

No. S218066

SUPREME COURT  
**FILED**

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

NOV 24 2014

CITY OF SAN JOSE, *et al.*,  
*Defendants and Petitioners Below,*

Frank A. McGuire Clerk  
Deputy

vs.

SUPERIOR COURT OF THE STATE OF CALIFORNIA,  
*Respondent.*

TED SMITH,

*Plaintiff, Real Party in Interest, and Petitioner Here.*

**PETITIONER'S REQUEST FOR JUDICIAL NOTICE**

After Decision by the Court of Appeal  
Sixth Appellate District  
Case No. H039498  
Santa Clara County Superior Court, Case No. 1-09-CV-150427

JAMES McMANIS (40958)  
MATTHEW SCHECHTER (212003)  
CHRISTINE PEEK (234573)  
TYLER ATKINSON (257997)  
JENNIFER MURAKAMI (273603)  
McMANIS FAULKNER  
A Professional Corporation  
50 West San Fernando Street, 10th Floor  
San Jose, California 95113  
Telephone: (408) 279-8700  
Facsimile: (408) 279-3244

Attorneys for Plaintiff, Real Party in Interest, and Petitioner Here,  
TED SMITH

No. S218066

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

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*Defendants and Petitioners Below,*

vs.

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*Plaintiff, Real Party in Interest, and Petitioner Here.*

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Attorneys for Plaintiff, Real Party in Interest, and Petitioner Here,  
TED SMITH

## REQUEST FOR JUDICIAL NOTICE

Pursuant to Evidence Code sections 450, 451, and 452, and California Rules of Court, rule 8.252(a), plaintiff, real party in interest, and petitioner here, Ted Smith (“petitioner”), hereby requests that this Court take judicial notice of the following documents, attached as Exhibits 1 through 4:

1. Exhibit 1 is a Floor Analysis produced by the Senate Rules Committee relating to Assembly Bill 1962, as amended August 5, 2002. (Sen. Rules Com., Off. Of Sen. Floor Analyses, 3d reading analysis of Assem. Bill No. 1962 (2001-2002 Reg. Sess.) as amended Aug. 5, 2002.) See Declaration of Tyler Atkinson in Support of Request for Judicial Notice (“Atkinson Declaration”), ¶¶ 3 and 4.

2. Exhibit 2 is a Bill Analysis prepared by the Senate Judiciary Committee relating to Assembly Bill 1962, as amended August 5, 2002. (Sen. Judiciary Com., Analysis of Assem. Bill No. 1962 (2001-2002 Reg. Sess.) as amended Aug. 5, 2002.) See Atkinson Declaration, ¶¶ 3 and 5.

3. Exhibit 3 is a City Council Resolution, Resolution 77135, of the City of San Jose, adopted August 26, 2014. Resolution 77135 incorporates an exhibit, “Consolidated Open Government And Ethics

Provisions,” which is attached to the Resolution. See Atkinson Declaration, ¶¶ 6.

4. Exhibit 4 is San Jose Municipal Code § 12.12.800. See Atkinson Declaration, ¶¶ 7.

This motion for judicial notice is based on the accompanying Memorandum of Points and Authorities and the Declaration of Tyler Atkinson.

### **MEMORANDUM OF POINTS AND AUTHORITIES**

Under Evidence Code section 450, the Court is authorized to take judicial notice of the law, including background information useful in construing statutes. Evid. Code § 450; *Kern v. County of Imperial* (1990) 226 Cal.App.3d 391, 400 fn. 8 (appellate court entitled to take judicial notice of the various legislative materials, including committee reports); see also Evid. Code §§ 451 and 452, subd. (b) and (h).

This case presents the novel question of whether written communications about the public’s business, sent or received by public officials and employees using personal equipment, such as personal electronic devices or personal email and texting accounts, are “public records” within the meaning of the California Public Records

Act (“CPRA”) and article I, section 3, subdivision (b)(1) of the California Constitution.

**A. Exhibits 1 and 2: Bill Analysis by the State Legislature.**

Petitioner requests that the Court take judicial notice of two (2) legislative reports, one by the Senate Rules Committee (attached hereto as Exh. 1), and the other from the Senate Judiciary Committee (attached hereto as Exh. 2), which are pertinent to the Court’s resolution of the question at issue. Legislative committee reports and analyses are the types of “legislative history documents that have been recognized by the California Supreme Court or [the Court of Appeal] as constituting cognizable legislative history” of which judicial notice is property taken. *Kaufman & Broad Communities, Inc. v. Performance Plastering, Inc.* (2005) 133 Cal.App.4th 26, 31, 34-35; see *Martin v. Szeto* (2004) 32 Cal.4th 445, 450 (judicial notice of reports or analyses from Senate Judiciary Committee); *Guillemin v. Stein* (2002) 104 Cal.App.4th 156, 166, n.12 (judicial notice of reports or analyses from Senate Rules Committee).

Although the legislative intent of the CPRA is clear on the face of the statute – the statute covers emails related to the people’s business which happen to be contained in government employees’

personal devices and personal accounts – in an abundance of caution, petitioner offers the legislative history to further demonstrate the intent of the Legislature.

Where legislative intent is not clear from the face of a law, courts may review and consider extrinsic aids, including legislative history. See *Runyon v. Bd. Of Trustees of Cal. State U.* (2010) 48 Cal.4th 760, 767, citing *Elsner v. Uveges* (2004) 34 Cal.4th 915, 929. Here, the legislative history of the CPRA evidences an intent by the Legislature for the CPRA to cover emails of public employees regarding public business, even if those emails are contained on private devices. The attached evidence, like other parts of the legislative history, makes clear that the Legislature amended the definition of a “writing” to cover electronic mail precisely to avoid a strained and conservative reading of the statute. Moreover, apropos of this appeal, the “stated need for the bill” arose from a concern that *municipalities* might attempt to avoid production of email based on a strained and conservative reading of the statute.

Neither Exhibit 1 nor Exhibit 2 were presented to the trial court. See California Rules of Court, rule 8.252(2)(B). In addition, neither exhibit relates to proceedings occurring after the order or judgment

that is the subject of the appeal. See California Rules of Court, rule 8.252(2)(D). The documents' authenticity is supported by the Declaration of Tyler Atkinson, one of petitioner's attorneys. See *People v. Connor* (2004) 115 Cal.App.4th 669, 681; *Whaley v. Sony Computer America, Inc.* (2004) 121 Cal.App.4th 479, 487.

**B. Exhibits 3 and 4: San Jose City Council Resolution and San Jose Municipal Code Section.**

Petitioner requests that the Court take judicial notice of a resolution of the San Jose City Council (attached hereto as Exh. 3) and a section of the San Jose Municipal Code (attached hereto as Exh. 4). Duly enacted municipal ordinances and city council resolutions are proper subjects of judicial notice. Evid. Code, § 452, subd. (b) (authorizing judicial notice for "legislative enactments issued by or under the authority of . . . any public entity in the United States."); *Evans v. City of Berkeley* (2006) 38 Cal.4th 1, 7, fn. 2 (notice proper for city council resolution); accord *Ste. Marie v. Riverside County Regional Park & Open-Space Dist.* (2009) 46 Cal.4th 282, 293, fn. 7.

Exhibit 3, Resolution 77135, incorporates an exhibit attached to the resolution, entitled "Exhibit A - Consolidated Open Government And Ethics Provisions." The Resolution and its exhibit are relevant to this appeal because they demonstrate: (a) that the City has the ability

to designate emails on personal devices to be public records; (b) that the City can assert control over writings by its officers that relate to the public's business even if on the official's personal device. Thus, Exhibit 3 supports petitioner's interpretation of the term "public records." See Exh. A to Exh. 3, p. 4-2, § 4.2.4 ("City Records also include any recorded and retained communications regarding official City business sent or received by the Mayor, Council members or their staffs via personal devices not owned by the City or connected to a City computer network.")

Exhibit 4 is the text of San Jose Municipal Code section 12.12.800. The Code section is relevant for the proposition that the mental process principle does not present countervailing policy issues that would favor adoption of the City's interpretation of the term "public records."

Neither Exhibit 3 nor Exhibit 4 were presented to the trial court. See California Rules of Court, rule 8.252(2)(B). In addition, neither exhibit relates to proceedings occurring after the order or judgment that is the subject of the appeal. See California Rules of Court, rule 8.252(2)(D).



The authenticity of Exhibits 1 through 4 is supported by the Declaration of Tyler Atkinson, one of petitioner's attorneys. See *People v. Connor* (2004) 115 Cal.App.4th 669, 681; *Whaley v. Sony Computer America, Inc.* (2004) 121 Cal.App.4th 479, 487.

**CONCLUSION**

For the foregoing reasons, Petitioner respectfully requests this Court take judicial notice of Exhibits 1 through 4.

Dated: November 21, 2014

McMANIS FAULKNER



\_\_\_\_\_

Attorneys for Plaintiff, Real Party in Interest, and Petitioner Here,  
TED SMITH

**DECLARATION OF TYLER ATKINSON**

I, Tyler Atkinson, declare as follows:

1. I am a member of the State Bar of California, and counsel for Petitioner Ted Smith.
2. I am familiar with the facts represented in this Request for Judicial Notice, and declare that they are true and correct. I personally obtained the documents accompanying this Request for Judicial Notice from reliable sources.
3. On November 19, 2014, I accessed the state website, “Official California Legislative Information,” located at [www.leginfo.ca.gov](http://www.leginfo.ca.gov), and printed Exhibit 1 and Exhibit 2.
4. Exhibit 1 is a true and correct copy of a computer printout of Floor Analysis produced by the Senate Rules Committee relating to Assembly Bill 1962, as amended August 5, 2002, obtained from [www.leginfo.ca.gov](http://www.leginfo.ca.gov). (Sen. Rules Com., Off. Of Sen. Floor Analyses, 3d reading analysis of Assem. Bill No. 1962 (2001-2002 Reg. Sess.) as amended Aug. 5, 2002.)
5. Exhibit 2 is a true and correct copy of a computer printout of Bill Analysis prepared by the Senate Judiciary Committee relating to Assembly Bill 1962, as amended August 5, 2002, obtained

from [www.leginfo.ca.gov](http://www.leginfo.ca.gov). (Sen. Judiciary Com., Analysis of Assem. Bill No. 1962 (2001-2002 Reg. Sess.) as amended Aug. 5, 2002.)

6. Exhibit 3 is a true and correct copy of a computer printout of City Council Resolution, Resolution 77135. I printed this document from the City's website, <http://www.sanjoseca.gov>, on November 21, 2014.

7. Exhibit 4 is the text of San Jose Municipal Code § 12.12.800. The text is identical to the language codified by San Jose Ordinance 28074 (available online at: <https://www.sanjoseca.gov/DocumentCenter/Home/View/139>) and the verbiage provided by the American Legal Publishing Corporation website (available online at: [http://sanjose.amlegal.com/nxt/gateway.dll/California/sanjose\\_ca/title12ethicsandopengovernmentprovisions/chapter1212sanjosemunicipallobbying\\*?f=templates\\$fn=default.htm\\$3.0\\$vid=amlegal:sanjose\\_ca\\$anc=JD\\_12.12.800](http://sanjose.amlegal.com/nxt/gateway.dll/California/sanjose_ca/title12ethicsandopengovernmentprovisions/chapter1212sanjosemunicipallobbying*?f=templates$fn=default.htm$3.0$vid=amlegal:sanjose_ca$anc=JD_12.12.800)). I compared the three (3) documents on November 21, 2014.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Dated: November 21, 2014

By:

  
TYLER ATKINSON

SENATE RULES COMMITTEE	AB 1962
Office of Senate Floor Analyses	
1020 N Street, Suite 524	
(916) 445-6614 Fax: (916) 327-4478	Version:

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THIRD READING

Bill No: AB 1962  
 Author: Hollingsworth (R)  
 Amended: 8/5/02 in Senate  
 Vote: 21

SENATE JUDICIARY COMMITTEE : 6-0, 8/6/02  
 AYES: Escutia, Ackerman, Kuehl, O'Connell, Peace, Sher

SENATE APPROPRIATIONS COMMITTEE : Senate Rule 28.8

ASSEMBLY FLOOR : 79-0, 5/28/02 (Passed on Consent) - See last page for vote

SUBJECT : Electronic communication

SOURCE : United States Justice Foundation

DIGEST : This bill includes transmitting by electronic mail and facsimile in the definition of writing for purposes of the Evidence Code and records covered by the Public Records Act, thus subjecting emails and facsimiles to the rules of evidence, and to disclosure under the Public Records Act when gathered, stored and maintained by a state or local agency.

ANALYSIS : Existing law defines "writing" that is evidence as handwriting, typing, printing, photostating, photographing, and every other means of recording upon any tangible thing, any form of communication or representation, including letters, words, pictures, sounds, or symbols, or combinations thereof.

CONTINUED

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 Page

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Existing law defines public records open to inspection under the Public Records Act as including any writing containing information relating to the conduct of the public's business prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics. The PRA defines "writing" as it is defined in Evidence Code Section 250, and also includes all papers, maps, magnetic or paper tapes, photographic films and prints, magnetic or punched cards, discs, drums, and other documents.

This bill would change the definition of "writing" to include "transmitting by electronic mail or facsimile" upon any tangible thing, any form of communication or representation "and any record thereby created, regardless of the manner in which the record has been stored."

FISCAL EFFECT : Appropriation: No Fiscal Com.: Yes  
 Local: Yes

SUPPORT : (Verified 8/20/02)

United States Justice Foundation (source)  
 Attorney General

OPPOSITION : (Verified >)

>

ARGUMENTS IN SUPPORT : According to the sponsor, the United States Justice Foundation, a municipality can claim that email and other electronic correspondence such as facsimiles are not "records" or "writings" and therefore

avoid disclosure under the Public Records Act and use of such material in judicial proceedings.

Although electronically transmitted documents or reproductions thereof are considered to be writings in practice and in most interpretations of communications in the business world and judicial proceedings, in fact the statutes referred to (Evidence Code Section 250 and Government Code Section 6252) do not mention emails and faxes in their definitions of "writing" or "record." This

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Page

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ambiguity was resolved in several appellate court cases, in favor of treating electronically produced and reproduced documents as records and writings. However, in order to clarify those statutes and avoid needless litigation, this bill would specifically include those records and writings in the statutory definition of those terms.

ARGUMENTS IN OPPOSITION : > \_

ASSEMBLY FLOOR :

AYES: Aanestad, Alquist, Aroner, Ashburn, Bates, Bogh, Briggs, Calderon, Bill Campbell, John Campbell, Canciamilla, Cardenas, Cardoza, Chan, Chavez, Chu, Cogdill, Cohn, Corbett, Correa, Cox, Daucher, Diaz, Dickerson, Dutra, Firebaugh, Florez, Frommer, Goldberg, Harman, Havice, Hertzberg, Hollingsworth, Horton, Jackson, Keeley, Kehoe, Kelley, Koretz, La Suer, Leach, Leonard, Leslie, Liu, Longville, Lowenthal, Maddox, Maldonado, Matthews, Migden, Mountjoy, Nakano, Nation, Negrete McLeod, Oropeza, Robert Pacheco, Rod Pacheco, Papan, Pavley, Pescetti, Reyes, Richman, Runner, Salinas, Shelley, Simitian, Steinberg, Strickland, Strom-Martin, Thomson, Vargas, Washington, Wayne, Wiggins, Wright, Wyland, Wyman, Zettel, Wesson

RJG:s1 8/20/02 Senate Floor Analyses

SUPPORT/OPPOSITION: SEE ABOVE

SUPPORT/OPPOSITION: NONE RECEIVED

\*\*\*\* END \*\*\*\*

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Page

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SENATE JUDICIARY COMMITTEE  
 Martha M. Escutia, Chair  
 2001-2002 Regular Session

AB 1962	A
Assembly Member Hollingsworth	B
As Amended August 5, 2002	
Hearing Date: August 6, 2002	1
Evidence Code; Government Code	9
GMO:cjt	6
	2

SUBJECT

Evidence Code and the Public Records Act: Electronic Communications

DESCRIPTION

This bill would include "transmitting by electronic mail and facsimile" in the definition of "writing" for purposes of the Evidence Code and "records" covered by the Public Records Act, thus subjecting emails and facsimiles to the rules of evidence, and to disclosure under the Public Records Act when gathered, stored and maintained by a state or local agency.

