Rules Agenda: 8/13/08
Item: I(2)(b)

CITY OF SAN JOSE
CAPITAL OF SILICON VALLEY

Memorandum

TO: RULES AND OPEN GOVERNMENT COMMITTEE

FROM: Tom Manheim
Director of Communications

SUBJECT: **SEE BELOW**

DATE: August 6, 2008

Approved Christine F. Shippey Date 8/6/08

SUBJECT: STAFF RESPONSE TO PHASE II REPORT AND RECOMMENDATIONS OF THE SUNSHINE REFORM TASK FORCE

NOTE: The Sunshine Reform Task Force's Phase II recommendations are extensive. This memorandum does not attempt to enumerate each and every recommendation, but rather focuses on those areas where the Administration has identified concerns. To fully understand the Task Force's comprehensive recommendations, readers should review the *Phase II Report and Recommendations*.

RECOMMENDATIONS

Review and make recommendations to the City Council on the Sunshine Reform Task Force's Phase II Report and Recommendations.

OUTCOME

After the Rules and Open Government Committee ("Rules Committee") reviews the Sunshine Reform Task Force's ("SRTF") Phase II Report and Recommendations, staff will prepare a final report for the City Council. When the City Council discusses and approves the Phase II recommendations, the City organization will implement these final Open Government provisions.

EXECUTIVE SUMMARY

Work of the Sunshine Reform Task Force Subcommittees. In August 2007, the Sunshine Reform Task Force's subcommittees began Phase II of its work, formulating recommendations to make government more open and accountable through four areas: by defining appropriate conduct for City employees, officials and those who do business or volunteer with the City (Ethics and Conduct); by suggesting upgrades and changes to the way information is organized

and presented on the City's website (Technology); by defining the City's structure and processes for addressing potential violations of Open Government regulations (Administration and Accountability); and by defining what documents and information are open to the public (Public Records).

Work of the Sunshine Reform Task Force. The Task Force completed its work in April 2008, resulting in three sets of recommendations that are intended to be part of an Open Government Ordinance: 1) Ethics and Conduct; 2) Administration and Accountability; and 3) Public Records. In a fourth area, Technology, the Task Force suggested that its recommendations remain separate and not be included in a Citywide Open Government Ordinance due to the changing nature of technology.

Organizational Feedback. The Administration received feedback on the recommendations through three venues. First, during the subcommittees' work to develop the recommendations, the Administration sought feedback from affected staff, departments, and offices on potential policy or implementation challenges. Additionally, as each subcommittee brought its work to the entire Task Force for review and approval, additional dialogue ensued and staff provided additional input, largely when requested by the Task Force members. Finally, an inter-departmental team has reviewed the final recommendations to identify any potential barriers to implementation. This report consolidates staff's preliminary feedback on the final recommendations and has been shared with the Task Force.

The Administration would like to acknowledge the extensive and comprehensive work undertaken by the Sunshine Reform Task Force. When these dedicated community members originally signed up for the Sunshine Reform effort, it was expected to last six-months. The fact that it has taken two years is a testament to their commitment, both to doing the job well and to improving transparency, openness, and trust in our City government. As is noted in the Task Force Chair's transmittal letter contained within the report, the work of the Task Force was characterized by an open and honest exchange with City staff. The Administration provided information and context and raised concerns where appropriate. The Task Force also received significant community and stakeholder input and reviewed other ordinances. The result was a healthy debate leading to the recommendations in the report. The Administration understands that trust in government rests on the openness and transparency of our governmental institutions. In all areas, our effort has been to balance the laudable goal of increasing openness with the equally compelling need to avoid unnecessary bureaucracy and maintain the City's ability to deliver services efficiently.

This staff report highlights only those Phase II recommendations that raised concern on the part of the Administration. In many other areas, staff is fully supportive of the Task Force recommendations as contained in the Phase II report. The complete *Phase II Report and Recommendations* contains additional recommendations that are not discussed in this memo. As noted above, a full reading of the *Phase II Report and Recommendations* is necessary for a full understanding of the Task Force recommendations. Staff has <u>not</u> included details for those recommendations that: 1) are consistent with current City practice; 2) raise no significant policy or implementation questions; or 3) are consistent with best practices in City government and are intended for future City practice. As the Rules and Open Government Committee considers

approval of these recommendations, reading the entire Phase II Report will provide the Committee a comprehensive understanding of all of the specific recommendations that Council will be asked to evaluate for adoption into an Open Government Ordinance. A summary of the subcommittee work is provided below.

Ethics and Conduct. The Ethics and Conduct Subcommittee considered how best to encourage the modeling of ethical behavior in a large organization. The subcommittee's recommendations are based on the following five tenets:

1. **Disclosure** - All relevant substantive information received from any source outside the public decision–making process should be disclosed.
2. **Conflicts of Interest** - Councilmembers must identify and disclose when even the appearance of a conflict might exist. Any person with a position of responsibility in a campaign would be prohibited from lobbying the official on whose campaign he/she worked/volunteered.
3. **Code of Ethics** - Members of the City Council and Board of the Redevelopment Agency, Council Committees, Boards, Commissions and Committees, and City Departments should adopt the City's Code of Ethics and verify that they have done so.
4. **Annual Review and Re-Adoption** - The City Council should review and re-adopt the Open Government Ordinance biennially.
5. **Ethics Education** - All City and Council staff should be educated about the Open Government Ordinance on an ongoing basis.

Technology. The objective of the Technology Subcommittee was to identify means to improve access to public information through the best use of technology. The recommendations in this section address the following sub-topics:

1. **Information Systems and Infrastructure** – Recommendations for the purchase and/or development of certain information systems.
2. **City Web Site** – Recommendations for management of the City's Internet web site.
3. **Procedures and Best Practices** – Recommendations for retention and management of certain electronic records.

Administration and Accountability. The Administration and Accountability Subcommittee addressed how to ensure the public's confidence in local government through the formulation of best practices to achieve voluntary compliance with, and address potential violations of, Open Government regulations. The subcommittee's recommendations include the establishment of an Open Government Officer and Open Government Commission, enforcement provisions, and recommendations for recording the closed sessions of City Council.

Public Records. The Public Records Subcommittee considered the overarching policy issues of: 1) what is the appropriate balance between the public's right to know and the protection of privacy and other important exemptions provided in the California Public Records Act ("CPRA"); and 2) when is the public interest better served by not disclosing information. The Task Force's recommendations can be divided into two sections: 1) which records must be disclosed; and 2) how must records be disclosed. The work of the Public Records Subcommittee

was perhaps the most complex and involved significant public input, especially with regard to Law Enforcement records.

BACKGROUND

In May 2006, the Sunshine Reform Task Force began meeting and in the course of its work decided to present its Open Government recommendations in two phases. The City Council reviewed the SRTF's final Phase I Recommendations, as amended by the Rules Committee, on June 10, 2008.

In August 2007, the Task Force formed four subcommittees to address the topics for Phase II: Ethics and Conduct, Technology, Administration and Accountability, and Public Records. From August 2007 through March 2008, the subcommittees formulated recommendations and reviewed them with the entire Task Force. During their work the subcommittees reviewed Open Government policies of other jurisdictions and considered feedback from the City organization. The Task Force completed its Phase II recommendations in April 2008.

In April and May 2008, staff convened an inter-departmental team to consider any policy or implementation barriers to the SRTF Phase II recommendations. This report, with the Administration's feedback on the SRTF recommendations, was presented to the SRTF on June 19, 2008. The Task Force's recommendations, along with the Administration's feedback, are discussed below.

Note on "Open Government" Nomenclature. For purposes of clarity, staff notes that the terminology used to refer to the overall body of work and the specific products of the SRTF will increasingly reference the term "Open Government." This is consistent with the terminology used by other cities and the Task Force itself to name the specific results of its work: *Open Government* ordinance, commission, and officer, as examples. The body of this report will use this term and as the organization continues to implement the approved recommendations, staff will increasingly use the term "Open Government" rather than continuing references to the term "Sunshine Reform."

ANALYSIS

A. ETHICS AND CONDUCT

The Ethics and Conduct Subcommittee developed recommendations that integrate provisions for transparency, disclosure, and accountability at all levels of City government and build on the ethical culture at City Hall.

The Subcommittee reviewed various City documents and policies including: 1) reform proposals submitted by Councilmembers and members of the public related to ethics and conduct and a comparison of those reform proposals with other jurisdictions; 2) City's Lobbyist Ordinance; 3)

the City Policy Manual related to the Code of Ethics (Section 1.2.1); 4) City Manager's and City Attorney's joint memo (February 23, 2007) to the Government Reforms and Ethics Subcommittee of the Mayor's Transition Committee; 5) City Attorney's Memo (February 2, 2007) to the San Jose Elections Commission regarding the City Council Referrals to the Elections Commission; 6) Mayor Reed's memo (November 8, 2007) to the City Council regarding the 2007 Mayor's Biennial Ethics Review; and 7) Employee Values Statement.

As a result of the Subcommittee's analysis, a number of provisions from the documents above were incorporated into the following Ethics and Conduct Subcommittee recommendations governing: Disclosure, Conflict of Interest, Code of Ethics, Annual Review and Re-Adoption, and Ethics Education. Some of the Task Force recommendations are provided below, along with policy or implementation issues and staff recommendations. Staff supports the Task Force's recommendations in this section and the following staff recommendations are simply minor modifications.

Disclosure (Section 5.2, p. 3)

Task Force Recommendation: "Lobbyists must file disclosure reports within two business days of engaging in reportable lobbying or fundraising activity. Fundraising activity includes contributions received and solicitations made on behalf of an elected official. These reports must be filed electronically with the City Clerk so that they can be viewed by the public online."

Policy/Implementation Issues: The City's Lobbyist Ordinance requires that lobbyists file quarterly reports of lobbying activity. The Lobbyist Ordinance also requires that lobbyists report fundraising activity – not only what the lobbyist contributes, but what he or she solicits. Any fundraising information is also reported on a quarterly basis. Moreover, the City Clerk currently posts online all lobbyist reports filed and expects to implement electronic filing next fiscal year. Moreover, the Elections Commission and the City Council considered a two-day filing deadline for fundraising activity in the Fall of 2006. The City Council agreed conceptually to impose a two-day filing requirement and referred back to the Elections Commission the mechanics of implementation . This referral is currently outstanding on the Elections Commission's workplan, including a review of the reporting thresholds.

Staff Recommendation: Permit the Elections Commission to develop the mechanics of implementation and the thresholds for reporting fundraising activity within two business days.

Conflict of Interest (Section 5.3, page 3)

Task Force Recommendation: "Councilmembers must recuse themselves from the decision-making process when an actual conflict arises. To achieve greater transparency, Councilmembers must also identify and disclose when even the appearance of a conflict might exist."

Policy/Implementation Issues: On November 20, 2007, the City Council approved Mayor Reed's 2007 Biennial Ethics Review, which, among other things, directed the City Attorney's office to draft a Charter amendment that would allow the Mayor and Councilmembers to abstain

from voting on a decision if constituents would reasonably question the integrity of their decisions. Staff understands that the Charter amendment will be submitted to the voters at the next general election after the November 2008 general election.

Staff Recommendation: No recommendation.

Code of Ethics and Ethical Standards (Section 5.4, page 4)

Task Force Recommendation: "Members of the Council, Board of the Redevelopment Agency, Council Committees, City Boards, Commissions and Committees, City Decision Making Bodies, City Non-governmental partners and City departments must adopt the City's Code of Ethics and sign a verification confirming that the Code of Ethics has been adopted. All elected and appointed officials, employees, vendors and registered lobbyists must sign a certification that they will abide by the City's Code of Ethics." The appropriate link to the web site address for the City's Code of Ethics must appear in a prominent place on appropriate City materials, whether printed, electronic or posted on the City's website.

Policy/Implementation Issues: The City's Code of Ethics is contained in Section 1.2.1 of the City Policy Manual and in Council Policy 0-15. The Code of Ethics applies to all City officials and City employees. The City's current practice is that each new employee signs an acknowledgment that he or she has reviewed the City's Code of Ethics. However, elected and appointed officials do not currently sign an acknowledgment about the Code of Ethics. While it is possible to have all elected and appointed officials (including Boards, Commissions and Decision-Making Bodies) and City staff, sign a verification confirming they will abide by the City's Code of Ethics, the implementation of this provision with all of the external partners with whom the City interacts could be accomplished most efficiently on a going-forward basis.

Staff Recommendation: Staff supports this recommendation but recommends implementation on a going-forward basis for vendors and contractors with the City. At the start or renewal of current contracts, City staff would implement the new Code of Ethics with vendors and contractors.

B. TECHNOLOGY

The SRTF Technology subcommittee was responsible for identifying ways in which technology may be employed to further the goal of open government by the City. Unlike the recommendations made by the other subcommittees, the Technology subcommittee's recommendations are not intended to be codified in the proposed Open Government Ordinance; instead, the recommendations should be used to guide the City in its technology practices. A number of the recommendations reflect current practice and direction of the City.

