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City of San José Rules and Open Government committee.

>> Mayor Reed: Call the meeting to order. This is Rules and Open Government Committee meeting for September 9th, 2009. Any changes to our agenda order for this meeting? None. Then we will take up September 15th, council meeting agenda. On page 1 I have one question and whether or not that's the kind of notice for the redevelopment agency, that we're going to take the entire redevelopment agency agenda here after the ceremonials.

>> Mr. Mayor, that's correct. This is the routine item. On our agenda we essentially repeat this also. The only difference ask that on our agenda it will say that item 8.1 will be heard first followed by the remainder of that agenda.

>> Mayor Reed: I guess what raises the question in my mind is it says the joint redevelopment agency, we're taking the joint items first and then --

>> Probably more accurate to say the redevelopment agency.

>> Mayor Reed: Anything else on page 1? Page 2 or 3? Page 4 or 5? Page 6 or 7? Page 8 or 9?

>> Mr. Mayor, on 3.5 we're going to be moving that to consent, it's a routine item.

>> Mayor Reed: Senior fair and day in the park, go to consent. Anything else on 8 or 9? Page 10 or 11? Is there a request for deferral on 6.1, the Chevron airport?

>> City Attorney Doyle: Yes, I think they were asking for a one-week deferral.

>> Mayor Reed: Anything else on 10 or 11? 12 or 13? 14 or 15? I have a question about how long these land use items are likely to take. Looks like they're all moving forward. Let's -- consent calendar replies six items and whether or not we should set a time-certain for the bail bonds item. Which I think is on the evening agenda, right?

>> 4.2.

>> Mayor Reed: 4.2 to be heard in the evening. Take the land use first, bail bonds not before 7:30.

>> Ed Shikada: We have heard Mr. Mayor that we expect some testimony on a number of the items for land use. So could take some time.

>> City Attorney Doyle: I think item 11.4 is one of the rezonings and I think has some controversy.

>> Mayor Reed: So not before 7:30 for sure, to be cautious, I suppose.

>> Ed Shikada: 8:00 would be --

>> Mayor Reed: More likely but certainly not before 7:30. Any requests for additions to that agenda? I don't have anything in writing.

>> Councilmember Pyle: Move to approve.

>> Councilmember Constant: Second.

>> Mayor Reed: Motion is to approve as amended. All in favor? [ayes]

>> Mayor Reed: Opposed? None opposed, that's approved. Moving to September 22nd. Draft city agenda. First question is, will plastic bags be on this agenda?

>> It's on there.

>> Mayor Reed: Okay. Anything on page 1? Page 2 or 3? Page 4 or 5? Page 6 or 7?

>> City Attorney Doyle: Page 6, item 7.2, that's the plastic bag item. This is the recommendation that is coming out of committee. But if the Rules Committee wants -- the direction is to get council direction to have the City Attorney come back with an ordinance as opposed to come back with an ordinance as proposed by the committee or as recommended by the committee. And it really is a question of logistics how the council or how the Rules Committee wants to manage that.

>> Mayor Reed: I think we should put it on so the council can give you the marching orders, rather than have you try to draft the agenda before -- or draft the ordinance before it goes to council in the next couple of weeks. And then after we have the ordinance, because I think there's some outreach with our other cities, and cities association, and the integrated waste management board which is no longer called that, recycling and waste reduction commission before the council would want to adopt an ordinance.

>> City Attorney Doyle: If I had to guess, given the -- we had to comply with CEQA at this point to bring back an ordinance for adoption it would probably be February. And I think director John Stufflebean is here and he can confirm that, it would be February at the earliest before we get back with an ordinance just to give you a timing.

>> Mayor Reed: I do think it's important to do that environmental clearance before we get final decision, since every other city got sued if they didn't do environmental clearance so we might as well get ahead of that game and do it first. Councilmember Constant.

>> Councilmember Constant: Just a question, is there a reason we're proceeding before the EIR because wouldn't the EIR potentially inform the direction we want to give on the ordinance?

>> City Attorney Doyle: No, I think the idea is, the first discretionary act would be the adoption of the ordinance. What we're seeking really is direction from the council. Then we can go out and do -- and complete the CEQA. David Powers & Associates, they're the environmental consultant. We would work in tandem with them and bring back whatever proposal council has given us. This is really to give us the outline, and then we can go do the work.

>> Mayor Reed: In terms of what the council could approve based on the current state of nonenvironmental clearance, are we talking about item A which is return to the council with an ordinance or are we talking about the B 1-6 which are details that we might not want to approve until we have environmental clearance?

>> City Attorney Doyle: That is the direction coming out of the committee, Councilmember Pyle was the chair of the committee. I wasn't there but you may want to add. That is the outline of what you may want to include and whether council agrees with that or not is the direction we want to seek.

