

CITY OF OAKLAND  
PUBLIC ETHICS COMMISSION  
SPECIAL MEETING  
One Frank Ogawa Plaza (City Hall)  
Wednesday, May 18, 2011  
Hearing Room Two  
6:30 p.m.  
Page 1



Commission Membership: Richard Unger (Chair), Ai Mori (Vice-Chair), Alex Paul, Amy Dunning, Lloyd Farnham, Christopher Young, Aspen Baker

Staff Members: Commission Staff:  
Daniel Purnell, Executive Director  
Tamika Thomas, Executive Assistant  
City Attorney Representative:  
Alix Rosenthal, Deputy City Attorney

### **SPECIAL MEETING AGENDA**

#### **NOTE SPECIAL START TIME AT 6:30 P.M.**

- A. Roll Call And Determination Of Quorum
- B. A Staff Report And Presentations On Improving Public Access To City Records
- C. Open Forum

The meeting will adjourn upon the completion of the Commission's business.

You may speak on any item appearing on the agenda; however, you must fill out a Speaker's Card and give it to a representative of the Public Ethics Commission. All speakers will be allotted three minutes or less unless the Chairperson allots additional time.

In compliance with the Americans with Disabilities Act, if you need special assistance to participate in the meetings of the Public Ethics Commission or its Committees, please contact the Office of the City Clerk (510) 238-7370. Notification two full business days prior to the meeting will enable the City of Oakland to make reasonable arrangements to ensure accessibility.

Should you have questions or concerns regarding this agenda, or wish to review any agenda-related materials, please contact the Public Ethics Commission at (510) 238-3593 or visit our webpage at [www.oaklandnet.com](http://www.oaklandnet.com).

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Approved for Distribution

Date

**CITY OF OAKLAND**  
**Public Ethics Commission**

Richard Unger, *Chair*  
Ai Mori, *Vice-Chair*  
Alex Paul  
Amy Dunning  
Lloyd Farnham  
Christopher Young  
Aspen Baker



Daniel D. Purnell, Executive Director

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One Frank Ogawa Plaza, 4<sup>th</sup> Floor, Oakland, CA 94612

(510) 238-3593

Fax: (510) 238-3315

**TO:** Public Ethics Commission  
**FROM:** Daniel Purnell  
**DATE:** May 18, 2011

**RE:** A Staff Report And Presentations On Improving Public Access To City Records

The Commission has directed staff to notice a series of public meetings on the subject of Oakland's policies and procedures regarding public records requests. The first meeting of this series occurred on February 2, 2011, at which the Commission received comments from members of the public on problems they encountered while attempting to access City records. A meeting conducted on March 24, 2011, focused on how City employees administer public records requests.

Tonight's meeting will review ordinances, policies and proposals from other local agencies. Attached to this memorandum is a summary of public records ordinances, policies and proposals from five local jurisdictions -- San Francisco, Berkeley, San Jose, Vallejo and Milpitas. **Attachment 1.** Commission staff has summarized those provisions which are not currently included in, or are at variance with, Oakland's Sunshine Ordinance.<sup>1</sup> In addition, staff has included a copy of the City of San Jose's administrative procedures for handling public records requests. **Attachment 2.**

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<sup>1</sup> Copies of the actual text of the laws and proposals can be found at:

<http://www.firstamendmentcoalition.org/category/resources/sunshine-ordinances/>  
or at  
<http://www.sfbos.org/Modules/ShowDocument.aspx?documentid=35804> (San Francisco only).

Commission staff has the following observations regarding the attached laws and proposals:

1) Several jurisdictions (San Francisco, San Jose, Milpitas) attempt to address the issue of what members of the public can do if they are denied inspection of a known record. Typically, most Oakland complaints allege either that the City made an untimely response, or that a record exists even though the City maintains that it does not. There have been occasions however when the City has refused to produce a document on grounds of a claimed exception, such as attorney-client privilege, privacy, etc. The policy question raised in these scenarios is whether there should be a person or body (such as the Commission) that should be authorized to review the disputed record and make a determination whether the claimed exemption applies. In civil lawsuits seeking enforcement of the CPRA, this authority is delegated to a judge, who may review the record in a private *in camera* proceeding. It is interesting to note that none of the five jurisdictions actually authorize any of its administrative bodies to review a disputed record.

2) Several jurisdictions (San Francisco and Milpitas) grant employees a legal cause of action against the city if an employee is wrongfully disciplined for providing a public record to a member of the public.

3) All jurisdictions except Vallejo try to address the issue of whether and when preliminary drafts, notes or memoranda shall be retained and, if so, whether and when they should be made public. The CPRA provides that such records may be withheld if they are not retained in the "ordinary course of business" and the public interest in withholding the documents "clearly outweighs the public interest in disclosure." These jurisdictions propose to either mandate disclosure without weighing the public interests involved, or to permit disclosure only after a final decision has been reached.

Some of the jurisdictions also propose to eliminate the so-called "balancing test" and the "deliberative process" exemption as a basis for withholding records. Both of these concepts employ an evaluation similar to that regarding preliminary drafts -- Whether the public interest is better served by withholding the document than by disclosing it. There are several policy questions that should be considered before eliminating these justifications for withholding: First, whether a public agency should possess some ability to withhold a document where there exists a clear public interest in doing so. Second, whether there should exist some "breathing room" for staff, legislators and/or executives to communicate in writing various policy options without concern that their so-called deliberative process will be made public and thus arguably impede collaborative policy formation.