The recommendations are organized into a statement of intent and 3 sections: 1) the City's information systems and infrastructure; 2) management and of the City's web site; and 3) procedures and best practices regarding technology. Staff supports a number of the Task Force's recommendations regarding the development of electronic document, web content management,

and law enforcement information systems (6.1.1 and 6.1.4). Staff also supports recommendations concerning web management (6.2). It is also worth noting that the City is already engaged in or has accomplished some of the recommendations under procedures and best practices (6.3). Some of the recommendations or summaries of the recommendations that do concern staff are provided below, along with policy or implementation issues and staff recommendations.

Ticketing Requests for Public Records (Section 7.1.2, page 18)

Task Force Recommendation: "The SRTF recommends that when the City Manager's Office, City Clerk's Office, City Attorney's Office, Police Department, Planning Department or the City's Public Information Officer receives a request for public records that requires more than one day to complete, a "ticket" with a unique number be opened to track the request through a program similar in functionality to a Help Desk Ticket System. When the request is fulfilled, the SRTF recommends that the ticket be closed."

Policy/Implementation Issues: Currently, each department or office individually tracks the requests made under the California Public Records Act. Requests involving multiple departments are coordinated and tracked by the City Manager's Office. Regardless of the method of tracking used, all departments or offices collect the same data. Consequently, merging these separate tracking operations into one system should be straightforward and relatively easy process. However, there would still be the expense of purchasing, implementing, and managing the new system, and then training employees how to use it. Since most responses to CPRA requests are completed within a day or so of receipt and since most departments receive only a few requests per month on average, the benefits would not appear to outweigh the expense of acquiring and maintaining a central tracking system.

Staff Recommendation: Continue current practice of tracking CPRA requests and responses by individual departments.

Web site (Section 7.2, pages 19-21)

Summary of Task Force Recommendations: This section of the Technology Sub-Committee's recommendations is organized into 3 sub-sections: 1) Navigation and Organization, 2) Web-Site Content, and 3) Interactive Services. Each section provides detailed recommendations regarding best practices for City web site management.

Policy/Implementation Issues: Council has approved funding and staff is implementing plans for a web audit to identify issues needing improvement and make recommendations on how best to accomplish any such improvements.

Staff Recommendation: Continue efforts to make most effective use of the web for City business and use the findings of the upcoming web audit to guide these efforts.

Posting Documents (Including Indexes and Policies (Section 7.3.1.010, page 21)

Task Force Recommendation: "The SRTF recommends that Budgets (Citywide Retention Schedule, Series No. 308) be posted online permanently."

Policy/Implementation Issues: The City has published Budget documents from FY1999-2000 to the present already posted on the City web site with no plans to remove them or discontinue posting of new Budgets. Retaining these documents on the site permanently could eventually prove a problem in relation to server storage requirements. Moreover, it is unlikely that many people would want or need to access these documents on a regular basis after several years.

Staff Recommendation: Continue current practice of posting Budget documents until such time as server storage requirements become an issue. At that time, assess usage of the documents and determine the benefits of online access to older budgets against the cost of retaining them online.

Archiving Documents (Section 7.3.1.020, page 22)

Task Force Recommendation: "Email Archive Recommendations

1. The SRTF recommends that the City immediately begin archiving the email of elected officials and non-clerical staff to elected officials that relates to the conduct of the City's business for 10 years.

2. The SRTF recommends that the City pursue a solution to archive, at a minimum, email of all City employees who file the *Form 700 – Statement of Economic Interests* that relates to the conduct of the City's business for 5 years."

Policy/Implementation Issues: This recommendation is contrary to the most basic principle of records management and archival administration, that records be retained on the basis of content rather than format or media. To require the retention of all e-mails for a certain length of time regardless of content would be like requiring the retention of all spreadsheets or word processing documents for the same period of time regardless of whether or not the information contained within them had any value. In addition, approximately 1300 City employees are currently required to file a Form 700. Continually identifying the individuals to whom the recommendations would apply, keeping track of the qualifying status of those individuals as they enter and leave City service or change positions, and then managing the retention of the applicable emails according to and throughout changes in such status would be a process for which the cost would far outweigh any supposed benefit.

Staff Recommendations: Continue current practice of retaining e-mails according to current e-mail policy and associated records retention schedules.

Retention Schedules (Section 7.3.1.030, page 22)

Task Force Recommendation: "The SRTF recommends that the City publish an index to City records and associated retention schedules for those records. The SRTF also recommends that changes to a retention schedule be reviewed at an open and public meeting of both the Open Government Commission and the City Council."

Policy/Implementation Issues: Currently, there are nearly 1,000 separate series (categories) of records listed on the various City retention schedules. These are continually being updated, added to or cancelled to reflect changes in State and Federal regulatory and statutory requirements as well as to cover new, changing, or discontinued City functions. Requiring that all changes to records retention schedules be reviewed by the City Council would reverse a long standing policy as stated in Council Resolution #68648 delegating approval of records retention schedules to the City Attorney, and would unduly elevate a routine administrative process as well as unnecessarily consume valuable Council time and energy.

Staff Recommendation: Retention schedules, which represent an index of records, should be published online. However, the current policy of review and approval of records retention schedules by City Attorney should be maintained.

For all other recommendations in the Technology Section of the Phase II Report, the Administration recommends that Council direct staff to review and implement as appropriate.

C. ADMINISTRATION AND ACCOUNTABILITY

This subcommittee addressed the question: What are the best organizational processes for addressing potential violations of Open Government regulations? This section includes the establishment of an Open Government Officer and Open Government Commission, enforcement provisions, as well as provisions for recording the closed sessions of City Council. While staff supports the procedures for enforcement established by the Task Force's recommendations, we believe that the process outlined by the Task Force could be conducted by existing personnel and committees, such as the City Attorney's Office, the Rules and Open Government Committee and/or the Elections Commission. Specific recommendations or summaries thereof are provided below, along with policy or implementation issues and staff recommendations.

Open Government Officer (Section 8.2, pages 23-24)

Task Force Recommendation: "The City will establish the position of Open Government Officer, who must be an attorney licensed to practice law in California and have demonstrated familiarity and experience with open government laws. The Open Government Officer will be a member of Senior Staff and report to the City Manager. The appointment of the Open Government Officer must be ratified by the Open Government Commission.

The Open Government Officer will:

1. Advise the City Manager on education and training for City Staff on the Open Government Ordinance and other open government laws;

2. Staff the Open Government Commission, including but not limited to providing advice to the Commission, conducting research or investigation at the direction of the Commission, and working with the City Attorney's Office in drafting revisions or amendments to the Open Government Ordinance at the direction of the Commission;

3. Work with the Public Records Manager to access information that can be used to generate routine statistical reports requested by the public or the Open Government Commission;

4. Coordinate with the Open Government Commission reports to the City Council evaluating and monitoring compliance with the Open Government Ordinance, investigate complaints of violations of the California Public Records Act, Ralph M. Brown Act or Open Government Ordinance, seek informal resolution of disputes regarding compliance if requested and issue decisions on formal complaints by the public."

In addition, the Open Government Officer would monitor the conduct of City Council/Redevelopment Agency Closed Sessions by either attending or listening to audio recordings of all Closed Session items not covered by the attorney-client privilege or related to personnel.

Policy/Implementation Issues: Based on the above-described job duties, staff believes that the most time-intensive function of the Open Government Officer would be the weekly monitoring of City Council/ Redevelopment Agency closed sessions. Beyond this monitoring, there does not appear to be enough activity to warrant a full-time Open Government Officer since the Public Records Manager estimates that in the seven months since he has been with the City, of the 46 significant CPRA requests he has coordinated, parts of only three requests and the entirety of only one were determined to be exempt and not provided to the requestor. Thus, only those four requests would potentially be subject in part or in whole to an appeal requiring the involvement of an Open Government Officer. Additionally, to establish and support the position of Open Government Officer, staff estimates the cost would approach $450,000 as shown in Attachment A.

Moreover, the function of this position duplicates that of the City Attorney who is the chief legal advisor to the Council and the City Administration. This proposal makes the assumption that the City Attorney has not or cannot fulfill this function satisfactorily. The Administration and the City Attorney believe that this function can and should remain with the City Attorney's Office. Through the proposed position of Open Government Officer, the Task Force believes it is creating a less expensive and less complex option for complainants to challenge CPRA or Brown Act violations rather than filing a complaint in Superior Court. But alternative processes already exist. The Rules and Open Government Committee currently hears complaints about CPRA

requests and the Attorney's Office responds to complaints about Brown Act violations, resulting in a cure or correction in most cases, even without a finding or admission of a violation.

Staff Recommendation: Retain this function with the City Attorney's Office and the Rules and Open Government Committee.

Open Government Commission (Section 8.3, pages 24-25)

Task Force Recommendation:

"A. The City will establish a neutral and independent Open Government Commission comprised of five members of the community or integrate the function of the Commission as described below into an existing Board or Commission as long as the members meet the following criteria. Each member must have some demonstrated familiarity and experience with open government laws and be a resident of the City of San Jose. The Commission's membership should be representative of the community and all members will be required to undergo a screening process to identify any potential conflicts of interest. Members must not be a paid City employee, a paid employee working on the campaign of a current Councilmember or candidate for City office or a contract lobbyist registered with the City. No member may participate as a candidate in any election for Mayor or Councilmember for the City of San Jose for a period of one year both before and after tenure on the Commission. Members will serve up to two four-year terms for a maximum of eight years. Members will be appointed by no less than two-thirds vote of the City Council.

B. The Open Government Commission will:

1. Advise the City Council about the Open Government Ordinance;

2. On an annual basis, (a) make any recommendation for amendments or changes to the Open Government Ordinance to the City Council; and (b) review the independence of the Open Government Officer;

3. Determine, if questioned or challenged, the categorization of a body for the purpose of determining the requirements, if any, for that body's meetings;

4. Develop an annual report, based on public input, indicating additional public information, if any, that the City should routinely make available to the public;

5. Hear appeals from decisions issued by the Open government Officer on complaints of violations of the California Public Records Act, Ralph M. Brown Act or Open government Ordinance; and

6. Recommend penalties for violations of the California Public Records Act, Ralph M. Brown Act or Open Government Ordinance where appropriate."

Policy/Implementation Issues: The recommendation for an Open Government Commission assumes that the City has received significant complaints about CPRA requests or Brown Act violations. To the contrary, there have not been numerous complaints about Open Government issues in the City. Additionally, as described above, the Rules Committee is the mechanism for addressing problems with significant CPRA requests.

Moreover, the Elections Commission has experienced challenges recruiting members and there may be similar challenges to find volunteers to staff a new Open Government Commission. The estimated costs for establishing and supporting a separate Commission – approximately $150,000 – are incorporated into Attachment A. If the Rules Committee chooses to accept the Task Force's recommendation, the functions of the Open Government Commission could be incorporated into that of the Elections Commission on an as needed basis. The Rules Committee could also serve as the portal for Open Government issues, determining whether appeals of responses to CPRA requests should be referred to the Elections Commission or not. In addition, the Elections Commission already has an independent legal evaluator available on a contract basis who could also advise the Commission on Open Government issues as needed.

Staff Recommendation: If the Rules Committee decides that an independent body should exist to hear complaints about Open Government violations, the Administration recommends that the function be integrated into an existing commission such as the Elections Commission. The Administration recommends further that the Rules Committee serve as a portal for Open Government items, determining on a case by case basis which matters to refer to the Elections Commission. Similar to all other previously approved Open Government recommendations, this process could be evaluated after a year of implementation.

Investigations (Section 8.4, pp. 24)

Summary of Task Force Recommendations: This section recommends the establishment by Council of regulations and procedures for investigations conducted by the Open Government Officer, authorizes the Open Government Officer to conduct investigations of allegations that the California Public Records Act, the Brown Act, or the City's Open Government Ordinance have been violated, and defines under what conditions such an investigation may be opened. It also prohibits the City Attorney from participating in those investigations or the review of allegations, although the City Attorney may provide the Open Government Commission with legal advice on other issues.

Policy/Implementation Issues: The function of this position duplicates that of the City Attorney who by Charter is the chief legal advisor to the Council and the City Administration. This recommendation makes the assumption that the CAO has not and/or cannot fulfill this function satisfactorily. The City Administration and the City Attorney believe that this function can and should remain with the City Attorney's Office.

Staff Recommendation: Retain this function with the City Attorney's Office and the Rules and Open Government Committee.

Enforcement – Requests for Public Records (Section 8.5.010, pages 25-26)

Summary of Task Force Recommendations: This section details procedures to appeal decisions that certain records are exempt under the authority of the California Public Records Act or the City Open Government Ordinance and should not be disclosed. The recommendations assign responsibilities for participants and establish steps and time limits to the process.

