

CITY OF OAKLAND
PUBLIC ETHICS COMMISSION
SUNSHINE ORDINANCE COMMITTEE
SPECIAL MEETING
One Frank Ogawa Plaza (City Hall)
Thursday, November 15, 2007
BUILDING BRIDGES ROOM
6:30 p.m.
Page 1



Committee Membership: Commissioners Mario Andrews, Curtis Below, Andrew Wiener

Staff Members: Commission Staff:
Daniel Purnell, Executive Director
Tamika Thomas, Executive Assistant
City Attorney Representative:
Mark Morodomi, Deputy City Attorney

AGENDA

- A. Roll Call And Determination Of Quorum
- B. Approval Of Minutes From The Special Meeting Of October 24, 2007
- C. Open Forum
- D. A Staff Report And Action To Be Taken Regarding Policy Proposals For The Oakland Sunshine Ordinance

The meeting will adjourn upon the completion of the Committee's business.

You may speak on any item appearing on the agenda; however, you must fill out a Speaker's Card and give it to a representative of the Public Ethics Commission. All speakers will be allotted three minutes or less unless the Chairperson allots additional time.

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Should you have questions or concerns regarding this agenda, or wish to review any agenda-related materials, please contact the Public Ethics Commission at (510) 238-3593 or visit our webpage at www.oaklandnet.com.

Approved for Distribution

Date



Commission Membership: Sukey Wilder (Chair), Curtis Below (Vice-Chair), Douglas Love, Andrew Wiener, Mario Andrews, John Ashford, [Vacancy]

Staff Members: Commission Staff:
Daniel Purnell, Executive Director
Tamika Thomas, Executive Assistant
City Attorney Representative:
Mark Morodomi, Deputy City Attorney

MINUTES OF MEETING

A. Roll Call And Determination Of Quorum

The meeting was called to order at 6:35 p.m.

Members present: Sukey Wilder, Curtis Below, Andrew Wiener, Mario Andrews (arrived at 6:47 p.m.), John Ashford and Doug Love

Staff Present: Daniel Purnell, Executive Director
Mark Morodomi, Deputy City Attorney

B. Approval Of Draft Minutes Of The Special Meeting Of October 1, 2007

The Commission moved, seconded and adopted a motion to approve the minutes of the October 1, 2007, meeting. (Ayes: Wilder, Below, Wiener, Ashford, Love).

C. Executive Director And Commission Announcements

The Executive Director reported that the Commission's Sunshine Committee held a meeting on October 24, 2007, as part of its ongoing review of the Oakland Sunshine Ordinance. The Committee will notice another meeting for Thursday, November 15, 2007.

Hastings College of the Law and the League of California Cities sponsored a symposium entitled "Transparency on Trial" on Friday, October 26, 2007. The event, attended by Commission staff, weighed the costs and benefits of efforts to expand open meeting and public records law.

The Executive Director addressed the Lake Merritt Breakfast Club on Thursday, November 1, 2007, with a 20-minute presentation about the Public Ethics



Commission. The Executive Director also addressed a delegation from mainland China on local governmental ethics laws earlier in October.

Twelve people filed timely applications for two open seats on the Public Ethics Commission. Interviews will take place in late November/early December with final selection to occur at the Commission's January, 2008, meeting.

There was one speaker: Sanjiv Handa

D. Open Forum

There were two speakers: Sanjiv Handa, Ralph Kanz

NOTE: Upon unanimous consent, Item G was taken out-of-order prior to consideration of Items E-1 and E-2.

G. A Presentation By The Oakland Community And Economic Development Agency (CEDA) Pertaining To Electronic Records Retention

The Commission received a presentation from Mohssan Yassini and Claudia Cappio pertaining to CEDA's efforts to electronically store, organize and retrieve public records.

There were two speakers: Ralph Kanz, Claudia Cappio

E. Complaints

1. A Staff Report And Action To Be Taken In the Matter Of Complaint No. 06-02 (Kanz) **(SUPPLEMENTAL)**

The Commission moved, seconded and adopted a motion to dismiss Complaint No. 06-02 on grounds that there is no information to support a reasonable inference that CEDA is withholding a specific public record or that an additional search would lead to the discovery of a requested public record. (Ayes: All)

There were four speakers: Sanjiv Handa, Ralph Kanz, Claudia Cappio, Chiye Azuma



2. A Staff Report And Action To Be Taken In The Matter Of Complaint No. 07-07 (Handa)

The Commission moved, seconded and adopted a motion to dismiss allegations that the Life Enrichment Committee improperly described Item 14 on the July 10, 2007, agenda ("Register of Big Trees" -- "Adopt A Resolution Directing Creation Of the Oakland Register Of Big Trees"). (Ayes: All)

The Commission moved, seconded and adopted a motion to 1) dismiss allegations that the Life Enrichment Committee improperly allocated speaking time at the September 25, 2007, meeting and 2) directed that the Sunshine Ordinance Committee examine the issue of speaker time limits as part of its review of the Oakland Sunshine Ordinance. (Ayes: All)

The Commission moved, seconded and adopted a motion to 1) dismiss allegations pertaining to the failure to receive public comment at the July 10, 2007, Life enrichment Committee meeting and 2) direct the Executive Director to draft a letter to the Life Enrichment Committee advising them of the procedures existing in the Sunshine Ordinance for noticing an action to cure and correct an alleged violation. (Ayes: All)

There was one speaker: Sanjiv Handa

F. A Staff Report And Action To Be Taken Regarding Preliminary Language Implementing Recommendations On Commission Authority And Organization

The Commission took public comment and considered additional changes to the proposed amendments to the Commission's implementing ordinance. The Commission directed staff to develop language implementing the Commission's changes and to schedule the item for further Commission review at the December, 2007, meeting.

There were three speakers: Sanjiv Handa, Ralph Kanz and Helen Hutchison

The meeting adjourned at 10:15 p.m.

CITY OF OAKLAND
Public Ethics Commission

Sukey Wilder, *Chair*
Curtis Below, *Vice-Chair*
Douglas Love
Andrew Wiener
Mario Andrews
John Ashford
(Vacancy)



Daniel D. Purnell, Executive Director

One Frank Ogawa Plaza, 4th Floor, Oakland, CA 94612 (510) 238-3593 Fax: (510) 238-3315

TO: Public Ethics Commission Sunshine Committee
FROM: Daniel Purnell
DATE: August 23, 2007

I. BACKGROUND

On March 8, 2007, the Sunshine Committee ("Committee") considered a staff memorandum that identified potential policy issues the Committee wished to address as part of its ongoing review of the Sunshine Ordinance. **Attachment 1.** The Committee directed staff to prepare a more in-depth analysis of the issues presented and return to the Committee for further discussion and direction.

This memorandum provides additional information and analysis of the issues presented in the March 8, 2007, staff report and presents key policy questions for the Committee to consider.

II. PRIVATE CORPORATIONS AND OPEN MEETING LAWS

The issue of whether certain private corporations should be subject to open meeting (as well as public record) laws is not a new one. The state's Brown Act (open meetings) and Public Records Act currently apply to some private corporations that meet specific criteria contained in those laws. Oakland's Sunshine Ordinance provides that private entities operating on City property and providing governmental services must hold open meetings of their governing boards subject to specific requirements and limitations.

This section examines private corporations currently subject to open meeting laws. It also identifies other types of private corporations that potentially could be subject to Sunshine's open meeting requirements.

A. Private Corporations Currently Subject To The Brown Act

The Brown Act provides two circumstances in which a private corporation or entity will be deemed a public "legislative body" and subject to open meeting requirements. (Note: A private corporation that meets these same criteria must also produce records under the Public Records Act.) A private corporation will be deemed to constitute an entity subject to the Brown Act under two circumstances:

First, whenever the governing body of a private corporation "is created by the elected legislative body in order to exercise authority that may lawfully be delegated by the elected governing body to a private corporation or entity" and,

Second, whenever the governing body of a private corporation "receives funds from a local agency and the membership of [that] governing body includes a member of the legislative body of the local agency appointed to that governing body as a full voting member by the legislative body of the local agency." [See Government Code Section 94952(c)(1)]

A fundamental difference between the two types of private corporations or entities subject to the Brown Act is that the first must be "created by" an elected legislative body; the second may be privately formed. Two court decisions have interpreted the term "created by" to include not just situations in which a legislative body expressly creates a private corporation, but also when the legislative body "is involved in bringing...[a private corporation] into existence." [See ILWU v. Los Angeles Export Terminal, Inc. (1999) 69 Cal.App.4th 287, 296; Epstein v. Hollywood Entertainment Dist. II Bus. Improvement Dist. (2001) 87 Cal.App.4th 862, 870.]

The California Attorney General advises that the mere receipt of public funds under the second criteria does not subject a private corporation to the Brown Act. A private corporation also does not qualify as a public body if the legislative body appoints someone other than one of its own members to the private corporation's governing body.

