



City of Alameda

Staff Report

File Number:2014-958

Open Government Commission

Agenda Date: 10/6/2014

File Type: Regular Agenda Item

Agenda Number: 3-B

Consider potential revisions to the City's Sunshine Ordinance.

To: Chair and Members of the Open Government Commission

From: Janet Kern, City Attorney
Michael Roush, Interim Assistant City Attorney

Re: Consider potential revisions to the City's Sunshine Ordinance

BACKGROUND

As required by the Sunshine Ordinance itself, recently the City Attorney's Office conducted two training sessions on the Ordinance. Both sessions were taped and the City Clerk's Office has retained the earlier one for those employees and public officials who were unable to attend the training or for those employees or officials who are hired/appointed/elected after May 2014. Having spent considerable time reviewing the Ordinance in preparation for the training, our Office sees some room for clarification and improvement and, accordingly, have prepared this staff report for the Commission's consideration. If the Commission agrees with some or all of these items, the Commission could recommend these (or other) amendments to the City Council for its consideration.

DISCUSSION

1. 2-90.2 (f). As part of the "Findings", this subsection provides that it is not in the public's interest to have private communications occur between decision makers and a limited number of individuals and therefore at public meetings, cell phones and other means of electronic communications including email, text and instant messaging shall be turned off during public meetings.

There are two issues with this. First, this provision is in the "Findings" section of the Ordinance and hence easy to overlook. We believe it should be in a "substantive" section of the Ordinance, rather than in the Findings. Second, because the City is trying to go paperless, most elected and appointed officials use City issued or their personal I-pads to access agenda materials. I-pads, of course, can be used to send email, text, instant messaging and the like. It seems that the Ordinance ought to be amended not only to move it to a different section but

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also to attempt to address this apparent conundrum. If the Commission agrees, we would be glad to propose language to accomplish this purpose.

2. 2-91.1 (Definitions). Subsections b.4 (d)(1) (concerning “passive meeting bodies”) and (e)(4) (concerning “policy bodies”) are somewhat ambiguous as to when a committee is a passive meeting body and when it is a policy body. We would suggest (d)(1) be revised to read, “Any advisory committee or body created by the initiative of a single member of a policy body, including the Mayor, or by a department head.” ; (e)(4) would read, “Any advisory committee or body created by the initiative of a policy body as a whole.”
3. 2-91.2 (Passive Meetings). In this section the word “gatherings” is used throughout. Would not the word “meetings” (as defined in 2-91.1 b.) be a better choice? In a. 3., should not “spectators” be “members of the public”? In light of the definition of “meeting” in section 2-91.1 b.4., section 2-91.2 a. 4 seems unnecessary/redundant. Assuming the reference in 2-91.2 a. 5 to “subdivision 4” refers to 2-91.2. a. 4., why include it as it is difficult to imagine a scenario where a passive meeting body could legitimately meet in closed session.
4. 2-91.4 (Conduct of business; time and place for meetings). 2-91.4 a., e., and f. reference “advisory bodies” but that term is not defined.
5. 2-91.6 (Public Notice Requirements). 2-91.6 c provides, in part, that persons who are unable to attend the public meeting or hearing may submit written comments and those comments will be brought to the attention of those conducting the meeting. Recently, an issue has arisen whether a member of a policy board who is unable to attend a meeting may nevertheless submit written comments about matters that the board will consider at that meeting. Our sense is that should not be permitted but there is no ordinance or policy in place to prohibit that. We analogize the situation to a board member who has a disqualifying financial conflict of interest. In that case, the person must not only remove him/herself from the dais when the items is under discussion but also must not attempt in any way to influence the other decision makers, e.g., by addressing the board at the meeting (unless the member’s own business or property is affected. Moreover, since a board member should make a decision only after considering all of the public’s comments, for the board member to express his/her views in written comments to the board before considering all of the public’s comments could call into question the fairness of the process. The Commission may, therefore, want to consider revising this section and/or section 2-91.17 (Public Comments by Members of Policy Bodies) to address this issue.
6. 2-91.14 (Video and Audio Recording, Filming and Still Photography). There seems to be some confusion from the text how long audio and video recordings must be retained. 2-91.14 b states that every board and commission enumerated in the Charter shall audio record every meeting and each such audio recording, and any other audio or video recording of a meeting

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of any other policy body made at the direction of the policy body shall not erased or destroyed. 2-91.14 c, however, provides that every City policy body, agency or department shall audio or video record every meeting held in a City Hall hearing room that is equipped with audio or video recording facilities and that each such audio or video recording shall not be erased or destroyed. The next sentence, however, states the City will make such video or audio recordings available via livestreaming, as well as archived in digital form for a period of at least 10 years after the date of the meeting. We believe the Commission should clarify the intent.

