



Memorandum

TO: RULES AND OPEN
GOVERNMENT COMMITTEE

FROM: Tom Manheim

SUBJECT: NEW TECHNOLOGIES

DATE: 01-14-2010

Approved

Date

1-14-2010

RECOMMENDATION

1. Approve language revising Council Policy 0-32 – *Disclosure and Sharing of Material Facts* (Attachment A) to include disclosure by the Mayor and members of the City Council of any communication received and read during a Council meeting, either directly or indirectly, that is relevant to a matter under consideration by the City Council.
2. Approve language modifying Council Policy 0-33 – *Public Records Policy and Protocol* (Attachment B) to include communications concerning official business sent and received by City officials via non-City- owned devices for consideration by the City Council.

BACKGROUND

On October 7, 2009, the Rules and Open Government Committee reviewed a staff work plan to study and develop recommendations regarding electronic communications received by Councilmembers during City Council and Council Committee meetings. The work plan also addressed the application of the City's public records policy to communications sent and received by City employees via personally owned devices. Following its review of the work plan, the Committee directed staff to return with options on both topics and further directed staff to develop its options regarding the City's public records policy with the assumption that the policy should cover communications concerning official City business sent and received by City employees via non-City-owned devices.

On December 9, 2009, the Rules and Open Government Committee (ROGC) reviewed and discussed options for:

1. Expanding the City Council's policy on disclosure of material facts to include disclosure by the Mayor and members of the City Council of any communication received and read during a

Council meeting, either directly or indirectly, that is relevant to a matter under consideration by the City Council; and

2. Amending the City's public records policy to require disclosure of recorded communications sent or received by City employees on non-City-owned devices unless subject to an exemption.

The ROGC directed staff to return with draft language for these revisions. The ROGC did not determine which City staff would be subject to the new requirements under the public records policy, although it was suggested that the revised policy be implemented on a pilot basis limited to the Mayor and Councilmembers and their staffs.

ANALYSIS

1. Disclosure of Material Facts

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

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

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

2. Public Records Policy and Protocol

The public records policy has been revised to include the following statement:

Records available for inspection and copying include any writing containing information relating to the conduct of the public's business that is prepared, owned, used, or retained by the City, regardless of the physical form and characteristics and, in addition, any recorded communications regarding official City business sent or received by the Mayor,

Councilmembers or their staffs via personal devices not owned by the City or connected to a City computer network.



for Tom Manheim
Communications Director

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

Attachment A – Draft revision of Council Policy 0-32
Attachment B – Draft revision of Council Policy 0-33

**Disclosure of Material Facts and
Communications Received During
Council Meetings**

Policy Number 0-32

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PURPOSE

The purpose of this policy is to require the Mayor and Members of the City Council to publicly disclose (1) material facts; and (2) communications received during Council meetings that are relevant to a matter under consideration by the City Council which have been received from a source outside of the public decision-making process.

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SCOPE OF APPLICATION

This Policy applies to each Member of the City Council.

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DEFINITIONS

“Material fact” means an important fact that is relevant for a Member of the City Council to make an informed and knowledgeable decision and which would likely affect the judgment or decision of a Member of the City Council or likely influence a Member of the City Council on an item of business on the City Council Agenda. Further, a fact is “material” if its omission or the failure to disclose the fact will substantially mislead any Member of the City Council from making an informed and knowledgeable decision about a pending legislative matter or an item of business before the City Council.

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“Communication received during a Council meeting” means a communication received and read during a Council meeting, either directly or indirectly, that is relevant to a matter under consideration by the City Council. Communications to be disclosed include, but are not limited to, text messages, emails and telephone calls. An indirect communication includes, but is not limited to, a text message, email or telephone call received by a staff member of a Member of the City Council or a conversation with a staff member of a Member of the City Council which is then communicated to the elected official. A communication could be considered relevant to a matter under consideration by the City Council if it is (1) from a party or his or her agent to an administrative hearing before the Council; or (2) from any person who actively supports or opposes any administrative or legislative decision and has a financial interest in the decision. A person actively supports or opposes a decision if he or she engages in lobbying activity as defined in the San Jose Municipal Lobbying ordinance, testifies in person before the City or Redevelopment Agency or otherwise acts to influence officers of the City or Redevelopment Agency.

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films and prints, and electronic mail and, in addition, any recorded communications regarding official City business sent or received by the Mayor, Councilmembers or their staffs via personal devices not owned by the City or connected to a City computer network.

