

CITY AND COUNTY OF SAN FRANCISCO



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MEMORANDUM

TO: Hon. Members of the Civil Service Commission
Sandra Eng, Executive Officer for the Civil Service Commission

CC: Carol Isen, Human Resources Director

FROM: Kate G. Kimberlin *Kate Kimberlin*
Deputy City Attorney

DATE: October 24, 2024

RE: Closed Sessions to Consider Individual Personnel Matters

INTRODUCTION

The Civil Service Commission has for many years held proceedings involving peace officers in closed session as required by state law, but it has more rarely exercised its authority to consider other personnel matters in closed session. The Commission has asked for legal advice on what other types of employment-related proceedings the Commission may consider in closed session.

QUESTIONS PRESENTED AND SHORT ANSWERS

1) May the Civil Service Commission consider employment-related matters in closed session?

Yes, the Commission may consider an employment-related matter in closed session if: (1) the matter involves an action regarding the employment of a specific applicant or employee; and (2) the Commission's decision could impact that individual applicant's or employee's employment with the City. The Commission may discuss the matter in closed session even if it does not have an ultimate decision-making role as to the applicant's or employee's hiring, termination, discipline, or terms of employment. But, the Commission's decision must play an official role in the employment-related decision.

2) What types of employment matters may the Commission hold in closed session?

The Commission may, but is not required to, hear in closed session appeals from the Human Resource Director's decisions regarding: (1) individual applications for employment, such as those related to the City's rescission of a conditional offer based on the outcome of a conviction history or other background check, or exclusion of an applicant from an exam due to failure to meet the minimum qualifications; and (2) individual separations from City employment, including appeals challenging a department's decision to designate a resigning employee's services unsatisfactory or the imposition of future employment restrictions.

Additionally, depending on the circumstances of the appeal, the Commission may hold in closed session some appeals from decisions of the Human Resources Director regarding violations of the City's Equal Employment Opportunity ("EEO") Policy. Given the case-by-case nature of this evaluation, we recommend the Commission consult in advance with the City Attorney's Office regarding whether or when to hold such appeals in closed session.

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3) What factors should the Commission consider in deciding whether to hold a closed session discussion?

While the Commission is not required to hold individual personnel matters in closed session even when there is a legal basis to do so, in deciding whether to hold a closed session it may choose to consider a variety of factors, including whether: (1) the matter involves facts that raise special privacy concerns, such as health or safety information about particular employees; (2) the facts or the resolution of the appeal are of concern to the public; and (3) the employees involved are high-level and have a low expectation of privacy. The Commission may wish to establish criteria under which it will consider holding a closed session for individual personnel matters.

LEGAL ANALYSIS

I. The Brown Act and Sunshine Ordinance Authorize, but Place Certain Limits on, the Commission's Authority to Consider Personnel Matters in Closed Session

The meetings of the Commission, like those of other San Francisco policy bodies, are governed by both the Ralph M. Brown Act (Cal. Gov. Code §§ 54950 *et seq.*) ("Brown Act") and the San Francisco Sunshine Ordinance (Admin. Code §§ 67.1 *et seq.*) ("Sunshine Ordinance"). Both laws allow the Commission to hold closed sessions regarding individual personnel matters. But this authority may only be exercised within limits:

- The Commission may consider only specified types of personnel matters in closed session;
- Those matters must involve individual personnel matters rather than general discussion of an issue, formulation of a policy, or implementation of a program; and
- Those matters must be within the authority of the Commission to consider.

In addition to these three basic limits on the scope of personnel closed sessions, several other general rules apply to the Commission's authority to hold such closed sessions:

- If the personnel matter involves a peace officer, the peace officer has a right to have the hearing held in closed session.
- Except in cases involving a peace officer, the Commission is not required to hold a closed session. That decision is within the Commission's discretion where, as described in this memorandum, there is a legal basis to do so for an individual personnel matter. There may be instances based on particular circumstances where it is legally advisable to hold a closed session.
- The Commission may consider a personnel action partially in closed session and partially in open session.
- If the Commission takes an action in closed session that affects the employment status of any individual employee, it must disclose that action and the vote taken on the action immediately upon returning to open session.

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We discuss these legal principles in greater depth below.

