

Date: May 18, 2011

Item No. 586
File No. 11017

SUNSHINE ORDINANCE TASK FORCE

AGENDA PACKET CONTENTS LIST*

- Tomas Picarello against Supervisor Carmen Chu**
-
-
-
-
-
-
-
-
-

Completed by: Chris Rustom

Date: May 12, 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.



DENNIS J. HERRERA
City Attorney

JERRY THREET
Deputy City Attorney

DIRECT DIAL: (415) 554-3914
E-MAIL: jerry.threet@sfgov.org

MEMORANDUM

April 26, 2011:

TOMAS PICARELLO v. SUPERVISOR CARMEN CHU (11017)

COMPLAINT

THE COMPLAINANT ALLEGES THE FOLLOWING:

Complainant Tomas Picarello alleges that the Supervisor Carmen Chu (the "Supervisor") failed to provide a legally adequate description of item 7 on the March 9, 2011 agenda of the Budget and Finance Subcommittee of the Board of Supervisors. He further alleges that she heard the item in closed session despite his complaint, and that a closed session was improper for hearing this item, which was a hearing on funding of two City departments.

COMPLAINANT FILES COMPLAINT:

On March 9, 2011, Mr. Picarello filed a Complaint against the Supervisor for her alleged violations of Sections 67.7, 67.8 and 67.10 of the Sunshine Ordinance.

JURISDICTION

The Supervisor is a member of a City department under the San Francisco City Charter and thus the Task Force has jurisdiction over this issue.

APPLICABLE STATUTORY SECTION(S):

- Section 67.7 governs descriptions of agenda items for a public meeting.
- Section 67.8 governs agenda descriptions for closed sessions.
- Section 67.10 governs permitted topics for closed sessions.

APPLICABLE CASE LAW:

None

ISSUES TO BE DETERMINED

Uncontested/Contested Facts: Complainant alleges that the description of agenda item 7 was legally insufficient, but fails to identify specifically how it was deficient. The agenda for the March 9, 2011 meeting of the Budget and Finance Subcommittee of the Board of Supervisors has the following description for item 7:

MEMORANDUM

TO: Sunshine Task Force
 DATE: April 25, 2011
 PAGE: 2
 RE: Complaint 11017: Picarello v. Chu

"Conference with City Attorney

[Convene in Closed Session - Existing Litigation - City as Plaintiff and/or Defendant]

Motion that the Budget and Finance Sub-Committee of the Board of Supervisors convene in closed session with the City Attorney for the purpose of conferring with, or receiving advice from, the City Attorney regarding the following existing lawsuits and claims in which proposed settlements are being considered by the Committee. Administrative Code Section 67.10(d) permit this closed session. Discussion in open session concerning these matters would likely and unavoidably prejudice the position of the City in the pending lawsuits and claims listed below.

[Appropriating \$2,809,000 of General Fund Reserve - Fourth Street Bridge Project Litigation Expenses in FY2010-2011]

7. 1101547.

Sponsor: Mayor

Ordinance appropriating \$2,809,000 from the General Fund Reserve to the Department of Public Works for litigation expenses related to the Santa Clara Superior Court Case between Mitchell Engineering/Obayashi Corporation v. City and County of San Francisco for the Fourth Street Bridge Project in FY2010-2011. (Fiscal Impact.)

2/8/11; RECEIVED AND ASSIGNED to the Budget and Finance Committee.

2/22/11; TRANSFERRED to the Budget and Finance Sub-Committee.

3/2/11; CONTINUED. Heard in Committee. Speakers: Andrew Shen (City Attorney); presented information concerning the matter and/or answered questions raised during the hearing. Continued to March 9, 2011.

After a closed session, if one occurs, the Committee shall adopt a motion either to disclose or not to disclose.

[Elect To Disclose]

Motion that the Board finds it is in the public interest to disclose information discussed in closed session, and directs the Chair immediately to disclose that information.

