



RECEIVED
San Jose City Clerk

Memorandum

2007 APR -3 A 9:29

TO: RULES COMMITTEE

FROM: Dan McFadden
Deputy City Manager
Robert L. Davis
Chief of Police

SUBJECT: SUNSHINE REFORM TASK FORCE DATE: March 29, 2007
UPDATE 2/24/07 MEETING ON LAW
ENFORCEMENT RECORDS

Approved *Deana Antine*

Date *4/2/07*

RECOMMENDATION

Accept the staff report on the outcome of the Sunshine Reform Task Force's February 24, 2007 panel discussion on law enforcement records.

BACKGROUND

On January 24, 2007, the Rules and Open Government Committee (Committee) reviewed San Jose Police Department's (SJPD) response to public records requests made by Californians Aware. The Committee approved a report from Police Chief Robert L. Davis dated January 19, 2007 providing SJPD's response to the public records request. The Committee further requested that the Sunshine Reform Task Force (SRTF) provide their recommendations to the Committee after an upcoming meeting on law enforcement records scheduled to be held on February 24, 2007.

On a separate but related referral, on February 7, 2007, the Committee reviewed a Public Records Request submitted by the American Civil Liberties Union (ACLU) seeking assistance in obtaining SJPD use of force and incident reports outlining how Tasers are being used. Captain Gary Kirby provided a verbal response to the ACLU's request. There was discussion to refer this item to the Public Safety, Finance, and Strategic Support Committee. The Committee agreed to defer the disposition of the item pending the outcome of the upcoming SRTF meeting on law enforcement records and a written response from the Police Department regarding public release of information on SJPD Taser usage.

This memo provides an overview of the February 24, 2007, SRTF's session on Law Enforcement Records and a written response to SJPD's verbal report to the Rules and Open Government on February 7, 2007 regarding the ACLU's request for information on Taser use and regulations.

ANALYSIS

Summary of Sunshine Reform Task Force's February 24, 2007 Meeting on Law Enforcement Records

On February 24, 2007, the Task Force held an afternoon session to hear various community perspectives and experiences on requests for law enforcement records. The session began with an overview of the Public Records Act presented by City Attorney Rick Doyle. Immediately following, the Task Force heard from an expert panel on issues and concerns with requests for law enforcement records. Panel members included: Barbara Attard, Independent Police Auditor; Rick Callendar, NAACP; James Chadwick, Sheppard Mullin Law Firm; Kyra Kazantzis, Public Interest Law Firm; Captain Gary Kirby, San Jose Police Department; Joanne McCracken, District Attorney's Office; Mark Scholsberg, America Civil Liberties Union (ACLU); John Tennant, General Counsel, San Jose Police Officers Association and San Francisco Police Officers Association. The meeting agenda, biographies and position statements of the panelist are included as Attachment A.

The panel session was moderated by Chris Arriola, Immediate Past President of the Santa Clara County Bar Association. Mr. Arriola directed pertinent questions to panel members and asked other panelists to comment on responses. The moderator also posed questions submitted by members of the public. Based on comments and responses to questions, some areas of agreement and areas requiring further discussion include:

Areas of Agreement

1. The importance of transparency in promoting community confidence and credibility in the San Jose Police Department.
2. Police reports, documents, and data that are required by state law to be released, should be released (see areas requiring further discussion below).
3. Information should be withheld that may compromise an investigation or endanger a person such as a victim, juvenile, and sexual assault victim.
4. Technology should be utilized to increase automation, gather specific data, and simplify responses to public records requests.

Areas Requiring Further Discussion

1. Based on California law, what police records may be released, are prohibited from release, and what records are discretionary?
2. What access should be given to police records that are discretionary?
3. How should the privacy rights of parties involved in police investigations, complaining or responding parties, victims, witnesses, and accused suspects be balanced with the public's right to access public records?
4. How should the privacy rights of police officers and their personnel and disciplinary records be balanced with the public's right to know? Is there a way to provide the public with additional information without compromising police investigations, personal privacy (e.g., complaining or responding parties, victims, witnesses, accused suspects, and police officers), community involvement, etc.?

The SRTF had an opportunity to engage panel members in a questions and answers in order to probe deeper into comments and concerns raised by panel members and to increase their understanding of the major issues on law enforcement records. While a number of questions centered on the SJPD's use of force, specifically as it relates to Taser use, there was limited discussion on the public records requests made by Californians Aware. It is important to note that the SRTF provided no recommendations on these matters. The February 24, 2007 meeting on Law Enforcement was primarily an informational gathering session. The SRTF is expected to continue its discussions on law enforcement records in late April, 2007.

ACLU's Request for Information on Taser Use and Regulations

(written response to SJPD's verbal report to the Rules and Open Government on February 7, 2007)

On January 24, 2007 the American Civil Liberties Union (ACLU) sent a letter to the Mayor and City Council regarding the San Jose Police Department's practices regarding public release of information on SJPD TASER usage. The SJPD's 2006 Force Response Report was distributed in an information memorandum to Council on March 15, 2006. This Report provides detailed information on how the San Jose Police Department is using force when a police officer is confronted with uncooperative suspect.

From this point forward and on an annual basis, staff from the Department's Research and Development Unit will collect and analyze reportable force used by members of the SJPD. The first annual report, which covered all reportable force used by the SJPD for calendar year 2006 will be made available on the Department's public website, www.sjpd.org.

