



# Memorandum

**TO:** RULES AND OPEN  
GOVERNMENT COMMITTEE

**FROM:** Jennifer Schembri

**SUBJECT:** PUBLIC RECORDS APPEAL -  
KEN GREGOIRE

**DATE:** January 15, 2020

Approved

Date

1/17/2020

## RECOMMENDATION

Deny the appeal from Ken Gregoire regarding the City's response to his request for draft versions of his annual performance appraisal.

## BACKGROUND

On November 21, 2019, Ken Gregoire requested through the Public Records Request online request form that he be provided with an electronic document file titled "Ken Gregoire – NMPP\_FY1819" that Mr. Gregoire described as being saved on his supervisor's OneDrive, and requested the version history and digital footprints of any comments made by specific managers (Attachment A).

NMPP refers to the City's Non-Management Performance Program, the program under which each employee's performance is evaluated and documented on an annual basis. Supervisors generally draft appraisals over a period of time, and will have multiple versions of an appraisal as content is added or deleted, verbiage is modified, and the content is proofread.

OneDrive refers to a file hosting and synchronization product offered by Microsoft as part of its Office software suite. OneDrive automatically retains a version history of a document file as edits are made, even when the author(s) of a document intentionally save over the same file rather than create different versions by saving them with different file names, and thus numerous versions of a single file may exist. When files are "shared" amongst multiple users, OneDrive associates those changes with the specific user who made them.

Mr. Gregoire's request is understood to be for a copy of each version that OneDrive preserved such that he could determine who authored which elements of his most recent performance appraisal, as well as how the performance appraisal was drafted and modified over time.

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On November 22, 2019, the City responded to the November 21, 2019, public records request to let Mr. Gregoire know that the records he requested were determined to be exempt from disclosure and would not be released pursuant to the preliminary drafts exemption, deliberative process privilege and the balancing test (§6254(a) and §6255 of the California Government Code respectively) (Attachment B).

On November 22, 2019, Mr. Gregoire sent an email asking how he could obtain the digital copy of his performance appraisal (Attachment C).

On November 22, 2019, the City responded that the public interest of ensuring candid and frank discussions about employees during the performance evaluation process outweighs the interest of the public disclosure of records generated during that process as disclosure of such records would have a chilling effect on candid and frank discussions about employee performance during the evaluation process (Attachment D).

On December 3, 2019, Mr. Gregoire sent an email to his November 21, 2019, public records request to the City Clerk email address (Attachment E).

### ANALYSIS

Mr. Gregoire is contesting the City's response to his public records request. Evaluating an employee's performance is something that requires a considerable amount of thought over time. Revisions are regularly made as supervisors initially gather their own thoughts, solicit input from others, begin articulating the narrative components of an appraisal, add or delete examples of performance and conduct, edit their own work, and then have the appropriate managers above them review and provide modifications before it is issued to the recipient employee. It is essential that supervisors and managers be able to engage in this exercise to ensure that a complete, thorough, and thoughtful performance appraisal is written for an employee.

If the process that supervisors and managers engage in to transform a performance appraisal from a blank page to a final evaluation were subject to disclosure, there would be a chilling effect on the candid and frank discussion between supervisors and managers that must occur to produce an appropriate appraisal. The City has a vested interest in ensuring that performance appraisals constitute a thorough and accurate depiction of an employee's performance and conduct during the rating period. §6254(a) of the California Government Code exempts from disclosure "preliminary drafts, notes, or interagency or intra-agency memoranda that are not retained by the public agency in the ordinary course of business, if the public interest in withholding those records clearly outweighs the public interest in disclosure." The records sought by Mr. Gregoire are the version history and digital footprints of any comments made by specific managers during the course of the creation of his performance appraisal, which is essentially a request for the electronic history of the creation of his performance evaluation.

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**CONCLUSION**

Mr. Gregoire's request for an electronic document file titled "Ken Gregoire – NMPP\_FY1819" that Mr. Gregoire described as being saved on his supervisor's OneDrive, and requested the version history and digital footprints of any comments made by specific managers is exempt from disclosure on the basis of the preliminary drafts exemption, deliberative process privilege, and the balancing test. Staff recommends that the Rules and Open Government Committee deny the appeal from Mr. Gregoire.