[Elect Not to Disclose]

Motion that the Committee finds that it is in the best interest of the public that the Committee elect at this time not to disclose its closed session deliberations listed above."

MEMORANDUM

TO: Sunshine Task Force
DATE: April 25, 2011
PAGE: 3
RE: Complaint 11017: Picarello v. Chu

The supporting materials for the agenda item includes the Budget Analysts' memorandum regarding the proposed ordinance, which has the following statement: "The City Attorney considers the detailed plans for the expenditures for the trial preparation and trial to be confidential and privileged." The memo goes on to explain that the City Attorney provided the detailed budget to the Budget Analyst on a confidential basis and had agreed to do the same for the Budget and Finance Subcommittee in a closed session.

Mr. Picarello further alleges that he protested the use of a closed session, but the committee proceeded to enter the closed session to discuss the matter despite his protest. Finally, Mr. Picarello alleges that agenda item 7 considered a funding measure for two City departments and was not related to pending litigation.

In response, the Supervisor alleges that she had no role in the drafting or printing of the agenda; rather that was the responsibility of the Clerk of the Board of Supervisors, in consultation with the City Attorney. She further alleges that Mr. Picarello was allowed his public comment on the item and that the committee voted to enter closed session to discuss the item under the advise of the City Attorney. The Supervisor further alleges that the agenda item discussion during closed session did relate to the pending litigation.

It is unclear from the allegations whether the entire discussion regarding this item took place in closed session, or whether part was in closed session and part was in open session.

LEGAL ISSUES/LEGAL DETERMINATIONS:

- Were sections of the Sunshine Ordinance, Brown Act, and/or California Constitution Article I, Section three violated?

SUGGESTED ANALYSIS**Under Section 67.7 of the Ordinance:**

- Was the agenda description of the legislative item in question a "meaningful description"?
- Was the agenda description of the legislative item in question "sufficiently clear and specific to alert a person of average intelligence and education whose interests are affected by the item that he or she may have reason to attend the meeting or seek more information on the item"?
- Was the agenda description of the legislative item in question "brief, concise and written in plain, easily understood English"?

Under Section 67.8 of the Ordinance:

- Did the agenda description of the legislative item in question include the specific language for that type of closed session required by this provision of the Ordinance?

MEMORANDUM

TO: Sunshine Task Force
DATE: April 25, 2011
PAGE: 4
RE: Complaint 11017: Picarello v. Chu

Under Section 67.10 of the Ordinance:

- Was the closed session under agenda item 7 based on the advice of legal counsel, and held after a motion and vote in open session to assert the attorney-client privilege to confer with counsel regarding pending litigation, when discussion in open session would likely and unavoidably prejudice the position of the City in that litigation?

CONCLUSION

THE TASK FORCE FINDS THE FOLLOWING FACTS TO BE TRUE:

THE TASK FORCE FINDS THE ALLEGED VIOLATIONS TO BE **TRUE OR NOT TRUE.**

ATTACHED STATUTORY SECTION FROM CHAPTER 67 OF THE SAN FRANCISCO ADMINISTRATIVE CODE UNLESS OTHERWISE SPECIFIED

SEC. 67.7. AGENDA REQUIREMENTS; REGULAR MEETINGS.

(a) At least 72 hours before a regular meeting, a policy body shall post an agenda containing a meaningful description of each item of business to be transacted or discussed at the meeting. Agendas shall specify for each item of business the proposed action or a statement the item is for discussion only. In addition, a policy body shall post a current agenda on its Internet site at least 72 hours before a regular meeting.

(b) A description is meaningful if it is sufficiently clear and specific to alert a person of average intelligence and education whose interests are affected by the item that he or she may have reason to attend the meeting or seek more information on the item. The description should be brief, concise and written in plain, easily understood English. It shall refer to any explanatory documents that have been provided to the policy body in connection with an agenda item, such as correspondence or reports, and such documents shall be posted adjacent to the agenda or, if such documents are of more than one page in length, made available for public inspection and copying at a location indicated on the agenda during normal office hours.