BACKGROUND

Record making, transmitting, and storage in the modern world has evolved rapidly into the electronic medium in recent years. Thus, the Electronic Transactions Act was adopted by the state to govern transactions entered into through electronically transmitted documents. The courts have adopted a set of rules governing the transmittal and receipt of documents by fax or facsimile transmissions. [Rules of Court 2001 et seq.] And court cases have interpreted the Public Records Act to include within its scope documents that are recorded in electronic form and reproduced on paper [ Aguimatang v. California State Lottery (1991) 234 Cal.App.3d 769, held that computer printouts of records made electronically are business records admissible under the Evidence Code and are public records subject to

(more)

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 Page 2

inspection by the public and disclosure under the Public Records Act].

This bill is intended to clarify that emails and other electronically transmitted documents such as facsimiles are "writings" under the Evidence Code and are "records" under the Public Records Act.

CHANGES TO EXISTING LAW

Existing law defines "writing" that is evidence as handwriting, typing, printing, photostating, photographing, and every other means of recording upon any tangible thing, any form of communication or representation, including letters, words, pictures, sounds, or symbols, or combinations thereof. [Evidence Code Section 250.]

Existing law defines public records open to inspection under the Public Records Act as including any writing containing information relating to the conduct of the public's business prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics. The PRA defines "writing" as it is defined in Evidence Code Section 250, and also includes all papers, maps, magnetic or paper tapes, photographic films and prints, magnetic or punched cards, discs, drums, and other documents.

This bill would change the definition of "writing" to include "transmitting by electronic mail or facsimile" upon any tangible thing, any form of communication or representation "and any record thereby created, regardless of the manner in which the record has been stored."

COMMENT1. Stated need for the bill

According to the sponsor, the United States Justice Foundation, a municipality can claim that email and other electronic correspondence such as facsimiles are not "records" or "writings" and therefore avoid disclosure under the Public Records Act and use of such material in judicial proceedings.

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Although electronically transmitted documents or reproductions thereof are considered to be writings in practice and in most interpretations of communications in the business world and judicial proceedings, in fact the statutes referred to (Evidence Code Section 250 and Government Code Section 6252) do not mention emails and faxes in their definitions of "writing" or "record." This ambiguity was resolved in several appellate court cases, in favor of treating electronically produced and reproduced documents as records and writings. However, in order to clarify those statutes and avoid needless litigation, this bill would specifically include those records and writings in the statutory definition of those terms.

2. Effect of changing the definition of "writing" in the Evidence Code

Evidence Code Section 250 defines "writing" to mean any "handwriting, typewriting, printing, photostating, photographing, and every other means of recording upon any tangible thing any form of communication or representation, including letters, words, pictures, sounds, or symbols, or combination thereof."

This bill would amend this definition of writing to mean any "handwriting, printing, photostating, photographing, photocopying, transmitting by electronic mail or facsimile, and every other means of recording upon any tangible thing, any form of communication or representation, including letters, words, pictures, sounds, or symbols, or combinations thereof, and any record thereby created, regardless of the manner in which the record has been stored."

Thus, the new definition of "writing" would include photocopies of any document (as differentiated from a photostated or photographed copy, which use different technologies), a document created in a word processor or computer and a print out of that document, and a computer print out of personnel records kept in the magnetic tape

AB 1962 (Hollingsworth)

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of a hard drive inside a networked computer. While it is not obvious even from this proposed definition, a "writing" would also include a CD and a DVD.

It should be noted that even though these electronic records or electronically transmitted documents may be considered "writing" under the Evidence Code, admissibility of the records and "any records created thereby" are subject to the secondary evidence rule. In other words, admissibility of records created electronically depends on the reliability and security of the technology that replicates the original record from the electronic medium into one that is presented to the court. This would be true under the bill, as it is under existing law. Thus, while a fax copy of a document (even signed) may be admissible as secondary evidence without further proof of the technological reliability of a fax machine, a print out from the hard drive of a computer may not be admissible per se as secondary evidence because there are no state standards adopted as yet that ensures that the reproduction (print out) faithfully reproduces what was in the original record (the hard



drive).

3. Effect of change to "writing" under the Public Records Act

The Public Records Act defines "public records" to include any writing containing information relating to the conduct of the public's business prepared, owed, used, or retained by any state or local agency regardless of physical form or characteristics. "Writing" means "handwriting, typewriting, printing, photostating, photographing, photocopying, and every other means of recording upon any form of communication or representation, including letters, words, pictures, sounds, or symbols, or combination thereof, and all papers, maps, magnetic or paper tapes, photographic films and prints, magnetic or punched cards, discs, drums, and other documents."

This bill would change the definition of "writing" under the PRA to the proposed new Evidence Code Section 250 language.

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Thus, the two definitions would be exactly the same, removing any doubt as to what writing is a public record that would be evidence in a court or administrative proceeding. This new definition, as stated in Comment 2, could include a computer hard drive and print outs made from the hard drive as well as email exchanged within an agency that is relevant to the public's business and print outs of those emails, if the emails are gathered, stored and maintained by the public agency.

Also, because this new definition would include a recording "upon any tangible thing," records kept in CDs and DVDs, as well as in a hard drive or in a magnetic punch card, would be a public record subject to inspection and copying, if they are prepared, owned, used, or retained by the public agency.

The Attorney General has interpreted the PRA to "cover every conceivable kind of record that is involved in the governmental process and will pertain to any new form of record-keeping instrument as it is developed. Only purely personal information unrelated to the "conduct of the public's business" could be considered exempt from this definition, i.e., the shopping list phoned from home, the letter to a public officer from a friend which is totally void of reference to governmental activities." [58 Ops. Atty. Gen. 629, cited in San Gabriel Tribune v. Superior Court (1983) 143 Cal.App.3d 762,775.]

Still, the Attorney General supports this bill as clarifying of existing law.

Support: Attorney General

Opposition: None Known

HISTORY

Source: United States Justice Foundation

Related Pending Legislation: AB 2033 (Robert Pacheco) would make admissible as secondary evidence reproductions of records made in a computer hard drive, provided the

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technology uses a "trusted system" according to standards adopted by the Secretary of State. The bill passed this Committee and is back in the Assembly for concurrence.

Prior Legislation: None Known

Prior Vote: Asm. Jud. (Ayes 13, Noes 0)

Asm. Appr. (Ayes 24, Noes 0)  
Asm. Flr. (Ayes 79, Noes 0)

\*\*\*\*\*

**RESOLUTION NO. 77135**

**A RESOLUTION OF THE COUNCIL OF THE CITY OF SAN JOSE CONSOLIDATING OPEN GOVERNMENT AND ETHICS PROVISIONS AND REPEALING VARIOUS RESOLUTIONS AND CITY COUNCIL POLICIES**

**WHEREAS**, in April of 2006, the City Council ("Council") approved the establishment of the Sunshine Reform Task Force to review and make recommendations to the Council regarding open government in the City of San José; and

**WHEREAS**, in May of 2006, the Sunshine Reform Task Force ("SRTF") began meeting and in the course of its work, determined to present its open government recommendations to the San José City Council in two phases; and

**WHEREAS**, Phase I included provisions for 1) Public Meetings, 2) Closed Session, and 3) Public Information and Outreach. The last of the SRTF Phase I recommendations were approved by the Council on March 2, 2010 and were directed to be implemented on a pilot basis; and

**WHEREAS**, Phase II included a focus on 1) Public Records, 2) Technology, 3) Enforcement, and 4) Ethics and Conduct. The last of the SRTF Phase II recommendations were approved by Council on October 20, 2009 and were directed to be implemented on a pilot basis; and

**WHEREAS**, during the course of the past ten years, this Council has adopted various City Council Policies and resolutions to set forth requirements related to open government and ethical considerations; and

**WHEREAS**, Public Information and Outreach provisions, including Public Review Files, were initially approved by the City Council by adoption of Resolution No. 74414 on

June 10, 2008, which resolution was repealed and superseded by Resolution No. 75978, adopted on September 13, 2011; and

**WHEREAS**, Public Meeting requirements were initially approved by the City Council by adoption of Resolution No. 74414 on June 10, 2008, which resolution was repealed and superseded by Resolution No. 75978, adopted on September 13, 2011. Prior to the adoption of Resolution No. 75978, many of these requirements, as well as additional requirements, were incorporated into the Resolution for Rules of Conduct of Council Meetings under Resolution No. 75246, adopted on January 12, 2010, which requirements were subsequently amended by the adoption of Resolution No. 76184 on April 3, 2012; and

**WHEREAS**, Closed Session requirements were adopted initially by the City Council on April 8, 2008, as set forth in City Council Resolution No. 74312 (the Resolution for Rules of Conduct of Council Meetings), and applied to other bodies as appropriate, including the Civil Service Commission, Deferred Compensation Advisory Committee, Elections Commission, Federated Employees Retirement Board, Police and Fire Retirement Board and San José Arena Authority by adoption of Resolution No. 74414 on June 10, 2008, which resolution was repealed and superseded by Resolution No. 75978 adopted on September 13, 2011; and

**WHEREAS**, the Public Records policy was originally adopted as City Council Policy 0-33, entitled "Public Records Policy and Protocol," on January 27, 2004, and revised on March 2, 2010. Portions of these provisions were also adopted by the City Council under Resolution No. 75091 on August 18, 2009, Resolution No. 75140, adopted on October 20, 2009, and Resolution Nos. 75292 and 75293 adopted on March 2, 2010, and further amended by the adoption of Resolution No. 76496 on December 4, 2012; and

**WHEREAS**, the Disclosure of Material Facts policy was originally adopted as City Council Policy 0-32, entitled "Disclosure and Sharing of Material Facts," on April 25, 2006 and later amended on March 2, 2010 by the adoption of Resolution No. 75293; and

**WHEREAS**, the Declaration of Conflict of Interest policy was originally adopted as City Council Policy 0-34, entitled "City Council Declaration of Conflict of Interest," on November 21, 2006 by the adoption of Resolution No. 73517; and

**WHEREAS**, on December 13, 2005, Council directed the City Manager and City Attorney as part of the Mayor's Biennial Ethics Review to develop a Council Policy which included all elements of the Procurement Process Integrity Guidelines adopted by Council on November 9, 2004 and apply these provisions to all competitive processes. These provisions were originally adopted as City Council Policy 0-35, entitled "Procurement and Contract Process Integrity and Conflict of Interest," on February 6, 2007 by the adoption of Resolution No. 73634; and

**WHEREAS**, this Council desires to amend and consolidate these Open Government and Ethics provisions described above in one resolution; and

**WHEREAS**, concurrent with this Resolution, the Council approved an ordinance amending Title 12 of the San José Municipal Code to add a new Chapter 12.21 to codify Open Government and Ethics provisions ("Open Government Ordinance");

**NOW, THEREFORE, BE IT RESOLVED BY THE COUNCIL OF THE CITY OF SAN JOSE THAT:**

- 1, The Consolidated Open Government and Ethics Provisions of the City of San José, which are attached hereto as Exhibit A and incorporated herein by this reference as though fully set forth herein, are hereby approved. This Resolution

shall be referred to as "The Consolidated Open Government and Ethics Resolution." Each of the policies and resolutions referenced in paragraphs 2 through 9 below has been revised and incorporated in The Consolidated Open Government and Ethics Resolution.

2. City Council Policy 0-32, entitled "Disclosure and Sharing of Material Facts and Communications Received During Council Meetings" is hereby repealed.
3. City Council Policy 0-33, entitled "Public Records Policy and Protocol" is hereby repealed.
4. City Council Policy 0-34, entitled "City Council Declaration of Conflict of Interest Policy" is hereby repealed.
5. City Council Policy 0-35, entitled "Procurement and Contract Process Integrity and Conflict of Interest" is hereby repealed.
6. Resolution No. 75091 is hereby repealed.
7. Resolution No. 75140 is hereby repealed.
8. Resolution No. 75292 is hereby repealed.
9. Resolution No. 75978 is hereby repealed.
10. Should any provision of this Resolution, or its application to any person or circumstance, be determined by a court of competent jurisdiction to be unlawful, unenforceable or otherwise void, that determination shall have no effect on any other provision of this Resolution or the application of this Resolution to any

other person or circumstance and, to that end, the provisions hereof are severable.

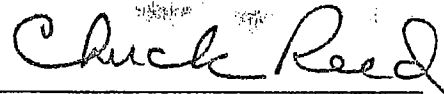
ADOPTED this 26<sup>th</sup> day of August, 2014, by the following vote:

AYES: CAMPOS, CHU, CONSTANT, HERRERA, KALRA,  
LICCARDO, NGUYEN, OLIVERIO, ROCHA; REED.

NOES: NONE.

ABSENT: KHAMIS.

DISQUALIFIED: NONE.



CHUCK REED  
Mayor

ATTEST:



TONI J. TABER, CMC  
City Clerk

**EXHIBIT A  
TO RESOLUTION NO. 77135**



**CONSOLIDATED OPEN GOVERNMENT  
AND  
ETHICS PROVISIONS**

**City of San José**



SECTION 1.	PUBLIC INFORMATION & OUTREACH .....	1-1
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1.1	PURPOSE .....	1-1
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## **SECTION 1. PUBLIC INFORMATION & OUTREACH**

### **1.0 LEGISLATIVE HISTORY**

Public Information and Outreach provisions, including Public Review Files, were initially approved by the City Council by adoption of Resolution No. 74414 on June 10, 2008, which resolution was repealed and superseded by Resolution No. 75978 adopted on September 13, 2011, which resolution is repealed by, revised, and incorporated into this Consolidated Open Government and Ethics Resolution.

### **1.1 PURPOSE**

The purpose of this Section 1 of this Consolidated Open Government and Ethics Resolution is to further the goals of the Open Government Ordinance by providing procedures that will facilitate public awareness and stakeholder participation in the governing process through easy access to, and full disclosure of, public information relevant to any issue being considered by the City Council, Council Committees, Council Appointees and City Boards, Commissions, and Committees.

### **1.2 DEFINITIONS**

#### **1.2.1 Definitions**

The definitions set forth in this Section 1.2 shall govern the application and interpretation of this Section 1 of this Consolidated Open Government and Ethics Resolution, entitled "Public Information & Outreach."

#### **1.2.2 City Boards, Commissions and Committees**

"City Boards, Commissions and Committees" means those bodies created by either the City Charter or the City Council excluding Decision-Making Bodies.

#### **1.2.3 City Council**

"City Council" means the San José City Council or any other legislative body that is solely made up of all of the San José City Councilmembers.

#### **1.2.4 City Lobbyist**

"City Lobbyist" means a person or business entity that receives or is entitled to receive \$250 or more in any month from the City to represent the City in matters before any local, regional, state, or federal administrative or legislative body, and who is required to register as a state or federal lobbyist as a result of such activity on behalf of the City.

