



THE CITY OF SAN DIEGO

DATE: December 13, 2019

TO: Ron Villa, Assistant Chief Operating Officer
Craig Gustafson, Interim Communications Department Director

FROM: Kyle Elser, Interim City Auditor
Office of the City Auditor

SUBJECT: Hotline Report of Public Records Act Responses

Summary of Investigative Results

Our Office received a Fraud Hotline report regarding the City's responses to Public Records Act (PRA) requests for records. We reviewed a judgmental sample of over 100 PRA requests that identified numerous examples of apparent deviations from PRA requirements. We specifically refer to some PRA requests in this report, but we found additional examples of similar issues that were not specifically identified in this report; our results should not be used to characterize all PRA responses.

As part of our investigation, we reviewed State law, City policy, other policy guidance, and conducted interviews with City staff and requesters. We determined that the City's PRA Program practices should be strengthened to ensure consistent compliance with all aspects of the PRA. More specifically, our investigation found sufficient and appropriate evidence to form the following opinions:

First, the City's PRA Program appears to have not complied with some aspects of the PRA, lacks policies and procedures, and relied on a City Administrative Regulation (AR) from 2004 that was not updated until very recently, and was incomplete. The new AR contains some inconsistencies with current PRA law, and is also incomplete.



OFFICE OF THE CITY AUDITOR
600 B STREET, SUITE 1350 • SAN DIEGO, CA 92101
PHONE 619 533-3165 • FAX 619 533-3036

TO REPORT FRAUD, WASTE, OR ABUSE, CALL OUR FRAUD HOTLINE: (866) 809-3500



Second, the PRA Program reports near-perfect compliance with statutory requirements of the PRA regarding the initial response to requesters. However, we found many instances where requesters were not told within the statutory timeframe whether records exist, nor were they told the estimated date and time when the records will be made available, as required by the PRA. Therefore, the PRA Program's voluntary statistic on compliance appears to be overstated. Further, the language used to describe the metric could be interpreted as meaning the City complied with all aspects of the PRA, but the metric is used to measure whether the City's initial response to requesters was made within the required timeframe.

Additionally, both the PRA and City policy require staff to assist requesters to make focused and effective requests and offer "suggestions for overcoming any practical basis for denying access to the records or information sought." We found examples where City staff did not appear to meet this requirement.

Finally, we identified a potential contract violation related to an unauthorized product endorsement by the City's PRA software vendor. The vendor corrected the apparent violation during the course of our investigation, after we made City management aware of the issue.

We made six recommendations and management agreed to implement all of them.

We note that the City Attorney's Office provided a response to our recommendations to management. See **Attachment D** for the City Attorney's memorandum and our comments on their response.

Public Access to Records is a Fundamental and Necessary Right

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 of every person in this state” (Gov. Code, § 6250). In 2004, the State Constitution was amended to include a right to access public records¹. A decade later, an amendment was added to require that local governments follow the PRA and provide public access to government information (Cal. Const. Art I §3(b)(7)). According to guidance related to the PRA published by the League of California Cities, the PRA establishes the right to either inspect public records, or receive copies of public records (“A Guide to the California Public Records Act,” published in April 2017 (Guide)).

The Guide states that PRA requests may be made in writing (by paper—mailed or personally delivered—or electronic format—via email or fax), verbally, or by phone. No particular request format may be required.

Certain exceptions to public disclosure are outlined in the PRA, but the general rule is that unless a specific legal exception exists, the records must be disclosed. Specifically, the PRA states (Gov. Code, § 6253(b)):

Except with respect to public records exempt from disclosure by express provisions of law, each state or local agency, upon a request for a copy of records that reasonably describes an identifiable record or records, shall make the records promptly available...

According to the Guide, there are “approximately 76 exemptions from disclosure” in the PRA (Gov. Code, §§ 6253.2 – 6268). The Guide states that the exemptions are both “intended to protect privacy rights,” and the “need for the government to perform its assigned functions in a reasonably efficient and effective manner, and to operate on a reasonably level playing field in dealing with private interests.” For example, personnel and medical records are not required to be disclosed when the disclosure would “constitute an unwarranted invasion of personal privacy” (Gov.

¹ Also, in 2004, the City’s Charter was amended to include section 216.1, which included at subsection (b)(1):

The people have the right of access to information concerning the conduct of the people’s business, and therefore, the meetings of public bodies and the writings of public officials and agencies shall be open to public scrutiny.