B. Private Corporations Currently Subject To The Oakland Sunshine Ordinance

The Oakland Sunshine Ordinance generally expands the state's open meeting and public record requirements and applies them to Oakland's "local bodies." The Sunshine Ordinance's definition of "local body" does not include private corporations but it does contain two provisions that require certain "persons" and "private entities" to provide some degree of public access to their meetings:

1. Sunshine Ordinance Section 2.20.040(A)

"To the extent not inconsistent with state or federal law, a local body shall require, as a condition of any express delegation of power to any public agency, including joint powers authorities, or other person(s), whether such delegation of power is achieved by legislative act, contract, lease or other agreement, that any meeting by such a public agency or other person(s) at

which an item concerning or subject to the delegated power is discussed or considered, shall be conducted pursuant to the Ralph M. Brown Act..."

California law permits local agencies to delegate specific administrative powers to subordinate boards or persons subject to certain limitations. The above-cited Section 2.20.040(A) states that whenever one of Oakland's local bodies makes an express delegation of power to any "public agency, including joint powers authorities, or other person(s)" that such agency or person conduct any meeting at which an item concerning or subject to the delegated power is discussed or considered pursuant to the Brown Act. An example of Section 2.20.040(A) coming into play is the creation of a joint powers authority, in which various public agencies delegate certain powers to a newly created board or agency. Subsection 2.20.040(A) requires Oakland to condition its express delegation of power on a requirement that the delegatee (i.e., the joint powers authority) conduct its meetings pursuant to the Brown Act.

Section 2.20.040(A) may not have much practical effect when applied to a joint powers authority or other public agencies -- State law already requires most public agencies, including joint powers authorities, to comply with the Brown Act. A more interesting situation would arise if the delegation of power is made to a "person." The term "person" is undefined under the Sunshine Ordinance but could reasonably be interpreted to include a private corporation as well as an individual. Subsection 2.20.040(A) would thus require an Oakland local body to condition its express delegation of power on the requirement that the private corporation conduct its meetings pursuant to the Brown Act. It is not clear how Section 2.20.040(A) would apply to an "individual."

2. Sunshine Ordinance Section 2.20.040(B)

"To the extent not inconsistent with state or federal law, a private entity that owns, operates or manages any property in which the City, Redevelopment Agency, or the Port Department has or will have an ownership interest, including a mortgage, and on which property the private entity performs a governmental function or service, shall conduct any meeting of its governing board at which an item relating to the administration of the property or the public function or service is discussed or considered subject to the following conditions:

(1) Such meetings need not be formally noticed, although the time, place and nature of the gathering shall be disclosed upon inquiry by a member of the public, and any agenda actually prepared for the meeting be made available upon request;

(2) Such meetings need not be conducted in any particular location to accommodate spectators, although spectators shall be permitted to observe on a space available basis consistent with legal and practical restrictions on occupancy;

(3) *Such business meetings need not provide opportunities for comment by spectators, although the governing board may, in its discretion, entertain questions or comments from spectators as may be relevant to the item considered; and,*

(4) *The private entity or persons may restrict the attendance of spectators only to the specific item(s) directly relating to the administration of the property or of the public function or service and, as to such specific item(s), may prohibit the attendance of spectators during the discussion or consideration of any item that would be the permitted subject of a closed session hearing under the Ralph M. Brown Act."*

Subsection 2.20.040(B) requires a private entity that "owns, operates or manages" any City property and on which the private entity performs a "governmental function or service," to conduct meetings of its governing board pursuant to the four requirements set forth above. The above-cited requirements are not as demanding as Brown Act requirements but exceed any other public notice requirements that the private entity would otherwise have to fulfill in order to conduct a meeting. The Sunshine Ordinance provides no definition or guideline as to what constitutes a "governmental function or service" (see further discussion at Section II.C.3., below).

Attachment 2 provides a summary of advance notice requirements for Oakland's local bodies under the Brown Act and Sunshine Ordinance.

C. Discussion Of Proposals To Expand Sunshine Open Meeting Requirements To Certain Private Corporations

1) Private corporations currently subject to the Brown Act but not expressly subject to the Sunshine Ordinance

As stated above, a private corporation is subject to the Brown Act if **1)** it is created by a public agency to exercise lawfully delegated powers; or **2)** it receives public funds and its governing board consists of a member of the local agency who sits as a full voting member of the private corporation's governing board. While a private corporation that meets either of the above two conditions would be subject to the Brown Act, it is not clear that they would meet the current definition of an Oakland "local body" and be subject to the Sunshine Ordinance and the Commission's authority to administer and enforce it.

- ***Should the Sunshine Ordinance be amended to provide that any private corporation or entity created by an Oakland public agency to exercise lawfully delegated powers, or that receives public funds and has a voting member appointed by an Oakland public agency, constitutes a "local body" subject to the open meeting provisions of the Sunshine Ordinance?***

2) Private corporations not subject to the Sunshine Ordinance but potentially could be

As stated above, private entities that own, operate or manage property in which the City/Redevelopment/Port has an ownership interest and on which property the private entity performs a governmental function or service must conduct its meetings under the minimal standards of Section 2.20.040(B). A question is raised whether private corporations meeting other, different criteria should also conduct its meetings subject to the minimal standards of Section 2.20.040(B):

a) Private corporations receiving City/Redevelopment/Port financial assistance

The City currently regulates, under its "Living Wage Ordinance" [O.M.C. Chptr. 2.28], certain "persons" who qualify as "City financial assistance recipients." Under the Living Wage Ordinance, any person (defined broadly as any individual, joint venture, company, corporation, etc.) that receives financial assistance in an amount of \$100,000 or more during a twelve month period must pay its employees a minimum amount of compensation ("living wage"). The significance of this provision is that the City already regulates a specific category of private entities based on the amount of financial assistance they receive from the City. (The ordinance also defines what constitutes "financial assistance.") The contention is that if the City can require private corporations to pay certain wages because they receive a specified amount of financial assistance from the City of Oakland, then these private corporations arguably should adhere to the minimum meeting standards contained in Section 2.20.040(B).

- ***Should private corporations that receive a specified amount of City/Redevelopment/Port financial assistance be required to meet the minimum meeting requirements of Section 2.20.040(B)?***

b) Private corporations whose governing board is appointed by the Mayor or City Council

Under the Brown Act, private corporations that receive public funds **and** whose governing board contains a member of the public agency with full voting rights must conduct its meetings as though it were a public agency. There are currently a number of local corporations, all of them non-profits, whose board is appointed in full or in part by the City Council and/or other City officials. Since these boardmembers are not the elected officials themselves, the corporation is not subject to the Brown Act or the Oakland Sunshine Ordinance (unless it owns, operates or manages City property and performs a governmental service thereon.) Because their governing boards are politically appointed, there is an argument that these corporations should also meet the minimum meeting standards contained in Section 2.20.040(B).

- ***Should private corporations whose majority of boardmembers are appointed by the City Council or the Mayor be required to meet the minimum meeting requirements of Section 2.20.040(B)?***

3) **Defining what constitutes a "governmental function or service" under Section 2.20.040(B)**

Section 2.20.040(B) provides in relevant part:

*"To the extent not inconsistent with state or federal law, a private entity that owns, operates or manages any property in which the City, Redevelopment Agency, or the Port Department has or will have an ownership interest, including a mortgage, and on which property the private entity performs a **governmental function or service**, shall conduct any meeting of its governing board at which an item relating to the administration of the property or the public function or service is discussed or considered subject to the following conditions. . ."* (Emphasis added.)

Since the adoption of Section 2.20.040(B), questions have arisen over what constitutes a "governmental function or service" as used in this section. The term is currently not defined in the Sunshine Ordinance.

The issue of what constitutes a "governmental function or service" most typically arises in questions about a governmental agency's liability for injury or damages incurred in the performance of certain activities. Under the common law and statutory doctrines of sovereign immunity, governmental agencies are generally not liable for the performance of "governmental functions", while they can be liable for the performance of so-called "proprietary functions".

Various states have defined what constitutes a "governmental function" for purposes of sovereign immunity. An Ohio statute is typical of the definition of "governmental function" used in jurisdictions adopting this form of immunity:

"(C)(1) 'Governmental function' means a function of a political subdivision that is specified in division (C)(2) of this section or that satisfies any of the following:

(a) A function that is imposed upon the state as an obligation of sovereignty and that is performed by a political subdivision voluntarily or pursuant to legislative requirement;

(b) A function that is for the common good of all citizens of the state;

(c) A function that promotes or preserves the public peace, health, safety or welfare; that involves activities that are not engaged in or not customarily engaged in by nongovernmental persons; and that is not specified in division (G)(2) of this section as a proprietary function." [Ohio Revised Code §2744.01(C)(1)]

Section (C)(2) next goes on to itemize more than 20 specific governmental functions, ranging from traditional governmental services as police, fire and emergency services, to the maintenance of public zoos and parks. In contrast, Ohio R.C. 2744.01(G)(2) defines a

"proprietary" function in relevant part as "...one that promotes or preserves the public peace, health, safety, or welfare and that involves activities that are customarily engaged in by nongovernmental persons." Section (G)(2) then itemizes specific proprietary functions such as government-run hospitals, public cemeteries, public stadia, civic or social centers, and off-street parking facilities. **Attachment 3.**

Defining what constitutes a "governmental function or service" for purposes of Sunshine Section 2.20.040(B) would appear to require, at a minimum, a definition similar to Ohio R.C. 2744.01(C)(1), which provides a general test that would have to be interpreted on a case-by-case basis. To provide entities potentially subject to Section 2.20.040(B) with more specific criteria, an extensive listing of specific governmental functions may be necessary, similar to those functions enumerated in Ohio R.C. Section 2744.01(C)(2). Should the Committee seek to pursue this latter approach, it may also be helpful to specify what types of functions or services do **not** constitute a governmental function, (i.e., the so-called "proprietary" services) as specified in Ohio R.C. Section 2744.01(G)(2).

