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To: The Sunshine Reform Task Force
From: The Public Records Subcommittee
RE: Police Reports
Date: March 24, 2008

Tonight the task force is being asked to consider two significant changes to our previous recommendations concerning police reports. The changes are being recommended to respond to privacy concerns highlighted by the City Attorney's Office in response to the District Attorney's memorandum.

The changes:

- Add a broad privacy exemption to the proposed ordinance
- Prohibit members of the public from requesting police reports older than 60 days by the name of the arrestee, the address, or any other information that could be used to identify the arrestee. The reason for this is to prevent the ordinance from being used to assemble criminal history information, which is protected under California law.

Background:

On Nov. 1, after months of consideration, the Sunshine Reform Task Force approved recommendations to open certain police records to public view in the city of San Jose. Subsequently the District Attorney sent a letter to the task force, dated Dec. 4, raising privacy concerns about the proposed ordinance and declaring that state law prohibits cities from adopting rules that open up police records.

On Jan. 31, the City Attorney released a response to the District Attorney's letter. The City Attorney disagreed with the DA's analysis of state law regarding the "preemption" issue. However, the City Attorney shared some of the DA's privacy concerns. The Public Records subcommittee, working with the City Attorney, then set out to rewrite portions of the proposed ordinance in hopes of mitigating those concerns.

Recommendation:

The police records recommendations already approved by the task force contain substantial privacy protections. Names of witnesses and juveniles must be removed from reports prior to their release; in addition, the

department may withhold reports for most sex crimes and domestic violence crimes.

However, the City Attorney expressed concern that release of police reports might, in certain circumstances, violate the privacy of an arrestee. This would occur if a member of the public were able to obtain multiple police reports pertaining to a particular person. In such a circumstance, the information in the reports could be used to compile a “criminal history” of the arrestee. Criminal histories are protected from release under state law.

In order to protect against that situation, the subcommittee adopted language that prohibits any member of the public from requesting a report by name, address, or other identifying information after 60 days. A member of the public can still receive older reports under certain circumstances. For example, a request for reports relating to all force incidents involving the San Jose police over the previous year would be granted, with the names of the arrestees in the older incidents redacted. But, to use a different example, a member of the public could not seek all police reports involving John Doe over the previous ten years.

In addition to the specific concerns about criminal histories, the City Attorney and the District Attorney have raised broader concerns about whether the privacy protections in the proposed ordinance are sufficient. Out of an abundance of caution, the subcommittee chose to add a broad privacy protection to the ordinance. The purpose of this was not to close off substantial amounts of information beyond what the task force has previously contemplated. Instead, it was to allow for the unexpected – the presence of sensitive information in a report that could not be removed under any specific protection we have previously adopted. The broad privacy protection joins three other exemptions that were already part of our recommendations -- to protect ongoing investigations, secret investigative techniques, and personal safety. The subcommittee heard some concerns that these four exemptions are so broad they will allow the police department to withhold most of the information contained in police reports, undermining the task force’s intent. However, the subcommittee believes that the department will comply with the letter and spirit of whatever police records rules are ultimately adopted by the city council.