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Locating and Identifying Records

Public records are open to inspection at all times during regular City business hours. The City does not maintain a centralized record keeping system, other than certain documents routinely maintained by the Office of the City Clerk. Each of the City's individual departments maintains and has custody of records and information relating to the responsibilities and work performed by the particular department. Information identifying the City's Departments and Department contacts is available on the City's website at www.sanjoseca.gov. Information about City Departments and contacts may also be obtained by contacting the City's Informational Call Center located at City Hall. The telephone number for reaching the Call Center is (408) 277-4000, and the TDD telephone for the hearing impaired is (408) 998-5299.

Each Department shall designate a person or persons, who will be responsible for responding to requests for records and coordinating the response with other City Departments, when appropriate. The Department representative shall also, to the extent reasonably practicable, assist the public in making focused and effective requests for records and information. In order to accomplish this, the representative shall: (1) assist the member of the public with identification of records and information that are responsive to the request or the purpose of the request, if known; (2) describe the information technology and physical location in which the records exist; and (3) provide suggestions for overcoming any practical basis for denying the request.

Making a Request for Records

There is no specific form that must be used to request records, nor is there any language that must be used when making a request. Requests may be made orally or in writing; either in person, through the mail, via e-mail or over the telephone. The request, however, should contain a reasonable description of the desired records in order to expedite processing of the request.

Form of Records Provided

Records shall be made available in their original form or by a true and correct copy. Audio, photographic and computer data, or any other such records, shall be exact replicas unless the Department determines it is impracticable to provide exact replicas. Any reasonably segregable portion of a record shall be provided to the public after deletion of portions that are deemed exempt from disclosure.

Time for Response

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Upon receipt of a written or oral request for records, the City shall make the records promptly available to the requestor. In cases where the records are not readily identifiable or accessible, or additional time is needed to determine whether the request in whole or in part seeks copies of disclosable records, the City will have ten (10) calendar days to provide its determination. The ten (10) day time period shall be calculated from the date the request is received. In unusual circumstances, the City may extend its time to respond by an additional fourteen (14) calendar days. Should this occur, the City will inform the requestor in writing of the extension within the initial ten (10) day period, setting forth the reasons for the extension, along with the estimated date of the City's further response. Unusual circumstances permitting the extension of time are limited to: (1) the need to search for and collect the requested records from facilities separate from the office processing the request; (2) the need to search for, collect, and appropriately examine a voluminous amount of separate and distinct records that have been asked for in a single request; (3) the need for consultation with another department or another agency that has a substantial interest in the response to the request; and/or (4) the need to compile data, to write programming language or a computer program, or to construct a computer report to extract data. If a written request for information is denied in whole or in part, the denial shall be in writing and shall contain the explicit reasons for denial of access to the subject records, as well as the names and titles or positions of each person responsible for the denial.

Fees and Charges

In most situations, the City will not charge any fees to cover the time and costs incurred in searching for, locating or collecting records. The City, however, may charge for the actual costs of duplicating paper copies of records and postage, consistent with the amounts set forth in City's Schedule of Fees and Charges. The City may also charge for duplication costs in another medium in accordance with the amounts set forth in the Schedule of Fees and Charges (e.g. copying video or cassette tapes). Requestors of electronic records shall pay for production costs, including the cost to construct the record and the cost of programming and computer services necessary to produce the copy if the request would require the production of a record that is otherwise only produced at regularly scheduled intervals, or the request would require data compilation, extraction, or programming to produce the record. However, the City will not charge for access to data that is readily accessible without significant cost to the City.

Department Procedures

Each City Department, with the assistance of the City Attorney's Office, shall establish procedures to be followed when making its records available for public inspection consistent with the provisions set forth in Attachment A. If any question exists as to whether any record, or portion of any record, is exempt from disclosure, it is the responsibility of the head of the Department, or his or her designee, to contact the Office of the City Attorney promptly within the time frame for responding to a public records request for advice.

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Attachment A
CITY OF SAN JOSE PUBLIC RECORDS PROCEDURE

Department Representatives

_____ Each Department shall designate a person or persons, who will be responsible for responding to requests for records and coordinating the response with other City Departments, when appropriate.

_____ Departments that have more than one division within the Department, shall assign a person or persons who will be responsible for coordinating and responding to requests for records and information that overlap different divisions within the Department.

