



DENNIS J. HERRERA
City Attorney

ANNE PEARSON
Deputy City Attorney

Direct Dial: (415) 554-4250
Email: Anne.Pearson@sfcityattty.org

MEMORANDUM

TO: Hon. Members of the Sugary Drinks Distributor Tax Advisory Committee

CC: Greg Wagner, Acting Director of Health
Christina Goette, Program Manager

FROM: Anne Pearson *AP*
Deputy City Attorney

DATE: October 31, 2018

RE: Sugary Drinks Distributor Tax Advisory Committee – Open Meetings, Public Records, and Conflicts of Interest Issues

The Department of Public Health (“DPH”), which provides administrative support to the Sugary Drinks Distributor Tax Advisory Committee (“SDDTAC”), has asked the City Attorney’s Office to address 11 specific questions pertaining to open meetings, public records, and conflicts of interests that will apply to members of the SDDTAC. The City Attorney has addressed many of these questions generally in the Good Government Guide, which is available on the City Attorney’s website (under “Good Government”). In responding to DPH’s specific questions, which were asked on your behalf, we frequently rely on the Guide, and strongly recommend that, in addition to carefully reading this memorandum, you refer to the Guide as a convenient and helpful resource when questions arise regarding public meetings, public records, and conflicts of interest issues.

1. Must subcommittees of the SDDTAC comply with the open meeting requirements applicable to policy bodies? For example, must a subcommittee meeting be subject to notice? Must a subcommittee meeting have an agenda? Must a subcommittee have a quorum to do business?

Yes. The voters established the SDDTAC by adopting Proposition V at the November 8, 2016 election. The ordinance that establishes and governs the SDDTAC is codified as Article XXXIII (Sections 5.33-1 through 5.33-6) in Chapter 5 of the Administrative Code.

The Ralph M. Brown Act (California Government Code Sections 54950 *et seq.*) (“Brown Act”) and the open meeting provisions of the San Francisco Sunshine Ordinance (San Francisco Administrative Code Sections 67.1 *et seq.*) (“Sunshine Ordinance”) govern meetings of multi-member bodies of local agencies, including advisory bodies such as the SDDTAC that are created by ordinance. The Sunshine Ordinance refers to these bodies as “policy bodies,” the term we use here as well. S.F. Admin. Code § 67.3(d).

A policy body may create subcommittees either directly, by voting to do so, or indirectly, by authorizing one or more of its members to do so. Those subcommittees are subject to the open meeting requirements of the Brown Act and the Sunshine Ordinance governing the conduct of meetings. Also, in some circumstances if the chair of a policy body forms a committee, the

MEMORANDUM

TO: Hon. Members of the Sugary Drinks Distributor Tax Advisory Committee
CC: Greg Wagner, Acting Director of Health
Christina Goette, Program Manager
DATE: October 31, 2018
PAGE: 2
RE: Sugary Drinks Distributor Tax Advisory Committee – Open Meetings, Public Records, and Conflicts of Interest Issues

chair's decision may be attributed to the body, so that that committee may be deemed a subcommittee of the policy body, and then itself is a policy body.

Occasionally, a single member of a policy body may, on the member's own initiative and without the express or implied authorization of the body, form a committee. Such a committee would not be considered a subcommittee of the policy body, and hence would not itself be a policy body. It would therefore not be subject to the Brown Act or the Sunshine Ordinance requirements for policy bodies. But the Sunshine Ordinance considers such a committee a "passive meeting body" that must meet in public and is subject to certain limited public notice requirements. (Good Government Guide, pp. 144–146, 169–171.)

At its January 19, 2018, meeting, the SDDTAC voted to establish three subcommittees: the Community Input Subcommittee, the Data and Evidence Subcommittee, and the Infrastructure Subcommittee. Because these subcommittees were established by the SDDTAC, they are subject to the open meeting requirements of the Brown Act and the Sunshine Ordinance.

Like any other policy body, a subcommittee must provide public notice of meetings and meeting agendas, typically 72 hours in advance (Good Government Guide, pp. 133-135), must have a meeting agenda that contains a meaningful description in plain English of each item of business that the subcommittee will discuss or take action on (Good Government Guide pp. 135–136), and a quorum of the subcommittee must be present in order for the subcommittee to meet. (Good Government Guide pp. 15, 24).