For a historical perspective, the San Jose Police Department (SJPD) began issuing every patrol officer a TASER device in the spring of 2004. The City of San Jose was one of the first major cities in the nation to deploy TASER devices to all of its patrol personnel, and Chief Rob Davis determined that a *TASER Usage Study* should be conducted since the TASER was a relatively new tool to law enforcement. The Department felt that the results of such a study could assist in determining whether TASER devices were being deployed effectively and could identify any training issues that might arise. This voluntary assessment of TASER usage by the SJPD covered the May 1 through October 31, 2004 time period (the time the majority of the TASER devices were issued). A second *TASER Usage Study* was subsequently released, which combined statistics on TASER usage from the initial report with an additional six-month period (November 1, 2004 through April 30, 2005), thus providing statistics for the entire first year of the Department's use of TASER devices.

After releasing the TASER reports, the Department recognized the need to expand the TASER study to include the tracking of all use of force data to quantify and qualify the force being used by officers. In August 2005, the Department voluntarily designed a "Force Response Report," which tracks not only TASER use but all reportable uses of force by Department members. The Department believes this all-inclusive report does satisfy the concerns stated by the ACLU in their January 24 correspondence, which allows the ACLU, or any other individual or entity, to analyze the Department's use of not only TASERS but all force options used by the Department.

RULES AND OPEN GOVERNMENT COMMITTEE

Subject: SRTF 2/24/07 Meeting on Law Enforcement Records

March 29, 2007

Page 4

To address the original ACLU request for police incident reports on TASER usage information for six-months prior to December 1, 2005 and six-months after December 1, 2005 that was not addressed in our first annual "Force Response Report" (CY 2006), the Department has released a summary for each of the TASER incidents during the specified timeframe to satisfy the ACLU request for records. This will provide more incident information than originally requested. The summary information was provided to the ACLU on March 30, 2007.



DAN MCFADDEN
Deputy City Manager



ROBERT L. DAVIS
Chief of Police

If you have any questions, please contact Dan McFadden, Deputy City Manager at 408-535-8120 or Rob Davis at 408-277-4212.

Attachment A

Sunshine Reform Task Force
February 24, 2007 Meeting on Law Enforcement Records

Meeting Agenda
Biographies and Position Statements of Panelists

SUNSHINE REFORM TASK FORCE

Public Records

Law Enforcement

Saturday, February 24, 2007

1:00 p.m. – 5:00 p.m.

I. Purpose:

To inform the Sunshine Reform Task Force of the various community perspectives and experiences with requests for law enforcement records.

II. Objectives:

1. To provide the community with an opportunity to address the Task Force on the City of San Jose's practice related to requests for law enforcement records;
2. To provide the Task Force with a variety of opinions related to Public Records requests before it deliberates the Public Records Section of the proposed Sunshine Ordinance;
3. To stimulate a vital and productive dialogue on Public Record Requests.

III. Panelists:

Barbara Attard	Independent Police Auditor
Rick Callender	National Association for the Advancement of Colored People (NAACP)
James Chadwick	Sheppard Mullin Law Firm (Mercury News)
Kyra Kazantzis	Public Interest Law Firm
Captain Gary Kirby	San Jose Police Department
Joanne McCracken	District Attorney's Office
Mark Schlosberg	American Civil Liberties Union (ACLU)
John Tennant	General Counsel, SJPOA and SFPOA

IV. Moderator:

Chris Arriola	Immediate Past President, S.C.C. Bar Association
---------------	--



Office of the City Clerk

SUNSHINE REFORM TASK FORCE

San José City Hall

200 East Santa Clara, San José, CA 95113

Saturday, February 24, 2007

9:00 a.m. – 12:00 p.m. – Rooms W118 -119

1:00 p.m. – 5:00 p.m. – City Council Chambers

AGENDA

Convene in Room W 118-119

Wrap Up of Previously Discussed Sections

Topic	Presenter	Time Allotted
I. Call to Order	Ed Rast, Chair	9:00 a.m.
II. Overview of the day	Ed Rast, Chair	9:05 a.m.
III. Review of Meeting Material	Staff	9:10 a.m.
IV. Wrap Up Discussion on: <i>Closed Session</i> <i>Public Meetings</i> <i>Public Information</i>	All	9: 15 a.m.
IV. Lunch Break	All	12:00 p.m.

Reconvene Meeting in City Council Chambers

1:00 p.m.

Public Records Expert Panel

V. Overview of Public Records Act	Rick Doyle, City Attorney	1:00 p.m.
VI. Introduction of Expert Panel Members and Moderator	Ed Rast, Chair	1:20 p.m.
VII. Expert Panel Presentation of Issues/Concerns (5 min each)	Expert Panel Members	1:30 p.m.
VIII. Discussion Among Expert Panel Members	All	2:10 p.m.

Topic	Presenter	Time Allotted
IX. Q&A and Discussion by Task Force	All	3:10 p.m.
X. Public Comment		4:10 p.m.
XI. Work Plan/Next Agenda	Ed Rast, Chair	4:55p.m.

