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TO: Public Ethics Commission
FROM: Daniel Purnell
DATE: November 1, 2004

RE: **A Report And Action To Be Taken Regarding A Proposed Amendment To The Oakland Sunshine Ordinance Requested By The Office Of The City Clerk**

I. INTRODUCTION

In July, 2004, the City Clerk requested a hearing before the City Council Rules and Legislation Committee on a proposal to amend Oakland's Sunshine Ordinance. The City Clerk told Commission staff that the current language in the Sunshine Ordinance does not adequately address situations in which failures of the City's computer system prohibits the timely completion of the City Council agenda and/or prevents a continuous ten-day, on-line posting of the City Council agenda.

Since then, the City Clerk has developed specific language to address the above concerns. The City Clerk has recently decided to propose the attached amendments to the Sunshine Ordinance to the City Council. The City Clerk is seeking the comments and support of the Public Ethics Commission before formally submitting the proposal. ***Attachment 1.***

II. PROPOSED LANGUAGE

There are three basic parts to the City Clerk's proposal. The first is an amendment re-defining what constitutes a "hardware or software failure" for purposes of the Sunshine Ordinance. The second slightly modifies existing law that excuses the local requirement for posting a copy of the agenda on-line if the failure to make such a posting results from a hardware or software failure. The third part would permit the City Council, Redevelopment Agency, Port Commission and the Public Ethics Commission

to excuse any local requirement pertaining to the notice of a regular meeting if the respective body determines, by a two-thirds vote, that the inability to comply with the Sunshine Ordinance's noticing requirements resulted from a hardware or software failure.

The following is a description and discussion of each of the City Clerk's proposed amendments.

A. Hardware Or Software Failure

The City Clerk proposes the following amendment to the current definition of "hardware or software failure":

SECTION 2.20.030 Definitions.

Words or phrases in this ordinance shall be defined pursuant to the Ralph M. Brown Act, Government Code section 54950 et. seq. and the Public Records Act, Government section 6250 et. seq., unless otherwise specified as follows:

(I) "Software or Hardware Impairment" means the City is unable to utilize computer software, hardware and/or network services to produce agendas, agenda-related material or to post agendas on-line due to inoperability of hardware or software caused by the introduction of a malicious program (including but not limited to a computer virus), electrical outage affecting the City's computer network, or unanticipated system or equipment failure. "Software or Hardware Impairment" may also include situations when the City is unable to access the internet due to required or necessary maintenance or the installation of system upgrades that necessitate de-activating the system network; however, the City shall make reasonable efforts to avoid a delay in the preparation, distribution or posting of agendas and agenda-related materials as a result of required or necessary maintenance or installation of system upgrades.

Deleted: Failure" means solely technological failures of software or hardware that are unforeseeable. This term includes failures such as those caused by natural disasters or acts of God, and technical failures against which the City has taken customary precautions.

Under current law, a hardware or software "failure" must be either an "unforeseeable" technological mishap (as opposed to human error), or caused by a technical failure "against which the City has taken customary precautions." The City Clerk contends that this definition is too narrow to adequately describe the situations that can materially affect the City's computer network and the ability of the City to produce written and electronic versions of an agenda and agenda-related materials.

For example, Commission staff is advised by the City's Office of Information Technology that there have been occasions when a computer virus has required a temporary shut-down of the City's computer network. There are also times in which it is necessary to temporarily de-activate the system to install new or additional programs, or to perform required maintenance. There is also the possibility that the system can be affected by deliberate human activities, such as "hacking" or sabotage.

It appears that the current definition may not apply to these situations because they arguably do not constitute "technological" and/or "unforeseeable" failures, nor do they always present an opportunity for the City to take any kind of precaution.

B. Excuse Of The On-Line Posting Requirement

Under current law, the City Council, Redevelopment Agency, Port Commission and the Public Ethics Commission are required to post a copy of any regular or special meeting agenda on-line. The failure to meet this requirement will not constitute a defect in providing proper public notice for a meeting if the failure to do so results from a "software or hardware failure" (as currently defined) and these entities comply with all other posting and noticing requirements. [See existing Sections 2.20.070(B) and 2.20.080(D)].

In her second proposed amendment, the City Clerk simply seeks to conform existing law with the newly proposed definition of "hardware and software impairment." The text of the proposal is as follows:

SECTION 2.20.080 Notice and Agenda Requirements: Regular Meetings.

(A) Ten Day Advance Notice Requirement For Regular Meetings Of The City Council, Redevelopment Agency, Board of Port Commissioners, Public Ethics Commission, And Their Standing Committees. The City Council, Redevelopment Agency, Board of Port Commissioners, Public Ethics Commission, and any of their standing committees shall provide notice before any regular meeting by:

(1) posting a copy of the agenda in a location freely accessible to the public 24 hours a day no later than ten (10) days before the date of the meeting;

(2) filing a copy of the agenda and all agenda-related material with the Office of the City Clerk and the Oakland main library no later than ten (10) days before the date of the meeting; and,

(3) posting a copy of the agenda on-line at the local body's website no later than ten (10) days before the date of the meeting.

