



Office of the City Auditor

**Report to the City Council
City of San José**

**OPEN GOVERNMENT: THE
CITY HAS MADE PROGRESS
IN MEETING THE GOALS
OF THE SUNSHINE REFORM
TASK FORCE**

**Report 17-04
August 2017**

August 24, 2017

Honorable Mayor and Members
Of the City Council
200 East Santa Clara Street
San José, CA 95113

Open Government: The City Has Made Progress in Meeting the Goals of the Sunshine Reform Task Force

In 2006, the City Council formed the Sunshine Reform Task Force to promote open, accessible, and inclusive government. The Task Force proposed changes in how the City discloses information discussed at public and closed session meetings and provides access to public information and records. In 2008 and 2009, the Council adopted nearly all the proposed changes, and in 2014, consolidated these changes (as amended) into a new Open Government Ordinance. The Council also approved a resolution to consolidate various procedures and policies into new Consolidated Open Government and Ethics Provisions. These provisions build upon, and often go beyond, what is required by the state.

The objective of our audit was to assess progress towards meeting the City's open government goals as proposed by the Sunshine Reform Task Force and codified by the City Council in 2014. Because of the broad scope of the ordinance and resolution, we did not review all open government provisions for strict compliance. We focused on the processes that facilitate access and disclosure of information relevant to issues being considered by the City Council. We also reviewed procedures in place to respond to public records requests. We conducted this audit in response to a resident request.

Finding 1: The City Has Made Progress in Many Areas of Open Government. In many areas, open government practices are well established in the City. For example, the City has standard procedures to prepare and post agendas 10 days in advance of City Council meetings (compared to three days per state law). In addition, responding to simple Public Records Act requests appears to be routine for City departments. In these and other areas, assigned staff and established procedures ensure the City meets open government guidelines on an ongoing basis. To ensure this progress is sustained, the City should incorporate open government provisions into the City Administrative Policy Manual.

Finding 2: Open Government Efforts Can Be More Consistent in Some Areas. For example, because of a loss of institutional knowledge from staff turnover, City Council memoranda have not consistently disclosed required information about jobs and housing impacts related to public subsidies of more than \$1 million. Open government provisions include guidelines for publicly posting calendars of City officials; however not all calendars we reviewed were posted in a timely manner, or included name, title, organization, and purpose as required. Clarifying requirements and developing standard procedures would make it easier for the City Council and City staff to disclose required information. In addition, we recommend the City Clerk's Office update its lobbyist reporting forms to better inform lobbyists of their

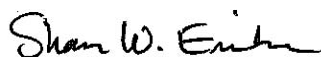
responsibilities, and provide training to Mayor and Council staff on lobbying guidelines. Finally, we recommend the City amend the Revolving Door Ordinance to reduce confusion and simplify rules for non-profit entities by either narrowing the non-profit exemption to 501 (c)(3) organizations whether or not they had received support from the city, or striking the non-profit exemption altogether.

Finding 3: The City Can Respond to Public Records Requests More Efficiently with Better Records Management. In 2016, the City Manager’s Office (CMO), City Clerk’s Office, the Environmental Services Department, the Police Department, and the Department of Planning, Building and Code Enforcement responded to at least 1,500 public records requests. These ranged from simple requests that can be responded to quickly, to very complex requests that take much more time. The median time to close these requests was five days. However, completion times can vary significantly because of the type and scope of requests. Each of the departments we reviewed had instances where completing a records request took more than one month and in some cases more than three months. The growth in electronic records and emails has made responding to complex records requests challenging and can lead to delays in responding. To address this growth, the City should update its records retention and email policies to reflect the current business environment, and implement strategies to address the growth of unnecessary electronic files and emails.

Finding 4: Periodic Reporting and Training Can Help Further Integrate Open Government into the City’s Business. The Municipal Code requires that the CMO provide regular reports on compliance with open government provisions. The CMO reports periodically on the timeliness of City officials’ calendar postings, but has not reported broadly on open government efforts. Providing such reports can improve accountability by generally detailing the scope of open government activities and identifying where the City can improve. The Municipal Code notes regular education and training on open government is essential to achieve compliance. However, current training is limited, and we found instances where staff was not familiar with open government provisions or related City policies. Because of this, we recommend the City provide open government training for new staff during the onboarding process and ongoing training for managers or supervisors.

This report includes 12 recommendations. We will present this report at the August 30, 2017 meeting of the Rules and Open Government Committee. We would like to thank the City Manager’s Office, the City Clerk’s Office, the City Attorney’s Office, and the other departments we interviewed for their time and insight during the audit process. The City Manager, City Clerk, and City Attorney’s Offices have reviewed this report and their responses are shown on the yellow pages.

Respectfully submitted,



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This report is also available online at www.sanjoseca.gov/audits.

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Introduction

The mission of the City Auditor's Office is to independently assess and report on City operations and services. The audit function is an essential element of San José's public accountability, and our audits provide the City Council, City management, and the general public with independent and objective information regarding the economy, efficiency, and effectiveness of City operations and services.

In accordance with the City Auditor's Fiscal Year (FY) 2016-17 Work Plan, we have completed an audit of the City's progress towards meeting the City's open government goals as proposed by the 2006 Sunshine Reform Task Force, which were modified and approved by the City Council in 2008 and 2009, and codified by the City Council in 2014. The audit was conducted in response to a resident request.

We conducted this performance audit in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives. We limited our work to those areas specified in the "Audit Objective, Scope, and Methodology" section of this report.

The City Auditor's Office thanks the City Manager's Office, the City Clerk's Office, the City Attorney's Office, the Information Technology Department, the Environmental Services Department, the Office of Economic Development, the Police Department, and the Department of Planning, Building and Code Enforcement for their time and insight during the audit process.

Background

In 2006, the City Council formed the Sunshine Reform Task Force (Task Force) to make recommendations to promote open, accessible, and inclusive government. The 15-member task force included residents representing multiple interests.¹ The intent was to "strengthen public confidence in City government and in all individuals elected and appointed to represent the best interests of the community." The Task Force adopted ten Sunshine Reform Goals:

1. The public's business should be conducted in public.

¹ Members of the Task Force included representatives from neighborhood groups, labor organizations, business groups, the media, and others.

2. Information about the time and location of public meetings should be readily accessible and convenient to access.
3. The public should have a meaningful opportunity to participate in public decisions.
4. The public should have both easy access and sufficient time to fully review all information that is relevant to an item being discussed at a public meeting.
5. There should be a full and complete disclosure of information relevant to an issue being considered by any public body.
6. Stakeholders should be provided with an opportunity to be fully engaged before significant items are brought to a public body for consideration.
7. Broader disclosure should be made of what the Council does in closed session.²
8. Public records should be broadly defined and inclusive.
9. The public should have easy and convenient access to public records.
10. Reforms should be enforceable and take into consideration recent efforts to increase efficiency, timeliness, and responsiveness in the delivery of public services.

The Task Force issued reports in two phases. The Phase I report, issued in May 2007, provided recommendations on conducting public meetings, conducting closed session meetings, and facilitating access to public information.³ The Phase II report, issued in June 2008, provided recommendations to improve government openness and accountability through ethics and conduct, technology, administration and accountability, and public records.⁴ The following timeline describes important milestones in the adoption and revisions of the Task Force recommendations. (For more information on specific provisions, see Finding I.)

² Closed sessions are meetings of decision-making bodies that are not open to the public. The Ralph M. Brown Act permits closed session in instances where sensitive or confidential information is discussed, such as personnel issues, pending litigation, or real estate negotiations.

³ <http://www.sanjoseca.gov/DocumentCenter/View/1097>

⁴ <http://www.sanjoseca.gov/DocumentCenter/View/1098>

Exhibit I: Timeline of the Sunshine Reform Task Force and the Open Government Ordinance and Resolution

- | | |
|---------------|---|
| 2008 - | In June, Council approved the Task Force Phase I report with recommendations for public meetings, closed sessions, and facilitating access to public information (as amended by the Rules Committee). Staff was directed to provide training sessions and begin a one-year pilot beginning January 2009. |
| 2009 - | In August, Council approved the Phase II report recommendations for public records, administration and accountability, and ethics and conduct (as amended by the Rules Committee). Council directed staff to implement recommendations on a pilot basis.

In October, Council approved the remaining Phase II report recommendations related to public safety reports and information (as amended by the Rules Committee) and directed implementation on a pilot basis. |
| 2010 - | In January, Council (1) clarified and amended rules on adding late items to Council agendas and proposals making substantial changes to recommendations pending before Council, and (2) amended the definition of and reporting requirements for non-governmental bodies. |
| 2011 - | In September, Council amended requirements regarding the video taping of open meetings and the conduct of closed session as it relates to real estate negotiations.

In December, Council authorized staff to waive fees for responses to Public Records Act requests in accordance with the Municipal Code, if it is in the interest of the public. |
| 2013 - | In August, Council directed staff to draft an ordinance and single procedural document to consolidate various ethics and open government policies and procedures. |
| 2014 - | In August, Council approved an ordinance renaming Title 12 of the Municipal Code and adding a new Chapter 12.21 to codify open government provisions (referred to as the <i>Open Government Ordinance</i>). It also approved Resolution 77135 to consolidate various procedures and policies into new <i>Consolidated Open Government and Ethics Provisions</i> . Council made some changes based on staff recommendations following the pilot phase of implementation (e.g., clarifications to reflect current practices and reduce burden on staff). |

Source: Auditor analysis of Sunshine Reform Task Force reports, Council memoranda relating to adoption of the Task Force recommendations and Open Government Ordinance and Resolution.

The City Goes Beyond State Requirements in Many Areas

The Open Government Resolution builds upon state law surrounding public meetings, public records, and other topics. It often goes beyond what is required by the state. The two primary state laws related to open government are the Ralph M. Brown Act and the California Public Records Act. Exhibit 2 provides a comparison of select provisions of these acts to San José's and other jurisdictions' open government guidelines.

Exhibit 2: Comparison Between State and City Open Government Rules

California	San José	Select Jurisdictions
<p>Ralph M. Brown Act:</p> <p>(a) Agendas of regular meetings of legislative bodies must be posted 72 hours prior to meeting and include information to be discussed.</p> <p>(b) Legislative bodies will publicly report on actions taken as well as member votes or abstentions on actions.</p> <p>(c) Certain disclosures are required of closed session items, such as case names of pending litigation, property addresses for real estate negotiations, and the names of organizations representing employees in labor negotiations.</p>	<p>(a) Agendas and staff reports are to be posted 10 days before regular Council meetings; 7 days before Council Committee meetings (5 days for Rules), and 7 days before Board and Commission meetings.</p> <p>(b) City Council meeting “action minutes” are to be posted as soon as possible⁵; Council Committee action minutes are to be posted 5 days before Committee report are to be heard; Board and Commission action minutes are to be posted within 10 days of meeting.</p> <p>(c) Additional disclosures are required, including: amount of money or relief sought in pending litigation; whether the likely value of property in real estate negotiations exceeds \$1 million; and the nature of negotiations with the City’s bargaining units (e.g., wages, hours, working conditions, etc.)</p>	<p>(a) Oakland requires agendas for regular meetings of legislative bodies to be posted 10 days prior to meetings; Sacramento requires 5 days.</p> <p>(b) Oakland requires draft minutes of council or committee meetings to be available no later than 10 business days after meeting. Official adopted minutes are to be available no later than 5 business days after meeting in which they are adopted. Milpitas has similar requirements, with the exception that final adopted minutes are to be available 10 business days after adoption.</p> <p>(c) San Francisco requires closed session agendas identify whether it is the plaintiff or defendant in pending litigation.</p>
<p>Public Records Act:</p> <p>(a) Local agencies must (1) provide requested documents “promptly” or (2) respond within 10 calendar days of a request to notify whether records⁶ will be disclosed (this can be extended for up to 14 additional days), and (3) provide assistance, to the extent reasonable, in identifying records that are responsive to the request.</p>	<p>(a) Public records requests are to be acknowledged in writing within one business day of receipt. For simple or routine requests, documents are to be provided within 2 business days. For extensive or demanding requests, the records are to be provided within 10 calendar days, unless the deadline is extended by mutual agreement or is considered an “unusual circumstance” per the Public Records Act.</p>	<p>(a) San Francisco allows requestors to submit an “Immediate Disclosure Request,” which must be turned around in 1 day.</p>

Sources: CA Ralph M. Brown Act, CA Public Records, San José Municipal Code Title 12.21 (Open Government Ordinance), and Resolution 77135, Consolidated Open Government and Ethics Provisions (Open Government Resolution), open government requirements in select jurisdictions in California.

