COUNCIL AGENDA: 08-18-09
ITEM: 3.4

CITY OF SAN JOSE
CAPITAL OF SILICON VALLEY

Memorandum

TO: HONORABLE MAYOR AND CITY COUNCIL

FROM: Tom Manheim

SUBJECT: SEE BELOW

DATE: July 30, 2009

Approved

Date 7/31/09

SUBJECT: RULES AND OPEN GOVERNMENT'S RECOMMENDATIONS ON THE SUNSHINE REFORM TASK FORCE PHASE II RECOMMENDATIONS

RECOMMENDATION

Approve the Sunshine Reform Task (SRTF) recommendations on Ethics and Conduct, Technology, Administration and Accountability, and portions of SRTF recommendations on Public Records, as amended by the Rules and Open Government Committee (ROGC). Direct staff to proceed with implementation on a pilot basis.

OUTCOME

Approval of the SRTF Phase II recommendations as described in the recommendation will permit staff to implement most of the Phase II provisions on a pilot basis and codify the Open Government reforms.

BACKGROUND

In 2006, the SRTF decided to approach its work in two Phases. The City Council approved the SRTF Phase I recommendations as amended by the ROGC in August of 2007 and June of 2008. The Task Force completed its Phase II recommendations in August of 2008. In transmitting the Phase II Report (Attachment A) to the ROGC, the Administration raised concerns with some of the recommendations from both operational and budgetary perspectives (Attachment B). The Task Force noted the Administration's concerns in its cover memo for the report. It should be noted however, that staff supported the great majority of the recommendations and acknowledges the substantial achievements by the Task Force in furthering the goals of open government in San José.

The Rules and Open Government Committee began its review of the Phase II recommendations in August of 2008. During this review, SRTF members provided additional input as did community members and stakeholder groups. As needed, the ROGC directed staff to conduct additional research and analysis. Of the recommendations forwarded by ROGC to the City Council, 42 (78%) are forwarded with a recommendation either to approve as recommended by

the Task Force or approve with minor revisions, while 12 (22%) are not recommended by the ROGC or recommended with major revisions.

The ROGC recommendations included in this recommendation and discussed below do not include three portions of the SRTF recommendations concerning Public Records – *Law Enforcement Information*, *Police Statistical Reports,* and *Statistical Reports Prepared by the San José Fire Department.* The Committee directed the Administration to provide additional information before considering these three sets of recommendations, and these will be brought forward to the City Council at a later date. In addition, because certain recommendations (*Balancing Test*, *Law Enforcement Information,* and *Police Statistical Reports)* have generated greater public interest, the Rules Committee directed that staff provide additional information to the City Council to ensure a fully informed discussion and consideration of all alternatives. For these, three sets of recommendations are provided side-by-side – those of the Task Force, the Administration, and the Rules and Open Government Committee.

ANALYSIS

A. ETHICS AND CONDUCT

5.1 Intent. This segment of the report included a strong statement of commitment by the City of San José to open government.

ROGC recommendation: The ROGC recommends adoption of the statement.

5.2 Disclosure.

5.2(A) The SRTF proposed that members of bodies that are subject to the Brown Act should disclose relevant information received from any outside source regarding issues under consideration.

ROGC recommendation: This is current practice and the ROGC recommends its continuation.

5.2(B) The SRTF recommended that lobbyists file disclosure reports within two business days of engaging in reportable lobbying or fundraising activity.

ROGC recommendation: In 2006, prior to the Task Force making recommendations, the City Council agreed to impose a two-day filing deadline and referred the matter to the Elections Commission to develop the mechanics of implementation. The Elections Commission has since referred the proposal to the Mayor's Biennial Ethics Review which began in June 2009. The ROGC recommends continuation of this approach.

5.2(C) The SRTF proposed a Charter amendment that would allow the Mayor and Councilmembers to abstain from voting on decisions if constituents would reasonably question the integrity of the decision.

ROGC recommendation: Around the same time that the SRTF was finalizing the Phase II report, the Council also considered submitting to the voters a Charter amendment to

allow the Mayor and Councilmembers to abstain from voting on matters that were not legal conflicts of interest but raised the appearance of a conflict. Due to the severe budgetary constraints facing the City in June 2008, the City Council deferred placing this issue on the ballot. Instead, Council has directed staff to develop a disclosure policy for when there is an appearance of a conflict. The ROGC recommends a continuation of this approach. The City Attorney's Office is working on a policy consistent with this direction and expects to bring forward a recommendation in September.

