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March 19, 2004

REPORT TO THE HONORABLE  
MAYOR AND CITY COUNCIL

PROPOSED TEMPORARY RULE OF THE CITY COUNCIL  
FOR NOTICING AND CONDUCT OF CLOSED SESSIONS

**INTRODUCTION**

At the regular meeting of the City Council on March 15, 2004, the Council considered the matter of compliance with the California Open Meeting Law, commonly known as the Brown Act (Cal. Gov't Code §§ 54950 – 54963), and the noticing of matters for open and closed sessions of the San Diego City Council [City Council]. Specifically, the City Council considered recommendations contained in a Report from Deputy Mayor Atkins and Councilmember Frye dated March 15, 2004. The City Council gave direction at the aforementioned meeting to the City Attorney to prepare for the regular meeting of the City Council on March 22, 2004, all necessary documents for the City Council to adopt and/or procedurally implement the recommendations contained in the Report from Deputy Mayor Atkins and Councilmember Frye. The City Council gave further direction to the City Attorney to analyze and comment upon the recommendations contained in the Report from Deputy Mayor Atkins and Councilmember Frye.

**PROCESS FOR IMPLEMENTING RECOMMENDED CHANGES**

San Diego Charter section 13 addresses the topic of “Meetings of the Council” and provides that meetings of the Council shall be held “in accordance with a rule adopted by the Council which may be amended at any time.” The City Council has established Permanent Rules of the City Council, codified at San Diego Municipal Code section 22.0101, which address the procedures to be followed for conducting meetings of the City Council. Rule 33 of the Permanent Rules provides that: (1) no permanent rule of the Council shall be amended except by ordinance adopted by the City Council; and (2) no such ordinance shall be considered by the Council until it shall have been referred to the Rules Committee. Rule 31 of the Permanent Rules provides that the Rules Committee may, at any time, place on the Adoption Agenda a resolution establishing a temporary rule.

In consideration of the above, the legal, proper, and most expeditious method to implement changes in the noticing and conduct of closed sessions is for the City Council to approve a temporary rule of the City Council. Pursuant to the direction of the City Council, the City Attorney has prepared and docketed a resolution for the City Council to consider adoption of a temporary rule. A proposed temporary rule [Atkins/Frye Proposed Rule] has been created to implement the concepts contained in the Report from Deputy Mayor Atkins and Councilmember Frye dated March 15, 2004.

The balance of this Report is dedicated to the City Attorney's analysis of the Atkins/Frye Proposed Rule and includes alternative provisions to that proposal. Attached to this Report is an Alternative Temporary Rule (dated March 17, 2004) of the rule that incorporates modifications recommended by the City Attorney.

The City Council is free to adopt, in whole or in part, the Atkins/Frye Proposed Rule, the Alternative Temporary Rule, or any combination thereof. The City Council may also direct consideration of some or all of the proposed temporary rule to the Rules Committee for further analysis and consideration. Finally, the City Council may maintain current practices with regard to compliance with the Brown Act and decline to adopt any portion of the temporary rule. The version of the rule ultimately approved by the City Council shall be attached and incorporated by reference into the applicable Resolution.

### **ISSUES AND RECOMMENDED CHANGES**

**1. Responsibility for Preparing Closed Session Docket**

The current practice is for the City Attorney to prepare the closed session docket. The Atkins/Frye Proposed Rule is silent on the issue. It is recommended that the City Attorney, in coordination with the City Clerk, be responsible for preparation of the closed session agenda in accordance with the City Council's temporary rule.

**2. Separate Closed Session Agenda or Closed Session Agenda Merged Into Regular Meeting Docket**

The current practice is for the closed session agenda to be published separately from the Regular Meeting Docket. The practice has been to publish the closed session docket on a Friday prior to a Tuesday closed session to meet the 72 hour notice requirement of the Brown Act. The Atkins/Frye Proposed Rule calls for the closed session agenda to be merged into the regular meeting docket for the City Council. This presents a timing problem because the regular docket of the City Council is typically sent to the printer for publication on a Monday, one week before the meeting to which it applies. Matters necessary for closed session discussion often arise late in the week immediately prior to a closed session,

however, making compliance with the Monday deadline impossible. In addition, the City Council meets in closed session on Tuesdays and often cannot get through all of the business on the closed session docket. It is often necessary, therefore, to re-notice closed session matters for the following week. Re-noticing on Tuesday, however, obviously causes the Monday printing deadline to be missed.