4) Most of the reviewed jurisdictions require the release of records pertaining to employee salaries and benefits. While there is a definite judicial trend requiring the release of such information, there is arguable merit in codifying the trend of these decisions, i.e., that employee salaries and benefits, including retirement benefits, are a matter of public record.

- 5) Several jurisdictions (San Francisco, Berkeley and Milpitas) create an affirmative duty on the part of all city departments (as well as local advisory bodies), to create and maintain a website that contains meeting notices, minutes and, in the case of Milpitas, all records that the departments are required to make publicly available.
- 6) San Francisco, Berkeley and Milpitas also require the completion and public posting of a city-wide "record index" for the purpose of assisting members of the public to make specific and focused public records requests. Such a project could be part of Oakland's ongoing records management process, which the Commission will be reviewing later this year.
- 7) San Francisco, Berkeley and Milpitas attempt to deal with the issue of whether records possessed or used by an elected official constitute a public record of the local agency. These jurisdictions, to a varying degree, assert a proprietary interest in such records and involve the city attorney's office to ensure that such records are maintained during the transition of office. A related issue is the creation of an affirmative duty to maintain a "public calendar" by specified city officials. Some argue that the combination of mandatory calendar disclosures, combined with an effective lobbyist registration ordinance, can provide a high degree of transparency into the public decision-making process.
- 8) Employee training in open government issues is a feature in the San Francisco and Milpitas versions, although staff questions why such a mandatory requirement should be limited only to open government issues versus other areas of public ethics law.
- 9) San Francisco and Berkeley address what has historically been a concern of this Commission -- getting City representatives to attend Commission meetings that involve Sunshine complaints against the City. Both jurisdictions require their city representatives to attend commission meetings considering sunshine complaints.
- 10) Most of the jurisdictions provide that the willful violation of a sunshine provision shall constitute "willful or official misconduct." This term has particular meaning under the state Government Code which provides for the removal from office of a public official accused and convicted of misconduct in office. Since the Government Code does not specifically define what constitutes "misconduct", these local provisions specify that violating a provision of the sunshine ordinance can be grounds for removal from office. Beyond that, various jurisdictions create a process for the administrative review of decisions made in connection with the release of public records. San Francisco goes so far as authorizing personal fines of up to \$5,000 for employees who willfully violate sunshine provisions. San Francisco and Milpitas establish legal presumptions that favor the disclosure of records that would operate against the cities in the event a claim is filed against the cities in court.
- 11) San Jose has taken the step of adopting administrative procedures for handling public records requests. The procedures articulate specific deadlines and assign

responsibilities for complying with state and local laws. The adoption of such procedures could be done administratively in Oakland by the City Administrator.

The final two meetings in this series will focus on the City Clerk's Office's current efforts to develop a City-wide records management program, and a public discussion of what recommendations the Commission may wish to make to amend the Sunshine Ordinance in the area of public records.

Respectfully submitted,

Daniel D. Purnell  
Executive Director

## ***COMPARISON OF KEY PROVISIONS OF LOCAL SUNSHINE ORDINANCES***

	<b>City of San Francisco</b> <i>(Proposed amendments)</i>	<b>City of Berkeley</b> <i>(To appear on 2012 ballot as an initiative)</i>	<b>City of San Jose</b> <i>(Adopted as city council resolutions)</i>	<b>City of Vallejo</b> <i>(Adopted ordinance)</i>	<b>City of Milpitas</b> <i>(Adopted ordinance)</i>
<b>Public Assistance</b>	Every dept. shall designate an employee to serve as its "custodian of records" to assist with the identification and disclosure of public records.	City manager shall designate a "custodian of records" in every City department.			
<b>Public Recourse</b>	If a dept. custodian refuses to produce a record, public may request opinion from the City Atty's Office or from the S.O. Task Force.		A member of the public may appeal a decision to withhold a record to the City's Public Records Manager, the City Council's Rules Committee, the Election Commission or to the City Council.		A member of the public may appeal a decision to withhold a record to the City's Public Records Supervisor or to the Open Government Commission.

	<b>San Francisco</b>	<b>Berkeley</b>	<b>San Jose</b>	<b>Vallejo</b>	<b>Milpitas</b>
<b>Immediate Disclosure</b>	<p>Requests for non-exempt public information that is readily identifiable and maintained by the dept. shall be produced no later than the following business day.</p> <p>Voluminous requests or requests involving multiple depts. are not subject to an immediate disclosure request.</p>	<p>City shall respond to a record request within 2 business days by either providing the record or by advising who will be responding to the request. Requests for a specifically identified, readily available record shall be produced the following business day. Denials shall be communicated within 3 business days.</p>	<p>City must send acknowledgement of a record request within 24 hours. City must respond to "simple and routine requests" within 2 business days. For extensive/demanding requests, City must respond within 3 business days stating when the records will be produced. If the City claims an exemption, it must communicate its claim within 10 days.</p>	<p>A written request for an identifiable, nonexempt public record shall be satisfied on the day of receipt if the request is received before noon, or by the close of business on the following business day.</p>	<p>Requests for records shall be satisfied no later than the close of business on the day following the request unless the dept head advises in writing that the request will be answered by a specific future date.</p>
<b>"Rolling" Production</b>	<p>Documents shall be produced on a "rolling" basis so as not to delay production until all relevant records have been produced and reviewed.</p>	<p>Voluminous records or those from multiple locations may be produced on a rolling basis but in no event later than 10 business days from the request.</p>	<p>City must produce records as they become available and not wait until all records are ready for production.</p>		

