Rules Committee: 3-30-05
Item: G(1)(a)

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# Memorandum

**TO:** RULES COMMITTEE

**FROM:** RICHARD DOYLE
City Attorney

**SUBJECT:** **Allegations by Silicon Valley Community Newspapers regarding Public Records Act violations**

**DATE:** March 21, 2005

This is in response to a memorandum from Councilmember Chuck Reed dated March 7, 2004, concerning the referenced matter. The Rules Committee referred the matter to the City Attorney for response.

**1. Has the Public Records Act request by Silicon Valley Community Newspapers dated September 10, 2004, as modified October 20, 2004, been responded to in a manner that complies with state law?**

Yes. The City's response to this records request conformed in all respects with the provisions of the California Public Records Act. This conformance includes, without limitation, addressing the following elements required by the Act:

- Making a determination and notifying the records requestor within 10 days of receipt of the records request regarding the disclosable public records in possession of the City. The City's response to this records request was sent to the requestor via regular U.S. mail and electronic mail on September 20, 2004, a copy of which response is attached hereto for convenient reference.
- Making available for inspection records gathered from departments located all over the City in response to the request: Ms. Brundage of Silicon Valley Community Newspapers travelled to the City Attorney's Office on October 19, 2004, January 6 and January 7, 2005, all of which were mutually agreed-upon dates and times, to review records gathered in response to her records request. Ms. Brundage also came to the City Attorney's Office March 8, 2005 to review additional records pursuant to an additional, separate records request she submitted.
- Providing photocopies of those records requested upon payment of only the direct costs of photocopying (without any charge for the massive amount of staff time -- well over hundreds of hours in the aggregate -- to research, compile and review potentially responsive records, which

- Reasonably segregating or redacting portions of a record not subject to disclosure (such as attorney-client communications) while making the balance of the record available for review and/or photocopying (as noted above).
- Providing an initial response to the request within the time limits set forth under State law (as noted above).
- Charging only the direct photocopy costs for records photocopied, in accordance with State law (as noted above).
- Requesting departments with records potentially responsive to the records request to coordinate with the City Attorney's Office in the production of their records.

While the original, and all subsequent, records requests from Silicon Valley Community Newspapers came to the City Attorney's Office, the City Attorney's Office coordinated City-wide with other departments that were more likely to have records that would be responsive to the records request in order to facilitate a comprehensive and complete response to the request.

**3. Is the City's document retention policy consistent with the California Government Code?**

Yes. The City's document retention policy is consistent with the requirements of California Government Code 34090 et seq. In some instances in both the Citywide General Records Retention Policy and the individual Records Retention Schedules for specific departments in the City, the City goes beyond the time requirements of the Government Code to retain records. These are usually records identified by the individual department as being useful for a time period longer than required by the Government Code (which in most cases under GC 34090 is a 2 year period).

**4. Is the practice of cleaning out District office files and recycling or destroying documents before a new Councilmember takes office consistent with the California Government Code?**

The practice may be consistent with the Government Code's requirements depending on whether the Councilmember is the "owner" of the record. If the Council office is the owner of the record, the Council office should comply with the Government Code 34090 et al. The required time for most, if not all, the records a Council office is the record owner of would most likely be 2 years under GC 34090. In most cases, the record owner of documents held by a Council office would be the City Clerk's office. The

obligated to search the backup tapes for e-mails. This is particularly true given the amount of time it would take to restore a single backup tape and the difficulty involved in searching once the backup is restored. We are informed that it takes an average of four hours of staff time to restore one day of e-mail.

**7. Do the City's electronic archives contain email between District 10 and the City Manager's Office from July 1 to August 31, 2004 that have not been given to Silicon Valley Community Newspapers?**

The City Manager's Office has responded to multiple Public Records Act requests regarding the McKean Sports Complex in Council District 10. All documents, both electronic and hardcopy, have been provided on more than one occasion to the City Attorney's Office. To respond to the requests, staff provided copies to the City Attorney's Office of hardcopy files and conducted document searches of both on-line email folders and off-line (archived) folders. As a general practice when responding to Public Records Act requests, the City did not restore electronic files (i.e., back-up tapes) to respond. The City Manager's Office has responded fully to the requests and responses have been coordinated by the City Attorney's Office.