5.3 Conflicts of Interest.

5.3(A) Conflicts of Interest. The SRTF recommended that Councilmembers be required to recuse themselves from decisions when a conflict of interest is present and to make disclosures when there is an appearance of a conflict.

ROGC recommendation: This reflects current City practice and the ROGC recommends its continuation.

5.3(B) Conflicts of Interest. The SRTF proposed that all reports of contributions to candidate accounts be available to the public on the City's web site.

ROGC recommendation: This is current City practice and the ROGC recommends its continuation

5.3(C) Conflicts of Interest. The SRTF recommended that an individual who has held a "position of responsibility" in a Council candidate's election campaign be prohibited from lobbying the person for whom they previously worked or volunteered during the entire time that the official serves in elected City office.

ROGC recommendation: The ROGC held a lengthy discussion regarding what constitutes a "position of responsibility" and was concerned over the lack of specificity for this term. As a result, the ROGC recommended deferral of the recommendation for discussion at the Mayor's Biennial Ethics Review.

5.4 Code of Ethics and Ethical Standards.

5.4(A) Code of Ethics and Ethical Standards. The SRTF recommended that all members of the Council, Boards, or Commissions, and all employees, vendors, City non-Governmental partners, and registered lobbyists adopt the City's Code of Ethics and verify in writing that they will abide by it. The recommendation also would require that the City's Code of Ethics appear in a prominent place on all appropriate City materials, whether printed, electronic or on-line

ROGC recommendation: This is current practice and the ROGC recommends its continuation.

5.4(B) Code of Ethics and Ethical Standards. The SRTF proposed that individuals who participate in the City's volunteer program adhere to the Code of Ethics and sign verification that they will do so.

ROGC recommendation: The ROGC recommends approval of this recommendation. It should be noted that the two departments that use volunteers the most, the Library and Parks, Recreation, and Neighborhood Services, already require new volunteers to sign a statement agreeing to a code of conduct.

5.4(C) Code of Ethics and Ethical Standards. The SRTF recommended the following statement about the City's ethical standards be required to appear in a prominent place on appropriate City materials, whether printed, electronic or posted on the City's web site: "The City of San José is committed to open and honest government and strives to consistently meet the community's expectations by providing excellent service, in a positive and timely manner, and in the full view of the public."

ROGC recommendation: The ROGC recommends approval of this proposal.

5.5 Annual Review and Re-Adoption. The SRTF recommended that the Open Government Ordinance be subject to an annual review and re-adoption by the City Council.

ROGC recommendation: As an alternative to annually reviewing and re-adopting the Open Government Ordinance, the ROGC recommends that the Open Government reforms be reviewed as a part of the Mayor's Biennial Ethics Review.

B. PUBLIC RECORDS

The Rules and Open Government Committee has directed staff to provide additional information before it makes recommendations on the SRTF Public Records recommendations related to *Law Enforcement Information, Police Statistical Reports,* and *Statistical Reports Prepared by the San José Fire Department.* These recommendations will be provided at a later date. All other recommendations related to the SRTF Public Record proposals are below.

6.1 Public Information That Must Be Disclosed.

6.1.1.050 Statistical Reports Prepared by the Independent Police Auditor (IPA). The SRTF recommended that the IPA maintain statistical reports concerning citizen complaints against the Police Department. The information must be maintained so that names of individual officers would not be disclosed, but it could be determined if multiple complaints have been directed at a single officer.

ROGC recommendation: The ROGC recommends approval of this proposal, which will require the IPA to change procedures to ensure that multiple complaints against a single officer can be tracked.

6.1.2.010 Advice from the City Attorney's Office. The SRTF proposed that the City Attorney release upon request a summary document that explains any written interpretation of the California Public Records Act, the Brown Act or the Open Government reforms.

ROGC recommendation: The ROGC recommends approval of this proposal but also recommends that language be included to clarify that this would not constitute a waiver of the attorney-client privilege.

6.1.2.020 Drafts and Memoranda. The SRTF recommended that all drafts, notes, and memoranda be subject to disclosure once the associated proposal, initiative or other contemplated action has been made public.