- ***Should the term "governmental function or service" be defined for purposes of Section 2.20.040(B)? If so, should the definition reflect the definition and/or elements enumerated in Ohio R.C. §2744.01 or other similar laws?***

4) Waiver From Open Meeting Requirements

The Brown Act does not permit public agencies to waive or to seek a waiver from its provisions. Since the overwhelming number of private corporations do not qualify as public agencies under the Brown Act, there may be reasons to exempt some private corporations from contemplated regulation under certain circumstances. For example, the Committee previously heard from representatives of a local non-profit corporation who stated that publicizing certain portions of its meetings and/or releasing certain business documents would permit competitors to acquire information that could be harmful to its business dealings on behalf of the City. Other private corporations may not have the staff or a local place of business to facilitate public attendance at board meetings.

One way to avoid unintended consequences or the burdensome application of local meeting requirements is to permit private corporations to seek a waiver from the Commission which currently has administrative and enforcement responsibilities under the Sunshine Ordinance. Waivers could be granted upon an affirmative showing of necessity for which the waiver is narrowly tailored to address the necessity. Waivers could also be subject to periodic renewal.

- ***Should any amendment requiring certain private corporations to meet the minimum meeting requirements of Section 2.20.040(B) permit such corporations to apply for a waiver from some or all of its provisions?***

III. PRIVATE CORPORATIONS AND PUBLIC RECORDS LAW

Under the California Public Records Act, a private corporation that is subject to the open meeting requirements of the Brown Act must also produce records as though it were a governmental agency. As stated above, the Sunshine Ordinance's definition of "local body," "agency" or "department" does not include private corporations. As a result, the City Attorney has previously advised that the **public records provisions** of the Sunshine Ordinance do not apply to private corporations.

The Committee has previously raised the question of whether private corporations that do not meet the Brown Act criteria, but nevertheless have a special relationship with the City, should make at least some of their records publicly available.

A. City Attorney John Russo's Proposal

In 2005, Oakland City Attorney John Russo proposed that local non-profit corporations (NPCs) meeting certain requirements should make available for public inspection certain types of financial documents. The proposal would apply to all local NPCs that "operate or manage any real property in which the City has an ownership interest and on which property the organization contracts with the City to perform a governmental function or service on behalf of the City." **Attachment 4.**

1) Types of records subject to disclosure

Under Mr. Russo's proposal, if a local NPC meets the above criteria, the local NPC would be required to disclose the following types of documents:

The non-profit's "most recent budget as already provided to the City" in connection with the non-profit's application, review or renewal for the City contract;

The non-profit's "most recently filed State and federal tax returns except to the extent those returns are privileged;" and,

Any financial audit or performance evaluation performed by or for the City "and/or pursuant to a contract between the City and the nonprofit organization" so long as the audit or evaluation (a) is in the non-profit's possession; (b) is not prohibited from disclosure under the terms of the contract between the City and non-profit organization; and (c) relates to the non-profit's performance under City contract within the last two years.

In a previous analysis of Mr. Russo's proposal, Commission staff noted that the above class of documents was somewhat limited and contained a number of exceptions that further narrowed the class of records available for inspection. A variation on Mr. Russo's proposal could include a broader class of documents subject to disclosure; for example, copies of its bid or proposal to the City; copies of all written agreements with the City; copies of public

documents required to be filed with other government entities such as articles of incorporation, bylaws and officer statements; budgets, income statements or financial records submitted to the City as part of its bid or proposal, and any financial or performance disclosures required under contract with the City.

- ***Should the class of private corporations subject to Mr. Russo's previous proposal be expanded to include corporations that 1) receive a specified level of City financial assistance, and/or 2) have a majority of its boardmembers appointed by the City Council or Mayor be required to make certain records available for inspection or copying?***
- ***Should the class of records available for public inspection and copying include any of the following: copies of bids or proposals to the City; copies of written agreements with the City; articles of incorporation, bylaws, officer statements and other publicly filed records; a current list of its board of directors; budgets, income statements or financial records submitted to the City as part of its bid or proposal; federal tax returns and schedules; and any financial or performance disclosures required under contract with the City?***

2) Waiver From Public Records Requirements

The same arguments supporting a waiver from local open meeting regulations generally apply to public record requirements. There may be legitimate reasons why a private corporation could or should not be subject to minimal records disclosure. The same waiver provisions contemplated for open meeting laws also could apply to public record requirements.

- ***Should any ordinance requiring certain private corporations to permit inspection of certain records permit such corporations to apply for a waiver from some or all of its provisions?***

IV. REMEDIES FOR SUNSHINE ORDINANCE VIOLATIONS

The Sunshine Ordinance currently provides that if the Commission determines that a local body violated any "material provision" of the ordinance, then the local body shall agendize whether to correct and cure the violation. [OMC Section 2.20.270(D)] This remedy is similar to one of the remedies provided in the Brown Act for local legislative bodies who violate open meeting laws. [See Government Code Section 54960.1] In addition to its "cure and correct" provisions, the Brown Act also provides misdemeanor penalties for a member of a legislative body that 1) attends a meeting at which action is taken in violation of the Brown Act, and 2) the action is taken with the intent to "deprive the public of information to which the member knows or has reason to know the public is entitled" under the Brown Act. [Government Code Section

54959] There is no corresponding administrative penalty in the Sunshine Ordinance for members of local bodies who violate the Sunshine Ordinance's open meeting provisions.

With respect to public records, the Public Records Act ("PRA") permits a person whose record request is denied to seek a court order to make the record available for inspection. [Government Code Section 6258] If the public nature of the record is disputed, the PRA permits a judge to inspect the record in private to determine whether it falls within one of the PRA's many exceptions for confidential records. [Government Code Section 6259] There is no express remedy in the Sunshine Ordinance for any dispute over public records, although a requesting party must first undertake mediation with the Commission's executive director before filing a complaint with the Commission over disputed records. [O.M.C. 2.20.270(C)]

Commission staff has surveyed a number of local and state "sunshine laws" to determine what kind of remedies they provide for the violation of open meeting and public record laws. The findings are set forth in **Attachment 5**. In summary, the available remedies for open meeting violations include: 1) subsequent "cure and correction" of the violation; 2) judicial nullification of any action taken at meetings held in violation of the law; 3) civil fines and/or misdemeanor penalties for "knowing" or "willful" violations; 4) formal discipline for employees who violate the law; and 5) possible removal from office for elected officials who violate the law. The available remedies for public records violations are: 1) judicial "in camera" determination of whether a record is public or confidential; 2) a judicial order compelling compliance; 3) civil fines and/or misdemeanor penalties for "knowing" or "willful" violations; and 4) formal discipline for employees who violate the law. The State of Ohio further requires a showing of irreparable harm or prejudice as a condition of any judicial remedy.

Of the above laws, only the San Francisco Sunshine Ordinance provides administrative remedies for sunshine ordinance violations. Under the San Francisco ordinance, any person can bring a complaint before the San Francisco Ethics Commission for "enforcement or penalties" if any city or state officials fail to take action within 40 days after the complaint is filed. [SF Code Section 67.35(d)] The "willful" failure of any San Francisco elected official, department head or manager to discharge duties under the Sunshine Ordinance, Brown Act or Public Records Act also constitutes "official misconduct" for which disciplinary sanctions can apply, including removal from office. Complaints alleging willful violation of the Sunshine Ordinance, Brown Act or Public Records Act are "handled" by the San Francisco Public Ethics Commission. [SF Code Section 67.34] Complaints can also be filed with the San Francisco Sunshine Ordinance Task Force which is authorized to conduct administrative hearings and issue its findings to other municipal agencies with enforcement power. [SF Code Section 67.30(c)]

Based on the above, it may be possible to develop additional administrative remedies for Oakland Sunshine Ordinance violations. Such remedies could include administrative fines and penalties, orders to compel documents, and/or "findings of violation" as to any elected or appointed official or employee. Any new remedies could also require a showing of "irreparable harm" and/or "prejudice" as a condition of any complaint seeking certain remedies.

- ***Should the Sunshine Ordinance contain provisions for administrative penalties, fines, orders to compel the production of records, and/or***

findings of violation for proven violations of open meeting and public record law? Should complainants be required to demonstrate "irreparable harm and/or "prejudice" as a pre-condition to certain complaints or remedies?

V. MANDATORY OPEN GOVERNMENT TRAINING FOR SPECIFIC CITY EMPLOYEES

Some cities require that employees receive training in open government law. The San Francisco Sunshine Ordinance requires all city officials and "designated employees" (i.e., employees required to file an annual Statement of Economic Interests) to attend annual training on the sunshine ordinance and to provide proof of compliance.