*Agendas and Staff Reports may be viewed on the Internet at

<http://www.sanjoseca.gov/clerk/TaskForce/SRTF/SRTF.asp>

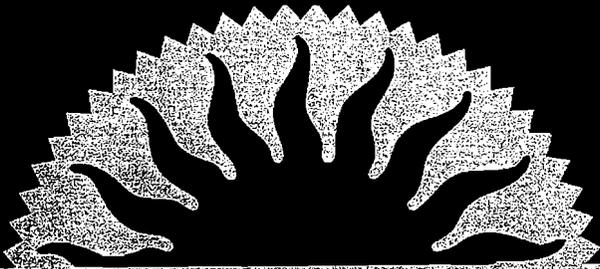
Members of the public may speak to the Task Force about any item that is on the agenda, and the public may also speak on items that are not on the agenda, but are within the jurisdiction or charge of the Task Force.

To arrange an accommodation under the Americans with Disabilities Act to participate in this public meeting, please call (408) 535-1260 or (408) 294-9337 (TTY) at least two business days before the meeting.

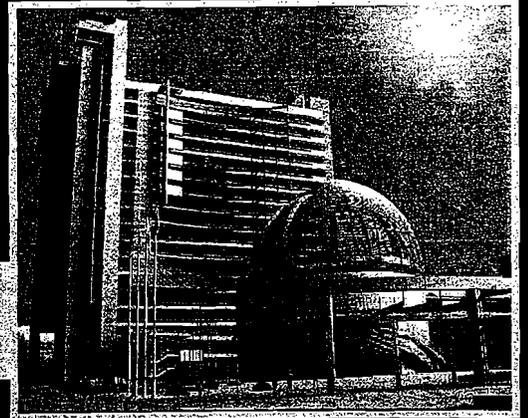
To request translation services, please call the Neighborhood Development Center at 723-4114. Requests made 48 hours in advance of the meeting will help to ensure availability.

Para solicitar servicios de traducción, por favor llamar al Centro de Desarrollo Comunitario al (408) 723-4114. Para facilitar la disponibilidad del servicio, se debe recibir la solicitud con 48 horas de anticipación.

Nếu cần thông dịch, xin gọi cô Anna Lê tại số 795-1811. Xin yêu cầu trước 48 giờ để có đủ thời giờ đáp ứng.



SUNSHINE REFORM TASK FORCE



Police Records Panel
Biographies and Position Statements

February 24, 2007

Moderator**CHRISTOPHER J. ARRIOLA**SCCBA President 2006

Biography

Christopher Arriola was the 2006 President of the Santa Clara County Bar Association in San José, which has almost 4,000 members. He has organized a President's Blue Ribbon Commission on Diversity in the Legal Profession in Silicon Valley, consisting of General Counsel, public and private firms and members of the judiciary that examined innovative solutions to diversity issues facing Valley law offices over the course of 2006.

Mr. Arriola was born in Southern California, graduated from Stanford University 1992 and Boalt Hall School of Law at the University of California Berkeley in 1995. After law school, Mr. Arriola went to work for the Los Angeles County District Attorney's Office and was assigned to try cases in the South Central Judicial District of the County in Compton. He published a commentary in the Los Angeles Times, an article in La Raza Law Journal, and consulted on the creation of an Emmy Award winning PBS documentary about a landmark Latino school desegregation case in Southern California, Mendez v. Westminster (1947). In 1998 Mr. Arriola returned to Santa Clara County at the District Attorney's Office in San José, California. He tried serious felony cases until 2000 when he worked on the newly established Community Prosecution Unit at the District Attorney's Office and conducted the first successful prosecution of a landlord for child endangerment. Mr. Arriola then worked for nearly four years as a trial attorney on the Career Criminal Unit, prosecuting the most serious offenders. He is presently assigned to the Juvenile Delinquency Unit, where he supervises the Mental Health Court and handles Sexual Assault cases.

Mr. Arriola is the Past President of the California La Raza Lawyers Association, a statewide association representing over 2,000 Latino attorneys and is currently its Judicial Chair. He has also served on numerous boards and commissions; most recently sitting as Co-Chair of the Governor's Advisory Panel on Racial Profiling, a body tasked with creating mandatory training on the subject for all California Police Officers. Mr. Arriola was named in the top 20 Lawyers under 40 in the State of California in 2003 by the Daily Journal Legal Newspaper and given a Bay Area Local Heroes Award by KQED-PBS for Latino Heritage month in 2001. He lives in San José, California with his wife and daughter.

Panelist**BARBARA ATTARD**San José Independent Police Auditor

Biography

Barbara Attard is the San José Independent Police Auditor, appointed by the Mayor and City Council in January 2005. For the previous seven years Ms. Attard had been the director of the Berkeley Police Review Commission (PRC), one of the oldest civilian oversight agencies in the United States. Ms. Attard began her career in civilian oversight with the San Francisco Office of Citizen Complaints (OCC) in 1983 as one of the first investigators hired for the newly founded agency.

Barbara is the immediate past-president of NACOLE, the National Association for Civilian Oversight of Law Enforcement. She has been on the NACOLE board for over six years, previously serving as NACOLE's secretary and vice-president. Ms. Attard has been active in international and national associations of civilian oversight for over twenty years.

Ms. Attard has championed the use of mediation in police misconduct cases and authored an article, "In Praise of Mediation." While at the OCC, she developed an "Early Warning System" for detecting and counseling San Francisco police officers whose citizen complaint records indicated possible problematic behavior patterns.

