

actually convened. **Attachment 5.** He said that he saw and obtained speaker cards at a table just outside City Hall chambers. He picked up a card for the City Council meeting but did not turn it in. He did fill out and submit a speaker card for the School Board meeting.

After the newly elected City officials took their oaths of office, City Council President Ignacio De La Fuente called the special meeting to order. He first took brief comments from the newly sworn officials and then took up agenda item 2 (adopt a resolution for the election of City Council president); item 3 (adopt a resolution for the election of vice mayor); item 4 (adopt a resolution appointing the president pro tempore of the City Council) and item 5 (an action to confirm various appointments to City Council committees).

At the conclusion of item 5, the City Clerk advised that there was a speaker, Sanjiv Handa, who signed up to speak on items 2, 3, 4 and 5. Mr. De La Fuente recognized Mr. Handa to speak for five minutes on those items.

After the City Council adjourned its meeting, the Oakland School Board immediately called its meeting to order. After taking comments from several members of the School Board, the School Board president recognized Mr. Mordecai, Mr. Handa and Oscar Wright to address the Board. Mr. Mordecai and Mr. Handa were permitted to speak for approximately two minutes. Mr. Wright requested and was granted several extra minutes to conclude his remarks. Mr. Mordecai told the joint assembly that the City Council violated the Brown Act for failing to permit public comment before or during action on agenda items. He also stated that the agendas for the School Board and City Council meetings violated the Brown Act for failing to provide an opportunity for public comment. He also objected to what he characterized as standard School Board practice of allowing the public only a short period of time at the beginning of its meetings to address all the items on a School Board agenda.

III. ANALYSIS

A. Applicable Law

There are two common types of public meetings. A "regular meeting" is one whose time and place is provided for by ordinance, resolution or by-laws. If a public body calls a meeting at a time or place other than the time or place specified for regular meetings, it is a "special meeting." The Brown Act and Oakland Sunshine Ordinance provide different requirements for the way regular and special meetings are publicly noticed and conducted.

The Brown Act requires the agenda for regular meetings of a legislative body to provide an "opportunity for members of the public to directly address the legislative body on any item of interest to the public, before or during the legislative body's consideration of the item, that is within the subject matter jurisdiction of the legislative body. . ." [Gov't Code §54954.3(a)] Special meetings are only required to

provide the public with an opportunity to "directly address the legislative body concerning any item that has been described in the notice for the meeting before or during consideration of the item." [Id.]

Thus, under the Brown Act, there is no requirement for a special meeting to provide members of the public with anything more than an opportunity to address those items that have been placed on the agenda. There is no requirement under the Brown Act for a special meeting to provide an opportunity for the public to speak on general matters of interest.

The Oakland Sunshine Ordinance, in its effort to supplement the Brown Act and encourage greater public participation, requires that "[e]very agenda for every regular or special meeting shall provide an opportunity for members of the public to directly address a local body on items of interest to the public that are within the local body's subject matter jurisdiction. . ." [O.M.C. §2.20.150(A); (emphasis added)] This requirement is typically met by placing an item commonly called "open forum" somewhere on the meeting agenda. The Sunshine Ordinance also requires every agenda for a regular or special meeting to provide an opportunity for members of the public to address the local body concerning an agenda item before the local body takes action on the item. [O.M.C. §2.20.150(B)]

Finally, in the event the Commission determines, after a formal hearing, that a local body has violated the Sunshine Ordinance, the local body is required to re-agendize the item in dispute and determine whether to cure and correct the violation. If the local body chooses to cure and correct the item, it would then decide whether to affirm or supersede its previous action after taking any new public testimony on the item. [O.M.C. §2.20.270(D)]

B. City Council Special Meeting (Complaint No. 05-01)

1. Opportunity To Address Items Of Interest To The Public

It is clear from its face that the agenda for the City Council special meeting of December 3, 2005, did not contain an opportunity for members of the public to address the City Council on items of interest to the public. While providing such an opportunity is not required under the Brown Act, it is a requirement of the Sunshine Ordinance. The City Council typically includes an "open forum" item on all its special meeting agenda.

According to Chief Assistant City Attorney Barbara Parker, it was simply an oversight that an "open forum" item was not provided on the December 3, 2005, City Council agenda. She noted that the City Council did recognize at least one public speaker (Sanjiv Handa) to address the City Council prior to adjournment whose comments were not limited to the agenda items. She also noted that it is standard practice for the City Council to include an "open forum" item on its special meeting agenda. Thus while there was nothing on the agenda indicating that members of the

public would be able to address the City Council under "open forum," the City Council did provide the opportunity for those who chose to fill out a speaker card to address the City Council on matters of general interest.