7. 2-91.15 (Public Testimony). One of the sentences in 2-91.15a is not clear and perhaps unintentionally contrary to the Brown Act: "However, in the situation of the City Council, the agenda does not have to provide an opportunity for members of the public to address the Council on any item that has been considered by a subcommittee compromised only of Councilmembers at a public meeting, unless the item has been substantially changed since the subcommittee heard the item." The Brown Act, at Government Code, section 54954.3, tracks, in part, the sentence in question (but with better punctuation) but adds an important caveat: the exception applies only when all interested members of the public were afforded the opportunity to address the committee on the item. Perhaps that exception is implied in the "However" sentence but our sense is that it ought to be express.
8. 2-91.17 (Public Comment by Members of Policy Bodies). See our comments under 5 above.
9. 2-92 Public Information. As a general observation, there appears to be some inconsistency in terms of the timing of responses to requests for public information. For example, 2-92.2 c provides that every custodian of records shall within 10 days following receipt of a request for public records comply with the request. But 2-92.d refers to a request from a member of the public to "any paid or elected agent" of the City who is to respond to the request within three business days by providing the information or explaining how, when and by whom the information will be provided, and who shall then have the responsibility of responding within 10 days of receipt of the referral. It is unclear what is meant by "any paid or elected agent" of the City and to what does the "within 10 days of receipt of the referral" apply.
10. Sections 2-92.2 (e), 2-92.4 (b) and 2-92.5 (a) and (c) all refer to "Legislative Body" of "Legislative Bodies"; neither term is defined or used elsewhere in the Ordinance.
11. Section 2-92.3 (Responsibilities of the Mayor). This section seems out of place in the Public Information section. It seems that it ought to be in the Public Access section and/or the Open Government section concerning complaints.
12. Section 2-92.4 (Notices and Posting of Information). 2-92.4 a addresses certain items that are to be posted on the City's website for a period of at least four years. But should not the majority of those items, e.g., the Charter, the Municipal Code, the General Plan, etc., always be posted on the website? It is unclear on the four year limitation.

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13. Section 2-92.6 (Opinions on Matters of Public Concern). We don't understand the reference in this section to "while not on duty". While that may have some application to employees (but not always, for example, members of bargaining groups may express matters of public concern while "on duty") but the application is more difficult as to board, commission or committee members.
14. Section 2-92.7 (Public Review File-Policy Body Communications). This section refers to "Every commission, board or other official body of the City...". Seems like it should simply refer to "Policy bodies".
15. Section 2-92.13 (Fees for Copying). Section 2-92.13 e seems out of place (it provides where EIR's will be posted). Perhaps it should be combined with 2-92.13 f. that addresses a project applicant's providing a certain number of EIR's for the public.
16. Section 2-92.15 (Requests made by Email). The substance of this section (acknowledging record requests by email with an email response) would seem to fit better in Section 2-92.2.
17. Section 2-93.5 (Department Head Declarations). Given that typically there will not be many substantive changes to the Ordinance and given that employees and officials are admonished to read the Sunshine Ordinance annually, it seems an annual training session is probably overkill. We would suggest every three years with the caveat that new employees and officials be required to review the tape of the training within six months of their employment/election/appointment. The title should also be revised, such as "Declaration by and Training Requirement for Form 700 Filers".

CONCLUSION

These suggested changes in no way denigrates the hard work the Commission did in crafting the Ordinance as many of these changes are simply clarifications. If the Commission agrees with any or all these, we can prepare draft amendments to the Ordinance and return those amendments to the Commission for further consideration.

Respectfully submitted
Janet Kern, City Attorney
Michael Roush, Interim Assistant City Attorney

Attachment: Sunshine Ordinance