A. Personnel Closed Sessions are Limited to Consideration of Certain Subjects

The Brown Act authorizes policy bodies, during a regular or special meeting, to hold closed sessions “to consider the *appointment, employment, evaluation of performance, discipline, or dismissal* of a public employee.” (Cal. Gov. Code § 54957(b)(1) (emphasis added); *Bell v. Vista Unified School Dist.* (2000) 82 Cal.App.4th 672, 682.) The parallel Sunshine Ordinance provision covers the same range of subjects; though it excludes “discipline” we have advised that the Ordinance implicitly allows a closed session to consider or impose discipline. (Admin. Code § 67.10(b).)

1. Personnel Closed Session Subjects Must Involve Individual Personnel Matters

The specific matters that may be considered in a “personnel” closed session must have an individualized focus. The text of both the Brown Act and Sunshine Ordinance compel this conclusion. The closed session is “to consider the appointment [etc.] of a *public employee*,” in the words of the Brown Act, or “*a City employee*,” in the words of the Sunshine Ordinance. (Cal. Gov. Code § 54957(b)(1) (emphasis added); Admin. Code § 67.10(b) (emphasis added).)

Further, the reasons the law permits such closed sessions are rooted in its individualized focus. As courts have often stated, “The purposes of the personnel exception are (1) to protect employees from public embarrassment and (2) to permit free and candid discussions of personnel matters by a local governmental body.” (*Fischer v. Los Angeles Unified School District* (1999) 70 Cal.App.4th 87, 96; see *Bollinger v. San Diego Civil Service Commission* (1999) 71 Cal.App.4th 568, 573.)

2. The Scope of Individual Personnel Matters Appropriate for Closed Session is Potentially Broad

The Brown Act and Sunshine Ordinance allow a policy body to hear in closed session only those matters concerning personnel actions involving the “*appointment, employment, evaluation of performance, discipline, or dismissal*” of an employee. (Admin. Code § 67.10(b); Gov. Code § 54957(b).)

While the terms “*appointment*,” “*evaluation of performance*,” “*discipline*,” and “*dismissal*” refer to relatively discrete personnel actions, the addition of the term “*employment*” to “the personnel exception was designed to permit candid discussion in closed session about the majority of personnel issues.” (*Travis v. Bd. of Trustees* (2008) 161 Cal.App.4th 335, 344.) The Court’s decision in *Travis* confirmed a number of prior California Attorney General opinions that sought to clarify the permissible scope of a closed session under the personnel exception. Among the subjects permitted in closed session are:

- Whether to grant tenure to a probationary employee (see Opinion No. 95-207, 78 Ops. Cal. Atty. Gen. 218 (July 25, 1995));
- Discussions of a particular employee’s “work load” (see Opinion 79-1207, 63 Ops. Cal. Atty. Gen. 153 (Feb. 26, 1980));

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- Discussion of an employee's retirement benefits, particularly when that discussion includes a review of medical records (*see* Opinion No. 82-505, 65 Ops. Cal. Atty. Gen. 412 (June 24, 1982)); and
- Discussions of confidential personnel records and "the actions which they memorialize" (*see* Opinion No. 82-505, 65 Ops. Cal. Atty. Gen. 412 (June 24, 1982)).

This is not an exhaustive list of subjects that may fall within the meaning of the term "employment," and these examples do not specifically describe the types of matters the Commission regularly considers. But the examples demonstrate that the term is broad enough to encompass nearly any individual action involving current or former individual employees of the City.

B. Closed Sessions Regarding Individual Personnel Matters May Extend Only to Decisions the Policy Body is Authorized to Consider

The policy body also must have authority to consider the particular personnel action that is the subject of the closed session. The Sunshine Ordinance contains language to that effect, permitting personnel closed sessions only where "*the policy body has the authority* to appoint, employ, or dismiss the employee." (Admin. Code § 67.10(b) (emphasis added).) The Brown Act does not expressly contain similar language, but it nonetheless embraces the principle that the policy body must have an official role vis-à-vis the personnel action at issue.

In *Gillespie v. San Francisco Public Library* (1998) 67 Cal.App.4th 1165, the Court answered the question of what it means to have "authority" over a particular employment decision under the Sunshine Ordinance and Brown Act. There, the Court ruled that the San Francisco Library Commission had authority to hold closed session discussions about which candidates it would recommend to the Mayor for appointment to the position of City Librarian. Even though the Mayor, not the Commission, had the ultimate authority to appoint the City Librarian, the Court held that a policy body may consider a matter in closed session so long as the body has some shared role in the personnel action in question. (*Id.* at 1171.) That the Charter required the Mayor to choose one of the Commission's nominees was, the Court held, sufficient to allow the Commission to consider the candidates for appointment in closed session. (*Id.*)