Commission and City Attorney staff routinely provide training to City officials and employees in open meeting and public records law. Since the training is voluntary and usually provided upon request, there are probably a number of City officials and employees who have not received training or received it more than a year ago. As an alternative to the broad requirement contained in the San Francisco ordinance, mandatory training could be targeted to a more specific audience, such as agency and department heads, employees who staff City boards and commissions, and those employees currently designated under the Sunshine Ordinance as the "most knowledgeable person" for each City department and agency.

- ***Should certain Oakland employees be required to receive mandatory public records training? If so, who should receive it? How often?***

VI. IMMEDIATE DISCLOSURE REQUESTS

Prior to 2003, the Sunshine Ordinance required that certain written requests for information had to be satisfied by the close of the next business day unless advised by the agency or department head that the request would be answered by a "specific future date." The written request had to be designated as an "immediate disclosure request" for the accelerated deadline to apply.

Under current law, all "immediate disclosure requests" for inspection or copies of public records must now be satisfied within three business days. Additional time to respond is provided under specific circumstances. Most significantly, the accelerated deadlines for "immediate disclosure requests" are now confined to "those public records which have been previously distributed to the public, such as past meeting agendas and agenda-related materials." [O.M.C. §2.20.230(C)]

The Committee has previously discussed whether the category of records available for "immediate disclosure" should be expanded to include records for which there is no dispute about their public nature, regardless of whether the document has been "previously released to the public." Examples of such records could include: Statements of Economic Interest (Form 700), campaign filings, employment and consulting contracts, litigation settlements, "police

blotters", resumes and applications for membership on City boards and commissions, etc. It is not clear however that any records contained in such classes of documents currently or routinely require more than three days to produce for public inspection and copying. The Committee may wish to inquire further into the present rationale for an "immediate disclosure" provision.

- ***Should the Sunshine Ordinance be amended to expand the class of documents subject to an immediate disclosure request? What types of documents should be included?***

VII. INCREASED NOTICE FOR SPECIAL MEETINGS

The Brown Act requires a local body to post written notice of special meetings at least 24 hours before a special meeting. In addition, the written notice must be sent to, and received by, each member of the legislative body and to each local newspaper of general circulation and other media that have previously requested such notice in writing. [Government Code §54956]

The Sunshine Ordinance requires Oakland local bodies to **post** notice at least 48 hours before a special meeting (not including Saturdays, Sundays and holidays.) Oakland local bodies must also **deliver** to each member of the local body, local newspapers of general circulation, and any person who has previously requested notice in writing, a copy of the agenda. Finally, the local body must **file** a copy of the agenda and all agenda-related materials in the Office of the City Clerk at least 48 hours before the stated time of the meeting (excluding Saturdays, Sundays and holidays). If the special meeting is held in a location other than the regular meeting place, then the above special meeting notice requirements must be met at least ten (10) days before the meeting date.

In addition to the Sunshine Ordinance, Oakland City Charter Section 208 further provides for special meetings held by the City Council:

"Special meetings [of the City Council] may be held at the regular place of meeting and shall be called, and notice thereof given, by the City Clerk upon the written request of the Mayor, the City Administrator, or three members of the Council and such notice shall state the special subject to be considered at the special meeting; and no other subject shall be there considered."

The Commission, in its enabling ordinance, is subject to a 72-hour notice period for its special meetings. [O.M.C. Section 2.20.060]

Over the years, several members of the Commission and public have advocated a longer notice period for special meetings in Oakland. Advocates of this position argue 1) the issues contained in a special meeting are no less important than those discussed at a regular meeting and should not be subject to a reduced notice period; and 2) as a matter of policy, a local body should not be able to reduce the length of the notice period simply by changing the time, date or place of a regular meeting. (Under generally accepted interpretation, any meeting that does not

qualify as a regular meeting is a special meeting. Thus even a minor change in the meeting time, or in the meeting date or location, can potentially trigger a "special meeting" designation.)

There are undoubtedly circumstances in which a local body may have to meet on relatively short notice and/or for a particular reason. The question of whether a "non-regular" meeting should be entitled to a shortened notice period arguably should depend on the relative urgency of the items to be considered, and not merely because a local body decides to add a meeting or make a slight modification to its regular meeting schedule.

One of the options could be to increase the current notice period for "non-regular meetings" unless the chair or members of the local body can cite some need justifying a reduced notice period. For example, special meetings could have a five-day (or longer) notice period unless the agenda states facts necessitating a shorter notice period, in which case a 24-hour (Brown Act) or 48-hour (Sunshine Ordinance) notice period would apply. The law could also specify acceptable reasons why a shorter notice period would be justified.

- ***Should special meetings having no particular urgency, or regular meetings whose starting time is adjusted, be subject to an extended notice period? If so, for how long? What conditions should exist to qualify a special meeting for a reduced notice period?***
- ***Should the Sunshine Ordinance be amended to achieve consistency with City Charter Section 208?***

VIII. CITYWIDE RECORD RETENTION POLICY

Under state law, records must be retained for a minimum of two years. (Some records must be preserved indefinitely, such as ordinances, resolutions, title to property, etc.) Records retained for the minimum period may not be destroyed unless the destruction is approved by the city attorney and the city council. [Government Code §34090] Unlike the Public Records Act, there is no definition of what constitutes a "record" for purposes of the state's record retention law. The California Attorney General's Office, in a detailed analysis of the statute, articulated a definition of "record" as:

". . .a thing which constitutes an objective lasting indication of a writing, event or other information, which is kept in the custody of a public officer and is kept either (1) a law requires it to be kept or (2) because it is necessary or convenient to the discharge of the public officer's duties and was made or retained for the purpose of preserving its informational content for future reference." [64 Cal.Opp.Att'y.Gen. 317, 326]

The above definition does not mean that all public documents must be retained; just those that are kept because the law requires it, or because it is necessary or convenient to do so **and** was made or retained to preserve the information for future reference. In the latter case, the initial

decision of whether to "retain" a document still appears to be within the discretion of the public officer.

The Sunshine Ordinance does not contain any provisions relating to the retention of records. Outside of specific state or federal laws pertaining to record retention, City agencies and departments appear free to develop and administer their own record retention policies. Recently, the Office of the City Attorney has identified a 15 year-old Administrative Instruction (AI 114) that creates a "Records Management Committee" within the City of Oakland. The Records Management Committee is charged with developing a records management program so that City records are efficiently "created, utilized, maintained, retained, preserved and disposed of." **Attachment 6.** Under AI 114, the Records Management Committee is also charged with reviewing records management practices for each of the City's agencies and departments, and to develop recommendations to the City Council and City Administrator. (Note: AI 114 has recently been suspended and is currently under review by the City Administrator's Office.)

At the March 8, 2007, Committee meeting, several people advocated that the Sunshine Ordinance be amended to include basic record retention requirements. As a point of reference, the San Francisco Sunshine Ordinance contains two record retention provisions that provide:

- 1) all documents "prepared, received, or maintained" by the Office of the Mayor, elected officials and department heads are the "property of the City and County of San Francisco" [SFSO Section 67.29-1]; and
- 2) the Mayor and all department heads must "maintain and preserve in a professional and businesslike manner all documents and correspondence, including but not limited to letters, emails, drafts, memorandum, invoices, reports and proposals. . ." [SFSO Section 67.29-7]

The San Francisco Administrative Code provides a definition of "records" for its record retention program and generally requires every department head to classify the department's records into specified categories "and to prepare a schedule for the systematic retention and destruction of such records. . ." subject to approval by the appropriate city officers and boards. [SF Admin. Code Section 8.3]

It would be possible to amend the Oakland Sunshine Ordinance to incorporate provisions similar to the San Francisco Sunshine Ordinance and/or AI 114. For example, the Sunshine Ordinance could be amended to 1) assert the City's proprietary right to documents, 2) impose a duty on public officials and employees to maintain and retain them according to a specified agency or departmental retention schedule, and 3) provide for a review and approval process involving the Commission, the City Attorney, City Council and other appropriate City officers.

- ***Should the Sunshine Ordinance be amended to establish a records retention policy as outlined above?***

IX. EARLY HOUR DECISION MAKING

Oakland's local bodies occasionally conduct meetings that run well into the next morning. Typically this occurs before a scheduled holiday period, such as the summer or winter recesses. It can also occur due to the consideration of particularly controversial and/or complex items that prompt extensive public debate and deliberation.

The Oakland City Council's Rules of (Meeting) Procedures state that "[m]eetings shall conclude no later than 10:30 p.m. unless extended by majority vote of the members of the council in attendance at the council meeting." When it appears that the meeting will continue past this 10:30 p.m. deadline, the City Council typically extends the deadline by unanimous consent until its business concludes. Since September, 2006, the City Council has held 26 regular and special meetings. Of those 26 meetings, at least 11 have adjourned past the 10:30 p.m. deadline.

Of particular interest and concern to the Committee is the nature of decisions taken after the 10:30 p.m. deadline. At its meeting of July 18, 2006, for example, the City Council voted to place a \$100+ million bond issue on the November, 2006, ballot at approximately 2:00 a.m. in the morning of the following day.

