



Memorandum

TO: HONORABLE MAYOR
AND CITY COUNCIL

FROM: Ed Rast, Chair

SUBJECT: SUNSHINE REFORM TASK
FORCE STATUS REPORT

DATE: March 19, 2007

The Sunshine Reform Task Force (Task Force) continues its work to draft a Sunshine Reform Ordinance and will bring forward its recommendations in two phases. Phase I will include requirements for the conduct of public meetings and closed sessions, along with improvements to facilitate access to public information. Phase II will provide recommendations to enhance access to public records, improvements to information technology, provisions for ethics and conduct and a proposal for enforcement. The purpose of this memorandum is to update the City Council on the Task Force's preliminary recommendations, outstanding issues, and proposed schedule for completing Phase 1 of its work. See summary of current recommendations and outstanding issues attached.

Due to the complexity of the issues involved and the difficulty in interpreting other model City Ordinances, the drafting of the ordinance has taken longer than expected. In order to expedite its work, the Task Force recently established a Committee structure to prepare preliminary drafts for consideration and adoption by the Task Force, each in their respective area of work (one for each area mentioned above).

The Task Force has completed approximately 90% of the work on Phase 1 of its recommendations (Public Meeting, Closed Sessions, and Public Information). Many of the recommendations will be easily implemented; others, due to their complexity and potential for unintended consequences, will be recommended on a pilot basis to test and evaluate. Some of the key outstanding issues include recommendations for: 1) major public subsidies (cost benefit analysis), and 2) audio recording closed session and an appeal process.

The Task Force expects to complete Phase 1 recommendations within the next 4-6 weeks and, as necessary, will schedule additional meetings to achieve this milestone. The projected schedule for completing Phase 2 recommendations is late summer.

The Task Force continues to carefully consider the staff, financial, and administrative challenges that San Jose city government faces and the potential unintended consequences of the proposed Sunshine Ordinance. We look forward to completing our discussions and forwarding the first phase of our recommendations in April, 2007. Thank you for your continued support and patience to provide the time necessary for us to complete this important work.

Ed Rast
Sunshine Reform Task Force Chair

Draft Sunshine Ordinance
Summary of Current Recommendations and Outstanding Issues
Sunshine Ordinance Provisions
Public Meeting, Closed Session, and Public Information

I. Public Meetings

The Task Force has made the following recommendations:

A. Definitions

1. Policy Body

- (i). City Council, Redevelopment Agency Board, Finance Authority, Clean Water Financing Authority, Parking Authority, all committees/bodies of the City Council or Agency Board, whether permanent or temporary, decision-making or advisory.
- (ii). All boards, commissions or other bodies established by City Charter or created by ordinance, resolution, or other formal action by the boards listed above.
- (iii). Committees of Council staff that represent a quorum
- (iv). Any body created by a policy body that exists primarily to exercise authority delegated to it; or receives City funds and has on its governing board a member of a policy body or designee with voting rights.
- (v). Any body that grants or advises a policy body or department head on grants where the aggregate amount of funds total more than \$200,000 in City funds or San José Redevelopment Agency funds per City fiscal year.

2. Ancillary Body

- (i). Committees or other bodies created by and to serve as an advisor to a member of a policy body, the Mayor, a City Councilmember, the Mayor's Chief of Staff, the Mayor's Budget and Policy Director, the City Manager, the City Attorney, the City Clerk, the City Auditor, the Independent Police Auditor, the Executive Director of the San José Redevelopment Agency or a Department Head.
- (ii). Ancillary body does not include any committee or body that consists solely of City staff.

3. Non-governmental and Non-City Government Body

A board or multimember body that governs any for-profit entity, non-profit entity, or non-City governmental body that exercises authority over City services that has been delegated to it by a policy body and receives more than \$200,000 in City or San José Redevelopment Agency funds per City fiscal year.

Task Force member Dan Pulcrano dissented. Mr. Pulcrano recommended adding an additional criteria to the definition such that a non-governmental body would be defined as, "an entity that receives more than \$200,000 in City funds per year *and such funds represent more than 20% of such entity's annual budget.*

Note: See examples of Policy Bodies, Ancillary Bodies and NGBs in Attachment A.