Code, § 6254(c)). In addition to the specific identified records that are not required to be disclosed, there is a provision in the PRA that establishes a more general rule regarding the denial of access to government records. The relevant part of the PRA states that either the “agency shall justify withholding any record by demonstrating that the record in question is exempt under express provisions” of the PRA, or under the circumstances, records may be withheld if “the public interest served by not disclosing the record clearly outweighs the public interest served by disclosure of the record” (Gov. Code, § 6255(a)).

The Guide refers to the latter provision as a “catch-all” exemption. Whenever either a specific exemption or the “catch-all” provision is used as the basis to deny any request for records, the notice to the requester “shall set forth the names and titles or positions of each person responsible for the denial” (Gov. Code, § 6253(d)). The Guide notes that State law requires written identification of the name and title of each person responsible for both the denial of access to records and redactions applied to parts of records:

If a written public records request is denied because the local agency does not have the record or has decided to withhold it, or if the requested record is disclosed in redacted form, the agency’s response must be in writing and must identify by name and title each person responsible for the decision. [Citing Gov. Code, §§ 6253(d) and 6255(b)].

Although there are recognized exceptions to PRA disclosures, and procedures to follow when records are withheld or redacted, the PRA states that any “statute, court rule, or other authority” related to the law “shall be broadly construed if it furthers the people’s right of access, and narrowly construed if it limits the right of access” (Cal. Const. Art I § 3(b)(2)).

There are two timeframes associated with the PRA: one for responding to requests, and one for disclosing the identified records. According to the Guide, “Although the law precisely defines the time for responding to a public records request for copies of records, it is less precise in defining the deadline for disclosing records.” The initial response lets the requester know whether the government agency has disclosable records or not. In general, the government agency is required to respond “within 10 days” to let them know if the records exist.

Specifically, the PRA (Gov. Code, § 6253(c)) states, in relevant part:

Each agency, upon a request for a copy of records, shall, within 10 days from receipt of the request, determine whether the request, in whole or in part, seeks copies of disclosable public records in the possession of the agency and shall promptly notify the person making the request of the determination and the reasons therefor.

The 10-day response time can be extended for up to 14 additional days under any of the following four “unusual circumstances;” however, the extensions are allowed “only to the extent reasonably necessary to the proper processing of the particular request” (Gov. Code, § 6253(c)):

- (1) The need to search for and collect the requested records from field facilities or other establishments that are separate from the office processing the request.
- (2) The need to search for, collect, and appropriately examine a voluminous amount of separate and distinct records that are demanded in a single request.
- (3) The need for consultation, which shall be conducted with all practicable speed, with another agency having substantial interest in the determination of the request or among two or more components of the agency having substantial subject matter interest therein.
- (4) The need to compile data, to write programming language or a computer program, or to construct a computer report to extract data.

The Guide cautions, “No other reasons justify an extension of time to respond to a request for copies of public records,” such as the government agency’s other, more important priorities, or the availability of knowledgeable staff. The Guide also warns, “commonly disclosed records that are held in a manner that allows for prompt disclosure should not be withheld because of the statutory response period.”

While there is a 10-day and an extended 14-day response time defined in the PRA related to initial responses to PRA requests, the only guidance related to the disclosure and delivery of the identified records is a reference to acting “promptly,” which is used six times in the PRA. In relevant part, the PRA states that a

government agency “shall make the records promptly available to any person upon payment of fees...” (Gov. Code, § 6253(b)). This standard is further emphasized in a different subsection, which states, “Nothing in this chapter shall be construed to permit an agency to delay or obstruct the inspection or copying of public records” (Gov. Code, § 6253(d)).

Once a government agency determines that disclosable records are in its possession, it is required to notify the requester of the estimated date and time when the records will be made available, specifically, the PRA states (Gov. Code, § 6253(c)):

When the agency dispatches the determination, and if the agency determines that the request seeks disclosable public records, the agency shall state the estimated date and time when the records will be made available.

In addition to providing requested records, the PRA requires government agencies to assist requesters. Specifically, the PRA (Gov. Code, § 6253.1(a)(1)-(3)) requires the following (emphasis added):

(a) When a member of the public requests to inspect a public record or obtain a copy of a public record, the public agency, in order to assist the member of the public make a focused and effective request that reasonably describes an identifiable record or records, **shall do all of the following, to the extent reasonable under the circumstances:**

(1) **Assist the member of the public to identify records and information** that are responsive to the request or to the purpose of the request, if stated.