The above example provides a factual basis for an argument against permitting certain types of actions from being taken past a certain hour of the evening. The argument asserts that certain significant decisions -- such as the sale or issuance of bonds, the assumption of significant contractual obligations, and/or the imposition of taxes and assessments -- should only be taken at a time convenient and conducive to public participation. If not, such decisions should be continued or re-scheduled to a subsequent meeting. By placing a such a rule in the Sunshine Ordinance, local bodies would not be able to waive the deadline by majority vote. A counter argument to such a proposal is that sometimes these items must be acted upon promptly and cannot be continued or re-scheduled to a subsequent meeting because of legal or other deadlines. Local bodies arguably should possess a maximum amount of flexibility in scheduling and conducting the City's business.

Commission staff believes that it may be possible to develop language to encourage or require that certain types of decisions be made within a certain hour of the evening. If desired, the language could also include a provision for local bodies to waive this requirement upon a showing of need or urgency.

- ***Should the Sunshine Ordinance be amended to provide that certain types of decisions only be taken before a specified hour? Should such an amendment also permit local bodies to waive such a requirement subject to a finding of particular need or urgency?***

X. MISCELLANEOUS ISSUES

At its regular meeting of July 9, 2007, the Commission directed the Sunshine Committee to investigate the City Council's public speaker policies and practices to determine whether such

policies and practices are consistent with the provisions of the Oakland Sunshine Ordinance. Commission staff is currently reviewing the minutes of past City Council meetings and will supplement this memorandum with its findings. The Committee may wish to provide specific direction to staff as to any particular inquiry or question it would like to have addressed as part of staff's review.

XI. STAFF RECOMMENDATION

Commission staff recommends that the Committee take public comment and consider the policy questions presented by staff and to provide specific direction regarding the preparation of any future policy recommendations and/or amendments to the Sunshine Ordinance.

Respectfully submitted,

Daniel D. Purnell
Executive Director

ATTACHMENT 1

CITY OF OAKLAND ***Public Ethics Commission***

Sukey Wilder, *Chair*
Curtis Below, *Vice Chair*
Fredericka (Ricka) L. White
Douglas Love
Andrew Wiener
(Two Vacancies)



Daniel D. Purnell, Executive Director

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TO: Sunshine Committee
FROM: Daniel Purnell
DATE: March 8, 2007

RE: Committee Policy Objectives For 2007

Commission staff has prepared this memorandum to identify potential policy issues that the Committee may wish to address as part of its ongoing review of the Sunshine Ordinance. The issues presented are not intended to be all-inclusive nor are they set forth in any particular order of significance or preference:

1. Private Corporations And Open Meeting Laws

Both the Brown Act and the Oakland Sunshine Ordinance currently contain provisions under which a private corporation must distribute advance notice of its meetings and conduct its meetings publicly. The Committee may wish to consider whether to expand these open meeting rules to apply to a greater class of corporations than currently prescribed by existing law.

2. Private Corporations And Public Records

The California Public Records Act applies to the same corporations as regulated under the Brown Act. The Office of the City Attorney previously proposed expanding the Sunshine Ordinance to increase the accessibility of certain documents from private companies having a special relationship with the City. The Committee may wish to further examine this proposal.

3. Remedies for Sunshine Ordinance Violations

One of the ongoing complaints about the Sunshine Ordinance is the absence of effective remedies for violation of its provisions. Currently, the Sunshine Ordinance requires any local body found in violation of the open meeting laws to agendaize an item to "cure and correct" the violation at a subsequent meeting. Further, the Sunshine Ordinance has no administrative remedy for violations of its public records provisions. Commission members have expressed frustration at not being able to fashion specific remedies for proven violations. The Committee may wish to research and develop proposals in this area.

4. Mandatory Open Government Training For Specific City Employees

Some cities require that employees receive at least a minimum amount of training in open government law. The San Francisco Sunshine Ordinance requires all city officials and "designated employees" (i.e., employees required to file an annual Statement of Economic Interests) to attend annual training on the Sunshine Ordinance. Another option would be to target mandatory training to a more specific audience, such as agency and department heads, employees who staff City boards and commissions, and to those employees designated as the public information officer for each City department and agency.

5. Immediate Disclosure Requests

Prior to 2003, the Sunshine Ordinance required that certain written requests for information had to be satisfied by the close of the following business day unless advised by the agency or department head that the request would be answered by a "specific future date." Under current law, all "immediate disclosure requests" for inspection or copies must now be satisfied within three business days. Additional time to respond is provided under specific circumstances. Most significantly, the accelerated deadlines for "immediate disclosure requests" are now confined to public records which have been "previously distributed to the public, such as past meeting agendas and agenda-related materials." The Committee may wish to help facilitate immediate disclosure of documents for which there is no dispute regarding their public character.

6. Increased Public Notice For Special Meetings

The Brown Act requires a local body to post notice of special meetings at least 24 hours before a special meeting. The Sunshine Ordinance requires Oakland local bodies to post notice at least 48 hours before a special meeting (not including Saturdays, Sundays and holidays). Several Commissioners and public speakers have advocated increasing the minimum time requirements for providing public notice of special meetings under the Sunshine Ordinance. Others have advocated

a limitation on the number or type of items that can be considered at a special meeting due to the shortened notice period.

7. Establish A City-Wide Record Retention Policy

State law establishes a basic record retention requirement of two years for certain documents; longer for others. Many cities have established their own requirements for record retention and certain City departments have established internal record retention guidelines. The San Francisco Sunshine Ordinance contains a detailed record retention policy that applies to its agencies and departments. The Committee may wish to evaluate whether the Oakland Sunshine Ordinance should address the issue of record retention, particularly with respect to electronic communications such as emails and voice messages.

8. Early Hour Decision-Making

Occasionally Oakland's local bodies consider significant policy and financial decisions very early in the morning after most members of the public have retired. The Committee may wish to consider whether the Sunshine Ordinance should regulate the kinds of decisions that can be taken after a specified hour.

Commission staff recommends that the Committee take public comment and suggestions regarding potential Sunshine issues. The Committee can then identify and prioritize which issues it wishes to pursue and direct staff to prepare a more detailed summary and analysis for the next Committee meeting.

Respectfully submitted,

Daniel D. Purnell
Executive Director

ATTACHMENT 2

SUMMARY OF MEETING NOTICE REQUIREMENTS FOR OAKLAND LOCAL BODIES

OAKLAND LOCAL BODIES AND OTHER ENTITIES	BROWN ACT	SUNSHINE ORDINANCE
City Council, Redevelopment Agency, Port Board, Ethics Commission And Their Respective Sub-Committees	Must post agenda at least 72 hours before a regular meeting; Must post agenda and deliver agendas to members, local media and agenda subscribers 24-hours before a special meeting.	Must post agenda and file agenda and agenda package 10 days before a regular meeting; Must post agenda and deliver agenda and agenda packages to members, local media and agenda subscribers 48-hours before a special meeting. All agendas must also be posted on-line.
All other "local bodies" (e.g., Planning Commission, other advisory boards and commissions)	Same requirement as City Council, Redevelopment Agency, Port Board, Ethics Commission And Sub-Committees	Same as Brown Act requirements for regular meetings except must file agenda and agenda packages with the City Clerk; Must post agenda and deliver agenda and agenda packages to members, local media and agenda subscribers 48-hours before a special meeting.
Private entities under OMC 2.20.040(A)	Possible Brown Act application if "created by" an Oakland local body.	Same as Brown Act requirement for regular and special meetings. Unclear if private entities defined under OMC 2.20.040(A) constitute a "local body" subject to PEC jurisdiction.
Private entities under OMC 2.20.040(B)	No Brown Act application.	See special meeting requirements listed above. Unclear if private entities defined under OMC 2.20.040(B) constitute a "local body" subject to PEC jurisdiction.

ATTACHMENT 3

OHIO REVISED CODE 2744.01 -- Political Subdivision Tort Liability Definitions.

As used in this chapter:

(A) "Emergency call" means a call to duty, including, but not limited to, communications from citizens, police dispatches, and personal observations by peace officers of inherently dangerous situations that demand an immediate response on the part of a peace officer.

(B) "Employee" means an officer, agent, employee, or servant, whether or not compensated or full-time or part-time, who is authorized to act and is acting within the scope of the officer's, agent's, employee's, or servant's employment for a political subdivision. "Employee" does not include an independent contractor and does not include any individual engaged by a school district pursuant to section 3319.301 of the Revised Code. "Employee" includes any elected or appointed official of a political subdivision. "Employee" also includes a person who has been convicted of or pleaded guilty to a criminal offense and who has been sentenced to perform community service work in a political subdivision whether pursuant to section 2951.02 of the Revised Code or otherwise, and a child who is found to be a delinquent child and who is ordered by a juvenile court pursuant to section 2152.19 or 2152.20 of the Revised Code to perform community service or community work in a political subdivision.