### **1.2.5 Decision-Making Bodies**

“Decision-Making Bodies” means those bodies created by either the City Charter or the City Council that, among other functions, powers and duties, receive evidence and make final decisions about matters that cannot be appealed to another City body.

### **1.2.6 Open Government Manager**

“Open Government Manager” means the person designated by the City Manager to be responsible to coordinate interdepartmental responses to Public Records Act requests and assist on complex requests.

### **1.2.7 Public Information**

“Public Information” means the content of “public records” as defined in the Public Records Act (California Government Code Sections 6250 et seq.), whether provided in documentary form, oral communication or other format that contains public information such as computer tape or disc or video or audio recording.

### **1.2.8 Public Records Act**

“Public Records Act” means the California Public Records Act (Government Code Sections 6250 et seq.), as amended. Except as otherwise provided here, the terms and provisions of this Section 1 of this Consolidated Open Government and Ethics Resolution shall be interpreted in accordance with the applicable definitions and provisions of the Public Records Act and any administrative or judicial interpretations thereof.

### **1.2.9 Public Review File**

“Public Review File” means the agenda and all supporting documentation for each public meeting for City Council, Council Committees, Decision-Making Bodies, and City Boards, Commissions and Committees.

### **1.2.10 Rules and Open Government Committee**

“Rules and Open Government Committee” (alternatively, the “Rules Committee”) means the Council Committee established pursuant to the Council Rules of Conduct Resolution, or its successor, that, among other things, considers and makes recommendations to the Council on disputes over Public Record requests.

### **1.3 GENERAL PROVISIONS**

#### **1.3.1 Release of Public Information**

- A. Records Coordinator. Every office or department shall designate as a records coordinator a person knowledgeable about the affairs of the department who has custody of records and Public Information relating to the responsibilities and work performed by the office or department.
- B. Role of Records Coordinator. The role of the records coordinator is to provide Public Information, including oral information, to the public about the office or department's operations, plans, policies and positions.
- C. Requests Involving Multiple Departments. If a request seeks Public Information from more than one office or department, the request shall be forwarded to the Open Government Manager and City Attorney's Office as well as the designated records coordinators of all affected offices/departments. The Open Government Manager, in consultation with the City Attorney's Office, shall coordinate and respond to the request with the assistance of the other offices/departments.
- D. Duty to Provide Public Information. City employees shall follow the protocol outlined in Section 4 of this Consolidated Open Government and Ethics Resolution, entitled "Public Records Policy and Protocol" which affirms the public's right to access City records and sets forth the procedures that facilitate accessibility of Public Information to members of the public.

#### **1.3.2 Maintenance and Location of Public Review File**

Public Review Files for the Council, Council Committees, Decision-Making Bodies and City Boards, Committees and Commissions shall be maintained by and located in the City Clerk's Office for the Council and Council Committees, and in individual departments that support each respective body other than the Council and Council Committees. Since the Clerk's Office is a central point for City records, the Clerk's Office shall maintain a directory of the location of the Public Review Files in the City organization.

#### **1.3.3 Calendars of Certain Officials**

- A. Certain Officials to Maintain Calendars. The following officials shall maintain a calendar: the Mayor, City Councilmembers, Chiefs of Staff (or equivalent regardless of title) for the Mayor and City Councilmembers, City Manager, City Clerk, City Attorney, Airport Director, Budget Director, Chief Development Officer, Emergency Services Director, Environmental Services Director, Fire Chief, Finance Director, Housing Director, Information Technology Director,

Library Director, Parks Director, Planning Director, Police Chief, Public Works Director, Retirement Director and Transportation Director.

- B. Minimum Public Information in Calendars. Calendars shall include, at a minimum, all City-related appointments, including regular and special City Council meetings, public events or speaking engagements, meetings with developers, meetings with consultants, meetings with lobbyists, regional meetings, and meetings of subcommittees or task forces. City officials are encouraged to record unscheduled meetings of a material nature with interested parties in any matter coming before the City Council or a Council Committee for a vote in which the matter under consideration is discussed.
- C. Appointment Public Information in Calendars; Exemptions. Each City-related appointment shall include the following Public Information: name(s), title(s), affiliated organization(s) and a general statement of the issues discussed. The following information may be exempted:
1. Personal appointments;
  2. Information protected by the attorney-client privilege;
  3. Information about attorney work product;
  4. Information about City staff recruitment;
  5. Information about a personnel issue;
  6. Information about corporate recruiting and retention;
  7. Information about criminal investigations and security;
  8. Information about whistle-blowers;
  9. Information about those who may fear retaliation; and
  10. Information that is otherwise prohibited from disclosure.
- D. Publishing of Calendars. The Mayor, City Councilmembers, Chiefs of Staff (or equivalent regardless of title) for the Mayor and City Councilmembers, City Manager, City Clerk and City Attorney shall publish their calendars to the City's web site once a week, on Monday, by 5 pm, for the previous seven (7) calendar days, except when the deadline falls on a Monday holiday. When the deadline for publishing calendars would otherwise fall on a Monday holiday, the deadline shall be extended by twenty-four (24) hours.

#### **1.3.4 Lobbyists on Behalf of the City**

- A. Link to Disclosure Forms. The City Clerk shall post on the City's web site a direct link to the disclosure forms that the City Lobbyists file with the appropriate federal and/or state agencies.
- B. Contract Provision with City Lobbyists. The City shall include in its contracts with City Lobbyists a prohibition from fundraising for the Mayor and/or City Council, candidates for Mayor or a City Council seat, and all City Officials.



- C. City Funds Not to be Used to Restrict Public Access. Funds of the City shall not be used to support any lobbying efforts to restrict public access to public records, Public Information, or meetings, except where such effort is solely for the purpose of protecting the identity and privacy rights of private citizens. The City staff or a City Lobbyist may request an exemption from this Section 1 from the Rules and Open Government Committee.

**1.3.5 Additional Public Outreach – Community Engagement Process**

- A. Community Engagement Process to be Initiated. When any City agency, department or office is initiating a process that would have significant Citywide impact or lead to a change in Citywide service levels such as a master planning process and the annual budget process, a Community Engagement Process shall be initiated as follows:
1. Determination of Significant Citywide Impact. When the process is initiated by the City staff, the City staff shall determine whether the process will have a significant Citywide impact. When the process is initiated by the City Council, the City Council shall determine at that time whether the process will have a significant Citywide impact.
  2. Outreach Methods for Community Engagement Process. At such time as a significant Citywide impact has been determined, the Community Engagement Process shall, at a minimum, employ the following outreach methods:
    - a. Early Notification Process. During the early notification process, information shall be posted on the City's web site and an email shall be sent to those who subscribe to receive email notice, and notices shall be distributed to the Mayor and City Council for distribution through their databases.
    - b. Community Meetings. At least two (2) community meetings shall be held at meaningful points in the process and one (1) community meeting shall be held to present the final recommendation. During the community meetings process, information shall be posted on the City's web site, email shall be sent to those who subscribe to receive email notice, information shall be sent by direct mail to those who subscribe to receive direct mail notice and flyers in community centers and libraries shall be posted.
    - c. Public Hearing Notice Process. During the public hearing notice process, information shall be posted on the City's web site, email shall be sent to those who subscribe to receive email notice,

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information shall be sent by direct mail to those who subscribe to receive direct mail notice, flyers in community centers and libraries shall be posted, notice shall be advertised in at least one (1) general circulation or community English language newspaper publication and notice shall be broadcast on the City television channel.

- B. Annual Public Meeting Discussion on Negotiations Process with City's Bargaining Units. A discussion of the negotiations process with the City's bargaining units shall be conducted annually as an item on the agenda at a public meeting, at a time that provides meaningful opportunity for the public to participate in the process, to educate the public on the negotiations process with the City's bargaining units and provide an opportunity for the public to ask questions and provide meaningful input to impending labor negotiations.

## **SECTION 2. PUBLIC MEETINGS**

### **2.0 LEGISLATIVE HISTORY**

Public Meeting requirements were initially approved by the City Council by adoption of Resolution No. 74414 on June 10, 2008, which resolution was repealed and superseded by Resolution No. 75978 adopted on September 13, 2011, which resolution is repealed by, revised, and incorporated into this Consolidated Open Government and Ethics Resolution. Prior to the adoption of Resolution No. 75978, many of these requirements, as well as additional requirements, were incorporated into the Resolution for Rules of Conduct of Council meetings under Resolution No. 75246, adopted on January 12, 2010, which requirements were subsequently amended by the adoption of Resolution No. 76184 on April 3, 2012.

### **2.1 PURPOSE**

The purpose of this Section 2 of this Consolidated Open Government and Ethics Resolution is to further the goals of the Open Government Ordinance by establishing standardized and consistent processes and procedures for noticing and conducting meetings of the City Council, Council Committees, City Boards, Commissions and Committees and certain Non-Governmental Bodies and to fully engage the public and other stakeholders.

### **2.2 DEFINITIONS**

#### **2.2.1 Definitions**

The definitions set forth in this Section 2.2 shall govern the application and interpretation of this Section 2 of this Consolidated Open Government and Ethics Resolution, entitled "Public Meetings."

#### **2.2.2 Agenda**

"Agenda" means a list of information about a meeting including the identity of the body conducting the meeting, the time and location of the meeting, a meaningful description of each item of business to be transacted or discussed at the meeting and the recommendation or proposed action for each item. Provided, however, if the item of business is the conduct of a hearing at which a Decision-Making Body will make a decision based on evidence presented at the hearing, the recommendation or proposed action should reflect that the Decision-Making Body will consider the item of business which may include a recommendation made by staff, but should not state the ultimate outcome.

### **2.2.3 Agenda Packet**

“Agenda Packet” means the Agenda of a public meeting and any other documents distributed to a body that is subject to the Brown Act in connection with a matter anticipated for discussion or consideration at a public meeting.

### **2.2.4 Brown Act**

“Brown Act” means the Ralph M. Brown Act (Government Code Sections 54950 et seq.), as amended. Except as otherwise provided here, the terms and provisions of this Section 2 of this Consolidated Open Government and Ethics Resolution shall be interpreted in accordance with the applicable definitions and provisions of the Brown Act and any administrative or judicial interpretations of the Brown Act.

### **2.2.5 City Boards, Commissions and Committees**

“City Boards, Commissions and Committees” means those bodies created by either the City Charter or the City Council excluding the Decision-Making Bodies.

### **2.2.6 City Council**

“City Council” means the San José City Council or any other legislative body that is solely made up of all of the San José City Councilmembers.

### **2.2.7 Decision-Making Bodies**

“Decision-Making Bodies” means those bodies created by either the City Charter or the City Council that, among other functions, powers and duties, receive evidence and make final decisions about matters that cannot be appealed to another City body.

### **2.2.8 Non-Governmental Body**

“Non-Governmental Body” means a nonprofit entity that:

- A. Operates or maintains a City facility with a value of over \$5 million for City purposes; or
- B. Receives annually at least the amount of the City Manager’s contracting authority in financial assistance from the City.

### **2.2.9 Other Advisory Entities**

“Other Advisory Entities” means entities that are created to advise the City, but are not created by the City Council.

### **2.2.10 Public Subsidy**

- A. **Public Subsidy.** A "Public Subsidy" means a provision of economic value by the City and other related entities to a private entity for purposes beneficial to the public, such as the operation of a business or event within San José, but for which the City or other related entities do not directly or indirectly receive goods or services in return for that expenditure.
- B. **Provision of Economic Value.** For the purposes of this Section, "provision of economic value" means:
1. Cash payments;
  2. Loans below the interest rate the City earns on its investment portfolio, known as "the City's portfolio rate", or loan guarantees;
  3. Land or access to land at prices below fair market value;
  4. Buildings or access to buildings at prices below fair market value as determined by either the City's purchase price, appraisal or replacement value (purchase price may be used for "unique" structures for which the City does not want to do a costly appraisal); or
  5. Waiver or reduction of fees or taxes.
- C. **Goods or Services.** For the purposes of this Section, "goods or services" include products or services provided at prices below market value. For example, if the City pays businesses or nonprofit organizations to make affordable housing units or discounted rides on buses or shuttles available to residents, it is purchasing the discount and not offering a Public Subsidy.
- D. **Initial Approval of Contract.** For the purposes of this Section, if the City signs a contract that stipulates the amount and terms of a Public Subsidy for several years, the subsidy requiring disclosure is the initial approval of the contract, not the annual payments rendered in accordance with the contract.

### **2.2.11 Rules and Open Government Committee**

"Rules and Open Government Committee" (alternatively, the "Rules Committee") means the Council Committee established pursuant to the Council Rules of Conduct Resolution, or its successor, that, among other things, reviews the City Council and City Council study session agendas.

## 2.3 GENERAL PROVISIONS

### 2.3.1 Scope of Public Meetings Provisions

#### 2.3.1.1 Meetings to be Open and Public

All meetings of bodies subject to the Brown Act shall be open and public and governed by the provisions of the Brown Act and this Section 2 of this Consolidated Open Government and Ethics Resolution. In the case of inconsistent requirements under the Brown Act and this Section 2 of this Consolidated Open Government and Ethics Resolution, the requirement that would result in greater public access shall apply.

#### 2.3.1.2 Meetings of Other Advisory Entities

- A. Other Advisory Entities Subject to Brown Act. The following advisory entities are subject to the requirements of the Brown Act:
1. Standing committees of City Boards, Commissions and Committees; and
  2. Committees comprised of Council staff that represent a majority of City Council offices.
- B. Other Advisory Entities Required to Allow Members of Public to Attend Meetings. An advisory entity is required to allow members of the public to attend its meetings but is not otherwise subject to the requirements of the Brown Act if:
1. It is created by, and to advise, solely on matters concerning the conduct of the public's business, the Mayor, the Mayor's Chief of Staff or Budget and Policy Director, a Councilmember, a Council Appointee or any member of a Board, Commission or Committee. This definition is not intended to include groups that advise elected officials solely on political or campaign-related matters; or
  2. It grants, or advises any group subject to the Brown Act about grants, of City funds of \$200,000 or more per fiscal year to a non-City organization.
- C. Other Advisory Entities Not Subject to Brown Act or Required to Allow Members of Public to Attend Meetings. An advisory entity is not subject to the requirements of the Brown Act or required to allow members of the public to attend its meetings if:
1. It is formed or used for specific or immediate problems and not intended to meet for more than six (6) months (an "ad hoc committee"); or

2. Its meetings include discussion about private or non-public information, where the public interest served by not disclosing the information clearly outweighs the public interest served by disclosure of the information.

### **2.3.1.3 Meetings of Non-Governmental Bodies**

Non-Governmental Bodies are not subject to the requirements of the Brown Act or required to allow members of the public to attend meetings. They are subject only to the requirements set forth in Section 2.3.2.9.

### **2.3.1.4 Violation of Procedural Rules**

An action taken in violation of these procedural rules may not be determined to be null and void if the action was in substantial compliance with the rules, or taken in connection with the sale or issuance of notes, bonds, other evidences of indebtedness, or the action taken gave rise to a contractual obligation upon which a party has in good faith relied.

