

DRAFT FOR DISCUSSION

10/25/07

Section 8 Administration and Accountability

8.1 Purpose and Intent

- A. The City Council, Council staff, Council Appointees, Department Heads and City staff should be encouraged to comply voluntarily with the Sunshine Ordinance, Ralph M. Brown Act, California Public Records Act and Political Reform Act. Regular education and training about the Sunshine Ordinance, Ralph M. Brown Act, California Public Records Act and Political Reform Act is essential to achieve voluntary compliance.
- B. The City Manager's Office must provide to the Council regular reports, at least annually, about the City's compliance with the Sunshine Ordinance.

8.2 Open Government Officer

- A. The City will establish the position of Open Government Officer, who must be an attorney licensed to practice law in California and have some demonstrated familiarity and experience with open government laws. The Open Government Officer will be a member of Senior Staff and report to the City Manager. The appointment of the Open Government Officer must be ratified by the Open Government Commission.
- B. The Open Government Officer will:
 - 1. Advise the City Manager on education and training for City Staff on the Sunshine Ordinance and other open government laws;
 - 2. Staff the Open Government Commission;
 - 3. Work with the Records Manager to access information that can be used to generate routine statistical reports requested by the community; and
 - 4. Coordinate reports with the Open Government Commission to the City Council evaluating and monitoring compliance with the Sunshine Ordinance; and
 - 5. Investigate complaints of violations of the California Public Records Act, Ralph M. Brown Act or Sunshine Ordinance and issue decisions on the complaints.

8.3 Open Government Commission

- A. The City will establish a neutral and independent Open Government Commission comprised of five members of the community or integrate the function of the Commission as described below into an existing Board or Commission as long as the members meet the following criteria. Each member must have some demonstrated familiarity and experience with open government laws and be a resident of the City of San Jose. The Commission's membership should be representative of the community and all members will be required to undergo a screening process to identify any potential conflicts of interest. Members must not be a paid City employee, a paid employee working on the campaign of a current Councilmember or candidate for City office or a contract lobbyist registered with the City. No member may participate as a candidate in any election for Mayor or Councilmember for the City of San Jose for a period of one year both before and after tenure on the Commission. Members will serve up to two four-year terms for a maximum of eight years. Members will be appointed by no less than two-thirds vote of the City Council.
- B. The Open Government Commission will:
1. Advise the City Council about the Sunshine Ordinance;
 2. Determine, if questioned or challenged, the categorization of bodies as policy, ancillary or non-governmental;
 3. Develop an annual report, based on public input, indicating additional public information, if any, that the City should routinely make available to the public;
 4. Hear appeals from decisions issued by the Open Government Officer on complaints of violations of the California Public Records Act, Ralph M. Brown Act or Sunshine Ordinance; and
 5. Recommend penalties for violations of the California Public Records Act, Ralph M. Brown Act or Sunshine Ordinance where appropriate.

8.4 Investigations

- A. The City Council will adopt, by resolution, regulations and procedures for investigations to be conducted by the Open Government Officer.
- B. The Open Government Officer will have the authority to investigate complaints alleging violations of the California Public Records Act, Ralph M. Brown Act or Sunshine Ordinance, in accordance with the regulations and procedures adopted by resolution of the City Council.

- C. A complaint filed with the Open Government Officer may be investigated only if the complaint identifies the specific alleged violation which forms the basis for the complaint and contains sufficient facts to warrant investigation. If requested, a complainant may make a complaint anonymously.
- D. The City Attorney's Office may provide legal advice to the Commission related to non-complaint matters or general interpretations of the San Jose Municipal Code or relevant California State or federal law, but must not participate in investigations or reviews of complaints.

8.5 Enforcement

8.6.010 Requests for Public Records

- A. Complaints alleging that records or some part of records are being withheld improperly under the California Public Records Act or the Sunshine Ordinance may be filed either with the Open Government Officer or with the Superior Court as set forth in Government Code Sections 6258 and 6259.
- B. If a complaint is filed with the Open Government Officer, he or she must notify, in writing, the person or persons against whom the complaint is made and provide a copy of the complaint and the regulations and procedures governing investigations by the Open Government Officer within 2 business days of receiving the complaint.
- C. The Open Government Officer must issue a decision on the complaint within 10 days after receiving it.
- D. Within 20 days of receiving the Open Government Officer's decision, the City or the complainant may either appeal the decision of the Open Government Officer to the Open Government Commission or file a complaint with the Superior Court as set forth in Government Code Sections 6258 and 6259. The Open Government Officer's decision will be part of the record before either the Open Government Commission or the Superior Court.
- E. If the City or the complainant appeals the decision of the Open Government Officer to the Open Government Commission, the Commission must issue a decision on the appeal within 30 days after receiving notice of the appeal. The Open Government Commission may retain an independent and neutral legal evaluator, who will be a practicing lawyer or retired judge, to provide legal advice to the Commission on the appeal.
- F. Within 20 days of receiving the Open Government Commission's decision on the appeal, the City or the complainant may file a complaint with the Superior Court as set forth in Government Code Sections 6258 and 6259. Both the Open

Government Officer's decision and the Open Government Commission's decision will be part of the record before the Superior Court.