ROGC recommendation: The ROGC recommends that this proposal be approved contingent upon the City's ability to maintain the Balancing Test and assert the deliberative process privilege (see page 6 of this memorandum). Currently, the City policy is to make available drafts that are retained in the normal course of business. Determinations to make other drafts available to the public are made on a case by case basis in consideration of how the public's interest is best served.

6.1.2.030 Litigation Materials. The SRTF proposed that the following litigation records be subject to disclosure upon request:

A. Pre-litigation claims.
B. Records previously not protected by attorney-client privilege.
C. Records of communications between the City and an adverse party once litigation is complete.

ROGC recommendation: This is current practice and the ROGC recommends its continuation.

6.1.2.040 Personnel Information. The SRTF recommended that specific human resource information regarding job applicants, employees, compensation and benefits, labor agreements, and performance-based compensation increases be subject to disclosures.

ROGC recommendation: This is current practice and the ROGC recommends its continuation.

6.1.2.040(B) Misconduct of City Officials. The SRTF proposed that records of misconduct by a City Official (as defined in Chapter 12.12 of the San José Municipal Code) be subject to disclosure when "there is reasonable cause to believe that the complaint is well-founded..."

The ROGC recommends approval of this proposal.

6.1.2.040(C) Log of Disciplinary Actions. The SRTF proposed that the City maintain a log of employee disciplinary action that includes non-identifying information about each action and that this log be open for inspection.

ROGC recommendation: The Office of Employee Relations has already initiated such a log with data going back to January, 2008. The ROGC recommends approval of this recommendation.

6.1.2.050 Contracts with the City and Redevelopment Agency. The SRTF proposed that contract-related materials be released as public records except as exempted in the California Public Records Act. The SRTF also recommended that the Office of the City Clerk retain all contracts except purchase orders.

ROGC recommendation: This is current City policy except for the proposal to retain all contracts except purchase orders in the City Clerk's Office. The ROGC does not recommend that the City Clerk retain all contracts, noting that some contracts, including those of the Redevelopment Agency, are more appropriately retained elsewhere. To ensure that the public has easy access to contracts, however, ROGC recommends that the Clerk's Office maintain an index of the locations of contracts.

6.1.2.060 Budget and Other Financial Information. The SRTF recommended that both proposed and adopted City budgets be subject to disclosure and that a line-item budget be made available either online or in hard copy at the Office of the City Clerk and all public libraries in the City. The Task Force has also recommended that all fiscal records be subject to disclosure after redaction of any privileged information.

ROGC recommendation: The ROGC recommends approval of these proposals with the exception of the recommendation to publish a line-item budget. The City makes extensive and comprehensive budgetary information available online and in hard copy form, but does not manage expenditures at the line-item level nor does it currently publish a line-item budget. The ROGC recommendation reflects current practice.

6.1.2.070 Balancing Test.

Background: The California Public Records Act provides a general exemption known as the balancing test. The balancing test allows public agencies to withhold records when, "on the facts of the particular case, the public interest served by nondisclosure clearly outweighs the public interest served by disclosure of the record." (California Government Code Section 6255.) This provision contemplates a case-by-case balancing process.

The SRTF has recommended that the balancing test be eliminated because of a belief that the City relies on it to withhold documents that should not be withheld. In place of the balancing test, the SRTF recommended four specific exemptions to allow the City to protect information that it believed should be properly withheld. The specific recommendation follows:

A. Except as provided in this section, no record may be withheld on the basis that the public interest in withholding the information outweighs the public interest in disclosure, or that disclosure would reveal or interfere with the deliberative process of any City body, agency, department, official, or employee.