	<b>San Francisco</b>	<b>Berkeley</b>	<b>San Jose</b>	<b>Vallejo</b>	<b>Milpitas</b>
<b>Employee Rights And Obligations</b>	Employees shall not be disciplined for providing non-confidential information to members of the public. Grants a cause of action against the City for wrongful discipline.	Employees shall not be disciplined for providing non-confidential information to members of the public.			Employees shall not be disciplined for disclosing any public info or record to any member of the public. Any employee who is disciplined for disclosing public info or records shall have a cause of action against the City and the supervisor imposing the discipline.
<b>Preliminary Drafts and Memos</b>	Preliminary drafts and memos shall <i>not</i> be exempt from disclosure.	Preliminary drafts and memos shall be subject to disclosure at the time a final recommendation is delivered.	Preliminary notes, drafts or memos shall be subject to disclosure once a proposal has been made public and only if the records have been retained at the time of the request (no duty to retain any particular record.)		No preliminary draft or memo shall be exempt from disclosure if it is normally kept on file. Preliminary drafts and memos concerning contracts, memoranda of understanding, or other matters subject to negotiation or pending council approval shall not be subject to disclosure until final action has been taken.

	<b>San Francisco</b>	<b>Berkeley</b>	<b>San Jose</b>	<b>Vallejo</b>	<b>Milpitas</b>
<b>Settlement Agreements</b>		No litigation settlement shall include language restricting disclosure of terms or communications between parties to the settlement.		When litigation is finally adjudicated or settled, records of all communications between the city and the adverse party shall be subject to disclosure. Settlement terms may not restrict disclosure of the terms and communications between the parties. All such records shall be released "as soon as reasonably possible."	
<b>Employee Records</b>	The following shall <i>not</i> be exempt from disclosure: employee resumes and job applications; investigative reports involving "substantial" allegations of misconduct; salary and benefits for each employee.	Employee salary, job description, benefits and pension benefits shall be a public record.	Employee salary, job description, benefits and pension benefits are public records. Records of misconduct involving City officials, including investigation and discipline, are public records subject to applicable exceptions under the law.		City must provide a listing of gross earnings, allowances, overtime, and deferred compensation, leave cash-out and percentage of base salaries that the city pays as its CalPERS contribution.

<p><b>City Contracts</b></p>	<p>All bids and responses become public after contract award, including all evaluation materials. Drafts of all proposed contracts requiring public body approval shall be retained and disclosed.</p>	<p>Drafts of all agreements with third parties must be retained and made available for public inspection 15 days before approval by a legislative body. All bids and responses become public after contract award or city decision not to proceed.</p>	<p>All bids and responses become public after contract award, including summaries of evaluations (but not "score sheets.") All retained drafts of specified "no bid" contracts shall be subject to disclosure after conclusion of negotiations.</p> <p>City shall maintain a public index of the location of every city contract.</p>		<p>All communications between city and persons seeking city contracts become public after contract is awarded except for info regarding net worth or other proprietary financial data. Evaluation forms and score sheets, including names of evaluators and individual ratings, become public after RFP review is completed. Upon request, city atty shall prepare a summary of all negotiations regarding any no-bid contract, lease and franchise agreements where no records exist.</p>
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	<b>San Francisco</b>	<b>Berkeley</b>	<b>San Jose</b>	<b>Vallejo</b>	<b>Milpitas</b>
<b>Basis For Withholding Records</b>	Would abolish the "balancing test" and "deliberative process" exemption as a basis for withholding records.	Would abolish the "balancing test" and "deliberative process" exemption as a basis for withholding records. City waives its right to all discretionary exemptions under the CPRA.	Intent is to "narrowly construe" application of the balancing test. Provides a list of records that may not be withheld using the balancing test.		City may not use balancing test or deliberative process test or any similar provision as basis for withholding a record. All withholding must be based on an express exception.
<b>Waiver Of Confidentiality By Third Parties</b>		Where disclosure of records is refused based on third party interests (e.g., privacy), city shall contact the third parties to request them to waive their interests in the records.			
<b>Dept Websites</b>	All city depts. shall maintain a website to which is posted name of record custodian, links to pertinent laws and to S/O.	All local legislative bodies shall maintain a website providing specified information and records.			All city depts. shall maintain a website that contains info that it is required to make publicly available, including campaign reports, Form 700s, budgets, mtg agenda & minutes, public notices and staff reports.

	<b>San Francisco</b>	<b>Berkeley</b>	<b>San Jose</b>	<b>Vallejo</b>	<b>Milpitas</b>
<b>Citywide Records Index</b>	City shall develop and maintain a standardized public index of records.	City shall develop and maintain a standardized public index of records.			City has 12 months to prepare a public records index maintained by city depts, boards, commissions and elected officers and organized to permit an understanding of the types of information maintained and how to access it, e.g. by name, date, proceeding, project, etc.

	<b>San Francisco</b>	<b>Berkeley</b>	<b>San Jose</b>	<b>Vallejo</b>	<b>Milpitas</b>
<b>Records Of Elected Officials</b>	Records of elected officials are the property of the city and shall be maintained and made available for inspection. City Atty shall monitor transition of offices to ensure no records are lost or destroyed.	Records of elected officials are the property of the city and shall be maintained and made available for inspection.			Records of elected officials and dept heads are the property of the city. City Atty shall monitor transition of offices to ensure no records are lost or destroyed. Elected officials and city manager shall maintain all records and correspondence within their jurisdiction and disclose such records upon request. E-mail created or received in connection with public business, the legal or financial rights of the city, or of persons directly affected by the activities of the city is a public record. E-mail must be retained and printed unless the dept or office can retain and retrieve the e-mail in electronic format.