>> Mayor Reed: Let's assume council agrees with everything here, can we make that direction without environmental clearance?

>> City Attorney Doyle: It is not a direction until you adopt an ordinance. You haven't adopted anything by merely giving us direction.

>> Mayor Reed: If council wants to modify this direction, that's okay, even though we don't have environmental clearance.

>> Councilmember Pyle: That's the whole purpose, is to get the discussion going.

>> Mayor Reed: Anything else on -- I forget where I was, page 6 or 7, we didn't get all the way through it. I didn't get through that. We have a memorandum from Councilmember Constant regarding executive home loan program. Is that ready to go to the council? We talked about that in the past. I don't know that staff needs to do any additional work on it. Can it go on the 22nd agenda is the question.

>> Councilmember Constant: I believe it is ready and I think the key to this is to kind of take a pause and a time-out to give the staff time to work on a comprehensive reform of the policy. So that any new recruitments or anything like that, and I have phone at length with the City Manager to make sure this wouldn't impair any ongoing recruitment processes.

>> City Attorney Doyle: I should note that the City Manager has proposed changes already to the policy that she may want to discuss at this -- or at least notify the council about but this is ready to go, I think.

>> Councilmember Chirco: Would it be helpful for this to go to a committee, finance and public service, so that -- the City Manager could bring her recommendations to the committee?

>> City Attorney Doyle: That's your call. I mean, it's whether you want to vet it through a committee process first.

>> Mayor Reed: I think this one is to essentially require council approval of any expenditure before we have a chance to look at any policy. The second bullet here, I think Councilmember Constant should speak for himself but what I'm reading is we've already directed these things to be done.

>> Councilmember Constant: Right, and my assumption based on my conversations with the City Manager is the revised policy would then come through the committee process and get to the council for discussion. But this is kind of a time-out, let's make it official that we're holding the process until we resolve the issues.

>> Councilmember Chirco: So then my second question would be, is this to limit, or is this too broad? I don't know what the City Manager might be bringing forth and with this kind of prescribed direction, since we haven't seen what the City Manager is going to bring forward.

>> Councilmember Constant: This is actually the direction that was already given in open council meeting so it's just reiterating it and specifying not limited to. So it gives options to explore all options.

>> Councilmember Chirco: But not limited to, all right. As long as it's not limited to.

>> Mayor Reed: Scott Johnson has a comment.

>> Scott Johnson: Thank you, mayor and members of the committee. Scott Johnson director of finance. I just wanted to notify the Rules Committee, I'm working with the City Manager's office on revisions to the policy and we're working on those. We listened to the tape, also, and the direction that we received from council, also received a memo from Councilmember Constant, considering all those options, and planning to bring forward a comprehensive memo to the council with various options in regards to provisions of the policy. The other thing I do want to mention is we do have one participant that has tendered his option for the program. So it is unclear to me whether or not that would hold up that process. Because there is an offer out there, a real estate offer out there that we are working with that particular participant.

>> Councilmember Constant: I think the intent of the memo is that the council is advised and has oversight of these. And I would imagine, unless the City Attorney, that something like this would come to closed session since it's a personnel issue on whether we're going to move forward or how would we deal with that?

>> City Attorney Doyle: It's really an open session item and what I would envision is that the staff would bring forward an approval of the proposed loan for whatever employee from here on out if the council goes along with adopting the recommendations.

So right now the council approves for all council appointees any executive home loan. It would extend to any department head, as well.

>> Councilmember Constant: And then just to reiterate, I did discuss this at length with the City Manager and she doesn't have any problems with the way this is laid out.

>> Councilmember Pyle: I'm still a stickler for process and I would rather see this vetted through the appropriate committee, which in this case would be finance, I believe. I would much prefer to do that so that it isn't just a, bing, here it is, without anyone having some kind of chance before that. For example, there is nothing in here about the radius of miles, from the city that we should be thinking about, I mean, it's well done, Pete, you did a good job on this but I think it needs more vetting.

>> Councilmember Constant: I think you're not understanding what I'm putting forward here is that this is just to pause the program, until the policy has an opportunity to go through the process. That's exactly what I'm asking for. It gives the City Manager time to craft the policy, bring it to committee, bring it to the council for adoption. But it says don't go out there and approve 40 loans before we change the policy.

>> Councilmember Chirco: Couldn't you do that with the first line of your memo and leave the rest for the policy debate, or discussion at committee?

>> Councilmember Pyle: I think so.

>> Councilmember Constant: I guess you could but this is just reaffirming what the council already did. This is the council action that was taken in the council meeting so it just restates it for clarity.