B. Except as otherwise provided in this Open Government Ordinance or by state or federal law, the following specific categories of information may be withheld or redacted, if on the facts of the

particular case the public interest served by not disclosing the record clearly outweighs the public interest served by disclosure of the record:

1. *Personal information provided to the City by a private individual, with the reasonable expectation that the information will remain confidential. "Personal information" means: name; passport, social security, driver's license, or other government-issued identification number; physical description; home address; home telephone number; personal email address; financial, credit card, or debit card account number; or other information that would make the individual who submitted it readily identifiable.*

2. *Identifying information regarding a City employee who: (a) provides information in the course of an investigation of the conduct of any City body, agency, department, official, or employee; and (b) is not a subject of the investigation. "Identifying information" means: names, unique job titles, or other information that would make the employee readily identifiable. Numerical or alphabetic designations will, to the extent possible, be substituted for names omitted from any record provided to the public.*

3. *Information regarding: (a) actual or potential threats to the security of public facilities, essential public services, or public access to public facilities or essential public services, and planned or actual responses to such threats, or (b) other information the disclosure of which would create a serious risk of death or injury, serious economic harm, or harm to public facilities or essential public services that cannot reasonably be prevented through means other than nondisclosure.*

4. *Records prepared for use in connection with a closed session of a body subject to the Brown Act, to the extent that they consist of information that may properly be discussed in closed session. Such records will be subject to disclosure to the same extent and pursuant to the same process as recordings or minutes of closed sessions.*

C. *If the City determines that the public interest is served by not disclosing the information, the City Attorney must provide, in writing, a detailed justification. The person requesting the public information may appeal the City Attorney's determination to the Open Government Commission.*

Policy/Implementation Issues: The City Attorney's Office and the Administration believe that the balancing test has been applied judiciously to protect only the most sensitive documents and that the City must have the flexibility to rely on the balancing test when a specific exemption does not apply.

During the SRTF's discussion about the balancing test, several Task Force members identified examples of information that would not be protected by the four exemptions; to address these examples the Task Force did make some additional amendments to the language that had been approved by the Public Records Subcommittee. However, at least one Task Force member noted that the difficulty in crafting the language of the exemptions underscored why the balancing test should not be eliminated – it is impossible to legislate every contingency. Since the Task Force approved these recommendations, the Administration has encountered additional categories of information for which it believes the public's interest would be better served by withholding, even though these categories would not be protected by the Task Force recommendations.

Historically, the City has applied the balancing test to protect the legitimate privacy rights of third parties or City employees or the "deliberative process/legislative privilege." The deliberative process/legislative privilege is invoked to exempt disclosure of records revealing the deliberations of government officials or information relied upon by the officials in making decisions that they would not otherwise receive if the information were routinely disclosed. The key question in every deliberative process/legislative privilege case is whether the public's interest is better served by protecting the decision making process. If the balancing test is eliminated, the City could not prevent disclosure of documents reflecting the frank discussion of legal or policy matters.

The Administration's initial recommendation provided to the ROGC in August 2008 was to retain the balancing test or consider modifying it with alternative language that the SRTF had previously considered, but rejected.

Additional Background:

The ROGC's review of the SRTF Balancing Test recommendations stimulated significant interest and input on the part of the Task Force and other stakeholders. Consequently, the ROGC directed staff to review the Summary of the California Public Records Act prepared by the California Attorney General's Office and draft language narrowly construing the Balancing Test. (Attachment C is an excerpt from the Summary of the California Public Records Act 2004 prepared by the California Attorney General's Office on the "public interest exemption" – also known as the Balancing Test.)

Staff was also directed to consider whether certain records could be identified that would always be disclosed—essentially a list of records to which the Balancing Test would never be applied. The Chair of the Public Records Subcommittee of the Task Force and counsel for the San José Mercury News offered to provide input about application of the Balancing Test to definite lists of documents. (Attachment D is a memorandum from Subcommittee Chairperson Robinson that discusses the application of the Balancing Test to the more than 800 categories of documents described in the City's records retention

schedules.)

Revised Staff Recommendation:

After further discussion at the ROGC, the Administration brought forward new proposed language narrowly construing the Balancing Test (Attachment E). Staff relied on the Attorney General's materials in preparing this proposal. Section C in this proposed language lists categories of records which will not be withheld on the basis of the Balancing Test. Section D in this proposed language creates a category of records which would only rarely be withheld and which would require Rules & Open Government approval before withholding based on the Balancing Test. During the July 29, 2009 meeting of the ROGC, SRTF member Bob Brownstein suggested that the line-item detail of budgets should be added to the category of records in Section C that would never be subject to the Balancing Test. The ROGC declined to change its recommendation, but did ask staff to be prepared to speak to this proposal should the issue arise during the City Council's consideration of this report.