Policy/Implementation Issues: As previously discussed, staff does not believe that there will be enough work for an Open Government Officer or Open Government Commission. The Rules Committee currently addresses disputes over significant CPRA requests that cannot be resolved by the Public Records Manager and City Departments. Furthermore, the Elections Commission could hear appeals as necessary, using the contract legal evaluator. If the Rules Committee decides to rely on the Elections Commission for some appeal process, the procedures and timelines recommended by the Task Force should be modified accordingly.

Staff Recommendation: Retain the functions of the recommended Open Government Officer with the City Attorney's Office. If the Rules Committee chooses to provide for an appeals function as described in the Task Force's recommendations, integrate that function into an existing commission such as the Elections Commission, with Rules Committee as a portal to make referrals to the Commission; if the Rules Committee adopts this option, the specific processes and timelines in the above recommendations would be adapted for the Elections Commission.

Public and Closed Session Meetings (Sections 8.5.020 and 8.5.030, pages 26-28)

Summary of Task Force Recommendations: The Task Force made detailed recommendations for procedures to be followed in responding to allegations that a public or closed session meeting was held in violation of the Brown Act or the City's Open Government Ordinance (whether inadvertently or intentionally). The recommendations assign responsibilities for participants in the review/determination/appeals processes, establish timeframes for the steps in the processes, and define remedies for failures to comply.

Policy/Implementation Issues: The City Administration and the City Attorney believe that adequate procedures are in place to address alleged violations of the Brown Act. Furthermore, the Elections Commission could hear appeals as necessary. If the Rules Committee decides to rely on the Elections Commission for some appeal process, the procedures and timelines recommended by the Task Force should be modified accordingly.

Staff Recommendation: Retain this function with the City Attorney's Office. If the Rules Committee chooses to provide for an appeals function as described in the Task Force's recommendations, integrate that function into an existing commission such as the Elections Commission, with Rules Committee as a portal to make referrals to the Commission; if the Rules Committee adopts this option, the specific processes and timelines in the above recommendations would be adapted for the Elections Commission.

Closed Session Recordings (Section 8.5.040, pages 28-29)

Task Force Recommendation:

"A. After every closed session, for every item discussed in closed session, a body must meet in open session to disclose, among the other information required in the Open Government Ordinance, (1) when the need for confidentiality will expire; if it is the opinion of the body that it cannot in good faith make a specific determination as to when the need for confidentiality will expire, it will so state, and the confidentiality will remain in effect, subject to a request by a member of the public or the body to review that decision; and (2) the reason for confidentiality if the body asserts that confidentiality must be maintained.

B. If the majority of a body entitled to hold closed session determines that the need for confidentiality has expired about a topic discussed in closed session, it may release, in transcript form, the recording of the topic discussed in closed session.

C. The Open Government Officer must review the closed sessions of the City Council, except for the portions protected by the attorney-client privilege and the portions that relate to personnel matters, either by attending the portions of the discussions not protected by the attorney-client privilege or related to personnel matters or by reviewing the portions of the recordings not protected by the attorney-client privilege or related to personnel matters, whichever method is preferred by the City Council.

1. If the Open Government Officer determines that the closed session conformed to the requirements of the Brown Act and the Open Government Ordinance, within 72 hours of the closed session, he or she will issue a public finding so stating.

2. If the Open Government Officer determines that the closed session did not comply with the Brown Act or the Open Government Ordinance, within 72 hours of the closed session, he or she will issue a public finding identifying the specific agenda item during which the violation occurred.

3. The City Council may discuss the Open Government Officer's finding of violation in closed session. The Council must issue a response to the Open Government Officer's finding within 30 days.

4. If the City Council accepts the Open Government Officer's finding of violation, the Council will affirm the Officer's finding in public session and take corrective action as defined in the Brown Act and the Open Government Ordinance.

5. If the City Council rejects the Open Government Officer's finding of violation, the Council will announce its rejection of the Officer's finding in public session.

6. If any member of the public wishes to challenge the City Council's decision, he or she may file a complaint with the Superior Court as set forth in Government Code

> Sections 54960 and 54960.1. After reviewing the complaint filed in the Superior Court by a member of the public, the Open Government Commission may seek to join the complainant as a plaintiff in the petition or submit a "friend of the court" brief in support of the complaint."

Policy/Implementation Issues: The Council has decided to record direction to real estate negotiators given by the City Council or Board of the Redevelopment Agency in closed session, and to do so only for the purpose of preparing and releasing a redacted transcript upon request if a Brown Act violation has been alleged. Thus, the Council and Board will not be releasing recordings of closed session on a routine basis. Moreover, the requirement that the Open Government Officer audit closed session to ensure that the discussion conformed with the requirements of the Brown Act and the Open Government Ordinance is within the responsibility of the City Attorney.

Staff Recommendation: The Council and Board will not be releasing recordings of closed session on a routine basis so the Task Force's recommendation about releasing closed session recordings is moot. In addition, the Administration and the City Attorney recommend that the responsibility for determining that closed session is held in compliance with the Brown Act and the Open Government Ordinance remain with the City Attorney.

D. PUBLIC RECORDS

The Task Force's recommendations about Public Records focus on two areas: (1) which records must be disclosed; and (2) how records must be disclosed.

Which Records Must Be Disclosed: Some of the Task Force's recommendations would require the City to release more documents than it might otherwise disclose under the CPRA; other recommendations would require the City to create new documents that do not currently exist. The Task Force's recommendations respond to the concern that the City withholds documents that the public should be entitled to see or that the City has information that should be compiled into reports that the public would like to see. Some of the recommendations about which records must be disclosed apply Citywide while others focus on particular departments.

How Records Must Be Disclosed: The Task Force's recommendations significantly shorten the time for the City to respond to requests for public records; "simple" requests must be fulfilled in 2-3 days. For extensive requests, the Task Force recommends that, within 3 days, the responsible employee provide a written response and estimated completion date. As permitted by the CPRA, under unusual circumstances the City may explain to the requestor that it will take an additional 14 days to fulfill the request. But the City must produce documents as they become available, if it is practical to do so.

The Task Force also recommended standardized copying fees for requests to provide certainty and consistency for the public. For the first 50 pages, the cost of duplication would be $.10 per page. Beginning with page 51, the City could charge the amount set by the City for cost recovery. As of October 2007, that fee is .20 per page. The Task Force also recommended fees

based on actual direct costs when a request requires the City to produce a record normally issued only periodically or compile or extract data, a requirement to provide the requestor a breakdown of the estimate for those costs, and a system by which the requestor might appeal the imposition of charges.

Although staff has concerns about some of the recommendations in this section, we support a number of others, including those dealing with disclosure of litigation records, personnel records, most financial records, and code enforcement records as well as the recommendations about the fees for duplication. Staff also supports recommendations 6.2.2 and 6.2.3, which require that withholding of exempt records be held to a minimum and that notice of non-disclosure be accompanied by a written justification. The recommendations for which staff has some concerns are provided below, along with policy or implementation issues and staff recommendations.

Balancing Test (Section 6.1.2.070, page 13-14)

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

Task Force has recommended that the balancing test be eliminated because of a perception that the City relies on it to withhold documents that should not be withheld. In place of the balancing test, the Task Force recommends that four specific exemptions be provided.

Task Force Recommendation:

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

B. Except as otherwise provided in this Open Government Ordinance or by state or federal law, the following specific categories of information may be withheld or redacted, if on the facts of the particular case the public interest served by not disclosing the record clearly outweighs the public interest served by disclosure of the record:

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

2. Identifying information regarding a City employee who: (a) provides information in the course of an investigation of the conduct of any City body, agency,

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

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

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

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

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

During the Task Force's discussion about the balancing test, several Task Force members identified examples of information that would not be protected by the four exemptions; to address these examples the Task Force did make some additional amendments to the language that had been approved by the Public Records Subcommittee. However, at least one Task Force member noted that the difficulty in crafting the language of the exemptions underscored why the balancing test should not be eliminated – it is impossible to legislate every contingency.

For example:

1) After the terrorist attacks of September 11, 2001, public agencies became concerned about requests for detailed information about public facilities. A request for blueprints of City Hall or the Water Treatment Facility, for example, could be protected by applying the balancing test because no specific exemption existed. In 2002, Governor Gray Davis signed a bill adding a specific exemption for "local government documents that assess the potential for terrorist attacks." The Governor's signing message stated, in part: "I believe that the balancing provision of Government Code section 6255 already protects these and other sensitive material in the hands of local as well as other government agencies. Given the tenor of these times, post-September 11th, it does not hurt to make it especially

clear that such documents are protected." Without the balancing test, however, sensitive documents may not be protected from disclosure.

2) On May 19, 2008, California Attorney General Jerry Brown issued an opinion determining that the names of peace officers involved in a critical incident are generally subject to disclosure under the California Public Records Act unless the facts of the particular incident support an exemption in accordance with the CPRA's balancing test. Thus, the only protection under the CPRA for maintaining the confidentiality of a peace officer's identity when an officer is acting in an undercover capacity or facing retaliation is the balancing test.

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

Furthermore, although the Task Force intended to protect third party information with the exemption listed above, staff is concerned that not all financial information of third parties would be protected – only account numbers would be exempt. In addition, staff is concerned that cell phone numbers of third parties should be protected – not just home telephone numbers. The City should be allowed to protect all the information in which third parties have a reasonable expectation of privacy.

Staff is also concerned that information about City employees who may be the subject of a confidential personnel investigation should be protected – at least until that information could otherwise be subject to disclosure under the California Public Records Act. The exemption approved by the Task Force could open the City to liability for invasion of privacy and defamation claims for disclosing protected information about employees for at least three reasons:

1) Disclosing unsubstantiated allegations, unsubstantiated information, and witness opinions about the accused employee may expose the City to liability for invasion of privacy and defamation.

2) If there is a pending criminal investigation relating to misconduct, the accused employee who participated in the investigation and provided statements may not have waived his/her Fifth Amendment and Fourteenth Amendment rights against self-incrimination, and the disclosure of such statements or information obtained as a result of the statements may affect his/her right to a fair trial should criminal charges be filed. This may be another area of exposure to liability.

3) The proposed language does not provide any exception for personnel records relating to misconduct by peace officers. Peace officer personnel records, including disciplinary actions, are confidential and may not be disclosed under the law. *Copley Press, Inc. v. Superior Court*, (2006) 39 Cal.4th 1272 (holding that Copley Press did not have a right under the California Public Records Act to records of the county civil service commission relating to a peace officer's administrative appeal of a disciplinary matter, which were protected by statutes safeguarding officer's right of privacy under the Penal Code.)

During the discussion about the balancing test, the Task Force considered but did not accept an alternative proposal – modification of the balancing test. The Task Force reviewed the following language:

> "The City may justify withholding any public information by demonstrating that, under the facts of the particular case, clear and convincing evidence exists that the public interest served by not disclosing the information outweighs the public interest served by disclosure of the information. If the City determines that the public interest is served by not disclosing the information, the City Attorney must provide, in writing, a detailed justification. The person requesting the public information may appeal the City Attorney's determination to the Open Government Commission."

Staff Recommendation: Retain the balancing test. The Rules Committee could consider modifying the balancing test consistent with the above language that the Task Force considered but did not approve.

Drafts and Memoranda (Section 6.1.2.020, page 9)

Background: The California Public Records Act exempts from disclosure "[p]reliminary drafts, notes or interagency or intra-agency memoranda that are not retained by the public agency in the ordinary course of business, if the public interest in withholding those records clearly outweighs the public interest in disclosure."

Task Force Recommendation: "Once a proposal, initiative or other contemplated or suggested action is made public, or presented for action by any City body, agency or official, all related preliminary drafts, notes or memoranda, whether in printed or electronic form, will be subject to disclosure if they have been retained as of the time the request is made. This subsection does not require the retention of preliminary drafts, notes or memoranda that would not otherwise be retained in the ordinary course of business or pursuant to a policy, procedure or practice."

Policy/Implementation Issues: The Task Force's recommendation could result in the release of many draft documents that would not necessarily be produced now. Staff is concerned that releasing drafts could potentially restrict the creative process of the City's Council and professional staff. Brainstorming sessions require that participants be willing to offer every idea and to temporarily suspend judgment about the quality of those ideas; if the result of every brainstorming session were subject to disclosure, participants would be less candid and more guarded. Moreover, in the case of draft budget proposals that are rejected, releasing information about proposals that affect individual employees who might be the subject of a layoff or work

groups or community-based organizations that might be defunded could be hurtful and demoralizing.

Staff Recommendation: Continue to follow the direction of the California Public Records Act on drafts.

Advice from the City Attorney (Section 6.1.2.010, page9)

Task Force Recommendation: "Upon request, the City Attorney will release a summary document that explains any written interpretation of the California Public Records Act, the Brown Act or any City of San Jose Open Government Ordinance code or rule. This provision does not require the disclosure of the actual advice give to any client, does not require the release of the specific information that the City is alleging it should not have to release, and does not require the release of any information that the City alleges could cause substantial harm to the public."

