

Date: July 27, 2010

Item No. 14, 15

File No. 10027

SUNSHINE ORDINANCE TASK FORCE

AGENDA PACKET CONTENTS LIST*

- Barry Taranto against the MTA
-
-
-
-
-
-
-
-
-
-
-

Completed by: Chris Rustom

Date: July 22, 2010

***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

JANA CLARK
Deputy City Attorney

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**MEMORANDUM
PRIVILEGED AND CONFIDENTIAL**

TO: Sunshine Ordinance Task Force
FROM: Jana Clark
Deputy City Attorney
DATE: July 22, 2010
RE: Taranto v. Municipal Transit Authority (10027)

COMPLAINT

THE COMPLAINANT ALLEGES THE FOLLOWING:

Complainant Barry Taranto ("Complainant") alleges that the Municipal Transportation Authority Board of Directors ("MTA") violated the *Ralph M. Brown Act* at their June 1, 2010 meeting. Specifically, Complainant alleges that Director Malcom Heinicke asked Deputy Director Chris Hayashi to approach the podium to answer questions regarding the timeline for the taxi hearing notification, a topic Complainant alleges was not on the meeting agenda, and that this discussion lasted for more than five minutes.

COMPLAINANT FILES COMPLAINT:

On June 1, 2010, Complainant filed a complaint against the MTA for their alleged violations of public meetings laws, and, in particular, the *Ralph M. Brown Act*.

JURISDICTION:

The MTA is a City charter created policy body over which the Task Force has jurisdiction with regard to complaints regarding public meetings and, in particular, agenda requirements.

APPLICABLE STATUTORY SECTION(S):

Section 67 of the San Francisco Administrative Code:

- Section 67.3 defines a Policy Body.
- Section 67.7(c) governs the posting of agendas for public meetings of a Policy Body.
- Section 67.7(d) governs discussion on items not included on posted agendas.

**MEMORANDUM
PRIVILEGED & CONFIDENTIAL**

TO: Sunshine Ordinance Task Force
 DATE: July 22, 2010
 PAGE: 2
 RE: *Taranto v. Municipal Transit Authority (10027)*

APPLICABLE CASE LAW:

There are no agenda notice requirements under the *Ralph M. Brown Act* (Gov. Code §§ 54950 et. seq.), for a regular open meeting of a local agency. (*Torres v. Board of Commissioners (1979) 89 Cal.App.3d 545.*)

ISSUES TO BE DETERMINED:**FACTUAL ISSUES:****A. Uncontested Facts:**

On June 1, 2010, MTA held a public meeting. The agenda for the meeting posted on MTA's website does not include as an item for discussion the timeline for the taxi hearing notification. At the meeting, in response to concerns raised by the public regarding the timeline, Director Malcom Heinicke asked Deputy Director Christiane Hayashi several questions for clarification. Deputy Director Hayashi approached the podium and provided an explanation. The exchange between Director Heinicke and Deputy Director Hayashi went on for more than five minutes and is available for review in the SFGTV "Video on Demand" library (MTA).

B. Contested facts/ Facts in dispute:

Complainant alleges that the discussion between Director Heinicke and Deputy Director Hayashi was a discussion of an item not on the agenda in violation of the Ordinance and the *Brown Act*. MTA alleges that no other member of the MTA Board spoke and, therefore, there was no violation of the Ordinance.

QUESTIONS THAT MIGHT ASSIST IN DETERMINING FACTS:

Did anyone other than Deputy Director Hayashi discuss the timeline for the taxi hearing notification?

Is Deputy Director Hayashi considered a member of the policy body for purposes of the Ordinance?

Is Deputy Director Hayashi considered a staff person for purposes of the Ordinance?

Is the exchange or discussion between Director Heinicke and Deputy Director Hayashi properly construed as a response to statements made by the public or questions posed by persons exercising their right to public testimony?

If the exchange or discussion is considered a response to statements or questions posed by the public, is it properly construed as a series of questions seeking clarification?

**MEMORANDUM
PRIVILEGED & CONFIDENTIAL**

TO: Sunshine Ordinance Task Force
DATE: July 22, 2010
PAGE: 3
RE: *Taranto v. Municipal Transit Authority (10027)*

If the exchange or discussion is considered a response to statements or questions posed by the public, is it properly construed as providing a reference to staff or other resources for factual information?

If the exchange or discussion is considered a response to statements or questions posed by the public, is it properly construed as requesting a staff person to report at a subsequent meeting on the topic?

