

CITY OF OAKLAND
Public Ethics Commission

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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
FROM: Daniel Purnell
DATE: July 12, 2004

RE: A Staff Report And Action To Be Taken Regarding A Proposal From Oakland City Attorney John Russo To Amend The Oakland Sunshine Ordinance To Require That City Executive Officers Provide Agenda-Related Material To The City Clerk

I. INTRODUCTION

At its regular meeting of May 3, 2004, the Commission referred to the Sunshine Committee a proposal from City Attorney John Russo to amend the Oakland Sunshine Ordinance. **Attachment 1.**

Mr. Russo proposes to amend Section 2.20.080 of the Sunshine Ordinance to require the City's executive officers to submit all agenda-related material to the City Clerk in time to meet the filing deadlines for regular and special meetings. This memorandum analyses the proposal and suggests additional language which the Committee may wish to consider before recommending any changes to the City Council.

II. BACKGROUND

Mr. Russo's proposal arises from a March 18, 2004, Commission hearing on Complaint No. 03-15 (Grinage). Among other things, the Commission was asked to determine whether Oakland Mayor Jerry Brown violated the Sunshine Ordinance's 10-day agenda filing requirement by submitting to a City Council standing committee a document containing his recommendations for action on an agenda item during the meeting at which the item was being considered. The Commission reasoned and concluded that because the Mayor was not a "local body" as defined

under the Sunshine Ordinance, the ten-day advance filing requirements for agenda related materials did not apply to him or his office.

Section 2.20.080 sets forth the basic notice and agenda requirements for regular meetings of Oakland's "local bodies." A "local body" is generally defined as the City Council, Redevelopment Agency, Port Board, City advisory boards and commissions, certain advisory bodies created and appointed by the Mayor, and any standing committee of the foregoing entities. [Section 2.20.030(E)].

With few exceptions, all local bodies are required to file a copy of the agenda and all "agenda related material" with the City Clerk before their meetings. The City Council, Port Board, Public Ethics Commission and their standing committees must file a copy of the agenda and agenda related materials with the City Clerk at least 48 hours before a special meeting and ten days before a regular meeting. [Sections 2.20.070(A); 2.20.080(A)].

The Sunshine Ordinance defines agenda related material as "the agenda, all reports, correspondence and any other document prepared and forwarded by staff to any local body, and other documents forwarded to the local body, which provide background information or recommendations concerning the subject matter of any agenda item." [Section 2.20.030(B)].

III. ANALYSIS

Mr. Russo proposes to amend the Sunshine Ordinance by adding the following language to Section 2.20.0080:

H. The Mayor, City Administrator, City Attorney, and City Auditor in their capacities with the City and Redevelopment Agency shall submit public agenda related materials to the City Clerk in sufficient time to meet the deadlines of this section and 2.20.070.

The proposed language would expand the responsibility for filing agenda related material to Oakland's officers. The proposal is consistent with current City practice because it is the City's officers and staff who actually draft and submit agenda related materials for filing and distribution.

A. Additional Exemptions For Certain Categories Of Agenda Related Material

Since Mr. Russo made his proposal, Mayor Brown and City Auditor Roland Smith have raised questions about the scope of the proposal. **Attachment 2.** In summary, they argue the proposed amendment would:

- 1) require copies of speeches to be filed ten days in advance of the regular meeting at which a speech is given;
- 2) prohibit members of a local body from making and submitting written amendments to staff proposals or recommendations during a public meeting;

3) prohibit members of a local body from considering written recommendations or amendments from members of the public unless they have been filed in advance with the City Clerk;

4) preclude the City Auditor from submitting important analyses to decision makers based on information that occasionally arises after filing deadlines have passed; and,

5) should not apply to survey information and audit reports that are not tied to any particular "action" items.

Commission staff notes that the Sunshine Ordinance already provides several levels of accommodation for material that could not otherwise be included in the ten-day agenda package. The City Council, Redevelopment Agency, Board of Port Commissioners, the Public Ethics Commission and their standing committees may "supplement" their ten-day agenda under a number of circumstances and conditions. Such supplemental filings may be submitted up to 72-hours before a regular meeting. [Section 2.20.080(B)].