Policy/Implementation Issues: Staff believes that the "actual advice given" to a client will be inextricably intertwined with the summary proposed in the Task Force's recommendation, and, consequently, the advice protected by the attorney-client privilege will be disclosed. Moreover, the California Public Records Act already requires that the City justify, in writing, withholding any record by demonstrating that the record is exempt under express provisions of the CPRA.

Staff Recommendation: Continue to follow the requirement of the California Public Records Act to justify in writing why a document is being withheld by demonstrating that the record is exempt under an express provision of the CPRA.

Law Enforcement Information (Sections 6.1.1.010 -6.1.1.030, pages 5-7)

Police Reports

Staff would like to acknowledge the significant time and effort taken by the Task Force in making its recommendations on police records. At an all-day meeting on a Saturday in February 2007, the Task Force listened to a panel comprised of a Captain from the San Jose Police Department, the Independent Police Auditor, a representative from the Santa Clara County District Attorney's Office, a representative from the American Civil Liberties Union, a representative from the National Association for the Advancement of Colored People, a representative from the Public Interest Law Firm, a lawyer representing the San Jose Mercury News and a lawyer representing the San Jose Police Officers Association. After the panelists debated issues about police records, the Task Force was given the opportunity to ask questions of the panelists. The Public Records Subcommittee also spent several months, beginning in June 2007 through March of 2008, discussing how best to craft the recommendations on police records. And the Task Force heard public testimony for hours at Task Force meetings in September and October of 2008.

As a result of all of this information and debate, the Task Force made a good faith effort to protect certain information contained in police records by including a lengthy list of exemptions. However, as discussed in greater detail below, staff believes that the Task Force's attempt to

protect certain information by including exemptions fails to fully accomplish its intent, when read in the larger context of the overall police records recommendation.

Background: The California Public Records Act exempts from disclosure police records of complaints, investigations, intelligence or security procedures with certain limited exceptions. But because the Task Force believes that the public should have more access to police reports, its recommendations require that most police reports be open to the public but permit redactions of certain information.

Task Force Recommendation:

"All reports prepared by Law Enforcement, including "Police Report," "Domestic Violence Supplemental," "Property Report," "Force Response Report," "Traffic Collision Report" and "Juvenile Contact Report" (collectively referred to as "Police Reports") are public records subject to disclosure, unless a general or specific exemption listed herein applies.

General Exemptions

A. Information may be redacted from any Police Reports if necessary to:

1. Protect the safety of any person;
2. Ensure the successful completion of the investigation or a related investigation;
3. Prevent the disclosure of legitimate law enforcement techniques that require confidentiality in order to be effective; or,
4. Prevent an unwarranted invasion of personal privacy.

B. Information in a Police Report may not be redacted under the privacy exemption of (A)(4) if:

1. That information was given to the police by the person who is making the request; or
2. The information pertains to the actions of a police officer in the official conduct of his or her duties; or
3. The information is required to be made public pursuant to Government Code Section 6254(f) or any other provision of State or federal law.

C. Redactions pursuant to this Section must be

1. Limited to that information necessary to further the purpose of the exemption;
2. To the extent practical, use numerical or alphabetic designations as substitutes for names omitted; and
3. Justified in writing by reference to the pertinent exemption(s).

Specific Exemptions

A. Unless otherwise authorized by state or federal law, the following Police Reports are exempt in their entirety from disclosure:

1. A "Juvenile Contact Report."

2. A "Domestic Violence Supplemental" unless and until such report is filed with the Superior Court, in which case it should be obtained through the Court.

3. Police Reports where a person is charged with Section 220, 261, 261.5, 262, 264, 264.1, 273.5, 286, 288, 288.5, 288a or 289 of the Penal Code or an attempt to violate any of these code sections, unless disclosure would further the investigation or protect public safety.

4. Accident Reports and supplements as defined by Vehicle Code Section 20012 and 20014.

B. Unless a report prepared by Law Enforcement is requested by a person entitled to the information under state or federal law, the following information must be redacted from any Police Report:

1. The name of any victim of any crime defined by Sections 422.6, 422.7 (hate crimes), 422.75, or 646.9 (stalking) of the Penal Code, as well as by Penal Code sections listed in (A)(3) above.

2. The name of any witness, juvenile or adult, unless the witness consents.

3. For any person other than an arrestee, residence address, residence telephone number or electronic email address, driver's license number, California Identification Card number, social security number, date of birth, place of employment, employee identification number, mother's maiden name, demand deposit account number, savings or checking account number, or credit card number.

4. For an arrestee, residence address, residence telephone number or electronic email address, driver's license number, California Identification Card number, social security number, place of employment, employee identification number, mother's maiden name, demand deposit account number, savings or checking account number, or credit card number.

5. The name of a juvenile arrestee or suspect, unless and until the juvenile is charged and prosecuted as an adult, provided that the first name and initial letter of the last name must be substituted in the Police Report.

6. The name of any person who has been accused of a crime if that person has not been arrested or charged in connection with that crime, unless the information furthers the investigation or protects public safety.

7. Any other information that is prohibited from disclosure by state or federal law.

C. Beginning 60 days after the date of an initial Police Report, the Police Report must not be disclosed in response to a request based on a specific member of the public, specific address or other information that could be used to identify a specific member of the public or specific address. In the event the Police Report is disclosed, the appropriate information should be redacted according to the general and specific exemptions described-above."

Policy/Implementation Issues: This response is not intended to address all of the San Jose Police Department's (Department) concerns, as it only represents the preliminary response to the SRTF's proposal related to police records. As stated in the September 10, 2007 memo from the Department to the SRTF (Attachment B), entitled "*SJPD Input to Subcommittee Recommendations*," the Department has serious concerns about any deviation from the existing requirements under the California Public Records Act. Ongoing adherence to the CPRA has proven effective in balancing two competing interests: 1) the public interest in providing access to information concerning the conduct of the people's business; and, 2) the public interest in effective law enforcement and the protection of the privacy rights of all persons involved in the criminal justice system.

It is the Department's position that the final SRTF proposal does not adequately provide the required comprehensive protections consistent with existing CPRA standards, and as such, would erode the Department's autonomy and discretionary authority to withhold certain police records from public inspection. The SJPD recommends that the Department be permitted to continue its policy and practice of releasing information in accordance with the CPRA as written by the California Legislature.

The Department has concerns about the adverse impact on: (1) the operations and resources of the Police Department; (2) the Police Department's ability to accomplish its mission to deter, detect, investigate and assist the District Attorney in the successful prosecution of crime; and (3) the Department's obligation to protect the legitimate privacy rights of those involved in the criminal justice system.

1. Police Records are Exempt from Public Disclosure Under the CPRA

In order to understand the Department's concerns, this memorandum first addresses the requirements of the California Public Records Act (CPRA) regarding information that must generally be disclosed by law enforcement. As explained above, the CPRA exempts from disclosure "[r]ecords of complaints to or investigations conducted by, or records of intelligence information or security procedures" of police departments with certain limited exceptions. As it relates to the SJPD, the CPRA requires the Department to make available to the public specific, current information on contemporaneous police activity to the extent that it exists in records to which the Department has access on arrests, complaints and requests for assistance received by the Department.

A. Arrest Information Subject to Public Disclosure

Upon request, the CPRA requires the Department to provide the name, occupation, date of birth, color of eyes and hair, gender, height and weight of the arrestee, the date of arrest, time and date of booking, location of arrest, the factual circumstances of the arrest, the amount of bail set, the time and manner of release or the location where the person is currently being held, and all

charges the arrestee is being held upon. In fact, all Santa Clara County law enforcement agencies have been working collectively to facilitate making a comprehensive arrest report available on the Internet that would be responsive to the above-listed CPRA requirements. Moreover, the Police Department currently makes available to the public a hard copy arrest log that has an abbreviated listing of information about current arrests.

B. Calls for Service Information Subject to Public Disclosure

Regarding complaints and requests for assistance received by the Department, the CPRA requires the Department to provide, upon request, the time, substance, and location of all complaints or requests for assistance and the time and nature of the Department's response, including, to the extent it is recorded, information regarding crimes alleged or committed or any other incident investigated, the time, date, and location of the occurrence, the time and date of the report, the name and age of the victim, the factual circumstances surrounding the crime or incident, and a general description of any injuries, property, or weapons involved. The names of victims of certain specified crimes are required to be withheld at the request of the victim or victim's parent or guardian.

C. Scholarly, Journalistic, Political, Governmental, or Private Investigator Requests for Current Addresses of Victims and Arrestees

Under the CPRA, upon request, the Department must provide additional information (the current address of arrestees and victims) where the requesting person executes a written declaration under penalty of perjury that: 1) the request is being made for scholarly, journalistic, political, or governmental purpose, or that the request is made for investigation purposes by a licensed private investigator; and 2) the information provided will not be used directly or indirectly, or furnished to another, to sell a product or service to any individual or group of individuals that may obtain current information on contemporaneous police activity.

However, the CPRA allows the Police Department to withhold the additional information if its disclosure would endanger "the safety of a witness or other person involved in the investigation . . .or . . . the successful completion of the investigation or a related investigation."

Furthermore, under Penal Code Section 841.5, it is a misdemeanor for any officer or employee of a law enforcement agency to provide any arrested person or any criminal defendant the address or telephone number of any person who is a victim or witness in the alleged offense.

2. Information Available to Crime Victims

Apart from the required public disclosures listed above, the CPRA also requires the Police Department to provide crime victims, their representatives and others suffering bodily injury or property damage as a result of an incident caused by a crime the following information and records: the addresses and names of the people involved in and non-confidential witnesses to the incident, the description of any property involved, the date, time and location of the incident and all diagrams of the incident, and all statements of parties involved and non-confidential witnesses to the incident.

Again, the CPRA allows the Department to redact information from these records where disclosure would endanger the safety of a witness or other person involved in an investigation or endanger the successful completion of an investigation or a related investigation.

Despite the detailed legislative scheme set out in the CPRA and Police Department practice which is consistent with the CPRA's requirements, the Task Force believes that the public should have access to police reports themselves. Where possible, the Department supports greater disclosure of information on police activity and has made significant strides in providing the public with near real-time access to police activity through the utilization of on-line services available on the Department's SJPD.org website (CrimeReports.com/Public CADMine). These public resources provide the residents with a more complete view of police activity throughout the City. In particular, CrimeReports.com identifies police activity by Police Department case number and lets the public know if a report was taken or an arrest made associated with the incident so that a resident can seek further public information regarding particular incidents of crime in his or her neighborhood.

3. Specific Objections to Task Force Recommendations

Although the Task Force's recommendations attempt to define the term "Police Reports" and the Department believes that the Task Force did not intend its definition to include "investigatory files," as the recommendation is written, the term "Police Reports" is defined as all reports prepared by law enforcement. The vast majority of reports prepared by officers regarding arrests and calls for service consist of what are called "Form 2s" and "Form 3s". Form 2s are used by police officers to report the officer's response to a self-initiated activity or a citizen complaint, also called a "call for service". A Form 3 is the form used by officers in narrating an interview of a witness, complaining party, or suspect.

Form 2s and Form 3s constitute the backbone of every investigative file opened and maintained by the Department. The Task Force recommendations would open to public disclosure the investigative files created and maintained by every entity within the Department.

The reports covered would include all reports written by the Bureau of Field Operations, including reports and files of the Special Operations Unit that conducts high-risk arrest and search and seizure operations. Reports containing tactical plans, security procedures, an investigator's analysis and conclusions about an investigation, an officer's notes outlining his or her thought processes, conclusions and analysis all would be subject to public disclosure. The definition of "Police Reports" would also include reports written by officers assigned to state and federal law enforcement agency task forces.

The Department would interpret the term "Police Reports" as written in the Task Force recommendation to also include police communications recordings (telephone calls from the public and radio traffic between Department members and with other law enforcement agencies) as well as audio recordings of interviews of suspects, witnesses and complaining parties. If the Department was compelled to produce these recordings, it does not have the staff or the technology to disguise voices or redact information from audio recordings.

The Task Force did include exemptions that would require the redaction of information that it believes should be protected. However, requiring disclosure of the actual reports with the information redacted places a significant and unmanageable burden on the Department at a time when the City is prioritizing the need for adding officers on the street. Every month, the Department files approximately 7,600 reports; each report averages five to seven pages. Unfortunately, with the large number of reports that the Department processes monthly, the opportunities for redaction errors are high and the ramifications could be significant.

The Department believes the Task Force's recommendations go too far and will effectively repeal the exemption for police records and require that most police records regarding investigations, arrests, and calls for service be open to the public. The SRTF recommendations would necessitate using detectives and civilian police personnel on an increased basis to review and redact sensitive information from reports to be released to the public. The resources of the City Attorney's Office would also be used at an increased rate since attorneys normally review proposed disclosures to insure compliance with existing City policy and state and federal law requirements that make specific documents and information confidential or otherwise restrict disclosure to specified persons and purposes. This is an impractical use of limited investigative staff for the purpose of mitigating the risk of releasing nondisclosable information. Limited investigative and administrative staff would better serve the community by performing their respective public safety roles. Likewise, the redaction procedures required by the SRTF recommendations will place an undue burden on the limited resources of the City Attorney's Office.