	<b>San Francisco</b>	<b>Berkeley</b>	<b>San Jose</b>	<b>Vallejo</b>	<b>Milpitas</b>
<b>Calendars</b>	<p>Elected officials and dept heads are required to maintain a public calendar identifying who the official met with and the matters discussed, except for "purely" personal or social meetings. Calendar entries must be disclosed no later than 3 business days after the calendar entry date.</p>	<p>Elected officials and dept heads are required to maintain a public calendar identifying the date, place and time of all "city-related meetings" they attend.</p>	<p>Elected officials, certain appointees, council staff, and most dept heads are required to maintain weekly calendars of all meetings including names and titles of meeting attendees, and the topic of the meeting and post the information to the city's website.</p>		<p>Elected officials, planning commissioners and city manager shall maintain a monthly calendar that includes all city-related appointments, mtgs, public events, speaking engagements, meetings with developers, consultants, and lobbyists, regional meetings, and meetings of committees or task forces. Entries shall include the mtg's duration, and all "principal individuals" present. Calendars shall be posted for the prior month during the first week of every month. Councilmembers shall be trained on entering data into the City's automated calendaring system.</p>

	<b>San Francisco</b>	<b>Berkeley</b>	<b>San Jose</b>	<b>Vallejo</b>	<b>Milpitas</b>
<b>Employee Training</b>	All Form 700 filers must file an annual declaration that they have read the S/O and attend annual training.				All Form 700 filers, including city council and appointed board members, must file an annual declaration that they have read the S/O and have attended annual training.
<b>Atty-Client Communications</b>	All advice from City Atty to the S/O Task Force regarding public records and open meeting law shall be a public record.	No atty-client privilege on matters involving a conflict of interest, a proposed legislative or administrative action, or the status of negotiations regarding claims by or against the city.	Upon request, the City Atty's Office shall provide a written summary of any written interpretation of open meeting law or proposal.	All written communication from City Atty regarding open government laws shall be a public record.	The City Atty's office shall not act as legal counsel for any employee for purposes of denying access to the public. All communications with the City Atty's Office regarding this ordinance shall be a public record.
<b>City Reps At Meetings</b>	A city representative shall be present at all S/O meetings to explain or testify on allegations alleging S/O violations.	A city representative shall be present at all S/O meetings to explain or testify on allegations alleging S/O violations.			

	<b>San Francisco</b>	<b>Berkeley</b>	<b>San Jose</b>	<b>Vallejo</b>	<b>Milpitas</b>
<b>Enforcemnt &amp; Penalties</b>	<p>S/O TF may issue Order of Determinations that shall be obeyed within five days or referred to Ethics Commission for enforcement. Upon a finding of a "serious and willful" violation, the S/O TF may retain outside counsel to prosecute in civil court. The Ethics Commission may impose personal fines of up to \$5000 for a city official or employee who willfully violates S/O. Creates a presumption in any civil court action that meetings should have been open or that records should have been disclosed.</p>	<p>Members of the public may allege violations with the S/O Commission. Hrgs must be held within 7 business days of filing before members of an Enforcement Committee. Committee shall issue ruling within 5 business days of a hrg. Decisions may be appealed to the full Commission at its next scheduled meeting. Commission decisions may be appealed to the City Council. If a Custodian of Records fails to produce a record determined to be a public record within 3 days, the requesting party or Commission "may notify" the City Atty, District Atty or Grand Jury.</p>		<p>Knowing, willful and deliberate failure of an elected official or managerial employee to discharge duties under the Brown Act, CPRA or S/O shall be deemed "official misconduct" subject to removal from office and/or disciplinary action including termination of employment.</p>	<p>Creates a presumption that the record sought is public, and the burden shall be upon the city to prove the exemption which applies.</p> <p>The willful failure by any elected official or management employee to discharge a duty imposed by the S/O, Brown Act or CPRA shall be deemed official misconduct.</p> <p>Any person may institute civil proceedings for enforcement and penalties under the S/O if enforcement is not taken by a city or state official 40 days after a complaint is filed.</p>

**Public Records Policy and Protocol****6.1.1****PURPOSE**

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

**AUTHORITY AND BACKGROUND**

On January 27, 2004, the City Council approved Resolution Number 71946 established City Council Policy 0-33 Public Records Protocol and Policy to affirm and augment the City's obligations under the California Public Records Act (CPRS), Government Code 6250 et seq. On August 18, 2009, the City Council approved Resolution Number 75091 which adopted a number of recommendations of the Sunshine Reform Task Force revising Council Policy 0-33 and further augmenting the CPRA. On March 2, the City Council adopted Resolution Number 75923 further revising Council Policy 0-33.

**POLICY**

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

**ACCESS TO CITY RECORDS****Records Available for Inspection and Copying**

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

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

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

**Locating and Identifying Records**

Public records are open to inspection at all times during regular City business hours. The City does not maintain a centralized record keeping system, other than certain documents routinely maintained by the

**Public Records Policy and Protocol****6.1.1**

Office of the City Clerk. Each of the City's individual Departments maintains and has custody of records and information relating to the responsibilities and work performed by the particular Department.