>> Councilmember Chirco: I have to agree with Nancy, that I would feel more comfortable if this went through a committee where the city staff had a chance to present theirs, and they got feedback, and then it would come to the council. Now, I actually could be 100% in agreement with you Pete, it's just if we have a process, we have a process. And to not follow the process gives me a degree of discomfort.

>> Councilmember Constant: I guess where I'm confused is, I don't see this as not following the process. This is actually -- the only thing that's outside the process is the council taking an action to pause a city council policy, a council resolution, until the item has the opportunity to work through the regular administrative process. So I'm not sure why we would go to committee to have a committee discuss what the council has already taken an action on.

>> Mayor Reed: Why don't we leave that out of this agenda item since we've already taken action, put agenda on item 1. That isn't changing the policy other than requiring council approval. It doesn't propose making the manager do anything differently in the current operation but bring it to council for approval is the way I read number 1. It's not even pausing the policy. It just says bring it to council for approval while we're looking at changing the policy. That, I think, could go on without having to go into the other issues which council has already given some direction on.

>> Councilmember Chirco: Also it helps for more discussion and I think we have stronger policies when that procedure is adhered to rather than to go from just a memo to council. But you actually have a snazzy set of vetting process.

>> Councilmember Constant: Well, I guess I'm completely confused and I'm the only one who doesn't understand this. But there's no circumvention of any process here. But -- you know, the committee's the committee, so we can go ahead and take a vote on it. I'll make a motion to move my memo forward. And if it doesn't get a second then there can be an additional one.

>> Mayor Reed: No second? Alternate motion?

>> Councilmember Chirco: I would make a motion to move the memo forward with the number 1 item. And then, when it goes to committee, the other items would be addressed.

>> Councilmember Pyle: Second.

>> Mayor Reed: Okay, the motion is to approve the first agenda item and the second agenda items then get dealt with in this process that's going to go through committee. Further discussion on that? All in favor? [ayes]

>> Mayor Reed: Opposed, none opposed, that will go on the agenda for the 22nd. Anything else in the way of additions or changes to the 22nd agenda? There's no evening meeting.

>> Councilmember Pyle: Move to approve.
>> Councilmember Chirco: Second.
>> Mayor Reed: Motion is to approve as amended. All in favor? [ayes]
>> Mayor Reed: Opposed, none opposed, that's approved. Next is, redevelopment agency September 15th. Anything on page 1?
>> Mr. Mayor, if I may just a reminder that under orders of the day where it indicates that the agency board will be convened, we'll add the sentence that item 8.1 the major league baseball park will be heard first and the remainder of the agency items will follow.
>> Mayor Reed: Okay. Anything else on page 2 or 3?
>> Councilmember Chirco: Move approval.
>> Councilmember Pyle: Second.
>> Mayor Reed: Or anything else in there? Motion is to approve. All in favor? [ayes]
>> Mayor Reed: Opposed, none opposed, that's approved. Agency agenda for September 22nd.
>> Mr. Mayor, members of the committee, the agency has no items at this time for the 22nd, if that remains the same we would recommend cancellation at next week's Rules Committee.
>> Mayor Reed: Okay.
>> Councilmember Pyle: So moved.
>> Mayor Reed: No action today then. Taking us to upcoming study sessions, nothing to look at today, legislative update, nothing to report except I am going to Sacramento tomorrow to meet with senators Florez and Corbett, dealing with some bills that they were carrying that would affect local control of our card club regulations. Meeting schedules, nothing to modify. Public record? Anything from public record that the committee wishes to pull for discussion?
>> Councilmember Constant: Mr. Mayor, I would just like to refer item P to Albert Balagso just so he's aware of the compliments for his staff and his programs. And then wanted to thank Mr. Wall for item O.
>> Mayor Reed: Okay, item P was a letter from Diane Kim to PRNS regarding the summer play camps 1 and 2 program through the office of therapeutic services and O was a letter from David Wall saying he sorely missed Councilmember Constant at the Rules Committee meeting.
>> Councilmember Constant: And with that I'll make a motion to note and file.
>> Councilmember Pyle: Second.
>> Mayor Reed: I have a question in the public record. I received some communications this last week regarding the convention center the Teamsters contracts, notably from the IAEE which is another one of our big vendors. Want to make sure that the clerk got copied of that so it can be included in the public record. Okay.
>> It will be in next week's public record.
>> Mayor Reed: Okay. And then I just wondered if the manager has anything to add on that. We talked about it last week under public record. We're continuing to get communications on it.
>> Ed Shikada: I believe the issue is still working. The immediate issues have been worked through on making sure that the functionality is maintained. I understand that there may still be some, call it debate, among the different labor organizations as to how best to interact on the site of the convention center at next week's league of cities conference. So we will be putting together an info memo to go to the council next week with the latest information.
>> Mayor Reed: Okay, motion on the public record is to note and file with the exception of two items that Councilmember Constant mentioned. All in favor? [ayes]
>> Mayor Reed: Opposed none opposed, that's approved. Item G, I have recommended two public sector appointments to Silicon Valley workforce investment network board, Bill Guthrie and David Baer.
>> Councilmember Constant: Motion to approve.
>> Second.
>> Mayor Reed: All in favor, opposed, none opposed, that's approved. Next we'll take up the 2009 league of California cities resolutions. I think Betsy Shotwell's going to give us a report on those.
>> Betsy Shotwell: Thank you, Mr. Chair, members of the committee. Betsy Shotwell, Director of Intergovernmental Regulations. You have before you your annual review of resolutions going forward to the league conference next week. There's two pending that will go to the policy committees Wednesday for discussion and further conversation, and you have one here, the first one has to do with supporting policies that would hold social hosts responsible for underage drinking that occurs on property under their possession, control, or authority, and oppose policies that make it easy for those who are underage to access alcohol through adults and on private property. This was brought forward by the City of Elk Grove