Ms. Attard earned her Masters Degree in Public Administration at the University of San Francisco. She has a Bachelor of Arts Degree in Philosophy and Social Science from Humboldt State University in northern California. Ms. Attard is a second generation San Francisco native.

Panelist

BARBARA ATTARD

San José Independent Police Auditor

Position Statement

The importance of transparency/appearance of transparency in promoting community confidence and credibility in the police department, as in all City government should be recognized and considered.

- Blanket refusal to provide police reports and other documents to support reports and studies and assist the community in researching issues breeds criticism and suspicion that problems are being covered-up.
- Greater openness and transparency enables the community to provide important feedback to elected officials and government entities about possible areas for improvement, thereby increasing the scope of oversight by the City Manager, the Council and the IPA.

Basic policy should be that police reports, documents and data that are not prohibited from release will be released. The Public Records Act gives police departments great discretion over the release of reports and other documents/data, this discretion should be exercised in favor of openness.

- When necessary or important for safety or mandated privacy issues, names or other information that must remain confidential should be redacted, i.e. information that could endanger witnesses, law enforcement officers, reportees, information regarding juvenile arrests, and others required by law.
- When possible, technology should be instituted to increase automation and simplify responses to public records requests.
- Openness should apply to communications records and data collection, as allowed by law.
- Policy should be carefully construed to ensure compliance and standardization of application.

Model policies from other departments with broadly open standards should be used as a guide—suggested policies include Berkeley and San Francisco.

Panelist**ENRICO (RICK) L. CALLENDER**

President San José/Silicon Valley NAACP

Biography

Currently, Rick is the President of 3500 member branch of the San José/Silicon Valley NAACP. The San José/Silicon Valley Branch, which was founded in 1952, is part of the nation's oldest and largest civil rights organization. Nationally the NAACP boasts over a half-million adult and youth members throughout the United States and the world.

Since taking the helm of President in January of 2000 Rick has led the branch to double its membership, take a larger role in the creation of public policy and has successfully investigated over 300 complaints that have been filed with his branch requesting the assistance of the NAACP. Rick also currently serves on the Executive Committee of the California State Conference of the NAACP as the Political Action Committee Chair for the State of California and is a member of the National NAACP's Powerful Resolutions committee since 2001.

Rick has led the SJ/SV Branch of the NAACP to receive two Thalheimer awards for being the most outstanding branch of its size in both 2004 and 2005. The Branch won in every category in which they were considered. The Thalheimer Award is the NAACP's top national award for branches is presented annually to the NAACP branches and state conferences that have contributed most to the furtherance of the association's mission during the preceding year.

Professionally, Rick works for the Santa Clara Valley Water District as their Assistant Officer in the Office of Government & Public Relations where he is responsible for developing positive working relationships and implementing strategic outreach and advocacy efforts relating with all Santa Clara County City Councils, the Santa Clara County Board of Supervisors, all Federal and State district offices, business associations, community leaders & Media within Santa Clara Valley.

In September of 2000 Rick took a leave of absence to successfully lead the Yes on Measure B Campaign for Clean, Safe Creeks in Santa Clara Valley. This countywide campaign targeted over 500,000 voters and raised over \$375 million dollars for the Santa Clara Valley Water District.

Rick has also worked as a Special Assistant to past City of San José Mayor Susan Hammer, as a Field Campaign Organizer for the California Democratic Party, as a Congressional Fellow for the United States House of Representatives, Subcommittee on Energy and as a Congressional Fellow to Congressman Ronald V. Dellums. Rick earned his Bachelors of Science degree in Industrial Engineering Technology with an emphasis in electronic and computer technology from California State University, Chico and his Masters of Arts in Public Administration from San José State University.

Rick has attended and graduated from eight executive leadership programs at different universities throughout the nation. These programs include; The University of Minnesota, Hubert H. Humphrey Institute of Public Affairs in Minneapolis, Minnesota; Syracuse University, Maxwell School of Citizenship and Public Affairs in Syracuse, New York; Howard University in Washington D.C.; University Of Louisville in Louisville, Kentucky; Florida International University in Miami, Florida, Clark/Atlanta University in Atlanta, Georgia; San José State University and the Bureau of Government Research and the Labor/Community Leader Institute, hosted by the South Bay Labor Council and San José State University.

Panelist

ENRICO (RICK) L. CALLENDER

President San José/Silicon Valley NAACP

Position Statement

1. Lack of access to records when requested.
2. Refusal to release records or given the “run around” on records.
3. Lack of data relative to use of force being accessible.
4. Lack of data on pedestrian stops and other stops.
5. Lack of easily accessible data on all police contact with the public.
6. No current plans to enhance systems on police cars to include cameras to create video records.
7. Lack of data on situations that occur at local educational institutions and schools.

Panelist**JAMES M. CHADWICK**Attorney

Biography

James Chadwick is a partner in the Entertainment and Media and Business Trials Practice Groups in Sheppard Mullin's San Francisco office.

Areas of Practice

Mr. Chadwick's practice focuses on media law and media defense litigation, including copyright and trademark litigation, First Amendment and privacy law, and access and newsgathering law, as well as general civil litigation.