In addition to permissive supplemental filings, the ten-day filing requirement may be excused if two-thirds of the members of a local body find that the minimum requirements of the Brown Act have been met and that one of the following three conditions exist: 1) it was not reasonably possible to meet Sunshine requirements and there is a need to take immediate action to avoid a substantial adverse impact if the item were deferred to a subsequent meeting; 2) there is a need to take immediate action relating to federal or state legislation or the City's eligibility for a grant or gift, or 3) the item is purely ceremonial or commendatory.

Commission staff believes that some of the above concerns are already addressed by existing provisions for supplementing and excusing Sunshine requirements. There are, however, certain categories of written material that, for practical and policy reasons, should arguably be exempt from advance filing requirements. One category would be for the accompanying text of speeches and so-called "visual aides" for oral presentations. Examples of this category would be the text of the Mayor's State of the City Address, or Power Point images from an oral presentation. A second category would be for written amendments or recommendations from members of a local body regarding agenda items. Examples of this category would include amendments to a proposed ordinance or resolution that members of a local body develop at or before a meeting.

The Commission may wish to consider the following proposed amendment to the definition of "agenda related material" in existing Section 2.20.030(B) to address the above concerns:

"Agenda Related Materials" shall mean the agenda, all reports, correspondence and any other document prepared and forwarded by staff to any local body, and other documents forwarded to the local body, which provide background information or recommendations concerning the subject matter of any agenda item. Notwithstanding the foregoing, agenda related materials shall not include: 1)

the written text or visual aids for any oral presentation which are not substituted for, or submitted in lieu of, a written report that would otherwise be required to meet the filing requirements of this Ordinance, and 2) written amendments or recommendations from a member of a local body pertaining to an item contained in agenda-related material previously filed pursuant to Section 2.20.070 or 2.20.080."

The above proposed amendment is intended to permit such documents as speech texts and Power Point presentations to be exempt from advance filing requirements. Such documents typically supplement otherwise permissible oral presentations and are usually not available in final form until just before the presentation. The language intends to avoid a potential loophole for using this exemption as a way to avoid advance filing requirements for staff reports that should otherwise be filed and distributed in advance of a meeting. The above proposed amendment also attempts to recognize and preserve the ability of members of local bodies to develop and distribute written proposals or recommendations at a public meeting.

B. Remedy For Violation Of Proposed Section 2.20.080(H)

Mr. Russo's proposal provides no remedy or consequence in the event a City officer fails to meet the filing deadlines.

Existing Section 2.20.270(D)(2) establishes the remedy when a local body has violated material provisions of the Sunshine Ordinance:

"In the event the Public Ethics Commission, upon the conclusion of a formal hearing conducted pursuant to its General Complaint Procedures, determines that a **local body** violated any material provision of this ordinance, the **local body** shall agendize for immediate determination whether to correct and cure the violation. Any violation shall have no effect on those actions described in Government Code Section 54960.1(d)(1) - (4), inclusive. (Emphasis added.)

The Committee may wish to consider the following language amending above section 2.20.270(D)(2) to require a local body to decide whether to correct and cure a violation if a City officer fails to timely submit agenda related material:

"In the event the Public Ethics Commission, upon the conclusion of a formal hearing conducted pursuant to its General Complaint Procedures, determines that a local body violated any material provision of this ordinance or took action upon an item for which the agenda-related material was not timely filed pursuant to Section 2.20.080(H), the local body shall agendize for immediate determination whether to correct and cure the violation. Any violation shall have no effect on those actions described in Government Code Section 54960.1(d)(1) - (4), inclusive.

The above amendment would require local bodies to determine whether to cure and correct actions affected not only by their violations of the Sunshine Ordinance, but also for actions affected by the failure of City officers to meet appropriate filing deadlines.

IV. STAFF RECOMMENDATION

Commission staff recommends that the Commission take public comment on the above proposals before considering whether to refer this proposal to the Oakland City Council for adoption.

Respectfully submitted,

Daniel D. Purnell
Executive Director