



SENT TO COUNCIL: _____

Memorandum

TO: RULES AND OPEN
GOVERNMENT COMMITTEE

FROM: Tom Manheim
Director of Communications

SUBJECT: SEE BELOW

DATE: August 6, 2008

Approved **DRAFT**

Date

SUBJECT: STAFF'S PRELIMINARY COMMENTS ON 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 areas that the Administration has identified that raise concerns. To fully understand the Task Force's recommendations in these areas, readers should review the *Phase II Report and Recommendations (Attachment A)*.

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 the City's Open Government Ordinance: 1) Ethics and Conduct; 2) Administration and Accountability; and 3) Public Records. The work of the Technology subcommittee is unique from the other three subcommittees because the Technology recommendations are not intended to be part of a Citywide Open Government Ordinance, but rather to serve as recommended guidelines on website issues and electronic information access.

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, most of which has been shared with the Task Force, as described. As this report is made available to the entire City organization, additional staff analysis may be necessary as potential new issues may be identified.

It is important to note that this report highlights only those recommendations for which staff felt that comment was appropriate and necessary. The complete Phase II Report and Recommendations is provided as Attachment A and contains additional recommendations that are not discussed in this memo. Staff has not included those recommendations that: 1) are consistent with current City practice; 2) raised 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.

Disclosure (Section 7.2, p. 23)

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 7.3, page 24)

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 7.4, page 24)

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. Some of the recommendations or summaries of the recommendations are provided below, along with policy or implementation issues and staff recommendations.

Ticketing Requests for Public Records (Section 6.1.2, page 17)

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 6.2, pages 18-19)

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.

Procedures and Best Practices (Section 6.3, pages 20-21)

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 6.3.1.020, page 21)

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 6.3.1.030, page 21)

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: Retain current policy of review and approval of records retention schedules by City Attorney.

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. Specific

recommendations or summaries thereof are provided below, along with policy or implementation issues and staff recommendations.

Open Government Officer (Section 8.2, page 26)

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 job duties, the most time-intensive function of the Open Government Office would be the weekly monitoring of City Council/Redevelopment Agency closed sessions. Beyond this there does not appear to be enough activity to warrant a fulltime appointment of an Open Government Officer. The Public Records Manager estimates that in the six months since he has been with the City, of the 30 significant CPRA requests he has coordinated, parts of only three requests were determined to be exempt and not provided to the requestor. Thus, only parts of those three requests would potentially be subject to an appeal requiring the involvement of an Open Government Officer. Additionally, the costs for this position approach \$600,000 as shown in Attachment B.

More importantly, 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 this proposed position, 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 Committee currently hears complaints about CPRA requests, and the Attorney's Office responds to complaints about Brown Act violations, resulting in most cases of a cure or correction, even without a finding 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, page 27)

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 a separate commission are incorporated into Attachment B. 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 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 a body should be created to hear complaints about Open Government violations, the Administration recommends that the function be integrated into an existing commission such as Elections Commission. The Administration recommends 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. 27-28)

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 28-29)

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 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 appeals process, the procedures and timelines recommended by the Task Force would need to be modified accordingly.

Staff Recommendation: Retain the functions of the recommended Open Government Officer with the City Attorney's Office. If 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 need to be adapted to fit the Elections Commission.

Public and Closed Session Meetings (Sections 8.5.020 and 8.5.030, pages 29-30)

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: These recommendations presume that the City Attorney's Office 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. Adequate procedures are in place to address alleged violations of the Brown Act. Additionally,

as previously mentioned, it does not appear that there is enough work for a full-time Open Government Officer.

Staff Recommendation: Retain this function with the City Attorney's Office.

Closed Session Recordings (Section 8.5.040, pages 31-32)

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 not yet determined whether to record Closed Session. Moreover, the functions described are within the responsibility of the City Attorney.

Staff Recommendation: The Administration and the City Attorney recommend that the Council not record Closed Session to preserve the integrity of the closed session process.

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 a standard programming fee when a request requires the City to produce a record normally issued only periodically or compile or extract data. [Section to be updated following Task Force action on June 19, 2008.] Some of the recommendations are provided below, along with policy or implementation issues and staff recommendations.

Balancing Test (Section 5.1.2.070, page 12)

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 must 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 as suggested above.

Drafts and Memoranda (Section 5.1.2.020, page 7)

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 5.1.2.010, page 7)

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 given 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 5.1.1.010 -5.1.1.030, pages 3-5)

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 C), 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 5.1.1.040, page 5)

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 be produced at the discretion of the Police Department. 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 5.1.1.060, pages 6-7)

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.