## **2.3.2 Public Meeting Notice and Agenda Requirements**

### **2.3.2.1 Agendas and Agenda Packets – City Council Regular Meetings**

- A. Agenda and Agenda Packet. At least ten (10) calendar days before a regular meeting, the City Clerk shall post, on the City's web site and in a location that is freely accessible to members of the public, an Agenda and Agenda Packet for the meeting.
- B. Rules and Open Government Waiver of Notice Requirements for Substantive Changes to the Agenda. No later than six (6) calendar days before a regular meeting, the Rules and Open Government Committee may permit substantive changes to the Agenda, including the addition of new items. The addition of a new item will require a waiver of the notice requirements for the Agenda item by the Rules and Open Government Committee.
- C. Description of Agenda Items. In addition to any requirements specified under the Brown Act, each item of business to be transacted or discussed at the City Council meeting shall include at least the following information:
  1. A clear and brief description of the subject matter;
  2. If applicable, the parties involved in the transaction;
  3. If applicable, the total cost of the transaction, including initial cost and the total cumulative cost;

4. If applicable, information regarding the designation of the action under the California Environmental Quality Act (CEQA); and
  5. Staff recommendation or proposed action. Provided, however, if the item of business is the conduct of a hearing at which the City Council will make a decision based on evidence presented at the hearing, the recommendation or proposed action should reflect that the Decision-Making Body will consider the item of business which may include a recommendation made by staff, but should not state the ultimate outcome.
- D. Amended Agenda. No later than seventy-two (72) hours before a regular meeting, the City Clerk may post on the City's web site and in a location that is freely accessible to members of the public, an amended Agenda to make administrative, nonsubstantive changes to the Agenda.
- E. City Council Waiver of Noticing Requirements for Placement of Items on the Agenda. Subsequent to the Rules and Open Government Committee Meeting six (6) calendar days before a regular meeting and prior to posting of the amended Agenda no later than seventy-two (72) hours prior to the regular meeting:
1. The City Clerk, in consultation with the Mayor, City Attorney and/or City Manager may add an item to the Agenda under Orders of the Day, using the procedure set forth in this subsection.
  2. The added item shall be included in the amended Agenda and shall be posted on the City's web site and in a location that is freely accessible to members of the public. The memorandum posted on the City's web site shall include an explanation as to why the item is being added.
  3. The City Council may consider the item only when the City Council makes a good faith, reasonable determination that the item must be resolved at that meeting. Such determination must be made by a two-thirds vote of the body, or if less than two-thirds of the members are present, a unanimous vote of those present.
  4. After placement on the Agenda pursuant to Section 2.3.2.1.E3, the City Council may discuss and act on the item. A waiver of the document noticing requirement as specified under Section 2.3.3.5B is not required.
- F. Agenda Items Added within 72 Hours. No items may be added to an Agenda within seventy-two (72) hours prior to the regular meeting except as follows, and consistent with the Brown Act.



1. The City Council may discuss and/or act on an item not appearing on the Agenda only in the following circumstances as allowed by the Brown Act:
  - a. When a majority decides there is an "emergency situation" as defined under the Brown Act;
  - b. When the City Council makes a good faith, reasonable determination by a two-thirds vote of the body, or if less than two-thirds of the members are present, a unanimous vote of those present, that: 1) there is an immediate need to take action; and 2) the need to take action arose after the posting of the Agenda; or
  - c. When an item appeared on the Agenda of, and was continued from, a meeting held not more than five (5) days earlier.
2. The item may then be placed on the Agenda, and the body may discuss and act on the added item. A waiver of the document noticing requirement as specified under Section 2.3.3.5B is not required.

**2.3.2.2 Agendas and Agenda Packets -- Council Committees**

- A. Agenda and Agenda Packet. At least seven (7) calendar days before a regular Council Committee meeting (except for the Rules and Open Government Committee, which requires five (5) calendar days before a regular meeting), staff shall post, on the City's web site and in a location that is freely accessible to members of the public, an Agenda and Agenda Packet for the meeting.
- B. Amended Agenda with Nonsubstantive Changes. No later than seventy-two (72) hours before a regular meeting, staff may post, on the City's web site and in a location that is freely accessible to members of the public, an amended Agenda to make administrative, nonsubstantive changes to the Agenda.
- C. Amended Agenda with Substantive Changes to a Recommendation.
  1. No later than seventy-two (72) hours prior to a regular meeting, staff may post, on the City's web site and in a location that is freely accessible to members of the public, an amended Agenda with substantive changes to a recommendation on the Agenda.
  2. Prior to considering the item with substantive changes, the Council Committee shall determine by a majority vote under Orders of the Day, whether the item should be heard and discussed, or deferred. If the Council Committee determines that the amount of notice to the public is appropriate for the item with substantive changes to the recommendation, it may choose to hear and discuss the item, but action on the item should

be deferred. If the Council Committee determines that additional noticing is warranted, it may defer the item.

- D. Agenda Items Added within 72 Hours. No items may be added to an Agenda within 72 hours prior to the regular meeting except as follows, and consistent with the Brown Act.
1. The Council Committee may discuss and/or act on an item not appearing on the Agenda only in the following circumstances as allowed by the Brown Act:
    - a. When a majority decides there is an "emergency situation" as defined under the Brown Act;
    - b. When the Council Committee makes a good faith, reasonable determination by a two-thirds vote of the body, or if less than two-thirds of the members are present, a unanimous vote of those present, that: 1) there is an immediate need to take action; and 2) the need to take action arose after the posting of the Agenda; or
    - c. When an item appeared on the Agenda of, and was continued from, a meeting held not more than five (5) days earlier.
  2. The item may then be placed on the Agenda, and the body may discuss and act on the added item. A waiver of the document noticing requirement as specified under Section 2.3.3.5B is not required.

### **2.3.2.3 Agendas and Agenda Packets -- Decision-Making Bodies**

- A. Agenda and Agenda Packet. At least seven (7) calendar days before a regular meeting, staff shall post, on the City's web site and in a location that is freely accessible to members of the public, an Agenda and Agenda Packet for the meeting.
- B. Agenda Recommendation. If an item of business is the conduct of a hearing at which a Decision-Making Body will make a decision based on evidence presented at the hearing, the recommendation or proposed action should reflect that the Decision-Making Body will consider the item of business which may include a recommendation made by staff, but should not state the ultimate outcome.
- C. Amended Agenda with Nonsubstantive Changes. No later than seventy-two (72) hours before a regular meeting, staff may post an amended Agenda to make administrative, nonsubstantive changes to the Agenda.

D. Amended Agenda with Substantive Changes Related to Administrative Hearings.

1. No later than seventy-two (72) hours prior to a regular meeting, staff may post, on the City's web site and in a location that is freely accessible to members of the public, an amended Agenda with substantive changes to items scheduled or to be scheduled for an administrative hearing on the Agenda, including either a substantive change to a recommendation or the addition of an item.
2. Prior to considering an item with substantive changes or the addition of the item, the Decision-Making Body shall determine by a majority vote under Orders of the Day, whether the item should be heard and discussed, or deferred.
3. If the Decision-Making Body determines that the amount of notice to the public is appropriate for the item with substantive changes to the recommendation or the added item, it may choose to hear and act on the item; if the Decision-Making Body determines that additional noticing is warranted, it may defer the item.

E. Agenda Items Added within 72 Hours. No items may be added to an Agenda within seventy-two (72) hours prior to the regular meeting except as follows, and consistent with the Brown Act.

1. The Decision-Making Body may discuss and/or act on an item not appearing on the Agenda only in the following circumstances as allowed by the Brown Act:
  - a. When a majority decides there is an "emergency situation" as defined under the Brown Act;
  - b. When the Decision-Making Body makes a good faith, reasonable determination by a two-thirds vote of the body, or if less than two-thirds of the members are present, a unanimous vote of those present, that: 1) there is an immediate need to take action; and 2) the need to take action arose after the posting of the Agenda; or
  - c. When an item appeared on the Agenda of, and was continued from, a meeting held not more than five (5) days earlier.
2. The item may then be placed on the Agenda, and the body may discuss and act on the added item. A waiver of the document noticing requirement as specified under Section 2.3.3.5B is not required.

**2.3.2.4 Agendas and Agenda Packets -- City Boards, Commissions and Committees**

- A. Agenda and Agenda Packet. At least seven (7) calendar days before a regular meeting of any City Board, Commission or Committee, staff shall post, on the City's web site and in a location that is freely accessible to members of the public, an Agenda and Agenda Packet for the meeting.
- B. Amended Agenda with Nonsubstantive Changes. No later than seventy-two (72) hours before a regular meeting, staff may post an amended Agenda to make administrative, nonsubstantive changes to the Agenda.
- C. Amended Agenda with Substantive Changes to a Recommendation.
1. No later than seventy-two (72) hours prior to a regular meeting, staff may post, on the City's web site and in a location that is freely accessible to members of the public, an amended Agenda with substantive changes to a recommendation on the Agenda.
  2. Prior to considering the item with substantive changes, the City Board, Commission or Committee shall determine by a majority vote under Orders of the Day, whether the item should be heard and discussed, or deferred. If the City Board, Commission or Committee determines that the amount of notice to the public is appropriate for the item, it may choose to hear and discuss the item with substantive changes to the recommendation, but action should be deferred; if the City Board, Commission or Committee determines that additional noticing is warranted, it may defer the item.
- D. Agenda Items Added within 72 Hours. No items may be added to an Agenda within 72 hours prior to the regular meeting except as follows, and consistent with the Brown Act.
1. The City Board, Commission or Committee may discuss and/or act on an item not appearing on the Agenda only in the following circumstances as allowed by the Brown Act:
    - a. When a majority decides there is an "emergency situation" as defined under the Brown Act;
    - b. When the City Board, Commission or Committee makes a good faith, reasonable determination by a two-thirds vote of the body, or if less than two-thirds of the members are present, a unanimous vote of those present, that: 1) there is an immediate need to take action; and 2) the need to take action arose after the posting of the Agenda; or

- c. When an item appeared on the Agenda of, and was continued from, a meeting held not more than five (5) days earlier.
2. The item may then be placed on the Agenda, and the body may discuss and act on the added item. A waiver of the document noticing requirement as specified under Section 2.3.3.5B is not required..

### **2.3.2.5 Special Meetings for all Legislative Bodies**

- A. Special Meeting. A "special meeting" means any meeting of the legislative body held at a different time or place than a regularly scheduled meeting for that body. This includes study sessions at which no action is scheduled to take place.
- B. Calling of a Special Meeting. A presiding officer or a majority of the members of the body may call a special meeting with four (4) calendar days' notice to the public. The City Clerk or other appropriate staff shall post, on the City's web site and in a location that is freely accessible to members of the public, an Agenda and Agenda Packet for the meeting.
- C. Calling of a Special Meeting with Less than Four (4) Calendar Days' Notice. A special meeting is permitted on less than four (4) calendar days' notice to the public but with at least twenty-four (24) hours' notice only when the members of the body make a good faith, reasonable determination by a two-thirds vote of the body, or if less than two-thirds of the members are present, a unanimous vote of those present, that an issue has arisen that must be resolved in fewer than four (4) calendar days.

### **2.3.2.6 Staff Memoranda**

- A. Staff Memoranda to Council from Staff Reporting to the City Manager.

Memoranda from departments and offices reporting to the City Manager shall include sections on "Policy Alternatives" and "Fiscal/Policy Alignment," as determined by the City Manager.

- B. Supplemental Staff Memoranda.

1. Providing Additional Information. Supplemental staff memoranda to all bodies that provide additional information only and do not change the staff recommendation on an Agenda item may be posted on the City's web site at any time before a meeting.

2. Substantively Changing the Staff Recommendation.

- a. For City Council. Supplemental staff memoranda that substantially change the staff recommendation to the City Council may be posted on the City's web site no later than the end of the business day on the Thursday before the meeting. If the Rules and Open Government Committee has not already approved a waiver of the document noticing requirements, the majority of the City Council must agree to waive the applicable document noticing requirements for the memorandum.
- b. For Decision-Making Bodies. Supplemental staff memoranda that substantially change the staff recommendation may be posted on the City's web site no later than four (4) days before the meeting, but the majority of the Decision-Making Body must agree to waive the applicable document noticing requirements for the memorandum.
- c. For Council Committees and City Boards, Commissions and Committees. Supplemental staff memoranda that substantially change the staff recommendation may be posted on the City's web site no later than four (4) days before the meeting; the Council Committee, City Board, Commission or Committee may choose to hear and discuss the item, but action should be deferred.

C. Cost/Benefit Evaluations of a Public Subsidy of \$1 Million or More.

1. A staff report in the form of an information memorandum addressed to the City Council shall be posted on the City's web site twenty-eight (28) calendar days in advance of the City Council meeting at which a Public Subsidy is to be considered, unless the Rules and Open Government Committee has permitted a waiver of this requirement. The staff report and any supporting documents shall be posted on the City's web site and made available for inspection and copying.
2. The staff report for a cost/benefit evaluation of a Public Subsidy shall include the following information:
  - a. **Accountability:** The options available if the projected returns do not occur and an after-action report describing the extent to which the proposal is actually generating the outcomes predicted.
  - b. **Net fiscal impact:** A calculation of tax revenues generated by the Public Subsidy minus tax revenues lost.
  - c. **Net job impact:** If the proposed recipient of the Public Subsidy is an employer, whether the employer provides health insurance and

the number of jobs to be generated as a result of the project receiving the Public Subsidy in each of the following annual salary categories: \$1 to \$20,000; \$20,000 to \$40,000; \$40,000 to \$60,000; \$60,000 to \$80,000; and \$80,000 and over.

- d. Housing impact: If the proposed Public Subsidy will impact the City's housing stock: (1) The number of housing units constructed or demolished as part of the project, categorized by level of affordability, and (2) an estimate of the number of ELI (Extremely Low Income) housing units that would be required for employees hired to implement the project.
- e. Source of funds: Information describing the source of funds and any restrictions on the use of funds.
- f. Neighborhood impacts: Information about the impact on neighborhoods, including data contained in environmental impact reports and traffic studies as well as impacts on other public infrastructure and services such as parks, community centers and libraries.

### **2.3.2.7 Memoranda from Members of Legislative Bodies**

- A. Memoranda by members of the City Council, Council Committees, Decision-Making Bodies and City Boards, Commissions and Committees may be distributed by the member, but only during normal business hours as posted by the City Clerk.
- B. Memoranda From More than 1 Member of the Legislative Body.
  - 1. Memoranda from members of the legislative body related to Agenda items before the body may be signed by more than one (1) member and shall be posted on the City's web site seventy-two (72) hours before a regular meeting.
  - 2. If the memorandum is distributed fewer than seventy-two (72) hours before the meeting, the body must determine by majority vote, before actually considering the item, whether the item should be heard or deferred. If the body determines that the amount of notice to the public is appropriate for the late memorandum, it may choose to hear and act upon the item; if the body determines that additional noticing is warranted, it may defer the item.
  - 3. In no event shall a memorandum be signed by a majority of the members of the body.

- C. Memoranda From One Member of the Legislative Body. A memorandum signed by one member of the body related to an Agenda item may be distributed at any time prior to the meeting of the body, but distribution at least seventy-two (72) hours before the meeting is encouraged.

**2.3.2.8 Outreach for City Council Meetings**

The following criteria should be used as guidelines for determining when an Agenda item is of "Significant Public Interest" and the type of outreach required:

- A. Criteria 1: Substantial expenditures of public funds (\$1 million or more). Email to appropriate stakeholders, community meetings, and/or notice in appropriate newspapers may be appropriate.
- B. Criteria 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. Web site posting and email to appropriate stakeholders is required, while community meetings and notice in appropriate newspapers may be appropriate.
- C. Criteria 3: Consideration of proposed changes to service delivery, programs, staffing that may have impacts to community services and have been identified by staff, City Council or a community group that requires special outreach. Web site posting, email to appropriate stakeholders, community meetings and notice in appropriate newspapers are required.