wishing the State of California had stronger legal means in code to deal with this issue. There are current law -- current state law dealing with the actual providing of alcohol to underage but its the consequences of that activity taking place, that the proposal is hoping to -- that the state will review and look at, legislation that would make this a stronger penalties. And staff from the police department is here to answer any questions.

>> Mayor Reed: Nancy.

>> Councilmember Pyle: This would be a misdemeanor?

>> Betsy Shotwell: Well, they don't really get into the specifics of the crime. Perhaps the attorney's office would be able to comment. It's perhaps in the criminal --

>> Councilmember Pyle: I'm referring to the third page.

>> Betsy Shotwell: The current law.

>> Councilmember Pyle: Current law is a misdemeanor, a slap on the wrist?

>> City Attorney Doyle: Not really. You're subject to six months in the county jail and/or a fine. So I think it really gets to enforcement and how, you know, the courts will enforce it.

>> Councilmember Pyle: And that would -- the circumstances of whatever happened would certainly play into whatever the judge decides?

>> City Attorney Doyle: I stand corrected. It's up to one year in the county jail.

>> Councilmember Pyle: Ah, so it is more than a slap on the wrist, yeah. Okay. Thank you.

>> Mayor Reed: Any others?

>> Betsy Shotwell: And then there's the second one having to do with a resolution urging city governments and others to divest from banks that fail to cooperate with foreclosure prevention efforts. And staff review here in the document states the issues, concerns, and also, further actions that -- I know the finance department was directed to take into account, as a council referral in June with regards to foreclosures and working with the financial institutions. And staff is here from the finance department as well to answer any questions you might have. And that recommendation is to disapprove.

>> Councilmember Constant: I would make a motion to --

>> Mayor Reed: Staff recommendation?

>> Councilmember Constant: Yes.

>> Mayor Reed: Staff recommendations. Just two right?

>> Betsy Shotwell: Just two this year as opposed to the regular 25.

>> Mayor Reed: Thanks for weeding them down. All in favor, opposed, none opposed, that's approved.

>> Betsy Shotwell: Thank you very much. This is a one week turn around as the meetings are next Wednesday out the conference.

>> Mayor Reed: That will go on the council agenda for Tuesday, the 15th.

>> Correct.

>> Mayor Reed: Okay.

>> Betsy Shotwell: Thank you.

>> Mayor Reed: Next item is an item I asked ton agendized so we could have a discussion before staff starts working on the referral from the council regarding conducting public business on personal equipment, e-mails, text messages, you name it. I thought it would be worthwhile for us to sort of talk about it a little bit before we have staff do a whole bunch of work to sort of frame the discussion a little bit. And I have thought about it somewhat, and there's several different elements of it which make it interesting. First is, the communications during council meetings that some people have pointed out, whether they're on the topic of the council meeting or not, there's communications, electronic, and I know that some cities have banned councilmembers from doing electronic communications during council meetings. That's one area, in-council communications and the second is disclosure of those, if they take place, should those be made part of the public record? And then, there's the category of communications, text, e-mail, on our personal devices, like my blackberry here that's a personal blackberry, that might have some connection to city business, and whether or not those should be treated the same way as electronic communications on my desktop in my office. And I was thinking there might be one more category of communications, oh, the hybrid question of, if it's a personal device would I get \$30 a month from the city for my use? Is that a city computer, or personal? And if so, does it make a difference on the public records analysis? I have seen the city attorney's analysis of this a couple of times. He's written a memo on it a time or two under the existing state of the law. And I presume that under public records act we can do more if we wanted to.

>> City Attorney Doyle: Yes.

>> Mayor Reed: Okay.