The Office of the City Attorney and the Administration believe that some flexibility is necessary to protect information in records. The proposed language in Attachment E affords the City the necessary flexibility, but is consistent with the Attorney General's interpretation that "[t]he City's interest in nondisclosure is of little consequence in performing this Balancing Test; it is the public's interest, not the City's interest that is weighed."

The proposed language in Attachment E clarifying the deliberative process privilege is also consistent with the Attorney General's materials. The proposed language makes clear that "the deliberative process privilege does not protect facts from disclosure but rather protects the process by which policy decisions are made" and that "[t]he Balancing Test is applied in each instance to determine whether the public interest in maintaining the deliberative process privilege outweighs the public interest in disclosure of the particular information in question."

The CPRA includes another exemption to protect drafts of documents not ordinarily retained in the ordinary course of business. As noted earlier, the SRTF proposal would require drafts to be disclosed—after the final document has been released—whether or not the draft would be retained the ordinary course of business. When the City withholds draft documents from disclosure, it does so to protect the deliberative process privilege. As long as the deliberative process privilege may be considered pursuant to the Balancing Test, the Task Force's recommendation on Drafts and Memoranda can be adopted.

6.1.2.080 Code Enforcement. The SRTF recommended that information relating to Code Enforcement cases, including closed investigative files, be open to disclosure with the exception of the personal identifying information of the complainant.

ROGC recommendation: This is current practice and the ROGC recommends its continuation.

6.2 Process for Disclosure

6.2.1 Immediacy of Response. The SRTF proposed new time requirements for responding to request for public records.

ROGC recommendation: The ROGC recommends approval of this proposal with slightly revised timeframes that will permit staff the flexibility to prioritize responding to requests with the requirements of other City business. Current City policy is to respond "promptly," following the requirements described in the California Public Records Act. The new proposed timelines are specific and will require a faster response to requests for public records than that dictated by the CPRA.

6.2.2 Justification of Withholding. The SRTF recommended that the City provide written justification whenever records are withheld from the response to a public records request.

ROGC recommendation: This is current practice and the ROGC recommends its continuation.

6.2.3 Withholding Kept to a Minimum. The SRTF recommended that the redaction or segregation of exempt records from responses to public records requests be required to be justified, that no fees should be charged to requestors based upon personnel costs of responding to requests, and that the capability for convenient, efficient, and economical responses to public records requests be incorporated into the design of all new automated information systems.

ROGC recommendation: This is current practice and the ROGC recommends its continuation.

6.2.4(A) Fees for Duplication. The SRTF proposed that the City provide estimated costs of duplication for public records request responses, including a breakdown of how those costs were determined. The requestor must agree to pay the estimated cost.

ROGC recommendation: This is current practice and the ROGC recommends its continuation.

6.2.4(B) Fees for Duplication. The SRTF proposed that the fee for providing photocopies in response to public records request be set at $.10 per page for the first 50 pages and, beginning with page 51, that it be set at standard level of cost recovery.

ROGC recommendation: The ROGC recommends continuing current City practice, which is to charge for all copies at a standard level of cost recovery, which is currently set at $.20 per page.

6.3 Effective Date. The SRTF recommended that its Public Records proposals take effect six months after approval by City Council.

ROGC recommendation: The ROGC recommends approval of this proposal.

C. TECHNOLOGY

Acknowledging the rapid pace of technological change, the Task Force recommended that the proposals in this section of the report devoted to the effective use of technology to enhance transparency be considered as guidance but that they not be included in the City's Open Government Ordinance.

The SRTF Technology recommendations are organized in three sections: Systems and Infrastructures, Web Site, and Procedures and Best Practices. A discussion of each follows:

7.0 Intent. The SRTF recommended promoting the use of technology to improve and further open government, transparency and access to public records.

ROGC recommendation: ROGC recommends approval of this statement.

7.1 Systems and Infrastructure.

7.1.1 Electronic Document and Web Content Management systems. The SRTF recommended the acquisition of Electronic Document and Web Content Management systems.

ROGC recommendation: Both staff and the ROGC agree with this recommendation but note that current budgetary constraints will delay implementation.

7.1.2 Ticketing Requests for Public Records. The SRTF recommended that the City implement an automated system similar to an IT Help Desk Ticket System to track the status of public records request responses.