**2.3.2.9 Requirements for Non-Governmental Bodies**

- A. Lead City Department. Each Non-Governmental Body shall be assigned to a "lead" City Department.
- B. Non-Governmental Body Receiving Annual Financial Assistance. A Non-Governmental Body that receives annual financial assistance from the City of at least the amount of the City Manager's contracting authority shall:
1. Post financial reports on the Non-Governmental Body's web site.
  2. Submit information and cooperate with the City, which will conduct an annual financial scan that reviews the Non-Governmental Body's financial condition based on its audited financial statements.
  3. If the annual financial scan identifies the need for corrective action, submit information and cooperate with the City and the lead department in preparing additional reports to the Council Committee overseeing financial matters with updates on the corrective actions being taken.



4. If the financial scan identifies any issues of concern, forward the report to the Council Committee most appropriate for oversight of the activities for which the Non-Governmental Body is providing services.
  5. In addition, the staff of the lead City Department shall meet regularly with the Non-Governmental Body to review contract issues and develop processes to address any concerns associated with a Non-Governmental Body.
- C. Non-Governmental Body Operating or Maintaining City Facility with Value over \$5 Million. For a Non-Governmental Body that operates or maintains a City facility with a value over \$5 million for City purposes, the lead City Department shall:
1. Post reports at least annually, detailing compliance with contractual requirements for facility maintenance.
  2. Report to the Council Committee overseeing financial matters any facility maintenance deficiency that would impede the public's use of or jeopardize the physical integrity of the facility.

#### **2.3.2.10 Recording Meetings**

- A. City Council and Council Committee Meetings. The meetings of the City Council and Council Committees shall be video-recorded, except when a City Council meeting is called to order for the sole purpose of either convening or reporting out on the results of a closed session. The video recordings shall be retained for at least two (2) years.
- B. Decision-Making Bodies and City Boards, Commissions and Committees. The Planning Commission meetings shall be video-recorded and the video recordings shall be retained for at least two (2) years. The meetings of every other City Board, Commission and Committee and Decision-Making Body shall be audio-recorded and the audio recordings shall be retained for at least two (2) years.

#### **2.3.2.11 Minutes**

- A. City Council. A synopsis of a regular City Council meeting shall be posted prior to the next regular meeting. Action minutes of a regular City Council meeting shall be posted as soon as possible.
- B. Council Committees. Action minutes of a regular Council Committee meeting shall be posted five (5) calendar days before the meeting at which the City Council will approve the Committee's report or the City Council will defer the report.

- C. Decision-Making Bodies and City Boards, Commissions and Committees. Action minutes of a regular meeting of a Decision-Making Body or City Board, Commission or Committee shall be posted within ten (10) calendar days after the date of the regular meeting.

**2.3.2.12 Public Testimony**

The Chair of the meeting may set such time limits for public testimony as is reasonable under the circumstances.

**2.3.2.13 Matrix of Public Meeting Requirements**

A matrix summarizing the public meeting requirements as specified in this Section 2 of this Consolidated Open Government and Ethics Resolution is included below.

## MATRIX OF PUBLIC MEETING REQUIREMENTS

Meeting Requirements	City Council	Council Committees	Decision-Making Bodies (Quasi-Judicial)	Boards, Committees Commissions	Other Advisory Entities
1. Agenda Posting (Regular Meeting)	10 days; exceptions may be requested from Rules if within Brown Act; amended agendas allowed if within Brown Act	7 days in advance; 5 days for Rules	7 days** amended agendas allowed if within Brown Act	7 days	3 days
2. Staff Reports	10 days; exceptions may be requested from Rules or City Council if within Brown Act	7 days in advance; 5 days for Rules; exceptions may be requested from the Committee	7 days	7 days	No posting requirement
3. Cost Benefit of Public Subsidy (\$1M or More)	Info Memo 28 days; Staff Reports 10 days	7 days in advance; 5 days for Rules	NA	7 days	NA
4. Supplemental Staff Reports	Informational Anytime; Substantive Changes: Exceptions may be requested from Rules, or City Council if posted Thursday prior to meeting	Informational Anytime; Substantive Changes prior to 4 days: Committee may hear the item or defer it; but action should be deferred	When necessary, presented at the Evidentiary Hearing	Informational Anytime; Substantive Changes prior to 4 days: May hear the item or defer it; but action should be deferred	No posting requirement
5. Memos from Member(s) of the Body	More than 1 signature 72 hours  Single signatures anytime but encouraged to be ≥ 72 hours	More than 1 signature 72 hours  Single signatures anytime but encouraged to be ≥ 72 hours	NA	More than 1 signature 72 hours  Single signatures anytime but encouraged to be ≥ 72 hours	No distribution deadline
6. Agenda Posting (Special Meeting, Including Study Session)	4 days, unless 2/3 of the members determine that an issue must be resolved in less than 4 days, then no less than 24 hours	4 days, unless 2/3 of the members determine that an issue must be resolved in less than 4 days, then no less than 24 hours	4 days, unless 2/3 of the members determine that an issue must be resolved in less than 4 days, then no less than 24 hours	4 days, unless 2/3 of the members determine that an issue must be resolved in less than 4 days, then no less than 24 hours	24 hours
7. Recording	Video record and maintain for at least 2 years*	Video record and maintain for at least 2 years	Video record Planning Commission; audio record all others	Audio record and maintain for at least 2 years	May audio record but not required
8. Public Testimony	At Chair's discretion; May set reasonable limits	At Chair's discretion; May set reasonable limits	At Chair's discretion; May set reasonable limits	At Chair's discretion; May set reasonable limits	At Chair's discretion; May set reasonable limits
9. Minutes	Synopsis posted by next meeting; Action Minutes as soon as possible	Action Minutes posted 5 days before meeting at which Council will hear Committee's report; if not posted in time, report will be deferred	Action Minutes; Post within 10 days of holding meeting	Action Minutes; Post within 10 days of holding meeting	No requirement

\*Except if Council Meeting is called to order for the sole purpose of either convening or reporting out on the results of a closed session.

\*\*Not required to specify "Recommended Action" on agendas or list all documents for each item.

### **2.3.3 Agenda Packet**

#### **2.3.3.1 City Council Agenda Packet Required to Include**

Unless the Rules and Open Government Committee has agreed to waive these requirements for a meeting of the City Council, the Agenda Packet must include:

- A. Any memorandum pertaining to a matter to be considered at the meeting (with the exceptions listed below in Section 2.3.3.5 of this Section 2 of this Consolidated Open Government and Ethics Resolution);
- B. Any contract in substantially final form;
- C. Any ordinance in substantially final form, except those relating to an appropriation;
- D. Any resolution in substantially final form, except those: 1) relating to appropriation-related funding sources; 2) giving authority to negotiate and/or execute contracts; or 3) memorializing a decision in an administrative appeal hearing prior to the conduct of the hearing ; and
- E. The report of any outside consultant pertaining to a matter to be considered at the meeting.

#### **2.3.3.2 City Council Agenda Packet Draft Documents to be Noted**

To the extent possible, every page of a draft document shall state that the document is a draft and advise any person seeking a final version of the document to contact the Office of the City Clerk at a particular telephone number and/or email address. In addition, every City Council Agenda shall note that documents attached to or referenced in the City Council Agenda may not be final documents and that final documents may be obtained by contacting the Office of the City Clerk at a particular telephone number and/or email address.

#### **2.3.3.3 Public Inspection of City Council Agenda Packet; Website**

Any document provided to the City Council shall be included in the Agenda Packet that is available for public inspection and copying in the Office of the City Clerk during usual business hours. A document distributed or intended to be distributed in connection with a matter on the City Council Agenda may also be available on the City's web site.

#### **2.3.3.4 Exemptions from Inclusion in City Council Agenda Packet**

The Agenda Packet need not include:

- A. Any material exempt from public disclosure; and
- B. Presentation and/or discussion materials including handouts used at a meeting of the body.

**2.3.3.5 Distribution of Certain Documents Allowed in Different Time Frame -- for Council, Council Committees, Decision-Making Bodies, and City Boards, Commissions and Committees**

The following documents need not be distributed with the Agenda Packet but will be distributed as soon as possible, but before the action is taken on the matter:

- A. The following staff memoranda for City Council meetings, which may be distributed without a waiver of noticing requirements from the Rules Committee:
  - 1. Planning Commission action where there was no significant change to the project description provided in the exhibit memorandum;
  - 2. Contract Bid Awards or procurement contracts where the initial memorandum was already distributed;
  - 3. Supplemental memoranda where additional information has been received after the initial memorandum was released but does not affect the recommendation of staff;
  - 4. Emergency items that may need to be added to the Agenda to preserve public welfare (i.e., health, safety and financial matters) and that need immediate Council action;
  - 5. Grant application memoranda where the Administration needs Council authority to submit applications and grant deadlines do not allow conformance with the 10-day requirement;
  - 6. Items where Council action is required to satisfy a legal deadline;
  - 7. Items heard by a Council Committee that require full Council action such as:
    - a. Emergency repair funding;
    - b. Appointments to boards, commissions, committees and other bodies when a timely appointment is needed;
    - c. Approval of the City's position on legislation, if a timely response is necessary; and
    - d. Implementation of arbitration decisions and approval of tentative labor agreements;

8. Reports regarding the second reading of an ordinance, provided that no substantial/material changes have been made from the ordinance posted for the first reading of the proposed ordinance or any substantive modifications approved at the first reading of a proposed ordinance.
- B. Waiver of Document Noticing Requirement. Any other document for which a waiver has been permitted in accordance with Section 2.3.3.6 below.
- C. Memos Prepared by Members of the Body. Memoranda prepared by members of the body for which the Agenda is being distributed.

**2.3.3.6 Waiver of Noticing Requirements for Documents in Agenda Packet**

- A. Bodies may waive the deadlines for distribution of documents pursuant to the following procedures:
  1. City Council. Either the Rules Committee or the City Council may permit a waiver of these requirements if the document relates to an item to be considered by the City Council.
    - a. If the Rules Committee has not already permitted a waiver, the Council must determine by a majority vote before actually considering the item, whether the item should be heard or deferred.
    - b. If the Council determines that the amount of notice to the public is appropriate for the document, it may choose to hear and act upon the item; if the Council determines that additional noticing is warranted, it may defer the item.
  2. Council Committee. The Council Committee may permit a waiver of these requirements if the document relates to an item to be considered by the Council Committee.
    - a. The Council Committee must determine by a majority vote before actually considering the item, whether the item should be heard or deferred.
    - b. If the Council Committee determines that the amount of notice to the public is appropriate for the document, it may choose to hear and act upon the item; if the body determines that additional noticing is warranted, it may defer the item.
- B. All Other Bodies. Decision-Making Bodies and City Boards, Commissions or Committees, other than Council Committees, may not permit a waiver of these

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requirements. In the event a waiver is required, the Decision-Making Body or City Board, Commission or Committee, other than Council Committees, must seek the approval for such waiver from the Rules Committee or the City Council.

## **SECTION 3. CLOSED SESSION**

### **3.0 LEGISLATIVE HISTORY**

Closed Session requirements were adopted initially by the City Council on April 8, 2008, as set forth in City Council Resolution No. 74312 (the Resolution for Rules of Conduct of Council Meetings), and applied to other bodies as appropriate, including the Civil Service Commission, Deferred Compensation Advisory Committee, Elections Commission, Federated Employees Retirement Board, Police and Fire Retirement Board and San Jose Arena Authority by adoption of Resolution No. 74414 on June 10, 2008, which resolution was repealed and superseded by Resolution No. 75978 adopted on September 13, 2011. This resolution is repealed by, revised, and incorporated into this Consolidated Open Government and Ethics Resolution.

### **3.1 PURPOSE**

The purpose of this Section 3 of the Consolidated Open Government and Ethics Resolution is to further the goals of the Open Government Ordinance by outlining procedures regarding the noticing, conduct and reporting of actions taken in Closed Session meetings of the City Council and other related bodies as permitted by the Brown Act.

### **3.2 DEFINITIONS**

#### **3.2.1 Definitions**

The definitions set forth in this Section 3.2 shall govern the application and interpretation of this Section 3 of this Consolidated Open Government and Ethics Resolution, entitled "Closed Session."

#### **3.2.2 Brown Act**

"Brown Act" means the Ralph M. Brown Act (Government Code Sections 54950 et seq.), as amended. Except as otherwise provided here, the terms and provisions of this Section 3 of this Consolidated Open Government and Ethics Resolution shall be interpreted in accordance with the applicable definitions and provisions of the Brown Act and any administrative or judicial interpretations of the Brown Act.

#### **3.2.3 City Council**

"City Council" means the San José City Council or any other legislative body that is solely made up of all of the San José City Councilmembers.



### **3.2.4 Council Appointees**

“Council Appointees” means the City Manager, City Attorney, City Clerk, City Auditor, and Independent Police Auditor.

## **3.3 GENERAL PROVISIONS**

### **3.3.1 Agenda Disclosures**

- A. Information to be Described in Agenda Disclosures. Agenda disclosures shall not be misleading. No discussion may take place in closed session that has not been disclosed on the agenda. Topics described on closed session agendas shall follow the discretionary provisions of the Brown Act at a minimum. The following additional information is required:
1. License/Permit: If the purpose of closed session is to discuss and determine whether an applicant for a license or license renewal, who has a criminal record, is sufficiently rehabilitated to obtain the license, the type of license or permit at issue must be identified in addition to the number of applicants.
  2. Real Property Negotiations: If the purpose of closed session is to meet with the City Council’s negotiator before the purchase, sale, exchange, or lease of real property or for the City Council to grant authority to its negotiator regarding the price and terms of payment for purchase, sale, exchange, or lease, whether the likely value of the property at issue exceeds \$1 million must be disclosed in addition to the street address, parcel number or other unique reference of the property, the name(s) of the negotiator(s) or his or her agent(s) or designee(s) attending closed session, the negotiating parties and whether instructions to the negotiator will concern price, terms of payment, or both.
  3. Existing Litigation: If the purpose of closed session is to confer with or receive advice from the City Council’s legal counsel regarding pending litigation when discussion in open session concerning those matters would prejudice the position of the City Council in the litigation, the amount of money or other relief sought in the lawsuit must be provided in addition to the claimant’s name, the names of the parties involved and the case or claim numbers (unless disclosure would jeopardize service of process or existing settlement negotiations).
  4. Liability Claims: If the purpose of closed session is to discuss a claim for the payment of tort liability losses, public liability losses, or workers’ compensation liability, the amount of money or other relief sought in the

claim must be provided in addition to the claimant's name and the name of the agency against whom the claim is filed.

5. Public Appointment/Employment: If the purpose of closed session is to consider the appointment or employment of a public employee, the department or agency to which the appointment will be made, in addition to the title of the position to be filled, must be provided.
  6. Public Employee Performance Evaluation: If the purpose of closed session is to consider the evaluation of a public employee, the name of the employee, in addition to the title of the position of the employee being reviewed, must be provided.
  7. Public Employee Discipline/Dismissal/Release: If the purpose of closed session is to consider the discipline (which includes potential reduction of compensation) or dismissal of a public employee or to hear complaints or charges brought against the employee by another person unless the employee requests a public session, the number of employees and the agency or department involved must be disclosed.
  8. Labor Negotiations: If the purpose of closed session is to meet with the City Council's designated representatives regarding the salaries, salary schedules, or compensation paid in the form of fringe benefits of its represented and unrepresented employees, and, for represented employees, any other matter within the statutorily-provided scope of representation, the nature of the negotiations, such as the issues to be discussed (i.e. wages/salaries, hours, working conditions, benefits or some combination) as well as the name of the existing contract or memorandum of understanding and information on how to obtain a copy must be provided, in addition to the names of the designated representative(s) or his or her agent(s) or designee(s) attending the closed session and the name of the employee organization representing the employees in question or the position and title of the unrepresented employee(s) who is (are) the subject of the negotiations.
- B. Real Property Negotiations. Closed session discussions about real property negotiations shall not address any subjects other than instructions from the City Council to its negotiators regarding price and terms of payment, with an understanding that price includes discussion on potential use of property. Moreover, closed session discussions about the purchase of real property or any proposed development of property shall not include re-budget decisions.
- C. Filing a Brief as a Friend of the Court. Approval given to legal counsel to file a brief as a friend of the court in any form of litigation shall be discussed in open session unless the City Attorney advises the City Council that, because of

potential liability to the City, filing a brief as a friend of the court should be discussed in closed session.