Information identifying the City's Departments and Department contacts is available on the City's website at [www.sanjoseca.gov](http://www.sanjoseca.gov). Information about City Departments and contacts may also be obtained by contacting the City's Informational Call Center located at City Hall. The telephone number for reaching the Call Center is (408) 535-3500, and the TDD telephone for the hearing impaired is (408) 294-9337.

**Making a Request for Records**

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

**Form of Records Provided**

Records shall be made available in their original form or by a true and correct copy, except that a requestor may designate another format and a requestor cannot be required to accept records in electronic format. Audio, photographic and computer data, or any other such records shall be exact replicas unless the Department determines it is impracticable to provide exact replicas. Any reasonably segregable portion of a record shall be provided to the public after deletion of portions that are deemed exempt from disclosure.

To the extent that it is technologically and economically possible, forms and computer systems used by the City relating to the conduct of the public's business should be designed to ensure convenient, efficient and economical access to public information, including making public information easily accessible over public networks such as the Internet. Specifically, forms and computer systems should be designed to (1) segregate exempt information from non-exempt information; and (2) reproduce electronic copies of public information in a format that is generally recognized as an industry standard format.

**Steps and Timeframes for Response**

Upon receipt of a written or oral request for records, the City shall make the records promptly available to the requestor. 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, within 24 hours from 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. Within 24 hours after the City employee responsible for responding to the request receives the request, he or she must acknowledge receipt of the request to the requestor.

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

**Public Records Policy and Protocol****6.1.1**

For extensive or demanding requests, no later than three (3) business days from the date the City employee responsible for responding to the request acknowledges receipt of the request to the

requestor, he or she must provide a response, which will include either the requested public information or an estimate as to when the requested public information will be available. This deadline may be extended by mutual agreement between the City and the requestor.

If the City believes that the requested public information or a portion of the requested public information is exempt, the City employee responsible for responding to the request must determine and report to the requestor within 10 calendar days from the date the City employee responsible for responding to the request acknowledges receipt of the request to the requestor. The response must also include the public information, if any, that the City believes is not exempt. This deadline may be extended by mutual agreement between the City and the requestor.

In unusual circumstances, the City employee responsible for responding to the request may notify the requestor in writing that an additional period no longer than 14 calendar days is necessary. The City employee responsible for responding to the request must notify the requestor as soon as possible but no later than 10 calendar days from the date the City employee responsible for responding to the request acknowledges receipt of the request to the requestor. "Unusual circumstances" means the following, but only to the extent reasonably necessary to the proper processing of the particular request:

1. The need to search for and collect the requested records from storage facilities that are separate from the office processing the request.
2. The need to search for, collect, and appropriately examine a voluminous amount of separate and distinct records that are demanded in a single request.
3. The need for consultation, which must be conducted with all practicable speed, with another agency having substantial interest in the determination of the request.
4. The need to write programming language or extract data that would not be otherwise be extracted.

In order to comply promptly with requests that involve multiple documents, the City employee responsible for responding to the request will, upon request, release documents as they become available, where such an approach is both practical and pertinent. This provision is intended to prohibit the unnecessary withholding of public information that is responsive to a request for public records until all potentially responsive documents have been reviewed and collected.

**Fees for Duplication**

The work of responding to a request for public information and making public information available must be considered part of the regular work duties of the City employee and no fee will be charged to the requestor to cover the personnel costs of responding to a request for public information, except to the extent otherwise allowed in this policy or by other state or federal laws. In most situations, the City will not charge any fees to cover the time and costs incurred in searching for, locating or collecting records.

**Public Records Policy and Protocol****6.1.1**

The City, however, may charge for the actual costs of duplicating paper copies of records and postage, consistent with the amounts set forth in City's Schedule of Fees and Charges.

The City may also charge for duplication costs in another medium in accordance with the amounts set forth in the Schedule of Fees and Charges (e.g., copying video or cassette tapes). The City will not charge for access to data that is readily accessible without significant cost to the City.

The actual direct hourly cost incurred by City staff 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. Before any fees are incurred, the City employee responsible for responding to the request must notify

the requestor of the estimated cost to respond, including a breakdown showing how those costs were determined, and the requestor must agree to pay the estimated cost.

A requestor may appeal the imposition of fees to the Rules and Open Government Committee if he or she wishes to argue that the public interest would be better served by waiving the fees and making the information available at no charge.

**RESPONSIBILITIES****All Staff Members**

All City staff members have an obligation to accept and respond to or refer requests for public records. Staff members responding to requests shall, to the extent reasonably practicable, assist the public in making focused and effective requests for records and information. Responding staff members shall: (1) assist the member of the public with identification of records and information that is responsive to the request or the purpose of the request, if known; (2) describe the information technology about and physical location of the records; and (3) provide suggestions for overcoming any practical basis for denying the request. If the staff member or Department receiving the request is not the holder of the requested records, the staff member or Department must forward the request to the appropriate staff member or Department within 24 hours of receiving the request.

If a request seeks information from more than one Office or Department, the request shall be forwarded to the City Manager's Office and City Attorney's Office, as well as the designated records coordinators of all affected Offices/Departments. The City Attorney or City Manager's Offices will coordinate and respond to the request with the assistance of the other Offices/Departments.

**Department Representatives**

Each Department shall designate a person or persons who will serve as Departmental California Public Records Act coordinator(s) responsible for responding to requests for records and coordinating the response with other City Departments, when appropriate. A list of current Department Public Records Coordinators is posted on the Public Records and Records Retention page of the City employee Intranet website and on the Open Government page of the City Internet Website.