Mr. Mordecai stated during the School Board meeting that he picked-up a speaker card for the City Council meeting but did not submit it. He told Commission staff that he did not initially intend to address the City Council at all that day. He said he made his allegations against the City Council during his comments to the School Board because of the manner in which the City Council conducted its meeting.

There is no question from the face of the agenda that it did not provide an item permitting public comment on items of interest within the City Council's jurisdiction. This appears to raise an issue whether the City Council violated Sunshine Ordinance §2.20.150(A) by failing to agendize an "open forum" item on the agenda.

A review of the meeting videotape also confirms Ms. Parker's assertion that the City Council did provide a period of open public comment towards the end of the meeting at which Mr. Mordecai could have spoken had he submitted a speaker card. However there was nothing on the agenda, nor were there any comments from the presiding officer or clerk, indicating that anyone who wanted to generally address the City Council would have an opportunity to do so at some point in the meeting. Without this information, people could not be expected to make an informed decision whether to submit a speaker card for this purpose.

2. Opportunity To Address Items Before Action Taken

Based on a review of the videotape of the January 3, 2005, meeting, it is also clear that the call for public speakers came after action was taken on agendized items Nos. 2, 3, 4 and 5. This appears to raise an issue whether the City Council violated Sunshine Ordinance Section 2.20.150(B), which requires that local bodies provide an opportunity for public comment before action is taken on an item. In this case, public comment was received after the City Council acted on its agendized items.

Mr. Mordecai told Commission staff that he had no intention of addressing the City Council on any agenda item that day. He also did not submit a speaker card even though it appears that he obtained one. These facts raise a question of whether Mr. Mordecai was harmed or prejudiced by the alleged failure of the City Council to permit other speakers to comment until after action was taken on the agendized items. (It is significant to note that the one speaker who did submit speaker cards on the agendized items did not object to having his comments received until after action was taken.) While these facts do not negate the issue raised under Section 2.20.150(B), Commission staff believes that the absence of any apparent harm or prejudice to Mr. Mordecai should be a significant if not decisive factor in the Commission's decision whether to pursue a formal hearing on this allegation.

B. Oakland School Board Meeting (Complaint No. 04-09)

The bylaws of the Oakland School Board provide that its regular meetings shall be held "two Wednesdays of each month at 5:30 p.m., pursuant to a schedule determined during the annual organizational meeting." The designated location for regular School Board meetings is the Board Room at 1025 Second Avenue in Oakland. On the School Board's current website, it lists regular School Board meetings as occurring on the second and last Wednesday of every month. Thus it would appear that the School Board's Monday, January 3, 2005, annual organizational meeting would qualify as a special meeting, subject to the applicable provisions of the Brown Act and possibly the Sunshine Ordinance, discussed above.

1. Opportunity To Address Items Of Interest To The Public

Mr. Mordecai alleges that the agenda for the January 3, 2005, School Board meeting was improper because it failed to contain an "open forum"-type item. As discussed above, this is not a requirement of the Brown Act but is a requirement of the Sunshine Ordinance. On its face, there appears to be an issue whether the School Board violated Sunshine Ordinance Section 2.20.150(A) by failing to agendaize an open forum-type item on its special meeting agenda.

While the Oakland School Board declined to comment on this complaint, an argument similar to the City Council's can be raised on its behalf here: Even though the School Board's agenda did not provide an express item for general public comment, such an opportunity was provided to the public at the start of the meeting. However, unlike the situation involving the City Council, Mr. Mordecai actually submitted a speaker card and addressed the School Board on an item of general interest (as opposed to the items listed on the agenda). Thus the question of whether Mr. Mordecai was actually harmed or prejudiced by the absence of an "open forum" item on the agenda presents itself again, arguably even stronger here than in his allegations against the City Council. As stated above, Commission staff believes that the absence of any apparent harm or prejudice to Mr. Mordecai should be a significant if not decisive factor in the Commission's decision whether to pursue a formal hearing on this allegation.

