Date: June 24, 2008

Item No. 5
File No.

SUNSHINE ORDINANCE TASK FORCE

AGENDA PACKET CONTENTS LIST*

☒	**GGG Excerpt**
☒	**DCA Zarefsky Letter dated February 26, 2007**
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Completed by: Frank Darby **Date:** June 19, 2008

***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.

Item #3 Sanchez

GOOD GOVERNMENT GUIDE

AN OVERVIEW OF THE LAWS GOVERNING THE CONDUCT OF PUBLIC OFFICIALS

2007–08 EDITION

DENNIS J. HERRERA
CITY ATTORNEY OF SAN FRANCISCO

1. THE CITY IS THE CLIENT OF THE CITY ATTORNEY'S OFFICE

The City as a whole is the client of the City Attorney.[2] While the City can act only through individual officers and employees or constituent bodies, such as boards and commissions, those City actors are not separate clients of the City Attorney's Office. Accordingly, the Office does not have a conflict of interest in advising multiple City officers and departments, who often may have differing policy views about issues giving rise to the need for legal advice. The Office does not owe a distinct duty of loyalty to individual officers or entities who act on the City's behalf.

This legal principle stems from two authorities: San Francisco's Charter and the California Rules of Professional Conduct. Charter section 6.102 designates the elected City Attorney as the legal representative of the City as a whole. The purpose of creating an elected City Attorney was to ensure that the City Attorney would owe loyalty to the people of San Francisco. "Made appointive by either a Mayor or Chief Administrative Officer, [the City Attorney] would be exposed to the possibility of conflicting allegiances." Francis V. Keesling, *San Francisco Charter of 1931*, at p. 41 (1933). In addition, a single City Attorney allows the City to speak with one voice on legal issues and avoids the chaos, as well as tremendous taxpayer expense, that would result if each City department could hire its own counsel to represent its view of the City's interests.

The California Rules of Professional Conduct also provide that the City as a whole is the client of the City Attorney. The Rules specify that when representing any organizational client, whether a corporation or a municipality, a lawyer must treat the organization as the client, acting through the highest officer, employee, or constituent part overseeing the particular issue. Rule 3-600(A), Cal. Rules of Prof. Cond.; *see also* Rule 1.13, ABA Model Rules of Prof. Cond.

Because the City is the client of the City Attorney, the City Attorney generally does not have a conflict in representing multiple persons and entities. Thus, for example, the State Bar has explained that a City Attorney, asked to advise both a Mayor and a City council regarding the power to adopt an ordinance where the two City actors disagreed on the legality and appropriateness of the action, does not have a conflict of interest and may advise both the Mayor and the City council. Both have a role, at different times, in speaking for the City on the legislation, and neither may sue the other over the dispute. *See* Cal. State Bar Ethics Op. 2001-156.

There are two limited exceptions to this general rule. The City Attorney sometimes represents separate legal entities that are related to but not part of the City. In addition, the City Attorney sometimes represents officers and employees in their individual capacities in tort lawsuits against them and the City in other legal matters. In these two limited circumstances, a different analysis applies to the City Attorney's role.

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2. For more information, see the memorandum entitled, "Client of the City Attorney" (December 12, 2003) on the City Attorney's Web site.

While the City is the client of the City Attorney, it does not follow that the City Attorney shares with every member of the organization the information discussed with a single commission, officer, or employee. Generally, when an individual City actor requests advice and asks that the request not be shared with others, the practice of the City Attorney's Office is, as a matter of comity, to honor that request to the extent possible. This practice allows each City actor to obtain the legal advice the City actor needs to perform organizational function, without concern that the discussions will be shared with someone with whom they have a policy disagreement.

But this practice does not entitle the officer to have the City Attorney withhold that same advice from the entities that speak for the City on a particular matter. To the contrary, one of the roles of the City Attorney's Office is to provide consistent, objective legal advice to all affected policy makers so that decisions can be made on the basis of informed policy choices, rather than the outcomes of legal disputes. For example, if two officers ask for confidential legal advice on the same question, the City Attorney will provide the same legal advice to each of them.

The City Attorney may share advice with multiple City officials in other circumstances as well. For example, if a single member of the Board of Supervisors requests draft legislation that the Office considers likely to be invalid, the Office will advise the member about the legal problems, but will also provide the same advice to legislative committees that consider the legislation, and to the full Board of Supervisors if the legislation comes before it, and then, finally, to the Mayor if the Board approves the legislation.

Finally, on occasion the City Attorney will assign one team of lawyers to a City board or commission that is engaged in adjudicating a matter, such as an appeal of a permit or tax assessment, and a separate team of lawyers to the department that made the underlying decisions. The two teams of attorneys do not share information about the pending matter. In such a circumstance, the City is still the client and the City Attorney's office does not have a conflict in advising both entities. But to protect the due process interests of persons appearing before the adjudicating board or commission, the City Attorney assigns separate lawyers to advise that body and to represent the City party involved in the matter.

2. The City Attorney's Role in Providing Ethics and Open Government Advice

The preceding discussion about the role of the City Attorney is particularly relevant to legal advice this Office gives to public officials about the ethics and open meeting laws discussed in the other parts of this Guide. When City officers and employees seek advice on ethics laws or open meeting laws, the City Attorney's Office does not provide that advice to the officer or employee in that person's individual capacity, but rather in that person's capacity as a City actor performing City duties. The individual City officer or employee does not have a separate attorney-client relationship with the City Attorney's Office.