Draft Sunshine Ordinance
Summary of Current Recommendations and Outstanding Issues
 Sunshine Ordinance Provisions
 Public Meeting, Closed Session, and Public Information

B. Requirements for Policy Bodies, and Ancillary Bodies (extending beyond current practice or the Brown Act)

	Policy Body	Ancillary Body
1. Agenda Posting	10 calendar days	4 calendar days
2. Staff Reports	10 calendar days	4 calendar days
3. Staff Reports – Expenditures of \$1M or More	14 calendar days	4 calendar days
4. Supplemental Staff Reports	5 calendar days	2 calendar days
5. Council Memos	3 business days	2 business days
6. Agenda Posting (Special Meeting)	4 calendar days	24 hours
7. Recording and Photography	City Council, Rules and Open Government Committee, Planning Commission and other Quasi-judicial bodies must video record meetings; all other Policy Bodies must audio record meetings; Recordings to be kept for 2 years.	Audio record meetings or provide action minutes Recordings to be kept for 2 years.
8. Public Testimony	Up to 4 minutes may be extended to a representative of an organization to provide public testimony if: 1) two or more members are in attendance, and 2) one representative is willing to yield his or her time.	Brown Act
9. Minutes	Current practice for Council meetings extended to all Policy Bodies; minutes provided no later than 10 days after the meeting.	Action minutes or audio recording

C. Requirements for Non-City Government Body and Non-City Government Body

1. Every non-governmental and non-City governmental body must: 1) be assigned to a policy body that has oversight over the body, and 2) make any decision about policy issues in the form of a recommendation to the assigned policy body.
2. Policy issues include, but are not limited to: adoption of or amendments to budgets; levels of service; allocation of services to different areas or populations; number and qualifications of staff; maintenance and preservation of public facilities and/or property; any decision that may place the City or the public at risk of financial loss, property damage or personal injury.

D. Outstanding Issues – Public subsidies, stacking e.g., managing requirements when a policy body reports to a policy, exemptions to the 10 day staff report rule, council memos, agenda descriptions.

Draft Sunshine Ordinance
Summary of Current Recommendations and Outstanding Issues
Sunshine Ordinance Provisions
Public Meeting, Closed Session, and Public Information

II. Closed Session

The Task Force has made the following recommendations:

A. Requirements for Closed Session Agendas

Description of topics must follow the discretionary provisions of the Brown Act at a minimum with other additional information required.

B. Statement of Reasons for Conducting Closed Sessions

In addition to the agenda requirements, a policy body that is meeting in closed session must open first in public session to explain the reasons for the closed session.

C. Topics that are Permitted to be Discussed in Closed Session

1. Policy bodies that are authorized to hold closed session to be specified in an ordinance and that the City provide a rationale that describes why each body needs to conduct closed session.
2. Performance evaluations of Council appointees may continue to take place in closed session.
3. Any discipline of the Council Appointees (who will be specifically listed in the ordinance) may continue to take place in closed session but the report of the discipline must be disclosed in open session.
4. Closed session discussions about real estate negotiations are permitted but:
 - (i). May not address any subjects other than instructions from the policy body to its negotiators about the price and terms of payment (understanding that price includes a discussion on the potential use of property).
 - (ii). Must first be identified in open session, specifically, the properties at issue and any development plans (within the constraints of CEQA), so that proposed development of property being considered for purchase or sale cannot be discussed in closed session.
 - (iii). All proposed agreements, after the deal is negotiated, must be approved by the policy body in open session. Notice must be 10 days for purchases that are under \$1M and 14 days for purchases over \$1M before the agreement is scheduled to be discussed in open session.
 - (iv). 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.