And like subcommittees generally, these subcommittees may serve only as advisors to the SDDTAC. The SDDTAC may not authorize a subcommittee to approve actions in the name of the SDDTAC.

2. May subcommittees meet by phone, and/or may some members of the subcommittee join an in-person meeting by phone?

Yes, under certain circumstances. Under the Brown Act, policy bodies may elect to meet by teleconference, if certain requirements are satisfied. Cal. Govt. Code §§ 54953(b)(1), (2). But the Charter requires the physical presence at one meeting site of the members of appointive boards, commissions, or other units of government, and the Administrative Code contains a similar "presence" requirement for policy bodies created by legislation. Charter § 4.104(b); Admin. Code § 1.29. (Good Government Guide, p. 145). Because the SDDTAC was created by ordinance, the full committee may not hold a meeting by phone.

Although the SDDTAC was established by ordinance, its subcommittees were not. Therefore, they are not subject to the "presence" requirement of the Administrative Code and may meet by phone if those meetings satisfy the Brown Act requirements. For subcommittee members to be able to meet by teleconference: each teleconference location must be identified on the agenda; the agenda must be posted at each teleconference location; each teleconference location must be accessible to the general public and to disabled persons; members of the public must have an opportunity to address the rest of the body directly from each teleconference location; and during the teleconference at least a quorum of the body must participate from

MEMORANDUM

TO: Hon. Members of the Sugary Drinks Distributor Tax Advisory Committee
CC: Greg Wagner, Acting Director of Health
Christina Goette, Program Manager
DATE: October 31, 2018
PAGE: 3
RE: Sugary Drinks Distributor Tax Advisory Committee – Open Meetings, Public Records, and Conflicts of Interest Issues

within the geographic boundaries of the City. Cal. Gov. Code §§ 54953(b)(3); 54961. As a practical matter, these requirements may be difficult to satisfy.

Rules regarding teleconferencing apply only to members of policy bodies. Thus, for example, a policy body, like the SDDTAC, has discretion to schedule a presentation by an expert on an agenda item where the expert does so from an outside location by telephone or video.

3. May the SDDTAC appoint an advisory committee that includes members of the public who are not members of the SDDTAC?

Yes. A policy body such as the SDDTAC may appoint an advisory committee to advise the policy body in the exercise of its powers and duties, and the advisory committee may consist of individuals who are not members of the parent body. For example, in fulfilling its duty to evaluate the impact of the Sugary Drinks Distributor Tax on beverage prices, the SDDTAC may choose to establish an advisory body consisting of members with expertise in the wholesale and retail beverage industry. This body could include members of the SDDTAC, so long as the number of SDDTAC members is less than a majority. If the advisory committee is created by the initiative of the SDDTAC, it will be subject to the open meeting requirements of the Brown Act and the Sunshine Ordinance, as described more fully in the response to Question #1.

4. May subcommittees develop an outreach plan designed to gather input to inform Requests for Proposals (RFPs) for contracts funded by sugary drinks tax revenue?

Yes. Although neither State nor local law prohibits the SDDTAC from contacting members of the public to solicit input concerning the grant making process in general or the grant of specific funds, the SDDTAC could expose the City, including itself and DPH, to allegations of bias if it selectively seeks input from certain prospective applicants, or is deferential to certain prospective applicants. Allegations of bias may lead to administrative or legal challenges that could jeopardize the validity of a grant award. Accordingly, the SDDTAC should be as inclusive as possible when conducting outreach to members of the general public.

5. Are e-mail communications between members of the SDDTAC regarding SDDTAC business subject to public disclosure?

Generally, yes. A record is subject to disclosure under the California Public Records Act if it (1) is a writing (very broadly defined to cover any physical form or characteristics), (2) that contains information relating to the conduct of the public's business, and (3) is prepared, owned, used, or retained by a state or local agency. Cal. Gov. Code § 6252(e); S.F. Admin. Code § 67.20(b). (Good Government Guide, pp. 86-88.)