While the City Attorney's Office does not generally disseminate the information a person provides when seeking assistance in complying with these laws, the Office may share that in-

formation with other City officials who require that information to perform their functions. For example, if this Office advises a member of a commission not to participate in the commission's discussion on a contract because of a conflict of interest, but that commissioner proceeds to do so anyway, the City Attorney's Office will advise the full commission that the individual commissioner has a conflict of interest. The commission requires this information because the conflict of interest could invalidate the commission's actions on the contract.

Finally, City officers and employees should be aware that legal advice on ethics laws and open government laws may not be confidential for another reason. The Sunshine Ordinance provides that notwithstanding any exemption provided by law, any written legal advice about conflicts or open government laws may not be withheld from disclosure in response to a request for records under the Sunshine Ordinance. Accordingly, the practice of the City Attorney's Office is to make clear to any officer or employee who requests such advice in writing that the advice may be subject to disclosure upon request by a member of the public.

VII. OPERATIONS OF COMMISSIONS

A. GOVERNING LAW

The Charter sets forth the general powers and duties of City commissions in sections 4.102 – 4.104. In addition, the Charter may provide more specific powers and duties for each commission. Finally, the Municipal Code establishes additional duties for some commissions.

In addition to the local laws that govern City commissions, some state laws affect their operations. As described in Part Three, state public meeting and public records laws, along with their local counterparts, apply to the operations of City commissions.

This section summarizes the general powers and operations of commissions.

B. COMMISSION RULES OF ORDER OR BYLAWS

In addition to the local laws described above, a commission may adopt rules and regulations consistent with state and local law. Charter § 4.104(1). Any amendment to these rules requires a public hearing, for which the commission must give at least ten days notice. A copy of the rules must be filed with the Clerk of the Board of Supervisors and the Library. *Id.*

A commission's rules of order or by-laws address matters relating to the operation of the commission that are not addressed by the Charter, Municipal Code or state or local sunshine laws. Generally, the rules address issues such as the election, terms and duties of officers; the establishment of the regular meeting time and place of the commission; the procedure for setting agendas; the procedure for consent calendars (if any); and procedures relating to the establishment and appointment of committees of the commission. The bylaws of many commissions provide that Roberts Rules of Order govern the commissions' operations where the bylaws do

Records containing medical information about an employee pose special privacy concerns. If your department receives a public records request for such a record, please contact the Office of the City Attorney for further assistance.

Although the comparison is not exact, often the types of personal information about employees that the City may not disclose will parallel the personal information about officials and members of the public that likewise the City may not disclose. If your department is inclined to disclose information that appears to be private, please contact the Office of the City Attorney for further assistance.

3. PENDING LITIGATION

A department is not required to disclose records relating to and developed during pending litigation to which the City is a party, until the pending litigation is finally adjudicated or otherwise settled. Govt. Code § 6254(b). But the City must disclose claims filed against the City. Similarly, the Sunshine Ordinance prohibits the City from entering into confidential settlements. Admin Code § 67.12(b)(3). If you receive a request to inspect records relating to pending litigation, please immediately contact the Deputy City Attorney handling the litigation.

4. ATTORNEY-CLIENT COMMUNICATION

A department may decline to disclose any attorney-client privileged communication between the department and its attorneys. State law makes communications between the City Attorney and those officials and employees privileged and confidential. Evidence Code § 950 *et seq.*

The Sunshine Ordinance requires disclosure of advice memoranda regarding the California Public Records Act, the Brown Act, the Political Reform Act, any "San Francisco governmental ethics code," or the Sunshine Ordinance. Admin. Code § 67.24(b)(1)(iii). At the same time the Charter and State law create attorney-client relationships between the City Attorney and City officials. Charter § 6.102. There may be instances where public disclosure of an attorney-client communication may conflict with the Charter and State law. Departments should refer requests for attorney-client communications to the City Attorney's Office.

The attorney-client privilege belongs to the client, not the attorney. Thus, records covered by the privilege that the City Attorney possesses must remain confidential unless the client – the City – consents to their disclosure. Bus. & Prof. Code § 6068(e).

5. ATTORNEY WORK PRODUCT

A department is not required to disclose records that contain the legal work of an attorney representing the City if the work is protected under the attorney work product doctrine. Govt. Code §6254(k); Code Civ. Proc. §2018.030. The attorney work product doctrine protects "[a] writing that reflects an attorney's impressions, conclusions, opinions, or legal re-

search or theories." Code Civ. Proc.§ 2018.030(a). The work product doctrine may also extend to other records relating to the legal work of attorneys representing the City, including documents prepared at the request of attorneys, such as reports by investigators, consultants and other experts. The work product privilege is separate from, and can cover records not protected by, the attorney-client privilege. If your department receives a public records request for such a record, please contact the Office of the City Attorney for further assistance.

6. INFORMANTS, COMPLAINANTS, AND WHISTLEBLOWERS

In some circumstances, the identity of persons complaining to the City about illegal acts may be shielded from public disclosure. Evidence Code § 1041. In addition, the identity of whistleblowers complaining about wasteful, inefficient, or improper activities or misuse of City funds by City officers and employees may be protected from disclosure. Charter §§ C3.699-13 and F1.107; C&GC Code § 4.120. Finally, the constitutional right to petition the government for a redress of grievances, or to engage in anonymous protest speech, may in some circumstances protect the identity of persons complaining to City officials.

7. TRADE SECRETS

Under certain circumstances, the law protects trade secrets from disclosure. Civil Code §§ 3426, 3426.7(c); Evidence Code § 1060. Different types of information, including proprietary financial data, may constitute a trade secret.

