

Regular Meeting  
June 10, 2003

1. Oral Communications..... 2
  2. Discussion of Procedure for Compliance and Enforcement of Council  
Protocols..... 2
- ADJOURNMENT: Meeting adjourned at 7:55 p.m..... 14

Chairperson Burch called the meeting to order at 7:05 p.m. in the Council Conference Room, 250 Hamilton Avenue, Palo Alto, California.

Present: Burch, Kleinberg, Lytle, Ojakian

1. Oral Communications

None.

2. Discussion of Procedure for Compliance and Enforcement of Council Protocols

Assistant City Manager Emily Harrison had asked her peers around the County how they handled the procedure for compliance and would provide the feedback she received.

Herb Borock, PO Box 632, Palo Alto, was surprised the item was on the agenda, since it was not referred by the Council. Previous practice was to have a copy of the minutes provided. He was also surprised the Policy & Services (P&S) Committee would say the item was referred, because the press reports seemed to agree with his own recollection of the meeting. The *Palo Alto Weekly* quoted Council Member Kleinberg as saying the protocols were never meant to be laws, simply guidelines to help Council Members behave with more civility. He thought the remark was made as opposed to having some kind of compliance and enforcement. The question then became why the item was agendized. The basic question was whether the Council followed its own procedural rules, which directed that agenda items came to committees only on referral from the Council rather than being placed by a staff member or committee chair. The minutes should determine whether the item was agendized because of Council direction. The *Palo Alto Weekly* quoted Council Member Kleinberg in 1999 as saying, "She criticizes Council Members' dysfunctional politeness in dealing with each other and City staff."

Ms. Harrison said the March 10, 2003, Council minutes indicated a motion was made by Council Member Kishimoto and seconded by Kleinberg to refer the procedure for compliance and enforcement of the protocols to the P&S Committee and the motion passed 8-0.

Chairperson Burch recalled the motion.

Ms. Harrison thought there was discomfort among many of the cities with the issue of enforcement. The mayor was normally responsible for enforcement. If

the mayor were the subject of the concern, the city manager or city attorney would be asked to remind the mayor about the protocols. At least two of the cities mentioned it was a problem because the council as a whole might be having interpersonal issues, so they were not feeling good about having any member of the council become the enforcer of the protocols. Most of the other cities handled enforcement with informal reminders about the protocol, which seemed to be successful.

Chairperson Burch thought beginning with self-enforcement was better until a determination could be made indicating something stronger was necessary.

Council Member Lytle quoted from page 7 of the City Council Memorandum dated May 1, 2003, quoting the League of California Cities (LCC) standard, which said, "The Code of Ethics expresses standards of ethical conduct expected for members of the City Council, boards and commissions. Members themselves have the primary responsibility to assure standards are understood and met and that the public can continue to have full confidence in the integrity of government. The chairs of boards and commissions and the Mayor have the additional responsibility to intervene when actions of members that appear to be in violation of the Code of Ethics are brought to their attention." She liked the self-enforcement and group enforcement as long as everyone was comfortable with it.

Chairperson Burch agreed.

Council Member Kleinberg was pleased to see language that explicitly stated her intention in voting for the protocols. She was never in favor of enforcing the protocols through sanctions or any other such action. The protocols were guidelines, procedural, and open for interpretation. The protocols should be interpreted flexibly, sympathetically, and humanely. It was important to attempt to understand one another better and to allow different styles within a framework toward which everyone could strive. No one person should be designated as the interpreter of what was meant by each one of the protocols. One of the struggles the Council had faced with the protocols involved anything beyond the underlined words. Anything beyond the underlined words caused confusion. If left a little vague for flexible interpretation, the better. She would invite including the section from the LCC Code of Ethics as a preamble to Palo Alto's protocols. The City would have training to go over the protocols. She queried how to use the City's protocols to avoid the kind of behavior seen in the Mountain View example.

Council Member Lytle said breaking the law seemed to be a good example.

Council Member Kleinberg said there were many behaviors that occurred in Mountain View prior to laws actually being broken. If the behaviors were nipped in the bud, it might not have escalated to breaking the law.

Ms. Harrison suggested wording, "Council Members shall be responsible for ensuring these protocols are respected."

Council Members Lytle and Kleinberg both liked the LCC language.