**Public Records Policy and Protocol****6.1.1**

<b>Department Coordination</b>	If a request seeks information from more than one Department, the request shall be forwarded to the designated representative in the City Manager's Office and the representative of all other interested Departments. The City Manager's representative will coordinate and respond to the request with the assistance of each of the Department coordinators.
<b>City Attorney's Office</b>	Requests that are related to pending or potential litigation shall be coordinated with the City Attorney's Office. Questions regarding the California Public Records Act or any documents that may not be subject to disclosure shall be forwarded promptly to the City Attorney's Office for review. Decisions to withhold records must be made in consultation with the City Attorney's Office.

**WITHHOLDING FROM DISCLOSURE****Common Exemptions**

Certain categories of records may be withheld from disclosure. These include, but are not limited to: (1) preliminary drafts of certain documents if the public's interest in disclosure is clearly outweighed by the public's interest of non-disclosure; (2) records related to pending litigation; (3) attorney-client communications; (4) personnel records, medical information, or other similar records, the disclosure of which would constitute an unwarranted invasion of personal privacy; (5) certain proprietary information, including trade secrets; and (6) records protected by State or Federal law.

**Withholding Kept to a Minimum**

Withholding shall be kept to a minimum and must always be for a sound and justifiable reason. Information that is exempt from disclosure must be redacted or otherwise segregated so that the nonexempt portion of requested public information may be made available. The reason for redaction or segregation must be explained.

**Justification Provided in Writing**

If a Department, after consultation with the City Attorney's Office, determines that the records sought in a written request for records are not subject to disclosure either in whole or in part, then the Department shall advise the requestor in writing that the records will not be made available and include the reasons why access is being denied, including the citation of the specific statutory or case authority. The notice of withholding shall include the names and titles or positions of each person responsible for the denial. In addition, the requestor must be notified that he or she has the right to appeal the non-disclosure (see procedures below).

**Redaction of Exempt Information**

Records containing a mix of information that must be disclosed and information that is exempt from disclosure must be redacted or otherwise segregated so that the nonexempt portion of requested public information may be made available. The reason for redaction or segregation must be explained.

**Public Records Policy and Protocol****6.1.1****The Balancing Test**

It is the intention of the City of San Jose to narrowly construe the balancing test if it limits the public's right of access. In order to withhold a record under Government Code Section 6255, the City must

demonstrate that the public's interest in nondisclosure clearly outweighs the public's interest in disclosure. The City's interest in nondisclosure is of little consequence in performing this balancing test; it is the public's interest, not the City's interest, that is weighed.

Consistent with case law and Government Code Section 6255, the City may withhold a record that is protected by the "deliberative process privilege." The deliberative process privilege is intended to afford a measure of privacy to decision makers. This doctrine permits decision makers to receive recommendatory information from and engage in general discussions with their advisors without the fear of publicity. As a general rule, the deliberative process privilege does not protect facts from disclosure but rather protects the process by which policy decisions are made. Records which reflect a final decision, and the reasoning which supports that decision, are not covered by the deliberative

process privilege. If a record contains both factual and deliberative materials, the deliberative materials may be redacted and the remainder of the record must be disclosed, unless the factual material is inextricably intertwined with the deliberative material. The balancing test is applied in each instance to determine whether the public interest in maintaining the deliberative process privilege outweighs the public interest in disclosure of the particular information in question.

**The following records will not be withheld on the basis of the balancing test:**

1. Accounting Records, including accounts payable and receivable, general ledger, banking and reconciliation, but excluding sales tax and resident utilities billing records.
2. City Budgets, Proposed and Adopted.
3. Public Meeting Records, including agenda, minutes, synopses, reports, audio-visual recordings, and most supporting documents, but excluding closed session records and internal City staff meetings.
4. Calendars after the fact, excluding:
  - a. Personal appointments
  - b. Information protected by the attorney-client privilege
  - c. Information about attorney work product
  - d. Information about City staff recruitment
  - e. Information about a personnel issue
  - f. Information about corporate recruiting and retention
  - g. Information about criminal investigations and security
  - h. Information about whistle-blowers
  - i. Information about those who may fear retaliation
  - j. Information that is otherwise prohibited from disclosure
5. Staff Reports and Memoranda, excluding those related to closed session or covered by attorney-client privilege.

**Public Records Policy and Protocol****6.1.1**

6. Summary Statistical Reports
7. Employee Compensation
8. City Master Plans
9. Labor-Management Agreements
10. Audit Reports and Responses
11. Officials and Employees Disclosure Records
12. Lobbyist Registration Records
13. Election Results
14. City Logos, Seals, and Other Branding Records
15. Licenses Issued by the City, excluding information the disclosure of which would violate personal privacy rights
16. Policies
17. Records Retention and Destruction Records
18. Published Information

**The following records will not be withheld on the basis of the balancing test unless specifically approved by a vote of the Rules and Open Government Committee:**

1. Geographic and Environmental Data and Records including geographic information systems data, environmental impact reports, and environmental monitoring and testing results.
2. Development Records and Permits, excluding plans of existing structures.
3. Contracts, Leases, and Other Legal Agreements, excluding information the disclosure of which would personal privacy or intellectual property rights.
4. Procurement Records after procurement activity has been concluded, excluding individual evaluator ratings and comments any information the disclosure of which would violate intellectual property rights.
5. Real Property Records.
6. Facility, Site, and Equipment Safety Inspection Reports, excluding security-related information.

