

SUNSHINE REFORM TASK FORCE MEETING MINUTES

Saturday, February 24, 2007

9:00am – 12:00pm (morning session)

1:00pm – 5:00pm (afternoon session)

City Hall, W-118/W-119

Council Chambers

Present: Ed Rast, Strong Neighborhoods Initiative PAC; Ken Podgorsek, United Neighborhoods of SCC; Virginia Holtz, Willow Glen Neighborhood Assoc.; Joan Rivas-Cosby, Five Wounds/Brookwood Terrace Neighborhood Advisory Committee; Dan Pulcrano, Silicon Valley Leadership Group; Susan Goldberg, San José Mercury News; Bob Brownstein, South Bay Labor Council; Brenda Otey, At Large-Representative; Mary Ann Ruiz, Parks and Recreation Commission; Karl Hoffower, Citizens Commission on Human Rights; Dave Zenker, Falls Creek Neighborhood Association; Bobbie Fischler, League of Women Voters (afternoon session); Nanci Williams, San José/Silicon Valley Chamber of Commerce; Margie Matthews, Former Councilmember; Edward Davis, Orrick Law Firm (Legal Counsel)

Absent: Bobbie Fischler, League of Women Voters (morning session)

Staff: Lee Price, City Clerk; Dottie Disher, Office of the City Clerk; Lisa Herrick, Senior Deputy City Attorney; Dan McFadden, Interim Deputy City Manager; Eva Terrazas, Office of the City Manager/Redevelopment Agency; Sheila Tucker, Office of the City Manager; Tom Manheim, Office of the City Manager.

MORNING SESSION

I. Call to Order

II. Overview of the day

Chair Rast reviewed the agenda for the February 24, 2007, meeting noting the morning session would focus on wrap-up discussions on Closed Session and Public Information provisions. The afternoon session will be dedicated to a panel discussion on law enforcement public records.

III. Review of Meeting Material

Staff provided an overview of the documents for the meeting.

IV. Wrap-Up Discussion on Closed Session

Task Force member Susan Goldberg facilitated the discussion on Closed Session. Ms. Goldberg reviewed the recommendations of the Closed Session Committee. The Task Force discussed and made decisions on the following recommendations:

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A. Discipline of Council Appointees

1. The Task Force discussed issues related to the topic of the constitutional right of privacy in disclosing disciplinary actions of Council Appointees.
2. The Task Force discussed issues related to potential violations of federal employment law.
3. **The Task Force agreed to:** 1) remove the term “evaluation,” to the Closed Session Subcommittee recommendations in Item 4.a., and 2) clarify the recommendations relate to the six Council Appointees and only if discipline is imposed.

Public Comment: James Chadwick, Attorney, noted that the CA Court of Appeals has addressed the right of privacy issue under two contexts – 1) the Public Records Act and, 2) the State Constitution. Mr. Chadwick noted disciplinary actions may be revealed without violating the Constitutional right of privacy if the charges are well-founded or discipline is imposed.

Public Comment: Darlene Wallach, San José Citizen, stated that the public has a right to know what occurred during a closed session.

Upon a motion by Susan Goldberg, seconded by Judy Nadler, the Task Force accepted the language recommended by the Closed Session Committee on Item 4a, “Discipline,” requiring the discipline of Council Appointees to be disclosed in open session as part of the report after closed session.”

Action Item: Legal Counsel will review the constitutional right of privacy and the applicability of federal labor law to the Task Force’s recommendations related to disclosing disciplinary actions.

B. Real Estate

1. The Task Force discussed the recommendation of the Closed Session Committee on Item 4.b., “Real Estate.” The Committee recommended that in addition to limiting closed session discussions about real estate negotiations to price and terms of payment, the ordinance should specifically prohibit any discussion of the source of funds from which payment would be made.
2. Staff noted this is not workable because of the practicality of discussing real estate negotiations without discussing the source of funds e.g., how can you discuss how much you are willing to pay if you don’t know how much you have to offer?
3. There was a general consensus that the source of funds for a project and any use of funds that wasn’t otherwise designated for that use have full disclosure in an open public session.