Construing the Brown Act, the Attorney General has taken a similar view. In Opinion No. 97-414, 80 Ops. Cal. Atty. Gen. 308 (Nov. 10, 1997) – which the court in *Gillespie* cited with approval (67 Cal.App.4th at 1172-73) – the Attorney General analyzed whether a committee of stakeholders formed by a school board to interview candidates and make a recommendation to the school board to fill the position of superintendent, could hold its meetings in closed session. The committee had no authority to appoint the superintendent, and the school board had no legal obligation to form the committee or to follow its recommendation. Nevertheless, the Attorney General concluded that the committee could perform its work in closed session:

[A]s long as the purposes of [the Brown Act] are served, we believe that its provisions extend to committees that are duly constituted and

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performing properly delegated duties that would otherwise be covered by the statutory language.

(80 Ops. Cal. Atty. Gen. 308.) The Attorney General supported this conclusion by reference to the purposes served by personnel closed sessions: “Such closure allows the [committee] members to candidly question the candidates as to their qualifications and to freely discuss each’s qualifications without subjecting the candidates to public embarrassment.” (*Id.*)

Thus, a San Francisco policy body may consider a personnel action in closed session if: (1) the matter involves an individualized action regarding the appointment, employment, evaluation of performance, discipline, or dismissal of an applicant or employee; and (2) that body has an official role – even if not, ultimately, a decision-making role – in the action.

II. The Commission May Meet in Closed Session to Discuss Individualized Personnel Actions in Which it has an Official Role

The Commission’s authority is established by the Charter, and includes the broad “power to inquire into the operation of the civil service merit system” and thereafter “direct the Human Resources Director to take such action as the Commission believes necessary to carry out the civil service provisions of [the] Charter.” (S.F. Charter § 10.101.) The Commission is further empowered to “hear appeals from an action of the Human Resources Director” regarding “[a]llegations of discrimination.” (*Id.*) The Commission’s decisions “regarding allegations of discrimination shall forthwith be enforced by every officer and employee.” (*Id.*)

Under its Charter authority, the Commission routinely hears appeals not only regarding discrimination, but also from individuals challenging personnel decisions of the Human Resources Director to: (1) rescind a conditional offer based on the outcome of a conviction history review, (2) exclude an applicant from an examination due to failure to meet the minimum qualifications; (3) deem a resigning employee’s services unsatisfactory, or (4) impose a ban on future employment. In addition to appeals, the Commission is responsible for certain individual personnel matters for its Executive Officer and the City’s Human Resources Director.

We address below each of these types of personnel matters and the Commission’s authority to consider them in closed session. Although we refer to the rules contained in Volume I of the Rules of the Commission – applicable to employees other than the uniformed ranks of the Police and Fire Departments and service critical employees of the San Francisco Municipal Transportation Authority – Volumes II, III, and IV contain analogous rules, respectively, for those groups of employees. The advice in this memorandum therefore applies all City employees other than peace officers, who uniquely have additional confidentiality protections under the Penal Code, as noted in section IV.B below.

A. Appeals Related to Applications for Hire or Promotion

The Commission routinely hears appeals from individuals who object to DHR’s decisions concerning applications for employment, including applications by existing employees for alternate or promotive positions within the City. The most common types of appeals are those related to the City’s rescission of a conditional offer based on the outcome of a conviction

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history or other background check or the exclusion of an applicant from an exam due to failure to meet the minimum qualifications.

In appeals from DHR's decisions regarding applications for employment, appellants are seeking the Commission's reversal of a decision that directly affects their individual right to work for or in a particular position within the City. The Commission may therefore permissibly hold those appeals in closed session because they involve an individualized action regarding the "appointment" of an employee, and the Commission has an official role in that personnel action.

B. Appeals Relating to the Separation Process and that May Impact Qualification for Future Employment

The Commission has the power to resolve appeals by former City employees in connection with their separation from City employment where the decision may impact the employee's qualification for future employment, either within or outside the City. The most common post-separation appeals challenge the imposition of future employment restrictions or designation of services unsatisfactory. Under the Commission's rules, it is authorized to take any action it "deems just" as to the appellant's future employment, including remanding the matter to the appointing officer for reconsideration. (See CSC Rule 122.9.5.)

As with appeals related to the application process, appeals regarding a particular employee's separation from the City are individual personnel actions relating to a subject enumerated in the Brown Act and Sunshine Ordinance (i.e., "dismissal"), and in which the Commission has an official role. The Commission may therefore choose to hold these types of appeals in closed session.