>> City Attorney Doyle: I would, under -- and I think that falls within that, just to be clear, when you talk about personal communications on your hand-held, what about personal communications on personal computers. That may be a laptop or stand or regular computers which aren't city computers but they may be city business. That's the same issue and I don't know if you want to take it, include that.

>> Mayor Reed: I think it is in the same category whether it's a blackberry or an HP pavilion. It is my equipment. City didn't put any money into this or the laptop that I have at home. Question is, if I'm communicating doing city business on my equipment, whether it's a hand held or laptop, seems to me same question. I don't know that there's a serious distinction in there on that one. But it may be something that we have to think about how we divide this thing up. But I know that councilmembers have opinions on it so I thought this would be a chance to talk about it a little bit before we ask the staff to figure out how to draft something.

>> Councilmember Constant: One of the things that's interesting for example in text messages, I don't think there's a way for me to export my text messages from my iPhone. I actually called AT&T, my service provider, to ask them about it. And there is no wholesale way to do that. I think we have to be careful at how we look at the limits of technology as well as the expansion of technology. Because we come up with a policy that deals with texting today and then six months from now there's a whole different technology that I wish I knew what it was because then I'd be the rich guy not working on the council anymore. But -- so I think we have to be careful to figure out what the limits are technology are, but also, however we craft it, whether -- whatever the parameters are, that it's something that's going to -- we're not going to revisit every six months when something new comes up. Because you know video chatting is now the newest thing and that's out there, and that could be something that gets tied into this and who knows what else? So I would just want to make sure that whatever we come up with is something that I could comply with. Because if it said, you know, if someone asks print out all your text messages, I can't do it. So I just don't know.

>> Councilmember Chirco: This sounds like it would be part of the discussion you were referring to, mayor, is what, looking at the limitations of technology, and what's realistic, and what's implementable. So I think that would be part of the discussion that the mayor's talking about. So I would move approval, and then expect a conversation that Councilmember Constant just articulated, to be part of the information that we would have to look at.

>> Councilmember Constant: Mr. Mayor, isn't your memo to have the discussion today?

>> Mayor Reed: Yeah, the referral has already been done to the staff to work on it.

>> Councilmember Chirco: I'm sorry.

>> Mayor Reed: I just wanted to frame it a little bit before they started working. They have plenty of things to do.

>> Councilmember Chirco: I'll be better next week. I'll finish my treatment. No problems.

>> Mayor Reed: Nancy.

>> Councilmember Pyle: I just want to say four years and eight months ago when I first started on this job, I had opted for the city to pick up my cell phone. When I realize that, four years and eight months later, I thought, what? I had no idea -- I didn't even remember that being done. So I think sometimes there's an unconscious problem, and Dennis will tell you I took care of that posthaste. I agree with you, mayor, when we're there we're there for the people's business and we're not there to do our own business. So from my own perspective, I think if we just don't plain have our cell phones at the dais, that may make a huge difference in reference to accountability. We have a phone there if we have an emergency situation, we have our viewer, we can tap into e-mail if we need to, or what have you. So I just really find it difficult to understand why the need for cell phones at the meeting.

>> Councilmember Chirco: Well, I know one of the things we do is we disclose any meetings we've had. That might be something we could look at. If you've had any city conversations on personal devices. Since I don't use them -- I believe it for those who do.

>> Mayor Reed: Well, there's more than one category of those communications. First is the communications that happen during a meeting that might be relevant to the meeting. So if somebody sends an e-mail message to the council during the meeting, on our -- through the city computers, that is a public record.

>> City Attorney Doyle: Yes.

>> Mayor Reed: For however long it's in the system.

>> Councilmember Pyle: Right.

>> Mayor Reed: Although it wouldn't be disclosed at the meeting. Especially if we are not looking at the e-mail, wouldn't even get it. But people send messages all the time. One thing is the disclosure. If they send a text message on a personal cell phone, that isn't going to go come through the city system, so that wouldn't become a public record. The distinction was if it were a city computer or a personal device because they get treated differently. And I don't know that they should. But that's different than whether or not the communicates ought to be happening at all. I know that Saratoga has had a discussion at the council on this and has given some general direction to their staff to look at it. I think they're headed in the direction of just banning use of electronic communications during meetings. But they're already looking at setting up city e-mail accounts so people don't have mayor personal e-mail accounts because that's all they have in Saratoga so they're kind of a different situation than we are. But the other things in addition to the fact you can't print text messages is, this I think is a really important question, is if everything that deals with city business on a home computer or a hand-held has to be saved, inventoried and dealt with for public records act request, who gets to be responsible for that? And who has to do the work? And you know, those are issues that I think right now, if somebody makes a public records act request, you know, we handle it internally with our staff. But what happens if we decide the communications on hand held devices should be public records? Then how do we manage whether it's printing them or somehow retrieving them or something? I think there's limits to the technology as well as the administrative burden of having to go through it and sort things out. Because in my -- if I were to save all my e-mail at home and go through it, well, 90% of it is Spam. Unfortunately. But there's a lot of it. And having to go through it is, you know, takes some time. As the staff knows from the work that we have to do here within our own system. And so I think that's an important issue to figure out whatever we want to do, how do we make it work with the technology and the administrative cost of doing that. Pete.