**Public Records Policy and Protocol****6.1.1**

7. Property Inventories excluding inventories of firearms and security equipment.
8. Closed Litigation Records, excluding information the disclosure of which would violate personal privacy, intellectual property rights or a protective order issued by a Court.

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. In addition, if the justification for withholding the information will expire at some point, the City Attorney must notify the requestor, in writing, that the record will be subject to disclosure at a later time.

**Mental Process Principle**

Under case law, the mental process that a legislator uses to reach a conclusion, including any motivation for that decision, is not subject to disclosure. The courts have held that the mental process used by a legislator in deciding how to vote is beyond the reach of the judiciary. Instead, it is the majority's vote itself that is relevant in evaluating the resulting action. The City need not apply the balancing test when deciding to withhold a record based on the "mental process principle."

**APPEALS PROCESS**

Requestors who believe that records have been inappropriately withheld from disclosure by a City department may resort to the City's appeal process for public records requests. A requestor has a number of options available as follows:

- The requestor may appeal to the City's Public Records Manager.
- The requestor may appeal to the City Council Rules and Open Government Committee either before or after an appeal to the City's Public Records Manager by contacting the Office of the City Clerk.
- Should the response of the Rules and Open Government Committee be unacceptable to the requestor, he or she may appeal to the Elections Commission or directly to the City Council by contacting the Office of the City Clerk.
- Should the response of the Elections Commission be unacceptable to the requestor, he or she may appeal to the City Council by contacting the Office of the City Clerk

The requestor may file an appeal with the Santa Clara County Superior Court at any time before, during, or after resorting to any other option listed here.

**RESPONDING TO REQUESTS FOR PARTICULAR DOCUMENTS**

Below are requirements for responses for particular types of records.

**Public Records Policy and Protocol****6.1.1****Advice from the City Attorney's Office**

Upon request, the City Attorney will release a summary document that explains any written interpretation of the California Public Records Act, the Ralph M. Brown Act or any Open Government reform adopted by the City Council. This provision does not constitute a waiver of the attorney-client privilege, 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 a member or members of the public.

**Disclosure of Drafts and Memoranda**

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 provision 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.

**Disclosure of Litigation Materials**

Notwithstanding any exemptions or privileges otherwise provided by law, the following are public records subject to disclosure:

1. A pre-litigation claim against the City;
2. A record previously received or created by a Department in the ordinary course of business that was not protected by the attorney-client privilege when it was received or created; and
3. When a lawsuit is finally adjudicated or otherwise settled, records of all communications between the Department and the adverse party including the text and terms of any settlement.

**Disclosure of Personnel Information**

None of the following will be exempt from disclosure under Government Code Section 6254(c), or any other provision of California law where disclosure is not forbidden:

1. The job pool characteristics and employment and education histories of all successful job applicants, including, at a minimum, the following information as to each successful job applicant:
  - (a) Years of graduate and undergraduate study, degree(s) and major and discipline
  - (b) Years of employment in the private and/or public sector
  - (c) Whether currently employed in the same position for another public agency

**Public Records Policy and Protocol****6.1.1**

- (d) Other non-identifying particulars as to experience, credentials, aptitudes, training or education entered in or attached to a standard employment application form used for the position in question
- 2. The professional biography or curriculum vitae of any employee, provided that the home address, home telephone number, personal email address, social security number, age and marital status of the employee must be redacted.
- 3. The job description of every employment classification.
- 4. The total compensation, by category, paid to an employee, including salary and City-paid benefits.
- 5. Any memorandum of understanding between the City or department and a recognized employee organization.
- 6. The amount, basis and recipient of any performance-based increase in compensation, benefits or both, or any bonus, awarded to any employee.

**Disclosure of Information Relating to Misconduct of City Officials**

The term "City Official" means the Mayor and Members of the City Council; any appointees of the City Council, Mayoral or Council unclassified staff members, Redevelopment Agency Board Member, the City Manager and his or her Assistant City Manager, Deputy City Managers, and heads of offices under the City Manager, the Executive Director of the Redevelopment Agency and his or her Assistant and Deputies, City department heads and Redevelopment Agency division heads.

The term "misconduct" includes dishonesty, misuse of City property or City funds, any violation of conflict of interest policies, the City's Gift policy or Discrimination and Harassment policy, inexcusable neglect of duty, fraud in securing employment and unlawful political activity.

Where there is reasonable cause to believe the complaint is well-founded, records of misconduct by a City Official, including any investigation and discipline, if any form of discipline is imposed, are subject to disclosure. Information that falls within the protection of any privileges or rights provided under the law may be redacted.

Nothing in this policy may be constructed as limiting access to other disciplinary records as permitted by the California Public Records Act.

**Disclosure of Log of Disciplinary Actions**

A log of disciplinary action 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. suspension, demotion, step reduction or dismissal/termination), 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. Nothing in this policy may be

**Public Records Policy and Protocol****6.1.1**

construed as limiting access to other disciplinary records as permitted by the California Public Records Act.

**Disclosure of Code Enforcement Records**

The following information is public and subject to disclosure:

1. Case number;
2. Name of the subject of the complaint;
3. Address of the property;
4. Substance of the complaint;
5. Notices of violation;
6. Compliance orders;
7. Administrative citations;
8. Warning notices;
9. Other documents submitted to the Appeals Hearing Board to support enforcement;
10. Resolutions of the Appeals Hearing Board;
11. Recordings of the Appeals Hearing Board proceedings; and
12. Any documents submitted to the Court for an inspection warrant or other legal action, unless the documents are filed with the Court under seal or there is a Court order preventing disclosure of the documents or information contained in them.