⁵ In 2016, the City Auditor released *Office of the City Clerk: Streamlining Processes and Clarifying Roles Can Better Ensure Compliance with Statutory Responsibilities*. At the time, the City Clerk’s Office had an internal goal of three months for having action minutes approved by Council. We recommended the City Clerk establish a more aggressive timeframe. As of December 31, 2016, the City Clerk had accelerated the goal to one month and had agreed to consider a more aggressive timeframe once full implementation of the new agenda management software was complete.

⁶ A public record is defined as any writing containing information relating to the conduct of the public’s business prepared, owned, used, or retained by a local agency regardless of physical form or characteristics. “Writing” is defined as any handwriting, typewriting, 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 combination thereof, an any record thereby created, regardless of the manner in which the record has been stored. The Public Records Act provides exemptions for certain public safety, personnel, or other records.

Other areas where the City's open government provisions go beyond what is required by the state include:

- *Calendars of public officials* – Calendars of the Mayor, Councilmembers, the City Manager, and other public officials are required to be posted online. Calendar appointments are to include names, titles, and affiliated organizations of meeting attendees and a general statement of the issues discussed. The City of Milpitas has similar requirements.
- *Community engagement process* – Multiple community meetings are required when the City considers a matter that would have a significant Citywide impact or lead to a change in Citywide service levels (such as a master planning process or the annual budget process). Open government provisions also provide guidelines for public notice of community meetings.
- *Disclosures of public subsidies* – The City requires 28-day public noticing in the form of an information memo for public subsidies greater than \$1 million. The information memo is to include estimates on the net fiscal and job impact of the subsidy, housing and neighborhood impacts, and the source of funds for the subsidy.⁷

Prior City Audits

In 2016, the City Auditor released *Office of the City Clerk: Streamlining Processes and Clarifying Roles Can Better Ensure Compliance with Statutory Responsibilities*.⁸ The audit had 20 recommendations, 13 of which had not been implemented or were only partly implemented as of December 31, 2016. Many of the open audit recommendations are related to open government efforts, including those related to posting of action minutes of City Council proceedings, implementation of a new records management system, training of new board and commission members, and developing consistent methodologies to calculate performance measures for its statutory responsibilities. We continue to follow progress on the implementation status of the remaining open recommendations.

Audit Objective, Scope, and Methodology

The objective of our audit was to assess progress towards meeting the City's open government goals as proposed by the 2006 Sunshine Reform Task Force, which were modified and approved by the City Council in 2008 and 2009, and codified by the City Council in 2014. We sought to understand and evaluate controls designed to facilitate access and disclosure of information relevant to issues being

⁷ CA Government Code 53083 requires disclosures for subsidies for economic purposes greater than \$100,000. However, the state's required disclosures are slightly different and do not need to be disclosed 28 days prior to Council discussion as the Open Government Resolution requires.

⁸ <http://www.sanjoseca.gov/DocumentCenter/View/57415>

considered by the Council. We also reviewed procedures in place to respond to public records requests. Because of the broad scope of the ordinance and resolution, we did not review for strict compliance with all open government provisions. We performed the following to achieve our audit objective:

- Reviewed the Phase I and Phase II reports of the Sunshine Reform Task Force.
- Reviewed the *Open Government Ordinance* (Municipal Code Chapter 12.21) and the *Consolidated Open Government and Ethics Resolution* (Resolution 77135).
- Reviewed other City and Council policies that address or relate to the City's open government goals, including:
 - *Lobbying Ordinance* (Municipal Code Chapter 12.12)
 - *Council Policy 6-30 Public Outreach Policy for Pending Land Use and Development Proposal*
 - *The City Manager's Community Engagement Process for Significant City Policy Actions*
 - *Council Policy 0-43 Open Data Policy*
 - *City Administrative Policy Manual (CPM) 1.7.1 Use of E-Mail, Internet Services, and Other Electronic Media*
 - *CPM 1.7.10 Open Data Implementation Policy and Procedures*
 - *CPM 6.1.1 Public Records Policy and Protocol*
 - *CPM 6.1.5 Records Retention and Disposition*
 - *CPM 6.1.10 Language Access Policy*
- Reviewed select sections of the California Government Code including the Ralph M. Brown Act (§§ 54950 et seq.), the Public Records Act (§§ 6250 et seq.), and sections concerning public meetings related to planning and zoning issues (§§ 65090 et seq.) and disclosures of economic development subsidies (§ 53083).
- Reviewed reference material from the League of California Cities, including:
 - *Open & Public V: A Guide to the Ralph M. Brown Act* (2016)
 - *The People's Business: A Guide to the California Public Records Act* (2008 and 2014 supplement)
- Reviewed the California Secretary of State's resources on records management, including:
 - *Records Management Handbook* (2008)
 - *Local Government Records Management Guidelines* (2006)

- Interviewed staff from the City Manager’s Office and the City Clerk’s Office about the development and posting of Council agendas, responding to public records requests, and other open government-related activities. In addition, we reviewed relevant procedures in place in each office related to these activities.
- Interviewed the City Attorney’s Office about procedures for developing City Council closed session agendas.
- Interviewed Public Records Act coordinators and records administrators in the Environmental Services Department, the Police Department, and the Department of Planning, Building and Code Enforcement to understand processes for responding to records requests and records retention and disposition, and staff from the Information Technology Department about their work related to public records management.
- Reviewed and analyzed available Public Records Act request logs and tracking spreadsheets from the City Clerk’s Office; the City Manager’s Office; the Environmental Services Department; the Department of Planning, Building and Code Enforcement; and the Police Department. These departments were identified as receiving a significant number of public records requests.
- On a limited, sample basis, reviewed publicly available information such as:
 - Three months of public officials’ calendars;
 - Financial reports and grant agreements of 13 non-governmental organizations receiving City support greater than the City Manager’s contracting authority;
 - 2017 lobbyist registration forms and lobbyist activity reports for the quarter ended March 31, 2017;
 - Memos to Council from April 2014 to February 2017 regarding public subsidies for economic development purposes;
 - Posted agendas of the City Council and Council Committees for the periods between March and May, 2017;
 - Five randomly selected closed session agendas during 2016;
 - Annual summaries of the labor negotiation process; and
 - Disclosure forms and contracts of organizations lobbying on behalf of the City.
- Benchmarked open government policies and procedures with other jurisdictions, including Los Angeles, San Francisco, Oakland, Sacramento, San Diego, and Milpitas.

Open Government

Because of the broad scope of open government and the limited testing we undertook during this review, future audits surrounding open government, in particular provisions related to public subsidies, community benefit organizations receiving City support, lobbying, contract integrity, and others may be warranted.

Finding I The City Has Made Progress in Many Areas of Open Government

Summary

The Open Government Resolution includes a broad set of procedures to improve access to public information and public records. It also prescribes disclosures surrounding public and closed session meetings of the City Council and other decision-making bodies. In many areas, open government practices are well established in the City. For example, the City has standard procedures to prepare and post agendas 10 days in advance of City Council meetings (compared to three days per state law). In addition, responding to simple public records requests appears to be routine for City departments. Finally, the City Attorney's Office has developed standard procedures to prepare closed session agendas that contain required open government disclosures. In these and other areas, there is assigned staff and established procedures to meet open government guidelines on an ongoing basis. To ensure this progress is sustained, the City should incorporate open government standards into the City Administrative Policy Manual.

Open Government Practices Are Well Established in Many Areas

The *Consolidated Open Government and Ethics Provisions* (Open Government Resolution) has seven sections and formalizes most of the recommendations made by the Sunshine Reform Task Force.⁹

⁹ <http://www.sanjoseca.gov/documentcenter/view/34998>

Exhibit 3: Overview of Open Government Provisions

Open Government Resolution Sections	Select provisions (further detail found later in report)
1. Public information and outreach	<ul style="list-style-type: none"> • Departments must have a designated Public Records Act coordinator. • Certain City officials and most department heads must maintain calendars; some officials' calendars must be posted online. • Provides guidelines for when a community engagement process is required. • Disclosures surrounding the negotiation process with employee bargaining units is required to be an agenda item for a Council meeting annually.
2. Public meetings	<ul style="list-style-type: none"> • Rules for posting of agendas for Council, Council committees, and other decision-making bodies. • Staff memos to Council from departments reporting to the City Manager's Office are to include sections on policy alternatives as well as fiscal/policy alignment where relevant. • Staff reports on public subsidies of \$1 million or more are to include cost/benefit evaluations and other disclosures and be posted 28 days before a Council meeting. (See Finding 2 for more information.) • Requires non-governmental organizations receiving a certain amount of assistance from the City to post financial reports on their website.
3. Closed session	<ul style="list-style-type: none"> • Prescribes procedures for noticing, conducting, and reporting of actions taken in closed session meetings of the Council and other decision-making bodies.
4. Public records	<ul style="list-style-type: none"> • Provides rules for responding to public records requests by departments and the City's Open Government Manager, including deadlines and guidelines for certain types of documents and information exempted from disclosure (e.g., some law enforcement documents, personnel records) as well as allowable fees. • Outlines an appeals process for when the City withholds documents that had been requested in a public records request.
5. Disclosure and sharing material facts and communication received during council meetings	<ul style="list-style-type: none"> • Councilmembers are required to disclose material facts and communications prior to Council action or public discussion.
6. Declaration of conflict of interest	<ul style="list-style-type: none"> • Councilmembers or members of decision-making bodies are to file conflict of interest declaration forms at least 24 hours before meeting, as necessary.
7. Procurement and contract process integrity and conflict of interest	<ul style="list-style-type: none"> • Requires all contact between prospective respondents and the City after the issuance of a solicitation be directed to the designated procurement contact. • Evaluators in the selection process must sign a confidentiality agreement. • Requires financial disclosures for procurement and contracting staff and others who regularly participate in making contracts on behalf of the City.

Source: Resolution 77135, Consolidated Open Government and Ethics Provisions

In some important areas, open government timelines and disclosures have become the normal course of business. There is assigned staff and established procedures to ensure open government requirements are met, even those that go beyond state requirements. Exhibit 4 provides examples of where procedures have been put into place and have become a standard business practice. Although we did not extensively

test for strict compliance with all the provisions of the Open Government Resolution, the listed provisions appear to be generally followed on an ongoing basis.

Exhibit 4: Established Processes for Select Provisions of the Open Government Resolution

Open Government Provision	Established Processes
City Council meeting agendas are to be posted 10 days ahead of meeting. Council Committee agendas are to be posted 7 days in advance (5 days for Rules Committee).	<ul style="list-style-type: none"> The City Manager’s Office (CMO) and City Clerk’s Office have established a process and timeline for developing Council and Committee agendas, including gathering staff memos, preparing the agendas, and posting based on the open government timelines. Late items can be added to Council agendas by the Rules Committee through “sunshine waivers.”
Board and Commission meeting agendas are to be posted 7 days in advance of meeting.	<ul style="list-style-type: none"> The City Clerk’s Office provides training for department staff who act as Board and Commission secretaries and who are responsible for posting agendas. The City Clerk’s Office has begun monitoring the timeliness of agenda postings and notifies Board and Commission secretaries and the CMO of compliance.
Staff memos to Council from departments reporting to the City Manager’s Office to include policy alternatives and fiscal/policy alignment.	<ul style="list-style-type: none"> The CMO has prepared a standard template for staff memos, with required sections for policy alternatives and fiscal/policy alignment. The CMO Agenda Services Division reviews memos for consistency, policy, and relevancy of content.
Closed session agenda and disclosures.	<ul style="list-style-type: none"> The City Attorney’s Office has established a process to prepare the closed session agendas to be posted by the City Clerk’s Office.
Annual summary of labor negotiations.	<ul style="list-style-type: none"> A discussion of the negotiation process with the City’s bargaining units has regularly been included as an agenda item for a Council meeting each year.
Responses to Public Records Act requests. ¹⁰	<ul style="list-style-type: none"> Each City department has a designated Public Records Act coordinator that responds to public records requests. The CMO’s Open Government Manager coordinates records requests that involve multiple departments, provides training for department Public Records Act coordinators, and maintains the City’s records retention schedules.
Community engagement process required when service or policy change determined to have significant citywide impact. ¹¹	<ul style="list-style-type: none"> Internal procedures developed by the CMO guide staff on when community engagement process is required. Council memo template has mandatory section on public outreach for staff to include any discussions that have occurred with the public, stakeholders, and/or community groups.
Non-governmental organizations receiving annual financial assistance greater than City Manager’s contracting authority required to post financial reports on their website.	<ul style="list-style-type: none"> Contract language with this requirement appears to be standard in agreements with non-governmental organizations.