### **3.3.2 Closed Session Disclosures**

#### **A. Statement of Reasons Before Closed Session**

1. **Open Session.** Before any closed session, the City Council shall meet in open session to (a) state the reason for closed session for each item on the agenda; and (b) cite the statutory authority for closed session for each item on the agenda, including the specific section of the Brown Act or other legal authority. The statement shall not be misleading. The City Council shall discuss only those matters covered in its statement. Moreover, for real property negotiations, the City Council shall identify in open session the properties at issue, any development plans for the property (within the constraints of the California Environmental Quality Act) and source(s) of payment for the property.
2. **Addition of an Item to Closed Session Agenda.** If an item is added to the closed session Agenda (i) upon a determination by a majority vote of the City Council that an emergency situation exists; (ii) upon a determination by a 2/3 vote of the members of the Council present at the meeting, or if less than 2/3 of the members are present, on a unanimous vote of those members present, that there is a need to take immediate action and that the need for action came to the attention of the City Council after the agenda was posted; or (iii) the item was posted for a prior meeting of the City Council occurring not more than five (5) calendar days before the date action is taken on the item and at the prior meeting the item was continued to the meeting at which action is being taken, the City Council shall state in open session: (a) the fact of the addition to the agenda; (b) why the item is being added; (c) the reason for closed session on the item; and (d) the statutory authority for closed session on the item.
3. **Emergency Situations.** Emergency situations are limited to: (a) a work stoppage, crippling activity or other activity that severely impairs public health, safety or both; or (b) a crippling disaster, mass destruction, terrorist act, or threatened terrorist activity that poses peril so immediate and significant that requiring the City Council to provide one-hour notice before holding an emergency meeting under this Section could endanger the public health, safety or both.
4. **Actions Subject to Invalidation.** Only items on the written agenda or added pursuant to this Section shall be discussed during closed session. Any action taken on an item that is not described in accordance with this

Section shall be subject to invalidation pursuant to the provisions of the Brown Act.

B. Approval in Open Session of Certain Closed Session Discussions

1. Purchase of Real Estate. All proposed agreements for the purchase or sale of real estate shall be approved by the City Council in open session, with the cumulative amount of the purchase clearly indicated on the Council agenda.
2. Proposed Contracts with Employees and Council Appointees. All proposed terms of contracts with represented and unrepresented employees and the Council Appointees shall be approved by the City Council in open session.
3. Proposed Settlement of Litigation or Claims \$50,000 and Higher. All proposed settlements of litigation or claims for which the City agrees to pay \$50,000 and more shall be approved by the City Council in open session.

C. Disclosure After Closed Session Discussions and Actions

1. After every closed session, the City Council shall meet in open session to make the following disclosures:
  - a. Approval of Certain Direction to Legal Counsel. Approval given to its legal counsel to defend, or seek or refrain from seeking appellate review or relief, or to enter as a friend of the court in any form of litigation must be reported in open session at the public meeting during which the closed session is held. The report must identify, if known, the adverse party or parties and the substance of the litigation. In the case of approval given to initiate or intervene in an action, the announcement need not identify the action, the defendants, or other particulars, but must specify that the direction to initiate or intervene in an action has been given and that the action, the defendants, and the other particulars will, once formally commenced, be disclosed publicly.
  - b. Settlement Less than \$50,000. Approval given to its legal counsel of a settlement where the City agrees to pay less than \$50,000 of pending litigation at any stage prior to or during a judicial or quasi-judicial proceeding must be reported after the settlement is final, as specified below:

- (1) If the City Council accepts a settlement offer signed by the opposing party, the City Council must report its acceptance and identify the substance of the agreement in open session at the public meeting during which the closed session is held.
    - (2) If final approval rests with some other party to the litigation or with the court, then as soon as the settlement becomes final, the City Council must disclose the fact of that approval, and identify the substance of the agreement.
  - c. Agreements Regarding Claims for Less than \$50,000. Final agreements reached as to claims where the City agrees to pay less than \$50,000 must be reported as soon as reached in a manner that identifies the name of the claimant, the name of the person or entity claimed against, the substance of the claim, and any monetary amount approved for payment and agreed upon by the claimant.
  - d. Employment Status of Council Appointee. Action taken to appoint, employ, discipline, dismiss, accept the resignation of, or otherwise affect the employment status of a Council Appointee in closed session must be reported at the public meeting during which the closed session is held. Any report required by this paragraph must identify the title of the position. The general requirement of this paragraph notwithstanding, the report of discipline, dismissal or the nonrenewal of an employment contract will be deferred until the first public meeting following the exhaustion of administrative remedies, if any.
  - e. Appraisals for Condemnation. Appraisals used in the condemnation of property must be disclosed after the condemnation proceedings have concluded.
  - f. Rejected Claims. Formal claims rejected by the City Council must be reported in a manner that identifies the name of the claimant, the name of the person or entity claimed against and the substance of the claim.
2. Disclosure of Discussion. The City Council may, upon a determination that disclosure is in the public interest and by motion and majority vote, disclose any portion of its discussion that is not confidential under federal or state law. The disclosure shall be made through the Chair of the City Council or his or her designee who was present in the closed session.

3. Information Included in Disclosures. Disclosures may be made orally or in writing, but shall be supported by copies of any contracts, settlement agreements, or other documents related to the action that was approved in the closed session. The supporting documents that embody the information required to be disclosed, except for documents otherwise required to be kept confidential by state or federal law, shall be provided to any person who has made a written request about that item or who has made a standing request for all such documentation as part of a request for notice of meetings.
4. Summary of Disclosures. A written summary of the disclosures required to be made shall be posted by the close of business on the next business day after the open session in the place where the agendas of the City Council are posted.

### **3.3.3 Recording Closed Session**

Direction to real estate negotiators given by the City Council in closed session shall be recorded only for the purpose of preparing and releasing a redacted transcript upon request if a Brown Act violation has been alleged. Redacted transcripts shall be released within thirty (30) calendar days of the request.

### **3.3.4 Other Bodies Permitted To Hold Closed Session**

The Civil Service Commission, Deferred Compensation Advisory Committee, Ethics Commission, Federated Employees Retirement Board, Police and Fire Retirement Board, San José Arena Authority, and other bodies as appropriate may also hold closed session consistent with this Section 3 of this Consolidated Open Government and Ethics Resolution, with the following two exceptions:

- A. None of these bodies may file a friend of the court brief independent of the City Council.
- B. Although these bodies shall obtain open session approval of closed session decisions on real estate negotiations, the approval may be given at an open meeting of a subcommittee of the body.

## **SECTION 4. PUBLIC RECORDS**

### **4.0 LEGISLATIVE HISTORY**

Provisions in this Section 4 were originally adopted as City Council Policy 0-33, entitled "Public Records Policy and Protocol," on January 27, 2004, and revised on March 2, 2010, which policy is repealed by, revised, and these provisions incorporated into this Consolidated Open Government and Ethics Resolution. Portions of this Section 4 were also adopted by the City Council under Resolution No. 75091 on August 18, 2009, Resolution No. 75140, adopted on October 20, 2009, and Resolution No. 75292 and Resolution No. 75293 on March 2, 2010, and further amended by the adoption of Resolution No. 76496 on December 4, 2012.

### **4.1 PURPOSE**

The purpose of this Section 4 of this Consolidated Open Government and Ethics Resolution is to affirm the public's right to access City Records and to set forth the procedures that will facilitate accessibility of information to members of the public.

The public's right to access information concerning the conduct of the people's business is a fundamental and necessary right. A City 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 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 affirm the public's right to access City 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 afforded to individuals and it is the intent of the City Council to promulgate a process that strikes an appropriate balance between the objectives of open government and the individual's right of privacy.

### **4.2 DEFINITIONS**

#### **4.2.1 Definitions**

The definitions set forth in this Section 4.2 shall govern the application and interpretation of this Section 4 of this Consolidated Open Government and Ethics Resolution, entitled "Public Records."

#### **4.2.2 Brown Act**

"Brown Act" means the Ralph M. Brown Act (Government Code Sections 54950 et seq.), as amended. Except as otherwise provided here, the terms and provisions of this Section 4 of the Consolidated Open Government and Ethics Resolution shall be

interpreted in accordance with the applicable definitions and provisions of the Brown Act and any administrative or judicial interpretations of the Brown Act.

#### **4.2.3 City Council**

"City Council" means the San José City Council or any other legislative body that is solely made up of all of the San José City Councilmembers.

#### **4.2.4 City Records**

"City Records" 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. City Records also include any recorded and retained communications regarding official City business sent or received by the Mayor, Council members or their staffs via personal devices not owned by the City or connected to a City computer network. 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. For the purposes of this definition, "City" shall mean any entity controlled by the City Council.

#### **4.2.5 Open Government Manager**

"Open Government Manager" means the person designated by the City Manager to be responsible to coordinate interdepartmental responses to Public Records Act requests and assist on complex requests.

#### **4.2.6 Public Information**

"Public Information" means the content of "public records" as defined in the Public Records Act (California Government Code Sections 6250 et seq.), whether provided in documentary form, oral communication or other format that contains public information such as computer tape or disc or video or audio recording.

#### **4.2.7 Public Records Act**

"Public Records Act" means the California Public Records Act (Government Code Sections 6250 et seq.), as amended. Except as otherwise provided here, the terms and provisions of this Section 4 of this Consolidated Open Government and Ethics Resolution shall be interpreted in accordance with the applicable definitions and provisions of the Public Records Act and any administrative or judicial interpretations thereof.



#### **4.2.8 Request for Proposals**

“Request for Proposals” means any formal solicitation by the City for proposals, quotes or other information from potential contractors, vendors or consultants relating to a City contract.

#### **4.2.9 Rules and Open Government Committee**

“Rules and Open Government Committee” (alternatively, the “Rules Committee”) means the Council Committee established pursuant to the Council Rules of Conduct Resolution, or its successor, that, among other things, considers and makes recommendations to the Council on disputes over Public Records Act requests.

#### **4.2.10 Writing**

“Writing” includes any handwriting, typewriting, printing, photocopying, 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.

### **4.3 GENERAL PROVISIONS**

#### **4.3.1 General Procedures**

##### **4.3.1.1 Public Records Coordinators**

- A. Records Coordinator to be Designated. Every office or department shall designate as a records coordinator a person knowledgeable about the affairs of the department who has custody of records and information relating to the responsibilities and work performed by the office or department.
- B. Role of Records Coordinator. The role of the Records Coordinator is to provide information, including oral information, to the public about the office or department's operations, plans, policies and positions. The Records Coordinator also is responsible for ensuring department members have received basic training in handling requests for public records.
- C. Requests Involving Multiple Departments. If a request seeks information from more than one office or department, the request shall be forwarded to the Open Government Manager and City Attorney's Office as well as the designated records coordinators of all affected offices/departments. The Open Government Manager, in consultation with the City Attorney's Office shall coordinate and respond to the request with the assistance of the other offices/departments.

- D. Records Coordinator. For the purposes of this Section 4 of this Consolidated Open Government and Ethics Resolution, "Records Coordinator" shall mean the person responsible for fulfilling a Public Records Act request, whether it be a departmental Records Coordinator, the Open Government Manager, or a representative of the City Manager's Office or the City Attorney's Office.

#### **4.3.1.2 Form of Request for City Records**

There is no specific form that must be used to request City 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.

#### **4.3.1.3 City Manager's Office Coordination**

A request should be forwarded immediately to the Open Government Manager if it: (1) seeks information from more than one department; or (2) has been directed to a department that does not maintain or have custody of the records, and the receiving department does not know where to forward the request.

If a request for records is directed to a department that does not maintain or have custody of the requested records then the representative shall promptly forward the request to the responsible department or the Open Government Manager to identify the appropriate department, if the representative does not know where to direct the request.

The Open Government Manager will coordinate and respond to the request with the assistance of the appropriate Records Coordinators.

#### **4.3.1.4 City Attorney's Office Coordination**

Records Coordinators should contact their assigned City Attorney for guidance in situations including, but not limited to:

- A. Requests for records related to pending or potential litigation;
- B. Requests for records in which litigation is already in progress;
- C. When the records are proposed to be withheld.

#### **4.3.1.5 When City Records Must Be Open to Inspection**

Public records are open to inspection at all times during regular City business hours. If a member of the public requests to view a record which is readily available, the requestor shall be given the opportunity to look at the immediately available documents without delay.

**4.3.1.6 Immediacy of Response**

- A. Deadlines. The deadlines listed in this Section are appropriate for extensive or demanding requests but shall not be used to delay fulfilling simple or routine requests.
- B. Forwarding of Request. If a request for any Public Information is presented to a City employee who is not responsible for responding to the request, it shall be forwarded, within one (1) business day from the day on which it was received, to the designated Records Coordinator, or the coordinator's supervisor if the coordinator is out of the office that day.-
- C. Acknowledgment of Receipt. Within one (1) business day of receipt by the responsible Records Coordinator, acknowledgement of such receipt shall be made in writing to the requestor.
- D. Simple or Routine Requests. For simple or routine requests, the Records Coordinator shall provide the requested documents no later than two (2) business days after the date the Records Coordinator receives the request.
- E. Extensive or Demanding Requests. For extensive or demanding requests, no later than three (3) business days from the date the Records Coordinator acknowledges receipt of the request to the requestor, the Records Coordinator shall provide a written response to the requestor, which will include an estimate as to when the requested Public Information will be available. The requested information shall be provided within ten (10) calendar days of the date the Records Coordinator acknowledges receipt of the request to the requestor, unless this deadline is extended by mutual agreement.
- F. Requested Public Information Exempt. If the City believes that the requested Public Information or a portion of the requested Public Information is exempt, the Records Coordinator, in coordination with the City Attorney's Office, shall so determine and make a written response to the requestor as specified in Section 4.3.1.7 within ten (10) calendar days from the date the City received the request. The response shall 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.
- G. Extension of Deadline. In unusual circumstances, the Public Records Coordinator shall notify the requestor in writing that an extension of the ten (10) calendar day period for an additional period no longer than fourteen (14) calendar days is necessary. The Public Records Coordinator shall notify the requestor as soon as possible but no later than ten (10) calendar days from the date the City receives the request. This deadline may be extended by mutual agreement between the City and the requestor.

“Unusual circumstances” shall mean the following, but only to the extent reasonably necessary for 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 otherwise be extracted.
- H. Multiple City Records. In order to comply promptly with requests that involve multiple records, the Records Coordinator shall, upon request, release City Records as they become available, where such an approach is both practical and pertinent. This Section 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.
- I. Convenient, Efficient and Economical Access. 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 shall 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.
  2. Reproduce electronic copies of public information in a format that is generally recognized as an industry standard format.

#### **4.3.1.7 Withheld Information**

- A. Information that is exempt from disclosure shall be redacted or otherwise segregated so that the nonexempt portion of requested Public Information may be made available.
- B. If the City determines that the public interest is served by not disclosing the information, the City, in consultation with the City Attorney, shall provide, in writing, a detailed justification.