Chairperson Burch suggested, "Council Members have the primary responsibility to assure that ethical standards are understood and the public can continue to have full confidence in the integrity of government."

Mr. Calonne urged the P&S Committee not to mention "reprimand, censure, etc." because some kind of hearing would be required. The discussions about the procedural workshop at the start of each year with the new mayor might include affirmation or acknowledgement by the Council Members of their agreement to support the protocols, similar to the campaign provision. Although the affirmation could not be forced, the Council could agree it was a great statement.

Council Member Ojakian suggested including the affirmation under "implementation," as opposed to "compliance."

Council Member Lytle asked to talk about the LCC code, because there was so much good in it.

Council Member Kleinberg thought the P&S Committee should agree with the need for enforcement. Page 7 of the Council Memorandum of May 1, 2003, stated, "As an expression of the protocols for members expected by the City, the protocols are intended to be self-enforcing and therefore become most effective when members are thoroughly familiar with them and embrace the provisions and voluntarily commit to signing a statement as new members."

Council Member Lytle read further, "Members entering office shall sign a statement affirming they read and understood the City Code of Ethics. In addition, the Code of Ethics shall be annually reviewed by the City Council, boards and commissions, and the City Council shall consider recommendations from boards and commissions and update it as necessary."

Ms. Harrison suggested taking the entire paragraph from the LCC Code of Ethics, substituting "protocols" for "code of ethics" and to add the wording to Nos. 17 and 18.

Council Member Kleinberg asked whether the boards and commissions would review the protocols.

Ms. Harrison said protocols for how the Council interacted with boards and commissions were included; however, staff had not envisioned the protocols addressing board and commission behavior.

Council Member Kleinberg said review would be by the Council and the P&S Committee.

Chairperson Burch asked whether a motion was necessary.

Ms. Harrison read what she thought the P&S Committee was approving. "Council Members themselves have the primary responsibility to assure that ethical standards are understood and met and that the public can continue to have full confidence in the integrity of government. As an expression of the standards of conduct for members expected by the City, the protocols are intended to be self-enforcing. Therefore, it becomes effective when members are thoroughly familiar with it and embrace its provisions. Members entering office shall sign a statement affirming they read and understood the City protocols. In addition, the Council protocols shall be annually reviewed by the City Council."

Council Member Kleinberg wanted to include the statement, "The Council shall consider recommendations from the P&S Committee and update as necessary."

Ms. Harrison said the suggestion was a good one.

**MOTION:** Council Member Kleinberg moved, seconded by Lytle, that the Policy & Services Committee recommend the following language in the Council Protocols: "Council Members themselves have the primary responsibility to assure that ethical standards are understood and met and that the public can continue to have full confidence in the integrity of government. As an expression of the standards of conduct for members expected by the City, the protocols are intended to be self-enforcing. Therefore, it becomes effective when members are thoroughly familiar with it and embrace its provisions. Members entering office shall sign a statement affirming they read and understood the City protocols. In addition, the Council protocols shall be annually reviewed by the City Council. The Council shall consider recommendations from the P&S Committee and update as necessary."

**MOTION PASSED 4-0.**

Chairperson Burch said rather than try to pick apart the protocols and remove redundancies, he was in favor of adopting the document in full. Perhaps staff could remove the language that did not fit, e.g., boards and commissions.

Ms. Harrison said staff could go through the document to clean it up.

Council Member Kleinberg thought the suggestion was great because the protocols adopted by the Council were basically Sunnyvale's protocols. To the extent the LCC Code of Ethics was based on Sunnyvale's protocols, the document would be redundant.

Council Member Lytle thought the ethics code should pertain to the boards and commissions as part of their orientation, but not the protocols. The LCC Code of Ethics could be a prevailing standard of all of the boards and commissions.

Mr. Calonne thought the suggestion was a good one. One of the concepts he had been considering was a provision of State law that required ethics training every two years for State officials. One of the pieces he would ask the Council to approve was a municipal code section calling for ethics training for boards and commissions every two years. Currently, the Planning Commission had a good set of procedures, but he was unsure about the others.

1. Clarification of Council Protocols re: Information Dissemination to Council

Chairperson Burch said page 3 of the City of Palo Alto Proposed Council Protocols (Council Protocols) indicated, "All Council Members should have the same information with which to make decisions."