8. INVESTIGATIVE AND SECURITY RECORDS

The Public Records Act exempts from disclosure records of complaints to, investigations conducted by, intelligence information, or security procedures of, and investigatory or security files compiled by, local police agencies. The Act also exempts from disclosure any investigatory or security files compiled by any other local agency for correctional, law enforcement, or licensing purposes. The Act specifies certain information in files covered by this exemption that must be disclosed. Govt. Code § 6254(f). In certain respects, the Sunshine Ordinance limits the scope of this exemption. Admin. Code § 67.24(d).

For more information on security matters generally, see the memorandum entitled, "Guidelines for Redacting Information from Plans Created by the City to Anticipate and Respond to Emergencies Created by Terrorist or Other Criminal Activity" (September 15, 2006) on the City Attorney's Web site.

D. DOCUMENTS CONTAINING EXEMPT AND NON-EXEMPT INFORMATION

Some records contain both exempt and non-exempt information. Under the Sunshine Ordinance, a department may not withhold an entire document unless all the information in it is exempt. The department must redact the exempted material and annotate the redacted text by referring to the specific provision of the Public Records Act, Sunshine Ordinance, or other law au-

e. MISCELLANEOUS EXCEPTIONS

Policy bodies may also meet in closed session in other limited circumstances: (1) to address national security and public building security measures (Govt. Code § 54957(a)); (2) to consider license applications by persons with criminal records (Govt. Code § 54956.7); and (3) for other special, limited circumstances, such as when a commission must consider a matter that is confidential under state or federal law. If a policy body has questions about whether one of these other exceptions might apply in a particular situation, they should contact the City Attorney's Office.

G. RIGHTS OF MEMBERS OF THE PUBLIC AT PUBLIC MEETINGS

1. ATTENDANCE

Members of the public have a right to attend any meeting of a policy body. Govt. Code § 54953(a); Admin. Code § 67.5. No member of the public may be required, as a condition of attending a meeting, to register the person's name, provide other information, complete a questionnaire, or fulfill any other precondition. Govt. Code § 54953.3. If an attendance list, register, questionnaire, or similar document is posted at or near the entrance to the meeting room or circulated to those attending the meeting, it must clearly state that signing or completing the document is voluntary and that any person may attend the meeting without signing or completing the document. Govt. Code § 54953.3.

The right to attend meetings does not extend to the closed session portion of a meeting. But every closed session must be part of a meeting that is open to the public both before and after the policy body goes into closed session.

Notwithstanding the general right to attend the meetings of a policy body, disruption of the meeting may warrant the exclusion of some or all members of the public from the meeting. See "Disruption of Meetings," below.

2. PUBLIC COMMENT

The Brown Act and Sunshine Ordinance give the public the right to speak at all meetings of policy bodies. Members of the public have the right to speak on each item on the agenda, whether scheduled for discussion or action. The public must be allowed to speak on an action item before the policy body takes action on it. The public must be allowed to speak on a discussion item before the body considers the item. These requirements ensure meaningful participation in the deliberations of the policy body. Govt. Code § 54954.3(a); Admin. Code § 67.15(a).

At a regular meeting, the public also has the right to speak on any item within the subject matter jurisdiction of the policy body, even if the item is not on the agenda. The policy body may schedule this opportunity for "general public comment" at any point during the meeting. A policy body is not required, but may choose, to offer an opportunity for "general public comment" at a special meeting. Govt. Code § 54954.3.

The Board of Supervisors alone is not required to provide for public comment on items before the full Board where those items were previously considered at a committee meeting at which public comment was allowed, or that were previously considered at a meeting of the full Board, sitting as a committee of the whole, at which public comment was allowed. Govt. Code § 54954.3; Admin. Code § 67.15(a).

A member of the public has a right to comment anonymously. The presiding officer may request that each speaker fill out a speaker card or state the speaker's name for the record, but may not require the speaker to disclose his or her identity. *See* Govt. Code § 54953.3; Admin. Code § 67.16.

A meeting is a public forum and broad reign must be given to a speaker's right of self-expression. A member of the public has the right to criticize the policy body's programs, practices, policies, and services, as well as its members and staff. The presiding officer nonetheless may reasonably confine a speaker's comments to the agenda item being addressed or, for general public comment, to the subject matter jurisdiction of the policy body.

In extreme and unusual circumstances, public comment may constitute discriminatory or harassing speech for which the City may be liable under state or federal antidiscrimination laws. To address this issue, the Mayor's Office has issued a "Policy on Discriminatory or Harassing Remarks Made at Public Meetings of City Boards and Commissions," a copy of which is included in the Supplement to this Guide.

Members of a policy body may offer public comment at the meeting of another policy body. Members retain their right to comment publicly on the wisdom or propriety of government actions, including those of the policy body on which they sit. Admin. Code § 67.17. Special provisions govern comment by members of the Board of Supervisors at the meeting of another policy body. Charter § 2.114.

Further, members of policy bodies who perform quasi-judicial functions, such as granting or revoking permits, need to be careful about their public comments. Quasi-judicial boards must afford a fair hearing to the parties before them. Central to a fair hearing is a requirement that decision makers come to the hearing with an open mind, prepared to hear both sides and to decide the case on the merits of the evidence presented. A member of a policy body who makes public statements or advocates in support of or opposition to a party who later appears before that body in a quasi-judicial proceeding could be vulnerable to a charge that the member is biased on the matter. Members of such bodies should confer in advance with the City Attorney's Office when these issues arise.