Sources: The Consolidated Open Government and Ethics Provisions, interviews with City staff, and internal policies and procedures.

¹⁰ For more information on public records request processing, see Finding 3.

¹¹ This process is distinct from public notice processes for land use and development proposals, which are governed by Council Policy 6-30, and utility rate-setting, which are governed by sections 15.08.320 and 9.10.1120 of the San José Municipal Code.

Staff Across the City Are Responsible for the Administration of Open Government

Every City department is responsible in part for the administration of open government. For example, each department must comply with deadlines to submit memos for Council agendas, designate a Public Records Act coordinator to respond to public records requests, and implement community engagement processes for policy actions with significant citywide impact. Additionally, some departments are responsible for preparing agendas and minutes of advisory commissions (e.g., a Housing Department staff member is the commission secretary for the Housing and Community Development Commission).

The City Clerk's Office, CMO, and City Attorney's Office (CAO) provide citywide coordination and oversight for the administration of open government provisions:

- The City Clerk's Office maintains records of activities of the City Council and the Rules and Open Government Committee; posts Council and Rules and Open Government Committee agendas and minutes; and responds to public records requests for contracts, ordinances, and Council resolutions.
- The CMO develops Council and Committee agendas, reviews staff memos, and consults with departments on community engagement processes. The CMO has an Open Government Manager to coordinate responses to complex public records requests. The Open Government Manager also facilitates department updates to the City's records retention schedules.
- The CAO advises Council and Committee members on open government provisions such as sunshine waivers, and prepares closed session agendas. The CAO also works with departments on public records requests, advising when certain records or information should be redacted or withheld.

Other City Regulations and Policies Help Meet Goals of Sunshine Reform Task Force

In addition to the open government provisions, other City policies and regulations help meet the Sunshine Reform Task Force goals of transparent and accountable City government, and encourage of civic engagement and participation. These include:

- *San José Municipal Code Chapter 12.12 San José Lobbying Ordinance*¹² – The ordinance defines lobbying activities, and outlines registration and reporting requirements for lobbyists and City officials. Lobbyists and lobbying are noted in multiple sections within the Open Government Resolution.
- *Council Policy 6-30 Public Outreach Policy for Pending Land Use and Development Proposals* – 6-30 outlines public outreach protocol specifically for land use and

¹² The Lobbying Ordinance has a goal “to enhance public confidence and trust with respect to lobbying activities and city practices” and notes that it is “in the spirit of open and transparent government, to allow the public to know and better understand the relationship between its elected officials, lobbyists, and lobbyist clients.”

development proposals, including required timelines and methods of public notice and comment prior to finalizing development plans. Public hearing notices are required to be made available in multiple languages.

- *Community Engagement Process for Significant City Policy Actions* – The process calls for the evaluation of whether a policy affects the City broadly, changes a ‘fundamental’ City service, restricts community activities or behaviors, or

creates controversy. Based on this evaluation, the process requires early notification and at least two community meetings.¹³

- *Council Policy 0-43 Open Data Policy* – Affirming “the City’s commitment to open, honest, and effective government,” the policy directs the City Manager to establish procedures by which department staff will post data generated by the City online such that it is free, searchable, up-to-date, and shared with other governments and stakeholders. These procedures were established in the *Open Data Implementation Policy and Procedures (City Administrative Policy Manual 1.7.10)*.

Long-Term Sustainability of Open Government Requires Ongoing Support

Open government benefits the public in two ways. First, it supports the public’s right to public information, as asserted by the California State Constitution. Second, it promotes an open and ethical culture at all levels of City government, and prevents corruption by ensuring that decisions are made publicly and with sufficient notice for public comment.

The concept of public accountability is key to our nation’s governing processes. Even in situations where demand for transparency is low, proactive open government practices reduce the risk that public decisions are made for the benefit of private interests. Proactive monitoring ensures compliance, creates accountability, and promotes residents’ trust in government.

Because of this, open government requires ongoing support and resources. For example, to support the public’s right to public information, City staff must retrieve public records as they are requested and, by law, cannot recover staff costs for locating records through fees.¹⁴ Other proactive open government practices, such as the publication of officials’ calendars, also require ongoing support.

¹³ The City Council approved the development and implementation of this process in response to a recommendation from the Sunshine Reform Task Force that a process similar to Council Policy 6-30 be created and implemented for non-development related actions that have a significant citywide impact. This has not been formally incorporated into the City Administrative Policy Manual, but is available for staff on the City’s intranet.

¹⁴ The Open Government Resolution only allows fees in limited circumstances, such as duplicating records or producing electronic records/reports. Requestors cannot be charged for staff time spent locating or collecting records.

The City Can Better Inform City Staff of Their Open Government Responsibilities

As shown in Exhibit 3, open government has broad application across the City. Staff across departments are expected to understand their responsibilities under open government. However, staff is not always aware of those responsibilities. These areas are discussed in later findings.

Currently, open government provisions are outlined in the Open Government Resolution. However, they should also be referenced in the City's Administrative Policy Manual, which was created to convey the standards that the City has for its employees and to allow employees to view City policies in one central place.¹⁵ Incorporating open government policies into the City's Administrative Policy Manual will be increasingly important as staff turns over in City departments and Council Offices and institutional memory of open government is lost.

Recommendation #1: The Administration should create an Open Government policy to be included in the City's Administrative Policy Manual. The policy should state the purpose and goals of the Open Government Ordinance and Resolution and cross reference with the specific procedures outlined in the resolution and other City policies as necessary.

¹⁵ The City Administrative Policy Manual does include 6.1.1 *Public Records Policy and Protocol*. Other sections of the Open Government Resolution are not currently included.

Finding 2 Open Government Efforts Can Be More Consistent in Some Areas

Summary

By clarifying requirements and developing standard procedures, the City can improve how it meets open government disclosure requirements in a couple of areas. Open government provisions require certain information to be disclosed related to public subsidies of more than \$1 million (e.g., job and housing impact). Because of a loss of institutional knowledge from staff turnover, the City has not been consistently meeting those requirements. Open government provisions also provide guidelines for publicly posting calendars of City officials. Based on our review, not all calendars have been posted timely or had included all required content.

Finally, the City has several laws that regulate lobbyists, including the Lobbying Ordinance, the Revolving Door Ordinance, and the Open Government Resolution. Generally, these provisions require self-regulation and self-reporting. However, the City's lobbyist reporting forms only refer to the Lobbying Ordinance. As a result, some lobbyists may be unaware of relevant restrictions in the Revolving Door Ordinance and Open Government Resolution. In addition, different definitions and exemptions in the Lobbying Ordinance and Revolving Door Ordinance make the Municipal Code difficult to navigate and may present conflicts of interest.

The City Has Not Consistently Met the Open Government Disclosure Requirements for Public Subsidies Greater Than \$1 Million

Under the open government provisions, the City is required to disclose certain information about public subsidies of more than \$1 million. California state law and the Governmental Accounting Standards Board (GASB) also have disclosure requirements for certain public subsidies. Each of the reporting requirements are slightly different, as shown in Exhibit 5. Notably, the City requires much more detailed information, including the potential impacts on housing, traffic, and public infrastructure. It also requires the information to be available to the public 28 days before the City Council considers a proposed subsidy.

Exhibit 5: Public Subsidy Disclosures Required by the City’s Open Government Resolution, California State Law, and the Governmental Accounting Standards Board

	Open Government Resolution (§ 2.3.2.6 C)	California Government Code (§ 53083)	GASB Statement 77 ¹⁶
Types of subsidies subject to disclosure	<ul style="list-style-type: none"> • Cash payments • Loans below the City’s portfolio rate • Land or access to land below fair market value • Buildings or access to buildings below fair market value • Waiver or reduction of fees or taxes 	<ul style="list-style-type: none"> • Bonds • Grants • Loans and loan guarantees • Enterprise zone or empowerment zone incentives • Fee waivers, tax abatements, tax exemptions, or tax credits • Land price subsidies • Matching funds • Other “expenditure of public funds or loss of revenue” meant to stimulate economic development 	<ul style="list-style-type: none"> • Tax abatements
Minimum threshold for disclosure	\$1,000,000	\$100,000	No minimum (The City sets a threshold in agreement with its financial auditor)
Required disclosures <i>(suggested disclosures are in italics)</i>	<ul style="list-style-type: none"> • Measures for accountability (in the event the City does not receive expected return on investment) • Net fiscal impact • Estimated number of jobs created (by salary level) • Net effect on housing • Source of funding and applicable restrictions • Impact on neighborhoods (environmental impacts, traffic impacts, public service impacts, etc.) 	<ul style="list-style-type: none"> • Description of subsidy, including source of funds • Name and address of recipient • Start and end dates of subsidy • Net tax revenue • Net jobs created (by full-time, part-time, and temporary) 	<ul style="list-style-type: none"> • Description of tax abated • Gross dollar amount of tax abated for the reporting period • Any related City commitments made as a part of the abatement agreement • <i>Authority for tax abatement</i> • <i>Eligibility criteria for tax abatement</i> • <i>Mechanism by which tax is abated</i> • <i>Provisions for recapturing abated taxes</i>
Form of disclosure	Information memorandum addressed to City Council	A written report available to the public and on the City’s website	Statement in the City’s Comprehensive Annual Financial Report (CAFR)
Time of disclosure	At least 28 days in advance of consideration by City Council	At the same time as consideration by City Council	End of the fiscal year
Follow-up requirements	After-action report (describing extent to which proposal is generating outcomes as predicted)	After-action report and public hearing (within five years of subsidy start date)	Ongoing annual reporting

Source: Open Government Resolution (§ 2.3.2.6 C), California Gov. Code. § 53083, and GASB Statement No. 77.

¹⁶ This is a new requirement. The FY 2015-16 Comprehensive Annual Financial Report (CAFR) notes that the City will include disclosures for GASB 77 in the following fiscal year (ending June 30, 2017.) To this end, the Director of Finance sent a memo to the City’s senior staff, requesting the gross amount of tax abatements, copies of staff reports, and draft disclosures by April 30, 2017. The memo also states that staff from the Finance Department will set up meetings with the Office of Economic Development and the Budget Office to discuss the implementation of GASB 77 further.

While the City appears to have complied with state-required disclosures for economic development subsidies of \$100,000 or more, it has not consistently met the open government provisions for public subsidies of \$1 million or more. For example, a memo to Council proposing to waive \$4 million in traffic impact fees for the development of a San José company's corporate campus included the state-required disclosures, but not the City-required disclosures. According to the Office of Economic Development (OED), staff turnover and loss of institutional memory likely resulted in the incomplete disclosures.

Moving Forward, the City Should Clarify Disclosure Requirements

In addition, it is not always clear whether a project or program should be considered a subsidy subject to the open government provisions. For example, the City granted a new airline \$1.8 million in a combination of marketing subsidies and waivers of taxes and fees to encourage service into the Mineta San José International Airport. For this proposal, the memo to Council included the state-required disclosures, but not the City-required disclosures. While the Resolution requires disclosure for cash payments, it does not elaborate on whether that includes payment for services (such as marketing). It is also not clear whether subsidies that are (a) part of a larger program or (b) to a non-profit or public agency, are subject to the open government disclosure requirements.

Because of the complexity of these agreements and the potential difficulty in determining the applicability of the open government disclosure requirements, the Administration and the CAO should clarify whether or how the requirements apply to different types of subsidies.

In addition, the Administration should update the template for staff memos to City Council to include a description of the public subsidy disclosure requirements as a reminder to staff when they prepare a memo to Council about a proposed subsidy. The template is used similarly to remind staff to include policy alternatives and fiscal/policy alignments required by open government provisions.