(C)(1) "Governmental function" means a function of a political subdivision that is specified in division (C)(2) of this section or that satisfies any of the following:

(a) A function that is imposed upon the state as an obligation of sovereignty and that is performed by a political subdivision voluntarily or pursuant to legislative requirement;

(b) A function that is for the common good of all citizens of the state;

(c) A function that promotes or preserves the public peace, health, safety, or welfare; that involves activities that are not engaged in or not customarily engaged in by nongovernmental persons; and that is not specified in division (G)(2) of this section as a proprietary function.

(2) A "governmental function" includes, but is not limited to, the following:

(a) The provision or nonprovision of police, fire, emergency medical, ambulance, and rescue services or protection;

(b) The power to preserve the peace; to prevent and suppress riots, disturbances, and disorderly assemblages; to prevent, mitigate, and clean up releases of oil and hazardous and extremely hazardous substances as defined in section 3750.01 of the Revised Code; and to protect persons and property;

(c) The provision of a system of public education;

(d) The provision of a free public library system;

(e) The regulation of the use of, and the maintenance and repair of, roads, highways, streets, avenues, alleys, sidewalks, bridges, aqueducts, viaducts, and public grounds;

(f) Judicial, quasi-judicial, prosecutorial, legislative, and quasi-legislative functions;

(g) The construction, reconstruction, repair, renovation, maintenance, and operation of buildings that are used in connection with the performance of a governmental function, including, but not limited to, office buildings and courthouses;

(h) The design, construction, reconstruction, renovation, repair, maintenance, and operation of jails, places of juvenile detention, workhouses, or any other detention facility, as defined in section 2921.01 of the Revised Code;

(i) The enforcement or nonperformance of any law;

(j) The regulation of traffic, and the erection or nonerection of traffic signs, signals, or control devices;

(k) The collection and disposal of solid wastes, as defined in section 3734.01 of the Revised Code, including, but not limited to, the operation of solid waste disposal facilities, as "facilities" is defined in that section, and the collection and management of hazardous waste generated by households. As used in division (C)(2)(k) of this section, "hazardous waste generated by households" means solid waste originally generated by individual households that is listed specifically as hazardous waste in or exhibits one or more characteristics of hazardous waste as defined by rules adopted under section 3734.12 of the Revised Code, but that is excluded from regulation as a hazardous waste by those rules.

(l) The provision or nonprovision, planning or design, construction, or reconstruction of a public improvement, including, but not limited to, a sewer system;

- (m) The operation of a job and family services department or agency, including, but not limited to, the provision of assistance to aged and infirm persons and to persons who are indigent;
- (n) The operation of a health board, department, or agency, including, but not limited to, any statutorily required or permissive program for the provision of immunizations or other inoculations to all or some members of the public, provided that a "governmental function" does not include the supply, manufacture, distribution, or development of any drug or vaccine employed in any such immunization or inoculation program by any supplier, manufacturer, distributor, or developer of the drug or vaccine;
- (o) The operation of mental health facilities, mental retardation or developmental disabilities facilities, alcohol treatment and control centers, and children's homes or agencies;
- (p) The provision or nonprovision of inspection services of all types, including, but not limited to, inspections in connection with building, zoning, sanitation, fire, plumbing, and electrical codes, and the taking of actions in connection with those types of codes, including, but not limited to, the approval of plans for the construction of buildings or structures and the issuance or revocation of building permits or stop work orders in connection with buildings or structures;
- (q) Urban renewal projects and the elimination of slum conditions;
- (r) Flood control measures;
- (s) The design, construction, reconstruction, renovation, operation, care, repair, and maintenance of a township cemetery;
- (t) The issuance of revenue obligations under section 140.06 of the Revised Code;
- (u) The design, construction, reconstruction, renovation, repair, maintenance, and operation of any school athletic facility, school auditorium, or gymnasium or any recreational area or facility, including, but not limited to, any of the following:
 - (i) A park, playground, or playfield;
 - (ii) An indoor recreational facility;
 - (iii) A zoo or zoological park;
 - (iv) A bath, swimming pool, pond, water park, wading pool, wave pool, water slide, or other type of aquatic facility;
 - (v) A golf course;
 - (vi) A bicycle motocross facility or other type of recreational area or facility in which bicycling, skating, skate boarding, or scooter riding is engaged;
 - (vii) A rope course or climbing walls;
 - (viii) An all-purpose vehicle facility in which all-purpose vehicles, as defined in section 4519.01 of the Revised Code, are contained, maintained, or operated for recreational activities.
- (v) The provision of public defender services by a county or joint county public defender's office pursuant to Chapter 120. of the Revised Code;
- (w)(i) At any time before regulations prescribed pursuant to 49 U.S.C.A 20153 become effective, the designation, establishment, design, construction, implementation, operation, repair, or maintenance of a public road rail crossing in a zone within a municipal corporation in which, by ordinance, the legislative authority of the municipal corporation regulates the sounding of locomotive horns, whistles, or bells;
- (ii) On and after the effective date of regulations prescribed pursuant to 49 U.S.C.A. 20153, the designation, establishment, design, construction, implementation, operation, repair, or maintenance of a public road rail crossing in such a zone or of a supplementary safety measure, as defined in 49 U.S.C.A 20153, at or for a public road rail crossing, if and to the extent that the public road rail crossing is excepted, pursuant to subsection (c) of that section, from the requirement of the regulations prescribed under subsection (b) of that section.
- (x) A function that the general assembly mandates a political subdivision to perform.

(G)(1) "Proprietary function" means a function of a political subdivision that is specified in division (G)(2) of this section or that satisfies both of the following:

- (a) The function is not one described in division (C)(1)(a) or (b) of this section and is not one specified in division (C)(2) of this section;

(b) The function is one that promotes or preserves the public peace, health, safety, or welfare and that involves activities that are customarily engaged in by nongovernmental persons.

(2) A "proprietary function" includes, but is not limited to, the following:

(a) The operation of a hospital by one or more political subdivisions;

(b) The design, construction, reconstruction, renovation, repair, maintenance, and operation of a public cemetery other than a township cemetery;

(c) The establishment, maintenance, and operation of a utility, including, but not limited to, a light, gas, power, or heat plant, a railroad, a busline or other transit company, an airport, and a municipal corporation water supply system;

(d) The maintenance, destruction, operation, and upkeep of a sewer system;

(e) The operation and control of a public stadium, auditorium, civic or social center, exhibition hall, arts and crafts center, band or orchestra, or off-street parking facility.

(H) "Public roads" means public roads, highways, streets, avenues, alleys, and bridges within a political subdivision. "Public roads" does not include berms, shoulders, rights-of-way, or traffic control devices unless the traffic control devices are mandated by the Ohio manual of uniform traffic control devices.

(I) "State" means the state of Ohio, including, but not limited to, the general assembly, the supreme court, the offices of all elected state officers, and all departments, boards, offices, commissions, agencies, colleges and universities, institutions, and other instrumentalities of the state of Ohio. "State" does not include political subdivisions.

ATTACHMENT 4

JOHN RUSSO'S 2005 PROPOSAL REGARDING ACCESS TO CERTAIN RECORDS OF NON-PROFIT ORGANIZATIONS

ORDINANCE FOR PUBLIC ACCESS TO RECORDS OF NONPROFIT ORGANIZATIONS THAT PERFORM GOVERNMENTAL FUNCTIONS ON CITY PROPERTY

SECTION 1. INTENT AND INTERPRETATION; COSTS OF COMPLIANCE.

(A) The intent of this Ordinance is to ensure that nonprofit organizations that operate City property and perform municipal governmental functions on City property do so with the greatest possible openness. Nothing in this Ordinance shall be construed to limit the level of openness and democracy in nonprofit organizations, and any contracting nonprofit organization may establish policies that guarantee additional openness.

(B) This Ordinance is intended to be cost-neutral in its effects upon nonprofit organizations. This Ordinance is not intended to allow individuals who seek to harass an organization to make excessive or repeated records requests. The requirements imposed by this Ordinance shall be subject to this intent. This Ordinance is not intended to impose obligations equal to those of governmental agencies upon nonprofit organizations.

SECTION 2. CONTRACT LANGUAGE ESTABLISHING PUBLIC ACCESS TO NONPROFIT ORGANIZATIONS.

(A) Each contracting agency of the City or any department thereof, acting for or on behalf of the City, shall include in all contracts between it and any nonprofit organization which is subject to this Ordinance, provisions imposing the requirements set forth in Sections 3 through 5, inclusive, or incorporate by reference the requirements.

SECTION 3. DEFINITIONS.

(A) "Actual costs of duplication" includes the costs of paper, ink, the amortized costs of copying equipment, staff time necessary to find, copy and compile the records or perform any legally permitted redactions.

(B) "City" shall mean the City of Oakland, Redevelopment Agency or Port Department.

(C) "Nonprofit organization" shall mean any corporation formed pursuant to California Corporations Code Sections 5000 et seq. for any public or charitable purpose, and/or any organization described within 26 U.S.C Section 501(c) that operates or manages any real property in which the City has an ownership interest and on which property the organization contracts with the City to perform a governmental function or service on behalf of the City.

SECTION 4. PUBLIC ACCESS TO RECORDS.