He is cited in Chambers USA: America's Leading Lawyers for Business, published by the respected English research firm Chambers & Partners. Mr. Chadwick was recognized as one of the country's top leading media and entertainment lawyers by Chambers & Partners' 2006. Prior to joining Sheppard Mullin, Mr. Chadwick was a partner with the firm of DLA Piper Rudnick.

Professional Qualifications and Activities

Mr. Chadwick is admitted to practice in California. He is the author or co-author of several articles and seminar presentations on media law and intellectual property issues, including media law, privacy, and potential liability on the Internet. He is the recipient of the James Madison Freedom of Information Award, presented by the Society of Professional Journalists and is a member of the Board of Directors and Executive Committee of the California First Amendment Coalition. Mr. Chadwick is the former chair and current vice-chair of the Media, Privacy, and Defamation Law Committee of the Tort Trial and Insurance Practice Section of the American Bar Association. He is a member of the ABA Forum on Communications Law and the Media Law Resource Center.

Panelist**JAMES M. CHADWICK**

Attorney

Position Statement

“Newspapers have traditionally reported arrests or other incidents involving suspected criminal activity, and courts have universally concluded that such events are newsworthy matters of which the public has the right to be informed.” (*Kapellas v. Kofman*, 1 Cal. 3d 20, 38 (1969).)

California law does not require disclosure of police arrest and incident reports (although it permits disclosure at the discretion of the police). Certain information regarding requests for assistance or arrests is supposed to be made public, including their time, date, and location, the name and description of anyone arrested, the name and age of the victim, the charges, and the factual circumstances surrounding the crime or incident.

However, law enforcement agencies routinely refuse to provide even this limited information. In a recent audit of 216 law enforcement agencies in California, arrest information was produced by fewer than 25 percent of agencies. The San José Police Department received an “F-”, failing to provide any of the information required by California law. (Source: Californians Aware, Audit Report 2007—Public Access to Law Enforcement Information, at <https://www.calaware.org/audits>.)

In California, it is often impossible to obtain routine information about crimes in your own community. It doesn't have to be this way.

32 states routinely make police “blotters” (recording basic information regarding arrests) and/or arrest reports available to the public: Alabama, Alaska, Arkansas, Colorado, District of Columbia, Georgia, Idaho, Illinois, Iowa, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Minnesota, Mississippi, Missouri, Montana, Nebraska, New Hampshire, New Mexico, New York, Ohio, Oregon, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Vermont, Virginia, and Wisconsin. In some of these states certain information is withheld (e.g., identities of witnesses, juvenile arrests, or names of confidential informants). (Source: Reporter's Committee for Freedom of the Press, *Open Government Guide*, 2007.)

The experience of these states demonstrates that routine disclosure of arrest and incident reports does not present an obstacle to effective law enforcement or endanger public safety. In fact, the routine disclosure of such information allows citizens to truly understand the nature and extent of crime in their neighborhoods, to determine the effectiveness of law enforcement, and to make informed decisions.

Information from arrest and incident reports can be used to provide systems such as Oakland's “Crime Watch” web site, which allows the public to determine the type and frequency of crimes committed anywhere in the city. (See: <http://gismaps.oaklandnet.com/crimewatch/wizard.asp>.) The San José Mercury News sought routine disclosure of crime information in electronic form from the San José Police Department in order to provide a similar service. The San José Police Department declined to provide the information.

This is some of the most useful information the City can provide its citizens, and the popularity of existing crime databases (such as the Megan's Law database) indicates that it is probably the most highly sought-after as well. I urge the Task Force to require the disclosure of arrest, incident, and use of force reports, subject to limited and carefully defined exceptions for certain information that may be contained in such report.

Panelist**KYRA KAZANTZIS**Directing Attorney

Biography

Kyra Kazantzis is currently the Directing Attorney at Public Interest Law Firm (PILF), a program of the Law Foundation of Silicon Valley. The mission of PILF is to protect the human rights of individuals and groups in the Silicon Valley area who are underrepresented in the civil justice system. PILF accomplishes its mission by leveraging the skills and resources of pro bono attorneys to provide high quality representation in class action and impact litigation and advocacy in state and local government, administrative agencies, and the state legislature.

From 1992 to 1995, Ms. Kazantzis headed the patients' rights advocacy unit at Mental Health Advocacy Project (MHAP), also a program of the Law Foundation. MHAP provides free legal and advocacy services to individuals identified as having mental health or developmental disabilities. At MHAP, Ms. Kazantzis specialized in issues of involuntary mental health commitment, peace officer interaction with individuals with disabilities, quality of care in psychiatric institutions and jails and minors' rights in residential care. In 1995, she was named Directing Attorney of MHAP and, in that position, supervised the work of 11 attorneys and advocates in four practice areas: housing, developmental services, economic and patients' rights until August 2000. Ms. Kazantzis is a founder and first directing attorney of the Fair Housing Law Project (FHLP), also a program of the Law Foundation.

Ms. Kazantzis' professional activities have included serving on the Board of Trustees of the Santa Clara County Bar Association (SCCBA) for four years as well as on the SCCBA's Education, Lawyer Referral Service, Professionalism Committees, Executive Committee, and Legal Services Committee. In past years, she served as the President of the California Association of Mental Health Patients' Rights Advocates, a trainer for the San José Police Department's CIT program, a member of the California Board of Corrections Medical and Mental Health Regulation Development Work Group, and a member of the California Department of Mental Health Medi-Cal Mental Health Managed Care Access Task Force. Ms. Kazantzis is currently a member of the Legal Aid Association of California's Directors of Litigation and Advocacy committee.