3. TIME LIMITS FOR PUBLIC COMMENT

A policy body has the power to adopt reasonable rules and regulations relating to public comment. Govt. Code § 54954.3(b); Admin. Code § 67.15(c). The Sunshine Ordinance requires all policy bodies to allow each member of the public to speak once on each calendared item for up to three minutes. Admin. Code § 67.15(c). The policy body may limit public comment on an agenda item to less than three minutes per speaker, based on such

factors as the nature of the agenda item, the number of anticipated speakers for that item, and the number and anticipated duration of other agenda items.

The Sunshine Ordinance requires the policy body to apply time limits uniformly to members of the public wishing to testify. Admin. Code § 67.15(c). An organizational representative has a right to comment on an item for the same amount of time as an individual member of the public. If a member of the public has a disability that impairs the ability to speak, the policy body must extend that person's time to speak to accommodate the disability. In addition, the body may grant additional time to accommodate members of the public requiring use of a translator.

A body may wish to adopt a rule limiting public testimony in situations where an agenda item is heard in one meeting and public testimony is taken on the item, and it is continued to the next meeting for deliberation and action. In this situation, the public body may preclude individuals from testifying at the subsequent meeting on an item where they have already provided testimony. Individuals attending the second meeting, who did not speak at the first meeting, should be allowed to testify. In addition, individuals who have points to make regarding issues that were not raised at the first meeting should also be allowed to testify.

If the parent board or commission limits a committee's authority to hear only those items referred to it by the parent board or commission, then the committee may limit public discussion to the items on its agenda. In other words, such committee is not required to take general public comment on items that are not listed on the agenda. Persons desiring to speak on non-agenda items may address those items at meetings of the parent board or commission, provided that the items are within the jurisdiction of the parent board or commission. Govt. Code § 54954.3(a).

4. Availability of Agendas and other Records Relating to Meetings

As a general rule, meeting agendas and other documents distributed to a majority of the members of a policy body in connection with a matter to be considered at a meeting must be made available to the public. Govt. Code § 54957.5(a). Moreover, even if a document has not been distributed to a majority, it must be made available to the public if it is intended to be distributed to a majority in connection with a matter anticipated for discussion or consideration at a meeting, and is on file with the clerk of the policy body. Admin. Code § 67.9(a).

These general rules are qualified by an exception. If the document is otherwise exempt from public disclosure, it typically remains exempt. Govt. Code § 54957.5(a); Admin. Code § 67.9(a). For example, a privileged attorney-client memorandum distributed by the City Attorney's Office to a majority of members of a policy body does not lose its confidential status by virtue of the distribution. Please consult in advance with the Deputy City Attorney assigned to your policy body if you need advice about who may authorize the disclosure of privileged documents.

1 of 3 DOCUMENTS

JAMES CHAFFEE, Plaintiff and Appellant, v. SAN FRANCISCO PUBLIC LIBRARY COMMISSION et al., Defendants and Respondents.

A109633

COURT OF APPEAL OF CALIFORNIA, FIRST APPELLATE DISTRICT, DIVISION FOUR

134 Cal. App. 4th 109; 36 Cal. Rptr. 3d 1; 2005 Cal. App. LEXIS 1810; 2005 Cal. Daily Op. Service 9872; 2005 Daily Journal DAR 13482

October 26, 2005, Filed

SUBSEQUENT HISTORY: [***1] The Publication Status of this Document has been Changed by the Court from Unpublished to Published November 21, 2005.

PRIOR HISTORY: Superior Court of San Francisco City and County, No. CGC-03-424978, Paul H. Alvarado, Judge.

SUMMARY:

CALIFORNIA OFFICIAL REPORTS SUMMARY

Plaintiff brought an action for injunctive and declaratory relief, alleging that defendants, the city library commission and its members, had violated the Ralph M. Brown Act (*Gov. Code, § 54950 et seq.*) and San Francisco's Sunshine Ordinance (S.F. Admin. Code, ch. 67), by not allowing a public comment period of three minutes per speaker for each agenda item at a meeting of the commission. At the meeting in question, the commission's president announced that public comment on each agenda item would be limited to two minutes per speaker, instead of the three minutes normally allotted to each speaker. The trial court granted summary judgment to defendants. (Superior Court of the City and County of San Francisco, No. CGC-03-424978, Paul H. Alvarado, Judge.)

The Court of Appeal affirmed. The court held that defendants did not violate the Brown Act or the Sunshine Ordinance by limiting public comment on each agenda item to two minutes per speaker. The president stated in his declaration that before the meeting, he anticipated four agenda items would be lengthy. Based on his judgment of the time required for the commission to consider those four items and the other items on the agenda, the president concluded the commission would not be able to complete its meeting in a reasonable period unless public comment was somewhat shortened. The minutes indicated that the meeting lasted more than four hours. Plaintiff failed to meet his burden to show the existence of a triable issue of material fact. Plaintiff presented no evidence that the president did not reasonably expect the four items he enumerated to be lengthy or that the commission did not reasonably apply its bylaws in the circumstances. (Opinion by Rivera, J., with Reardon, Acting P. J., and Sepulveda, J., concurring.) [*110]

HEADNOTES

CALIFORNIA OFFICIAL REPORTS HEADNOTES
Classified to California Digest of Official Reports

(1) Municipalities § 44--Meetings--Brown Act--Public Comment.--Pursuant to *Gov. Code, § 54954.3, subd. (a)*, part of the Ralph M. Brown Act, local agencies are required to provide an opportunity for public comment at meetings.