4. Unintended Consequence – Disclosure of Police Records to Criminal Suspects and Defendants Outside of the Criminal Discovery Process

Under the CPRA, criminal defendants and suspects cannot obtain access to reports and investigative files due to the existence of the broad exemption against public disclosure of police records, as well as more specific statutory prohibitions against disclosure of specified information to arrestees and criminal suspects. Access to police records for criminal defendants is governed by criminal discovery statutes and judicial rules that protect the constitutional rights of defendants and preserve the privacy rights and safety of victims, witnesses, complaining parties, and other persons involved in the criminal justice system. There is no public interest in providing criminal suspects with access to police reports and investigative files outside of the existing constitutional and statutory framework for criminal discovery. Although the Department believes that the Task Force intended to broaden the availability of police reports only for the general public, the recommendations will have the direct and unavoidable effect of promoting disclosure of police records to criminal suspects and to criminal defendants, which they are unable to obtain currently under the CPRA.

Beyond the important privacy concerns being discussed, much of the California Legislature's purpose for exempting police records in the CPRA was to keep police records out of the hands of criminals and those who would exploit criminal records for commercial gain or private voyeurism. This could only be accomplished through a broad exemption due to the fact that the CPRA generally does not permit a public agency to distinguish among requesters, except in the circumstances specified in the preceding discussion. The City's own Public Records Policy and

Protocol requires disclosure even to anonymous requesters of public records and information. In fact, the CPRA expressly forbids limiting access to a public record based upon the purpose for which it has been requested, if that record is otherwise subject to disclosure. The Department understands that the broad exemption against disclosure of police records of complaints to and investigations conducted by the Department is to prevent the CPRA from becoming a conduit for criminals to gain information about police investigations, methods of conducting investigations, security procedures, intelligence and tactical information. Public access beyond the existing CPRA restrictions to investigative information will negatively affect the Department's ability to solve crimes regardless of whether officers or detectives are investigating unsolved crimes in open investigations or trying to reopen closed files when new information becomes available.

The Department has serious concerns that the Task Force's recommendations will adversely impact (1) the operations and resources of the Police Department; (2) the Police Department's ability to accomplish its mission to deter, detect, investigate and assist the District Attorney in the successful prosecution of crime; (3) and the legitimate privacy rights of those involved in the criminal justice system.

5. Negative Impact of Task Force Recommendations on Operations and Resources

It is undisputed that the Department would not be as effective without the active cooperation and assistance of the community in reporting and solving crimes. The Department must be able to protect those who report crimes and cooperate with the police from intimidation, retaliation and public embarrassment. Although the SRTF recommendations in theory permit the Department to redact information that should be protected, in practice the Department will face a number of problems.

The Department does not have an electronic report writing application for officers in the field. Instead, patrol officers write their reports by hand. Then, within 30-45 days of the handwritten report, clerical staff at the Department enters the handwritten information into a records management system (RMS).

RMS designs do not have the capability of redacting information of a sensitive nature through an automated process. In order to produce a police report with protected information redacted, the detective in charge of the case would still need to review the report and redact by hand the information that should be protected. Although a new automated report writing process will provide improved efficiencies to the Department in releasing the information currently authorized by the CPRA for release, it will have no impact on reducing the amount of time it would require a police detective to read through and redact a full police report. Non-sworn clerical staff cannot perform the redactions because only the case detective would understand and know whether the information would impact the safety of any person or successful completion of the investigation or a related investigation, expose legitimate law enforcement techniques that require confidentiality in order to be effective or protect personal privacy.

The SRTF's recommendations exempt disclosure of the Domestic Violence supplemental and other Police Reports related to sexual assault and domestic violence. Perplexingly, however, the Task Force recommendations permit access to reports on child abuse and neglect, homicides, kidnappings, stalking, hate crimes, extortions, gang-related crimes and other high-profile crimes.

Law enforcement reports on child abuse and neglect cases are confidential under the Child Abuse and Neglect Reporting Act.

Moreover, as noted above, since the SRTF recommendations permit access to investigative files maintained by every unit within the Department, release of a file will always require the officer or detective in charge of the case to review the file carefully and make the necessary redactions. In short, detectives will spend less time investigating crimes and more time redacting reports.

Furthermore, if redactions are performed detective by detective, it will be difficult to ensure consistency and accuracy. Moreover, errors in redaction may endanger the safety of persons involved in investigations. If just one mistake is made – and the name, address and/or statement of a witness or victim are released in a gang-related crime, for example – that witness would likely suffer retaliation.

The SRTF's recommendations also require that the Police Department justify in writing each redaction and refer to the pertinent exemption. This requirement is not only burdensome, it is likely that each justification will be challenged which will result in significant litigation.

6. Adverse Effect on Successful Prosecution of Crime

The Task Force's recommendations do not take into account the entire life cycle of a crime – from the response to a call for assistance from the Police Department to prosecution by the District Attorney's Office. While the Police Department may have the ability to withhold certain information during the investigation of the crime, it is not clear from the Task Force's recommendations what information, if any, may be protected after the Police Department has sent the report to the District Attorney's Office. A prosecutor may have to prove in court that a defendant or witness knew some information that was not available to the public. If a police report is available to the public before the District Attorney's Office has the opportunity to review the report, file the criminal complaint and proceed to trial, the prosecution may be jeopardized.

Moreover, if the Task Force recommendations are adopted, other law enforcement agencies – local, state and federal agencies – may be unwilling to share information with the Police Department if the Department is obligated to produce that information to the public. The Police Department may lose access to information that would help to solve or prevent crimes in San Jose. The Department has serious concerns that it will lose connection and involvement with other law enforcement agencies that are currently the Department's collaborative partners, and believes that this could result in a loss of information and resources to protect the citizens of San Jose. This concern has been expressed by both the Santa Clara County Chiefs' of Police Association and the California Police Chiefs Association.

7. Adverse Effect on Old and Closed Cases

The Task Force recommendations will also impact closed cases that are not prosecuted for lack of sufficient evidence. Frequently, closed cases are reopened when new evidence comes to light. It is quite likely that the disclosures required under the Task Force recommendations will make it much more difficult for the Department to resolve old and closed cases because criminal suspects

will have access to the evidence that the police have developed in existing reports and investigative files. It is much easier for a criminal to cover his or her tracks if the criminal has access to the detailed information on the suspect's prior conduct that exists in police reports. In addition, the prosecution in an old or closed case where a suspect has been arrested could be hampered because the public release of details associated with the crime would make it difficult for prosecutors to prove that witnesses have knowledge of certain details that were not publicly known.

8. Privacy and Litigation Concerns

The Task Force recommendations intended to protect privacy rights fall short of the protections under the CPRA as drafted by the Legislature. Moreover, we are concerned that the Task Force recommendations intended to protect sensitive information from disclosure in lieu of the police records exemption will generate litigation that the City has been able to avoid by following the requirements of the CPRA.

The District Attorney's December 4, 2007 memo to the Task Force provided analysis of the California laws and cases that protect the privacy interests of all persons involved in the criminal justice system. The City Attorney's January 31, 2007 memo focused on one aspect of statutory privacy protection, the prohibition against disclosing local summary criminal arrest history information, which protects the privacy rights of criminal suspects and defendants. In response, the Task Force recommended preventing disclosure after 60 days of a Police Report in response to a request based on a specific member of the public, specific address or other information that could be used to identify a specific member of the public or specific address.

The Task Force's recommendation, however, does not adequately protect the privacy of all people involved in the criminal justice system. And California case law interpreting the CPRA is clear – the only information available to the public is current information on contemporaneous police activity on arrests, complaints and requests for assistance received by the Department and the time and nature of the Department's response. (*County of Los Angeles v. Superior Court (Kusar)* (1993) 18 Cal.App.4th 588.) Thus, disclosure of information in police reports on arrests, complaints and requests for assistance received by the Police Department and the time and nature of the Department's response should be prohibited after 60 days.

In addition, the Task Force's recommendations permit redaction of information to "prevent an unwarranted invasion of personal privacy." But it will be difficult to discern in any given case what is an "unwarranted" invasion of personal privacy. Persons will contest in litigation what an "unwarranted invasion of personal privacy" means because the meaning is susceptible to differing interpretations depending on the factual circumstances of the particular case.

The Task Force's recommendations forbid redaction of private information if that information was given to the police by the person who is making the request. Although this seems reasonable, divulging the private information to the person who made the request would constitute a "waiver" as to all others. In other words, if the Police Department provided private information about the requestor to the requestor, it would be unable to protect that information from others who sought it. Giving personal information to the person who provided it to the Department may result in public disclosure of sensitive information that will endanger the

successful completion of an investigation or a related investigation or endanger the safety of a person involved in the investigation.

The Task Force also recommended that information that "pertains to the actions of a police officer in the official conduct of his or her duties" not be redacted using the privacy exemption. This exception, however, may result in the release of information that invades the personal privacy of a police officer. Again, it is also likely that disputes over the scope of this exception will generate more litigation for the City.

The Task Force recommends further that, for juvenile witnesses and suspects, the name should be redacted but the first name and initial letter of last name must be provided. But this requirement provides very little – if any – protection for the juvenile witnesses and suspects. Throughout a police report, there are many references to involved individuals using identifiers other than the true name of an individual, which could lead a reader to be able to identify the person(s) referenced (e.g. gang monikers, tattoos, nicknames, geographic location, school attended, etc.). Moreover, neighbors and other persons living in close proximity to a complaining party or a witness may have little difficulty in discerning the true identity of victims or witnesses (whether juvenile or adult) based upon the police reports that will be subject to disclosure under the Task Force recommendations. Finally, it is doubtful that the exemption for juvenile contact records meets the stringent confidentiality requirements under Welfare and Institutions Code and the California Rules of Court for juvenile records.

Staff Recommendation: Permit the Police Department to continue its policy and practice of releasing information in accordance with the CPRA as written by the Legislature.

The Police Department cannot effectively perform its mission of protecting public safety without maintaining the exemption from disclosure of police records, including police reports, under the California Public Records Act. The Department would continue to provide current information on arrests, complaints and calls for service as required by the California Public Records Act. The Department will continue its efforts to improve on-line accessibility of releasable information to public. Additionally, other requests for information can be produced by clerical staff without distracting field officers and detectives from investigating crime.

As the Rules Committee considers this recommendation, it is important to note that even after an automated records management system is implemented, it will not remove the need for a police detective to review and redact information by hand.

The Department must also be permitted to protect any private information – not just that which would constitute an "unwarranted invasion." The privacy and safety interests of police officers, witnesses, complaining parties and other persons involved in the criminal justice system must also be considered. The Department must be allowed to maintain its current discretion in protecting information that could hinder successful investigation and effective prosecution of crime or endanger witnesses, victims and other persons involved in the criminal justice system.

Police Department Statistical Reports (Section 6.1.1.040, page 7)

Task Force Recommendation:

"The San Jose Police Department must produce:

A. A quarterly report on all stops conducted by San Jose police officers, including all traffic stops and pedestrian stops in which a person was questioned, photographed, frisked, patted down, detained, issued a citation or arrested.

For each stop, the report will include the race and ethnicity of the person stopped, some geographic designation of the location of the stop, the reason for the stop, whether a citation was issued, whether a vehicle was searched and whether consent was granted for the search, and whether an arrest occurred.

B. A quarterly report on the San Jose Department's use of force in arrests, including the race and ethnicity of the person arrested, some geographic designation of the location of the arrest, the reason for use of force by category (for example, refusal to comply with police orders, threatening behavior or language, engaged in use of force against another person, etc.) whether a warning was given prior to use of force, the type of force used by category (for example, firearms, tasers, batons, pepper spray, hands and feet, etc), and the injuries sustained by the arrested party and officer, if any.

C. The type and frequency of police statistical reports must be reviewed annually. The first annual review will take place 12 months after adoption of the public records section of the Open Government Ordinance. The review will be implemented by the Open Government Commission. In the event the Open Government Commission has not been operating for at least 6 months, the review will be implemented by the City Council."

Policy/Implementation Issues: The recommendation to produce a quarterly vehicle/pedestrian contact report is overly burdensome and would necessitate a report to be written on every contact by the Police Department. This will have a stifling effect on an officer's ability to move freely throughout his or her normal and often informal daily contacts with the public. The increased paperwork associated with this recommendation would also create an additional workload for the officer to assure that accurate information was collected and documented before moving on to another contact or investigation. This recommendation would also impact the limited staffing of Police Data Specialists in the Department's Records Division. In past years, the Police Department has made available an annual report on vehicle traffic stops and has tried to automate this process with varying results. To expand the report to include pedestrian stops, even on an annual basis, will create an unrealistic burden on officers and support staff.