Recommendation #2: The Office of Economic Development, in coordination with the City Attorney’s Office, should develop a policy and procedures to clarify whether and how to disclose cost-benefit information for provisions of economic benefit to private entities when:

- a) The provision is a part of a larger incentive program to be issued to entities that meet specified criteria,**
- b) Multiple provisions may benefit a single entity within a short timeframe,**
- c) The City provides services on behalf of/for a private entity, and**
- d) The entity receiving the benefit is a non-profit or public agency.**

Recommendation #3: The City Manager’s Office should update the Council memo template to include direction for required disclosures for proposed subsidies of more than \$100,000 and more than \$1 million, in accordance with the state law and Open Government Resolution, respectively.

State Law and the City’s Open Government Resolution Require Timely After-Action Reports for Economic Development Subsidies

As shown in Exhibit 5, both state law and the Open Government Resolution require follow-up reporting on public subsidies. These follow-up, or after-action, reports are meant to provide the public with information on the effectiveness of subsidies (e.g., actual number of jobs and net tax revenue generated). At the time of the audit, not all staff were aware of these reporting requirements.

Centralized Tracking of Public Subsidies Can Ensure Proper Financial Reporting

Developing standard procedures to track subsidies can help ensure timely after-action reports. For example, Los Angeles and Long Beach have webpages that present state-required economic development reports centrally. Central tracking could also include projects that are subject to City-required disclosure.

GASB Statement No. 77 sets standards for disclosure of local government tax abatements.¹⁷ This is a new rule, and the City is preparing these disclosures for the FY 2016-17 CAFR. Similar to the state- and City-required after-action reports, the GASB disclosures describe agreements retrospectively. As the

¹⁷ The purpose of this standard is to inform the public, as well as financial and oversight bodies, of limitations on a government’s ability to raise revenue.

Administration begins to collect Citywide information on tax abatements to comply with GASB 77, it may also identify projects that require after-action reports. Moving forward, the Administration should play a central role in tracking these subsidies and abatements on an ongoing basis to ensure future compliance with follow-up requirements.

Recommendation #4: The Administration should implement procedures to track public subsidy and tax abatement agreements to ensure compliance with state and Open Government after-action reporting requirements and financial statement disclosures.

The City Can Better Ensure Public Calendars Are Set Up Timely and Include All Required Information

Open government provisions require the Mayor, Councilmembers, Chiefs of Staff (or equivalent regardless of title), City Manager, City Attorney, and City Clerk maintain calendars of all their City-related appointments and publicly post them online each week. Generally, City-related appointments must include the names, titles, and affiliated organizations of the participants, as well as a general statement of the issues discussed.

The provisions offer limited exceptions for confidential information such as items that relate to attorney-client privilege, personnel issues, whistleblowers, or criminal investigations. City officials are not required to post personal appointments or unscheduled meetings, though the provisions encourage inclusion of “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.”

Not All Public Calendars Have Been Posted Timely or Included All Required Information

Based on our review of several publicly available calendars of City officials, we found:

- Although the Mayor, Councilmembers, City Manager, City Attorney, City Clerk, and Chiefs of Staff all had public calendars posted online, four were posted more than two months after the officials’ start of service.¹⁸

¹⁸ The length of time calendars had been maintained online also varied. At the time of the audit, some officials’ calendars automatically deleted posts older than three months, while others have archived calendars from years past. Open government provisions do not specify how long calendar appointments must remain public, however many policy decisions take longer than three months. A longer reporting period could better meet the purpose of the open government provisions to “facilitate public awareness...through easy access to, and full disclosure of, public information relevant to any issue being considered by the City Council.” To address this issue, the IT Department has reconfigured the calendar settings to display a minimum of one year’s appointments, the maximum allowed by the vendor. IT has also contacted the vendor about potentially increasing the minimum to two years.

- Many calendar appointments do not disclose all information as required by open government provisions.

According to City staff, training for new City officials on the calendaring requirement does not include required information for City-related appointments. There is also no direction on who can help new Council staff set up the calendars, which may delay initial set up when there is unanticipated turnover.

Recommendation #5: The City Clerk's Office should:

- a. Include Open Government calendaring requirements (e.g., name, title, organization, and purpose, as outlined in §1.3.3 of the Open Government Resolution) in trainings for new Council staff, and**
- b. Include calendar set up as a part of the onboarding process for Council staff (such as referral to appropriate Information Technology Department and City Manager's Office staff).**

Lobbyists Are Responsible for Complying with Provisions in the Lobbying Ordinance, Revolving Door Ordinance, and the Open Government Resolution

The City has several laws that regulate lobbyists, including the Lobbying Ordinance, Revolving Door Ordinance, and the Open Government Resolution. These regulations share similar goals and were developed concurrently.¹⁹ Similar to the Open Government Ordinance, the purpose of the Lobbying Ordinance is “in the spirit of open and transparent government, to allow the public to know and better understand the relationship between its elected officials, lobbyists, and lobbyist’s clients.” Generally, these provisions require self-regulation and self-reporting.

¹⁹ The City Council amended the Revolving Door and Lobbying Ordinances in 2007, as a part of the Reed Reforms, named for Mayor Chuck Reed. The Reed Reforms also called for a sunshine ordinance, which became the Open Government Ordinance and Open Government Resolution.

Exhibit 6: Overview of Lobbying Provisions

Lobbying Ordinance	Open Government Ordinance and Resolution	Revolving Door Ordinance
<ul style="list-style-type: none"> • Defines lobbying activity • Requires annual registration with the City Clerk’s Office • Requires regular disclosure of communications with City officials • Requires regular disclosure of financial support, such as campaign contributions or certain donations made at the request of a City official • Specifies filing deadlines, with late fines cumulating daily for up to 60 days 	<ul style="list-style-type: none"> • Encourages further lobbyist-related disclosures • Restricts contact with City officials and staff during the solicitation process—lobbyists for respondents to a request for proposals, quotes, qualifications, or bids are prohibited from communicating with City officials until after the City has issued notice of its intended award and has completed the protest period 	<ul style="list-style-type: none"> • With few exceptions, limits the ability of former designated City staff²⁰ to register as lobbyists within two years of employment with the City²¹ • Outlines process for obtaining a waiver to the prohibition through the City Council • Aims to “prevent such former officials and designated employees from using their positions with the city or agency for personal gain”

Source: San José Municipal Code Chapter 12.10 (Revolving Door Ordinance), 12.12 (Lobbying Ordinance), and 12.21 (Open Government) and Resolution 77135 (Consolidated Open Government and Ethics Provisions).

Lobbyists May Not Be Aware of All Applicable Regulations

The City Clerk’s Office administers lobbyist filings and posts the reports online so they are publicly available in a PDF format. Currently, this process requires manual processing and data entry. The City Clerk’s Office is working to update the lobbyist reporting and registration forms so they can be completed online and posted automatically. Additionally, while the City Clerk’s Office does a cursory review of the lobbyist reports, it does not review for content.

Though multiple laws regulate lobbyists, the lobbyist reporting forms only refer to the Lobbying Ordinance. As a result, some lobbyists may not be aware of relevant provisions of the Open Government Resolution or Revolving Door Ordinance that apply to them. For example, some lobbyists have reported communication in violation of the contract integrity process in their quarterly reports,²² suggesting they were not aware that such communication was prohibited.

Similarly, there does not appear to be any mechanism to identify former City staff who register as lobbyists. Three lobbying firms registered lobbyists that had

²⁰ Designated staff are City employees in positions identified in the City’s Conflict of Interest Code. Due to their position, and ability to make or influence public decisions, these staff are required to disclose receipt of gifts and potential economic conflicts of interest annually.

²¹ The Revolving Door Ordinance prohibits designated employees from representing “anyone else on any matter, whether or not for compensation, before the city council, redevelopment agency board, any commission thereof, any individual member of the city council, redevelopment agency board, or commission, or any staff of the city or agency.”

²² The City Auditor’s Office referred these instances to the Finance Department.

been designated City employees within the past two years.²³ Finally, there is not a process to identify unregistered lobbyists who may schedule meetings with City officials.²⁴

The City Can Better Inform Lobbyists and City Officials of Lobbying Guidelines

Since the City's process for monitoring lobbyists relies on self-reporting, it is particularly important that lobbyists understand the rules they are expected to follow. Meetings in violation of the contract integrity process and Revolving Door Ordinance can compromise the independence, impartiality, and integrity of public decision-making. Certain firms or stakeholders may receive undue favor to the detriment of public benefit. To promote awareness of these restrictions on lobbying, the City Clerk's Office should incorporate these provisions into the updated registration and reporting forms.

Additionally, City staff and officials who meet regularly with lobbyists should be aware of who may be subject to lobbyist reporting requirements, and prohibitions on meetings during the solicitation process. This awareness provides a check against self-reporting and self-regulation.

Recommendation #6: The City Clerk's Office should:

- a. **Update the lobbyist reporting form to include a reference to Section 7 of the Open Government Resolution, restricting lobbying during the solicitation process,**
- b. **Update the lobbyist registration form to include a check box that indicates whether a lobbyist is a former employee of the City, potentially subject to the Revolving Door Ordinance, and**
- c. **Implement a process to refer such former City staff to the City Attorney's Office for follow up.**

Recommendation #7: The City Clerk's Office, in coordination with the City Attorney's Office, should provide Open Government training for Mayor and Council office staff on:

- a. **The definition of a lobbyist,**
- b. **Resources on lobbyist disclosure to identify potential unregistered lobbyists (such as the City Clerk's Registered Lobbyist List), and**
- c. **Restrictions on lobbying during the solicitation process.**

²³ The City Auditor's Office referred these individuals the City Attorney's Office to review whether they were subject to the Revolving Door Ordinance.

²⁴ The City Auditor's Office referred four potential unregistered lobbyists to the City Clerk's Office.

The Revolving Door Ordinance can be Simplified to Better Prevent Potential Conflicts of Interest

The Revolving Door Ordinance prevents certain former City employees who had decision-making authority from (a) lobbying or (b) working on legislative or administrative matters that directly relate to their past work with the City, within two years of City employment. The purpose of the ordinance is to prevent City officials and employees from using their positions for personal gain (such as securing future employment) or creating an unfair advantage for firms that hire former City employees. It is meant to provide assurance that public decisions are made in the public interest.

Recognizing that there may be instances in which former City employees appropriately seek employment relevant to their current work, the ordinance allows affected employees to ask the City Council to waive the restriction on a case-by-case basis.

The ordinance provides certain exemptions from the Revolving Door restrictions for employees leaving because of a City layoff or to work for another government. The exemptions also apply for employment with some non-profits as described below.

The Revolving Door and Lobbying Ordinances Apply to Different Types of Non-profits

The Revolving Door Ordinance defines a non-profit differently than it is defined in the Lobbying Ordinance, which can make the rules difficult to navigate. For example:

- The Revolving Door Ordinance non-profit exemption applies to all organizations which would qualify as a non-profit under the federal Internal Revenue Code. This includes 501(c)(3) charitable organizations, 501(c)(4) social welfare organizations (e.g., civic leagues, homeowners associations), 501(c)(5) labor and agricultural organizations, and 501(c)(6) business associations.
- The Lobbying Ordinance only mentions and exempts 501(c)(3) organizations.

The Revolving Door Exemption Applies Only When a Non-profit Has Received City Funding or Other Support – Not When It Has Not

Currently, the Revolving Door Ordinance allows former designated City employees to lobby the City immediately after leaving City employment—without a Revolving Door waiver—if they work for a non-profit that *has* received financial support from the City within the past five years. However, the

same exemption does *not* apply for non-profits that have *not* received financial support from the City. As a result, the same employees would *not* be allowed to lobby the City immediately after leaving City employment if they work for a non-profit that *had not* received financial support from the City.

Policy Choices

Aligning the definition of non-profit in the Revolving Door Ordinance to the definition within the Lobbying Ordinance would make the rule less confusing and prevent City employees from using their former position to gain advantage for lobbying firms without a waiver.