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Public Comment: Dean Munro, Mayor's Liaison to the Task Force, discussed Measure P. Mr. Munro stated that the public receives adequate notice when money is being reallocated.

Public Comment: James Chadwick, Attorney, disagreed with Dean Munro's comment about Measure P. Mr. Chadwick argued that when a contract is altered, it changes budget priorities. He believes the public should be notified of alterations much sooner than the current two week requirement for items over \$1M.

Public Comment: James Chadwick, Attorney, explained that the Brown Act requires the parcel/property that is being discussed to be identified on the agenda for any closed session. If the closed session discussion involved the consideration of changing funds, that is something that would need to be revealed after the closed session.

Public Comment: Darlene Wallach, San José Citizen, declared that the public has a right to speak anonymously.

Upon a motion by Bob Brownstein, seconded by Ken Podgorsek, the Task Force accepted the modified language as proposed below Item 4.b., "Real Estate:"

"The Committee recommends that in addition to limited closed session discussions about the real estate negotiations to price and terms of payment, if funds not budgeted for this purpose are to be discussed in closed session, the possible use of those funds must first be discussed in open session. The report of a closed session decision must include a full disclosure of the use of any funds not previously budgeted for that purpose, and the full disclosure of the opportunity cost of the use of those funds."

(Zenker, Williams, Rivas-Cosby, and Mathews dissenting).

Action Item: The Closed Session Committee and staff will further review the language of Item 4b.

C. Labor

1. The Task Force discussed the recommendation of the Closed Session Committee on Item 4.c., "Labor." The Committee recommends that all proposed contracts with represented and unrepresented employees and the Council Appointees be approved by the policy body in open session. Notice must be 10 days for contracts that are under \$1M and 14 days for contracts over \$1M before the contract is scheduled to be discussed in open session.
2. Staff discussed significant concerns about recording labor negotiations during a closed session and recommended that the Task Force reconsider this

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- decision as the cost far outweighs the benefit. The Task Force agreed to discuss the issue during its discussion on recording closed sessions.
3. The Task Force discussed some of the challenges in disclosing labor contracts including: good faith bargaining, binding arbitration, unfair labor practices, negotiating retroactive pay, labor discord, and giving the public a false impression that there is a meaningful opportunity to participate in the process.
 4. The Task force tabled the discussion. The Subcommittee will meet with Task Force member Brownstein, who is knowledgeable of labor law, to revise the Committee's recommendations in order to meet the intent but not run afoul of unfair labor practices.

Action Item: The Task Force will discuss the concept of not recording labor negotiations.

D. Litigation

1. The Task Force discussed the recommendation of the Closed Session Committee on Item 4.d., "Litigation." The Committee recommends that all proposed settlements \$50,000 or more be approved by the policy body in open session. Notice must be 10 days for settlements that are under \$1M and 14 days for settlements over \$1M before the agreement is scheduled to be discussed in open session.
2. Staff noted there was not a legal issue with the Committee's recommendations but would be a change in the City's current practice. Staff clarified that settlement agreements are public records and subject to disclosure upon request.
3. The Task Force discussed the potential for putting the City at a disadvantage in negotiating settlements, opening up the City to additional law suits and comparing settlements, impact to deadlines in settlement negotiations, restrictions of disclosure based on attorney client privilege, and giving the public a false impression that there is a meaningful opportunity to participate in the process. The Task Force's Legal Counsel noted the recommendations could give the City additional leverage because settlements would undergo public scrutiny.

Public Comment: James Chadwick, Attorney, noted the Committee's recommendation would not prevent the City Council from discussing the wisdom of a settlement in closed session, but rather provide an opportunity for public input prior to the final vote.

Public Comment: Darlene Wallach, San José Citizen, noted recent settlements related to police actions have been too low, recommended Departments to be required to pay their own settlements, and noted concern of the potential liability to the City over the closing of the San Jose medical Center.