The Task Force's recommendation to produce a quarterly use of force report is similarly burdensome. Until such time as an appropriate level of non-sworn staffing and a new RMS is implemented, which will provide an automated technological solution to the burdensome task of collecting and categorizing data, the production of this voluntary report will continue to be a

challenge for the Department to prepare. A requirement to produce this report on a quarterly basis will be an even greater challenge.

Staff Recommendation: Permit any report not mandated by Council to be produced at the discretion of the Police Department until such time as both data entry and the production of reports is fully automated. With the loss of over 60 non-sworn support staff, the production of any voluntary reports has been an increasing challenge to produce.

Fire Department Statistical Reports (Section 6.1.1.060, pages 8-9)

Task Force Recommendation:

"A. The San Jose Fire Department must produce and post on its web site a quarterly report on the following performance measures:

1. Citywide, the number of:

   a. Fires;

   b. Fire injuries;

   c. Fire fatalities; and

   d. Emergency medical responses.

2. Citywide, and by Fire Station, the percentage of time the initial responding unit arrives within 8 minutes after a 9-1-1 call is received;

3. By Fire Station, the number of:

   a. Fire emergency responses;

   b. Medical responses;

   c. Hazardous Materials Incident Team responses;

   d. Other emergency responses; and
   e. Non-emergency service calls;

4. Citywide, the percentage of fires contained in

   a. The room of origin; and

   b. The structure of origin;

5. Citywide, the percentage of fires where the cause was determined (and broken out by causal factors);

6. Citywide, the percentage of arson cases referred for prosecution;

7. Citywide, the percentage of:

   a. State-mandated fire inspections;

   b. Permitted (non-mandated) fire inspections; and

   c. Hazardous materials inspections.

8. Citywide, the average cost of calls per service.

B. The type and frequency of fire statistical reports must be reviewed annually. The first annual review will take place 12 months after adoption of the Public Records section of the Open Government Ordinance. The review will be implemented by the Open Government Commission, unless the Commission has not been operating for at least 6 months, in which case the review will be implemented by the City Council."

Policy/Implementation Issues: Staff is concerned about the burden of quarterly reporting. The Fire Department does not currently possess the necessary analytical and web maintenance capacity to provide the requested data on a quarterly basis. And the scheduled completion of the Fire Department's comprehensive records management system (RMS) in July 2008 starts the phased implementation of a series of modules (e.g., incident, station journal, training, inspection, etc.). Some of the earlier modules will improve the efficiency of acquiring and processing the data requested by the Task Force, however, inspection and arson activity data will be available much later (1-2 years) in the phased implementation process. Considering the RMS implementation schedule and the absence of web support staff, the frequency and nature of the data requested by the Task Force would require the addition of 1 FTE of a Systems Application Programmer (with web experience) and .25 FTE of an Analyst.

Staff Recommendation: Continue to report the same data with the same frequency until the Fire Department's RMS is fully implemented and staff is available to generate the information requested by the Task Force's recommendation.

Contracts with the City (Section 6.1.2.050(E), page 13)

Task Force Recommendation: "All contracts, except for Purchase Orders, regardless of amount or who approved it are filed and open to public inspection at the City Clerk's Office."

Policy/Implementation Issues: Staff notes that although the Clerk's Office maintains the contracts that have been approved by Council, many other contracts exist throughout the City that are not stored in the City Clerk's Office.

Staff Recommendation: State that contracts with the City are open to the public, but do not attempt to centralize every contract at the Clerk's Office.

Budget and Other Financial Information (Section 6.1.2.060, page 13)

Task Force Recommendation: "Proposed or final budgets, including the line item budget, for the City or any of its departments, programs or projects are subject to disclosure and should be made available in electronic form."

Policy/Implementation Issues: The City currently makes a comprehensive set of budget materials available online and in our libraries. Among other documents, this includes: 1) all Proposed and Adopted Operating and Capital Budgets; 2) Fees and Charges Report; 3) Annual Report; 4) Mid-Year Budget Review Report; and, 5) and City Manager's Budget Request and Five-Year Forecast for the General Fund and Capital Improvement Program Report.

Over the past six years, the annual process for developing a budget has been transformed into a performance-based budgeting process, with programs converted to core services, which are then combined into city service areas. This framework aligns front-line services to the Mayor and Council policy priorities. Current and planned performance levels at both the city service area and core service level, along with budget information to support these efforts, are provided in the budget documents at a detailed level. Actual and budgeted expenditures are displayed at several levels in the Proposed and Adopted Operating Budget document. Departmental operating budgets are displayed at the core service, appropriation (personal services and non-personal/equipment) category, and funding source level. Actual and budgeted overtime levels are also displayed in the appropriation category. Many expenditures that cross department lines and are significant in nature are displayed and appropriated as a separate line item in the City-Wide Expenses section of the document (e.g., workers' compensation claims, sick leave payments upon retirement, general liability claims, reserves, transfers, capital projects, etc.).

Producing and publishing a line-item budget does not align with the work that has gone into transforming the organization through performance-based budgeting whereby the focus is now on outcomes and measures rather than detailed inputs. Although the City tracks expenses for accounting purposes by specific account categories (utilities, office supplies, overtime, etc.), legal controls for departments are set at the higher budget category level (personal services, non-personal/equipment, and city-wide expenses appropriations). This higher level of budget control supports the City's evolution to performance-based budgeting. This structure acknowledges the complexity of the organization and the wide variety of services delivered and provides tools at all levels of the organization to plan, manage, and measure the results that customers experience.

Under the performance-based budgeting model, department leadership is held accountable to achieve Council-adopted service levels as outlined in business plans and performance measures published in the budget document. While the line item budget is the initial plan to achieve these objectives, department leadership, as professional managers, are given the discretion to adjust spending within their personal services and non-personal/equipment appropriations to achieve Council-adopted service levels. If the City Council chose to make line-item budget information

available, the Budget Office would need to reprioritize work based on the additional workload involved in producing another budget document for posting online or in hard copy.

Staff Recommendation: Direct staff to post all published budget documents online for easy access by the public, but do not require that the line item budget be made available in electronic form.

Immediacy of Response (Section 6.2.1, pages 15-16)

Task Force Recommendation:

"A. The deadlines listed in this section are appropriate for extensive or demanding requests but should not be used to delay fulfilling simple or routine requests.

B. If a request for any public information is presented to a City employee who is not responsible for responding to the request, it must be forwarded, by the end of the business day on which it was received, to the City employee responsible for responding to the request or to the employee's supervisor if that employee is out of the office that day.

C. By the end of the business day on which the City employee responsible for responding to the request receives it, he or she must acknowledge receipt of the request to the requestor.

D. For simple or routine requests, by the end of the next business day after the date the City employee responsible for responding to the request acknowledges receipt of the request to the requestor, the City employee responsible for responding to the request must provide a response and the requested public information."

Policy/Implementation Issues: The City's Public Records Policy and Protocol states that "the Department representative shall promptly respond to the request." The Policy and Protocol requires further that 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..."

Because the City's Public Records Policy and Protocol already mandates a prompt response to requests for public records, staff is concerned about the Task Force's requirements to take certain action "by the end of the business day" rather than within a "reasonable time" or "as soon as possible." While staff appreciates the importance of responding to requests for public records, the City should continue to have the ability to consider the urgency of other priorities that an employee may be responding to.

Staff also notes that the proposed timeline may imply a requirement for a centralized method for tracking requests. As explained above, since most responses to CPRA requests are completed within a day or so of receipt and since most departments receive only a few requests per month on average, the benefits would not appear to outweigh the expense of acquiring and maintaining a central tracking system.

Staff Recommendation: Continue to follow the Public Records Policy and Protocol.

POLICY ALTERNATIVES

Not applicable.

PUBLIC OUTREACH/INTEREST

- ☐ **Criterion 1**: Requires Council action on the use of public funds equal to $1 million or greater. **(Required: Website Posting)**
- ☐ **Criterion 2:** Adoption of a new or revised policy that may have implications for public health, safety, quality of life, or financial/economic vitality of the City. **(Required: E-mail and Website Posting)**
- ☐ **Criterion 3:** Consideration of proposed changes to service delivery, programs, staffing that may have impacts to community services and have been identified by staff, Council or a Community group that requires special outreach. **(Required: E-mail, Website Posting, Community Meetings, Notice in appropriate newspapers)**

The work of the Sunshine Reform Task Force has been well-publicized in the community. In addition to coverage by the local media, an early advertising campaign invited suggestions from the community and over 50 reform proposals were received. All meetings are televised and all documents are available online.

Staff has posted all Task Force agendas and meeting minutes on the City's website and has regularly notified those who have requested notification by e-mail of the Task Force meetings.

COORDINATION

The preparation of this staff memo was coordinated with the City Attorney's Office, the City Clerk's Office, the Redevelopment Agency, the departments of Parks, Recreation and Neighborhood Services, Housing, Planning, Building and Code Enforcement, Fire, Police, Information Technology, Retirement Services, and the City Manager's Office.

FISCAL/POLICY ALIGNMENT

Not applicable.

COST SUMMARY IMPLICATIONS

Estimated costs for the Open Government Officer and Commission are provided in Attachment A. Council should direct staff to conduct further analysis for any approved Task Force recommendations to evaluate potential costs and benefits.

CEQA

Not a project.

TOM MANHEIM
Director of Communications

For questions please contact Tom Norris, Project Manager, at 408-535-8120.

Attachments:

A. Estimated Costs for Open Government Officer and Open Government Commission
B. SJPD Input to Subcommittee Recommendations dated September 10, 2007

Estimated Costs for Open Government Officer and Open Government Commission

		One-time Expenditure	Ongoing Expenditures
	City Manager's Office		
1	**1.0 FTE Open Government Officer - Member of Senior Staff Reporting to City Manager (New Position: Comparable to a Sr. Deputy City Attorney)**		$230,000
2	**1.0 FTE Administrative Assistant - Reports to Open Government Officer** Provides adminstrative support to Open Government Officer & Commission; agenda and meeting minutes;		$70,737
3	**0.5 FTE Senior Executive Analyst (Reports to Open Government Officer)** Provides analytical support to the Open Government Officer		$50,118
5	**One-time overhead for two new positions* (OGO, and Admin. Asst.)** Computers, chairs, phones, supplies	$8,300	
	City Attorney's Office		
6	**.25 FTE Sr. Deputy City Attorney - Reports to City Attorney** Provides legal advice/support to Open Government Officer		$57,500
7	**.25 FTE Sr. Deputy City Attorney - Reports to City Attorney** Provides legal advice/support to Commission on general interpretations of the Municipal Code, State & Federal laws; ***but not related to complaint matters***		$57,500
8	**.25 FTE Legal Analyst II -** Supports Officer and/or Commission		$28,750
9	**.25 FTE Legal Administrative Assistant -** Provides support to the Sr. Deputies assigned to advise the Open Government Officer/Commission		$24,125
	City Clerk's Office		
10	**Independent Legal Evaluator -** Provides legal advice to the Commission on ***complaint matters*** (Similar to Elections Commission)		$75,000
11	**Ongoing Administrative Support for Open Government Commission** (website mgmt, annual training, etc., + 3 court reporter services @ 1500 each)		$9,500
	Subtotals	$8,300	$603,230
	Final Total		$611,530

SRTF: 9/20/07
ITEM: IV. 1

CITY OF SAN JOSE
CAPITAL OF SILICON VALLEY

Memorandum

TO: Sunshine Reform Task Force

FROM: Robert L. Davis
Chief of Police

SUBJECT: **SJPD INPUT TO SUBCOMMITTEE RECOMMENDATIONS**

DATE: September 10, 2007

Approved

Date 9/10/07

RECOMMENDATION

Accept the San Jose Police Department's (Department) preliminary response to the Sunshine Reform Task Force (SRTF) regarding the SRTF Public Records Subcommittee's (Subcommittee) recommendations dated September 6, 2007.

OUTCOME

The purpose of this memo is to provide preliminary information, from the Department's perspective, on the Subcommittee's proposal regarding the disclosure of police records. Given that the Subcommittee's final recommendations were received on September 6, 2007 (Attachment A), and this report was due for distribution by September 10, this memo outlines only the Department's initial comments in response to proposed recommendations regarding the release of public records.

BACKGROUND

This memo is not intended to address all of the Department's concerns, as it only represents the preliminary operational ones identified by the Department and does not include those of a legal nature. As a result, depending on the timing of this item advancing to the Rules & Open Government Committee or the full City Council, the Department will work with the City Attorney's Office and approach the Santa Clara County District Attorney's Office (DA) to formulate a report that contains comprehensive information on the operational and legal issues associated with the recommendations. It is important to note that concerns about the recommendations have been raised by the Department, City Attorney's Office, and District Attorney's Office, and that a joint comprehensive response on operational and legal concerns would be most productive as final action on the proposed ordinance approaches.