If the City's priority is to limit the use of a former employee's connections to gain advantage for lobbying, it should make the non-profit exemption in the Revolving Door Ordinance match the non-profit exemption in the Lobbying Ordinance. This would strike the language in the Revolving Door Ordinance defining a non-profit organization as "an entity which would qualify as such under the federal...within the past five years." And specifically exempt "an employee or volunteer of a non-profit organization with tax exempt status as a 501(c)(3) under the Internal Revenue Code."

However, if the City's priority is to minimize the potential for employees to use their position within the City to secure future employment, it should consider striking the non-profit exemption altogether. This would ensure former designated employees comply with the Revolving Door Ordinance restrictions whether working for a for-profit or non-profit institution.

While there are roughly 1,000 designated City employees to whom this rule **could apply**, it should be noted that the Revolving Door policy **only applies** when employees leave City employment to lobby or work on legislative or administrative matters that **directly relate** to the work they did for the City in the past year. The City does not track where people work after leaving the City, so it is not possible to estimate the number of former employees who work for non-profit organizations and to whom such a change might have applied.

Recommendation #8: The City Council should consider a change to the Revolving Door Ordinance that mitigates potential conflicts of interest and simplifies the rules surrounding former designated employees who work for non-profit organizations as lobbyists or on legislative or administrative matters which they worked on as part of their City employment. Potential policy directions include:

- a) Narrowing the non-profit exemption to 501(c)(3) organizations, regardless of whether the organization had received support from the City; or**
- b) Striking the non-profit exemption, such that the same rules apply whether former designated employees go to work for non-profit or for-profit organizations.**

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Finding 3 The City Can Respond to Public Records Requests More Efficiently With Better Records Management

Summary

In 2016, the City Manager's Office and four departments responded to at least 1,500 public records requests. The median time to close these requests was five days. However, completion times can vary significantly because of the type and scope of requests. Each reviewed department had instances where completing a records request took more than one month and in some cases more than three months. The growth in electronic records and emails has made responding to complex records requests challenging and can lead to delays in responding. To address this growth, the City should update its records retention and email policies to reflect the current business environment. The City should also implement strategies to address the growth of unnecessary electronic files and emails. This could include department file clean outs, guidance on what records should be saved, and/or periodic notices to staff to review or delete old emails.

The City Manager's Office and Four Departments Responded to More than 1,500 Public Records Requests in 2016

The California Public Records Act (PRA) states that "access to information concerning the conduct of the people's business is a fundamental and necessary right." Public records include any writing prepared, owned, used, or retained by a local agency containing information relating to the conduct of the public's business.²⁵ It requires that local agencies respond to requests within 10 days to notify the requestor whether the records will be disclosed. This response can be extended an additional 14 days. The PRA stipulates that requested documents are to be provided "promptly" if they are not exempted from disclosure under the act.²⁶

²⁵ The PRA defines "writing" as "any handwriting, typewriting, 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 combination thereof, an any record thereby created, regardless of the manner in which the record has been stored."

²⁶ Some records are exempted from disclosure, including preliminary drafts, personal information, certain law enforcement records, library circulation records, and others. There is also an exemption for instances when an agency can demonstrate that not making the record available better serves the public interest than disclosing the information (this is referred to as the "balancing test").

The open government provisions build on the PRA, setting more detailed guidelines for acknowledgement and response to public records requests as follows:

Receipt of request to be acknowledged by City staff	1 business day
Documents to be provided (simple/routine requests)	2 business days
Documents to be provided (extensive or demanding requests)	<10 calendar days (unless extended by mutual agreement)
Extension	14 days

The City Has Standard Processes for Responding to Public Records Requests

Members of the public can submit public records requests through a variety of means, including by email, telephone, an online form,²⁷ or in person to the Open Government Manager or directly to department staff. Each City office or department has a designated PRA coordinator whose role is to provide information to the public about the office or department's operations, plans, policies, and positions, and to ensure that department staff have a basic understanding of how to handle public records requests. Some departments have multiple PRA coordinators across different divisions.

Upon receiving a PRA request, department PRA coordinators try to access requested information themselves (if readily available) or identify staff in their department who are best able to locate the necessary records to fulfill the request. Staff will then review their files for responsive records, and send materials to the PRA coordinator to close out the request.^{28,29} PRA coordinators report that City staff are generally aware of their responsibilities related to responding to records requests.

The open government provisions give the Open Government Manager in the CMO responsibility to coordinate interdepartmental responses to PRA requests, assist with complex requests, and review appeals on withheld records.

²⁷ The public records request form is accessible at <http://www.sanjoseca.gov/FormCenter/Open-Government-14/Request-Public-Records-139>.

²⁸ The Open Government Resolution only allows PRA fees in limited circumstances, such as duplicating records or producing electronic records/reports. Requestors cannot be charged for staff time spent locating or collecting records. Based on interviews with PRA coordinators and a review of costs recorded in PRA tracking logs, costs are charged infrequently. The City automatically waives the fee if the total is under \$5; the Rules and Open Government Committee and Council Appointees can also waive fees under certain circumstances.

²⁹ In certain instances, the Information Technology Department utilizes the software tool Discovery Attender to perform file searches on the City's network. However, its ability to search is limited to filenames; it does not search through the content of files.

In 2016, over 1,500 public records requests were submitted to the CMO, City Clerk's Office, the Police Department, the Environmental Services Department, and Planning, Building and Code Enforcement's Planning Division. Exhibit 7 displays the estimated number of requests received by department or division and a description of their typical requests.

Exhibit 7: Overview of Public Records Requests, 2016 (Select Departments/Divisions)*

Department/ Division	Common requests	Estimated # of requests	Median days to close (estimate)	Average days to close (estimate)
City Manager's Office	Commercial, personal, and property records	430	2	7
City Clerk's Office	Legislative documents (e.g., ordinances, resolutions), contracts, and financial and campaign disclosures for candidates and City officials	290	<1	1
Environmental Services Department	Financial data, studies and assessments, communications, contracts and other records	70	6	10
Police/ Research and Development	Crime/arrest data, policies/procedures, individual subject matter requests	180	11	16
Police/ Records	Incident reports, call data	460	9	14
Planning, Building and Code Enforcement/ Planning	Permits, documents, communications surrounding development projects	130	4	7
Overall		1,560	5	9

Source: Auditor analysis of department public records request logs.

* Because of gaps and variations in the data and potential duplicate entries, these are best estimates of the number of requests and timeliness of responses.

It Can Take Significant Time to Respond to Complex Records Requests

Based on a review of select tracking logs, the median time to close public records requests was five days in 2016. However, because of the types and scope of requests, completion times vary significantly across departments. For example, the City Clerk's Office, which responds to requests for legislative documents such as ordinances and resolutions as well as campaign disclosures, closed requests within two days 90 percent of the time. The Police Department's Research and Development division receives more complex requests, such as all documents or correspondence pertaining to a subject or decision, and thus only responded within two days 16 percent of the time.³⁰

³⁰ In practice, the City is generally only able to complete requests within two or three days if the information is readily accessible online or in a database. Since records are not stored in a central system, getting the request to the right people takes time.

Roughly 30 percent of records requests took longer than 10 days to complete. Each reviewed department had instances where completing a records request took more than one month and in some cases more than three months.³¹

These extended response times can be attributed to the complexity and scope of requests, the need for coordination across departments, and time spent redacting personal or other exempt information. For wide-scoped requests (e.g., “any and all documents”), City staff work with the requestor to clarify and narrow their requests. City staff have also put records online,³² and departments have worked with the City Attorney’s Office on what redactions can be pre-approved or must be elevated. Despite these steps, just locating records causes additional delays and difficulty.

The Growth in Electronic Records and Emails Has Made Responding to Records Requests Challenging

Based on interviews with the Information Technology Department (IT) and staff in other departments, the volume of electronic files on the City’s network and saved emails in City email accounts has grown over the years – including old files from past employees and routine, unsolicited, and mass emails. This has made responding to public records requests difficult when the request has a significant scope or is wide ranging (e.g., “any and all documents”). In addition to the extended periods of time that requestors wait for records, it can take significant staff time to locate relevant files, identify those that are responsive to the request, and redact personal or other information. One department estimated more than 600 staff hours were spent across the department researching and compiling information for PRA requests (including the PRA coordinator’s time).

Public records come in different forms and are stored in different ways throughout the City. City staff maintain paper files onsite; old files are kept in an offsite storage facility. City staff maintain electronic files on the City’s network. Staff maintain their own email accounts and are responsible for saving and/or deleting old emails.³³

³¹ Given the broad scope of the audit and limitations in recorded data, it is unclear how often City staff requested extensions from requestors.

³² The City’s Open Government website contains a link to various online records (<http://www.sanjoseca.gov/index.aspx?NID=223>), including employee salary information, campaign finance disclosures and lobbyist filings, building permits, and others. The City’s Open Data Portal (<http://data.sanjoseca.gov/home/>) contains various downloadable datasets, including Airport arrivals and departures, Police calls for service, parking garage data, and others.

³³ Based on the March 2017 ruling in *City of San José v. Superior Court of the State of California (Ted Smith)*, records stored on privately owned devices are considered public records and subject to disclosure under the California Public Records Act. The City is currently updating its *Public Records Policy and Protocol* (City Administrative Policy Manual 6.1.1) to reflect this ruling.

The City Has Approved Retention Schedules to Help Manage How Long Records Are to Be Kept

Per City policy, records should be retained according to approved retention schedules and then destroyed unless needed for ongoing litigation, audits, or continuing informational value. Although the specifics vary by department, this could include records that document some kind of decision, action, transaction, or agreement; studies or reports commissioned or produced by the City; and data used for reporting purposes. These types of records should be retained for a minimum two years by state law.

The purpose of a retention schedule is to help ensure records are maintained as long as decision-makers need them and to avoid keeping them longer than the information is worth (particularly given the cost of storage and space). Each City department has a records administrator who is responsible for reviewing and updating its records retention schedule, coordinating storage of inactive records, and facilitating destruction of records in accordance with policy.³⁴ Records retention schedules are posted publicly on the City's website.

The frequency with which departments are reviewing, storing, and destroying records appears to vary. Paper records might primarily be reviewed when an employee changes positions or leaves employment; some departments send their files to storage more frequently than others; and destruction is infrequent (one department mentioned records dating back into the 1970s).

Electronic files and emails appear to be reviewed on an individual basis. In the past, IT facilitated email review and cleanup through limits on mailbox sizes and purges every 90 days, but this ended a few years ago when City emails shifted to Office 365 and storage capacity grew.³⁵

Records Retention Policies Should Be Updated to Reflect the Current Business Environment

PRA coordinators have noted that despite staff generally being aware of their responsibilities to respond to a records request, they do not believe all staff know the rules surrounding retaining or disposing of electronic documents, including emails. This risks records potentially not being available as they had been inadvertently deleted. Furthermore, staff may not understand the importance of regularly reviewing their files, and consequently not allocate

³⁴ A records administrator's responsibilities are distinct from a PRA coordinator's responsibilities.

³⁵ The City's *Use of E-mail, Internet Services, and Other Electronic Media* policy (City Administrative Policy Manual 1.7.1) explains that the City email system is not a recordkeeping system. Emails and attachments that must be retained as records per the records retention schedule are to be saved as electronic files on the City's network; all others should be deleted as soon as possible. The Open Government Manager's "Email Retention FAQs" (see Appendix A) offers additional clarification, stating that emails should be considered with reference to the records retention schedule and archived based on their content (i.e., if it documents an action, decision, transaction, agreement, or other ongoing value).

sufficient time for cleanup. Because of this, records requests can take a significant amount of time to fulfill because of the volume of documents to research, review, and potentially redact.

The City has two policies pertaining to records retention, both of which were last updated in 2010 and need to be updated to reflect the current business environment. One policy provides guidance on records retention processes, the other addresses emails specifically. Existing policy focuses primarily on paper records, and requires approval from the CAO prior to destruction. However, it is not clear if the CAO should sign off on electronic and email records prior to deletion as well. The email policy still mentions limits on mailbox sizes and “automatic purges,” even though these practices ended a few years ago.

New Forms of Communication or Media Will Require Ongoing Review of Records Policies

The City is currently updating its policies to address text messages and emails on government officials’ personal devices; guidance on new forms of records such as social media and other messaging applications have not yet been developed. Updating these policies would clarify staff responsibilities relating to management of electronic records and emails, address existing gaps, and reflect current practices.