Notwithstanding Section 2.20.080(D), the failure to timely post a copy of the agenda online because of software or hardware impairment, as defined in Section 2.20.030(I), shall not constitute a defect in the notice for a regular

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meeting, if the local body complies with all other posting and noticing requirements.

An identical and corresponding amendment is proposed for special meetings contained in Section 2.20.070(B).

C. Excuse of Other Sunshine Requirements

The Oakland City Council, Redevelopment Agency, Port Board and Public Ethics Commission must comply with both the Ralph M. Brown Act and the Oakland Sunshine Ordinance in order to properly notice regular and special meetings. No California city may excuse, weaken or ignore the Brown Act's minimum requirements for providing notice for public meetings.

The Sunshine Ordinance imposes additional requirements on City bodies for noticing public meetings. For the City Council, Redevelopment Agency, Port Board and Public Ethics Commission, these additional requirements include 1) posting a copy of the agenda in a public location ten days before a regular meeting, 2) filing a copy of the agenda and all agenda-related materials with the City Clerk and the Oakland main library ten days before a regular meeting, and 3) posting a copy of the agenda on-line ten days before a regular meeting. [See existing Section 2.20.080(A)].

The Sunshine Ordinance currently provides a way for a local body to take action on an item appearing on an agenda even if the additional requirements of the Sunshine Ordinance have not been met. For example, if for some reason the City was unable to file a copy of the agenda with the Oakland main library until nine days before a meeting instead of the required ten days, the local body can currently excuse this local requirement under a very narrow set of circumstances.

In order to excuse the failure of a local body to meet local notice requirements, the local body must determine that 1) the minimum requirements of the Brown Act have been met and 2) adopt a motion by a two-thirds vote that it was not "reasonably possible" to comply with the Sunshine Ordinance's additional requirements AND any one of three conditions exist:

a) there is a need to take immediate action on an item in order to avoid a "substantial adverse impact" that would occur if the action were deferred to a subsequent special or regular meeting;

b) there is a need to take immediate action which relates to federal or state legislation or the local bodies' eligibility for any grant or gift; or

c) the item relates to a purely ceremonial or commendatory action.

The City Clerk proposes to add a fourth condition on which a local body may base a decision to excuse the Sunshine Ordinance's additional notice requirements

-- that of a "hardware or software impairment" as discussed above. The full text of the City Clerk's proposal is as follows:

SECTION 2.20.080 Notice and Agenda Requirements: Regular Meetings

(D) Excuse Of Sunshine Notice Requirements. If an item appears on an agenda but the local body fails to meet any of the additional notice requirements under this section, the local body may take action only if:

(1) The minimum notice requirements of the Brown Act have been met; and,

(2) The local body, by a two-thirds vote of those members present, adopts a motion determining that, upon consideration of the facts and circumstances, it was not reasonably possible to meet the additional notice requirements under this section and any one of the following exists:

(a) the need to take immediate action on the item is required to avoid a substantial adverse impact that would occur if the action were deferred to a subsequent special or regular meeting;

(b) there is a need to take immediate action which relates to federal or state legislation or the local body's eligibility for any grant or gift;

(c) the item relates to a purely ceremonial or commendatory action; or,

(d) the City experienced a software or hardware impairment as defined by Section 2.20.030(I).

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Under current law, the City Council, Redevelopment Agency, Port Board or the Public Ethics Commission is not even able to consider whether a software or hardware problem made it impossible to comply with the Sunshine Ordinance's additional notice requirements. The City Clerk's proposal would add an additional factor for these bodies to consider. Unlike the existing excuse for on-line posting contained in Section 2.20.080(A)(3) and Section 2.20.070(B), this proposed basis for excuse would not operate automatically. A local body would still be required to determine, by a two-thirds vote, that it was not "reasonably possible" to meet the additional Sunshine requirements and that the event met the proposed definition of a software or hardware impairment. The Commission will recall that included in the proposed definition of a "software or hardware impairment" is a requirement that the City must make a reasonable effort, in spite of the failure, to avoid a delay in the preparation, distribution or posting of agendas and agenda-related material.

III. DISCUSSION

The Office of the City Attorney has advised Commission staff that it has taken a policy position on the City Clerk's proposal. The City Attorney's Office has no objection to the proposed definition of what constitutes a "software or hardware impairment." It also has no objection to the second proposal to make the automatic excuse for the failure to post on-line refer to the new definition of software or hardware impairment. The Office of the City Attorney does object to the third proposal to permit a local body to consider whether a software or hardware failure is an acceptable basis on which to

excuse the failure to meet additional notice requirements. The City Attorney's Office contends that this proposal is contrary to the letter and spirit of the existing ordinance and would "deny the public and the City Council the essential 10-day notice of major City decisions."

Commission staff believes the proposals offer a practical description and approach to the City's increasing dependence on complex computer networks to produce timely written and electronic material. While Commission staff acknowledges the concerns raised by the City Attorney's Office, Commission staff believes that sufficient safeguards are in place to ensure that a local body will only be able to invoke the excuse provision where a significant computer failure occurs and reasonable steps have been taken to avoid delays in the production of agenda material.

Respectfully submitted,

Daniel D. Purnell
Executive Director