

Memorandum

TO: HONORABLE MAYOR AND
CITY COUNCIL

SUBJECT: 2022 BIENNIAL
ETHICS REVIEW

FROM: Nora Frimann
Jennifer A. Maguire

DATE: May 5, 2023

RECOMMENDATION

- (a) Accept the report on the Biennial Ethics Review.
- (b) Approve an ordinance amending Section 12.21.430 of Chapter 12.21 of Title 12 of the San José Municipal Code to clarify the appeal process for a Public Records Act request.

SUMMARY AND OUTCOME

Accepting the staff report provides the City Council with an update to how the Administration processes Public Record Act requests. Approval of the proposed ordinance would require that Public Records Act appeals to waive attorney client privilege for exempt records only be considered by the City Council, and that the Board of Campaign and Political Practices not be required to consider Public Records Act appeals.

BACKGROUND

The San José City Charter, Section 607 Code of Ethics, requires the Mayor to conduct a biennial review of the City's Code of Ethics, including any ordinances relating to ethics standards, and make any recommendation for amendments or changes to the City Council.¹ This memorandum responds to the December 6, 2022 Biennial Ethics Review memorandum submitted to the Rules and Open Government Committee by former Mayor Sam Liccardo.² The memorandum made several recommendations pertaining to how the City processes Public Record Act requests (PRA) and requests clarification on the obligations of the Brown Act, including:

¹ San Jose City Charter Section 607: "...The Mayor, on a biennial basis beginning in 1993, shall conduct a review of the City's Code of Ethics including any ordinances relating to ethic standards. The Mayor shall make any recommendation for amendments or changes to the Code of Ethics and its implementing ordinances to the City Council..."

² <https://sanjose.legistar.com/LegislationDetail.aspx?ID=5985786&GUID=07A637E2-AD14-45A4-B233-A749F9D77784>

1. Bring to Council any proposed changes in City ordinances, rules, protocols and processes—including the integration of proposed technology solutions— to better facilitate the production of documents, audio, and video under the Public Records Act and similar transparency laws, to:
 - a. Address the rapidly growing volume of Public Record Act requests to the City, in a manner that will i. Reduce fiscal burden on taxpayers (and concomitant workload on City staff); ii. Reduce delay of record production and improve responsiveness; iii. Reduce errors in failing to turn over relevant records.
 - b. Identify voluntary protocols that can lawfully encourage media and other entities to better focus their PRA requests to satisfy their (& the public's) need for information without overburdening understaffed City records offices seeking to comply with voluminous, "fishing expedition" re-productions of audio, video, and paper records. Consider also legislative advocacy—in concert with the League of California Cities and the Big City Mayors' coalition—to enable mechanisms that will curtail abuse of well-intentioned PRA requirements.
 - c. Given the rapidly growing inventory and cost of digital records and data, review record destruction policies under City Policy 6.1.5, and return to Council for a public discussion about the appropriate policy, and the best approaches to ensure compliance.
2. On the Brown Act, without creating any additional standing committees under Cal. Govt Code Section 54952(b),
 - a. Clearly define the appropriate duration of five-councilmember "groups" formed to avoid Brown Act violations, presumably based on the recency of the Council vote on the matter. Clarify the City's interpretation of the letter and spirit of the law, and to avoid rigid interpretations that make future discussions of policy matters unreasonably difficult.
 - b. Clearly define the scope of issues, such that a Council vote on a large, umbrella issue (e.g. Climate Smart, the City's affordable housing strategy, or Measure T) will not forevermore preclude communication outside a Brown Act group on a very specific implementation of that strategy.

On January 11, 2023, the Rules and Open Government Committee approved the recommendations in Mayor Sam Liccardo's Biennial Ethics Review memorandum.

ANALYSIS

Recommendations Related to the Biennial Ethics Review

The Biennial Ethics Review submitted by former Mayor Liccardo made several recommendations pertaining to PRAs; and each is addressed below in turn.

Reducing the Rapidly Growing Volume of Public Record Act Requests

PRA requests have been increasing over the last few years. Acknowledging this increase in volume, a recommendation was made to review this challenge within a context that could reduce fiscal burden on taxpayers (and concomitant workload on City staff), reduce the delay of record production, improve responsiveness, and reduce errors in failing to turn over relevant records. The City Manager's Office, in collaboration with the City Attorney's Office (CAO) and City Clerk's Office, has been working to modernize the City's PRA processes and respond to PRAs in a more efficient manner. This work began in 2021 and is part of a phased approach being led by the Open Government Manager (OGM) who works to oversee inter-departmental PRAs and support departmental PRA coordinators for single-department PRAs. Following is a description of the phased approach.