Recommendation #9: The Administration should update City policies and guidance on the retention and disposition of electronic records and City email to reflect the current technological environment and allow for more effective management of public records. This includes the storage of records to efficiently respond to public records requests and the disposition of records per approved retention schedules.

An Electronic Content Management System Can Facilitate Records Management in the Future

Per the state’s Records Retention Handbook, the “desired end of [records management] is to ensure that information contained in...records is available when and where it is needed at the least possible cost.” Effective records management can not only save time, it can also protect the City from legal liability (e.g., if the City is required to produce records for subpoenas or legal discovery).

IT has started moving towards a centralized system through roll out of an enterprise content management system (SharePoint) where all official City

documents will eventually be stored.³⁶ SharePoint will enable the City to have a more consistent records management structure compared to the current decentralized enterprise fileshare system. With this structure in place, the City could conduct centralized searches for requested documents as well as set up a workflow for automatic destruction of documents based on their retention schedules.

Until the new enterprise content management system is in place, the City will need to take steps to better manage electronic records, including email. In the short term, this can be done in a variety of ways. For example, City records administrators have described “purge” days where staff reviews and cleans out old paper-based file systems. Similar purging of unnecessary electronic files by records administrators and staff can help alleviate the growth of records on the City’s enterprise fileshare system, while maintaining the ability to retain documents and more efficiently respond to public records requests.

The Open Government Manager sends annual reminders on records retention and related resources to department records administrators. These reminders could be distributed more broadly to remind and educate staff citywide of their role in helping manage public records. Training, as discussed in Finding 4, would also help introduce and reinforce the importance of records management.

Recommendation #10: To better manage electronic records on the City’s enterprise fileshare and email systems, the Administration should consider a combination of strategies, including but not limited to:

- a) Developing procedures for department records administrators to conduct electronic file clean outs to dispose of unnecessary electronic files as well as those saved past the City’s approved retention schedules.**
- b) Periodic reminders to City staff to clean out their email folders, along with guidance on what is a public record that should be saved, and what is not.**

³⁶ Documents maintained by the City Clerk’s Office were the first to be moved to SharePoint. IT expects to move remaining departments’ documents to SharePoint in the coming years.

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Finding 4 Periodic Reporting and Training Can Help Further Integrate Open Government Into the City’s Business

Summary

The Municipal Code requires that the CMO provide regular reports on compliance with the Open Government Ordinance and Resolution. To date, the CMO has been reporting on the timeliness of City officials’ calendar postings; however, it has not reported broadly on the City’s open government efforts. Providing such reports can improve accountability by generally detailing the scope of open government activities and identifying where the City can improve. The Municipal Code also calls for regular education and training on open government, saying that it is essential to achieve compliance. However, current trainings are limited. Including open government training for staff during the onboarding process, as well as regular training for managers or supervisors can better integrate open government into the City’s business.

The Municipal Code Requires Periodic Reviews and Staff Training to Administer the Open Government Ordinance and Resolution

As described in Finding 1, many open government practices have become well established across the City. There are assigned staff accountable for fulfilling open government requirements, standard procedures to provide consistency and continuity, and often processes to identify and remedy any potential problems.

For example, staff in the CMO and the City Clerk’s Office have an established process for developing and posting City Council agendas and their attachments to meet open government timelines. If staff memos are not available at the time the agenda is to be posted, either the item is automatically deferred or staff requests a sunshine waiver from the Rules and Open Government Committee.

Other examples of established procedures relate to public records requests and closed session agendas. However, in some instances, there have been gaps in meeting open government provisions (as described in Finding 2). Furthermore, despite the progress that the City has made in improving transparency and open government, there is room to improve. In the 2016 National Citizen Survey™, less than a third of residents said the City did a good or excellent job at being honest or welcoming of resident involvement.³⁷ While these perceptions may reflect government institutions broadly, they do point to the continuing need to improve open government to maintain resident trust.

³⁷ See the [Annual Report on City Services 2015-16](#) for survey results.

Periodic Reviews Can Improve Accountability of the Open Government Resolution

The City Council's goal was for open government to become fully integrated into performing the City's business. In the Ordinance, the Council included the requirement that:

... the City Manager's Office shall provide to the Council regular reports about the City's compliance with the Open Government Ordinance and the Consolidated Open Government and Ethics Resolution.³⁸

Although the CMO does report twice a year on City officials' public calendar postings, these reports are limited in scope. They do not assess content requirements, only the timeliness of postings.³⁹ The CMO has not reported broadly on the City's compliance with the City's open government provisions.

Other jurisdictions have compliance reporting like what is described in the Municipal Code. In San Francisco, the Sunshine Ordinance Task Force reports on compliance with San Francisco's sunshine ordinance as well as any practical or policy problems encountered in its administration. In its 2016 report, the Task Force provided information on the number of complaints filed related to the ordinance and recommendations to improve enforcement. It also noted that the ordinance was outdated and needed to be amended to be both current and effective.

Providing compliance reports as described in the Municipal Code can provide the Council with information on the scope of activities, as well as what is working and where the City can improve. It can also identify areas where the City's open government or related policies should be updated to remain current and effective.

³⁸ Municipal Code 12.21.400 B. These reviews were to be done in conjunction with the Mayor's review of the City's Code of Ethics, as required by § 607 of the City Charter. The most recent Mayor's review was completed in 2015 and included recommendations for the City Clerk to report on the feasibility of creating an electronic filing system for lobbyist tracking and reporting, and refining lobbyist forms. There were additional recommendations to the City Attorney to draft amendments to the Municipal Code to change the reporting period for lobbyists from quarterly to weekly and other changes. Finally, there was direction to the Ethics Commission to recommend revisions to the City's Gift Ordinance to better align with state law.

³⁹ The Mayor's 2009 Biennial Ethics Review, accepted by City Council, directed the City Manager's Office to review compliance with Open Government calendar requirements and make regular reports to the Rules and Open Government Committee. On December 10, 2014, the Rules and Open Government Committee directed staff to report on compliance of content requirements in addition to timeliness of postings. At the time, Mayor Reed suggested a sample-based review would be sufficient.

Recommendation #11: In accordance with the Municipal Code, the City Manager's Office, in coordination with the City Clerk's Office, should issue regular reports on the scope of open government activities, including:

- a) **Open meeting provisions such as posting of agendas and minutes of the City Council and decision-making bodies,**
- b) **Responding to public records requests,**
- c) **Posting of City officials' public calendars,**
- d) **Other public disclosure and information activities, such as notices of public subsidies, community engagement or outreach efforts, and required disclosures of City-funded non-governmental organizations, and**
- e) **Recommendations to update open government or related City policies to remain current and effective, as necessary.**

Staff Training Can Better Integrate Open Government into Standard Business Practices

Another way open government can become a more integrated part of performing the City's business is to ensure that staff is aware of their expectations and responsibilities. The Municipal Code provides that:

It shall be the policy of the City to provide regular education and training about the Open Government Ordinance, the Consolidated Open Government and Ethics Resolution, Brown Act, Public Records Act, and Political Reform Act, which is essential to achieve compliance.⁴⁰

However, the City provides only limited training on open government. The City Clerk's Office coordinates training for Councilmembers and Council staff on the Brown Act, the Political Reform Act, and some but not all open government provisions. The City's Open Government Manager provides training to department PRA coordinators on rules surrounding public records requests.

Other trainings may occur at the department level; however, it is not clear how frequently they may happen or whether they would cover the full scope of open government. Staff in different areas described instances where they or other staff were unfamiliar with open government provisions or related City policies, or where noncompliance was because of an oversight.

⁴⁰ Municipal Code 12.21.400 A

Other jurisdictions, including Los Angeles and San Francisco, have developed online training tools for staff to understand their open government policies. In San Francisco, annual trainings are mandatory for City officers, including elected officials, department heads, and members of boards and commissions.

The City should similarly provide trainings on the open government provisions. This would ensure that knowledge of the open government provisions becomes institutionalized and that there is consistency and continuity in how business operates across the City and over time. For example, new staff should be provided training on open government during the onboarding process. Also, managers or supervisors should undertake regular trainings, similar to the biennial discrimination and harassment trainings required for supervisors in the City. Trainings could introduce topics such as revolving door policies, public records, and record retention policies.

Finally, though the Code of Ethics states “City employees and officials shall uphold the public’s right to know...in accordance with the Brown Act...” it does not reference the City’s open government provisions. To ensure City staff are aware of these provisions, they should be referenced in the Code of Ethics.

Recommendation #12: To ensure that open government becomes an integrated part of the City’s business, the Administration should:

- a) **Reference the Consolidated Open Government and Ethics Resolution in the City’s Code of Ethics, and**
- b) **In accordance with the Municipal Code, provide training on the Open Government Ordinance and Consolidated Open Government and Ethics Resolution for (i) new employees as part of the onboarding process and (ii) for managers and supervisors on a regular basis.**

Conclusion

In 2006, the City Council formed the Sunshine Reform Task Force to promote open, accessible, and inclusive government. The Task Force proposed changes in how the City discloses information discussed at public and closed session meetings and provides access to public information and records. Many of the proposals went beyond what state law requires. In 2008 and 2009, the Council adopted nearly all the proposed changes, and in 2014 approved a new Open Government Ordinance. Council also approved a resolution to consolidate various procedures and policies into new Consolidated Open Government and Ethics Provisions. Since that time, the City has made progress in making open government part of how it conducts business. To ensure the City sustains this progress, open government should be incorporated in the City Administrative Policy Manual. Also, there are a few areas where the City can improve, including disclosures of public information, responding to public records requests more efficiently with better records management, and regular reporting and training on open government requirements.

RECOMMENDATIONS

Recommendation #1: The Administration should create an Open Government policy to be included in the City's Administrative Policy Manual. The policy should state the purpose and goals of the Open Government Ordinance and Resolution and cross reference with the specific procedures outlined in the resolution and other City policies as necessary.

Recommendation #2: The Office of Economic Development, in coordination with the City Attorney's Office, should develop a policy and procedures to clarify whether and how to disclose cost-benefit information for provisions of economic benefit to private entities when:

- a) The provision is a part of a larger incentive program, to be issued to entities that meet specified criteria,
- b) Multiple provisions may benefit a single entity within a short timeframe,
- c) The City provides services on behalf of/for a private entity, and
- d) The entity receiving the benefit is a non-profit or public agency.

Recommendation #3: The City Manager's Office should update the Council memo template to include direction for required disclosures for proposed subsidies of more than \$100,000 and more than \$1 million, in accordance with the state law and Open Government Resolution, respectively.

Recommendation #4: The Administration should implement procedures to track public subsidy and tax abatement agreements to ensure compliance with state and Open Government after-action reporting requirements, and financial statement disclosures.

Open Government

Recommendation #5: The City Clerk's Office should:

- a) Include Open Government calendaring requirements (e.g., name, title, organization, and purpose, as outlined in §1.3.3 of the Open Government Resolution) in trainings for new Council staff, and
- b) Include calendar set up as a part of the onboarding process for Council staff (such as referral to appropriate Information Technology Department and City Manager's Office staff).

Recommendation #6: The City Clerk's Office should:

- a) Update the lobbyist reporting form to include a reference to Section 7 of the Open Government Resolution, restricting lobbying during the solicitation process,
- b) Update the lobbyist registration form to include a check box that indicates whether a lobbyist is a former employee of the City, potentially subject to the Revolving Door Ordinance, and
- c) Implement a process to refer such former City staff to the City Attorney's Office for follow up.

Recommendation #7: The City Clerk's Office, in coordination with the City Attorney's Office, should provide Open Government training for Mayor and Council office staff on:

- a) The definition of a lobbyist,
- b) Resources on lobbyist disclosure to identify potential unregistered lobbyists (such as the City Clerk's Registered Lobbyist List), and
- c) Restrictions on lobbying during the solicitation process.

Recommendation #8: The City Council should consider a change to the Revolving Door Ordinance that mitigates potential conflicts of interest and simplifies the rules surrounding former designated employees who work for non-profit organizations as lobbyists or on legislative or administrative matters which they worked on as part of their City employment. Potential policy directions include:

- a) Narrowing the non-profit exemption to 501(c)(3) organizations, regardless of whether the organization had received support from the City; or
- b) Striking the non-profit exemption, such that the same rules apply whether former designated employees go to work for non-profit or for-profit organizations.