(A) Disclosure of Records. Each nonprofit organization shall maintain and make available for public inspection and copying any of the following subject to any privilege or exemption in law, including the Public Records Act or Sunshine Ordinance, and subject to exemption to protect any trade or business secret whose disclosure would inhibit the entity's ability to compete in the marketplace:

- (1) The nonprofit organization's most recent budget as already provided to the City in connection with the nonprofit organization's application for, or in connection with the review and/or renewal of, the nonprofit organization's contract,
- (2) The nonprofit organization's most recently filed State and federal tax returns except to the extent those returns are privileged,
- (3) Any financial audits or any performance evaluations of such organization performed by or for the City and/or pursuant to a contract between the City and the nonprofit organization only if such financial audits and performance evaluations meet the following criteria:
 - (a) Are in the nonprofit organization's possession,
 - (b) Are not prohibited from disclosure under the terms of the contract between the City and the nonprofit organization, and
 - (c) Relate to the nonprofit corporation's performance under its contract with the City within the last two years
- (4) A member of the public may request additional financial information pursuant to other than that described above, pursuant to Section 4(c) of this ordinance; however, the provision of such additional financial information by a nonprofit organization shall be voluntary, not compulsory

(B) Procedure to Obtain Records. Members of the public, upon giving ten days' notice to the nonprofit organization and payment of actual costs of duplication, shall be entitled to inspect the records during the nonprofit organization's regular business hours or to receive a copy of records a nonprofit organization may comply with this section by sending a copy of the records, by first class mail, with the costs of such mailing and actual costs of duplication prepaid by the member of the public, to a member of the public who has requested such information. The nonprofit organization may extend its time to allow inspection or provide copies if it informs the requestor the reasons for the extension and gives a date certain for inspection or production.

(C) Dispute Resolution. A requestor who has a complaint concerning a nonprofit organization's compliance or noncompliance with this Ordinance, may submit that complaint to the Office of the City Attorney or Port Attorney as appropriate. That office shall consider the request or complaint and shall determine a resolution. After resolution by the City Attorney or Port Attorney, a requestor may seek declaratory relief from a Superior Court only on whether the organization has violated this section.

(D) Donor Confidentiality. No nonprofit organization shall be required to make available to the public any document which would reveal the identity of any of that nonprofit organization's donors or the amount or nature of any donations to that nonprofit organization.

(E) Creation of Records. Nothing in this Ordinance requires the creation of new record or conducting computer programming in response to a request.

(F) Advice. Any nonprofit organization may also contact the Office of the City Attorney of Port Attorney for advice on how to comply with this Ordinance.

SECTION 5. COMPLIANCE.

In the event that a nonprofit organization materially fails to comply with any contract provision required by this Ordinance, the City agency or department which is a party to such contract shall consider such failure a material breach of the contract. The City Attorney or Port Attorney may, but is not required to, further consider such material breach as grounds for terminating the contract or not renewing the contract, partially or in its entirety.

SECTION 6. SEVERABILITY.

This Ordinance shall be construed so as not to conflict with applicable federal or State laws, rules or regulations. Nothing in this Ordinance shall authorize any City agency or department to impose any duties or obligations in conflict with limitations on municipal authority established by State or federal law at the time such agency or department action is taken.

In the event that a court or agency of competent jurisdiction holds that State or federal law invalidates any clause, sentence, paragraph or section of this Ordinance or the application thereof to any person, or circumstances, it is the intent of the City Council that the court or agency sever such clause, sentence, paragraph or section so that the remainder of this Ordinance shall remain in effect.

SECTION 7. CITY UNDERTAKING LIMITED TO PROMOTION OF GENERAL WELFARE.

In undertaking the adoption and enforcement of this Ordinance, the City is undertaking only to promote the general welfare. The City is not assuming, nor is it imposing on its officers and employees, an obligation for breach of which it is liable in money damages to any person who claims that such breach proximately caused injury.

Other than that provided in Section 4 (C), this Ordinance does not create a legally enforceable right by any member of the public against the City or a nonprofit organization.

ATTACHMENT 5

SUMMARY OF REMEDY PROVISIONS FROM OTHER SUNSHINE LAWS

JURISDICTION	OPEN MEETING REMEDIES	PUBLIC RECORD REMEDIES
<p>Florida Title X, Chptr. 119</p>	<p>Criminal infraction (fine) for violation; misdemeanor prosecution for "knowing" violation.</p>	<p>Criminal infraction (fine) for violation; misdemeanor prosecution for "knowing" violation. Complaining party has right to an accelerated hearing and automatic stay from destruction for any record in question. Respondent must produce record w/in 48 hrs. of court decision to produce.</p>
<p>Missouri RSMo Chapter 610</p>	<p>Court may declare void any action taken in violation of the law. If court determines that the public body or a member knowingly violated the Sunshine Law, the court shall subject the member or body to a civil fine of up to \$1,000 and may order all costs and reasonable attorney fees. If the court determines that the public body or member has purposely violated the Sunshine Law, the court shall subject the member or body to a civil fine of up to \$5,000; and shall order the member or body to pay all court costs and reasonable attorney fees.</p>	<p>Same as open meeting remedies.</p>

<p>Ohio Revised Code Chptrs 121, 149</p>	<p>Any citizen may seek an injunction to enforce open mtg. laws but must show legal elements of "irreparable harm" and "prejudice." Actions taken at a meeting held in violation of open mtg. laws can be ruled invalid. Violations of open meeting act can constitute grounds for removal from office.</p>	<p>Only remedy is to file a writ demanding compliance.</p>
<p>Pennsylvania</p>	<p>Actions taken at a meeting held in violation of open mtg. laws can be ruled invalid. Any member of any agency found violating open mtg law liable for penalty up to \$100 per violation.</p>	
<p>San Francisco</p>	<p>S/O Task Force can refer to "other municipal agencies having jurisdiction" any violations it determines under the Brown Act, Public Records Act and Sunshine Ordinance. (Proposed amendments would permit the S/O Task Force to conduct administrative hearings to determine violations of open meeting and public record laws. Its findings could then be used as evidence in other judicial or administrative proceedings.) "Willful" violation of the S/O shall constitute "official misconduct," subject to discipline and potential removal from office. The SF Ethics Commission is authorized to conduct</p>	<p>Same as open meeting remedies.</p>

	hearings on whether a violation was "willful" and report findings to the Board of Supervisors.	
AB 1393 (Leno) (pending in State Senate as of 6/07)	N/A	<p>Specifies that a court may award to a plaintiff up to \$100 for each day that a state or local agency:</p> <ul style="list-style-type: none"> a) Declines to comply with a request to inspect or copy a record that is publicly accessible pursuant to PRA; or, b) Delays in responding to the request "for reasons that are unstated to the requester, or that are unsupported by compelling circumstances, or that otherwise demonstrate a lack of the diligence required to make records available promptly, without delay or obstruction...or otherwise frustrates timely and complete access." <p>Court must determine agency acted in "bad faith" or with "reckless disregard of the agency's obligations [under the PRA].</p>

CALIFORNIA SUNSHINE ORDINANCES

Government Entity	Title	Found on the Web at
City of Benicia	Open Government Ordinance	http://www.codepublishing.com/ca/benicia/
City of Milpitas	Open Government Ordinance	http://municipalcodes.lexisnexis.com/codes/milpitas/
City of Oakland	Oakland Sunshine Ordinance	http://municipalcodes.lexisnexis.com/codes/oakland/
City and County of San Francisco	San Francisco Sunshine Ordinance	http://www.sfgov.org/site/sunshine_page.asp?id=34495
City of Vallejo	Vallejo Sunshine Ordinance	http://municipalcodes.lexisnexis.com/codes/vallejo/
Contra Costa County	Better Government Ordinance	http://municipalcodes.lexisnexis.com/codes/ccosta/

Proposed Drafts	Found on the Web at
City of Berkeley	http://www.cfac.org/content/sunshine/berkeley.php
San Francisco	http://www.sfgov.org/site/uploadedfiles/sunshine/Documents/tf_cac_proposed_ordinance_amendments.doc

STATED PURPOSES FOR ADOPTING LOCAL SUNSHINE ORDINANCES

Benicia, Oakland, and Vallejo state similar purposes.

City of Benicia

- ❖ To "make it easier for people to access city government" and "be involved in a more meaningful and knowledgeable way." § 4.04.010.
- ❖ To "assure that the deliberations of these bodies and the city's operations are open to the public." § 4.04.020(C).
- ❖ To "clarify and supplement the Ralph M. Brown Act and the California Public Records Act." § 4.04.020(D).
- ❖ To "assure that the people of the city . . . can be fully informed and thereby retain control over the instruments of local government in their city." § 4.04.020(D).
- ❖ To "list and implement fundamental rights of each member of the public." § 4.04.020(E).

City of Oakland

- ❖ To "assure that [commissions, boards, councils, advisory bodies and other agencies] deliberations and the city's operations are open to the public." § 2.20.010(B) (emphasis added).
- ❖ To "clarify and supplement the Ralph M. Brown Act and the California Public Records Act;"
- ❖ To "assure that the people of the city . . . can be fully informed and thereby retain control over the instruments of local government in their city." § 2.20.020(C).