Department Coordination

_____ If a request seeks information from more than one department, the request shall be forwarded to the designated representative in the City Manager's Office and the representative of all other interested departments. The City Manager's representative will coordinate and respond to the request with the assistance of each of the Department representatives.

_____ If a request for records is directed to a department that does not maintain or have custody of the records, then the representative shall promptly attempt to identify the appropriate department and forward the request to the responsible department for preparation of a response. In the event a request is forwarded to another department for a response, the requestor shall be given notice of the referral to another department and contact information for the Department who will be preparing the response.

Coordination with the City Attorney's Office

Requests that are related to pending or potential litigation shall be coordinated with the City Attorney's Office. Questions regarding the Public Records Act or any documents that may not be subject to disclosure shall promptly be forwarded to the City Attorney's Office for review.

Steps for Responding to Requests for Records

_____ Upon receiving a request for records, whether orally or in writing, the Department representative shall promptly respond to the request. For example, if a request is made in person at the City Clerk's Office for a copy of a City Council agenda maintained at the City Clerk's Office, the requested agenda should be made available to the requestor at the time of the request.

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_____ If a particular request requires research as to the existence of the requested record and/or its location, then the Department representative shall promptly begin researching the request and shall immediately note his or her calendar (e.g. Outlook), with the last date to respond to the request. This date shall not exceed ten (10) calendar days from the date the request is received.

_____ In unusual circumstances, the City may extend its time to respond by an additional fourteen (14) calendar days. The circumstances permitting an extension of time are limited to:

- (1) the need to search for and collect the requested records from facilities separate from the office processing the request;
- (2) the need to search for, collect, and appropriately examine a voluminous amount of separate and distinct records that have been asked for in a single request;
- (3) the need for consultation with another department or another agency that has a substantial interest in the response to the request; and/or
- (4) the need to compile data, to write programming language or a computer program, or to construct a computer report to extract data.

Should one or more of these circumstances arise, the Department representative will inform the requestor in writing of the extension within the initial ten (10) day period, setting forth the reasons for the extension, along with the expected date of the City's further response. Any questions about extending the initial ten (10) day time to respond to requests should be directed to the City Attorney's Office.

_____ Records shall be available for review and inspection during regular City business hours.

_____ If a request for records seeks the production of records or documents that are not in existence at the time the request is made, the City is not obligated to create a document in order to respond to the request.

Common Exemptions

There are certain categories of documents that are generally not subject to disclosure. These include, but are not limited to: (1) preliminary drafts of certain documents that are not retained by the City in the ordinary course of business; (2) records related to pending litigation; (3) attorney-client communications; (4) personnel records, medical information, or other similar records the disclosure of which would constitute an unwarranted invasion of personal privacy; (5) corporate financial and proprietary information, including trade secrets; and (6) records protected by State or Federal law. If the Department (after consultation with the City Attorney's Office when appropriate), determines that the records sought in a written request for records are not subject to disclosure either in whole or in part, then the Department shall advise the requestor in writing that the records will not be made available and include the reasons why access is being denied, as well as the names and titles or positions of each person responsible for the denial.

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Responding to Requests for Particular Documents

The following procedures shall apply when responding to requests for these particular categories of documents:

Disclosure of Preliminary Drafts

Preliminary drafts of documents kept in the ordinary course of business, including drafts of agreements, which are kept and preserved after final action has been taken, shall be disclosed if requested.

Disclosure of Litigation Materials

1. When litigation in which the City is a party is finally adjudicated or otherwise settled, records of communications between the City and the adverse party in the litigation shall be subject to disclosure including the text and terms of any settlement agreement between the parties.

2. Such disclosure shall not apply to records that are otherwise privileged under federal or state law, such as attorney-client communications, or to records sealed by the court or where disclosure is otherwise limited by the court.

Disclosure of Information Relating to Contracts, Bids and Proposals

1. Records of contractors' bids shall be available for inspection immediately following the opening of bids.

2. Responses to Requests for Proposals or Requests for Qualifications/Quotations and similar submittals shall be regarded as public records and are available for inspection after City staff's recommendation has been made public, unless there are elements in the proposal which are defined by the proposer as business or trade secrets and plainly marked as "Confidential," "Trade Secret," or "Proprietary." Although trade secret information may be exempt from disclosure, the City typically is not in a position to establish whether the information that a proposer has submitted is a trade secret. If a request is made for information marked "Confidential," "Trade Secret," or "Proprietary", the City will provide the proposer who submitted the information with reasonable notice to allow the proposer to seek protection from disclosure by a court or government agency of competent jurisdiction.