MEMORANDUM

TO: Sunshine Task Force
DATE: April 25, 2011
PAGE: 5
RE: Complaint 11017: Picarello v. Chu

SEC. 67.8. AGENDA DISCLOSURES: CLOSED SESSIONS.

(a) In addition to the brief general description of items to be discussed or acted upon in open and public session, the agenda posted pursuant to Government Code Section 54954.2, any mailed notice given pursuant to Government Code Section 54954.1, and any call and notice delivered to the local media and posted pursuant to Government Code Section 54956 shall specify and disclose the nature of any closed sessions by providing all of the following information:

(1) With respect to a closed session held pursuant to Government Code Section 54956.7:
LICENSE/PERMIT DETERMINATION:

_____ applicant(s)

The space shall be used to specify the number of persons whose applications are to be reviewed.

(2) With respect to every item of business to be discussed in closed session pursuant to Government Code Section 54956.8:

CONFERENCE WITH REAL PROPERTY NEGOTIATOR

Property:

Person(s) negotiating:

Under negotiation:

Price: Terms of payment: Both: _____

The space under "Property" shall be used to list an address, including cross streets where applicable, or other description or name which permits a reasonably ready identification of each parcel or structure subject to negotiation. The space under "Person(s) negotiating" shall be used to identify the person or persons with whom negotiations concerning that property are in progress. The spaces under "Under negotiation" shall be checked off as applicable to indicate which issues are to be discussed.

(3) With respect to every item of business to be discussed in closed session pursuant to Government Code Section 54956.9, either:

CONFERENCE WITH LEGAL COUNSEL

Existing litigation:

_____ Unspecified to protect service of process

_____ Unspecified to protect settlement posture

or:

CONFERENCE WITH LEGAL COUNSEL

Anticipated litigation:

_____ As defendant _____ As plaintiff

The space under "Existing litigation" shall be used to specifically identify a case under discussion pursuant to subdivision (a) of Government Code Section 54956.9, including the

MEMORANDUM

TO: Sunshine Task Force
DATE: April 25, 2011
PAGE: 6
RE: Complaint 11017: Picarello v. Chu

case name, court, and case number, unless the identification would jeopardize the City's ability to effectuate service of process upon one or more unserved parties, in which instance the space in the next succeeding line shall be checked, or unless the identification would jeopardize the City's ability to conclude existing settlement negotiations to its advantage, in which instance the space in the next succeeding line shall be checked. If the closed session is called pursuant to subdivision (b) or (c) of Section 54956.9, the appropriate space shall be checked under "Anticipated litigation" to indicate the City's anticipated position as defendant or plaintiff respectively. If more than one instance of anticipated litigation is to be reviewed, space may be saved by entering the number of separate instances in the "As defendant" or "As plaintiff" spaces or both as appropriate.

(4) With respect to every item of business to be discussed in closed session pursuant to Government Code Section 54957, either:

SEC. 67.10. CLOSED SESSIONS: PERMITTED TOPICS.

A policy body may, but is not required to, hold closed sessions:

(d) Based on advice of its legal counsel, and on a motion and vote in open session to assert the attorney-client privilege, to confer with, or receive advice from, its legal counsel regarding pending litigation when discussion in open session concerning those matters would likely and unavoidably prejudice the position of the City in that litigation. Litigation shall be considered pending when any of the following circumstances exist:

(1) An adjudicatory proceeding before a court, administrative body exercising its adjudicatory authority, hearing officer, or arbitrator, to which the City is a party, has been initiated formally;