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Upon a motion by Ken Podgorsek, seconded by Karl Hoffower, the Task Force agreed to recommend that all proposed settlements \$50,000 or more be approved by the policy body in open session. Notice must be 10 days for settlements that are under \$1M and 14 days for settlements over \$1M before the agreement is scheduled to be discussed in open session.

Public Comment: James Chadwick, Attorney, noted that the process would not impair the City's ability to justify a settlement because the settlement document would be made public prior to the approval by the City Council.

E. Certification

1. The Task Force discussed the recommendation of the Closed Session Committee on Item 4.e., "Certification." The Committee recommended the procedure described by Ed Davis in his outline and explained in more detail at the meeting on January 18, 2007. The default is that the recording is made available unless certified. If certified, the City Attorney must state (1) the reason why non-disclosure is in the public interest; and, (2) when the need for non-disclosure will no longer exist. The Committee further recommended that appeal of the City Attorney's decision be made to three retired judges. One judge will be selected by the City Council and one judge will be selected by the proposed Sunshine Ordinance Commission. These two judges will select the third judge.
2. Ed Davis, Task Force Legal Counsel, noted the Task Force should consider establishing an appeal process from a broader perspective and consider establishing a process that could be used to hear all appeals of the Sunshine Ordinance.
3. Staff expressed concerned about weakening the role of City Attorney, potential cost, and expanding the City's liability.
4. The Task Force tabled the discussion due to time limitations.

V. Work Plan/Next Agenda

- A. The Task Force discussed the feasibility of completing Phase 1 recommendations by March 2007. The Task Force agreed to complete Phase 1 prior to submitting its recommendations to the City Council and tentatively scheduled to complete its discussions in April 2007.

Public Comment: Dean Munro, Mayor's Liaison to the Task Force, noted there was an expectation that the Task Force come forward with its recommendations for Phase 1 in March 2007. If it is not practical, Mr. Munro recommended that the Task Force provide the Mayor and Council with a detailed status report on the decisions to date, outstanding issues, and schedule to complete its work.

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- B. The next meeting will include discussions on:
1. Task Force Member Brownstein's proposal regarding major public subsidies
 2. Wrap-up discussion on Public Information (calendar, and additional public outreach)

Public Comment: Darlene Wallach, San José Citizen, stated that it would be in the public's interest to have public comment at the beginning of a meeting, rather than the end.

VI. Lunch Break

The Task Force adjourned for lunch at 12:21 p.m.

AFTERNOON SESSION

VII. Overview of Public Records Act

Rick Doyle, the City's Attorney, provided an overview of the Public Records Act.

VIII. Introduction of Expert Panel Members and Moderator

Chair Rast introduced the moderator and panelist for the police records session

Chris Arriola, Moderator

Barbara Attard, Independent Police Auditor

Rick Callender, San José NAACP, President

James Chadwick, Sheppard Mullin Law Firm (Mercury News), Attorney

Kyra Kazantzis, Public Interest Law Firm, Directing Attorney

Captain Gary Kirby, San José Police Department

Joanne McCracken, District Attorney's Office, Attorney

Mark Schlosberg, American Civil Liberties Union (ACLU)

John Tennant, General Counsel, San Jose and San Francisco Police Officers Associations

IX. Expert Panel Presentation of Issues/Concerns

Chris Arriola, the Panel Moderator, provided a brief welcome and prompted each panelist to provide their position statements.

X. Discussion Among Expert Panel Members

Chris Arriola facilitated a panel discussion by directing questions to panel members and asking others to comment on responses. The Moderator also asked panel members questions submitted by the public. Some areas of agreement and areas requiring further discussion include the following:

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Areas of Agreement

- A. The importance of transparency in promoting community confidence and credibility in the San Jose Police Department.
- B. Police reports, documents, and data that are not prohibited from release should be released.
- C. Information should be withheld that may compromise an investigation endanger or endanger a person such as victims, witnesses, juveniles, and sexual assault victims.
- D. Technology should be utilized to increase automation, gather specific data, and simplify responses to public records requests.