Draft Sunshine Ordinance
Summary of Current Recommendations and Outstanding Issues
Sunshine Ordinance Provisions
Public Meeting, Closed Session, and Public Information

5. Closed session discussions about litigation are permitted but all proposed settlements \$50,000 or more must 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.
6. Closed session discussions on labor negotiations are permitted but:
 - (i). An early public involvement process will be conducted, such as a study session, to provide an opportunity for the public to ask questions and provide input. The process will be conducted at a time that provides a meaningful opportunity for the public to participate in the process.
 - (ii). All proposed contracts with represented and unrepresented employees and the Council appointees must be approved by the policy body in open session. Notice must be 10 days for contracts that are under \$1 million, and 14 days for contracts over \$1 million before the contract is scheduled to be discussed in open session.

D. Additional Requirements for Closed Session.

All closed sessions of any policy body must be audio recorded in their entirety.

E. OUTSTANDING ISSUES

1. Topics that are Permitted to be Discussed in Closed Session

Labor Agreements - The Task Force has referred, for legal analysis, its recommendations on labor negotiations to the Attorney's Office, and an external labor law attorney.

2. Disclosing Closed Session Discussions and Actions

- (i). The Closed Session Committee recommended a procedure for disclosure of closed session recordings. The default is that the recording is made available unless the City Attorney "certifies" that the recording should not be disclosed. 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.
- (ii). The Closed Session Committee recommended that appeals of the City Attorney's certification of closed session recordings be made to three retired judges. One judge would be selected by the City Council and one judge would be selected by the Sunshine Ordinance Commission. These two judges would select the third judge.

Draft Sunshine Ordinance
Summary of Current Recommendations and Outstanding Issues
Sunshine Ordinance Provisions
Public Meeting, Closed Session, and Public Information

- (iii). A member of the Task Force has recommended that there be a written summary of the disclosures made in open session. The Task Force as a whole has not agreed with this recommendation.

3. Additional Requirements for Closed Session.

The Closed Session Committee recommends: 1) all closed session recordings are confidential unless and until they are made available as provided in this section, and 2) all recordings must be retained for at least 5 years from the date disclosure is required; or (2) certification of non-disclosure is permitted.

Draft Sunshine Ordinance
Summary of Current Recommendations and Outstanding Issues
Sunshine Ordinance Provisions
Public Meeting, Closed Session, and Public Information

III. Public Information

A. Release of Oral Information

This section reflects the City's current practice.

1. Each Department is required to assign a records coordinator to answer questions about the Department's operations, plans, policies, and positions.
2. Public employees would not be discouraged from or disciplined for expressing their personal opinion as long as they do not represent their opinion as that of the Department or City.

B. Public Review File

The section generally reflects the current city practice but centralizes record keeping for an expanded list of Policy Bodies.

1. The City Clerk is required to maintain a file containing correspondence from or to all of the City's policy bodies. Attachment A provides an expanded list of policy bodies.
2. Department's are also required to maintain correspondence files that are available for public review.

C. Calendar Disclosures

This section recommends changes to the City's current practices regarding the disclosure of calendars for City officials. It identifies the City officials that must maintain a calendar, what information should be included on the calendar, and which of those calendars should be posted on the City's website,

Key changes from the City's current practice are:

1. The individuals required to post their calendars online currently applies only to the Mayor and City Councilmembers. Under this recommendation, four Council Appointees (excluding the Independent Police Auditor and City Auditor) would also be required to post calendars. In addition, the number of individuals required to maintain a calendar would expand to include: 1) Chiefs of Staff for elected officials, and; 2) Department/Office Directors (other than Employee Relations Director and Human Relations Director).
2. The frequency of posting the calendars of elected officials would change from quarterly to every Monday at noon covering the previous 7-days.
3. Content – For meetings not otherwise publicly noticed and recorded, the calendar shall include a general statement of issues being discussed. In

Draft Sunshine Ordinance
Summary of Current Recommendations and Outstanding Issues
Sunshine Ordinance Provisions
Public Meeting, Closed Session, and Public Information

addition, the Task Force recommendation provides the following guidance in determining when an unscheduled meeting should be included on a calendar: *Public Officials are encouraged to record contacts of a material nature on matters coming before a policy body for consideration. If a public official meets with someone, and it impacts their decision the meeting should be considered material.*

4. Exceptions – The Task Force recommendation for personal activities that can be excluded reflects the City's current practice. The Task Force added additional exceptions: 1) Attorney Client Privilege; 2) Private or Proprietary City Business including: a) Personnel and Recruitment Matters; and, b) Economic Development Matters; 3) Whistle-Blowers; and, 4) Meetings with Individuals Fearing Retaliation.