C. Public Ethics Commission Jurisdiction Over The Oakland School Board

In the event the Commission decides to pursue a hearing on issues relating to the Oakland School Board raised in this complaint, Commission staff raises a question whether the Commission has jurisdiction over the School Board for purposes of enforcing open meeting laws. The Commission will recall that Commission staff raised this issue in the Drake complaint (PEC Complaint No. 04-01), which also dealt with alleged violations of the Sunshine Ordinance by the Oakland School Board. That complaint was ultimately withdrawn by the complainant and dismissed by the Commission at its regular meeting of February 7, 2005.

Oakland Municipal Code Section 2.24.020 authorizes the Public Ethics Commission to "oversee compliance with any ordinance intended to supplement the Brown Act or Public Records Act." The City of Oakland "supplemented" the Brown Act and Public Records Act with the adoption of the Oakland Sunshine Ordinance in 1997.

The public meeting provisions of the Sunshine Ordinance apply to "local bodies." A "local body" is defined in relevant part as "any board, commission, task force or committee which is established by City Charter, ordinance, or by motion or resolution of the City Council, the Oakland Redevelopment Agency or the Board of Port Commissioners." [O.M.C. §2.20.030(E)]

Section 404 of the Oakland City Charter establishes the Oakland Board of Education (School Board). On its face, it appears that the School Board meets the definition of a "local body" under the Sunshine Ordinance since it is "established by City Charter."

On the other hand, City Charter Section 404(a) states that "[t]he provisions of the Education Code of the State of California shall apply as to matters not provided for in this Charter." Nothing in the City Charter speaks to the conduct of public meetings by the School Board. In the absence of express language on this subject, it appears that the City Charter requires the state Education Code to govern the conduct of School Board meetings.

Education Code Section 35145 provides that meetings of "any" school board shall be conducted in accordance with the Ralph M. Brown Act, the state's open meeting law. Thus a question is raised whether the City Charter prevents the Sunshine Ordinance from applying to the School Board by deferring to the state Education Code all regulation of School Board meetings.

IV. STAFF RECOMMENDATION

A. Complaint No. 05-01 (City Council Meeting)

1. Failure To Provide An "Open Forum" Item On The Agenda

Commission staff believes there is a legal and factual issue whether the City Council violated Sunshine Ordinance Section 2.20.150(A) by omitting an "open forum" item on its December 3, 2005, special meeting agenda. The Commission has discretion whether to schedule a formal hearing on this matter. Given the existence of some mitigating circumstances (i.e., this was an uncharacteristic oversight; Mr. Mordecai did not intend to speak under "open forum" anyway; at least one other speaker was permitted to address the City Council), the Commission may wish, as an alternative to a formal hearing, to direct a letter to the City Council expressing its concern and/or objection to the omission of the open forum item.

2. Failure To Take Public Comment Before Action Is Taken

Commission staff believes there is a legal and factual issue whether the City Council violated Sunshine Ordinance Section 2.20.150(B) by receiving public comment after it had taken action on agenda items 2, 3, 4 and 5. While the Commission has discretion whether to schedule a formal hearing on this matter, Commission staff does not recommend that the Commission do so in the absence of information showing harm or prejudice to Mr. Mordecai. The Commission may wish, as an alternative to a formal hearing, to direct a letter to the City Council expressing its concern and/or objection to receiving public comment after taking action on agenda items 2, 3, 4 and 5.

B. Complaint No. 04-09 (School Board Meeting)

Commission staff believes there is a legal and factual issue whether the Oakland School Board violated Sunshine Ordinance Section 2.20.150(A) by omitting an "open forum" item on its December 3, 2005, special meeting agenda. While the Commission has discretion whether to schedule a formal hearing on this matter, Commission staff does not recommend that the Commission do so in the absence of information showing harm or prejudice to Mr. Mordecai. The Commission may wish, as an alternative to a formal hearing, to direct a letter to the School Board expressing its concern and/or objection to the omission of the open forum item.

If the Commission decides to pursue a formal hearing on Complaint No. 04-09 on any allegation involving the School Board, then Commission staff recommends that the Commission first determine, based on advice from the Office of the City Attorney, whether the Commission has jurisdiction over the School Board under the Sunshine Ordinance.

Finally, as to any allegation the Commission may wish to set for formal hearing, Commission staff recommends that the Commission direct staff to attempt to reach a settlement among the parties before a hearing date is scheduled.

Respectfully submitted,

Daniel D. Purnell
Executive Director

*** City Attorney approval as to form and legality elates specifically to the legal issues raised in the staff report. The City Attorney's approval is not an endorsement of any policy issues expressed or of the conclusions reached by staff on the merits of the underlying complaint.*