**8. If any files have been destroyed or taken as alleged in the above described letters, who did so and what actions could be taken to recover any such documents?**

We are not aware of the destruction of any specific files that contain public records or documents which were the subject of a pending public records act request. Former Vice mayor Dando has confirmed that she purged documents when she left office, consistent with the practice of other former Mayors and City Councilmembers. Many of the documents that appear to have been recycled (copies of staff memos, agreements) are on file with other City departments such as the City Clerk and Employee Services which serve as the official repository for such records.

RICHARD DOYLE
City Attorney

cc: Mayor and City Council
Del Borgsdorf, City Manager
Lee Price, City Clerk

Council office may have copies of those records that are held by the City Clerk's office. Copies have no retention period requirements under the Government Code and can be destroyed or recycled at any time pursuant to GC 34090.7.

**5. Does the City have a system that enables reliable verification of compliance with the Public Records Act by the offices of the Mayor and Councilmember?**

The City does not have a universal system for Council Offices to follow to ensure reliable verification of compliances with Public Records Act requests. Council Offices generally work with the Office of the City Clerk or Office of the City Attorney to coordinate responses to Public Records Act requests. We rely on the Council offices to search records and provide same that are responsive to any request. The recent work completed by the Offices of the City Attorney, City Clerk and City Manager is a good starting point for ensuring a reliable process for Council Offices. Staff could provide training to Council Offices on responding to Public Records Act requests and apply the same processes to ensure reliable responses.

**6. Does the City have an obligation under the Government Code to search archived electronic files to retrieve email requested under the Public Records Act?**

Archived electronic files are files that are transferred to a storage file typically because they are old items that are not frequently used. They are files that have not been deleted by the individual user, but are essentially put into storage to allow for later retrieval. With regard to e-mails which may exist in archived files, because the e-mails were put into folders which were later essentially put into storage by archiving the file, the City has the same obligation under the Public Records Act to search archived electronic files as it does to search hard copied documents that have been sent to storage. When a Public Records Act request seeks documents that have been kept and sent to storage, the public entity has an obligation to conduct a reasonably diligent search for the stored record.

Archived files are different than and clearly distinguishable from electronic data contained on backup tapes. The City maintains a backup data system which saves electronic data by way of a tape backup that creates a daily "snapshot" of e-mails residing in the individual accounts on a central server. This "snapshot" is created generally once daily and provides a historical record of the e-mails residing on the server at the time of the "snapshot". The backup tapes are maintained for a limited period of time, generally no more than 90 days at which point the oldest stored backup tape is overwritten and becomes the next new backup tape. This system was not designed as a message storage system, but rather for point-in-time disaster recovery. Because the backup system was intended only as a fail-safe system and was never intended to be a record storage system, it is the opinion of this Office that the City is not

totalled approximately 5 feet of material, produced in response to the request).

- Reasonably segregating or redacting portions of a record not subject to disclosure (such as attorney-client communications) while making the balance of the record available for review and/or photocopying.

- Producing electronic mail records.

While this inquiry is phrased as if Silicon Valley Newspapers modified on October 20, 2004 the content or scope of their original records request, please note that Silicon Valley Community Newspapers clarified via electronic message sent to the City's Attorney's Office on Veteran's Day Holiday (Nov. 11, 2004) that they "didn't intend for that [narrowed request] to supplant their original Sept. 10 request." They just meant to clarify the order in which they wanted to review the records gathered in response to their original request.

**2. Has the Public Records Act request by Silicon Valley Community Newspapers been responded to in a manner that complies with the City's Public Records Policy?**

Yes. The City's response to this records request fully conformed in all respects with City Policy, and in some instances exceeded the requirements of the Policy, including without limitation conforming to or exceeding the following specific elements of the Policy:

- Making available for review and inspection during normal business hours all records not exempt from disclosure under State law.

- Assisting the requestor in identifying records and information responsive to the request by identifying persons at the City most likely or reasonably likely to have records responsive to the request and performing queries with those persons City-wide for those records.

- Describing where the records are located (and then actually gathering the responsive materials in one location at the City rather than making the requestor travel to several different departments of the City).

- Conducting an extensively broad review of potentially responsive records City-wide, rather than making the requestor provide a more reasonable request for more identifiable, desired records.