<complaints@sfgov.org>
03/10/2011 02:53 PM

To <soft@sfgov.org>
cc
bcc
Subject Sunshine Complaint

To:soft@sfgov.orgEmail:complaints@sfgov.orgDEPARTMENT:Budget and Finance
Committee
CONTACTED:Chairperson Carmen Chu
PUBLIC_RECORDS_VIOLATION:No
PUBLIC_MEETING_VIOLATION:Yes
MEETING_DATE:3-9-11
SECTIONS_VIOLATED:67.7, 67.8 and 67.10
DESCRIPTION:Agenda item # 7 was factually misleading. Agenda item heard in closed session
despite my objection. Agenda item concerned funding two city departments and not pending
settlement discussions.
HEARING:Yes
PRE-HEARING:No
DATE:3-10-11
NAME:Tomas Picarello
ADDRESS:
CITY:
ZIP:
PHONE:
CONTACT_EMAIL: [REDACTED]@yahoo.com
ANONYMOUS:
CONFIDENTIALITY_REQUESTED:Yes

Conference with City Attorney

*[Convene in Closed Session - Existing Litigation - City as Plaintiff and/or Defendant]
Motion that the Budget and Finance Sub-Committee of the Board of Supervisors convene in closed session with the City Attorney for the purpose of conferring with, or receiving advice from, the City Attorney regarding the following existing lawsuits and claims in which proposed settlements are being considered by the Committee. Administrative Code Section 67.10(d) permit this closed session. Discussion in open session concerning these matters would likely and unavoidably prejudice the position of the City in the pending lawsuits and claims listed below.*

7. 110154 **[Appropriating \$2,809,000 of General Fund Reserve - Fourth Street Bridge Project Litigation Expenses in FY2010-2011]**
Sponsor: Mayor
 Ordinance appropriating \$2,809,000 from the General Fund Reserve to the Department of Public Works for litigation expenses related to the Santa Clara Superior Court Case between Mitchell Engineering/Obayashi Corporation v. City and County of San Francisco for the Fourth Street Bridge Project in FY2010-2011.

(Fiscal Impact.)

2/8/11; RECEIVED AND ASSIGNED to the Budget and Finance Committee.

2/22/11; TRANSFERRED to the Budget and Finance Sub-Committee.

3/2/11; CONTINUED. Heard in Committee. Speakers: Andrew Shen (City Attorney); presented information concerning the matter and/or answered questions raised during the hearing.

Continued to March 9, 2011.

After a closed session, if one occurs, the Committee shall adopt a motion either to disclose or not to disclose.

[Elect To Disclose]

Motion that the Board finds it is in the public interest to disclose information discussed in closed session, and directs the Chair immediately to disclose that information.

[Elect Not to Disclose]

Motion that the Committee finds that it is in the best interest of the public that the Committee elect at this time not to disclose its closed session deliberations listed above.

ADJOURNMENT

April 5, 2011

Sunshine Ordinance Task Force
City Hall, Room
1 Dr. Carlton B. Goodlett Place
San Francisco, CA 94102

Re: Sunshine Complaint #11017

Dear Mr. Rustom:

Thank you for your March 25, 2011 email notifying us of Sunshine Complaint #11017.

From my understanding, the complaint filed by, Mr. Tomas Picarello, included the following: 1) that Agenda Item #7 on the Budget and Finance Sub-Committee meeting held on March 9, 2011 was factually misleading, 2) that the item was heard in closed session against the individual's objection and 3) the agenda item concerned funding of two city departments and not pending settlement discussions.

In response to the first issue, the City Attorney and the Clerk of the Board collectively drafts the summary language and noticing language on all Board's agendas. Even though our office is not directly involved with drafting the specific language to describe the legislation, it is important to note that the agenda indicated that a motion to convene in closed session would be considered and that the item being considered is connected to litigation.

In response to the second issue, public comment was considered on the motion to enter into closed session and Mr. Picarello's objection was noted as a part of the public record. However, upon the advice of the City Attorney and in accordance with the law, the Budget and Finance Sub-Committee did vote unanimously on the motion to convene in closed session on the item.

Finally, in response to the third issue, the funding proposed is tied directly to pending litigation. Upon the advice of the City Attorney, the Board considered the appropriateness of and voted for a motion to enter into closed session.

I thank you again for the opportunity to provide additional information to resolve this matter.

Sincerely,

Carmen Chu
District 4 Supervisors
San Francisco Board of Supervisors