(2) Statutes § 21--Construction--Legislative Intent--Extrinsic Aids.--The rules governing statutory construction are well settled. A court begins with the fundamental premise that the objective of statutory interpretation is to ascertain and effectuate legislative intent. To determine legislative intent, the court turns first to the words of the statute, giving them their usual and ordinary meaning. When the language of a statute is clear, the court need go no further. However, when the language is susceptible of more than one reasonable interpretation, the court looks to a variety of extrinsic aids, including the ostensible objects to be achieved, the evils to be remedied, the legislative history, public policy, contemporaneous administrative construction, and the statutory scheme of which the statute is a part. Thus, although the court looks first

to the statutory language, it does not give the words a literal meaning if to do so would result in an absurd result that was not intended. The court should avoid an interpretation which renders a part of the statute or ordinance surplusage. The court must give due consideration to the public entity's view of the meaning of its ordinance. However, the court is not bound by the public entity's views, as interpretation of laws is ultimately a judicial function. The court uses the same rules to interpret ordinances.

(3) Municipalities § 44--Meetings--Brown Act--Public Comment--Time Limits.--*Gov. Code, § 54954.3, subd. (b)*, part of the Ralph M. Brown Act (*Gov. Code, § 54950 et seq.*), provides for local agencies to adopt reasonable regulations to ensure opportunity for public comment, including, but not limited to, regulations limiting the total amount of time allocated for public testimony on particular issues and for each individual speaker. The Ralph M. Brown Act does not specify a three-minute time period for comments and does not prohibit public entities from limiting the comment period in the reasonable exercise of their discretion. [*111]

(4) Municipalities § 44--Meetings--Brown Act--Public Comment--Time Limits--Two Minutes Per Speaker.--A library commission did not violate the Ralph M. Brown Act (*Gov. Code, § 54950 et seq.*) and San Francisco's Sunshine Ordinance (S.F. Admin. Code, ch. 67), by limiting public comment on each agenda item at a meeting of the commission to two minutes per speaker, instead of the three minutes normally allotted to each speaker.

[9 Witkin, Cal. Procedure (4th ed. 1997) Administrative Proceedings, § 22.]

COUNSEL: James Chaffee, in pro. per., for Plaintiff and Appellant.

Dennis J. Herrera, City Attorney, Wayne Snodgrass and Rafal Ofierski, Deputy City Attorneys, for Defendants and Respondents.

JUDGES: Rivera, J., with Reardon, Acting P. J., and Sepulveda, J., concurring.

OPINION BY: Rivera

OPINION

[**2] **RIVERA, J.**--Plaintiff James Chaffee brought an action for injunctive and declaratory relief, alleging defendants had violated the Ralph M. Brown Act (*Gov. Code, § 54950 et seq.*) [1] (the Brown Act) and the San Francisco Sunshine Ordinance of 1999 (S.F. Admin. Code, ch. 67) (the Sunshine Ordinance) by not allowing a public comment period of three minutes per speaker for each agenda item at a meeting of the San Francisco Public Library Commission (the Commission). [2] The trial court granted summary judgment to defendants. We affirm.

1 All undesignated statutory references are to the Government Code.

2 The named defendants were the Commission, Commission President Charles Higueras, and Commissioners Carol Steiman, Lonnie Chin, Helen Bautista, Steven Coulter, and Deborah Strobin.

[***2] **I. BACKGROUND**

The Commission held a meeting on September 4, 2003. There were 12 items on the agenda. Higueras announced at the beginning of the meeting that public comment on each agenda item would be limited to two minutes per speaker, instead of the three minutes normally allotted to each speaker. [3] [*112] According to a declaration prepared by Higueras in support of defendants' motion for summary judgment, the Commission occasionally limits public comment to two minutes per speaker when necessary to allow the Commission to complete its agenda within a reasonable period of time, or before an anticipated loss of quorum. Before the September 4, 2003, meeting, Higueras anticipated that four of the items on the agenda would be lengthy, and the Commission would not be able to complete the meeting in a reasonable period unless public comments were shortened.

3 It appears that Chaffee spoke on seven agenda items at the meeting.

II. DISCUSSION

Chaffee contends state and local law required the Commission [***3] to provide each speaker three minutes to make comments, and that the trial court erred in granting summary judgment to defendants.

As discussed in a decision announced by Division Two of the First Appellate District, involving the same plaintiff [**3] and many of the same defendants: "On appeal from a grant of summary judgment, we exercise our independent judgment in determining whether there are triable issues of material fact and whether the moving party is entitled to judgment as a matter of law. (*Guz v. Bechtel National, Inc. (2000) 24 Cal.4th 317, 334-335 [100 Cal. Rptr. 2d 352, 8 P.3d 1089].*) Summary judgment is properly granted if there is no question of fact and the issues raised by the pleadings must be decided as a matter of law. (*Code Civ. Proc., § 437c, subd. (c)*;