Panelist

KYRA KAZANTZIS

Directing Attorney

Position Statement

The public has a fundamental right of access to police reports and investigations to ascertain whether the public's business is being conducted in accordance with state and federal law. The work of police—given that it can involve taking away the liberty of or using force against members of the public—should be acknowledged as work that comes with a high level of public interest and, accordingly, deserves a high level of public scrutiny. Providing access to police information—such as incident and use of force reports—to individual members of the public and watch-dog agencies creates an opportunity for healthy public dialogue about the performance of the police department. This kind of public dialogue can in turn spur important oversight and review of police policies and actions by elected officials and other policy makers. In addition, members of the public have a right to know of the occurrences of crime so that they can make informed decisions about their own safety. The need for privacy of the identity of victims can be addressed through specific exceptions and redactions.

SUNSHINE REFORM

Panelist

CAPTAIN GARY L. KIRBY

San José Police Department

Biography

Gary L. Kirby began his career in law enforcement with the San José Police Department in January 1986. His first assignment out of the academy was to the Bureau of Field Operations as a patrol officer. After four (4) years in Patrol, Gary was assigned to the Bureau of Field Training as a Patrol Field Training Officer, responsible for training and evaluating new recruits.

Gary transferred to the Bureau of Investigations and was assigned as an undercover officer, working in a covert capacity in narcotics investigations. After being promoted to Sergeant in 1993, Gary was assigned for four (4) years as a Patrol Supervisor in Field Operations. He was transferred to the Bureau of Investigations as an Investigator Sergeant, assigned to the Night Detective Detail, working high profile major incident cases. He was transferred to the Homicide Unit as a Homicide Investigator Sergeant in 1995.

During his tenure in the Homicide Unit, Gary was recognized by the Santa Clara County District Attorney's Office as Homicide Investigator of the Year, receiving this distinction twice, the first in 1999 and again in 2002, for his work on a number of highly-complex homicide investigations that resulted in successful prosecutions.

After his tenure in homicide investigations, Gary was transferred to the Department's METRO Unit, which is comprised of specially trained Bureau of Field Operation's personnel who are primarily responsible for establishing a rapid response program that may be implemented within any part of the City. During that assignment Gary was responsible for developing additional investigative capabilities, adding capacity to assist in major case investigations including handling street level covert narcotic, prostitution and homicide investigation assistance. As a Sergeant, Gary also worked as Director of the SJPD Police Academy and as an investigator for the Department's Internal Affairs Unit.

Gary is currently assigned as Commander, Office of the Chief - Research and Development Unit. In that role he is responsible for reviewing and maintaining Department policies and procedures, ensures compliance with current laws and regulations affecting law enforcement, acts as liaison with Federal, State and local agencies, researches and monitors new technologies as well as the implementation of those technologies. He represents the Office of the Chief on all matters associated with the Department of Homeland Security funding and training, and acts as an advisor to the Chief of Police on various issues. He currently is a member of the Steering Committee of the Silicon Valley Regional Interoperability Project (SVRIP), which has been instrumental in moving emergency services interoperability forward.

In addition to his duties in Research and Development, Gary also manages the Department's Crime Analysis Unit. and Advocacy committee.

SUNSHINE REFORM

Panelist

CAPTAIN GARY L. KIRBY

San José Police Department

Position Statement

In preparation for the panel discussion on February 23, 2007, with the Sunshine Task Force on public records held by the San José Police Department, a list of issues/concerns is presented for possible discussion. The San José Police Department used, as a reference, the proposed "San José Sunshine Ordinance" drafted by the San José Mercury News, the League of Women voters and neighborhood groups.

The San José Police Department has issues/concerns with the following sections of the proposed San José Sunshine Ordinance:

SEC. 26.3.3 PUBLIC INFORMATION THAT MUST BE RELEASED.

(a) General

(2) "The City shall not invoke its legal discretion to withhold public information or public records under Government Code section 6254 of the Public Records Act with respect to any category of information addressed in this section. Instead, the provisions of this section shall govern and provide enhanced rights of access to public information and public records."

(9) "The release of any confirmed misconduct of a City official or employee, and of any sanction or discipline imposed for such misconduct."

(d) Law Enforcement Information

(1) "The San José Police Department shall make available to any person, upon request, any police report, arrest report, or incident report. However, unless the report is requested by a person entitled to the following information under state or federal law, the following information shall be removed from the report it is released:" (References sections i – vii)

(2) "All other records pertaining to any investigation, arrest or other law enforcement activity shall be disclosed to the public once the District Attorney or a court determines that a prosecution will not be sought against the subject involved, once a final judgment of conviction or acquittal has been entered, or once the statute of limitations for filing charges has expired, whichever occurs first. However, subdivision (i) of this section notwithstanding, the following individual items of information in the following categories may be segregated and withheld if, on the particular facts, the public interest in nondisclosure clearly and substantially outweighs the public interest in disclosure:" (References sections I – xi)

(3) Partial objection to this section: "However, a unique numerical or alphabetical designation shall be assigned to each officer who is the subject of one or more complaints, so that the public can determine whether multiple complaints have been directed at a single officer, and the nature of those complaints."