**COORDINATION**

This memorandum was coordinated with the City Attorney's Office.

A handwritten signature in cursive script, appearing to read "J Schembri".

JENNIFER SCHEMBRI  
Director of Employee Relations  
Director of Human Resources

For questions please contact Allison Suggs, Assistant Director of Employee Relations, at (408) 535-8157.

Attachments

**Suggs, Allison**

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**Subject:** PRA for Employee's Own NMPP**From:** [noreply@sanjoseca.gov](mailto:noreply@sanjoseca.gov) [mailto:[noreply@sanjoseca.gov](mailto:noreply@sanjoseca.gov)]**Sent:** Thursday, November 21, 2019 7:24 AM**To:** PublicRecordsRequest <[PublicRecordsRequest@sanjoseca.gov](mailto:PublicRecordsRequest@sanjoseca.gov)>**Subject:** Online Form Submittal: Request Public Records

[External Email]

## Request Public Records

### Request Public Records

*An email address is required so that we may respond to your request.*

First Name	ken
Last Name	gregoire
Company/Organization/Agency	Field not completed.
Address	[REDACTED]
City	SAN JOSE
State	California
Zip	95122
Telephone Number	[REDACTED]
Fax Number	Field not completed.
Email Address	[REDACTED]
Records Requested	file being requested is "Ken Gregoire - NMPP_FY1819" file located in Ryan Reynado "onedrive" or "sanjoseca.gov" sharepoint between April 2019 and October 2019. Would like version history,digital footprints of any comments made by "Rob" Rob Lloyd, "Amanda" Amanda Le, "Claudia" Claudia Chang, "Tommy" Tommy Khuu.
Preferred Method of Delivery	Email

Email not displaying correctly? [View it in your browser.](#)

**Steele, Sarah**

---

**Subject:** RE: PRA for Employee's Own NMPP

**From:** Employee Relations

**Sent:** Friday, November 22, 2019 10:06 AM

**To:** Kenny G [REDACTED] Gregoire, Ken <Ken.Gregoire@sanjoseca.gov>

**Cc:** PublicRecordsRequest <PublicRecordsRequest@sanjoseca.gov>

**Subject:** RE: PRA for Employee's Own NMPP

Hi Ken,

The records requested below and in the attached have been determined to be exempt from disclosure and will not be released. They are exempt from disclosure pursuant to the following sections of the California Government Code:

1. Deliberative process principal (§ 6255); which permits the City to withhold records to protect communications before a decision is made
2. Public Interest balance (§ 6255 (a) which permits the City to withhold record, where public interest served by not making disclosure clearly outweighs the public interest served by disclosure.

Thanks,

**Office of Employee Relations**

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**From:** Gregoire, Ken <Ken.Gregoire@sanjoseca.gov>  
**Sent:** Tuesday, December 3, 2019 3:23 PM  
**To:** City Clerk <city.clerk@sanjoseca.gov>; Kenny G <[REDACTED]>; Gregoire, Ken <Ken.Gregoire@sanjoseca.gov>  
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Hello,

I am appealing the answer I received from OER. As a 25 year employee I am aware that Rob Lloyd (IT director) and Amanda Le (IT division manager) had direct input on my performance evaluation as I work in IT I know there are digital footprints that would confirm this. According to OER Ryan Reynado (my direct supervisor) is the only one that wrote my performance evaluation, I know you will find in my direct supervisors "onedrive" or on the city "sharepoint" site where my evaluation is located you will find version history with comments from "rob" rob Lloyd and "Amanda" Amanda Le, with comments on the side of the document. The evaluation goes thru iterations from 5 layers of management rob Lloyd (it director), amnda le (division manager), Claudia chang (AO), Tommy Khuu (section manager), Ryan Reynado (direct supervisor). As an employee I don't see why there is so much secrecy in hiding who had input on my performance evaluation, as rob Lloyd and Amanda le have stated their opinions of me on this document that I am an unsatisfactory employee. As I have stated below my direct supervisor Ryan Reynado was NOT the only contributor to my performance evaluation and that can be proven by the digital copy/copies (version history) in "onedrive" or "sharepoint". I am asking for copies of the different digital versions or version history of my evaluation.

Thank You

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