ROGC recommendation: The ROGC does not recommend approval of this SRTF proposal. Staff is currently tracking the existing requests without such a system. Should the volume of future requests require a ticketing system, staff will recommend reconsideration of this proposal.

7.1.3 Displaying and Recording Votes at Council Meetings. The SRTF proposed that the City use technology to display specific votes of the Mayor and Councilmembers in the Council Chambers and on CivicCenter Television, and that a permanent database of those votes be maintained for public access on the City web site.

ROGC recommendation: The City currently has the technological capability to display individual votes for all meetings held in the City Council Chambers and this system is used at the discretion of the Chair. The ROGC recommends that use of this system remain at the discretion of the Chair rather than for every vote taken by the Council at each meeting. However, the ROGC does recommend that staff implement a searchable database of each vote by Councilmembers and Mayor in a manner accessible to the public via the City's web site.

7.1.4 Public Safety and Law Enforcement. The SRTF recommended that the City pursue development and acquisition of a Records Management System with the capability to redact information that is exempt from disclosure under the California Public Records Act and that the San José Police Department (SJPD) improve its current on-line system for viewing the location of crimes in the City to provide more comprehensive information about those crimes.

ROGC recommendation: The ROGC recommends approval of this recommendation. The SJPD has issued an RFP for a Records Management System.

7.2 Web Site. The SRTF made 19 separate and detailed technical recommendations regarding the operation of the City's web site.

Note: The City Council has provided funding for consulting services to assess and make recommendations of the City's Internet to improve online services and access to information. The SRTF recommendations will be examined in the course of that audit to determine ongoing relevance to current technological trends.

7.3 Procedures and Best Practices.

7.3.1 Posting, Archiving, Access and Document Retention Policies

7.3.1.010(A) Posting Documents. The SRTF recommended that every Department maintain an index, linked from the Department's home page, of every report made to the City Council or Council Committee.

ROGC recommendation: The ROGC is not recommending approval of this proposal. Staff evaluated the City's new search engine and determined that it provides adequate access for quickly locating staff reports.

7.3.1.010(B) Posting Documents. The SRTF recommended that the City budgets be posted on-line permanently.

ROGC recommendation: This is current City practice and the ROGC recommends its continuation.

7.3.1.010(C) Posting Documents. The SRTF recommended that the City have a qualified professional in records management determine the adequacy of retention periods for ten categories of City records in current records retention schedules.

ROGC recommendation: The City Council approved funding for a Public Records Manager in the 2007-2008 Budget, and a professional Public Records Manager has been on staff since January, 2008. This recommendation has been completed, and the ROGC recommends a continuation of this practice.

7.3.1.020(A) Archiving Documents. The SRTF recommended that all email of elected officials as well as non-clerical staff to elected officials be retained for 10 years and that

all email of City employees who file the Form 700 – Statement of Economic Interests be retained for 5 years.

ROGC recommendation: The ROGC is not recommending approval of this proposal. Staff noted that best practices in records management prescribe retaining email based upon an analysis of the content of the emails and the relevant records retention schedules. The ROGC also took into account information from staff regarding the enormous volume of email that the City produces and the resources that would be required to manage such a large quantity of email over time.

7.3.1.020(B) Archiving Documents. The SRTF proposed that the City maintain a permanent electronic archive of Council documents.

ROGC recommendation: This is current City practice and the ROGC recommends its continuation.

7.3.1.030 Retention Schedules. The SRTF proposed that the City publish an index to City records and the associated retention schedules for those records and that all changes to retention schedules be reviewed at an open and public meeting of both the Open Government Commission and the City Council.

ROGC recommendation: The City currently maintains an index of its records and the associated retention schedules on the City web site and the ROGC recommends continuation of that practice. However, the ROGC is not recommending approval of the SRTF proposal that all changes to retention schedules be reviewed by the City Council noting the routine administrative character of this activity. Instead, the ROGC recommends that all proposed changes be posted on the City's web site thirty days in advance of becoming effective.

7.3.2 Records Manager and Other Staffing Requirements. The SRTF recommended that the City hire a Public Records Manager.

ROGC recommendation: As noted earlier, the City Council approved funding for a Public Records Manager in the 2007-2008 Budget, and a professional Public Records Manager has been on staff since January, 2008. ROGC recommends a continuation of this position.