City of Vallejo

- ❖ To "ensure that [city council, the housing authority, the redevelopment agency, and all special districts, agencies, and authorities] deliberations and the city's operations are open to the public to the full extent permitted by law." § 2.08.010(B) (emphasis added).
- ❖ To "clarify and supplement the Ralph M. Brown Act . . . and the California Public Records Act;"
- ❖ To "assure that the people of the city . . . can be fully informed and thereby retain control over the instruments of local government in their city." § 2.08.010(C).

San Francisco and Milpitas share identical texts.

City and County of San Francisco and City of Milpitas

- ❖ To carefully and narrowly define circumstances that allow the business of government to be conducted in secret in order "to prevent public official from abusing their authority." § 67.1(d); § 310-1.10(d).
- ❖ To hold accountable public officials attempting to conduct business of government in secret. § 67.1(e); § 310-1.10(e).
- ❖ To assure that "the people of the City remain in control of the government they have created." § 67.1(f); § 310-1.10(f).

City of Berkeley

- ❖ To "increase access to City . . . decision making procedures beyond that required by the Ralph M. Brown Act . . . and the California Public Records Act." § 1.30.030.

A COMPARISON OF SELECT PROVISIONS

DISCLOSURE OF ACTIONS IN CLOSED SESSIONS: SETTLEMENT

Benicia and Oakland have substantially similar provisions for publicly reporting actions taken in closed session regarding settlement of litigation.

- ❖ If accepting a settlement, the body must report its vote and indentify the substance of the agreement;
- ❖ The body cannot agree to terms that would preclude release of the settlement and related documents;
- ❖ If closely related litigation is still pending, the body may delay releasing the settlement and documents until after the litigation concludes. § 4.08.150(C)(3).

San Francisco and Milpitas share identical disclosure of settlement provisions. Proposed amendments to the San Francisco ordinance include only minor technical changes. Benicia, Oakland, San Francisco, and Milpitas generally cover a public reporting requirement, a ban on confidential settlement agreements, and a waiting period for pending litigation.

- ❖ The body cannot agree to terms that would preclude release of the settlement and related documents;
- ❖ For settlements involving changes to an existing policy, practice or program or payment of \$50,000 or more, the city must make the settlement and documents publicly available ten days before the meeting to approve the settlement agreement;

- ❖ If the information would be detrimental in pending litigation with another party on the same facts or incident, disclosure of the settlement and documents may wait until the litigation concludes. § 67.12(b)(3); § 310-2.100(b)(3).

Contra Costa County offers in legally precise language provisions for immediate public reporting and a ban on confidential settlement agreements, but does not provide for a waiting period for pending litigation.

- ❖ A settlement must be reported as soon as it is final;
- ❖ If the body approves the final settlement, it must report the approval, the substance of the agreement and the vote in open session immediately;
- ❖ The county cannot agree to terms that would preclude release of the settlement and related documents unless the materials originally constituted a confidential communication between county and counsel. § 25-2.406(b)(3).

Vallejo's ordinance includes a 72-hour public reporting requirement but does not provide for a ban on confidential agreements or a waiting period for pending litigation.

- ❖ For settlements involving changes to an existing policy, practice or program or payment of more than \$50,000, the city must make the settlement and related documents available 72 hours before the meeting to approve the settlement agreement. § 2.08.080(A).

Berkeley differs from most in that settlements presumptively belong on the open agenda.

- ❖ Settlements to be approved by the City Council generally should be placed on the open agenda even if accompanied by a confidential attorney-client memorandum or previously discussed in closed session;

ENFORCEMENT AGAINST THE CITY AND ITS OFFICIALS AND EMPLOYEES

Contra Costa County provides an administrative process for enforcement and requires exhaustion of that process before a private action may be brought in court.

- ❖ **Better Government Task Force.** The ordinance establishes a nine-member task force to advise the Board of Supervisors regarding implementation. § 25-6.204(a)-(c).
- ❖ **Exhaustion and Private Right of Action.** The administrative process of review and enforcement must be exhausted before a plaintiff may bring an action to enforce her right under the ordinance to access public records or right to attend a meeting required to be open. § 25-6.204(d)-(e). The administrative process does not preclude or limit remedies under the Brown Act or Public Records Act.
- ❖ **Costs and Fees.** A prevailing plaintiff receives reasonable costs and attorney's fees if "the court orders such fees to be paid." § 25-6.204(f).

- ❖ If disclosure of the settlement would compromise the City's strategic legal interests in the litigation, or litigation deadlines, or the offer requires swifter council action, the city must disclose it for public inspection at the "earliest practicable time." § 1.30.170(B).

Vallejo simply provides a private right of action but also specifies disciplinary actions for willful misconduct by city officials and managerial employees.

- ❖ **Private Right of Action.** Any person may institute proceedings in court to enforce her right of access to public records or right to attend a meeting required to be public. § 2.08.150(A).
- ❖ **Costs and Fees.** A prevailing plaintiff receives costs and reasonable attorneys' fees. § 2.08.150(B).
- ❖ **Misconduct.** If an elected official willfully violates the ordinance, lawful removal from office is mandatory. A managerial employee must face disciplinary action up to termination. § 2.08.140.

Milpitas and San Francisco presently share the same enforcement schemes, but San Francisco has proposed extensive revisions treated separately below. The city has 40 days to respond to a complaint before an action may be brought in court.

- ❖ **Open Government Commission (Milpitas).** The ordinance establishes a five-member task force to advise the Council regarding implementation. § 310-4.10(a)-(c).
- ❖ **Administrative Process.** The Commission recommends an administrative process of review and enforcement. § 310-4.10(d). The administrative

process does not preclude or limit remedies under the Brown Act or Public Records Act.

- ❖ **Private Right of Action.** Any person may institute proceedings in court to enforce her right of access to public records or right to attend a meeting required to be public. § 310-460(a).
- ❖ **Waiting Time.** If after 40 days, the city fails to act on a complaint, the plaintiff may institute enforcement proceedings. § 310-460(d)
- ❖ **Costs and Fees.** A prevailing plaintiff receives costs and reasonable attorneys' fees. § 310-4.60(b).
- ❖ **Willful Violations.** Willful violations of the ordinance or state law by an elected official or managerial city employee constitute official misconduct. § 310.450.

Oakland provides an administrative process and private right of action but also requires a complaining party to participate in mediation as a prerequisite to filing an administrative complaint. The City has broad powers to cure challenged actions.

- ❖ **Public Ethics Commission.** The Commission is charged with advising and assisting the City on implementation. § 2.20.270.
- ❖ **Administrative Process.** The Commission develops and maintains an administrative process for review and enforcement. § 2.20.270(A)(3). The administrative process does not preclude or limit remedies under the Brown Act or Public Records Act.
- ❖ **Exhaustion and Private Right of Action.** After exhausting the administrative review process, any person may bring an action to enforce rights under the ordinance. § 2.20.270(B)(1).

- ❖ **Costs and Fees.** A court may award a prevailing plaintiff reasonable costs and attorney's fees. § 2.20.270(B)(2).
- ❖ **Mediation.** A person whose request to inspect public records is denied may demand "immediate mediation." The mediation must begin no later than ten days after the demand. The mediation is not binding on the parties. § 2.20.270©.
 - A person may not file a complaint with the Commission for failure to grant access to a document until after requesting and participating in mediation. § 2.20.270(F).
- ❖ **Cure and Correction.** The city may correct challenged actions by placing it on a subsequent meeting agenda for a redetermination. § 2.20.270(D).

Benicia has enforcement provisions similar to Oakland. The Benicia ordinance imposes express requirements on the administrative review process but does not require or call for mediation. Unlike Oakland, Benicia provides a penalty for elected officials and an enforcement process for violations of the ordinance by the city manager or city attorney.

- ❖ **Administrative Review Process.** The process includes a first appeal to the city manager, then appeal of the city manager's decision to the commission or a panel of city attorneys. A final appeal may be made to the city council whose decision is final. § 4.20.010(A).
- ❖ **Penalties.** Violation of the ordinance by an elected official may include public censure. § 4.20.020(F).
- ❖ **Enforcement of Ethics.** The City Council handles alleged violations by the city manager and city attorney. § 4.20.040.

Proposed and Analyses

Berkeley eliminates the common to the other cities' enforcing only a limited exception for a correct by voiding a violative act.

- ❖ **Self Correction.** If any board takes an action in an Act, that action must be redacted for discussion and compliance with law regarding complaint is filed. § 1.30.180.
- ❖ **Complaint Process.** A complaint with violations of the ordinance or manager must respond in 30 days to order compliance. Copy the complaint or the on the council agenda. § 30.260.
- ❖ **No Private Right of Action.** The complaint process is the exclusive remedy. Ordinance does not provide a private right of action when a body refuses to act in violation of the ordinance. A complaint is made. Under this may initiate an action 30 day complaint, but the action is. § 130.280.

San Francisco has proposed amendments to its enforcement scheme as follows above.

- ❖ The newly reauthorized ordinance must hold an administrator in office if a violation has occurred may issue a determination to schedule its determination process. § 67.34.

- ❖ The Commission has adjudicatory powers to subpoena, take evidence, and compel witnesses to attend and testify.
- ❖ By two-thirds vote, the Commission may seek outside council to prosecute a willful violation in civil courts.