- **Phase 1 Procure a PRA Technology Solution (Complete)**

Historically, PRA responses have been handled manually both within and among departments. The manual process of PRA responses added to the complexity of the internal management of PRAs, pulling accurate data for reports, reviewing requester/departamental communications, redacting and/or withholding records, notating government codes to justify redactions/exemptions, and more. To address some of these challenges, in 2021, a request for proposals was conducted to modernize the City's PRA processes by introducing a centralized platform that allows for a streamlined approach to PRA management. The system allows for PRA submission from both known and anonymous requesters, automatically acknowledges receipt of the PRA, handles communication between the requester and departments, retains and releases the responsive records, and has a built-in program to facilitate the review of records for redactions and exemptions. A contract was awarded to GovQA (now a part of Granicus, Inc.) in December 2021.

- **Phase 2 Implement GovQA Citywide and Make Needed Adjustments (Ongoing)**

Implementation of the GovQA platform (known as the "Records Center" on the City's website) began in August 2022 and, since implementation, has handled over 2,000 requests, including for single departments and inter-departmental requests.³ The OGM continues to manage and oversee the general maintenance of the Records Center as well as the interdepartmental PRA process. As part of this work, the OGM also provides general support to departmental PRA coordinators to a) determine adjustments and tweaks within the Records Center that better route requests to departments, b) ensure template responses are updated that provide proper communication to requesters, and c) provide training to staff and coordinators on how to use the Records Center.⁴ Concurrently, to support ongoing enhancements to the new system, the OGM works with the CAO on conversions of out-of-date California Government Statutes to new codes, which, once uploaded into the Records Center, will assist staff in the redaction/exemption

³ <https://www.sanjoseca.gov/PublicRecordsRequests>

⁴ New materials and trainings will merge the City's PRA process with the Records Center's functionalities and workflows so that staff can better understand the system. Trainings will also emphasize correcting common issues seen throughout the PRA process and the Records Center.

process, thereby supporting more timely responses to requestors. This latter piece is being phased in as quickly as possible and is expected to be complete in the Summer of 2023.

- **Phase 3 Policy Updates to City Policy Manual 6.1.1 (*Future Project*)**

To assist staff and align practice with policy, the OGM will also work with the City Manager's Office staff and CAO to review and update City Policy 6.1.1 *Public Records Policy and Protocol*, which affirms the public's right to access public records and provides direction to City staff. The last update to 6.1.1 is from May 15, 2019. This update will also conform with the proposed ordinance to clarify the appeals process.

It is important to note that while the activities described above are expected to improve the general efficiency of PRA coordination (reducing delays and errors), PRA requests do continue to create a substantial workload on City staff, as staff receiving requests must manually search for records across different systems as well as redact and/or withhold information based on California government statutes. Moreover, in general, those that are tasked with coordinating PRA requests within the departments have other, more substantial, portfolios of work assigned.

Identify Voluntary Protocols to Legally Encourage Focused PRA Requests

To further reduce overburdened staff workloads, a recommendation was made to identify voluntary protocols to encourage media and other entities to better focus their PRA requests, as well as explore legislative advocacy at the state level to curtail abuse of well-intentioned PRA requirements.

The State of California provides that the public shall have access to public records unless a legal exemption applies. At times, when the public is seeking records, they may submit broad requests not knowing the exact language to use to obtain the information they are seeking. Broad requests can in turn extend the amount of time it takes staff to search, redact, and produce records. To help the public better focus PRA requests—thereby ensuring the public is receiving the information they need—and to help expedite processing of requests, PRA coordinators regularly communicate with requestors to better understand the parameters of their requests. Outside of the manual search, collection, and review of responsive records, departments are encouraged to direct requesters to City records depositories (i.e. City Clerk's GILES system, SJPermits, etc.), which house records that are already publicly available. In an effort to help the public understand how they can better focus their requests, the OGM will make adjustments to the City's Public Records website and the Records Center website to reflect voluntary instructions requesters can take into account when submitting their PRA request.⁵ The instructions will provide guidance to requesters to help them identify a) the types of records they are seeking, b) which staff/departments may be holders of such records, c) what specific keywords they may want to use, d) what timeframe they are interested in, as well as other tips to help expedite their request. Additionally, hyperlinks will be provided on the website to direct requesters to City websites where records are already made publicly available.

⁵ <https://www.sanjoseca.gov/your-government/departments-offices/office-of-the-city-manager/official-city-records>

In regard to legislative advocacy at the state level, advocating for changes to the California Public Records Act does not currently fall into the 2023-2024 Legislative Priorities adopted by the City Council that guide and focus the City's intergovernmental relations team (IGR) core advocacy, which include: 1) Address homelessness and enable affordable housing, 2) Promote Safety and Vision Zero Initiatives, 3) Pursue funding for equitable, sustainable and resilient infrastructure, 4) Drive impactful climate action and unlock San José's 2030 Climate Smart goals, and 5) Relentlessly advocate for regional policy solutions that result in equitable outcomes and prosperity for San José families.