7.3.3 Privacy. The SRTF recommended that the City follow a privacy policy, referenced in the footer of every City web page, to ensure that home and email addresses be redacted from public information, and that Social Security Numbers of contractors be maintained separately from contracts.

ROGC recommendation: This is current practice and the ROGC recommends its continuation.

D. ADMINISTRATION AND ACCOUNTABILITY

8.1 Purpose and Intent. The SRTF recommended regular education and training about the Open Government reforms, Ralph M. Brown Act, California Public Records Act and

Political Reform Act. The SRTF also recommended that the City Manager's Office regular reports to the City Council about compliance with the reforms.

ROGC recommendation: The City currently provides regular education and training about all open government laws. In addition, the Administration has been reporting regularly to Council about the reforms. The ROGC recommends continuing these practices.

8.2 Open Government Officer. The SRTF recommended the Open Government Officer position, which would be filled by an attorney reporting to the City Manager and would be responsible for:

1. Overseeing education and training to ensure the City's compliance with the Open Government Ordinance;
2. Supporting the work of an Open Government Commission, including the evaluation of and monitoring of compliance with the Open Government Ordinance, and evaluation of complaints alleging violations of the California Public Records Act, the Brown Act, and the Open Government Ordinance.
3. Monitoring closed sessions and/or reviewing closed session tapes or transcripts to ensure proper conduct of Closed Sessions. (An earlier decision by the City Council not to approve the recording of closed sessions–except for discussions concerning real estate negotiations–eliminated the need for this function of the Open Government Officer.)

8.3 Open Government Commission. The SRTF also recommended that the City establish a neutral and independent Open Government Commission, with a composition similar to the San José Elections Commission. The SRTF recommended the following duties and responsibilities for the Commission:

1. Advise the City Council about the Open Government Ordinance;
2. On an annual basis, (a) make any recommendation for amendments or changes to the Open Government Ordinance to the City Council; and (b) review the independence of the Open Government Officer;
3. Determine, if questioned or challenged, the categorization of a body for the purpose of determining the requirements, if any, for that body's meetings;
4. Develop an annual report, based on public input, indicating additional public information, if any, that the City should routinely make available to the public;
5. Hear appeals from decisions issued by the Open Government Officer on complaints of violations of the California Public Records Act, Ralph M. Brown Act or Open Government Ordinance; and
6. Recommend penalties for violations of the California Public Records Act, Ralph M. Brown Act or Open Government Ordinance where appropriate.

8.4 Investigations. The SRTF also recommended a process for investigating complaints related to open government laws.

Policy/Implementation Issues: Allegations that City personnel have violated the Brown Act or CPRA are rare. As a result, the Administration concluded that there does not appear to be enough activity to warrant the creation of a new Open Government Officer and Commission, along with the infrastructure necessary to support the proposed position and

commission, which staff estimates would cost approximately $611,000 annually (See Attachment F).

Moreover, the function of the Open Government Officer position duplicates, in many ways, that of the City Attorney who is the chief legal advisor to the Council and the City Administration. The Administration and the City Attorney believe that this function can and should remain with the City Attorney's Office. Other functions of the Open Government Officer are absorbed by the Public Records Manager.

ROGC recommendation: The ROGC does not recommend the establishment of an Open Government Officer position or the creation of an Open Government Commission.

8.5 Enforcement. The SRTF proposed specific appeals processes involving the Open Government Officer and Open Government Commission to enforce complaints about requests for public records and violations of the requirements for public meetings and closed session. The SRTF also recommended that penalties for violations be progressive, including education and training and up to recommendations for corrective action to the appropriate Council Appointee and the Rules and Open Government Committee.

Policy/Implementation Issues: Although the Task Force intended to develop a less expensive and simpler option for complainants to challenge CPRA or Brown Act violations, alternative processes already exist. The Public Records Manager is involved in all requests for records that concern multiple departments. The Public Records Manager also assists departments in responding to requests for public records and in understanding the requirements of the CPRA and the City's Public Records Policy and Protocol. In addition, the Rules and Open Government Committee currently hears complaints about CPRA requests, and the Attorney's Office responds to complaints about Brown Act violations, resulting in a cure or correction in most cases, even without a finding or admission of a violation.