Personnel Information (Section 5.1.2.040(C), pages 9)**Task Force Recommendation:****“Log of Disciplinary Actions**

1. A log of disciplinary actions taken when a Notice of Discipline is issued for regular classified civil service employees must be maintained, updated as frequently as possible and available for inspection. The log must include the department, employee classification (except for single position classifications or unique classifications, for which releasing the classification would identify the employee), type of discipline (i.e. suspensions, demotions, step reductions and dismissals/terminations), basis of the complaint (such as violation of the San Jose Municipal Code, Council Policy or Administrative Policy) and any final disposition. Identifying information must not be included in the log.
2. Nothing in this section may be construed as limiting access to other disciplinary records as permitted by the California Public Records Act.”

Policy/Implementation Issues: The Task Force’s recommendation requires that the City create a “log” of disciplinary actions that does not currently exist. Staff notes that the obligation to create and maintain a detailed log will require additional resources.

Staff Recommendation: If creation of a log of disciplinary actions is implemented, reevaluate the decision after one year to determine actual use of the log by the public.

Contracts with the City (Section 5.1.2.050, pages 10-11)

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 5.1.2.060, pages 11-12)

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: As explained above, 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.

These budget documents contain thousands of pages of detailed information about the City’s expenditure plans for every Department, as well as citywide. While this Budget information is

appropriate to post on the City's web site, staff is concerned about the burden involved in making the line item budget available electronically. Although the City tracks expenses for accounting purposes by specific account categories (utilities, office supplies, etc.), the City does not use line items for budget control or decision-making. Legal controls for departments are set at the higher budget category level (Personal Services and Non Personal/Equipment).

In addition, "line item" information exists only in the City's Automated Budget System (ABS). Data in the system, which was created several decades ago before "open architecture" came into wide use, is not formatted in such a way as to make it available online without extensive and time-consuming re-programming or a software conversion, neither of which are currently planned or budgeted.

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.

Shorter Response Time (Section 5.2.1, pages 14-15)

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.

Fees for Duplication – Copying (Section 5.2.4, Paragraph B, page 16)

Task Force Recommendation: “The fee for photocopying any public information in response to any request to the City is .10 per page for the first 50 pages. After the first 50 pages, the fee will be set at a standard level of cost recovery as adopted by the City Council during the annual fee-setting process. That level is currently .20 per page.”

Policy/Implementation Issues: The City’s policy is to recover costs to the extent possible. Consistent with the City’s policy and the CPRA, in October 2007, the Council adopted a standardized Citywide photocopying fee of \$.20 per page for responding to public records requests.

Staff Recommendation: Maintain the current fee structure.

Fees for Duplication – Programming (Section 5.2.4, Paragraph C, page 16) [This section to be updated following Task Force action on June 19, 2008.]

Task Force Recommendation: “A fee of \$__ per hour will be charged for responding to any request for public information that either (1) is produced only at otherwise regularly scheduled intervals, if the interim production of the report cannot be achieved without a substantial burden on City staff; or (2) requires the City to write programming language or extract data that would not otherwise be extracted.”

Policy/Implementation Issues: Staff believes that the fees for any computer programming and data extraction required to respond to CPRA requests should reflect the hourly wage rates for the employees who must perform these activities. The required skills and expertise, and thus the wage rate(s), can vary from situation to situation depending upon several factors including but not necessarily limited to:

- 1) The nature of the request (i.e., what information is requested in what format);
- 2) The type of system involved (e.g., accounting system versus geographic information system); and/or

- 3) The rigidity versus openness of the system (rigidity increases the difficulty in extracting data in ways not already designed into the system).

Three requests received in the last twelve months illustrate the effect that such variations can have upon data extraction costs:

- 1) One request was for information from the Department of Public Works Geographic Information System (GIS). Responding to this request took 6 hours of work from one employee for a charge of \$232.
- 2) Another request—this one for information from the City's financial system regarding employee salaries from past years—required four employees in four different classifications and wage rates working from one to eight hours each for a total charge of \$1,720.
- 3) Another yet more complex request to identify and extract information from the City e-mail system would have required (the requestor declined to pay) an estimated 3 Information Technology Department employees representing three separate classifications and wage rates working hours ranging from eight to thirty-five at a total cost of \$4,640.

In short, the high degree of variation in the costs of responding to CPRA requests that require computer programming and data extraction makes the establishment of a standardized hourly fee for performing this work not feasible. The establishment of such a fee would result in some requestors being overcharged while others would be undercharged.

Staff Recommendation: Continue to charge for the actual costs incurred for the programming or data extraction.

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 B. 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 Eileen Beaudry, Project Manager, at 408-535-8123.

Attachments:

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