CITY OF
SAN JOSE
CAPITAL OF SILICON VALLEY

*Office of the City Attorney*
RICHARD DOYLE, CITY ATTORNEY

September 20, 2004

Ms. Sandy Brundage, Reporter
Almaden Resident
Silicon Valley Community News
1095 The Alameda
San Jose, CA 95126

Re: Public Records Request dated September 10, 2004

Dear Ms. Brundage:

Our Office is in receipt of your electronic message of September 10, 2004 in which you have made a request for access to certain materials in the possession of the City related to, among other things, a proposed sports field complex on McKean Road in the City and the Almaden Youth Association. As the City is an extremely large organization, it would take an enormous amount of time to survey every department and division of the City to ascertain if any records responsive to your request are housed in each area of the City organization. Rather than ask you to resubmit a more focused request for identifiable records, I have asked Councilmember Pat Dando and her assistants Denelle Fedor and Joshua Howard (persons specifically identified in your request), the City Manager's Office, and the Departments of Planning, Building and Code Enforcement, Public Works and Parks, Recreation and Neighborhood Services (departments of the City where it is reasonably likely that records responsive to your request may be located) to review their records for those that may be responsive to your request. Appropriate persons in the City are in the process of identifying and gathering the documents they possess that appear to be responsive to your request.

Your request is for access to "certain material in the possession of the City...." It is not clear what is meant by the word "material." Please note that the City interprets that word to mean a writing that constitutes a public record as defined under the California Public Records Act (Cal. Gov't. Code sections 6250 *et.seq.*). You also have asked to inspect and receive "conversations through the present date." Please know that the City does not know how to make conversations available to you except to the extent that discloseable conversations have been memorialized in a writing that constitutes a public record.

With regard to your request for each environmental study conducted for the proposed sports complex, the Planning Division has advised that you should have received a copy of the draft environmental impact report for this proposed project (the

"DEIR") and all testing done in connection with that DEIR should be contained in that DEIR. However, please do feel free to let me know if there is a study that you believe was performed and committed to a writing that is not contained with the DEIR, and I will ask appropriate City staff if they have a copy in their possession.

Your request for "all documents and conversations" from the project's inception through the present date related to the project, AYA, SAVUR, SAVRA, each individual director on the board of AYA, including ex-officio members such as Gary Rummelhof, each environmental study, the well tests, the drilling of a second well, the Caglia Ranch, the San Jose Unified School District, artificial turf, water supply at the site, and traffic and safety issues at the proposed site is so broad that it is reasonably likely to include a request for documents that would be exempt from disclosure under Sections 6254 and 6255 of the California Public Records Act on a variety of grounds.

These grounds include the preliminary drafts, notes or inter/intra-agency memoranda exemption set forth in Cal. Government Code section 6254(a). In this regard, please be advised that City staff do not routinely retain or maintain personal notes that they may jot down during a meeting and routinely delete messages or notes received or sent electronically. The City has an adopted City policy establishing that e-mails are not intended to be kept as permanent City records.

Your request also may include documents that are exempt from disclosure under Cal. Government Code section 6254(k) because their disclosure is protected by the attorney-client privilege or prohibited by Cal. Evidence Code section 1040, which section makes privileged information acquired in confidence by a public employee in the course of his or her duty and not open, or officially disclosed, to the public prior to the time the claim of privilege is made. Additionally, your request likely includes materials that would be exempt from disclosure under Government Code Section 6255, specifically the deliberative process privilege encompassed thereby.

Notwithstanding the overbroad nature of your request, the City officials and staff that I described above are currently in the process of gathering all documents that appear to be responsive to your request and not subject to one of the exemptions or privileges noted above. These City officials and staff are performing this task without requiring you to submit a more focused request. Please note that the decision to proceed in this fashion does not affect or limit the City's ability or right to object to similar blanket requests for materials in the future.

We anticipate that documents gathered pursuant to your request can be made available to you for your inspection within approximately ten (10) to fourteen (14) business days from the date of this response. We will contact you at the telephone number provided in your electronic message when these records are ready for your inspection. Should you request any photocopies of those records, you will be charged only the direct photocopy charges therefor. The undersigned is responsible for this response to your request.

Please feel free to contact the undersigned if you have any questions or concerns in connection with this response.

RICHARD DOYLE, City Attorney

By: _____
RENEE GURZA
Sr. Deputy City Attorney

c: Councilmember Pat Dando
Del Borgsdorf, City Manager
Stephen Haase, AICP, Director of Planning, Building and Code Enforcement
Katy Allen, Director of Public Works
Sara Hensley, Director of Parks, Recreation and Neighborhood Services