- C. In addition, if the justification for withholding the information will expire at some point, the City shall notify the requestor, in writing, that the record will be subject to disclosure at a later time.
- D. Withholding of information shall be kept to a minimum.

#### **4.3.1.8 Form of City Records Provided**

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

#### **4.3.1.9 Advice from the City Attorney's Office**

Upon request, the City Attorney shall release a summary document that explains any written interpretation of the Public Records Act, the Ralph M. Brown Act or any provision of this Section 4. 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.

#### **4.3.1.10 Records Retention**

This Section 4 does not obligate City departments to retain documents beyond the period of time designated for the department in the City's record retention policy.

In the event a request for records is received prior to its destruction under the City's record retention policy, the requested records will be provided.

### **4.3.2 Specific Procedures for Certain Types of Documents**

#### **4.3.2.1 Budget and Other Financial Information**

- A. Budgets. Proposed or final budgets for the City or any of its departments, programs or projects shall be subject to disclosure and shall be made available in electronic form.
- B. Payment Obligations and Actual Disbursements. 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 shall be subject to

disclosure, except that any information that is protected by privilege or other right provided under the law may be redacted.

#### **4.3.2.2 Code Enforcement Records**

A. Information Subject to Disclosure. The following information is public and shall be 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. 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.

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

C. Investigative Files. Investigative files are not public until after the case has been closed. However, any information within the investigative file of a closed case 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 shall be redacted before releasing the investigative file in response to a Public Records Act request.

#### **4.3.2.3 Contracts with the City**

A. Solicitation for Contracts

1. Correspondence. All correspondence regarding a solicitation for contracts with the City, including responses to Requests for Proposals, shall become the exclusive property of the City and are public records under

the Public Records Act. All documents that are sent to the City in connection with a solicitation for contracts with the City shall be 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 Public Records Act.

2. Proposals as Public Records. 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 may be considered a public record in its entirety.
  3. Bids Public upon Bid Opening. All formal bid responses shall become public upon bid opening and must be made available immediately after bid opening.
  4. Disclosure of Proposals. The City shall 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 shall be subject to public disclosure. If a proposer believes that there are portion(s) of the proposal which are exempt from disclosure under the Public Records Act, the proposer shall mark it as such and state the specific provision in the 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 shall plainly mark the information as "Trade Secret" and refer to the appropriate section of the Public Records Act which provides the exemption as well as the factual basis for claiming the exemption.
  5. Evaluator Information. After the notice of intent to award a City contract has been announced, the names of the evaluators and aggregated summaries of the evaluations or ratings shall be made available if requested; under no circumstances are the individual evaluations or ratings (also known as "score sheets") subject to disclosure.
- B. Negotiated Agreements. When the City 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 of \$500,000 or more; or (b) a term of ten (10) years or more; or (3) any franchise agreement, after the negotiations have been concluded, all documents exchanged and related to the position of the parties, including draft contracts, shall be made available for public inspection and copying upon request. This subsection 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 completion of negotiations, the executed contract, including the dollar amount of the contract, shall be made available for inspection and copying.

- C. Index of Location of Contracts. An index of the location of every contract currently held by the City, except for purchase orders, regardless of amount or who approved the contract, is available and open to public inspection at the City Clerk's Office. This information is not in a format where the information can be printed or distributed.

#### 4.3.2.4 Law Enforcement Information

- A. Reports Prepared by Law Enforcement. In complying with the requirements of the Public Records Act when responding to a request for a public record, the San José Police Department ("SJPD") shall provide a response that contains the information required to be released under the Public Records Act, subject to the obligations and limitations of the Public Records Act and other state and federal laws, including the right of privacy afforded to victims and others by the California Constitution. However, since the Public Records Act does not define clearly what constitutes the "substance" or "factual circumstances" of an arrest, complaint or request for assistance, subject to the limitations explained above, the SJPD shall provide the following information:

1. Substance. Information about the "substance" of complaint or request for assistance will include:
  - a. The type of crime or activity involved; and
  - b. The actions which constitute the elements of the crime.
  
2. Factual Circumstances. Information about the "factual circumstances" surrounding the crime or incident will include:
  - a. Whether the suspect is known or unknown to the victim;
  - b. Whether the crime appears to be gang-related, if the SJPD believes such disclosure is appropriate;
  - c. Whether force was used, and if so, the type of force used (e.g. physical force, baton, TASER, etc.) and the circumstances which resulted in the use of force (e.g. challenge to fight, resistance to arrest, etc.);
  - d. Whether any specialized resources (e.g. Helicopter, K-9, MERGE, Bomb or Units, etc.) provided significant assistance; and
  - e. Whether the suspect was arrested.



- B. Statistical Reports Prepared by the San José Police Department. The SJPD shall report the number and type of department-initiated complaints against SJPD officers, the number and types of cases in which discipline is imposed, and the nature of the discipline imposed. This report shall be maintained in a format which assures that the names and other identifying information of individual officers are not disclosed directly or indirectly. The report shall disclose the number and type of department-initiated complaints and how many complaints were received about any one officer so that the public can determine whether multiple complaints have been directed at a single officer within a calendar year as well as in a cumulative, five-year period.
- C. Statistical Reports Prepared by the Independent Police Auditor. The Independent Police Auditor shall produce and provide, no less often than every two (2) years, a report, kept separate from the personnel records of the SJPD, which reports the number and type of citizen-initiated complaints against SJPD officers, the number and types of cases in which discipline is imposed, and the nature of the discipline imposed. This report shall be maintained in a format which assures that the names and other identifying information of individual officers are not disclosed directly or indirectly. The report shall disclose the number and type of citizen-initiated complaints and how many complaints were received about any one officer so that the public can determine whether multiple complaints have been directed at a single officer within a calendar year as well as in a cumulative, five-year period.

#### 4.3.2.5 Personnel Information

- A. None of the following shall be exempt from disclosure under the Public Records Act or any other provision of California law where disclosure is not forbidden:
1. Job Pool and Employee Information. 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 or discipline;
    - b. Years of employment in the private and/or public sector;
    - c. Whether currently employed in the same position for another public agency;
    - 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. Employee Biography or CV. 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. Job Description. The job description of every employment classification.
4. Total Compensation. The total compensation, by category, paid to an employee, including salary and City-paid benefits.
5. Memorandum of Understanding. Any memorandum of understanding between the City or department and a recognized employee organization.
6. Performance-Based Increases or Any Bonus. The amount, basis and recipient of any performance-based increase in compensation, benefits or both, or any bonus, awarded to any employee.

B. Misconduct of City Officials

1. City Official. The term "City Official" for purposes of this Section shall mean the Mayor and Members of the City Council; any appointees of the City Council, unclassified staff members in the office of the Mayor or a Councilmember, the City Manager and his or her Assistant City Manager, Deputy City Managers, and heads of offices reporting to the City Manager and City Department heads.
2. Misconduct. The term "misconduct" for purposes of this Section includes dishonesty, misuse of City property or City funds, any violation of conflict of interest laws or policies, the City's Gift Policy or Discrimination and Harassment Policy, inexcusable neglect of duty, fraud in securing employment and unlawful political activity.
3. City Records Subject to Disclosure. 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, shall be subject to disclosure. Information that falls within the protection of any privileges or rights provided under the law may be redacted.
4. Not Limiting Access. Nothing in this Section shall be construed as limiting access to other disciplinary records as permitted by the Public Records Act.

C. Disciplinary Actions -- Regular Classified Civil Service Employees

1. Log. The Office of Employee Relations shall maintain a log of disciplinary actions taken by the City for regular classified civil service employees,

updated as frequently as possible and available for inspection. An item may be included in the log only upon issuance of a notice of discipline. The log shall 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 José Municipal Code, Council Policy or Administrative Policy) and any final disposition. Identifying information shall not be included in the log.

2. Not Limiting Access. Nothing in this Section shall be construed as limiting access to other disciplinary records as permitted by the Public Records Act.

#### **4.3.2.6 Complaints and Complaint Information**

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

#### **4.3.2.7 Disclosure of Litigation Materials**

- A. When litigation in which the City is a party is finally adjudicated or otherwise settled, records of communications between the City and the adverse party in the litigation shall be subject to disclosure including the text and terms of any settlement agreement between the parties.
- B. Notwithstanding subsection A above, such disclosure shall not apply to records that are otherwise privileged under federal or state law, such as attorney-client communications, or to records sealed by the court or where disclosure is otherwise limited by the court.
- C. Notwithstanding any exemptions or privileges otherwise provided by law, the following shall be disclosed:
  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.

#### **4.3.2.8 Common Exemptions from Disclosure**

There are certain categories of documents that are generally not subject to disclosure. These include, but are not limited to: (1) preliminary drafts of certain documents that are not retained by the City in the ordinary course of business; (2) records related to pending litigation; (3) attorney-client communications; (4) personnel records, medical information, or other similar records the disclosure of which would constitute an unwarranted invasion of personal privacy; (5) corporate financial and proprietary information, including trade secrets; and (6) records protected by State or Federal law.

#### **4.3.2.9 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, shall be subject to disclosure if they have been retained as of the time the request is made and no other exemption applies. This Section shall 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.

#### **4.3.3 Determination of Release or Withholding of Documents**

##### **4.3.3.1 Balancing Test**

The balancing test is used to determine whether the public interest is better served by releasing or withholding documents.

- A. Narrowly Construe the Balancing Test. It is the intention of the City 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 shall 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.
  
- B. Deliberative Process Privilege. 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. City 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 shall be 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.

C. City Records Not to be Withheld on Basis of Balancing Test. The following records shall 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;
6. Summary statistical reports;
7. Employee compensation;
8. City master plans;
9. Labor-management agreements;
10. Audit reports and responses;
11. Officials and employees financial 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; and

18. Published information.

D. City Records that may be Withheld upon Approval by Rules and Open Government Committee. The following records shall 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 violate personal privacy or intellectual property rights;
4. Procurement records after procurement activity has been concluded, excluding individual evaluator ratings and comments and 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;
7. Property inventories excluding inventories of firearms and security equipment; and
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.

**4.3.3.2 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."

**4.3.4 Fees and Appeal Process**

**4.3.4.1 Fees for Duplication**

- A. No Fee for Personnel Costs of Response. The work of responding to a request for Public Information and making Public Information available shall be considered part of the regular work duties of the City employee and no fee shall 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 Section 4 or in other state or federal laws.

- B. Cost Recovery Fee. The fee for photocopying any Public Information in response to any request to the City shall be set at a standard level of cost recovery as adopted by the City Council during the annual fee-setting process.
- C. Costs of City Staff. The actual direct hourly cost incurred by City staff shall 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.
- D. Estimate of Cost to Respond. Before any fees are incurred, the Records Coordinator shall notify the requestor of the estimated cost to respond, including a breakdown showing how those costs were determined, and the requestor shall agree to pay the estimated cost.
- E. Waiver of Costs. In accordance with the provisions of Section 1.17.015 of the San José Municipal Code, direct costs of duplication or the cost of programming and computer services may be waived as specified in the Schedule of Fees adopted by resolution of the City Council.
- F. Appeal of Costs. An individual 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.

#### **4.3.4.2 Appeals Process for Withholding of City Records**

A requestor of public records may appeal the decision of the department to withhold records pursuant to Section 12.21.430 of the San José Municipal Code if the requestor believes the release of the record is in the public interest.

#### **4.3.5 Applicability of Public Records Act**

##### **4.3.5.1 Applicability of Public Records Act**

The provisions of the Public Records Act supersede the provisions of this Consolidated Open Government and Ethics Resolution to the extent that the Public Records Act would provide greater or faster access.

**SECTION 5. DISCLOSURE AND SHARING OF MATERIAL FACTS AND COMMUNICATIONS RECEIVED DURING COUNCIL MEETINGS**

**5.0 LEGISLATIVE HISTORY**

This policy was originally adopted as City Council Policy 0-32, entitled "Disclosure of Material Facts," on April 25, 2006 and amended on March 2, 2010 by the adoption of Resolution No. 75293, which policy is repealed by, revised, and incorporated into this Consolidated Open Government and Ethics Resolution.

**5.1 PURPOSE**

The purpose of this Section 5 of this Consolidated Open Government and Ethics Resolution is to require every member of the City Council to publicly disclose (1) Material Facts; and (2) Communications Received during Council Meetings that are Relevant to a Matter under Consideration by the City Council which have been received from a source outside of the public decision-making process.

This Section 5 of this Consolidated Open Government and Ethics Resolution applies to every member of the City Council.

**5.2 DEFINITIONS**

**5.2.1 Definitions**

The definitions set forth in this Section 5.2 shall govern the application and interpretation of this Section 5 of this Consolidated Open Government and Ethics Resolution, entitled "Disclosure of Material Facts and Communications Received During Council Meetings."

**5.2.2 Actively Supports or Opposes any Administrative or Legislative Decision**

"Actively Supports or Opposes any Administrative or Legislative Decision" means he or she engages in lobbying activity as defined in the San José Municipal Lobbying Ordinance (Chapter 12.12 of the San José Municipal Code), testifies in person before the City Council or otherwise acts to influence members of the City Council.

**5.2.3 City Council**

"City Council" means the San José City Council or any other legislative body that is solely made up of all of the San José City Councilmembers.



#### **5.2.4 Council Staff Member**

“Council Staff Member” means any paid or unpaid staff of the Mayor’s Office or any City Council Office.

#### **5.2.5 Communication Received During a Council Meeting**

“Communication Received during a Council Meeting” means either a Direct Communication or an Indirect Communication received and read during a City Council meeting, that is relevant to a matter under consideration by the City Council.

#### **5.2.6 Direct Communication**

“Direct Communication” includes but is not limited to, a text message, email, telephone call, or any other type of communication with the City Council.

#### **5.2.7 Indirect Communication**

“Indirect Communication” includes all of the above identified in Section 5.2.6, received by a Council Staff Member or a conversation with a Council Staff Member which is then communicated to a member of the City Council.

#### **5.2.8 Material Fact**

“Material Fact” means a fact that is relevant for a member of the City Council to make an informed and knowledgeable decision and which would likely influence the decision of a member of the City Council on an item of business on the City Council agenda. A fact is material if the failure to disclose the fact will substantially mislead any member of the City Council from making an informed and knowledgeable decision about an item of business on the City Council agenda.

#### **5.2.9 Relevant to a Matter Under Consideration by the City Council**

“Relevant to a Matter under Consideration by the City Council” means from (1) a party or his or her agent to an administrative hearing before the City Council; or (2) any person who Actively Supports or Opposes any Administrative or Legislative Decision and has a financial interest in the decision.

### **5.3 GENERAL PROVISIONS**

#### **5.3.1 Duty to Publicly Disclose**

Each member of the City Council has a duty and responsibility to publicly disclose all (1) Material Facts; and (2) Communication(s) Received During a Council Meeting related to an item on the City Council agenda after the Material Facts are received or

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the Communications are Received during a Council Meeting from sources outside of the public decision-making process.

**5.3.2 Disclosure Required Prior to Council Action**

The Material Fact or Communication Received during a Council Meeting shall be disclosed at the Council meeting before the City Council takes any action on the item after a good faith determination by the member of the City Council that the fact or communication is required to be disclosed in accordance with this Section.

**5.3.3 Submission of Material Fact in Writing**

If the Material Fact is in written form, it shall be submitted to the City Clerk who will make the information publicly available.

**5.3.4 Disclosure Required No Later than Public Discussion**

Material Facts received orally and Communications Received during a Council Meeting shall be disclosed no later than public discussion of the item under consideration by the City Council.