C. Appeals Concerning the City's Equal Employment Opportunity Policy

The Commission also hears appeals concerning alleged violations of the City's EEO policy. These appeals relate exclusively to individual complaints of discrimination or harassment, not to the Human Resources Director's authority over broader EEO-related policies and procedures. Unlike the categories discussed above where the Commission clearly has authority to choose to meet in closed session, the answer to whether the Commission may consider EEO-related appeals in closed sessions depends on the circumstances of the specific case. The Commission should consult with our Office in advance to determine whether it may be appropriate to hold these matters in closed session.

The Charter grants the Commission authority to make decisions regarding EEO matters concerning individual employees, which satisfies the first of the two-prong inquiry summarized above. The second, and more difficult question as to EEO matters, is whether the Commission has authority to make a decision that will impact an individual applicant's or employee's employment with the City – i.e., their hiring, discipline, termination, employment evaluation, or other terms of employment. The answer to this question ultimately turns on whether the Commission may issue a decision in the appeal that impacts the applicant's or employee's employment with the City. The scope of the appeal and the remedy sought in each case therefore dictate whether the Commission may hold a particular matter in closed session.

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The complaints the Commission hears sometimes relate to and impact the employment of applicants or employees who file the appeals and sometimes relate to and impact the employment of other applicants or employees. For example, the appellant may allege they were the subject of discrimination or retaliation resulting in an adverse employment action (e.g., denial of overtime, lost promotional opportunity, or termination). Or, they may make allegations against another employee that lead the Commission to conclude the other employee violated the City's EEO policies. Or, the appellant may allege that their working conditions have been adversely impacted by alleged discriminatory or harassing conduct. Thus, based on the facts of the particular appeal, the Commission may need to consider facts relevant to an individual personnel action and craft a remedy that impacts the employment of one or more applicants or employees. In such situations, it would generally be permissible for the Commission to go into closed session.

Where an appellant seeks to challenge DHR's findings on their EEO complaint regarding the conduct of other City employees, the Commission should balance the privacy rights of the non-appellant employee(s) with the rights of the appellant and the public's interest in open proceedings. In cases where an appellant is challenging DHR's decision not to investigate a complaint, the privacy interests of the alleged discriminator may, in some cases, be minimal and the Commission could address privacy concerns by redacting the employee's name and other potentially identifying information from materials submitted to the Commission. In other instances, the privacy rights of other non-parties – such as witnesses interviewed in the course of an EEO investigation – may warrant additional protection. Because these concerns are highly fact-dependent, we urge the Commission to continue to consult with our Office in advance on a case-by-case basis.

D. The Commission May be Required to Disclose Action Taken in Closed Session and Must Vote Whether to Disclose Discussions Held During Closed Session

Where the Commission does take an action in closed session that "affect[s] the employment status" of an individual City employee or applicant, it must, upon return to open session, immediately disclose the action taken as well as the vote of every Commissioner. (Cal. Gov. Code § 54957.1(a)(5).) For example, if the Commission acts to remove a future employment restriction for an employee, the Commission must disclose that action and its vote as soon as it returns to open session. Conversely, the Commission's decision to deny an EEO-related appeal may not affect any particular employee's status with the City and the Commission may therefore choose, but is not required, to disclose its action or vote.

Upon return to open session, the Commission is also required, by motion and vote, to decide whether to disclose any or all of its discussion on each matter considered in closed session. (Admin. Code § 67.12(a).) While the motion and vote are required, there is no legal requirement the Commission disclose such discussions. It may, however, choose to do so to the extent it believes the public's interest in those discussions outweigh any privacy or confidentiality interests.

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III. Factors the Commission May Consider When Determining to Hold a Matter in Closed Session

While the Commission is authorized to hold closed sessions to consider certain types of individual personnel matters, neither the Brown Act nor Sunshine Ordinance mandates it do so. Where it has the authority to hear a type of personnel matter in closed session, the Commission could make a blanket decision that all matters of that type be heard in open session, or that all matters of that type be heard in closed session. Alternatively, the Commission could delegate to the Executive Officer, perhaps in consultation with the Commission President (though that is not legally required), the power to make the open session/closed session decision as to a particular type of matter on a case-by-case basis.