The Department appreciates the Public Records Subcommittee's efforts in seeking to establish a sound policy on the release of police records. The Department has reviewed the Subcommittee's recommendations and, by this memo, notes a few initial concerns. The Department will provide additional comments as it continues to track and study the final recommendations that emerge from the SRTF.

Public Policy Framework

In February 2007, the SRTF held a panel discussion which included the Department, District Attorney's Office, Independent Police Auditor, American Civil Liberties Union, National Association for the Advancement of Colored People, among others. The Subcommittee also heard from Department staff and a representative from the DA's Office as it developed its recommendations. However, the Department would like to engage in a comprehensive discussion with the City Council on underlying assumptions and public policy goals for broader disclosure of police records. The Department, in its role as a steward of the public interest from a law enforcement perspective, would like the opportunity to discuss public policy goals and/or the higher-level framework for developing the ordinance, with direct input provided by the Department. Through this discussion, the Department may be able to identify areas where alternative approaches for achieving the same public policy goals can be achieved and the Department's key concerns can be addressed.

Key public policy and/or issues for additional discussion include:

- *Can the City of San Jose preempt the California Public Records Act (CPRA)?*
- *How does the SRTF balance the need for broader public disclosure against protections afforded through the CPRA, specifically for witnesses, investigative integrity, etc.?*
- *What unintended consequences arise from each of the proposed ordinance provisions that have not been identified?*
- *What impacts do the proposed ordinance provisions have with respect to the life cycle of a crime, from the moment that the crime takes place to prosecution of the crime?*
- *What goal(s) is the SRTF trying to achieve with respect to broader disclosure of police records?*
- *What's the process to collect input from the community on proposed recommendations?*
- *What would be the impact of the proposed ordinance to the Department's working relationship with other law enforcement agencies, who currently share their confidential information (local, state and federal) with the Department?*

ANALYSIS

Before releasing any information requested under the CPRA, the Department must always consider whether "the disclosure would endanger the safety of a witness or other person involved in the investigation, or... would endanger the successful completion of the investigation or a

related investigation."[1] It is critical for the Department to protect investigative techniques, the identity and physical well being of victims, witnesses and confidential informants, as well as the future prosecution of cases. Complex police work and the type of community interaction that must take place to gain information from victims, witnesses, and informants demands a great deal of discretion be afforded to law enforcement when determining what type of information should be released.

As the SRTF considers proposals to increase public access to information, enhance neighborhood participation, and ensure government accountability, it should also consider the public safety impacts its recommendations may have on members of this community.

There are four topics on which the Department provides a preliminary response and respectfully requests SRTF consideration: Safety of Crime Victims and Witnesses; Ability of the Police to Solve Crimes; Wrongly Accused Persons or Persons not Charged; and, Operational Impacts/Constraints.

1. Safety of Crime Victims and Witnesses

The Department does not believe that the recommendations provide adequate safeguards to protect the safety of crime victims and witnesses. For example, serial burglars could anonymously get copies of police reports to learn about investigative techniques that could make them more successful. Another example, pedophiles could also misuse public databases as a means to connect with other pedophiles, thus increasing their dangerousness to children. Under the Subcommittee's recommendations, pedophiles would have access to closed cases involving child molestation. While victims' names would be protected, dangerous predators could learn police investigative techniques, enhancing the molester's ability to victimize other children without detection.

Moreover, effective law enforcement techniques require the active cooperation and assistance of the community in reporting and solving crimes. In order to maintain the level of successful community cooperation and assistance the Department currently enjoys, the Department must be able to protect those who report crimes and cooperate with police from unwanted intimidation, retaliation and unwarranted public embarrassment.

If we are not able to protect the confidentiality of community members, community cooperation with the police will decrease, compromising law enforcement's effectiveness. Unfortunately, the Subcommittee's recommendation does not provide adequate protection for the confidentiality of community members who cooperate with police investigations. The Department's high value on working cooperatively, and confidentially, with community members has helped the City to have the distinction of being named the Safest Big City in America for six years and have a higher than average rate of solving certain crimes. Because of this success, the Department's business practices are being adopted by other law enforcement agencies throughout the nation. The

[1] Government Code Section 6254, Subdivision (f)

Subcommittee's recommendations omit protections for adult witnesses, which jeopardizes the delicate balance between the community and law enforcement.

The Department is also concerned that the proposed language only excludes Juvenile Contact Reports and Domestic Violence Supplemental Reports from disclosure. There are no provisions for protection of reports pertaining to:

- Sexual assaults
- Juvenile sexual assaults
- Kidnappings
- Extortions
- Homicides
- Hate crimes
- Gang investigations
- Cases involving confidential informants
- Other high-profile crimes

It is because of the Department's experience working with the victims and witnesses in such crimes that we have grave concerns that these recommendations will deter some individuals from reporting or working with the Department to solve these crimes. We believe that victims and witnesses cooperate with the Department now because personal information about them is protected under the CPRA. Through the Strong Neighborhoods Initiative process, a broader discussion with the community-at-large should be scheduled; community members should tell us how they feel about their personal information becoming public should they be a victim or witness in a crime.

The District Attorney shares the above concerns. In the District Attorney's Office position statement dated February 24, 2007 (Attachment B), distributed to the SRTF, the District Attorney's Office stated that more crime victims and witnesses will risk retaliation, or victims will decide not to report crimes to police and the privacy of victims and witnesses will be violated. Specifically, the District Attorney contends that 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. Overly broad public access to police reports undermines this legitimate concern.

DEPARTMENT PROPOSAL: *If the SRTF wants to address the concern of protecting the confidentiality of witnesses, it may want to consider in Section 5.1.1.030 (E) deleting the word "juvenile," so that the section reads: "The names of witnesses."*

2. Ability of the Police to Solve Crimes

The District Attorney's Office also observed in its February 24th statement:

> 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.

Additionally, it is the position of the District Attorney's Office that:

> 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 statue 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 statue 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.

DEPARTMENT PROPOSAL: *If the SRTF wants to address the concern of protecting investigations that may not be active for future prosecution, it may want to consider in Section 5.1.1.020 (C) deleting the words "where the prospect of prosecution is likely."*

3. Wrongly Accused Persons and Persons Not Charged

It is not uncommon for people to be accused wrongly of committing criminal acts. The unguarded disclosure of this information could subject the person to embarrassment, social censure or economic and/or personal hardship. When further investigated, these accusations may turn out to be false; however, the Subcommittee's proposal contains no protections for the privacy of those who are falsely accused. The District Attorney's Office agrees with this concern. Individuals arrested for a crime for which they are not ultimately charged retain significant protection from public access to the allegations against them.

Additionally, wrongly accused persons are not the only individuals who receive protection under this category. People who are arrested for a crime for which they are not ultimately charged retain significant protection from public access to the allegations against them. The legislature and courts have acknowledged this important public interest. Overly broad public access to police reports undermines this legitimate concern. As a normal course of business, law enforcement often collects sensitive information related to matters that could evolve into a civil proceeding. This information is usually collected to document actions involving issues of a sensitive nature often times involving an individual's mental wellbeing, child custody cases, or civil assistance calls for service.

DEPARTMENT PROPOSAL: *The Department believes that the current CPRA Section 6255 (a)[2] sufficiently allows the Department appropriate discretion when deciding to release information.*

4. Operational Impacts/Constraints

Disclosure proposals should also consider the broader operational and resource issues facing the Department in order to implement the proposed ordinance language, mainly staff's ability to conduct its work and, more importantly, prioritize delivery of direct public safety services. This issue has been the subject of City Council discussion over the past year and has resulted in the development of a Police Department Five-Year Staffing Plan. *(Note: The Department would like to refer the SRTF and the public to the September 25, 2007 Council Agenda report regarding San Jose as the 'Safest Big City,' particularly the section that discusses a 10-Year history of demand for service and supply of resources. Copies will be provided in advance of this meeting.)*

As stated, this report provides initial operational issues that would impact the Department's direct ability to provide public safety services. Additionally, the Subcommittee's proposed ordinance language would also present some significant resource challenges that the City Council would need to resolve prior to the Department's ability to implement.

For instance, with respect to the provision to release redacted records, it is important to note that this would create a significant workload issue that the Department is not currently prepared to implement. The Department appreciates the Subcommittee's understanding that without a Department automated records management system, records will continue to be collected and redacted or summarized by hand/manually. This is an extremely time-consuming process and expansion of this practice would not be prudent before a long term sustainable solution such as an automated records management system is in place.

Additionally, with respect to the provision to produce quarterly statistical reports, the Department appreciates that the Subcommittee recognizes the high value placed on these published reports. The Department has taken great measures to ensure publication of these self-initiated reports, and it has often been the first, or one of the first law enforcement agencies to produce such data. This practice has been implemented because of the Department's value of transparency and disclosure of information to the public on police operations. Lessons learned recently by the Department have revolved around the importance of complete statistical analyses when correlating complex data to derive statistical significance/validity, such as correlating: crime/arrests/police activity with geographic location, ethnicity, use of force, etc. The Department believes that its recent practice of obtaining independent outside expertise to produce such analyses is the best direction and results in correct interpretation of the data.

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[2] Government Code Section 6255 (a) The agency shall justify withholding any record by demonstrating that the record in question is exempt under the express provisions of this chapter or that on the facts of the particular case the public interest served by not disclosing the record clearly outweighs the public interest served by disclose of the record.

Further, it is important to note that the Department collects and compiles this data manually; the compilation is accomplished by having personnel work overtime. Additionally, over the past six months, the desire to provide the public with accurate statistical analysis has resulted in additional costs related to more rigorous/complete statistical analysis and the need to obtain outside expertise to perform these analyses. This has resulted in additional costs for the City.

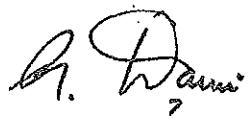
DEPARTMENT PROPOSAL: *Direction to implement proposals that have significant impacts on the Department's current resources, or that result in the need for additional resources, should be considered during the City Council's budget deliberation process. This approach affords the City Council to weigh other public safety funding priorities against the SRTF's proposal, which, in some cases, the ability to implement is entirely impacted by available resources and capacity.*

CONCLUSION

The Department appreciates the Subcommittee's efforts in seeking to establish a sound policy on the release of police records and the opportunity to provide this report. It is not the intention of the Department to question the value of the Subcommittee's work or to minimize the value of providing information about Department operations to the public. The Department has clearly demonstrated a strong commitment to transparency over the years, such as the previously mentioned reports (i.e., Vehicle Stop Demographic Report, TASER Usage Data and Information, 911/Call Center Data). The Department is only suggesting that a closer and/or broader review of law enforcement concerns be considered prior to any SRTF action. For this reason, a comprehensive report summarizing the operational and legal concerns will need to be completed prior to consideration by the Rules & Open Government Committee or full City Council.

For this reason, a comprehensive report summarizing the operational and legal concerns will need to be completed prior to consideration by the Rules & Open Government Committee or full City Council. The Department will work with the City Attorney's Office and approach the Santa Clara County District Attorney's Office (DA) to formulate a report that contains comprehensive information on the operational and legal issues associated with the recommendations. It is important to note that concerns about the recommendations have been raised by the Department, City Attorney's Office, and District Attorney's Office, and that a joint comprehensive response on operational and legal concerns would be most productive as final action on the proposed ordinance approaches.

While the Department supports the great value in releasing some information in these reports that will keep the community informed of crime trends via the Department's website, and coordinated police community outreach, serious reflection should be taken before the SRTF makes recommendations that might serve to undermine the very positive aspects of the current CPRA as it pertains to affording a police department the ability to serve the broader public interest from a law enforcement perspective and its ability to its job of protecting citizens.



ROBERT L. DAVIS
Chief of Police

RLD: GLK: LR

For any questions, contact Captain Gary Kirby, Bureau of Administration, at 408-277-5215

Attachment A: SRTF Subcommittee Proposed Ordinance and Final Report
Attachment B: Position paper by DDA JoAnne McCracken

ATTACHMENT A

To: The Sunshine Reform Task Force
From: Public Records Subcommittee
Subject: Opening police records
Date: 9/4/07

California law sets a clear standard of openness for government records. In almost every information category, all records are open – except for the small number of items whose disclosure might hinder the workings of government or improperly compromise personal privacy. But for police records, that standard is reversed. Unlike sunshine laws around the country, California's public records act makes only a select number of key facts public for each police-involved incident or arrest, while allowing all other information to remain secret, at the discretion of the police department. As the public records subcommittee learned during its weeks of work on this issue, the result of this approach is that most police records and much information about police activities are kept from the public at large.

By a unanimous vote, the Public Records subcommittee offers the attached draft language in hopes of opening many records of the San Jose police department to public scrutiny. The subcommittee believes this move will enhance the trust between the department and the residents it serves, and better inform the residents of San Jose about crime in their midst and the nature of police work. Our proposals would establish a level of openness unprecedented in California local government, although it is common in many other states. The subcommittee believes that San Jose, a city with a well-respected police department and a new commitment to the public's right to know, is well-situated to lead the way.