E-mail communications between SDDTAC members relating to SDDTAC business meet the first two parts of the definition of a public record. But we need to consider the third part: whether they would be “prepared, owned, used or retained by a ... local agency.”

SDDTAC members who occupy seats 10, 13, and 14 are public employees who serve on SDDTAC by virtue of their status as departmental representatives. If any one of these members is a sender or recipient of an e-mail concerning the work of the SDDTAC, then the e-mail would

MEMORANDUM

TO: Hon. Members of the Sugary Drinks Distributor Tax Advisory Committee
CC: Greg Wagner, Acting Director of Health
Christina Goette, Program Manager
DATE: October 31, 2018
PAGE: 4
RE: Sugary Drinks Distributor Tax Advisory Committee – Open Meetings, Public Records, and Conflicts of Interest Issues

meet the third part of the definition and be a public record. The fact that the departmental representative may use a personal email address, cell phone, or computer to send or receive the email does not alter the conclusion that the communication is a public record, so long as the communication concerns City business and is received or created in the performance of work duties. (For more information on this issue, see the memorandum entitled, “Public Records on Personal Electronic Devices” (March 24, 2017) on the City Attorney’s website.)

As to SDDTAC members who serve as members of the public and exchange e-mail on their own personal electronic devices with fewer than a quorum of the members, the answer may be less clear. Even assuming that the email communication in question concerns information relating to business of the SDDTAC, it is possible that a court could conclude that it is not subject to disclosure if it wasn’t prepared at the behest of the SDDTAC, or owned, used or retained by the full policy body. But, in light of a 2017 opinion by the California Supreme Court, concluding that records housed on a City employee’s or official’s personal electronic device or account are public records if they would otherwise meets the definition, it is highly likely that a court would conclude that email communications between SDDTAC members that relate to the business of the SDDTAC are disclosable, even when the communication is between fewer than a quorum of the members. *See City of San Jose v. Superior Court*, 2 Cal.5th 608, 618 (2017) (Good Government Guide, pp. 100-101.)

The key criteria for determining whether such a communication on a personal electronic device is a public record are the content and context of the record, including the purpose of the communication and the sender(s) and intended recipient(s); whether it concerns City business; and whether a City official or employee has received or created it in the performance of work duties, even if not required or solicited. For further guidance, see this Office’s legal opinion on the *San Jose* decision, “New California Supreme Court Case: Public Records on Personal Electronic Devices,” dated March 24, 2017, available on the City Attorney’s website.

The most prudent course is for SDDTAC members to presume that these e-mail messages would be public records and, accordingly, either refrain from engaging in such e-mail correspondence, or exercise care in what is said in the e-mail, knowing that it possibly may become public.

6. Can emails between members of the SDDTAC be considered meetings, subject to open meeting requirements?

Yes, under certain conditions. Communications among a majority of SDDTAC members (whether written or oral) are likely to conflict with the open meeting requirements of State and local law. Depending on the circumstances, such communications may constitute a “seriatim” (serial) meeting violating the open meeting requirements. Seriatim meetings can occur by use of technology, such as fax, e-mail, text message, or telephone, or through an intermediary.

A single letter, fax, e-mail, text message, or other written communication from a member of a policy body to a majority of the members regarding matters within the body’s jurisdiction is not in itself unlawful. But there is a substantial risk that the initial one-way lawful communication could result in a seriatim meeting in which a majority of the body ends up

MEMORANDUM

TO: Hon. Members of the Sugary Drinks Distributor Tax Advisory Committee
CC: Greg Wagner, Acting Director of Health
Christina Goette, Program Manager
DATE: October 31, 2018
PAGE: 5
RE: Sugary Drinks Distributor Tax Advisory Committee – Open Meetings, Public Records, and Conflicts of Interest Issues

discussing, deliberating, or taking action on any matter within the jurisdiction of the body. S.F. Admin. Code § 67.3(b)(3); Cal. Gov. Code § 54952.2(b).

Communicating by e-mail or text message is of particular concern because the sender cannot control the actions of others in forwarding and responding to messages, which can easily lead to a substantive discussion among a majority of the body. Putting members' email addresses in the "BCC" line may reduce the risk that a recipient will "reply all," but cannot eliminate that risk.