>> Councilmember Constant: I'll have to say just from a personal perspective, I wouldn't support an all out ban. And I'll tell you why. I think you may remember, Mayor, once I had to come you and tell you I had to leave, because my wife was stranded on the side of the freeway --

>> Mayor Reed: I do remember.

>> Councilmember Constant -- with all five kids. And I left the meeting. There are many times when I have to let my wife know we're going to be until 2:00 a.m., or whenever, late, or she sends me shopping lists of things that she needs for the kids on my way home from work. There is a line between the personal and professional but text messages are a way of life for some people. I know I rely on them quite a bit. I think on Tuesday my wife and I wouldn't talk if it weren't for text messaging. So I think that's something we have to keep in mind. And we haven't started talking about social networking yet either. But I think that's something, that wave is here, but I don't think it's crested yet. There's a lot more to come in the social networking arena. And I know I've got over 150 of my constituents that we communicate through social networking and I send them updates and I have done it during council meetings on an issue topical and of concern to my residents. So that's a whole other issue of how we would deal with that. And maybe not all who's watching knows that we do have the Internet up there and I know many of us use that to research during the council meeting to either confirm or refute something that is being said or presented. But we also have access to our city e-mail up there, too. So there -- I don't think there's any guidelines for that use. That's something that I think belongs in this whole discussion, as well. Because you still -- you can text without a phone. You can just go to Verizon or AT&T's Website and send a text to someone on their network and there is no record of it. So there are a lot of ways that this technology works. And I think we just need to be conscious of all of it.

>> Mayor Reed: Well, I don't know if we've helped narrow this down for the staff or not. That was the hoped for outcome.

>> City Attorney Doyle: I have a few questions, and I think the one thing is the scope. You're talking about electeds and probably your staffs. But how far down your organization does it go? It probably should cover any of the council appointees but how far? I mean, is it all employees that the rules apply to? Typically the public records act includes all public employees and that's the same for everybody and that's a question of scope. The second thing is, to echo Councilmember Constant, the law hasn't caught up with technology. But there's some -- the spirit of the law is probably there. And you talk about disclosure, and that's -- the Brown Act requires that you take public testimony, that you have a milk meeting. And so if somebody marches on down to City Hall and testifies it's public. But if you get something from a constituent that's going to have an impact on your vote, is that an argument that that should be disclosed as well just because they haven't shown up on the dais or they are saying something that might be of equal value or more value to that councilmember in that decision? You have deliberative

process, I don't know if you want to ever exercise that. And there's communications from staff members. Your staffers may be sending you information, and those are generally protected, at least in some circumstances. And do you want that information, should that be public, or is it really from third parties? Those are the types of things, the public records team is here and they are the ones that are going to have to craft something but those are the types of things that are sort of looking for guidance.

>> Mayor Reed: As far as I know we don't have any other cities that have taken this on other than the Saratoga piece.

>> City Attorney Doyle: No. And as we mentioned in our memo. The one case is a Superior Court case out of San Joaquin County, City of Tracy, and the court there said that the councilmember had a right of privacy, it didn't have to turn the information over. But if this council wants to make a decision that you don't have that reasonable expectation of privacy, and in fact it's something that, if it's city business, it should be turned over, then that's what we're looking to sort of craft.

>> Councilmember Constant: If I could muddy the water a little bit more, unlike e-mail, you can see when it was certainly and you can actually track down when it was opened, which leads you believe it was read if it was opened. You can't do that with text messages. So you -- and you have no control over who sends you a text message. So if you're in a council meeting, and you get a text message, whether it's delayed or not is whole 'nother story because I've gotten texts hours after they were sent, at times. But if you don't read that text message because you didn't hear it vibrate or it was sitting in your purse or your bag or whatever, I could easily see someone getting tripped up on a disclosure issue because there's a record of it coming in but there's no way that you know if you read it or not. And I think that's something we have to be conscious of, as well.

>> Mayor Reed: Rick, could you talk just a little bit about the privacy issue? You'll interested in whether or not there was any analysis in that case that's the one case on the privacy rye.