Here's a look at our recommendations.

Departmental reports – The subcommittee reviewed copies of each significant type of incident report produced by San Jose police officers and retained by the department. In general, these reports include information describing various types of incidents that merit a police response. They include descriptions of suspects, information about victims, and the laws that have allegedly been violated. When an arrest is made, that information is included, as well. Most reports also include a narrative description of the incident or crime to which they pertain.

We concluded that it is appropriate for these reports to be public records, with certain sensitive information excepted. However, we agreed that two reports – those detailing juvenile contacts and reports of domestic violence – are sensitive enough to require special protections, and we are proposing some limits on access to those reports.

There are many reasons we decided in favor of openness, but two are worth special mention.

First, it is clear that the current state of the law allows the police department a level of discretion that does not work in favor of public understanding. For instance, in arrest incidents, California law now requires police departments to reveal "the factual circumstances surrounding the arrest." A representative of the San Jose Police Department told the subcommittee that the department complies with this requirement merely by providing a list of the legal code sections allegedly violated by the arrestee. The representative conceded that a narrative summary of the arrest would comply more fully with "the spirit of the law," and stated that the department is willing to prepare such summaries when automated field reporting (a technological solution which has not been budgeted, and, thus, not purchased) is implemented. But the subcommittee concluded that the simplest and fullest disclosure would result from releasing the summary already compiled by the department on its police reports.

Second, it is important for the task force to understand that many of these reports already become public when the case proceeds to court. All court records are public records, except in the rare circumstances where they are sealed. Many court files contain copies of the police report in the case, after it has been redacted to eliminate sensitive information in much the same way that the subcommittee is recommending.

Investigations – Police departments collect information in the course of an investigation. In the event of prosecution all investigatory material that is admitted into evidence becomes public through the court process. Questions often arise, however, when an investigation does not succeed. Was the investigation pursued vigorously? Were obvious leads neglected? Were proper police procedures followed? If a resident was wrongfully accused at some point in the process, what lay behind the suspicion? Answering these questions can help greatly in ensuring that the public trusts the department's work.

For that reason, the subcommittee concluded that the public ought to have the right to review investigations after the need to protect the information has passed. This is one area where there is precedent in California for our recommendation: San Francisco has long made public the files of unsuccessful investigations. For consistency, we added the requirement that files of successful investigations become public after a case has concluded, but it is our expectation that most of the information on those cases will already have become public through the court process.

Protecting sensitive information – The primary objection offered to the release of police records is that sensitive information inevitably will be revealed along with more appropriate information. The full task force heard these concerns during the earlier public hearing. The subcommittee concluded that many of the concerns are misplaced.

Witnesses told the task force that it is critical to protect the identities of victims and those who may be wrongly accused. However, both of those pieces of information are already public under the California Public Records Act, Section 6254(f), except that the name of a victim of a sexual assault crime, domestic violence crime or hate crime may be withheld at the victim's request. Nothing in our recommendations affects the status of that information, nor do we have the power to do so.

More appropriate concerns involve the need to ensure the successful conclusion of an investigation and to protect the safety of individuals involved in the investigation. The subcommittee has adopted language, modeled on what already exists in state law, to accomplish those critical goals. It is our expectation that these exemptions will make information public on a sort of "sliding scale": Early in an investigation, the department would have greater need to withhold certain facts about an incident; once a prosecution proceeds, that need should diminish.

Finally, we have included language in the proposed ordinance to protect personal privacy, juveniles and victims of sex crimes. Again, we have consulted existing models to ensure this language achieves what we intend.

Statistical reports – Recent San Jose police department administrations have excelled in compiling and publicizing key statistical information about police activities – especially traffic stops and use of force. However, because leadership can change, the subcommittee concluded that the department should be required to continue these reports to the public. In addition, we are recommending a more expanded report on police misconduct that the city now produces, one that provides some information about how those complaints are resolved.

Personnel information – California law includes strong requirements making most police personnel information confidential. Among the protected information are the names of officers involved in disciplinary proceedings, and the reasons an officer may have been terminated from his job. While the subcommittee and task force heard recommendations that the city of San Jose should make this information public, the city does not have the power to do so.

Timing – The subcommittee is mindful that a new regimen for disclosure will place some burdens on the police department. After reviewing various forms used by the police department, we believe that the forms can be designed in such a way that will make it relatively simple to remove sensitive information. But because this effort will take time, and because some amount of training will also be needed, we propose that our recommendations not take effect until six months after they have received final council approval.

Section 5

Public Records

5.1 Public Information That Must Be Disclosed

5.1.1 Law Enforcement Information

5.1.1.010 Records Prepared By Law Enforcement

A. All reports prepared by Law Enforcement, including "Police Report," "Domestic Violence Supplemental," "Property Report," "Force Response Report," Traffic Collision Report" and "Juvenile Contact Report," are public records, except that:

1. A "Juvenile Contact Report" is exempt from disclosure unless a juvenile has been charged with a crime and will be tried as an adult in criminal court.

2. A "Domestic Violence Supplemental" is exempt from disclosure unless and until a Domestic Violence Supplemental is filed with the Superior Court. Any information redacted in the Domestic Violence Supplemental filed in Superior Court will remain exempt from disclosure.

B. Investigatory records prepared by Law Enforcement are public records.

5.1.1.020 When Records Prepared By Law Enforcement Must Be Disclosed

A. All reports prepared by Law Enforcement that are not exempt must be disclosed except as provided in Section 5.1.1.020(C).

B. Investigatory records prepared by Law Enforcement must be disclosed when:

1. The Law Enforcement agency has closed the case;

2. The statute of limitations has expired; or

3. If the case is prosecuted, at the time a judge or jury enters a conviction or acquittal.

C. If a report or investigatory record is not exempt, but disclosure of a particular item of information would endanger the safety of a person involved in an investigation or would endanger the successful completion of the investigation or a related investigation where the prospect of prosecution is likely, that particular item of information may be redacted.

D. If a particular item of information is redacted, the person responsible for withholding the information must explain that disclosure would either endanger the safety of a person involved in an investigation or would endanger the successful completion of the investigation or a related investigation. Without compromising the information Section 5.1.1.020(C) seeks to protect, the explanation must describe why disclosure would either endanger the safety of a person involved in an investigation or the successful completion of the investigation or a related investigation.

5.1.1.030 Information That May Be Redacted From Records Prepared By Law Enforcement

Unless a report prepared by Law Enforcement or an investigatory record is requested by a person entitled to the information under state or federal law, the following information must be removed from the report or investigatory record before it is released:

A. With respect to the victim of any crime, the address, telephone number or electronic mail address of the victim, except in response to a request made pursuant to Government Code section 6254(f)(3);

B. With respect to the victim of any crime defined by Section 220, 261, 261.5, 262, 264, 264.1, 273a, 273d, 273.5, 286, 288, 288a, 289, 422.6, 422.7, 422.75, or 646.9 of the Penal Code, the name of the victim may be withheld at the victim's request, to the extent permitted by Government Code section 6254(f)(2);

C. With respect to any person other than an arrestee or suspect, the address, telephone number or electronic mail address, any driver's license or California Identification Card number, social security number, date of birth, place of employment, employee identification number, mother's maiden name, demand deposit account number, savings or checking account number, or credit card number, if contained in the report;

D. With respect to any person, including an arrestee or suspect, any social security number, employee identification number, mother's maiden name, demand deposit account number, savings or checking account number, or credit card number, if contained in the report;

E. The names of juvenile witnesses;

F. The name of any juvenile arrestee or suspect, unless and until it has been determined that the juvenile will be charged and prosecuted as an adult, provided that the first name and initial letter of the last name of any juvenile arrestee or suspect shall remain on the report in any event;

G. The identity of any confidential source.

H. Any other information that is prohibited from disclosure by state or federal law.

Numerical or alphabetic designations should, to the extent practicable, be substituted for names omitted from any report.

5.1.1.040 Statistical Reports Prepared By The San Jose Police Department

The San Jose Police Department must produce:

A. A quarterly report on traffic stops conducted by San Jose police officers, including ethnicity of the person stopped, some geographic designation of the location of the stop, whether the vehicle was searched and whether an arrest occurred.

B. A quarterly report on the San Jose Police Department's use of force in arrests, including the ethnicity of the person arrested, some geographic designation of the location of the arrest, and the type of force used, by category (for example, firearms, tasers, batons, pepper spray, hands and feet).

5.1.1.050 Statistical Reports Prepared By The Independent Police Auditor

The Independent Police Auditor must maintain a report, kept separate from the personnel records of the Police Department, which reports the number and substance of citizen complaints against the Police Department or its officers, the number and types of cases in which discipline is imposed, and the nature of the discipline imposed. This record must be maintained in a format which assures that the names and other identifying information of individual officers involved is not disclosed directly or indirectly. However, a unique numerical or alphabetical designation should 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.

* * *

5.4 Effective Date

This section will become effective six months after the City Council approves these recommendations.

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 felony 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 information 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.

Rules Agenda: 8/13/08
Item: I(2)(c)

August 13, 2008

Mayor Chuck Reed
San José City Council Members
San José City Hall
200 East Santa Clara Street, 18th Floor
San José, CA 95113

Dear Mayor Reed and Council Members,

The members of the Sunshine Reform Task Force believe it is necessary to provide the Council a brief letter to accompany our Phase II report, in light of the staff's response to our work.

We recognize that the staff has an obligation to critically review our work. We felt that the staff's comments on our Phase I report were reasonable and contributed to a thoughtful discussion at the Rules and Open Government Committee and the Council, leading to the adoption of a strong set of reforms for the citizens of San Jose.

However, while staff also offered valuable input to the Phase II process, its thorough rejection of the most important of our Phase II recommendations does not in our view make a positive contribution to the process ahead. Many of the staff comments regarding the Phase II recommendations call for the maintenance of the status quo. The Task Force believes that leaving city policy and procedures as they are is inconsistent with the charge we received from the City Council, as well as the community's clearly expressed expectations for change.

We look forward to discussing with Rules and Open Government Committee and the Council the reasons behind our recommendations. As council members begin their consideration, we urge them to keep in mind four critical questions:

1. **Is the time right for additional sunshine reforms?** The Sunshine Reform Task Force has committed hundreds of hours of work to its Phase II report, based on our understanding that the Council expected a strong package of open government reforms. We received extensive input from community members and organizations, many of whom recommended stronger measures than we adopted. We recognize that Sunshine Reform will be complex and ongoing, and it would not be constructive to continue the process without a strong commitment to significant change. While we have seen no wavering of the Council's commitment to its charge, we are concerned that the staff is recommending – in essence – an abandonment of the reform process. If the Council shares the staff's belief that significant additional reforms should not be undertaken, it would be helpful if council could express that viewpoint promptly.

2. **How should the financial implications of Sunshine reforms be considered?** The Sunshine Reform Task Force is fully aware of the city's fiscal difficulties. The staff position on Sunshine reform appears to be that certain recommendations should be completely rejected due to the current lack of funds. The Task Force would urge the Council to take a different approach when cost is an issue, following its long-standing

practice of implementing partial solutions and preparing "wish lists" until funds become available. Better access to information, we believe, can make government more efficient and effective as well as result in sound fiscal decisions. The Task Force believes that transparency is a good investment.

3. **Can enforcement be effective and credible if it is not independent?** A major defect of most sunshine reform efforts is the lack of accountability and enforcement. While the precise form of an enforcement system is certainly open to serious debate, we have viewed one element to be essential: independence. If a San Jose resident issues a complaint regarding the way in which a city department, city attorney or Council has implemented the Sunshine Ordinance, that complaint should not be decided by those being challenged, as the staff recommends. The principle of independent review of government actions is as old as the doctrine of separation of powers and checks and balances in the United States Constitution.

4. **What is the true intent of the proposed Sunshine reforms?** In certain cases, the Task Force believes city staff is misreading both the intent and the actual text of the Phase 2 report. For example, the city staff claims that our proposals "significantly shorten" the time allowed to respond to public records act requests – ignoring our desire to clarify murky time frames in the Public Records Act. The most consistent misrepresentations come in the section on police records. The staff suggests that the release of records will compromise police investigations and endanger officers and community members, overlooking the Task Force's proposals to allow the police department to withhold records when such concerns are present.

As already noted, we expect our work to receive full and careful review – by Council, staff, and the community. We have worked hard to incorporate community input and to reflect the views, constraints and experience offered by the staff in our recommendations to date.

We trust that the Council's review will be undertaken from the viewpoint that open government reforms are a necessary part of city government's commitment to high ethical standards and meaningful public participation. Legitimate concerns may be raised about some of our recommendations, but we hope such concerns will lead to a discussion of sensible alternatives rather than a preference for business as usual.

We look forward to a full, thoughtful and positive discussion with Rules and Open Government Committee and the entire Council's approval of community based Sunshine recommendations with full and speedy implementation.

Thank you for your consideration.

Ed Rast, Chair