SEC. 26.4.5 SUNSHINE ORDINANCE SUPERSEDES OTHER LOCAL LAWS

"The provisions of this Title supersedes other local laws. Whenever a conflict in local law is identified, the requirement which would result in greater or more expedited public access shall apply."

SUNSHINE REFORM

Panelist

JOANNE MCCRACKEN

Attorney

Biography

JoAnne McCracken has been an attorney since 1986. After a few years in a civil litigation firm, she joined the Santa Clara County District Attorney's office in 1989. She has prosecuted a wide range of cases, including homicide, sexual assault, domestic violence, and burglary. She spent several years as the Community Prosecutor for Alum Rock, Berryessa and Milpitas and worked extensively on community concerns, truancy and other public safety issues in those neighborhoods. She is now the Chief Trial Deputy, supervising the general felony trial calendar, the Lifer Unit and the Homicide Unit.

SUNSHINE REFORM

Panelist

JOANNE MCCRACKEN

Attorney

Position Statement

District Attorney's Concerns about Proposal to Expand Public Access to Law Enforcement Records

San José, widely regarded as one of the safest big cities in the nation, is effective in its efforts to solve and prosecute crime. Despite this success, many crimes go unsolved. Cases may be rejected by the District Attorney because there is insufficient evidence, only to be resurrected later when further leads are developed. An ordinance which gives broad public access to police reports will have serious consequences to our community. Fewer crimes will be solved. More crime victims and witnesses will risk retaliation. More victims will decide not to report crimes to the police. Privacy will be violated. Access will be expensive. Each of these reasons is explored below.

SJPD Will Be Hindered in its Ability to Solve Crime: One key to law enforcement's success is that suspects do not have access to information in police reports. Suspects do not know, for example, whether a witness can identify them, whether fingerprints or DNA evidence has been left behind or whether their crime has been captured on videotape. This superior knowledge is crucial in police interviews of suspects and of witnesses. Crimes may be solved simply because a witness or suspect knew a key fact that had not been released to the public. Gang detectives maintain significant intelligence data on gang activities. Police reports contain information about police intelligence and security techniques that will be used in future investigations. Some crimes are solved only after a rash of similar offenses occurs. Many homicides and sexual assault cases remain unsolved for years, until a break in the investigation develops. If any of this information were available to the public, investigations could be compromised.

While the precise impact of public access to police reports cannot be determined, statistical data comparing San Francisco (a city with broad public access to police records) to San José, (where police records are available pursuant to Government Code Section 6254(f) only), is illuminating. Crime rates in San Francisco are significantly higher than in San José for both violent and property crime. However, San Francisco filed only 4824 fel-

ony cases in fiscal year 2003-2004. Of those felonies, felony convictions were obtained in only 457 cases—less than 10%. Dismissals or acquittals occurred in 2037 cases—more than 42%. By contrast, Santa Clara County filed 11,180 felony cases in the same period. Felony convictions resulted in nearly 70% of cases and dismissals or acquittals occurred in just 16% of cases.

Limiting public access to police records until after the District Attorney rejects charges or the statute of limitations has expired does not adequately protect investigations. Many cases are solved and charges filed after the District Attorney initially declined charges. Crimes barred by the statute of limitations can provide important evidence to help solve a similar crime committed by the same individual. For example, a child molestation charge may be barred by the statute of limitations, but would be important evidence in a more recent assault by the same suspect on a different child. If the suspect had access to the first police investigation, the second case could be compromised.

Even redacting reports would be burdensome and costly. In most cases, redacting would have to be done by an experienced police officer, familiar with what information could compromise future investigations or officer safety, rather than by clerical staff.

Retaliation Is Real: Witnesses and victims of crime all too often face retaliation for reporting crime. Tragically, this retaliation sometimes is fatal. Although victims and witnesses in gang cases are especially at risk, the police cannot predict with any degree of accuracy when retaliation will occur. Broad public access to police reports will compromise safety of victims and witnesses.

In other cases, public access could have devastating consequences to victims. For example, a child who reports sexual abuse by her father may face serious consequences if charges are not filed and her father had access to the police report.

Disclosure of Police Reports Will Have a Chilling Effect on Victims' Reporting of Crime: Most crime victims are afraid of the perpetrator. Victims and witnesses commonly understand that their identifying informa-

tion may be disclosed only when charges are filed, but even then, not directly to the offender. If police reports were available to the public, victims and witnesses may feel reluctant to report crime.

Crime Victims Are Entitled to Privacy: Many victims feel ashamed or want the fact of their victimization to remain as private as possible. The legislature and courts have acknowledged this important public interest. Public access to police report undermines this legitimate concern.

Uncharged Suspects Are Entitled to Privacy: While some information is subject to disclosure under Government Code Section 6254(f), individuals arrested for a crime for which they are not ultimately charged retain significant protection from public access to the allegations against them. If one is innocent of a crime, shouldn't that person's privacy be protected? Additionally, public access to police records undoubtedly would be used by potential employers seeking to deny a job to anyone who has been accused of a crime. This would effect an extreme hardship on persons who are accused in a police report, whether or not the allegations had any merit.