If the Commission delegates the decision to the Executive Officer, it should identify factors that cut in favor of an open session or closed session. Or, instead of identifying factors, the Commission could establish a presumption (or default) that a certain type of matter be heard in open session or closed session. Even if the Commission establishes a presumption or delegates these decisions to the Executive Officer, the Commission President or the Commission as a whole should retain the power to override the initial decision. While not strictly required by the Brown Act or Sunshine Ordinance, the Commission may also continue to vote on whether to hold an item in closed session.

Further, there is no rule that if the Commission holds a matter in closed session it must hold the matter in its entirety in closed session. It is permissible to have an open session and a closed session on the same matter, typically by choosing to confine the closed session to those dimensions of the matter that may be especially sensitive or that would raise significant legal concerns if discussed in open session. If the Commission (or the Executive Officer or Commission President) anticipates it *may* want to hold an item in closed session – either entirely or in part – it must ensure its agenda adequately informs the public of this possibility.

Numerous factors could enter into the Commission's consideration of whether to hold a closed session relating to a personnel matter where a closed session is legally permissible. We suggest several factors below that the Commission may choose to consider:

- Are there particular facts that raise special privacy concerns? For example, do the facts of an appeal involve a juvenile or sensitive medical information, or is an employee alleged to have been involved in egregious misconduct that has not been substantiated?
- Is the nature of the appeal such that privacy concerns do not seem compelling? An example might be an appeal in which the appellant is asserting that their work experience should serve as an adequate substitute for minimum qualifications for a position.
- Does the appeal involve a relatively high-level City employee, whose reasonable expectation of privacy may not be as great as the privacy expectations of less powerful or less visible City employees?

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- To what extent is the public interest furthered by holding an open session on a particular matter? For example, does the appeal concern substantiated allegations of sexual misconduct, violence, or dangerous conditions that the public has a greater interest in knowing about and that outweigh individual privacy concerns? Similarly, are there are allegations of widespread discrimination within a department or allegations implicating multiple victims?

We are available to discuss these or other factors and assist in developing a potential Commission policy on closed sessions. And, we remain available to the Commission to evaluate any specific situations on request.

IV. Other Situations Where the Commission Considers Personnel Matters in Closed Session

A. Exercise of Duties in Connection with the Appointment of the Executive Officer and the Human Resources Director

Unlike the individual personnel matters discussed above, the Commission has routinely held in closed session discussions and actions pertaining to: (1) the appointment and evaluation of the Commission’s Executive Officer, and (2) the nomination and appointment of the City’s Human Resources Director. These are both topics that the Commission may—and should—continue to hold in closed session because the Charter grants to the Commission the authority to make these personnel decisions and because these actions fall squarely within the topics that may be permissibly held in closed session under both the Brown Act and Sunshine Ordinance. (See Charter § 10.101 [“The Commission shall have the power and it shall be its duty to appoint an executive assistant to be the administrative head of the affairs under its control who shall serve at its pleasure”]; Charter § 10.103 [“A Human Resources Director shall be selected by the Mayor from candidates nominated by the Civil Service Commission and confirmed by vote of the Board of Supervisors.”].)

B. Distinct Rules Applicable to Peace Officers

As mentioned above, in this memorandum our focus is not on the particular issues that may arise in the context of personnel matters involving peace officers. The term “peace officers” means persons employed by the City as a sheriff, undersheriff, deputy sheriff, chief of police, police officer, or inspector for the District Attorney’s Office. Under California Penal Code § 832.7, the City is not permitted to disclose peace officers’ personnel records – including complaints about peace officers – or information about those records except under very limited circumstances not typically present in the context of the Commission’s proceedings. The Commission generally should hold appeals involving peace officers in closed session, but the Commission should consult in advance with our Office as these appeals arise.

V. Next Steps

We trust that this memorandum offers a basis for the Commission’s further discussions regarding what, if any, matters it chooses to hold in closed session. We recommend the Commission discuss and determine how it would like to proceed regarding the various categories of personnel matters it hears, including:

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1. Whether to agendize all individual personnel matters of a particular type as closed session matters or presumptively as open session matters?
2. What criteria will the Commission consider to determine whether to go into closed session where it is permitted to do so?
3. Who should determine whether to place a matter on the closed session agenda?
4. How to evaluate requests by appellants or departments for a closed session in particular EEO matters?
5. Whether to affirmatively offer appellants the option to request a closed session?
6. How to administer closed sessions, including whether to require parties to appear in person for closed sessions?

The Commission must discuss these policy questions in open session as part of a properly noticed agenda item.

As always, we look forward to working with the Commission at your request to discuss these topics, and remain available to advise the Commission on all matters raised in this memorandum.