Assistant City Manager Emily Harrison said although the document said, "proposed," the Protocols were actually in final form.

Chairperson Burch thought the only reason for the Council to ask for clarification was to ensure all Council Members were given the same information with which to make decisions. He asked how implementation of the Protocols would be done.

Ms. Harrison said staff had been transmitting to the Council all agenda-related correspondence. Therefore, all information was available to all Council Members as well as the public. The City Clerk provided information to the Council at places as well as making information available to the public in packets. The process had been going very well. The information had been shared and was part of the decision making process.

Council Member Lytle thought the process was going well. Her recollection of the Council debate at the time involved questions asked in forms other than e-mail. If questions were asked in another format, the question issue was at what point staff relayed information that was provided to a Council Member either verbally or in person. The other issue was about non-agenda related items; whether things were being asked that people should be sharing.

Ms. Harrison thought both issues were closely related. Most of the non-email conversations were usually about items that might be on the agenda in the future but were not on the horizon.

Chairperson Burch asked whether the information would still be given to all Council Members.

Ms. Harrison said no. Staff had considered a difficult procedure. Whenever a conversation occurred, staff would follow up with e-mail, e.g., "per our conversation, here..." which would in turn be copied to the other Council Members.

Chairperson Burch said someone had to make a judgment along the line.

Ms. Harrison said yes. In checking with her peers in Santa Clara County, the procedure was handled in that very manner. When staff had any information, it was sent to all Council Members. The Council was given a "heads up" on various items.

Council Member Kleinberg said the distinction Ms. Harrison was making was a project already in process rather than whether names should be put on buildings in Palo Alto to raise revenues, which was not an agenda item. If she called to ask a staff member about naming rights for City Hall, the conversation might not be given to all Council Members. However, if the conversation had to do with the tennis courts at Terman or something that would eventually be voted upon by the Council, an executive summary of the conversation would be appropriate.

Ms. Harrison said Council Member Kleinberg's assessment was correct. The goal was to avoid surprising or embarrassing Council Members. If there were information about which the Council would need to know, every Council Member would be provided with the information.

Council Member Kleinberg had heard Ms. Harrison make the same statement in the past. From her point of view, the goal was great. However, there was a

much deeper and fundamental purpose to be served by insuring information was being equally shared. One was the fact there were nine individual good brains. Some brains thought one way and came up with an issue, concern, or question and some brains worked another way. It was that synergy of perspectives, not only at the Council meeting when a decision was to be made, but before the Council meeting when backgrounds were brought to bear and what was heard in the community to come up with questions, ideas, etc. for staff. The feedback given by staff to each of the perspectives enriched the information. The second reason was the expectation of the public that Council Members come prepared to meetings. The meetings were then more efficient, more complex, and the level of discussion more sophisticated. The entire City would benefit from having the kind of information staff was generating for individual Council Members. The information given to the Council was similar to the "discovery" information acquired by attorneys before even entering the courtroom, which was a huge portion of trial preparation. Every individual needed the same information. The debate, then, was not about the facts but about the policy, outcome, or equity. There were some extremely fundamental principles that were well served by the sharing of the kind of information that went into a decision-making activity by the Council.

Ms. Harrison wanted to make a distinction between items that were not agenda-related. Council Member Kleinberg was correct about the synergy of ideas and broadening the discussion by information shared up to the point of the policy decision.

Council Member Kleinberg described a hypothetical scenario in which she and Ms. Harrison went to lunch and a variety of subjects were discussed. During the course of the discussion, a matter like the zoning ordinance update was discussed, a question was asked and information given. She queried whether the information that was shared would be committed to a memo.

Ms. Harrison said yes. If the Council Member failed to catch something said by the staff during a Council meeting, she might be alerted to convey the information to other Council Members with the idea someone else might not have gotten it either.

Council Member Kleinberg said if staff shared information with all nine members updates, clarifications, etc. that had been shared in a verbal context to one member rather than an e-mail, the prior Policy & Services (P&S) Committee had difficulty determining whether the act of sharing the information crossed a line into deliberative process and would reveal the thinking of that party in a way that might then violate some rules.

Council Member Lytle said her issues were less about deliberative process and more about the logistical problem with emails and the Brown Act. It sounded like some of the information was withheld until it was set at places.