Aguilar v. Atlantic Richfield Co. (2001) 25 Cal.4th 826, 843 [107 Cal. Rptr. 2d 841, 24 P.3d 493] (*Aguilar*).) In moving for summary judgment, a defendant may show that one or more elements of the cause of action cannot be established by the plaintiff or that there is a complete defense to the cause of action. (*Code Civ. Proc., § 437c, subd. (o)(2)*; *Aguilar, supra, 25 Cal.4th at p. 849.*) [***4] Once the defendant has met that burden, the burden shifts to the plaintiff to show that a triable issue of one or more material facts exists as to that cause of action or a defense thereto. (*25 Cal.4th at p. 849.*) The plaintiff may not rely upon the mere allegations or denials of his pleadings to show that a triable issue of material fact exists but instead, must set forth the specific facts showing that a triable issue of material fact exists as to that cause of action or a defense thereto. (*Ibid.*) [¶] The moving party must support the motion with evidence including affidavits, declarations, admissions, answers to interrogatories, depositions, and matters of which judicial notice must or may be taken. (*Code Civ. Proc., § 437c, subd. (b)*; *Aguilar, supra, 25 Cal.4th at p. 843.*) Similarly, any adverse party may oppose the motion and ' "where appropriate," ' may present evidence including affidavits, declarations, admissions to interrogatories, depositions, and matters of which judicial notice must [*113] or may be taken. (*25 Cal.4th at p. 843.*) In ruling on the motion, the court must consider all of the evidence [***5] and all of the inferences reasonably drawn therefrom (*Code Civ. Proc., § 437c, subd. (c)*; *Aguilar, supra, 25 Cal.4th at p. 843*), and view such evidence and inferences in the light most favorable to the opposing party. (*Aguilar, supra, at p. 843.*)" (*Chaffee v. San Francisco Library Commission (2004) 115 Cal.App.4th 461, 466 [9 Cal. Rptr. 3d 336].*)

(1) Three enactments bear upon this dispute. The Brown Act requires local agencies to provide an opportunity for public comment at meetings. (*§ 54954.3, subd. (a).*) In particular, as pertinent here: "The legislative body of a local agency may adopt reasonable regulations to ensure that the intent of *subdivision (a)* is carried out, including, but not limited to, regulations limiting the total amount of time allocated for public testimony on particular issues and for each individual speaker." (*§ 54954.3, subd. (b).*)

The Sunshine Ordinance likewise regulates public comment at meetings. Section 67.15, subdivision (c) of the San Francisco Administrative Code provides: "A policy body may adopt reasonable regulations to ensure that the intent of subdivisions (a) and (b) [providing [***6] that members of the public have an opportunity to address public meetings] are carried out, including, but not limited to, regulations limiting the total amount of time allocated for public testimony on particular issues and for each individual speaker. Each policy body shall adopt a rule providing that each person wishing to speak on an item before the body at a regular or special meeting shall be permitted to be heard once for up to [**4] three minutes. Time limits shall be applied uniformly to members of the public wishing to testify."

The Commission's bylaws provide in article VII, section 2, as pertinent here: "The Commission shall hold meetings open to the public and encourage the participation of interested persons. Each person wishing to speak on an item before the Commission shall be permitted to be heard once for up to three minutes."

Chaffee's position is straightforward: He contends the phrase "up to three minutes" in the Sunshine Ordinance and the Commission's bylaws gives the *speaker*--not the Commission--the right and the power to determine how long his or her remarks will be, up to three minutes. [4] Defendants contend the provision that members of the public be permitted [***7] to be heard "for up to three [*114] minutes," although ambiguous, should be interpreted to mean that members of the public may be granted less than three minutes when required by the circumstances of a particular meeting. This interpretation, according to defendants, is consistent with the legislative history and the purpose of the Sunshine Ordinance.

4 Chaffee concedes that the three-minute period might be reduced if the total time allowed for testimony had been reached. The Commission's bylaws do not limit the total time of public comment testimony, and defendants make no contention that such a limit had been exceeded here.

(2) "The rules governing statutory construction are well settled. We begin with the fundamental premise that the objective of statutory interpretation is to ascertain and effectuate legislative intent. [Citations.] To determine legislative intent, we turn first, to the words of the statute, giving them their usual and ordinary meaning. [Citations.] When the language of a statute is clear, we [***8] need go no further. However, when the language is susceptible of more than one reasonable interpretation, we look to a variety of extrinsic aids, including the ostensible objects to be achieved, the evils to be remedied, the legislative history, public policy, contemporaneous administrative construction, and the statutory scheme of which the statute is a part. [Citations.]" (*People v. Flores (2003) 30 Cal.4th 1059, 1063 [135 Cal. Rptr. 2d 63, 69 P.3d 979].*) Thus, although we look first to the statutory language, we do not give the words a literal meaning if to do so would result in an absurd result that was not intended. (*People v. Pieters (1991) 52 Cal.3d 894, 898 [276 Cal. Rptr. 918, 802 P.2d 420].*) We should avoid an interpretation " 'which renders a part of the statute or ordinance "surplusage." ' " (*Baldwin v. City of Los Ange-*

les (1999) 70 Cal.App.4th 819, 838 [83 Cal. Rptr. 2d 178].) We must give due consideration to the public entity's view of the meaning of its ordinance. (*City of Walnut Creek v. County of Contra Costa (1980) 101 Cal. App. 3d 1012, 1021 [162 Cal. Rptr. 224].*) However, we are not bound by the public entity's views, as interpretation of laws is ultimately a judicial [***9] function. (*City of Long Beach v. Department of Industrial Relations (2004) 34 Cal.4th 942, 951 [22 Cal. Rptr. 3d 518, 102 P.3d 904]*; *Crumpler v. Board of Administration (1973) 32 Cal. App. 3d 567, 578 [108 Cal. Rptr. 293].*) We use the same rules to interpret ordinances. (*Carson Harbor Village, Ltd. v. City of Carson Mobilehome Park Rental Review Bd. (1999) 70 Cal.App.4th 281, 290 [82 Cal. Rptr. 2d 569].*)

Arguably, the language of the Sunshine Ordinance and the Commission bylaws is susceptible to more than one reasonable interpretation. Accordingly, we will look to appropriate extrinsic aids to ascertain its meaning.