D. Lobbyists on Behalf of the City

This language refers to individuals or organizations that lobby in Sacramento or Washington, DC on behalf of the City. It would require individuals or organizations to report expenditures quarterly that advance lobbying efforts on behalf of the City. The information required in each report appears to be consistent with what is currently mandated, but more frequent reporting would be required.

1. Patton Boggs, the City's lobbyist in Washington, DC, is currently required to file reports every six months with the clerks of the House and Senate. The proposed language would require quarterly reports to be filed, and copies would be available through the City Clerk's office.
2. Currently Roxanne Miller, our Sacramento lobbyist, is required to file quarterly reports detailing her activities on behalf of the City. The proposed changes would exempt her from new reporting requirements since she is a City employee.

E. Additional Public Outreach

This section reflects the City's current practice on outreach for land use/development proposals and public capital projects. This section also recommends an outreach policy be established for citywide initiatives that have a significant Citywide impact. The new policy will provide a similar detail of guidance as the City's private development and land use proposals (Policy 6-30).

Draft Sunshine Ordinance
Summary of Current Recommendations and Outstanding Issues
Sunshine Ordinance Provisions
Public Meeting, Closed Session, and Public Information

Key recommendations include:

1. Include by reference, current City practice related to: 1) Policy 6-30 *Public Outreach for Land Use/Development Proposal* which establishes a range of outreach efforts depending on the size of a land use proposal, and 2) outreach for capital projects (CIP Outreach Policy; Council Policy 5-6-Traffic Calming; and Outreach Policy for Parks, Recreation & Neighborhood Services).
2. While the existing policies adequately address projects and proposals that impact a specific geographic location within the City, an additional policy should be created to address City-initiated policy actions that have a significant citywide impact. The Policy would require a community engagement process to be conducted when any City Department or Office is initiating a planning process that would have significant citywide impact or lead to a change in citywide service levels such as a Master Planning Process and the Annual Budget Process. The process would replicate the most extensive outreach requirements contained in Policy 6-30 and would be required to be applied consistently across all City departments.

Attachment A. Examples of Policy bodies, Ancillary Bodies, Non-Government Bodies, and Non-City Government Bodies

Examples of Policy Bodies (incomplete list):

City Council	City Boards, Commissions and Committees
SJ Redevelopment Agency Board	Council Assistants Meeting
San Jose Financing Authority	Rules and Open Government Assistants Meeting
SJ Clean Water Financing Authority	Team San Jose
San Jose Parking Authority	Community Action and Pride Grant Program
Planning Commission	Healthy Neighborhoods Venture Fund
Civil Service Commission	Bringing Everyone's Strength's Together Program
Council Salary Setting Commission	San Jose Beautiful
Council Committees	

Examples of Ancillary Bodies (incomplete list):

Mayor's Gang Prevention Task Force
Evergreen Visioning Project
Mayor-elect Reed's Transition Team and Subcommittees.

Examples of Non-Government Body (incomplete list):

Children's Discovery Museum	MACSA	Merlin San Jose
Tech Museum of Innovation	SC Family Health Plan	Project Sentinel
San Jose Museum of Art	Municipal Health Services	Kubra
San Jose Historical Museum	SJ Conservation Corps	Norcal
Mexican Heritage Corporation	Breakout Prison Outreach	Greenwaste
Repertory Theatre	MACLA	AMPCO
Theatre on San Pedro Sq.	Pathway Society, Inc.	Technology Center
American Musical Theatre	Japantown	Catholic Charities of SC County
San Jose Stage Company	Goodwill	
Korean American Community Services	San Jose Smart Start Family Child Care	

Examples of Non-City Government Body (incomplete list):

Oak Grove School District
San Jose Unified School District
Santa Clara County