LEGAL ISSUES/LEGAL DETERMINATIONS:

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

SUGGESTED ANALYSIS

Under Section 67.7 of the Ordinance:

Determine whether section 67.7(d) of the Ordinance permitted Director Heinicke to ask Deputy Director Hayashi for clarification regarding the topic raised by public testimony, despite the fact that the topic was not listed on the posted agenda. In particular, determine if this is fairly construed as a discussion by the policy body or instead a response to statements made or questions posed by persons exercising their public testimony rights, to the extent of asking a question for clarification, providing a reference to staff or other resources for factual information, or requesting staff to report back to the body at a subsequent meeting concerning the matter raised by such testimony, as permitted by the Ordinance.

CONCLUSION:

THE TASK FORCE FINDS THE FOLLOWING FACTS TO BE TRUE:

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

**MEMORANDUM
PRIVILEGED & CONFIDENTIAL**

TO: Sunshine Ordinance Task Force
DATE: July 22, 2010
PAGE: 4
RE: *Taranto v. Municipal Transit Authority (10027)*

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

Section 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.

(c)

The agenda shall specify the time and location of the regular meeting and shall be posted in a location that is freely accessible to members of the public.

(d)

No action or discussion shall be undertaken on any item not appearing on the posted agenda, except that members of a policy body may respond to statements made or questions posed by persons exercising their public testimony rights, to the extent of asking a question for clarification, providing a reference to staff or other resources for factual information, or requesting staff to report back to the body at a subsequent meeting concerning the matter raised by such testimony.

(e)

Notwithstanding Subdivision (d), the policy body may take action on items of business not appearing on the posted agenda under any of the following conditions:

(1)

Upon a determination by a majority vote of the body that an accident, natural disaster or work force disruption poses a threat to public health and safety.

(2)

Upon a good faith, reasonable determination by a two-thirds vote of the body, or, if less than two-thirds of the members are present, a unanimous vote of those members present, that (A) the need to take immediate action on the item is so imperative as to threaten serious injury to the public interest if action were deferred to a subsequent special or regular meeting, or relates to a purely commendatory action, and (B) that the need for such action came to the attention of the body subsequent to the agenda being posted as specified in subdivision (a).

**MEMORANDUM
PRIVILEGED & CONFIDENTIAL**

TO: Sunshine Ordinance Task Force
DATE: July 22, 2010
PAGE: 5
RE: *Taranto v. Municipal Transit Authority (10027)*

(3)

The item was on an agenda posted pursuant to subdivision (a) for a prior meeting of the body occurring not more than five calendar days prior to the date action is taken on the item, and at the prior meeting the item was continued to the meeting at which action is being taken.

(f)

Each board and commission enumerated in the Charter shall ensure that agendas for regular and special meetings are made available to speech and hearing impaired persons through telecommunications devices for the deaf, telecommunications relay services or equivalent systems, and, upon request, to sight impaired persons through Braille or enlarged type.

(g)

Each policy body shall ensure that notices and agendas for regular and special meetings shall include the following notice:

KNOW YOUR RIGHTS UNDER THE SUNSHINE ORDINANCE (Chapter 67 of the San Francisco Administrative Code)

Government's duty is to serve the public, reaching its decisions in full view of the public.

Commissions, boards, councils and other agencies of the City and County exist to conduct the people's business. This ordinance assures that deliberations are conducted before the people and that City operations are open to the people's review.

FOR MORE INFORMATION ON YOUR RIGHTS UNDER THE SUNSHINE ORDINANCE OR TO REPORT A VIOLATION OF THE ORDINANCE, CONTACT THE SUNSHINE ORDINANCE TASK FORCE.

(h)

Each agenda of a policy body covered by this Sunshine Ordinance shall include the address, area code and phone number, fax number, e-mail address, and a contact person's name for the Sunshine Ordinance Task Force. Information on how to obtain a free copy of the Sunshine Ordinance shall be included on each agenda.

THE CALIFORNIA CONSTITUTION AS AMENDED BY PROPOSITION 59 IN 2004 PROVIDES FOR OPENNESS IN GOVERNMENT.

Article I Section 3 provides:

a) The people have the right to instruct their representative, petition government for redress of grievances, and assemble freely to consult for the common good.

b)(1) The people have the right of access to information concerning the conduct of the people's business, and therefore, the meetings of public bodies and the writings of public officials and agencies shall be open to public scrutiny.

2) A statute, court rule, or other authority, including those in effect on the effective date of this subdivision that limits the right of access shall be adopted with findings demonstrating the interest protect by the limitation and the need for protecting that interest.

**MEMORANDUM
PRIVILEGED & CONFIDENTIAL**

TO: Sunshine Ordinance Task Force
DATE: July 22, 2010
PAGE: 6
RE: *Taranto v. Municipal Transit Authority (10027)*

3) Nothing in this subdivision supersedes or modifies the right of privacy guaranteed by Section 1 or affects the construction of any statute, court rule, or other authority to the extent that it protects that right to privacy, including any statutory procedures governing discovery or disclosure of information concerning the official performance or professional qualifications of a peace officer.