7. May DPH staff who provide administrative support to the SDDTAC send email communications to all members, at the behest of one member, urging them to take action on state legislative items by contacting their representatives in support of or opposition to a bill?

Generally, no. DPH may not distribute to members of the SDDTAC communications that urge them to support or oppose a bill pending in the state legislature without first confirming whether the City has taken a position on the bill and coordinating with the Mayor's office. SDDTAC members may lobby the Legislature or Congress in their individual capacities, not as members of SDDTAC. But they may not speak on behalf of the City and they may not use City resources to facilitate the lobbying activity unless they coordinate with the Mayor.

8. May SDDTAC members, or the organizations for whom they work, apply for grants or contracts that are funded by the sugary drinks tax?

Yes, but only under very limited circumstances where the members are not seeking to influence specific grant funding decisions to their organizations. The SDDTAC is charged with submitting to the Board of Supervisors and the Mayor an annual report that evaluates the impact of the sugary drinks tax, and makes recommendations regarding the potential establishment and/or funding of programs to reduce the consumption of sugary drinks. S.F. Admin. Code § 5.33-4. In March 2018, the SDDTAC issued its first report to the Board and Mayor, which included recommendations about the populations that should be served by SDDTAC funding; the types of activities that should be funded (e.g., community-based grants, school nutrition, education and student-led action, food access, healthy retail, oral health); and the percentage of tax revenue that should be allocated to each category of funded activity. The SDDTAC's specific funding recommendations are attached to this memorandum.

In June 2018, the Mayor issued a proposed budget for FY 2018-2019. The Executive Summary of the Mayor's proposed budget reflected the Mayor's intent to spend the sugary drinks tax revenue in ways that were consistent with the SDDTAC's recommendations. The summary provided:

The FY 2018–19 and FY 2019–20 proposed budget dedicates the full projected two-year revenue from the tax of approximately \$20 million to new investments *in alignment with recommendations made by the citizen advisory committee created by the legislation*. Nearly half of the money will be administered as grants to community-based organizations that work directly with these impacted populations to improve health

MEMORANDUM

TO: Hon. Members of the Sugary Drinks Distributor Tax Advisory Committee
CC: Greg Wagner, Acting Director of Health
Christina Goette, Program Manager
DATE: October 31, 2018
PAGE: 6
RE: Sugary Drinks Distributor Tax Advisory Committee – Open Meetings, Public Records, and Conflicts of Interest Issues

education, physical activity, food access, and awareness. Funding will also be dedicated to provide healthy eating vouchers, address oral health issues, improve access to water refilling stations, and provide administrative support to the citizen advisory committee. The programs supported by this revenue address health inequities in communities with high rates of sugary drink consumption and those populations disproportionately impacted by chronic diseases such as diabetes, obesity, and heart disease. (Emphasis added.)

The final budget ordinance adopted by the Board of Supervisors, and signed by the Mayor, incorporated several of the SDDTAC's recommendations insofar as it allocated funds to specific departments consistent with the allocations recommended by the committee. *See* Board File No. 180574. For example, the SDDTAC's recommendation that \$520,000 be appropriated for the Recreation and Parks Department, and that \$150,000 be appropriated for the Office of Economic Workforce Development, were reflected in the final budget.

We understand based on information from DPH that the department is engaging in a robust stakeholder engagement that includes holding several Town Hall meetings in order to elicit input from the public at large. We further understand that several SDDTAC members attended the recent Town Hall meetings in order to hear public input, but did not speak at those meetings or otherwise contribute any additional recommendations relating to funding priorities at those meetings. Moving forward, we understand that SDDTAC members will provide no additional input about requests for proposals ("RFPs") in either their private capacities or as SDDTAC members. DPH staff will develop the RFPs, and release them through a competitive bidding process.

California Government Code Section 1090 and its local counterpart, San Francisco Campaign and Governmental Code Section 3.206(b), generally prohibit City officers and employees, or any board or commission of which they are members, from "making" any contract in which they have a "financial interest." Even though some of the advisory committee members are not City officers or employees, the California Attorney General's Office and the California Fair Political Practices Commission ("FPPC") have advised that Section 1090 applies to members of advisory bodies. *See, e.g.*, 82 Ops.Cal.Atty.Gen. 4-5 (1999); FPPC McMinn Adv. Ltr., File No. I-14-155 (Oct. 8, 2014).

