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SUNSHINE ORDINANCE TASK FORCE

AGENDA PACKET CONTENTS LIST*

- [x] **Presentation by Allen Grossman**
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Completed by: **Chris Rustom** **Date:** **Jan. 21, 2011**

***This list reflects the explanatory documents provided**

~ Late Agenda Items (documents received too late for distribution to the Task Force Members)

** The document this form replaces exceeds 25 pages and will therefore not be copied for the packet. The original document is in the file kept by the Administrator, and may be viewed in its entirety by the Task Force, or any member of the public upon request at City Hall, Room 244.

INTRODUCTION: SOTF MEETING QUORUM AND VOTING RULES

The public's rights of access to this City's public records and meetings were enhanced significantly with the its voters' adoption of the its Sunshine Ordinance over 10 years ago.

The single most important part of that law was the establishment of a unique body, the SOTF, as the quasi-judicial forum to resolve disputes between the public and the City officials, departments and agencies regarding open government matters, particularly access to public records. The SOTF affords the public a level playing field with expedited relief when these disputes arise; no need to file and pursue a lawsuit, necessary under state law without the SOTF.

Over the past few years the SOTF's ability to remedy violations and maintain that "level playing field" has been seriously compromised as a result of the City Attorney's advice regarding both minimum quorum and voting requirements.

When only six SOTF members attend a meeting - which has happened recently - the complainant will be denied access to records or the proper conduct of a meeting even if a five-member majority - 83% - vote "yes"; whereas, the respondent City department, official or agency will absolved by a single "yes" vote - 16.67%. Now, with only nine seats filled, the complainant will need no less a two-thirds majority.

Such a voting "rule" is manifestly unfair, untenable and cannot be justified under any appropriate standard. It is certainly contrary to the purposes of the constitutional and state law protections afforded the public for gaining access to public meetings and records.

The following Memorandum addresses in detail the three legal issues on which the City Attorney's advice was given and why, in my opinion, that advice, in each instance, was improper. In addition, it will show that, if the SOTF chooses to reject that advice on any of the three issues, the SOTF can adopt its own quorum and voting rules. This would put the complainant and the respondent on an equal footing on all disputes heard by the SOTF.

However, even if the City Attorney's advice on all three is correct, there is a partial but important solution involving disputes over disclosure of public records, which constitute most of the disputes heard by the SOTF. The proposal I made last month and repeat here effectively eliminates the egregious consequences of the existing voting procedure with respect to public records requests.

In short, the current SOTF voting procedure whether a requested record is disclosable should be reversed because under California law all public records are *presumptively* disclosable and the City's departments, officials and policy bodies have *the burden of establishing that a specific exemption from disclosure applies*. For that reason, a motion should not be for a determination of a "violation." Rather, the motion put to the vote should be for a determination that the specific exemption relied on by the respondent applies; and the burden of proving that exemption should rest on the respondent, not on the complainant to establish that it does not apply. Thus, in the case of the five to one vote that the complainant would now lose, the respondent would lose and be required to disclose the requested record, which is as it should be.

Respectfully Submitted,

Allen Grossman

MEMORANDUM

TO: SOTF MEMBERS

RE: SOTF MEETING QUORUM AND VOTING RULES

DATE: JANUARY 25, 2011

While the public statewide has constitutionally protected and state law rights to open government – access to public records and open meetings of state and local bodies - San Franciscans have expanded rights and protections from the San Francisco Sunshine Ordinance, a voter initiated and voted adopted law.

Probably the single most important one was the establishment of a unique body, the SOTF, as the quasi-judicial forum to resolve disputes between the public and the City officials, departments and agencies regarding open government matters.

The SOTF is designed to afford members of the public a level playing field with expedited relief when these disputes arise; no need to hire an attorney, file a lawsuit, take on the full might of the 200 lawyer city attorney's office or wait for the case to progress to a decision, all of which would be needed under the state laws without the SOTF.

That design is implemented in a number of ways:

- First, the SOTF is required to inform the petitioner of its determination whether the requested public record, is disclosable no more than 45 days from the time the petition is filed.