4) Nothing in this subdivision supersedes or modifies any provision of this Constitution, including the guarantees that person may not be deprived of life, liberty, or property without due process of law, or denied equal protection of the laws, as provided by Section 7.

5) This subdivision does not repeal or nullify, expressly or by implication, any constitutional or statutory exception to the right of access to public records or meetings or public bodies that is in effect on the effective date of this subdivision, including, but not limited to, any statute protecting the confidentiality of law enforcement and prosecution records.

6) Nothing in this subdivision repeals, nullifies, supersedes, or modifies protections for the confidentiality of proceedings and records of the Legislature, the Members of the Legislature, and its employees, committee, and caucuses provided by Section 7 of Article IV, state law, or legislative rules adopted in furtherance of those provisions: nor does it affect the scope of permitted discovery in judicial or administrative proceedings regarding deliberations of the Legislature, the Members of the Legislature, and its employees, committees, and caucuses.

Government Code section 54953, known as the *Ralph M. Brown Act*, governs public access to meetings:

(a) All meetings of the legislative body of a local agency shall be open and public, and all persons shall be permitted to attend any meeting of the legislative body of a local agency, except as otherwise provided in this chapter.

(b)

(1) Notwithstanding any other provision of law, the legislative body of a local agency may use teleconferencing for the benefit of the public and the legislative body of a local agency in connection with any meeting or proceeding authorized by law. The teleconferenced meeting or proceeding shall comply with all requirements of this chapter and all otherwise applicable provisions of law relating to a specific type of meeting or proceeding.

(2) Teleconferencing, as authorized by this section, may be used for all purposes in connection with any meeting within the subject matter jurisdiction of the legislative body. All votes taken during a teleconferenced meeting shall be by roll call.

(3) If the legislative body of a local agency elects to use teleconferencing, it shall post agendas

**MEMORANDUM
PRIVILEGED & CONFIDENTIAL**

TO: Sunshine Ordinance Task Force
DATE: July 22, 2010
PAGE: 7
RE: *Taranto v. Municipal Transit Authority (10027)*

at all teleconference locations and conduct teleconference meetings in a manner that protects the statutory and constitutional rights of the parties or the public appearing before the legislative body of a local agency. Each teleconference location shall be identified in the notice and agenda of the meeting or proceeding, and each teleconference location shall be accessible to the public. During the teleconference, at least a quorum of the members of the legislative body shall participate from locations within the boundaries of the territory over which the local agency exercises jurisdiction, except as provided in subdivision (d). The agenda shall provide an opportunity for members of the public to address the legislative body directly pursuant to Section 54954.3 at each teleconference location.

(4) For the purposes of this section, "teleconference" means a meeting of a legislative body, the members of which are in different locations, connected by electronic means, through either audio or video, or both. Nothing in this section shall prohibit a local agency from providing the public with additional teleconference locations.

(c) No legislative body shall take action by secret ballot, whether preliminary or final.

(d) (Effective until January 1, 2009)

(1) Notwithstanding the provisions relating to a quorum in paragraph (3) of subdivision (b), when a health authority conducts a teleconference meeting, members who are outside the jurisdiction of the authority may be counted toward the establishment of a quorum when participating in the teleconference if at least 50 percent of the number of members that would establish a quorum are present within the boundaries of the territory over which the authority exercises jurisdiction, and the health authority provides a teleconference number, and associated access codes, if any, that allows any person to call in to participate in the meeting and that number and access codes are identified in the notice and agenda of the meeting.

(2) Nothing in this subdivision shall be construed as discouraging health authority members from regularly meeting at a common physical site within the jurisdiction of the authority or from using teleconference locations within or near the jurisdiction of the authority. A teleconference meeting for which a quorum is established pursuant to this subdivision shall be subject to all other requirements of this section.

(3) For purposes of this subdivision, a health authority means any entity created pursuant to Sections 14018.7, 14087.31, 14087.35, 14087.36, 14087.38, and 14087.9605 of the Welfare and Institutions Code, any joint powers authority created pursuant to Article 1 (commencing with Section 6500) of Chapter 5 of Division 7 for the purpose of contracting pursuant to Section 14087.3 of the Welfare and Institutions Code, and any advisory committee to a county sponsored health plan licensed pursuant to Chapter 2.2 (commencing with Section 1340) of Division 2 of the Health and Safety Code if the advisory committee has 12 or more members.

(4) This subdivision shall remain in effect only until January 1, 2009.