## **SECTION 6. DECLARATION OF CONFLICT OF INTEREST**

### **6.0 LEGISLATIVE HISTORY**

These provisions were originally adopted as City Council Policy 0-34, entitled "City Council Declaration of Conflict of Interest," on November 21, 2006 by the adoption of Resolution No. 73517, which policy is repealed by, revised and incorporated into this Consolidated Open Government and Ethics Resolution.

### **6.1 PURPOSE**

The purpose of this Section 6 of this Consolidated Open Government and Ethics Resolution is to require the Mayor and Councilmembers and members of City Boards, Commissions, and Committees to conduct a review of agenda items in order to publicly disclose the nature of any conflict of interest with respect to an agenda item pending before the body.

State law requires that immediately prior to the consideration of a matter before an agency, a public official (a) identify the financial interest that gives rise to the conflict in sufficient detail to be understood by the public; (b) publicly state his or her recusal from the matter; and (c) leave the room until after the disposition of the matter unless the matter appears on a consent calendar or other similar portion of an agenda for uncontested matters. (Gov. Code Section 87105).

This Section 6 of this Consolidated Open Government and Ethics Resolution is intended to exceed the requirements of state law by requiring advance notice and disclosure of any conflict of interest with respect to the agenda item or matter in addition to the procedures required by Gov. Code Section 87105.

### **6.2 DEFINITIONS**

#### **6.2.1 Definitions**

The definitions set forth in this Section 6.2 shall govern the application and interpretation of this Section 6 of this Consolidated Open Government and Ethics Resolution, entitled "Declaration of Conflict of Interest."

#### **6.2.2 City Boards, Commissions and Committees**

"City Boards, Commissions and Committees" means those bodies created by either the City Charter or the City Council.

### **6.2.3 City Council**

"City Council" means the San José City Council or any other legislative body that is solely made up of all of the San José City Councilmembers.

### **6.2.4 Political Reform Act**

"Political Reform Act" means the California Political Reform Act (Government Code Sections 81000 et seq.), as amended. Except as otherwise provided here, the terms and provisions of this Section 6 of the Consolidated Open Government and Ethics Resolution shall be interpreted in accordance with the applicable definitions and provisions of the Political Reform Act and any administrative or judicial interpretations of the Political Reform Act.

## **6.3 GENERAL PROVISIONS**

### **6.3.1 Scope of Application**

This Section 6 of this Consolidated Open Government and Ethics Resolution applies to the Mayor, City Councilmembers and members of City Boards, Commissions and Committees who are "public officials" under the state Political Reform Act.

### **6.3.2 Disclosure of Conflicts of Interest**

The members of the City Council and members of City Boards and Commissions should disclose conflicts of interest which require abstention from participation in a decision in advance of the public meeting at which the decision is to be made.

- A. Conflict of Interest Declaration Form. The City Clerk shall prepare a conflict of interest declaration form for use by members of the City Council and City Boards, Commissions and Committees. Conflicts of interest shall be publicly disclosed in a conflict of interest declaration form filed with the City Clerk with a copy to the City Attorney at least twenty-four (24) hours before a City Council or Board, Commission and Committee meeting unless the conflict of interest becomes known to a member within the twenty-four (24) hours before the meeting in which case the declaration shall be filed with the City Clerk with a copy to the City Attorney, whenever the conflict of interest becomes known but no later than at the end of the meeting at which the Agenda item is heard.
- B. Decisions or Items to be Identified. The member shall identify the following:
  - 1. The decision or item of business and each type of economic interest held by the member which is involved in the decision and which gives rise to the conflict of interest (i.e. investment, business position, interest in real property, personal financial effect, or the receipt or promise of income or

gifts); and/or

2. The agreement or contract and the member's financial interest in the agreement or contract.
- C. Details to be Disclosed. Conflicts of interest including economic interests under the Political Reform Act shall be identified in the disclosure form by the following details:
1. If an investment, the name of the business entity in which the investment is held;
  2. If a business position, a general description of the business activity and the name of the business entity;
  3. If real property, the address or other indication of the location of the property, unless the property is the member's principal or personal residence, in which case, identification that the property is a residence;
  4. If income or gifts, the identification of the source; and
  5. If personal financial effect, then identification of the expense, liability, asset or income of the member affected.
- D. Government Code Section 1090 Conflicts. Conflicts of interest including a financial interest in an agreement or contract as described in Gov. Code Section 1090 shall be identified in the conflict of interest declaration form by describing the interest in the agreement, including for example, agreements with nonprofits where the member serves on the nonprofit's board of directors.
- E. "Common Law" Conflicts of Interest. "Common Law" conflicts of interest shall be identified where a member's private or personal interests renders the member unable to make a fair or impartial decision and therefore, conflicts with his or her official duties. This type of conflict of interest is based on case law and may apply to non-economic conflicts of interest.
- F. Conflicts of Interest on Closed Session Items. If a decision is made during a closed session of a public meeting and a member's economic interest creates a conflict of interest under the Political Reform Act, Gov. Code Section 1090 or a "common law" conflict of interest, a declaration of a conflict of interest form shall be filed with the City Clerk with a copy to the City Attorney as a part of the official public record of the meeting. This declaration shall be filed at least twenty-four (24) hours before the closed session unless knowledge of the conflict of interest arises within twenty-four (24) hours of the closed session, at which time the conflict of interest declaration form shall be filed immediately with the City Clerk

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with a copy to the City Attorney. The declaration of conflict described in the conflict of interest declaration form shall be limited to a statement that the member's recusal from participation is because of a conflict of interest under the law.

**SECTION 7. PROCUREMENT AND CONTRACT PROCESS INTEGRITY AND  
CONFLICT OF INTEREST**

**7.0 LEGISLATIVE HISTORY**

On December 13, 2005, Council directed the City Manager and City Attorney as part of the Mayor's Biennial Ethics Review to develop a Council Policy which included all elements of the Procurement Process Integrity Guidelines adopted by Council on November 9, 2004 and apply these provisions to all competitive processes. These provisions were originally adopted as City Council Policy 0-35, entitled "Procurement and Contract Process Integrity and Conflict of Interest," on February 6, 2007 by the adoption of Resolution No. 73634, which policy is repealed by, revised and incorporated into this Consolidated Open Government and Ethics Resolution.

**7.1 PURPOSE**

The purpose of this Section 7 of this Consolidated Open Government and Ethics Resolution is:

1. to ensure integrity in the City's procurement and contract processes;
2. to educate City employees, consultants, uncompensated outside parties, and any person involved in the decision to award a contract about potential Conflicts of Interest; and
3. to establish guidelines for procedural screening of Conflicts of Interest.

The City desires to provide a fair opportunity to participants in competitive processes for the award of City contracts by promulgating integrity and removal of Conflicts of Interest through the inclusion of the components specified in Section 7.3 in all competitive solicitations.

**7.2 DEFINITIONS**

**7.2.1 Definitions**

The definitions set forth in this Section 7.2 shall govern the application and interpretation of this Section 7 of this Consolidated Open Government and Ethics Resolution, entitled "Procurement and Contract Process Integrity and Conflict Of Interest."

**7.2.2 Chief Purchasing Officer**

"Chief Purchasing Officer" means that City employee designated by the City Manager to be responsible for the City's procurement process.

### **7.2.3 Council Appointees**

"Council Appointees" means the City Manager, City Attorney, City Clerk, City Auditor, and Independent Police Auditor.

### **7.2.4 Solicitation**

"Solicitation" means, but is not limited to, specification development, preparation and issuance of Requests for proposals, quotes, qualifications or bids, evaluation of responses and submissions, and other evaluations which lead to an award of a City contract.

## **7.3 GENERAL PROVISIONS**

### **7.3.1 Communication Protocol**

This Section describes the characteristics of appropriate communication between respondents and the City during various phases of a Solicitation.

- A. Prior to Issuance of Solicitations. Prior to the issuance of Solicitations, contact between prospective respondents and City staff, elected officials, or consultants is permissible.
- B. After Issuance of Solicitations and prior to Submission deadline for Solicitations. After issuance of Solicitations, all contact between prospective respondents and the City must be directed to the procurement contact designated in the Solicitation. City staff, elected officials, and consultants will refer all inquiries to the procurement contact.

All requests for clarification, objections to the structure, content, or distribution of a Solicitation, or other inquiries must be made in writing and the City shall answer to these clarifications, objections, and inquiries in writing via addenda to the Solicitation.

- C. After Submission Deadline of Solicitations and prior to Issuance of a Notice of Intended Award. After the submission deadline of Solicitations, all contact regarding the procurement between respondents and the City and participants in the evaluation process, who are not City employees, must be directed to the procurement contact designated in the Solicitation. City staff, elected officials, and consultants will refer all inquiries to the procurement contact.
- D. After Issuance of a Notice of Intended Award. The City will issue a notice of intended award to all respondents including the basis for selection and instructions for filing a protest. All respondents shall follow the procedures for protest as indicated in the Solicitation document. During the protest period, City



staff, elected officials, and consultants will refer all inquiries to the protest hearing officer identified in the Solicitation document.

- E. After Completion of Protest Period. After completion of the protest period, contact between prospective respondents and City staff, elected officials, or consultants is permissible.

### **7.3.2 Respondent's Code of Conduct**

By submitting a response to a City Solicitation, respondents agree to adhere to this Section 7 of this Consolidated Open Government and Ethics Resolution and are individually and solely responsible for ensuring compliance with this Section 7 of this Consolidated Open Government and Ethics Resolution on behalf of the respondent's employees, agents, consultants, lobbyists, or other parties or individuals engaged for purposes of developing or supporting a response.

In addition to adhering to the various sections of this Section 7 of this Consolidated Open Government and Ethics Resolution, respondents may not:

- collude, directly or indirectly, among themselves in regard to the amount, terms or conditions of a Solicitation;
- influence any City staff member or evaluation team member throughout the solicitation process, including the development of specifications; and
- submit incorrect information in the response to a Solicitation or misrepresent or fail to disclose material facts during the evaluation process.

Any evidence that indicates that a respondent has failed to adhere with any section of this Section 7 of this Consolidated Open Government and Ethics Resolution may result in the respondent's disqualification from the procurement as well as possible debarment.

### **7.3.3 Confidentiality During Evaluation Process**

City staff, consultants, and outside evaluators, who are participants in the evaluation process, are required to sign a confidentiality agreement, which binds the participants not to share any information about responses received and the evaluation process until the City issues a notice of intended award.

### **7.3.4 Conflict of Interest**

Per the General Rule with Respect to Conflicts of Interest, as outlined in the City Council Policy 0-15, "Code of Ethics for Officials and Employees of the City of San José", City elected officials, appointed officials, their staffs, and City employees are expected to avoid any conflicts of interest. Further, employees should avoid the

appearance of conflicts of interest in order to ensure that City decisions are made in an independent and impartial manner.

In general, Council Appointees shall take measures to ensure that the City avoid any conflict of interests in procurement processes of City contracts. Specifically, these measures include that:

- A. Professional procurement and contracting staff, including buyers, managers, department heads, members of the City Attorney's Office and others who regularly participate in the making of contracts on behalf of the City disclose relevant financial interest as required by state law and by City policy, and annually review those statements in conjunction with this Section 7 of this Consolidated Open Government and Ethics Resolution and other ethical standards.
- B. Persons who may not be regularly involved in City procurements review this Section 7 of this Consolidated Open Government and Ethics Resolution and other ethical standards and elicit such information from them to enable the City to determine if the person's participation would create a conflict of interest. Such persons shall include, but are not limited to:
  - 1. authors of specifications
  - 2. paid and unpaid evaluators
  - 3. paid and unpaid consultants who assist in the procurement process
- C. The person managing the procurement shall discuss any potential conflict of interest identified with the City Attorney's Office and document the resulting determination, and take appropriate action including, but not limited to, removal of an employee, consultant, or outside uncompensated party from the procurement activity or cancellation of a Solicitation.
- D. The City Manager, in consultation with the City Auditor and City Attorney, has published an administrative policy outlining the procedural elements of this Section 7 of this Consolidated Open Government and Ethics Resolution.
- E. This Section 7 of this Consolidated Open Government and Ethics Resolution is intended to set a balance between careful adherence to good procurement and contracting principles together with thorough examination of potential conflicts of interest against an undue burden on the participants in procurement and contracting processes. By establishing the following exceptions to the procedures to be administered by the City Manager, it is not intended to suggest that there is a lesser requirement with regard to ethical standards, but rather a need to have a less burdensome process with regard to certain procurements and contracting activities. The following competitive processes are not subject to procedural requirements as administered by the City Manager:

1. Any contracting activity with an estimated value less than \$100,000.
2. Disposition of goods as described in the Municipal Code Chapter 4.16.
3. Award of grants by the City with a value below \$10,000.

### **7.3.5 Allegations of Conflict of Interest**

Prior to the Solicitation release up to award of contract, any allegations of conflict of interest by a City employee, consultant, or other participant in the pre-Solicitation and Solicitation process shall be reported to the procurement contact. The procurement contact shall investigate the alleged conflict of interest in consultation with the City Attorney's Office and document the resulting determination.

### **7.3.6 Allegations of Misconduct**

At any time during a Solicitation process, any misconduct by a City employee, consultant, or other participant in the pre-Solicitation and Solicitation process, shall be reported to the City's Chief Purchasing Officer. The Chief Purchasing Officer shall investigate the alleged misconduct, in consultation with the City Attorney's Office and others as appropriate. Nothing in this Section 7 of this Consolidated Open Government and Ethics Resolution is intended to prohibit anyone from communicating with the City Manager's Office, the City Attorney's Office, the City Auditor's Office, or the Mayor or any City Council Member about any alleged misconduct.

### **12.12.800 Disclosure of communications with registered lobbyists.**

Before taking any legislative or administrative action, the mayor, each member of the city council, the chair and each member of the San José redevelopment agency board of directors, and each member of the planning commission, civil service commission, or appeals hearing board must disclose all scheduled meetings and telephone conversations with a registered lobbyist about the action. The disclosure may be made orally at the meeting before discussion of the action on the meeting agenda. The oral disclosure must identify the registered lobbyists, the date(s) of the scheduled meetings and telephone conversations, and the substance of the communication. This section does not limit any disclosure obligations that may be required by this code or city policy.

(Ord. 28074.)

**S218066**

**CERTIFICATE OF SERVICE**

I am a citizen of the United States. My business address is 50 West San Fernando Street, 10th Floor, San Jose, California, 95113. I am employed in the County of Santa Clara, where this mailing occurs. I am over the age of 18 years, and not a party to the within action. I served the foregoing document described as:

**REQUEST FOR JUDICIAL NOTICE**

on the following person(s) in this action:

Richard Doyle Nora Frimann Margo Laskowska Office of the City Attorney 200 E. Santa Clara Street, 16 <sup>th</sup> Floor San Jose, CA 95113	<u>Attorneys for Defendants and Petitioners, City of San Jose</u>
Clerk of the Court Sixth District Court of Appeal 333 W. Santa Clara Street Suite 1060 San Jose, CA 95113	
Clerk of the Superior Court Santa Clara County Superior Court 191 N. First Street San Jose, CA 95113	
Ted Smith 465 S. 15th Street San Jose, CA 95112	<u>Plaintiff and Real Party in Interest</u>

**(BY OVERNIGHT DELIVERY)**

I enclosed the documents in an envelope or package provided by an overnight delivery carrier and addressed to the persons at the addresses listed above or on the attached service list. I placed the envelope or package for collection and overnight delivery at an office or a regularly utilized drop box of the overnight delivery carrier.

I declare under penalty of perjury under the laws of the United States of America that the above is true and correct.

Executed on November 21, 2014, at San Jose, California.

  
\_\_\_\_\_  
SABA SHAKOORI