Areas Requiring Further Discussion

- A. Based on California law, what police records may be released, are prohibited from release, and what records are discretionary?
- B. What access should be given to police records that are discretionary?
- C. How should the privacy rights of parties involved in police investigations, complaining or responding parties, victims, witnesses, and accused suspects be balanced with the public's right to access public records?
- D. How should the privacy rights of police officers and their personnel and disciplinary records be balanced with the public's right to know?
- E. Is there a way to provide the public with additional information without compromising police investigations, personal privacy (e.g., complaining or responding parties, victims, witnesses, accused suspects, and police officers), community involvement, etc?

XI. Q&A and Discussion by Task Force

The primary purpose of the Task Force Q & A was to give the Task Force an opportunity to increase their understanding of specific areas of concern expressed by panel members by directing follow-up questions to panel members. Each Task Force member was given an opportunity to pose a question to a panelist.

XII. Public Comment

William Lawrence, San José Citizen, noted that he had sent a report to the Task Force concerning his arrest in 2005. Mr. Lawrence mentioned that his property was taken and destroyed prior to the settlement of the case. He wanted to know why the property/evidence was destroyed and why this information is not being disclosed.

Aram James, Coalition for Justice Accountability, requested that the City ban tasers in San José. In addition, Mr. James asked that citizens to forward their public records requests to Captain Kirby if they do not receive a response in the required amount of time (10 days). Mr. James stated that individual reports are needed, not just summaries. He explained that disclosing individual reports will help prevent any wrongful convictions.

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Sanjeev Bery, ACLU, discussed resources and budget. Mr. Bery commented that regardless of the resources, San Jose Police department (SJPd) should provide open police records. Mr. Bery identified other cities whose police departments currently have an open records policy and recommended that the SJPd observe these other cities' practices. Mr. Bery also stated that having open records will save the City money.

Mark Petersen-Perez, Resident of Palo Alto and Citizen of Nicaragua, recommended that Palo Alto and other cities become taser-free zones. Mr. Petersen-Perez also commented that police records and other data are not readily available to the public due to budgetary problems. Mr. Petersen-Perez stated that the Public records Act must be fulfilled, regardless of budgetary problems.

Darlene Wallach, San José Citizen, insisted that there needs to be transparency in government. Ms. Wallach believes that the public needs to know who is patrolling their community. Ms. Wallach provided two examples of innocent citizens who were killed by the police in San José. She promoted the idea of having a Megan's Law for the SJPd.

Edward Imamura, Silicon Valley De-Bug, noted that the SJPd needs to be retrained. Mr. Imamura noted how threatening the SJPd was during the recent Mardi Gras event downtown.

Brad Imamura, San José Citizen, stated that there is very limited access for people to retrieve records/information from the City of San José. Mr. Imamura noted he had personally requested records from most City departments and has not received a response via phone or e-mail. Mr. Imamura argued that sending records electronically is easy; therefore, San José is not living up to their reputation as "Capital of the Silicon Valley".

Jesse Villarreal, San José Citizen, suggested that the SJPd and District Attorney's Office have made false claims in their commitment to transparency. Mr. Villarreal requested to know why the SJPd and District Attorney's Office are afraid of open grand juries and why these groups are more concerned about protecting an officer's privacy rather than a victim's family. Mr. Villarreal offered cases where he was unfairly treated by the SJPd.

Raj Jayaolev, Silicon Valley De-Bug and New American Media, discussed the relationship between youth from ethnic communities, the police, and City of San José. Mr. Jayaolev noted that there is fear and mistrust with these two groups. Mr. Jayaolev also quoted a statement John Tennant used earlier, "To get respect, show respect." Mr. Jayaolev recommended that the SJPd show respect to the public in order to receive respect.

Daniel McCall, San José Citizen, requested to know why due process requirements related to marijuana laws are not enforced. McCall also commended the ACLU for their work.

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Gary Jansen, San José Citizen, stated if a document is called a “public record” then it should be made public. Moreover, Mr. Jansen said public records should also be easily available to the public, since most City business is 99.9% public.

Upon a motion by Ken Podgorsek, seconded by Joan Rivas-Cosby, the Task Force adjourned the February 24, 2007 meeting at 4:43 p.m.