Recommendation #9: The Administration should update City policies and guidance on the retention and disposition of electronic records and City email to reflect the current technological environment and allow for more effective management of public records. This includes the storage of records to efficiently respond to public records requests and the disposition of records per approved retention schedules.

Recommendation #10: To better manage electronic records on the City's enterprise fileshare and email systems, the Administration should consider a combination of strategies, including but not limited to:

- a) Developing procedures for department records administrators to conduct electronic file clean outs to dispose of unnecessary electronic files as well as those saved past the City's approved retention schedules.
- b) Periodic reminders to City staff to clean out their email folders, along with guidance on what is a public record that should be saved, and what is not.

Recommendation #11: In accordance with the Municipal Code, the City Manager's Office, in coordination with the City Clerk's Office, should issue regular reports on the scope of open government activities, including:

- a) Open meeting provisions such as posting of agendas and minutes of the City Council and decision-making bodies,
- b) Responding to public records requests,
- c) Posting of City officials' public calendars,
- d) Other public disclosure and information activities, such as notices of public subsidies, community engagement or outreach efforts, and required disclosures of City-funded non-governmental organizations, and
- e) Recommendations to update open government or related City policies to remain current and effective, as necessary.

Recommendation #12: To ensure that open government becomes an integrated part of the City's business, the Administration should:

- a) Reference the Consolidated Open Government and Ethics Resolution in the City's Code of Ethics, and
- b) In accordance with the Municipal Code, provide training on the Open Government Ordinance and Consolidated Open Government and Ethics Resolution for (i) new employees as part of the onboarding process and (ii) for managers and supervisors on a regular basis.

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APPENDIX A



E-mail

Frequently Asked Questions

What e-mail should be retained?

You should retain e-mail if you need it to document:

- an action,
- a decision,
- a transaction,
- an agreement, or
- because the information in the e-mail has ongoing value to help you perform your work.

How long should I retain my e-mail?

You should retain any e-mail that you need to keep according to an approved records retention schedule based on the content of the e-mail.

Isn't the City records retention period for e-mail 90 days?

No, this is the City's **purge** policy for e-mail. This means that users have 90 days to determine if an e-mail message needs to be retained as a record, and if so, take the appropriate actions to preserve those messages as per the retention requirements.

What e-mail need not be retained?

The following are examples of message content that usually should not be retained, and can be deleted routinely:

- Routine messages
- Mass or broadcast e-mail messages
- Drafts and other work papers
- Spam and other unsolicited e-mails
- Courtesy and convenience copies
- Attachments that have been saved elsewhere

How do I retain e-mail?

E-mail that needs to be retained as a record can be saved on network drives by selecting the "Save As" button on the File menu at the top of the Outlook screen. They may also be dragged and dropped to an appropriate drive. You can also print out e-mail and save it in hard copy files, but that is not recommended, both for the unnecessary paper it consumes and because it does not save all of the e-mail "meta-data" (information that is embedded in the email).

Why should I purge e-mail that is not needed as a record?

Retaining unneeded e-mail unnecessarily consumes the City's information technology resources to store and manage the e-mail. It can also make responding to public records requests or litigation discovery more difficult and time-consuming if e-mail that should be retained is mixed up with e-mail messages that are not responsive to the request.

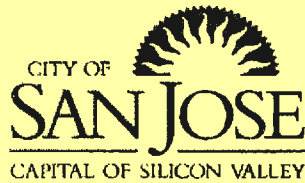
Is e-mail subject to public records requirements?

If an e-mail contains information relating to the conduct of the public's business and is prepared, owned, used or retained by the City, it is subject to public records requirements.

Who can I ask if I have additional questions regarding records retention and e-mail management issues?

Questions regarding how long to retain e-mail, as well as any other records related issues, may be directed to the City's Open Government Manager at Tamara.Becker@sanjoseca.gov or (408)535-8120.

Source: Guidelines distributed by the Open Government Manager.



Memorandum

TO: SHARON ERICKSON
City Auditor

FROM: Norberto L. Dueñas
Toni J. Taber

SUBJECT: RESPONSE TO THE AUDIT OF
OPEN GOVERNMENT

DATE: August 22, 2017

BACKGROUND

The Administration appreciates the City Auditor's work on evaluating Open Government provisions and reporting requirements. The Administration has reviewed the Audit of Open Government and is in overall agreement with the recommendations identified in the report. The following are the Administration's responses to each recommendation.

RECOMMENDATIONS AND RESPONSE

Recommendation #1: The Administration should create an Open Government policy to be included in the City's Administrative Policy Manual. The policy should state the purpose and goals of the Open Government Ordinance and Resolution and cross reference with the specific procedures outlined in the resolution and other City policies as necessary.

Administration Response to Recommendation #1:

The Administration agrees with this recommendation and will incorporate the Ethics and Open Government provisions into the City's Administrative Policy Manual.

Green – The Administration can implement this Recommendation within the next six months.

Recommendation #2: The Office of Economic Development, in coordination with the City Attorney's Office, should develop a policy and procedures to clarify whether and how to disclose cost-benefit information for provisions of economic benefit to private entities when:

- a) The provision is a part of a larger incentive program to be issued to entities that meet specified criteria,
- b) Multiple provisions may benefit a single entity within a short timeframe,
- c) The City provides services on behalf of/for a private entity, and
- d) The entity receiving the benefit is a non-profit or public agency.

Administration Response to Recommendation #2:

The Administration agrees with the need to develop a policy and procedures to clarify whether and how to disclose cost-benefit information for provisions of economic benefit to private entities. Due to lack of clarity around reporting requirements, and complicated by staff turnover, it is noted that certain reporting requirements related to public subsidies have not been met. Moving forward the Administration will work with the City Attorney's Office to clarify requirements and develop standard procedures.

Clarity has been lacking as to whether a program or certain type of project should be considered a subsidy subject to the open government provisions. For example, while the Resolution requires disclosure for cash payments, it does not elaborate on whether that includes payment for services (such as marketing). It is also not clear whether subsidies that are part of a larger program, or subsidies to a non-profit or public agency, are subject to the open government disclosure requirements. These factors have likely resulted in the incomplete disclosures.

Green-The Administration is already implementing this Recommendation. OED is coordinating with the City Attorney's Office to clarify whether a project or program should be considered a subsidy subject to the open government provisions. Additionally, regular training of existing and new staff will be required to ensure adequate understanding of fiscal/policy alignments required by Open Government provisions.

Recommendation #3: The City Manager's Office should update the Council memo template to include direction for required disclosures for proposed subsidies of more than \$100,000 and more than \$1 million, in accordance with the state law and Open Government Resolution, respectively.

Administration Response to Recommendation #3:

The Administration agrees with this recommendation and will incorporate the recommendation into the Council memo template.

Green – The Administration can implement this Recommendation by the end of calendar year 2017.

Recommendation #4: The Administration should implement procedures to track public subsidy and tax abatement agreements to ensure compliance with state and Open Government after-action reporting requirements and financial statement disclosures.

Administration Response to Recommendation #4

The Administration agrees with the need to track the status of all proposed public subsidy agreements to ensure compliance with GASB 77, as well as state- and City-required disclosures and follow-up reports. The Administration will work with the involved departments to establish tracking procedures.

Green – The Administration will work with departments to ensure required disclosures and follow-up reports by the end of the current fiscal year.

Recommendation #5: The City Clerk's Office should:

- a) Include Open Government calendaring requirements (e.g., name, title, organization and purpose, as outlined in §1.3.3 of the Open Government Resolution) in trainings for new Council staff, and**
- b) Include calendar set up as a part of the onboarding process for Council staff (such as referral to appropriate Information Technology Department and City Manager's Office staff).**

Administration Response to Recommendation #5:

The Administration agrees with this recommendation. The City Clerk's Office is conducting monthly trainings with City Council offices and will incorporate this topic into their monthly training. One solution is teaching Council offices how to create an autotext for meetings that will prompt them for the all required information.

Green – The City Clerk's Office can implement this Recommendation within six months.

Recommendation #6: The City Clerk's Office should:

- a) Update the lobbyist reporting form to include a reference to Section 7 of the Open Government Resolution, restricting lobbying during the solicitation process,**
- b) Update the lobbyist registration form to include a check box that indicates whether a lobbyist is a former employee of the City, potentially subject to the Revolving Door Ordinance, and**
- c) Implement a process to refer such former City staff to the City Attorney's Office for follow up.**

Administration Response to Recommendation #6:

The Administration agrees with this recommendation. The registration form has already been updated to include the check box indicating whether a lobbyist is a former employee of the City, and a full overhaul of the registration form will be completed by January for the 2018 registration cycle.

Green – The City Clerk's Office can implement this Recommendation within six months.

Recommendation #7: The City Clerk's Office, in coordination with the City Attorney's Office, should provide Open Government training for Mayor and Council office staff on:

- a) The definition of a lobbyist,
- b) Resources on lobbyist disclosure to identify potential unregistered lobbyists (such as the City Clerk's Registered Lobbyist List), and
- c) Restrictions on lobbying during the solicitation process.

Administration Response to Recommendation #7:

The Administration agrees with this recommendation. The City Attorney can coordinate with the City Clerk on Open Government training and advise the Mayor, the City Council and their staffs on the legal requirements of the Lobbyist Ordinance before the end of the fiscal year.

Green – The City Clerk, in coordination with the City Attorney's Office, can implement this Recommendation by the end of this fiscal year.

Recommendation #8: The City Council should consider a change to the Revolving Door Ordinance that mitigates potential conflicts of interest and simplifies the rules surrounding former designated employees who work for non-profit organizations as lobbyists or on legislative or administrative matters which they worked on as part of their City employment. Potential policy directions include:

- a) Narrowing the non-profit exemption to 501(c)(3) organizations, regardless of whether the organization had received support from the City; or
- b) Striking the non-profit exemption, such that the same rules apply whether former designated employees go to work for non-profit or for-profit organizations.

Administration Response to Recommendation #8:

Refer to Memo from City Attorney's Office for this response.

Recommendation #9: The Administration should update City policies and guidance on the retention and disposition of electronic records and City email to reflect the current technological environment and allow for more effective management of public records. This includes the storage of records to efficiently respond to public records requests and the disposition of records per approved retention schedules.

Administration Response to Recommendation #9:

The Administration agrees with this recommendation and can work towards updating City policies and guidance on the retention and disposition of records. While the City has implemented new technologies, there is still quite a bit of work required to utilize these new technologies for records management so, policies and guidance will reflect the City's most current capabilities.

Green –The Administration can update City policies and guidance to include the management and disposition of electronic records and which reflect the current technological environment for records management. It is anticipated that this work could be completed within a year.

Recommendation #10: To better manage electronic records on the City's enterprise fileshare and email systems, the Administration should consider a combination of strategies, including but not limited to:

- a) **Developing procedures for department records administrators to conduct electronic file clean outs to dispose of unnecessary electronic files as well as those saved past the City's approved retention schedules.**
- b) **Periodic reminders to City staff to clean out their email folders, along with guidance on what is a public record that should be saved, and what is not.**

Administration Response to Recommendation #10:

The Administration agrees with this recommendation and will work with the City Attorney's Office to update procedures related to records disposition and include electronic files. The City Manager's Office will send out periodic reminders to department Records Administrators, so that they can in-turn notify their department staff, to clean out records in accordance with the records retention schedules.

Green – The Administration can implement this Recommendation within the next year.

Recommendation #11: In accordance with the Municipal Code, the City Manager's Office, in coordination with the City Clerk's Office, should issue regular reports on the scope of open government activities, including:

- a) **Open meeting provisions such as posting of agendas and minutes of the City Council and decision-making bodies,**
- b) **Responding to public records requests,**
- c) **Posting of City officials' public calendars,**
- d) **Other public disclosure and information activities, such as notices of public subsidies, community engagement or outreach efforts, and required disclosures of City-funded non-governmental organizations, and**
- e) **Recommendations to update open government or related City policies to remain current and effective, as necessary.**

Administration Response to Recommendation #11:

The Administration agrees with this recommendation. The City Clerk's Office is responsible for item "a" and has maintained a posting matrix, which is a public record, since January 2017. The City Manager's Office is responsible for b and c. The Clerk and City Manager's Office share joint responsibility for item e.