If the City Council would like to make this a legislative priority for IGR during the next legislative session, the team would dedicate staff resources to proactively seek legislative solutions around this issue. It is important to note, however, if the City Council prioritized changes to the Public Records Act, it appears that there is currently little appetite in the State Legislature to drive changes, given that any proposed change may be perceived by the public as an attempt to reduce public transparency and access to records. As such, it may be challenging to find a representative to author and champion this change. Should the City Council not wish to make this a legislative priority for the next legislative session, IGR can continue to monitor this topical area in the event there is a policy window that opens for advocacy on this issue.

Review City Policy 6.1.5 Records Retention and Disposition

Given the rapidly growing inventory and cost of digital records and data, a final recommendation directed a review of the City's record destruction policies under City Policy 6.1.5. The City Manager's Office is currently undergoing such a review in collaboration with the CAO and all City Departments. This work is guided by recommendations made in the Open Government Audit (recommendations #17-04-09 and #17-04-10); and completion of these recommendations is expected in 2023. As technological advances have resulted in an increasing reliance on electronic records, the OGM is updating City policies and creating new guidance for City Staff on the retention and disposition of electronic records and emails. The completion of this body of work is expected to result in more effective management of public records. During the implementation phase of this work, new guidance will be provided to staff to ensure compliance.

Brown Act Purpose and Requirement

Pursuant to Government Code Section 54950, the Legislature found and declared that it is the intent of the Brown Act that public bodies such as city councils conduct their deliberations and take actions openly. The Brown Act requires that all meetings of the legislative body of a local agency be open and public. The City Council and its Standing Council Committees are legislative bodies. A Brown Act "serial meeting" occurs when a majority of the members of a legislative body uses a series of communications, directly or through intermediaries, to hear, discuss, deliberate, or take action on an item of business that is within the legislative body's subject matter jurisdiction.

Individual conversations or communications between Councilmembers and another person are allowed as long as that other person does not communicate to other Councilmembers the comments or position of other members of the City Council, resulting in a serial meeting. Serial meetings primarily occur in two forms: "Daisy Chain" and "Hub and Spoke." The Brown Act permits staff to meet with members of the City Council to answer questions or provide information regarding a matter that is within the City Council's subject matter jurisdiction, if that person does not communicate to other Councilmembers the comments or position of other members. The City Attorney's Office will continue to advise the City Council on the legal requirements and on how best to comply with both the letter and spirit of the law.

Proposed Ordinance Amending Section 12.21.430 of Chapter 12.21 of Title 12 of the San José Municipal Code

On May 10, 2022, the City Council requested that the San José Municipal Code be amended to clarify that an appeal, for an exemption to a Public Records Act request based on the attorney client privilege, should only be heard by the City Council, as holder of the privilege. The referral arose from an appeal by Spotlight for records protected by the attorney client privilege. In that case, the City Council waived the privilege after the appeal had been first considered by both the Board of Campaign and Political Practices, and the Rules and Open Government Committee. The Board of Fair Campaign and Political Practices requested as part of its broader recommendation for changes to election matters that they be removed as a body for appeal because their expertise, and primary purview are election issues.

The proposed ordinance would amend Section 12.21.430 of Chapter 12 of the San José Municipal Code to clarify a Public Records Act appeal for records exempt under the attorney client privilege must be considered by the City Council. The proposed ordinance would also remove the Board of Campaign and Political Practices as a body that must consider Public Records Act request appeals. As revised, a requestor may still appeal to the OGM, Rules and Open Government Committee, and City Council; or proceed directly to the Superior Court. City Policy 6.1.1 would need to be updated to conform if the proposed ordinance is approved.

EVALUATION AND FOLLOW-UP

No additional follow up action with the City Council is expected at this time.

PUBLIC OUTREACH

This memorandum will be posted on the City's Council Agenda website for the May 23, 2023 City Council meeting.

COMMISSION RECOMMENDATION AND INPUT

No commission recommendation or input is associated with this action.

CEQA

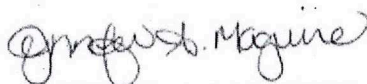
Not a Project, File No. PP17-009, Staff Reports, Assessments, Annual Reports, and Informational Memos that involve no approvals of any City action.

PUBLIC SUBSIDY REPORTING

This item does not include a public subsidy as defined in section 53083 or 53083.1 of the California Government Code or the City's Open Government Resolution.



NORA FRIMANN
City Attorney



JENNIFER A. MAGUIRE
City Manager

The principal authors of this memorandum are Rosa Tsongtaatarii, Chief Deputy City Attorney and Sarah Zárate, Director of Office of Administration, Policy and Intergovernmental Relations, and Edwin Huertas, Open Government Manager. For questions, please contact Edwin Huertas, Open Government Manager, via email at edwin.huertas@sanjoseca.gov.