- Next, if the record is found disclosable, the SOTF must immediately order compliance; if the respondent fails to comply within five days the SOTF must to notify the district attorney or the attorney general to insure compliance.

- Lastly, throughout and prior to this entire procedure, The San Francisco City Attorney's office …[can] not act as legal counsel for any city employee or any person having custody of any public record for purposes of denying access to the public."

Thus, it is critical that the SOTF not be hamstrung by imposed rules or procedures that prevent it from expeditiously carrying out its mandated responsibility to serve as the public's "court".

Nonetheless, that is exactly what has happened over the past few years as the SOTF's ability to remedy these violations and it ability to maintain that "level playing field" has been seriously compromised as result of the City Attorney's advice. That advice on several issues raised both the minimum quorum requirement and the voting threshold the public must reach to prevail. This advice has been given, notwithstanding the City Attorney's obligation under Sunshine Ordinance

that the " his office "act to protect and secure the rights of the people of San Francisco to access public information and public meetings..."

When only six SOTF members attend a meeting - which has happened recently - the complainant will be denied access to records or the proper conduct of a meeting even if a five-member majority - 83% - vote "yes"; whereas, the respondent City department, official or agency will absolved by a single "yes" vote - 16.67%. Now, with only nine seats filled, the complainant will need no less a two-thirds majority.

That voting "rule" is manifestly unfair, untenable and cannot be justified under any appropriate standard. It is certainly contrary to the purposes of the constitutional and state law protections afforded the public for gaining access to public meetings and records.

What follows is my presentation of the contested legal issues and some suggested solutions. I will try to minimize the legal content of the explanations, although these issues are 100% legal in nature.

Three Basic Questions to be Answered.

Three questions need answers before a definitive conclusion can be reached on the quorum and voting rules to which the SOTF is subject or, alternatively, which it may adopt for itself. They are:

First, is the San Francisco Sunshine Ordinance a wholly independent stand-alone law not subject to the San Francisco City Charter?

> If the answer is "No", then the SOTF can adopt its own quorum and voting rules without regard any provisions in the City Charter.

Second, if the answer is "yes", are there any specific provisions in the City Charter that govern the SOTF quorum and voting procedures?

> If the answer is "no", then the SOTF can adopt its own quorum and voting rules without regard any provisions in the City Charter

Third, if the answer is "yes", which ones are they and how should those rules be followed by the SOTF in its quorum and voting procedures?

The first question: Is the San Francisco Sunshine Ordinance a wholly independent stand-alone law not subject to the San Francisco City Charter?

Under the Brown Act:

> A **meeting** is "... any congregation of **a majority of the members of a legislative body** at the same time and location, including teleconference location, to hear, discuss, deliberate, or take action on any item that is within the subject matter jurisdiction of the legislative body. [§54952.2(a)] and
>
> **Action taken** at a meeting is"... a collective decision made by a majority of the members of a legislative body, a collective commitment or promise by a majority of the members of a legislative body to make a positive or a negative decision, or **an actual vote by a majority**

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of the members of a legislative body when sitting as a body or entity, upon a motion, proposal, resolution, order or ordinance. [§54952.6]

The common rule is that a majority of the members of the body physically present constitute a quorum and the decision of a majority of those present constitutes action taken. There is nothing in the Brown Act that specifically negates that this rule when determining what constitutes a meeting and what constitutes action taken.

The Oakland Ethics Commission so states that in its digest of its own Sunshine Ordinance in the following quotation from its website:

> "The Brown Act and Sunshine Ordinance do not expressly state how a public meeting must be conducted. There are issues that may arise at a public meeting however, that may affect whether the meeting complies with open meeting laws after the meeting begins.
>
> "The following is a brief summary of those issues:
>
> "Presence of a Quorum. □Unless otherwise provided in the city ordinance or resolution creating the local body, a majority of the members typically constitutes the quorum. A quorum is necessary before the local body can take any formal action; **a majority of a quorum is required to take action on behalf of the local body.** (Emphasis added.)