Section 1090 does not define what constitutes "making" a contract, but courts and administrative agencies have broadly construed this term. "Making" a contract does not simply include final approval of a contract, but extends to the planning, preliminary discussion, negotiations, drawing of plans and specification, and solicitation of bids that lead to the formal making of a contract. *Stigall v. Taft*, 58 Cal.2d 565, 569 (1962). Individuals in advisory positions can influence the development of a contract during the early stages of the contracting process even though they have no actual power to execute the final contract. *See, e.g.*, *City Council of the City of San Diego v. McKinley*, 80 Cal.App.3d 204 (1978) (member of Park and Recreation Board who owned a landscape architectural firm participated in the making of a contract in violation of Section 1090 where he was also a member of a committee created to

MEMORANDUM

TO: Hon. Members of the Sugary Drinks Distributor Tax Advisory Committee
CC: Greg Wagner, Acting Director of Health
Christina Goette, Program Manager
DATE: October 31, 2018
PAGE: 7
RE: Sugary Drinks Distributor Tax Advisory Committee – Open Meetings, Public Records, and Conflicts of Interest Issues

advise the Board on the design, architecture, landscaping, and technical planning of a Japanese garden).

Section 1090 also does not define what constitutes a “financial interest.” But similarly, courts have broadly interpreted “financial interest” for the purposes of Section 1090, cautioning that the term should not be read in a “restrictive and technical manner.” *See People v. Honig*, 48 Cal.App.4th 289 (1996). For Section 1090’s purposes, SDDTAC members should consider sources of income to them and to their employers as a financial interest. A Section 1090 violation has three potential consequences for the official who engages in such a violation. First, any contract made in violation of Section 1090 is void, which means the City Attorney’s Office cannot approve the contract as “to form.” *Thomson v. Call*, 38 Cal.3d 633, 646 (1985). Second, the interested party, such as a City contractor or grantee, must disgorge all of the public funds it has received, and the public entity is not required to restore any of the benefits it has received. *Id.* at 647. The disgorgement of public funds is “automatic” and is appropriate regardless of whether any fraud occurred. *Carson Redevelopment Agency v. Padilla*, 140 Cal. App. 4th 1323, 1335-37 (2006). Third, an individual official who engages in the violation of Section 1090 may be personally liable for civil or criminal penalties. Cal. Gov. Code § 1097; S.F. Campaign & Gov’tal Conduct Code § 3.242.

To date, SDDTAC’s influence on the contracts that will eventually be executed has been limited to the Board’s appropriation of sugary drinks tax funds in amounts that are roughly equivalent to the SDDTAC’s recommendations. Although the SDDTAC has made additional recommendations about the specific types of projects that should be funded, and attended DPH’s Town Hall meetings to hear public input, the City departments that will be executing contracts have not yet released their procurements, which will also be influenced by the input received during their stakeholder engagement process. Those procurements may or may not reflect the specific funding recommendations of the SDDTAC.

If a SDDTAC member applies for and is awarded a soda-tax funded grant, either as an individual or on behalf of the organization for whom he or she works, it is not likely that the agreement would be void under Section 1090 in light of the member’s limited influence on the procurement. This conclusion presumes that the SDDTAC’s funding recommendations are, as they were in 2018 – high level recommendations. It also presumes that moving forward, the member has no further influence on the RFP development or selection process by, for example, participating in DPH’s Town Hall meetings, even if just for the purpose of listening to public comment. SDDTAC members should bear in mind that there are at least three ways in which a potential Section 1090 violation could be brought to light or subject to investigation.