As a compromise that will allow more flexibility but meet the intent of the Atkins/Frye Proposed Rule, the closed session docket could be separate and distinct from the City Council's regular meeting agenda, but made available to the public and distributed concurrent with the regular meeting agenda of the City Council at 10:00 a.m. on Wednesday. As with matters appearing on the regular council docket, from time to time, it may be necessary to publish a Closed Session Supplemental Agenda. Any such Closed Session Supplemental Agenda should be made available to the public and distributed in the same manner as the supplemental agenda for any regular or special meeting of the City Council.

3. Procedures for Public Input and Council Debate in Open Session

The subjects properly noticed and discussed in closed session are confidential and as the Councilmembers are well aware, the disclosure of confidential information is itself a violation of the Brown Act, carrying with it potential criminal enforcement and penalties. Disclosure of confidential information is also a violation of the City's Ethics Ordinance, subject to enforcement by the City's Ethics Commission. Finally, discussion of closed session matters in open session carries with it the very real risk that any applicable attorney-client privilege is waived as to the entire matter, a fact of which litigation opponents and negotiating adversaries will be aware. For these reasons, and to ensure that the attorney-client privilege, litigation, bargaining, and privacy rights of individuals are not compromised, careful consideration must be taken to develop very specific rules and guidelines for the discussion of closed session matters in open session.

In recognition of this point, the Atkins/Frye Proposed Rule provides that "discussion and deliberation of closed session matters in open session shall be confined to matters already on the public record or otherwise known to the parties to litigation or bargaining adversary." It is our opinion, however, that this standard is too ambiguous and is subject to varied interpretations. We recommend, therefore, that very specific rules and guidelines be developed for public comment and open session discussion of matters on the closed session agenda. This will facilitate implementation of the rule and be of benefit to both the Council and the public. The City Attorney also recommends that the closed session agenda be developed with specific categories of closed session items.

Additionally, many litigation and other closed session matters are in the nature of ongoing disputes and controversies. To avoid repeated debates over the propriety of convening into closed session on an ongoing matter, it is recommended that these actions be classified into “new business” and “old business.” Should the Council desire to re-examine the propriety of continuing to meet in closed session on a matter of “old business,” direction may be given to the City Attorney in closed session to place the matter on a future open session agenda as a debatable matter.

#### 4 Transcriptions of Closed Sessions

Recordation or transcription of closed session proceedings is not required under the Brown Act. Any record of closed session is, as a matter of law, confidential and not a public record. The minutes or a transcription of any closed session may only be disclosed by a court order or a validly issued subpoena from a court or a state, federal, or local enforcement agency. Such a subpoena could be made at the request of a member of the public involved in litigation with the City or from a federal, state, or local enforcement agency investigating the City or a City Official.

The Atkins/Frye Proposed Rule calls for the transcription of all closed sessions by a reporter from the City Clerk’s Office or other similar reporter. The stated rationale is to bolster public confidence and to facilitate the availability of this confidential information for individuals or governmental entities interested in investigating or initiating enforcement actions against the City.

The decision regarding whether to obtain a transcript of closed session proceedings is a policy matter for the Mayor and City Council. In the event that the Mayor and City Council decide to have all closed session discussions preserved in writing and made available for litigation from third parties, the City Attorney recommends that the proceedings be recorded by a certified court reporter employed by a private court reporting service. The City Clerk does not have staff qualified to transcribe closed sessions.

#### 5. Litigation Log

The Atkins/Frye Proposed Rule calls for the City Clerk to provide the Mayor and City Council with a weekly listing of litigation filed against or by the City and its agencies. Although the City Clerk accepts service of process for the City when the City is sued, the City Clerk does not accept service of process for City employees specifically named in complaints, nor City agencies, and is not necessarily aware of civil actions filed on behalf of the City by the City Attorney. For these reasons, and because San Diego Charter section 40 imposes a duty upon the City Attorney to “preserve in the City Attorney’s office a docket of all cases in which the City is

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interested in any of the courts and keep a record of all proceedings of said cases,”  
it is recommended that the Litigation Log made available for the Mayor, City  
Council, and public be managed and distributed by the City Attorney.

Respectfully submitted,

CASEY GWINN  
City Attorney

RAD:sr:jb  
Attachments  
RC-2004-8