Ms. Harrison said staff copied the rest of the Council but there was no discussion.

Council Member Lytle clarified there was no problem with the Brown Act unless more Council Members started chiming in.

City Attorney Ariel Calonne said straight responses were not a problem.

Chairperson Burch said answers raised during the day of a meeting were at places but also on e-mail.

Ms. Harrison said yes. The earlier in the day the questions were posed, the more often that would be the case.

Council Member Lytle said one of the issues that was confusing but was addressed during the Council meeting was less about the deliberative process issue than the fact the Council was advised the operation would not work until a central clearing house was designated for exchanging the information with all Council Members. It sounded like an interim process was designated.

Mr. Calonne said there were a couple of issues. The exchange part was still a problem. The current discussion dealt with asking questions of staff and staff providing answers, all of which was agenda related. At one of the meetings, the Council discussed dividing information into agenda related and non-agenda related as one possibility. The Attorney General could determine whether or not agenda related information was legal. However, he felt the Council was on safe ground with the current procedure. The complexity came in and addressed the deliberative process issue in a more difficult way that was with non-agenda related interactions. The logistics were difficult. Staff was unsure about telephone calls and the type of information it should share. Deliberative process was usually described as the ability of the legislator or high executive to have some decision making space. The policy development side where something was not agendized but where there was an idea was a core deliberative process. It was more difficult if, for example, a Council Member called staff to discuss interest in an ordinance related to "x." The question was whether the question should be passed along to other Council Members.

Council Member Lytle thought the distinction was consistent with the California League of California Cities' (LCC) ethical standard, which put a burden on the

Council Members rather than staff to share substantive information relative to a matter under consideration by the council, board or commission for which information might have been received outside the public decision making process. The ethical backing in terms of protocol seemed consistent with what the Council had developed. One of the misunderstandings that occurred somewhere along the way was that Council Members were trained under prior protocols to get questions answered in advance of a meeting because it was seen as bringing people up to the same speed as other Council Members and a waste of other Council Members' time. At some point, the questions being asked were considered "new territory," and the fact this information was not being shared became a source of confusion. Then the question arose as to how the information would be shared.

Council Member Burch suggested the protocol read, "All Council Members should make decisions with the same information on agendized or soon-to-be agendized matters."

Council Member Kleinberg thought the words "information from staff" should be included.

Council Member Lytle said it was not just information from staff but from outside sources.

Council Member Kleinberg said a telephone call from someone outside of staff relaying information about a situation might not be factual. She queried whether the protocols would require her to divulge the information.

Ms. Harrison said the protocols were only related to staff information.

Chairperson Burch asked where e-mail questions were sent.

Ms. Harrison said she was responsible for the City Manager's organization to make sure the questions went to the right person and came back in a timely fashion. If the questions were strictly legal, Mr. Calonne responded.

Chairperson Burch asked about putting the judgment on one person as to whether the question was or was not an agenda-related question.

Ms. Harrison said almost all of the questions came in on Monday morning.

Mr. Calonne said another way to frame it was not only in terms of the Council's right to know, but the public right to know, and that information about meetings should be open and public. When one Council Member had information, the

public and other Council Members should also have the information. The idea of communications about meetings was then open and the public would hopefully crack the legal nut about the inaccessibility of email somehow making it secret or shady.

Ms. Harrison said part of the ethics to which Mr. Calonne referred was exactly that; it was the responsibility of Council Members to share.

Council Member Lytle agreed. Council Members were responsible to share what they learned.

Mr. Calonne said the protocols would play better if framed in terms of open government and public access to meetings. Mr. Calonne said historically Palo Alto's standing committees were the first in the State to be held in an open and public forum, which pre-dated the 1993 Brown Act. The City had a proud tradition of open government. Having a statement to capture its standing would be appropriate.

Chairperson Burch said if the P&S Committee could agree on the wording, the document could be approved and sent back to the Council.

Ms. Harrison said only the one piece had to be sent back. The rest of the document had been approved. She suggested, "In order to facilitate open government, all Council Members should make decisions with the same information from staff on agendized or soon-to-be agendized items."

Council Member Kleinberg asked for a definition of "soon-to-be agendized."

Ms. Harrison said items on Council committee agendas would come to the full Council for discussion.

Council Member Kleinberg thought a description about the term should be included.