If that is the case under State law, the City Charter provision relied in by the City Attorney requiring a super majority is inapplicable under the Brown Act's quorum and voting rules when fewer than all 11 members attend a SOTF meeting or when SOTF seats are vacant; thus, the SOTF meetings can be conducted by quorum and voting rules that it adopts consistent with its purposes and by Robert's Rules of Order [SOTF By-Laws §5(a)].

However, the City Attorney is on record that the City Charter always "trumps" the San Francisco Sunshine Ordinance. For example:

- In a 2008 Memorandum, Paula Jesson, the Deputy City Attorney, acting in the capacity of the Supervisor of Records under Section 67.21(d) of the Sunshine Ordinance, wrote:

  "In your email, you cite Section 67.36 of the Sunshine Ordinance, which states that the Ordinance "supersedes other local laws," and you note that the Charter is local law too. **However, an ordinance cannot trump the Charter, which is the supreme local law…**"[Citations and quotations from cited cases omitted.)

- In his January 4, 2011 Memorandum to the SOTF regarding case # 10057, DCA Threet stated:

  "Put simply, … **Where an ordinance and the Charter are in conflict, the Charter must prevail.** (citation omitted) The Controller therefore cannot be prohibited by the Sunshine Ordinance from asserting this exemption."

The full supremacy provision is clear and to the point: "The provisions of this Sunshine Ordinance supersede other local laws. Whenever a conflict in local law is identified, the requirement which would result in greater or more expedited public access to public information shall apply."

As some members know, my answer to the first question is "yes" because (1) the "supremacy" provision is effective and the Sunshine Ordinance is the operative law when there is a conflict with the City Charter and (2) in any case, the two State laws, the Brown Act and the CPRA, coupled with the authority that each law gives local agencies to expand public meeting and records access preempts those fields from any restrictive regulation by the local agency; the so-called "preemption" doctrine.

To my knowledge the City Attorney has never undertaken an honest in-depth analysis of these two issues: (a) whether the City Charter is, in fact, the "trumping" law, given that the San Francisco Sunshine Ordinance was a voter initiated and adopted law containing a supremacy provision superseding the City Charter when a conflict exists or (b) even if the SOTF is subject to the City Charter, whether the preemption doctrine prevents the Charter from imposing any restrictions on the SOTF, its expanded access to public meetings and records, its functions or its procedures.

The SOTF, as a body, can either accept the City Attorney's legal advice - by how many votes? - and not pursue the trumping issue any further; or it can reject the City Attorney's legal advice and adopt a set of rules that conform to the norm; i.e., a majority of filled seats constitute a quorum for a meeting and the vote of majority of that quorum constitutes action taken.

The second question: If the answer is "yes" - the Charter does "trump" the San Francisco Sunshine Ordinance - the only relevant section of the City Charter that could govern the SOTF quorum and voting procedures is Section 4.104(b), which provides, in part:

> "The presence of a majority of the members of an appointive board, commission or other unit of government shall constitute a quorum for the transaction of business by such body. ... Unless otherwise required by this Charter, the affirmative vote of a majority of the members shall be required for the approval of any matter. All appointive boards, commissions or other units of government shall act by a majority, two-thirds, three-fourths or other vote of all members. ..."

The City Attorney's advice is found in DCA Thomas J. Owen's May 21, 2007 Memorandum:

> **"Since the Sunshine Ordinance Task Force is an "appointive board, commission or other unit of government" within the meaning of Charter Section 4.104(b), it is subject to the requirements** that:
>
> "(1) A quorum shall consist of the presence of a majority of the members of an appointive board, commission or other unit of government;
>
> "(2) Unless the Charter requires otherwise, the affirmative vote of a majority of the members shall be required for the approval of any matter, and the body shall act by a majority, two-thirds, three-fourths or other vote of all of its **authorized** members; ...

> **"Therefore, the Task Force may not amend its by-laws to allow a majority of members present at a meeting - rather than a majority of the full-authorized membership of the Task Force-to make substantive decisions."** (Emphasis added.)

