

REPLACEMENT

COUNCIL AGENDA: 02-23-2010

ITEM: 3.4



Memorandum

TO: HONORABLE MAYOR
AND CITY COUNCIL

FROM: Tom Manheim

SUBJECT: NEW TECHNOLOGIES

DATE: February 26, 2010

Approved

Date

2/26/10

REASON FOR REPLACEMENT MEMO

The reason for this replacement memo is to correct language in paragraph 2, "Public Records Policy and Protocol," on page 3.

RECOMMENDATION

1. As recommended by the Rules and Open Government Committee, approve language revising Council Policy 0-32 – *Disclosure and Sharing of Material Facts* to include disclosure by the Mayor and members of the City Council of any communication received and read during a Council meeting, either directly or indirectly, that is relevant to a matter under consideration by the City Council. The proposed resolution amending Policy 0-32 is posted with this memo.
2. As recommended by the Rules and Open Government Committee, approve language modifying Council Policy 0-33 – *Public Records Policy and Protocol* to include communications concerning official business sent and received by the Mayor, Councilmembers or their staff via non-City-owned devices for purposes of a one-year pilot program. The proposed resolution amending this Policy 0-33 is posted with this memo.

BACKGROUND

In August, 2009, the City Council referred to the Rules and Open Government Committee (ROGC) the question of "how communications about city business made with new technologies such as personal email, text messages, cell phones, and social networking websites should be dealt with as public records."

A few weeks later, in early September, 2009, the ROGC identified a number of issues related to communications using new technologies and directed staff to return with a broad framework of issues to discuss.

On October 7, 2009, the ROGC reviewed and approved a work plan to study and develop recommendations regarding electronic communications received by Councilmembers during City Council and Council Committee meetings. The work plan also addressed the application of the City's public records policy to communications sent and received by City employees via personally owned devices. The Committee directed staff to return with options on both topics.

On December 9, 2009, the ROGC reviewed and discussed options for:

1. Expanding the City Council's policy on disclosure of material facts to include disclosure by the Mayor and members of the City Council of any communication received and read during a Council meeting, either directly or indirectly, that is relevant to a matter under consideration by the City Council; and
2. Amending the City's public records policy to require disclosure of recorded communications sent or received by City officials on non-City-owned devices unless subject to an exemption.

On January 20, 2010, the ROGC reviewed drafts of Council policies 0-32 and 0-33. The ROGC approved the proposed revisions with some amendments and directed staff to agendize the Committee's recommendations for discussion and approval by the City Council.

ANALYSIS

1. Disclosure of Material Facts

The Council's disclosure policy would be amended to require Members of the City Council to disclose communications received and read during a Council meeting, either directly or indirectly, that are relevant to a matter under consideration by the City Council or a Council Committee. The disclosure must be made orally, no later than public discussion of the matter under consideration by the City Council, after a good faith determination by the Member of the City Council that the fact or communication is required to be disclosed in accordance with the policy.

Communications to be disclosed include, but are not limited to, text messages, emails and telephone calls. An indirect communication is a text message, email or telephone call received by a staff member of the Mayor or a councilmember or a conversation with a staff member of a Member of the City Council which is then communicated to the elected official.

A communication is considered relevant to a matter under consideration by the City Council if it is (1) from a party or his or her agent to an administrative hearing before the Council; or (2) from any person who actively supports or opposes any administrative or legislative decision and has a financial interest in the decision. A person actively supports or opposes a decision if he or she engages in lobbying activity as defined in the San Jose Municipal Lobbying ordinance, testifies in person before the City or Redevelopment Agency or otherwise acts to influence officers of the City or Redevelopment Agency.

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2. Public Records Policy and Protocol

The public records policy would be revised to include the following statement:

Records available for inspection and copying include any writing containing information relating to the conduct of the public's business that is prepared, owned, used, or retained by the City, regardless of the physical form and characteristics and, in addition, any recorded and retained communications regarding official City business sent or received by the Mayor, Councilmembers or their staffs via personal devices not owned by the City or connected to a City computer network.

It should be noted that this policy change does not impose any new requirement to retain records. Rather it establishes how records that exist at the time of a request should be treated. The ROGC recommends that this revision be implemented as a pilot program.



Tom Manheim
Communications Director

For questions please contact Tom Norris, Public Records Manager, at (408) 535-8120.