- G. The Superior Court will award court costs and reasonable attorney fees to the complainant should the complainant prevail in litigation filed pursuant to this section. The costs and fees will be paid by the City and will not become a personal liability of any employee of the City responsible for making the decision to refuse disclosure. If the Superior Court finds that the complainant's case is clearly frivolous, it will award court costs and reasonable attorney fees to the City.

8.6.020 Public and Closed Session Meetings

- A. If, through mistake, inadvertence, surprise or excusable neglect, the person(s) responsible for posting agendas for policy bodies fails to post an agenda or distribute agenda-related materials for a regular public or closed session meeting ten (10) days in advance of the meeting, the Rules and Open Government Committee will have the authority to review the facts and decide whether to waive the 10-day requirement, continue or re-notice agenda items or cancel the meeting. If the 10-day requirement is waived, the Mayor or Chair of the policy body will disclose at the beginning of the meeting that the required notice was not met, why notice was not met and why the meeting is being held anyway.
- B. Complaints about public and closed session meetings must be made within 90 days of the date of the meeting.
- C. Complaints alleging that a public or closed session meeting has been held or is threatened to be held by members of a policy body in violation of the requirements of the Ralph M. Brown Act or the Sunshine Ordinance may be filed either with the Open Government Officer or with the Superior Court as set forth in Government Code Sections 54960 and 54960.1.
- D. If a complaint is filed with the Open Government Officer, he or she must notify, in writing, the person or persons against whom the complaint is made and provide a copy of the complaint and the regulations and procedures governing investigations by the Open Government Officer within 2 business days of receiving the complaint.
- E. The Open Government Officer must issue a decision on the complaint within 10 days after receiving it.
- F. If the Open Government Officer determines that a member or members of a policy body held or are threatening to hold a public or closed session meeting in violation of the Sunshine Ordinance, he or she will issue a demand that the member or members of the policy body cure or correct the action challenged.

- G. Within 30 days of receipt of the demand from the Open Government Officer, the member or members of the policy body must cure or correct the challenged action and inform the Open Government Commission in writing of either (1) its actions to cure or correct or (2) its decision not to cure or correct the challenged action.
- H. If the policy body takes no action within the 30-day period, the inaction will be deemed a decision not to cure or correct the challenged action, and the Open Government Commission may refer the challenged action to the Santa Clara County Office of the District Attorney within 15 days after the 30-day period expires.
- I. If the policy body informs the Open Government Commission in writing of its decision not to cure or correct the challenged action, the Commission may (1) accept the response of the policy body not to cure or correct the challenged action; or (2) reject the response of the policy body not to cure or correct the challenged action and refer the challenged action to the Santa Clara County Office of the District Attorney within 15 days of receiving notice of the policy body's action not to cure or correct the challenged action.
- J. If the policy body informs the Open Government Commission in writing of its actions to cure or correct the challenged action, the Commission may (1) accept the actions to cure or correct the challenged action; or (2) reject the actions to cure or correct the challenged action and refer the challenged action to the Santa Clara County Office of the District Attorney within 15 days of receiving notice of the policy body's action to cure or correct the challenged action.

8.6.030 Closed Session Recordings

- A. If a majority of a policy body entitled to hold closed session determines that the need for confidentiality has expired about a topic discussed in closed session, it may release, in transcript form, the recording of the topic discussed in closed session.
- B. Complaints alleging that a policy body discussed some topic in closed session in violation of the Ralph M. Brown Act or Sunshine Ordinance may be filed with the policy body.
 - 1. The policy body must make a decision about the complaint within 20 days.
 - 2. If a majority of the policy body agrees to do so, it will release, in transcript form, the recording of the topic discussed in closed session alleged to be in violation of the Brown Act or Sunshine Ordinance.

3. If a majority of the policy body does not agree to release a transcript of the recording of the topic discussed in closed session alleged to be in violation of the Brown Act or Sunshine Ordinance, the complainant may file a complaint with the Superior Court as set forth in Government Code Sections 54960 and 54960.1. The Open Government Commission may join the complainant as a plaintiff in the petition. The complainant must file the petition within 20 days after service upon him or her of the decision from the policy body not to release a transcript of the closed session recording.
4. The Superior Court will award court costs and reasonable attorney fees to the complainant should the complainant prevail in litigation filed pursuant to this section. The costs and fees will be paid by the City and will not become a personal liability of any employee of the City responsible for making the decision to refuse disclosure. If the Superior Court finds that the complainant's case is clearly frivolous, it will award court costs and reasonable attorney fees to the City.

8.6.040 Progressive Penalties

Penalties for violating the Sunshine Ordinance should be progressive.

- A. If the Open Government Commission determines that the complaint arose out of a minor violation based on a misinterpretation of the Sunshine Ordinance, the Commission may recommend to the appropriate Council Appointee that the person or persons who misinterpreted the Sunshine Ordinance must participate in education and training about the Sunshine Ordinance within 30 days of the date the Commission makes its recommendation.
- B. If the Open Government Commission finds intentional or repeated violation of the Sunshine Ordinance, it may issue a report, including a recommendation for corrective action, to the appropriate Council Appointee and the Rules and Open Government Committee.