>> City Attorney Doyle: No, it really -- it just took a look at the California state constitution which has an express right of privacy in it. And the court -- I think the refusal to turn it over was on the balancing test that the individual councilmember's right of privacy outweighed the -- you're trying to sort of compare to a constitutional provision, you have prop 59 which is a constitutional provision and the public records act and the court essentially determined that the individual had a right of privacy. That court, that was appealed to the Court of Appeals and was thrown out because the plaintiff forgot to name the councilmember in the lawsuit. So they threw it out on a technicality. We don't have a reported decision. There's another case out of -- I've mentioned it is a case of a police officer using a city paid for hand held device where he was using it for personal text messaging. And the ninth Circuit Court of appeals which is federal court said that you needed a warrant in order to get any access to that information. Even though the policy is that you didn't use it for personal reasons. So there is an argument and there may be some constitutional issues we have to deal with, but I think if people go into it not expecting any expectation of privacy I think there are ways to distinguish whatever rules we establish from the ninth circuit case. It is really how far you go and you know as public officials I think you know that you have less privacy than most people. Although the constitution does protect you somewhat, and it really is a question of where do you think that line should be drawn. And if it's public business, fine. But how do you draw a line and how do you enforce it? The city certainly can't get access to your private stuff, and so is everybody on the honor system at that point? It really gets down to some practical decisions or problems of enforcement as well, and how we work that through. So I think staff is willing to come back with something, but there may be, similar to the prior discussions on sunshine, there may be some lengthy, when we get into the details there may be some lengthy discussion.

>> Mayor Reed: On the privacy issue, so if somebody wants to know every phone call that I made from City Hall, I know it may be different with VOIP than it was in the old days when we had individual phones. But let's assume somewhere there's a list of every phone call made from my phone in City Hall. Is that a public record?

>> City Attorney Doyle: We typically and maybe Mr. Manheim or Ms. Herrick or Mr. Norris can help me out here. Because I've dealt with the question specific to cell phone. We do not turn over phone numbers. The reason we don't turn over phone numbers is to protect the privacy of the individual phone number and the individual phone call. The fact that you called them doesn't mean they want their phone number public. We turn over the time of call, to whom the call was made not the phone number. And we do give dollar amounts particularly of cell phone records what the total bill was but we do not give out the phone numbers.

>> Mayor Reed: Is that a balancing act determination?

>> City Attorney Doyle: Yes.

>> Mayor Reed: People have interest of how much money got spent on the phone call but a privacy question about would who's on the other end?

>> City Attorney Doyle: The individual name maybe not we will turn that over but the actual phone number is something else.

>> Mayor Reed: That's a City Hall phone, what if I go home and make the same phone calls on my home phone number, not even a cell phone, just a land line?

>> City Attorney Doyle: Well, right now without a subpoena, we couldn't get access to those records, without voluntarily turning them over.

>> Mayor Reed: My records, not the city's records?

>> City Attorney Doyle: Yes.

>> Mayor Reed: And if someone wants to issue a subpoena in one of our many, many cases, what is the basis if I wanted to resist the subpoena? My personal phone.

>> City Attorney Doyle: I think your personal phone it would be -- well if it's part of the civil action it's not reasonably calculated to lead to the discovery admissible evidence. Fairly low standard but I think we would argue this is private information and unless you can make a showing of some kind of connection, we would seek to exclude it or at the minimum get a protective order. So that other than the lawyer's eyes only, it couldn't be used for any other purpose. So I mean there are ways to protect that stuff. But if it's a public record, it's available to everybody. So it really -- that's a different issue.

>> Mayor Reed: Okay. Any other complicating factors councilmembers want to ask about?

>> Councilmember Pyle: Just want to say sounds like he who pays the goal, keeps the confidence. If you pay for your own whatever it happens to be, that's your responsibility and that's your information and it is private.

>> City Attorney Doyle: Yeah, and it is. And the question that the council needs to address is to the extent that you're using a personal computer for city business, does the council want to say that to the extent it's city business and it's involved that that should be disclosed, any record as a public record? And if you do that then the practical problem is how do you enforce that? I mean the city has a difficult position to go in and you're really putting people on the honor system.

>> Councilmember Constant: So kind of moving this back to the low-tech, if I get a letter or written communication at mail at home which I actually get more frequently than I ever expected, are those public records? I've never treated them -- I usually just throw them away but I actually get them.

>> City Attorney Doyle: You have a document -- well, that's a good question, it really is. Probably more likely than not, yes.

>> Councilmember Constant: I never expected that, just like I didn't expect someone to come to my house at 6:00 in the morning complaining their garbage didn't get picked up but those things happen.

>> City Attorney Doyle: Generally, if the city has, the city broadly has control over so it's in the possession of the city whether physical or constructive. The argument is you are the city and you have control over that. But you know, I don't know of any case law on that so, written documents are a little bit different because we again the law was written, even though it extends to electronic communications, it was written with the idea of written physical documents.

>> Mayor Reed: Judy.