Yellow – Items a, b, c and e are relatively easy to implement and could be by the end of this year. There is a concern, however, that some of the other notices might be difficult to maintain

due to current staffing shortages. The City Manager's Office will work with key departments to identify what additional information can be reported out on a regular basis and identify the timing of these report outs.

Recommendation #12: To ensure that open government becomes an integrated part of the City's business, the Administration should:

- a) Reference the Consolidated Open Government and Ethics Resolution in the City's Code of Ethics, and
- b) In accordance with the Municipal Code, provide training on the Open Government Ordinance and Consolidated Open Government and Ethics Resolution for (i) new employees as part of the onboarding process and (ii) for managers and supervisors on a regular basis.

Administration Response to Recommendation #12:

The Administration agrees with this recommendation and agrees with the importance of ensuring that open government becomes an integrated part of the City's business.


Green-The Administration can implement this Recommendation within the next 6 months. The modifications to the Code of Ethics Policy will be brought forward to be approved by the City Council. The Office of Employee Relations will incorporate relevant portions of the Open Government Ordinance and Consolidated Open Government and Ethics Resolution for new employees as part of the New Employee Welcome and for managers and supervisors as part of the Supervision Academy and any Code of Ethics trainings.

CONCLUSION

The Audit Report provides recommendations to support the proper reporting requirements to promote open, accessible, and inclusive government. The Administration values these recommendations for opportunities to improve. We would like to thank the City Auditor and staff for this operational review.



ROBERTO DUENAS
City Manager



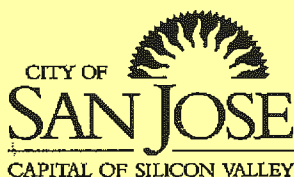
TONI TABER
City Clerk

Cc: Dave Sykes
Jennifer Maguire
Julie Edmonds-Mares

Kim Welsh
Chris Burton
Rick Doyle

Rob Lloyd
Jennifer Schembri
Ed Moran

Reena Brilliot
Mark Vanni



Memorandum

TO: HONORABLE MAYOR
AND CITY COUNCIL

FROM: Richard Doyle
City Attorney

SUBJECT: RESPONSE TO CITY
AUDITOR'S RECOMMENDED
CHANGES TO REVOLVING
DOOR ORDINANCE

DATE: August 24, 2017

In her August 2017 Open Government audit report, the City Auditor recommends that:

The City Council should consider a change to the Revolving Door Ordinance that mitigates potential conflicts of interest and simplifies the rules surrounding former designated employees who work for non-profit organizations as lobbyists or on legislative or administrative matters which they worked on as part of their City employment. Potential policy directions include:

- a) Narrowing the non-profit exemption to 501(c)(3) organizations, regardless of whether the organization had received support from the City; or
- b) Striking the non-profit exemption, such that the same rules apply whether former designated employees go to work for non-profit or for-profit organizations.

Such policy considerations will affect City officials and employees. The differing exceptions for nonprofits were included in the Revolving Door Ordinance and Lobbyist Ordinance based on a policy determination, which should be reviewed as the Council considers the Auditor's recommendation. A brief analysis of those policies is provided below.

BACKGROUND

1. Revolving Door Ordinance

The City's Revolving Door Ordinance prohibits former City officials and employees designated in the City's Conflict of Interest Code (Reso. No. 78059) from:

- Working on any legislative or administrative matter which they worked on during the twelve months prior to terminating City employment;

- Representing anyone else on any matter before the City (i.e. lobbying) whether or not for compensation; or
- Receiving any gifts or payment in violation of the City's Gift Ordinance (SJMC Chapter 12.08). (SJMC § 12.10.030.)

In other words, the Revolving Door Ordinance bans City officials and designated employees from using their City connections and insider knowledge to further a private employer or to lobby the City on behalf of another person or entity.

The ban imposed by the Revolving Door Ordinance applies for two years after leaving City employment. (SJMC § 12.10.030.) But, the City Council may grant a waiver if it is in the City's best interests and consistent with the purpose of the Revolving Door Ordinance. (SJMC § 12.10.070.)

In addition, this ban does not apply to City officials or employees who work or volunteer with a nonprofit organization recognized under the Federal Internal Revenue Code and has engaged in programs or projects that received financial or other formal support from the City Council within the past five years. (SJMC §§ 12.10.020, 12.10.050.) Because this exception includes any federally recognized nonprofit, it is not limited to 501(c)(3) charitable nonprofits. As a result, former City officials or designated employees are not subject to the Revolving Door ban if they, for example, lobby on behalf of a 501(c)(4) or 501(c)(6) nonprofit.

A form of the Revolving Door nonprofit exception was adopted on November 24, 1992, as then SJMC section 10.36.490 (Ord. No. 24214), on the recommendation of a task force created to review the City's ethics laws. The exception was carried over when the Council adopted Title 12 on November 23, 1993 (Ord. No. 24499), and was modified to its current form on November 9, 2004. (Ord. No. 27271.) The record for adopting the nonprofit exception is sparse. But, based on Council discussions in adopting the exception, it appears the Council wanted to exempt nonprofit organizations because it would ensure that subsequent employment was consistent with City interests.

2. Lobbyist Ordinance

In contrast to the Revolving Door Ordinance, the Lobbyist Ordinance (SJMC Chapter 12.12) regulates lobbyist conduct, and requires lobbyists to register and periodically report their lobbying activities to the City. (SJMC § 12.12.010 *et seq.*) Like the Revolving Door Ordinance, there is also an exception for individuals who lobby on behalf of nonprofit organizations, but only for 501(c)(3) nonprofits. This means individuals who lobby for a 501(c)(3) nonprofit do not have to register or report their lobbying activities. (SJMC § 12.12.020.M.)

The 501(c)(3) exception in the Lobbyist Ordinance was adopted on June 26, 2007 (Ord. No. 28074) after Council directed the City Attorney on April 3, 2007 to draft, among other things, an exception for 501(c)(3) nonprofits. Before Council gave this direction, then Mayor Reed, Vice Mayor Cortese, and Councilmember Chirico wrote, in a March 29, 2007 memorandum to Council, "It is appropriate to exempt 501(c)(3) nonprofit organizations from having to register as lobbyists. The lobbyist registration fee is burdensome on many nonprofits and we don't believe the City is interested in regulating the activities of those entities that are not engaged in raising money for political campaigns. These organizations are also regulated under federal and state tax rules." It is important to note that the IRS restricts the lobbying activities of 501(c)(3) organizations. As discussed further, 501(c)(3) organizations can lobby to further their charitable purpose, but too much lobbying may jeopardize the organization's tax exempt status.

3. Common Nonprofits Recognized under the Federal Internal Revenue Code

The federal government recognizes different types of nonprofits, and each subsection under Section 501(c) of the Federal Internal Revenue Code guides a different type of nonprofit. The most common are:

- 501(c)(3): charitable organizations, including religious, educational, and medical organizations.
- 501(c)(4): organizations benefitting social welfare.
- 501(c)(5): organizations are set up for horticultural or agricultural purposes.
- 501(c)(6): business leagues and organizations that forward the interests of an industry.

While all nonprofits organized under section 501(c) are tax-exempt, not all nonprofits may engage in the same activities. Most nonprofits fall under 501(c)(3) and include entities like the American Red Cross, UNICEF, and the Sierra Club. These organizations cannot attempt to sway legislation or politics in a biased way, but may spread general awareness in furtherance of the organization's tax-exempt purpose.

On the other hand, 501(c)(4) nonprofits may engage in political activity, such as lobbying and campaign activities, so long as the organization's primary purpose is promoting the common good or social welfare. 501(c)(4) nonprofits include the Rotary Club, the NAACP, and homeowners' associations are also generally organized as 501(c)(4) nonprofits.

Finally, 501(c)(5) and 501(c)(6) nonprofits are for labor unions and business organizations, respectively. These organizations may engage in lobbying and campaign activities to advance the interest of their members. 501(c)(5) nonprofits include organizations like the AFL-CIO, and 501(c)(6) nonprofits include The Silicon Valley Organization (formerly San Jose Silicon Valley Chamber of Commerce) and Team San José.

ANALYSIS

The City Auditor recommends that the Council consider changing the nonprofit exception in the Revolving Door Ordinance to apply only to individuals who work for 501(c)(3) nonprofits, like in the Lobbyist Ordinance. The City Auditor also recommends that the Council consider removing the requirement that the 501(c)(3) nonprofit must have engaged in programs or projects that have received financial or other formal support in the past five years.

If the above recommendations were fully adopted, the exception under the Revolving Door Ordinance would apply to any 501(c)(3) nonprofit, but not to any other type of nonprofit. This means that officials and designated employees who leave the City to work for other types of nonprofits will be subject to the ban under the Revolving Door Ordinance.

Alternatively, the City Auditor recommends that the Council consider striking the nonprofit exception so the Revolving Door ban applies to any official or designated employee who leaves the City to work for a nonprofit.

- 1. The City may amend the exceptions in the Revolving Door Ordinance for certain City officials and designated employees, but is limited by State law for the Mayor, Councilmembers, and the City Manager.**

The City has discretion to change the exceptions in its Revolving Door Ordinance as it applies to certain City officials and designated employees. California law imposes a one-year ban on local elected officials and city managers from paid lobbying of their former agency. (Gov. Code § 87406.3) However, State law allows cities to adopt more restrictive rules.

The Revolving Door Ordinance is more restrictive than State law because it applies to a more people and conduct. But, State law does not have an exception for nonprofits or allow for any waiver. Although the exceptions and waiver process in the Revolving Door Ordinance are valid for most City officials and designated employees, the Mayor, Councilmembers, and the City Manager will still be subject to the State's one-year ban on paid lobbying, regardless of whether an exception applies under the Revolving Door ordinance or they obtain a waiver from the City Council.

2. If the City Auditor's recommendation was adopted, the Revolving Door restrictions would apply to more individuals who leave City employment.

If the Revolving Door Ordinance were amended to only exempt 501(c)(3) nonprofits, the Revolving Door ban would apply to more employees who leave City employment. This is because City officials and employees who leave the City to work for a 501(c)(4) or 501(c)(6) nonprofit would no longer be exempt under the Revolving Door Ordinance.

For example, the Revolving Door ban does not currently apply to a hypothetical designated employee who leaves the City to work as a lobbyist for an organization like Team San José—a 501(c)(6) nonprofit. If the City Auditor's recommendation was adopted, this hypothetical former employee would be subject to the Revolving Door restrictions for two years, unless the Council granted a waiver.

It should also be noted that this hypothetical former employee lobbying for Team San José must currently register as a lobbyist and periodically report lobbying activities under the Lobbyist Ordinance. That is because the exception in the Lobbyist Ordinance for individuals lobbying for a 501(c)(3) does not apply to a person lobbying for a 501(c)(6).

If the nonprofit exception were removed altogether, then the Revolving Door ban would apply to even more individuals because former officials and designated employees who left the City to work for any nonprofit, including a 501(c)(3), would be subject to the ban.

3. Eliminating the requirement that the nonprofit organization has received financial or other formal support from the City would create a bright-line rule.

The City Auditor recommends that the City Council consider removing the requirement that the nonprofit organization "has engaged in programs or projects which have received financial or other formal support from the city council or redevelopment agency board within the past five years." (SJMC § 12.10.020.E.)

If this recommendation was adopted, the Revolving Door nonprofit exception would apply to any nonprofit whether or not it received financial or other formal support from the City. This is a policy decision, but adopting this recommendation would create a bright-line rule that is easier to interpret. It is not always clear whether a nonprofit

HONORABLE MAYOR AND CITY COUNCIL

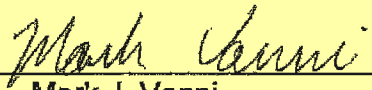
August 24, 2017

Subject: Response To City Auditor's Recommended Changes To Revolving Door Ordinance

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organization received financial or other formal support from the City.

RICHARD DOYLE
City Attorney

By 
Mark J. Vanni
Deputy City Attorney

For questions please contact Mark Vanni, Deputy City Attorney, at (408) 535-1997

cc: Norberto Dueñas
Sharon Erickson