SUNSHINE ORDINANCE TASK FORCE

1 Dr. Carlton B. Goodlett Place, Room 244, San Francisco CA 94102

Tel. (415) 554-7724; Fax (415) 554-7854

http://www.sfgov.org/sunshine

SUNSHINE ORDINANCE COMPLAINT

Complaint against which Department or Commission Municipal Transportation Agency Board of Directors

Name of individual contacted at Department or Commission Chairman Tom Nolan

Alleged violation public records access
 Alleged violation of public meeting. Date of meeting Tuesday, June 1, 2010

Sunshine Ordinance Section Ralph M. Brown Act
(If known, please cite specific provision(s) being violated)

Please describe alleged violation. Use additional paper if needed. Please attach any relevant documentation supporting your complaint.

During Public Comment at the SFMTA Board Meeting on June 1, several individuals expressed concern about the timeline for taxi hearing notification. Director Malcolm Heinicke then asked Chris Hayashi to approach the podium to answer some questions. This topic was not listed on the meeting agenda. The discussion went on for more than five minutes without a chance for public response or the deputy city attorney calling to place item on future agenda.

Do you want a public hearing before the Sunshine Ordinance Task Force? yes no
Do you also want a pre-hearing conference before the Complaint Committee? yes no

(Optional)¹
Name BARRY TARANTO Address 1068A Los Gatos Rd. San Rafael, CA 94903-2572
Telephone No. 415-479-4479 E-Mail Address barryto@pacbell.net
Date June 1, 2010 Barry K. Taranto Signature

I request confidentiality of my personal information. yes no

¹ NOTICE: PERSONAL INFORMATION THAT YOU PROVIDE MAY BE SUBJECT TO DISCLOSURE UNDER THE CALIFORNIA PUBLIC RECORDS ACT AND THE SUNSHINE ORDINANCE, EXCEPT WHEN CONFIDENTIALITY IS SPECIFICALLY REQUESTED. YOU MAY LIST YOUR BUSINESS/OFFICE ADDRESS, TELEPHONE NUMBER AND E-MAIL ADDRESS IN LIEU OF YOUR HOME ADDRESS OR OTHER PERSONAL CONTACT INFORMATION. Complainants can be anonymous as long as the complainant provides a reliable means of contact with the SOTF (Phone number, fax number, or e-mail address).

Gavin Newsom | Mayor

Tom Nolan | Chairman

Jerry Lee | Vice-Chairman

Cameron Beach | Director

Malcolm Heinicke | Director

Bruce Oka | Director

Nathaniel P. Ford Sr. | Executive Director/CEO

June 7, 2010

Mr. Rick Knee
Chairman, Sunshine Ordinance Task Force
City Hall, Room 244
1 Dr. Carlton B. Goodlett Place
San Francisco, CA 94102

Re: Complaint against the Municipal Transportation Agency
Complaint No. #10027

Dear Mr. Knee:

I am writing in response to Complaint No. #10027 filed by Mr. Taranto on June 1, 2010. His complaint states:

“During public comment at the SFMTA Board meeting on June 1, several individuals expressed concern about the timeline for taxi hearing notification. Director Malcolm Heinicke then asked Chris Hayashi to approach the podium to answer some questions. This topic was not listed on the meeting agenda. The discussion went on for more than five minutes without a chance for public response or the deputy city attorney calling to place item (sic) on a future agenda.”

Admin. Code 67.7 (d) states “No action or discussion shall be undertaken on any item not appearing on the posted agenda, except that members of a policy body may respond to statements made or questions posed by persons exercising their public testimony rights, to the extent of asking a question for clarification, providing a reference to staff or other resources for factual information, or requesting staff to report back to the body at a subsequent meeting concerning the matter raised by such testimony.”

The exchange between Director Heinicke and Deputy Director Christiane Hayashi is available for review in the SFGTV “Video on Demand” library. The exchange occurs approximately one hour into the meeting, at the conclusion of public comment.

As the video shows, in response to concerns expressed by members of the public, Director Heinicke asked several questions for clarification to which Ms. Hayashi provided an explanation. The video will show that no other member of the SFMTA Board of Directors spoke and therefore there was no discussion of the item by the policy body.

Page. 2

Because, pursuant to the Admin. Code cited above, Director Heinicke has the right to ask questions for clarification and because there was no discussion of the matter by the policy body, I respectfully disagree with Mr. Taranto that a violation took place.

Sincerely,

A handwritten signature in black ink that reads "R. Boomer". The signature is written in a cursive style with a large, stylized initial "R".

Roberta Boomer
Secretary, SFMTA Board of Directors

cc: Barry Taranto
SFMTA Board of Directors

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