- First, a complaint alleging a Section 1090 violation could be filed with a government agency with jurisdiction to investigate such allegations. These agencies include the San Francisco Ethics Commission, the City Attorney’s Office, and the District Attorney’s Office.
- Second, as the proposed contracts or grants will be subject to competitive bidding, a bidder who does not prevail may file a bid protest. Such a bid protest could

MEMORANDUM

TO: Hon. Members of the Sugary Drinks Distributor Tax Advisory Committee
CC: Greg Wagner, Acting Director of Health
Christina Goette, Program Manager
DATE: October 31, 2018
PAGE: 8
RE: Sugary Drinks Distributor Tax Advisory Committee – Open Meetings, Public Records, and Conflicts of Interest Issues

focus on any connection between the winning bidder and SDDTAC members, and raise conflict of interest allegations.

- Third, a member of the public or a media outlet could raise concerns about the connections between SDDTAC members and the entities who receive funding, in part, through the committee's recommendations.

SDDTAC members who may wish to apply for sugary drinks tax-funded projects, either on their own or as an employee of an institutional applicant, should be very mindful of the potential for conflicts of interests, and should limit their participation in discussions about the funding of programs to very high level discussions and recommendations. For this reason, we would advise that SDDTAC members not attend future Town Hall meetings, or other public gatherings, regarding funding priorities and that their organizations instead send other representatives. Such members should abstain from participating in discussions designed to identify detailed funding priorities and/or eligibility criteria for funding. The SDDTAC should contact the City Attorney's Office for further advice regarding specific factual situations as the need arises.

9. May SDDTAC members attend "Friends of Soda Tax committee" meetings and participate in discussions about the sugary drinks tax, SDDTAC recommendations, and SDDTAC strategy?

Yes, but only under certain circumstances where a quorum is not present. The Friends of Soda Tax Committee ("The Friends Committee") is a committee formed by local organizations that track implementation of the sugary drink tax. The Friends Committee was instrumental in advocating that the Board of Supervisors adopt legislation forming the SDDTAC, and has lobbied the Board to adopt a budget reflecting recommendations by the SDDTAC about how the tax revenue should be spent. Members of the SDDTAC may attend meetings of the Friends Committee so long as a quorum of the SDDTAC is not present. But if a quorum of members is present, given the subject matter jurisdiction of the SDDTAC, their attendance might be a meeting within the meaning of the Brown Act and Sunshine Ordinance – and an illegal meeting for several reasons, including failure to notice the meeting in accordance with those laws.

10. May three to four SDDTAC members meet with a member of the Board of Supervisors to educate that Supervisor about SDDTAC recommendations?

Yes. As noted above, a meeting (not using that term in the technical sense of the Brown Act and Sunshine Ordinance) that involves less than a majority of the members of the SDDTAC generally is not subject to open meeting requirements imposed by those laws. Because there are 16 members of the SDDTAC, three or four would not constitute a majority. But, as noted above, there are three subcommittees of the SDDTAC. If the three or four members meeting with the Supervisor constituted a majority of a subcommittee, that would violate the Brown Act and Sunshine Ordinance, because it would constitute a meeting of the subcommittee within the meaning of those laws.

MEMORANDUM

TO: Hon. Members of the Sugary Drinks Distributor Tax Advisory Committee
CC: Greg Wagner, Acting Director of Health
Christina Goette, Program Manager
DATE: October 31, 2018
PAGE: 9
RE: Sugary Drinks Distributor Tax Advisory Committee – Open Meetings, Public Records, and Conflicts of Interest Issues

11. May one SDDTAC member attend a regional meeting that is convened to discuss the possibility of a regional awareness campaign?

Yes. Generally, neither the Brown Act nor the open meeting provisions of the Sunshine Ordinance apply to meetings attended or hearings conducted by individuals, such as an individual member of a policy body, even if the member is performing an assigned function for the body.

Also, under both the Brown Act and the Sunshine Ordinance, there is an exception to the open meeting rules that allows even a majority of the members of a policy body to attend a regional, statewide, or national conference, such as an educational conference, provided that the majority do not use the occasion to collectively discuss the topic of the gathering or other business. Cal. Govt. Code § 54952.2(c)(2); Admin. Code §67.3(b)(4)(B). The conference must be open to the public, but members of the public have no right to attend for free if other participants or registrants must pay fees or other charges to attend. Cal. Govt. Code §54952.2(c)(2).

* * *

We hope you find this information helpful. If we can provide you with any further assistance, please do not hesitate to call on us.