The name or other identifying information of the complainant in Code Enforcement complaints is confidential and must be redacted from any document unless the complainant agrees to disclose his or her identity.

Investigative files are not public until after the case has been closed. However, any information within the investigative file that would identify the complaining party's identity, information that would disclose legitimate law enforcement techniques that require confidentiality in order to be effective and information protected by other exemptions will be redacted.

**Disclosure of Information relating to Contracts with the City and Redevelopment Agency**

A. Solicitation for Contracts:

1. All correspondence regarding a solicitation for contracts with the City or Redevelopment Agency, including responses to Requests for Proposals, become the exclusive property

**Public Records Policy and Protocol****6.1.1**

of the City or Agency and are public records under the California Public Records Act. All documents that are sent to the City and Agency are subject to disclosure if requested by a member of the public. There are a very limited number of narrow exceptions to this disclosure requirement as set forth in the California Public Records Act.

2. Therefore, any proposal which contains language purporting to render all or significant portions of the proposal "Confidential," "Trade Secret" or "Proprietary," or fails to provide the exemption information required as described below will be considered a public record in its entirety.
3. All formal bid responses become public upon bid opening and must be made available immediately after bid opening.
4. The City or Agency will not disclose any part of any proposal before it announces a recommendation for award, on the ground that there is a substantial public interest in not disclosing proposals during the evaluation process. After the announcement of a recommended award, all proposals received in response to a solicitation will be subject to public disclosure. If a proposer believes that there are portion(s) of the proposal, which are exempt from disclosure under the California Public Records Act, the proposer must mark it as such and state the specific provision in the California Public Records Act, which provides the exemption as well as the factual basis for claiming the exemption. For example, if a proposer submits trade secret information, the proposer

must plainly mark the information as "Trade Secret" and refer to the appropriate section of the California Public Records Act which provides the exemption as well as the factual basis for claiming the exemption.

5. Although the California Public Records Act recognizes that certain confidential trade secret information may be protected from disclosure, the City or Agency may not be in a position to establish that the information a proposer submits is a trade secret. If a request is made for information marked "Confidential," "Trade Secret" or "Proprietary," the City or Agency will provide proposers who submitted the information with reasonable notice to seek protection from disclosure by a court of competent jurisdiction.
  6. After the notice of intent to award a City or Agency contract has been announced, the names of the evaluators and collective summaries of the evaluations or ratings must be made available if requested; under no circumstances are the individual evaluations or ratings (also known as "score sheets") subject to disclosure.
- B. When the City or Agency has negotiated the following types of agreement without a competitive process: (1) personal, professional or other contractual services for \$500,000 or more; (2) a lease or permit having (a) total anticipated revenue or expense to the City or Agency of \$500,000 or more; or (b) a term of ten years or more; or (3) any franchise agreement, then, after the negotiations have been concluded, all documents exchanged and related to the position of the parties, including draft contracts, must be made available for public inspection and copying upon request.

This provision does not require the retention of draft contracts that would not otherwise be retained in the ordinary course of business or pursuant to a policy, procedure or practice. Upon

**Public Records Policy and Protocol****6.1.1**

completion of negotiations, the executed contract, including the dollar amount of the contract, must be made available for inspection and copying.

- C. San Jose Municipal Code Section 4.04.080 provides:
1. The City Manager must file a quarterly report with the City Council, which describes all the contracts having a value of One Hundred Thousand Dollars or more that were entered into and executed by the City Manager, City Attorney, City Clerk and City Auditor in the preceding calendar quarter. The report must identify the subject matter of the contract, the person(s) or entity(ies) with whom the contract was made and the amounts, if any, payable by or to the City under each contract.
  2. The City Attorney, City Clerk, and City Auditor must provide to the City Manager the information necessary to enable the preparation and filing of quarterly reports.
- D. Contracts over \$100,000 that are not entered into by the Council Appointees listed in Municipal Code Section 4.04.080 are reported to the City Council when they are requested to be approved.
- E. An index of the location of every contract, except for Purchase Orders, regardless of amount or who approved it, shall be available and open to public inspection at the City Clerk's Office.

**Disclosure of Budgetary and Other Financial Information**

Proposed or final budgets for the City or any of its departments, programs or projects are subject to disclosure and should be made available in electronic form.

All bills, claims, invoices, vouchers or other records of payment obligations as well as records of actual disbursements showing the amount paid, the payee, the purpose for which the payment was made and who approved the payment are subject to disclosure, except that any information that is protected by privilege or other right provided under the law may be redacted.

**Disclosure of Electronic Mail**

E-mail shall be treated the same as other written documents. If the e-mail is kept in the ordinary course of business, it is a public record unless it falls within an exemption. Additional information regarding the storage and use of e-mail in the City may also be found in Section 1.7.1 of the City Policy Manual entitled "Use of E-Mail, Internet Services & Other Electronic Media."

**RECORDS RETENTION**

This policy and protocol does not obligate City departments to retain documents beyond the period of time indicated by the City's records retention schedule. In the event a request for records is received before its destruction under the City's record retention schedule, the requested records will be provided.

**Public Records Policy and Protocol**

**6.1.1**

Approved:

/s/ Ed Shikada  
Assistant City Manager

November 15, 2010  
Date