Local Ordinance Requiring Disclosure of Police Reports Could Conflict with, Or Violate, State Laws: Disclosure of police reports could conflict with, or violate, other state laws. For example, police reports are protected under Government Code Section 6254(f). Police reports retain their confidential nature even after the criminal case has been adjudicated. The police would violate Penal Code Section 841.5 by providing a suspect or defendant with a police report or the name or address of a victim or witness. Evidence Code Sections 1040(b)(1) and 1041 may provide privileges from disclosure of certain information possessed by the police. Additionally, such an ordinance would conflict with state statutes ordering the sealing of records for defendants who successfully complete diversion, are found to be factually innocent, are acquitted at trial or are juveniles. These conflicts raise complicated preemption issues and may expose the City to costly litigation by persons whose privacy was violated by the release of records.

Panelist

MARK SCHLOSBERG

ACLU of Northern California

Biography

Mark Schlosberg has served for the last five years as Police Practices Policy Director for the ACLU of Northern California (ACLU-NC). In this capacity, he has worked on a variety of policing issues including racial profiling, accountability systems, surveillance, crowd management, and use of force in cities throughout Northern and Central California. He is the author of numerous articles and reports on policing issues.

Prior to working at the ACLU, Schlosberg was Vice Chair of the Berkeley Police Review Commission. Schlosberg received his J.D. from New York University School of Law and B.A. from University of California at Berkeley.

Panelist

MARK SCHLOSBERG

ACLU of Northern California

Position Statement

Key Issues: The ACLU-NC is concerned about the SJPDP policy and practice of denying public access to its incident and use-of-force reports. These reports document SJPDP officers' interactions with the San José public. Without access to these original source documents, it is impossible for the public to independently evaluate SJPDP policies and practices.

The importance of these records is highlighted by the recent debate over appropriate rules for SJPDP Taser use. In December 2005, the Department issued a new Taser policy in response to community concerns and recommendations by the Independent Police Auditor.

To monitor how these new rules were implemented, we requested copies of one year's worth of incident and use of force reports regarding Taser use. We sought the reports for six months before and six months after the SJPDP policy change. We wanted to see to what extent the policy change had affected SJPDP Taser practices. We specifically said we did not want records related to ongoing investigations or records that would in other ways infringe on legitimate privacy or law enforcement interests. Unfortunately, these records have not been provided consistent with the Department's general policy of non-disclosure.

The Department cites Government Code 6254(f) in support of its policy. However, its blanket policy of non-disclosure is inconsistent with the spirit of the Public Records Act. It is also inconsistent with the practice of other departments in the region, such as San Francisco, Oakland, and Berkeley.

We fully recognize the need to withhold certain records for legitimate privacy and/or law enforcement interests (e.g. when release would have a significant likelihood of jeopardizing an ongoing investigation, names of sexual assault victims and juveniles, etc). However, the release of the vast majority of incident and use of force reports would not infringe on either of these interests.

As a general matter, secrecy should be the exception, not the rule. Police officers work in the public sphere -- they interact with the public and do the public's business. Police records should therefore be public. We urge the Sunshine Reform Task Force to make recommendations aimed at making these records public.

Panelist**JOHN R. TENNANT**General Counsel

Biography

John Tennant is general counsel for two of the largest police unions in the Bay Area, the San Francisco Police Officers' Association and the San José Police Officers' Association. A 1989 graduate of Harvard Law School, John has represented public employees throughout California for the past seventeen years in all aspects of their labor relations with both state and local government. Formerly a partner with the San Francisco law firm of Carroll, Burdick, & McDonough, John has served as general counsel to the San José Police Officers' Association since 1998 and as general counsel to the San Francisco Police Officers' Association since 2006. A frequent lecturer on the rights of public employees, John has given seminars to labor and management representatives alike on public sector labor laws, primarily those that govern police officers and other public safety employees. In 2002, John was awarded a Fulbright grant to study police unionism in Paris, France – specifically, how police unions and immigrants' right groups might lessen the tensions in the strife-torn suburbs outlying Paris between the French police and primarily Muslim immigrants from France's former colonies in North Africa.

Panelist

JOHN R. TENNANT

General Counsel

Position Statement

John Tennant will address the wisdom embodied in the balancing scheme of what is known as the Pitchess statutes (i.e., Penal Code section 832.7 and Evidence Code sections 1043 and 1046, as well as the California Constitution's reference to them in Article 1, Section 3(b)(3)). Under that statutory scheme, enacted in 1978, a judge reviews in camera police personnel records that are sought to be disclosed via the filing of a Pitchess motion and weighs the litigant's interest in disclosure against the officer's right to privacy.

Mr. Tennant will then address how the constitutional rights of public employees have been severely curtailed in recent years by the courts (and, in particular, by the U.S. Supreme Court) under a prevailing trend in the jurisprudence that goes roughly as follows: when the State acts as an employer rather than as the State per se, a public employee is to be treated far more in the nature of a private-sector employee and, thus, does not possess certain rights, such as First Amendment freedom of speech rights for speech related to the employee's duties (see, e.g., *Garcetti v. Ceballos*, 126 S.Ct. 1951 (2006)). If this line of jurisprudence is to be applied consistently, then public policy requires that public employees like police officers should, as is the case with their private-sector counterparts, enjoy the same protections of the private-sector work force, such as confidentiality of personnel records.