Mr. Calonne thought implementation would help clarify. On the email side, the issue of when something would be soon-to-be agendized became an issue. The idea of using a tentative agenda as a gatekeeper device was possible. Staff wanted a clear paper record of when something was in place. The details would be included in the email component of the protocols.

Council Member Burch asked whether verbal exchange was necessary to define.

Ms. Harrison thought the protocol should remain as stated.

**MOTION:** Council Member Lytle moved, seconded by Ojakian, that the Policy & Services Committee recommend to the Council wording for the protocol, "In order to facilitate open government, all Council Members should make decisions with the same information from staff on agendized or soon-to-be agendized items."

Ms. Harrison clarified the tentative agenda and Council committee deliberations as the definition for "soon-to-be agendized items."

**MOTION PASSED 4-0.**

2. League of California Cities Code of Ethics

**MOTION:** Chairperson Burch moved, seconded by Ojakian, that the Policy & Services Committee direct staff to take the Code of Ethics and customize it for Palo Alto.

Council Member Kleinberg wanted to see the final document before it was passed on to the Council.

Chairperson Burch suggested just referring the document to staff to clean it up.

Council Member Lytle thought there was not too much redundancy. The things that were redundant were primarily the broad preamble verbiage.

Council Member Ojakian had found some redundancy and then stopped trying to find it, since it was staff's job. Other cities had protocols in place. He was curious how useful the protocols were in the other cities, i.e., whether the protocols worked, how they had been adapted, etc.

Ms. Harrison had been involved in a roundtable discussion with the other city managers in Santa Clara County. Only one city did not have formal protocols and the city manager was scrambling as quickly as possible to get protocols put in place.

Council Member Ojakian wanted to know how the protocols were working.

Ms. Harrison was unsure other cities had a code of ethics in place.

Council Member Kleinberg said Sunnyvale had a code of ethics.

Council Member Ojakian suggested going back to the LCC and asking.

Council Member Lytle said Judy Nadler conducted a session with San Jose officials during the prior week. If discussing the protocols was part of the orientation when people first applied for the job, it became part of the job description. Catching people at the very beginning was better. It was becoming more and more necessary with time because before email, fax, etc., the common government norm and understanding was taught personally by managers and attorneys who would spend hours going over the material with staff and council members, training about how good government worked. No one had that time anymore. The protocols reinforced the information.

Council Member Kleinberg said doing something before there was a problem was important. There was then no personal baggage attached.

Council Member Lytle said the code of ethics was something to which the Council could aspire. It was not that the City had a problem; however, there were incidents on every Council Member's part when they had not been able to live up to the protocols. It was no shame on anyone's part but was something toward which to strive and keep on track as well as possible. Kindness and understanding was necessary because people were still learning or working on the protocols. It was important to forgive when things did not go exactly right. Reinforcing in a kind way, probably privately, was helpful. The one people had the most difficulty with was going from characterizing something that had been personally interpreted and then moving toward the intent of the other person, e.g., leaping to conclusions about someone else's intent. It was easy to see when someone else leaped to the intent or motive but difficult to see in oneself. Everyone needed help in recognizing when someone crossed the line in characterization of facts into implying intent or motive on someone else's part.

Council Member Ojakian said a good source to ask about was former Mayor Nadler who worked at Santa Clara University in the ethics area. He had personally attended a class she gave several months ago with several elected officials attending. There was some benefit to see whether cities had modified their protocols, etc.

Ms. Harrison heard the P&S Committee's sense that the end of page 7, where sanctions were discussed, would not be included.

All agreed.

Council Member Ojakian clarified the motion was to direct staff to take the code of ethics and do some review and bring it back.

Council Member Lytle said Mr. Calonne had mentioned one aspect that might require amendment due to the City Charter.

Mr. Calonne could not recall.

**MOTION PASSED 4-0.**

5. Discussion for Future Meeting Schedules and Agendas

Assistant to the City Manager Chris Mogensen said the next Policy & Services Committee meeting would be held on July 8, 2003. The agenda would include Council Consent Calendar Protocol, Email communications policy, ex parte communications, and revision of the Code of Ethics.

Council Member Kleinberg understood a column would appear in the *Palo Alto Weekly* about ex parte communications.

ADJOURNMENT: Meeting adjourned at 7:55 p.m.

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