The SRTF indicated that one significant reason for the creation of the Open Government Commission was to create an independent entity to evaluate complaints. However, the Administration noted that since the San José Elections Commission currently serves a similar, independent role in evaluating complaints related to the City's ethics provisions, it could serve a similar role for complaints related to the CPRA, Brown Act and Open Government Ordinance.

ROGC recommendation: The ROGC recommends an appeals process for public records requests that would involve the City's Public Records Manager, the ROGC, the Elections Commission and the Council. Under the ROGC's proposal, a requestor would have many options to appeal. Such appeals could be directed to the Public Records Manager, the ROGC, the Elections Commission or the City Council, either sequentially or directly.

The ROGC further recommends an alternative process to resolve allegations of meeting violations. Under this alternative, the City Attorney would review the complaint and then provide advice to the body in question. If the complainant is not satisfied with the results, and if the body is not the City Council, the complainant could appeal to the ROGC and/or to

the City Council for redress. In all cases, the complainant could file a complaint with the Superior Court and/or the District Attorney as provided in the Brown Act.

The Rules and Open Government Committee concluded that the alternative of using the Public Records Manager, Rules and Open Government Committee, and the Elections Commission as avenues of appeal stayed true to the intent of the Task Force by providing some independent review in a manner that more effectively uses City resources.

PUBLIC OUTREACH

Not applicable.

COORDINATION

This report has been coordinated with the City Attorney and the City Clerk.

Tom Manheim
Director of Communications

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

Attachments:

A. Phase II Report and Recommendations of the Sunshine Reform Task Force, August 13, 2008
B. Staff Response to Phase II Report and Recommendations of the Sunshine Reform Task Force, August 6, 2008
C. Excerpt from *Summary of the California Public Records Act 2004,* Office of the Attorney General, California Department of Justice
D. Memorandum re: Balancing Test—Application to City Records, Bert Robinson, Sunshine Reform Task Force
E. Proposed Language for the Balancing Test
F. Estimated Costs for Open Government Officer and Open Government Commission

Code of Ethics Agreement for Bodies Created by City Council

Residents of the City of San Jose are entitled to fair, ethical and accountable City government that is independent, impartial, and accountable. As a member of a body created by the City Council and subject to the Brown Act (including but not limited to a City Board, Commission, Committee, Task Force or Working Group), you are expected to promote and maintain the highest standards of professional and personal conduct to maintain the public's confidence in their City government. In keeping with the City of San Jose's commitment to an open and ethical environment, it is required that you adhere to the City's Code of Ethics for Bodies Created by City Council.

I, _____, as a member of a body created by the City Council, agree to:

- Conduct myself in a professional manner; maintaining high standards of integrity and honesty.
- Treat all members of the public, staff and members of bodies created by the City Council with respect and courtesy.
- Encourage diverse public engagement in the City's decision-making processes and support the public's right to have access to public information concerning the conduct of the City's business.
- Avoid any activity that could be seen as a conflict of interest, such as accepting gifts or favors from individuals or organizations, that could be seen to be an attempt to use my official position to influence a City decision.
- Disclose any relevant substantive information I have received from any source outside the public decision-making process on any matter that is under consideration of the body
- Base my decisions on the merits and substance of an issue, rather than on unrelated considerations.
- Outside of my responsibilities as a member of a body created by the City Council, not appear on behalf of private interests of third parties before the Council, any body created by the City Council or other proceeding of the City.
- Respect confidential information and resources that are available to me as a result of representing the City, and refrain from using them for personal gain or for personal, non-City business related reasons. Bring any violation of this confidentiality, any violation of City Policy or local, State or Federal law to the attention of my staff liaison.
- Reinforce the City of San José's commitment to equal employment opportunity and a work environment free of discrimination and harassment, including sexual harassment.
- Comply with the laws of the nation, the State of California and the City of San Jose in the performance of my public duties.
- Read and adhere to Council Policies 0-4, Consolidated Board and Commission Policies; 0-15, Code of Ethics for Officials and Employees of the City of San José; and 0-36, City Council/Commission Code of Conduct.

I understand that I may be dismissed from my position as a member of a body created by City Council for not adhering to the above Code of Ethics.

_____ _____

Signature Date