Whether or not §4.14(b) applies to the SOTF, the word **"authorized"** in Mr. Owen's conclusion (2) is not found in §4.104(b) – a significant addition when there are vacant seats, as there have been on the SOTF for some months.

On the broader question, my answer is "no." My opinion is that even if the City Charter "trumps" the Sunshine Ordinance Task Force, §4.104(b) does not apply to the SOTF. To be subject to §4.104(b) requirement, the SOTF must first be governed by Section 4.100 of Article IV:

> "In addition to the office of the Mayor, the executive branch of the City and County shall be composed of departments, appointive boards, commissions and other units of government. To the extent law permits, each appointive board, commission, or other unit of government of the City and County established by state or federal law shall be subject to the provisions of this Article and this Charter."

The SOTF is not part of the "executive branch," the head of which is the Mayor. It is a *unique* autonomous body created by the voter-initiated and adopted Sunshine Ordinance, and its powers, functions and operations are governed solely by that ordinance. For that reason, many provisions of Article IV do not and could not apply to the SOTF, particularly those in Section 4.102, which imposes certain duties on each "appointive board, commissions other unit of government." Some of those duties are directly contrary to provisions in the Sunshine Ordinance pertaining to the SOTF, its relationship to the Mayor and its specific functions.

For example, under §4.102, the SOTF would be required to: (1) formulate and approve plans and programs and set policies consistent with the overall City and County objectives, **as established by the Mayor**, (2) develop an Annual Statement of Purpose outlining its areas of jurisdiction and goals, **subject to review and approval by the Mayor**, (3) approve applicable departmental budgets, (4) **submit to the Mayor** at least three qualified applicants, ... for the position of department head, (5) **failure to act on the Mayor's recommendation for removal** of a department head... and **constitutes official misconduct**, (6) **exercise such other ...duties** as shall be prescribed by the **Board of Supervisors** and (7) deal with administrative matters solely through the department head and **any interference herein prohibited on the part of any member shall constitute official misconduct.** (Emphasis added.)

The SOTF, as a body, can either accept the City Attorney's legal advice - by how many votes? - and not pursue the six-vote minimum requirement any further or it can reject the City Attorney's legal advice and adopt a set of rules that conform to the norm; i.e., a majority of filled seats constitute a quorum for a meeting and the vote of majority of that quorum constitutes action taken.

The Third Question: If the answer is "yes" - that the SOTF quorum and voting procedures are governed by Charter §4.104(b) - how should those rules be followed by the SOTF in its quorum and voting procedures? In deciding that question, one must also take into account, DCA Threet's advice that in determining the number of SOTF members for purposes of §4.104(b), vacant seats are counted.

As noted above, the combination of requiring at least six votes in favor of a complainant's claim of a violation, plus the fact that there is an automatic "no" for each absent member and, currently, two more "nos" because two seats are vacant is simply not acceptable.

In my recent Memorandum to the SOTF members, my conclusions were that the requirements that a motion to find a "violation" and the complainant prove a "violation" when the dispute is whether a public record is exempt from disclosure were unnecessary. Rather, the motion should be for a "determination" whether the specific exemption relied on by the respondent applies; and the burden of carrying that burden forward should rest on the respondent, rather than requiring the complainant to establish the negative, that the claimed exemption does not apply.

In its simplest terms, the complainant would assert that the respondent has refused to provide the requested public records. The respondent would then cite the particular exemption that it claims applies to those records. At the hearing, the respondent would speak to the exemption issue first and the complainant would rebut the respondent's argument. The motion to be voted on would be "Does the claimed exemption apply to the requested records." To prevail the respondent would need at least six "yes" votes. Once this procedure was adopted, the playing field would be leveled and there would be no need to dispute the advice from the City Attorney's office on the voting issue.

However, there remain the other instances when the Sunshine Ordinance provisions are inconsistent or incompatible with those in the Charter, such the six-vote minimum, and those too will have to addressed. For that reason, I have this final suggestion:

The SOTF should seek out an independent national law firm (with an office in San Francisco) to review the basic questions on a *pro bono* basis and give its opinion either way.