3. When an individual, firm or organization is awarded a contract, information including financial information which was submitted to the City during the bid or proposal process from all proposers will be subject to disclosure unless otherwise exempt. following ways:
1) delete or redact those portions of the records that include personal information and make the remaining portion of the record available for inspection if the remaining portion of the record is not otherwise exempt from disclosure;

2) notify the party whose personal information is being sought and provide the party with the opportunity to initiate legal proceedings or other appropriate process to prevent the release of such information; 3) seek a judicial determination as to whether or not the

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requested personal information should be disclosed; or 4) disclose the information where permitted, allowed or compelled to do so.

Complaints and Complaint Information

Information regarding complaints shall be made available. However, specific information about complainants shall be redacted from any record furnished if necessary in order to protect the privacy rights and safety of individuals making complaints and to protect an individual's right to petition government for redress of grievances.

Electronic Mail

E-mail shall be treated the same as other written documents. If the e-mail is kept in the ordinary course of business, it is a public record unless it falls within some exception to disclosure under the Public Records Act. Additional information regarding the storage and use of e-mail in the City may also be found in Section 3.01 of the City's policy manual entitled "Use of E-Mail, Internet Services, and other Electronic Media."

Records Retention

This procedure does not obligate City departments to retain documents beyond the period of time designated for the department in the City's record retention policy. In the event a request for records is received prior to its destruction under the City's record retention policy, the requested records will be provided.

City of San José, California**COUNCIL POLICY**

TITLE: PUBLIC RECORDS POLICY AND PROTOCOL	PAGE 1 of 7	POLICY NUMBER 0-33
	EFFECTIVE DATE January 27, 2004	REVISED DATE
APPROVED BY COUNCIL ACTION ON: 1/27/04		

Policy Statement

The public's right to access information concerning the conduct of the people's business is a fundamental and necessary right. A record shall not be withheld from disclosure unless it is exempt under applicable laws, or the public interest served by not making the record public clearly outweighs the public interest served by disclosure of the record. The California Public Records Act permits local agencies to adopt regulations stating the procedures to be followed when making their records available to the public. The San José City Council desires to establish a formal written policy affirming the public's right to access City of San José records and to set forth the procedures by which such records will be made available to the public. The City Council is mindful of the constitutional right of privacy accorded to individuals and it is the intent of the City Council to promulgate a policy that strikes an appropriate balance between the objectives of open government and the individual's right of privacy.

Purpose

The purpose of this policy is to affirm the public's right to access City records and to set forth the procedures that will facilitate accessibility of information to members of the public

Accessing City Records**Records Available for Inspection and Copying**

Records available for inspection and copying include any writing containing information relating to the conduct of the public's business that is prepared, owned, used, or retained by the City, regardless of the physical form and characteristics. The records do not have to be written but may be in another format that contains information such as computer tape or disc or video or audio recording.

"Writing" includes any handwriting, typewriting, printing, photostating, photographing, and every other means of recording upon any form of communication or representation such as letters, words, pictures, sounds, or symbols, as well as all papers, maps, magnetic or paper tapes, photographic

**Disclosure of Material Facts and
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1. Each Member of the City Council has a duty and responsibility to publicly disclose all (1) material facts; and (2) communications received during a Council meeting related to an item on the City Council Agenda after the material facts are obtained or received or the communications are received during a Council meeting from sources outside of the public decision-making process.

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2. The material fact or communication received during a Council meeting shall be disclosed at the Council meeting at which the item is heard prior to the City Council taking any action on the item.

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a. If the material fact is in written form, it shall be provided to the City Clerk who will make the information publicly available.

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b. Material facts received orally and communications received during a Council meeting shall be disclosed no later than public discussion of the matter under consideration by the City Council after a good faith determination by the Member of the City Council that the fact or communication is required to be disclosed in accordance with this Policy.

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A fact is "material" if it is one which would likely to affect the judgment or decision of a Member of the City Council or likely to influence a Member of the City Council on an item of business on the City Council Agenda. Further, a fact is "material" if its omission or the failure to disclose the fact will substantially mislead any Member of the City Council from making an informed and knowledgeable decision about a pending legislative matter or an item of business before the City Council.¶

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Revised: _____, 2010

Original Effective Date: April 25, 2006

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