pension fund investments exception), 54956.9 (litigation exception) and 54957

(personnel exception); Opinion No. 04-408, 88 Ops.Cal.Atty.Gen. 16, 2005 WL 429690 (interpreting the personnel exception to include review of a current employee's medical records for disability retirement).

- (7) Deferred Compensation Advisory Board: Government Code Sections 54956.81 (pension fund investments exception), 54957.10 (withdrawal from deferred compensation plan exception).
- (8) San Jose Arena Authority: Government Code Sections 54957 (personnel exception) and 54957.6 (labor negotiations exception).

C. The policy bodies that are permitted to hold closed session may discuss only the following topics permitted by the Brown Act as limited by this section:

- (1) License and permit determinations for rehabilitated criminals;
- (2) Real property negotiations (A policy body may only give instructions to its negotiator about the price (which necessarily includes discussion of the potential use of property) and terms of payment. Policy bodies must not discuss in closed session the source of funds to be used to purchase real property. Policy bodies must not discuss in closed session any proposed development of property being considered for purchase or sale.);
- (3) Pension fund investments;
- (4) Conferences with legal counsel about:
 - (a) Existing litigation;
 - (b) Anticipated litigation where there is significant exposure to the policy body; or
 - (c) Anticipated litigation where the policy body will be initiating litigation;
- (5) Liability claims;
- (6) Threats to public services or facilities;
- (7) Actions concerning public employees such as:
 - (a) Public employee appointment;
 - (b) Public employment;
 - (c) Public employee performance evaluation; or

- (d) Public employee discipline or release;
 - (8) Conferences with labor negotiators;
 - (9) Case review or planning;
 - (10) Withdrawal from deferred compensation plan;
 - (11) Reports of proposed new service, program or facility involving trade secrets;
 - (12) Public hearings on staff privileges, reports of medical audit committee or report of quality assurance committee;
 - (13) Charge or complaint involving information protected by federal law;
 - (14) Conference involving a joint powers agency; or
 - (15) 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. The statement must not be misleading. The policy body may discuss only those matters covered in its statement.
- (1) Real property negotiations: A policy body must identify in open session the properties at issue, any development plans for the property (within the constraints of the California Environmental Quality Act) and source(s) of payment for the property.
- 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 (1) the fact of the addition to the agenda; (2) why the item is being added; (3) the reason for closed session on the item; and (4) the statutory authority for closed session on the item. Emergency

situations are limited to (1) a work stoppage, crippling activity or other activity that severely impairs public health, safety or both or (2) a crippling disaster, mass destruction, terrorist act, or threatened terrorist activity that poses peril so immediate and significant that requiring a policy body to provide one-hour notice before holding an emergency meeting under this section could endanger the public health, safety or both.

- C. Only items on the written agenda or added pursuant to Section 4(B) may be discussed 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. Approval in Open Session of Certain Closed Session Discussions.

- A. All proposed agreements for the purchase or sale of real estate must be approved by the policy body in open session. For transactions less than \$1 million, the policy body must post the item on the agenda at least 10 calendar days before a regular meeting. For transactions \$1 million and more, the policy body must post the item on the agenda at least 14 calendar days before a regular meeting.
- B. All proposed contracts with represented and unrepresented employees and the Council Appointees must be approved by the policy body in open session. For contracts less than \$1 million, the policy body must post the item on the agenda at least 10 calendar days before a regular meeting. For contracts \$1 million and more, the policy body must post the item on the agenda at least 14 calendar days before a regular meeting.
- C. All proposed settlements of litigation or claims that are \$50,000 and more must be approved by the policy body in open session. For settlements less than \$1 million, the policy body must post the item on the agenda at least 10 calendar days before a regular meeting. For settlements \$1 million and more, the policy body must post the item on the agenda at least 14 calendar days before a regular meeting.

6. 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 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.

- (2) Approval given to its legal counsel of a settlement of less than \$50,000 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.
- (3) Disposition reached as to claims of less than \$50,000 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.
- (4) Action taken to appoint, employ, discipline, 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 discipline, dismissal or the nonrenewal of an employment contract shall be deferred until the first public meeting following the exhaustion of administrative remedies, if any.
- (5) 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 6(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 by Section 6(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 action that was approved in the closed session. The supporting documents that embody the information required to be disclosed, except for documents otherwise required to be kept confidential 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 by Section 6(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.

7. 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. The certification must also state when the recording may be made available, but the City Attorney may extend the time of the certification if he or she makes a specific finding that the public interest in non-disclosure outweighs the public interest in disclosure.
- B. After every closed session, a policy body must report any certifications in open session.
- C. To contest the City Attorney's certification of a recording of closed session on a matter, any interested person may lodge a complaint with a three-member panel of retired judges. The panel will be established as follows: the City Council will select one judge, the Sunshine Ordinance Committee will select another judge, and the two judges together will select the third judge. The City has the burden of proving that the certification is appropriate.