[**5] Defendants argue the legislative history suggests the "up to three minutes" language in the Sunshine Ordinance was intended to give agencies flexibility in determining the length of public comments. The predecessor to the [*115] Sunshine Ordinance required each board or commission to adopt rules providing that each person who wished to speak on an item at a meeting be heard "for not less than three minutes." (S.F. Admin. Code, former § 16.5-1.) Although at least one draft of the proposed Sunshine Ordinance contained a similar provision with the "not less than three minutes" language, [***10] the city ultimately adopted, in 1993, a version requiring policy bodies to adopt rules allowing speakers to be heard for "up to three minutes." (S.F. Admin. Code, § 67.15, subd. (c).) We agree with defendants that the language adopted provides for more flexibility than the language contained in the predecessor ordinance or in the earlier draft of the Sunshine Ordinance. Additionally, in a 1993 memorandum intended to familiarize boards, commissions, and department heads with the requirements of the recently enacted Sunshine Ordinance, the city attorney interpreted the ordinance to allow some discretion in the amount of time allowed for each speaker. The memorandum stated: "The San Francisco Administrative Code requires all boards, commissions and committees to allow each member of the public to speak once at the meetings with regard to each calendared item for up to three minutes; bodies may impose shorter, reasonable time limits in their discretion." Thus, the legislative history and the city's contemporaneous interpretation of its ordinance manifest an intention by the city to allow policy bodies discretion to set a time limit of less than three minutes for public comments. Moreover, [***11] as defendants point out, Chaffee's reading of the Sunshine Ordinance and the Commission bylaws would lead to the result that public entities would lack discretion to *increase* the time available for public comments in appropriate circumstances--a result surely not intended by the Brown Act or the Sunshine Ordinance.

We do not mean to imply that restrictions on public comment time may be applied unreasonably or arbitrarily. [5] However, there is no difficulty in imagining situations in which such limits would be appropriate. For instance, setting stricter time limits might be necessary in order to allow every member of the public who wished to speak to do so within the total time allotted for public comment, or in order to complete a meeting with a lengthy agenda within a reasonable period of time. This interpretation does not, as Chaffee argues, render the words "up to three minutes" surplusage. Rather, it allows public entities to exercise their reasonable discretion in departing from the normal time limits.

5 For instance, Chaffee suggests that defendants' interpretation would mean that comment time could be limited if the news media were present, if the cameras were on, if there were sensitive issues, or if the Commission president did not like the comments being made. He also speculates that if defendants prevail here, they will restrict public comment time to five seconds in the future. None of those concerns are present here, and we do not address them.

[***12] [*116] **(3)** This interpretation of the Sunshine Ordinance is consistent with the Brown Act. As noted earlier, the relevant portion of the Brown Act provides for local agencies to adopt "reasonable regulations to ensure [opportunity for public comment], including, but not limited to, regulations limiting the total amount of time allocated for public testimony on particular issues and for each individual speaker." [**6] (*§ 54954.3, subd. (b).*) The Brown Act does not specify a three-minute time period for comments, and does not prohibit public entities from limiting the comment period in the reasonable exercise of their discretion.

(4) In light of the foregoing, we agree with the trial court that the undisputed evidence shows defendants did not violate the Sunshine Ordinance or the Brown Act in the September 4, 2003, meeting at issue here. Higueras stated in his declaration that before the meeting, he anticipated four items would be lengthy. Those items were the presentation of a report by two members of the library staff concerning the library's "affinity centers"; the presentation, discussion, and potential commission action on the 2003-2006 Strategic Plan for the library; the presentation by the city [***13] librarian on a proposed gift recognition policy; and a closed session with deputy city attorneys concerning pending litigation. Based on his

judgment of the time required for the Commission to consider those four items and the other items on the agenda, Higueras concluded the Commission would not be able to complete its meeting in a reasonable period unless public comment was somewhat shortened. According to Higueras, meetings generally last between two and a half and three hours. When Higueras left the meeting after three hours, it was still in progress, and the meeting minutes indicate it lasted more than four hours. This showing was sufficient to meet defendants' initial burden on summary judgment to show that one or more elements of the action could not be established or there was a complete defense to the cause of action, and the burden accordingly shifted to plaintiff to show the existence of a triable issue of material fact. (*Code Civ. Proc., § 437c, subd. (o)*; *Aguilar, supra, 25 Cal.4th at p. 849.*)

In our view, plaintiff failed to meet his burden. He stated in a declaration that it was not unusual for the Commission meetings to [***14] have 12 or 13 items, and the 12-item agenda at the September 4, 2003, meeting was not unusually long. Whatever the number of agenda items that are usual at the Commission meetings, plaintiff presented no evidence that Higueras did not reasonably expect the four items he enumerated to be lengthy, or that the Commission did not reasonably apply its bylaws in the circumstances.

[*117] III. DISPOSITION

The judgment is affirmed.

Reardon, Acting P. J., and Sepulveda, J., concurred.