>> Councilmember Chirco: I'm guessing this is a concern not just to San José but to across the country. And so do you see in the next short while, you know, three to five years, there's going to be court cases that will give better guidance than there exists currently?

>> City Attorney Doyle: Probably. I think you've seen it in the federal context. There -- and I mentioned this at one of the council meetings. Similar to California law there are strict prohibitions on use of government property for political purposes. So White House officials for example have to have their own personal devices in order to do anything political. Because the hatch act prohibits any government. And that was an argument that the former vice president asserted many times. And then there's also -- you know, so what's personal, what's public, gets clouded and so you're going to see, someone's going to bring a test case. Similarly in California you've seen one case. And I haven't seen the league, a program for next week but I wouldn't be surprised if it's a discussion item. Because the league took a position supporting the city of Tracy in not having to turn those documents over. They wanted to protect the privacy interest. So at the state level, cities are still taking the position that these are private. And yet it's evolving and I think the more you mush the two, whether it's going to be -- whether it's the legislature or the courts it's going to be tough to say that they shouldn't be treated as public.

>> Councilmember Chirco: Because my thinking is and I will always plead guilty of simplistic thinking. But I think how many resources do we direct toward a problem that we can't find the parameters to, when there are no parameters? And just some of the very things that Councilmember Constant has brought out. I would probably err on the side of asking individual councilmembers to disclose. Because I tell you if you're not being truthful in that there's a bigger problem than just disclosure. Always want to balance the resources against return on investment. And this one looks like it could be a resource sink and not much return. As Councilmember Constant was saying, are we back here in six months because either the law has changed or technology has totally evolved from a total ineffective technology user. Just applying what seems to be simplistic thinking.

>> Mayor Reed: Anything else on this? This was just agendaized for discussion, not for. We're nowhere near figuring out what can be done or should be done.

>> City Attorney Doyle: Some kind of a draft document, I'm looking at Tom Manheim, probably his new project.

>> Tom Manheim: Thank you. We've been just talking about when, what sort of time frame we'd be looking at. And I think it's going to be in November before we can come back to you with any recommendations. We would be looking at something in that sort of a time frame.

>> Mayor Reed: Well what you might want to come back to us first with is some idea of a work plan. After you've had a chance to listen to the discussion and think about it, how you're going to proceed before you launch into it and spend a lot of time and see if maybe we can narrow it down a little bit.

>> Tom Manheim: Maybe a broad framework of the issues we'll be looking at.

>> Mayor Reed: Yes, not a 100% work plan but a scoping, that would be helpful. By that time we might have some other entities like the league of California cities that have weighed into it. That might be helpful. Anything else on this? Okay that concludes that agenda item. I think that was the last item of business. We have open forum, remaining on the agenda. Mr. Wall.

>> David Wall: Good afternoon. First we'll start off with some ceremonial matters. Top of the list, your continuing pay cut of \$17,237.50.

>> Mayor Reed: Actually, it's 27,000.

>> David Wall: 27,000?

>> Mayor Reed: But who's counting.

>> David Wall: Public records says 17,000. Is it 27,000?

>> Mayor Reed: I can talk to you offline.

>> David Wall: I'll make amends to that. Like to thank the Rules Committee as a overwhelm, I don't know how to thank you, so we'll invoke the doctrine of thank you apportionment for the graffiti abatement on the train mural. And that document and photographs are before you. The photographs were taken at night.. You can see the mitigation and how handy it will be in restoration. The other one is for the D.O.T. folks that came in to take care of a large tree branch that -- what I believe a garbage truck took out and didn't tell anybody about and just left it there. And then we go also to this continued request that you have on realtime budgetary talks, as far as how they apply to city employees. Before the holidays, don't wait until next year to start doing things. Sparse budget and layoff priorities and things. Then we have innovation. A use for reclaimed water that has not been discussed that would help out in the overall treatment of the plant for consistent flows, it would -- because I can't -- to talk all about it in two minutes or even less than that, but a certain portion of reclaimed water continually pumped into the sewage system, because of your good environmental records, ladies and gentlemen, there's an unintended consequence in that hydraulic loadings to the plant may drop to such a degree, the actual solids in the collection system will start to bind up. In other words, then you'll get slugs of solids into the plant versus a continuous flow, that would also go to mitigate the cost of retrofitting or outfitting large apartment complexes with reclaimed water because you wouldn't need to do it double plumbing. All you would need to do is make sure that where the apartments go into the mains, you have a continuous flow.

>> Mayor Reed: Sorry, your time is up.

>> David Wall: Fine.

>> Mayor Reed: Hate to interrupt your flow, interesting topic.

>> David Wall: No, hate to interrupt your pay cut.

>> Mayor Reed: Anything else on open forum? We're adjourned.