Item # 3 Sanchez

CITY AND COUNTY OF SAN FRANCISCO

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City Attorney

OFFICE OF THE CITY ATTORNEY

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February 26, 2007

Honorable Members
Sunshine Ordinance Task Force
c/o Frank Darby, Jr., Administrator
Room 244, City Hall
1 Dr. Carlton B. Goodlett Place
San Francisco, CA 94102

Re Complaint No. 07006 (Kimo Crossman v. Administrator, SOTF)

Dear Honorable Task Force Members:

This letter responds to a letter dated February 12, 2007 from Allen Grossman to the Task Force pertaining to the subject complaint. Mr. Grossman appears to assert that Section 67.21(i) of the Sunshine Ordinance precludes the City Attorney's Office from providing legal assistance to City departments with respect to public records matters, if such assistance supports or facilitates denial or redaction of a public record to a member of the public. Section 67.21(i) states in relevant part: "The San Francisco City Attorney's Office shall act to protect and secure the rights of the people of San Francisco to access public information and public meetings and shall not act as legal counsel for any City employee or any person having custody of any City record for purposes of denying access to the public." (S.F. Admin. Code, §67.21(i).) On the basis of this provision, Mr. Grossman asserts that it is improper for the City Attorney's Office to draft a letter to the Task Force on behalf of a City department in support of a denial or redaction of a public record, and asks the Task Force to disregard a letter submitted by Mr. Darby as Task Force Administrator in response to the subject complaint.

Mr. Grossman's legal assertions are in error. The Task Force should reject his assertions and deny his request.[1]

The City Charter – the City's supreme law, equivalent to a municipal constitution – provides that the City Attorney acts as legal counsel to all departments. (S.F. Charter, §6.102.) In furtherance of this Charter-mandated role, this Office regularly provides a myriad of legal services to departments, ranging from the drafting of documents to the provision of formal and informal legal advice, on all subjects. The Charter does not suggest, much less mandate, a different or lesser role for the City Attorney in the area of public records law. And since the client of the City Attorney is the City, the City Attorney's duty is to ensure that his advice to all City departments is consistent with City law including the Sunshine Ordinance. If Section 67.21(i) were interpreted to prohibit or limit the City Attorney's Office in providing legal assistance to departments pertaining to public records law, there would be a conflict between the Charter and the Sunshine Ordinance – which, like any ordinance, is subordinate to the Charter. (*Currieri v. City of Roseville* (1970) 4 Cal.App.3d 997, 1001.) In that event, Section 67.21(i) would be invalid. But this Office, like a court, must strive to interpret Section

[1] Mr. Grossman appears to have written his letter in his capacity as an interested member of the public, rather than as counsel to the complainant. We are not familiar with the Task Force's procedures for handling a request from a member of the public that pertains to the process for hearing a specific complaint. We have chosen to respond to Mr. Grossman's letter in the event the Task Force gives consideration to his letter.

67.21(i) in a manner that is consistent with the Charter, to avoid a conflict and thereby affirm the validity of Section 67.21(i). (*Cf. Kash Enterprises, Inc. v. City of Los Angeles* (1977) 19 Cal.3d 294, 305 [principle that ordinance should be construed if possible to preserve its constitutionality].)

Further, both federal and state law prohibit departments from disclosing certain types of records and information to the public. Other provisions of law permit a department to withhold records and information from the public. The prohibitions on disclosure and the provisions permitting nondisclosure are often technical, unclear, or complex and typically require legal interpretation when applied in particular circumstances. It is evident that departments often need legal counsel in making these determinations and in drafting letters reflecting these determinations. Interpreting the Sunshine Ordinance to preclude the City Attorney's Office from providing legal assistance on public records matters simply because in some cases that assistance would provide legal support for or facilitate a department's withholding or redacting a record would make no sense. This Office, like a court, must interpret Section 67.21(i) to avoid this absurd result. (*O'Hanesian v. State Farm Mut. Auto Ins. Co.* (2006) 145 Cal.App.4th 1305, 1313.)

In light of the City Attorney's role under the Charter as legal counsel to the City – which necessarily includes all City departments – and the provisions of federal and state law that mandate or permit nondisclosure of public records, Section 67.21(i) must not be interpreted to impose rigid constraints on the City Attorney's Office. Rather, Section 67.21(i) merely reinforces the Charter-mandated obligation of the City Attorney to the City and the public. It reflects the voters' intent to remind the City Attorney of his Charter obligation to properly advise all officials with regard to all of their legal duties, including those that arise from the Sunshine Ordinance and the Public Records Act. Therefore, where the Sunshine Ordinance, Public Records Act, or any other law forbids disclosure of a record or authorizes redaction or nondisclosure, the Sunshine Ordinance does not prevent the City Attorney from advising departments of their duties and privileges under the law, or drafting a letter in support of a department's lawful decision to withhold or redact a record. On the other hand, this Office should not facilitate, support, or advocate for a department's denial of access to a record without regard to the requirements of the law. That is what Section 67.21(i) means.

While the City Attorney's Office provides a range of legal services to departments, including drafting correspondence pertaining to legal matters, the City Attorney is not an advocate for individual departments. The client is the City as a whole. The City Attorney seeks to provide consistent, legally correct advice to all City agencies including the Sunshine Ordinance Task Force that guides all agencies in their compliance with all applicable laws, including the Sunshine Ordinance and Public Records Act. The City Attorney recognizes the importance of enforcing these and other open government laws and providing the public with access to public records in accordance with the law.

This Office's past practice with regard to matters pending before the Task Force, including the drafting of letters to be submitted to the Task Force, is consistent with this interpretation. The City Attorney does not represent departments as such before the Task Force. Rather, in providing legal assistance to a department in connection with a matter before the Task Force, this Office ultimately serves not only the department but the Task Force as well. Section 67.21(i) does not prevent the City Attorney from performing this important legal function.

Very truly yours,

DENNIS J. HERRERA
City Attorney

PAUL ZAREFSKY
Deputy City Attorney