(2) **Describe the information technology and physical location** in which the records exist.

(3) **Provide suggestions for overcoming any practical basis for denying access** to the records or information sought.

Note that according to the PRA, a government agency is not permitted to limit access to information based on the intended use of the information, specifically, the PRA states, “This chapter does not allow limitations on access to a public record based upon the purpose for which the record is being requested, if the record is

otherwise subject to disclosure” (Gov. Code, § 6257.5). In a section regarding practice tips, the Guide notes that voluminous requests may be addressed by asking the requester to narrow the scope, consent to a later deadline, or providing partial responses on a “rolling” basis as documents become available.

Private Email and Text Communications May Constitute Public Records

The California Supreme Court recently determined that government employees who use personal electronic accounts, including email accounts and text messages, to conduct official agency business may be subject to the PRA. Citing the “constitutional mandate to interpret the Act broadly in favor of public access,” the Court stated, “we hold that when a city employee uses a personal account to communicate about the conduct of public business, the writings may be subject to disclosure under the California Public Records Act” (*City of San Jose v. Superior Court* (2017) 2 Cal.5th 608, 614).

The *City of San Jose* case related to private data and email searches noted that government agencies may develop search policies and rely on employees to review personal files and electronic devices for materials that may be responsive to a PRA request. The Court mentioned a federal and Washington state procedure that requires employees to submit an affidavit to support the withholding of materials, and a federal policy that requires employees to “use or copy their government accounts for all communications touching on public business.” The Court noted that federal standards allow employees to conduct their own searches for public records on personal devices “so long as the employees have been properly trained” to distinguish between public and personal records.

In an April 4, 2017 Memorandum of Law² regarding the *City of San Jose* decision, the City Attorney’s Office made five recommendations to the Mayor regarding PRA requests seeking public records on private electronic devices and accounts.

The first City Attorney’s recommendation was to educate and train City staff regarding the decision. On March 24, 2017, a Citywide email was sent (Attachment

² Source: <http://docs.sandiego.gov/memooflaw/ML-2017-4.pdf>

A) regarding the decision. The communication noted that City employees who are required to respond to PRA requests “must search City accounts and their own personal files, accounts, and devices for responsive records.” Further training and guidance was promised. However, the City has not offered a Citywide training on this issue to date.

In contrast to the Citywide email communication, the current PRA Program training materials offered to City staff involved with coordinating PRA responses for departments state (emphasis added):

Upon receipt of a CPRA request **asking for private emails and accounts**, employees are asked to search (good faith, reasonable effort) not only their City accounts but also their own private devices/accounts.

We note two differences between the Citywide communication, which stated that *all* employees who search for records *must* include their private devices and accounts, versus the training materials that only *asks* that employees search their private accounts, and *only* when there is a request “asking for private emails and accounts.”

The second City Attorney’s recommendation was that “administrative regulations should be updated to state that public records include any writings relating to City business that have been sent, received, or stored on personal electronic devices or accounts.” It further recommends that a requirement be added to the policy update to mandate that both City and private accounts be searched whenever an employee is required to respond to “a request for records” under the PRA.

The relevant Administrative Regulation (AR) was updated and published recently. The prior version, from 2004, was replaced with a new AR dated May 31, 2019. The new definition of public records was added to the updated AR.

The third City Attorney’s recommendation was that the City may consider prohibiting employees from using personal accounts and devices to conduct public business “unless electronic communications are copied and retained in accordance with established records retention schedules or forwarded to the City’s email server for storage.” The memorandum noted that such a mandate would apparently trigger a meet-and-confer process with recognized employee organizations under the Meyers-Milius-Brown Act (MMBA). The new AR does not prohibit City employees from using personal accounts and devices to conduct City business.

The fourth City Attorney's recommendation was that City employees complete an affidavit or other statement certifying their compliance with the requirement that the employee has searched their private devices and accounts for responsive records and provided them. The memorandum noted that implementing this recommendation would also trigger MMBA procedures. The new AR includes a three-page certification titled, "Statement of Compliance Regarding Search of Personal Accounts and Devices."

Finally, the City Attorney's memorandum recommended that the existing City policy regarding mobile devices be expanded to address City employees who do not receive a fixed stipend in exchange for conducting City business on personal devices. Specifically, the updated policy should apply the rule that work-related text messages be transferred to the City for storage. The new AR only requires employees who receive a stipend for using a personal mobile device to produce public records stored on those devices. The details of the AR requirements will be discussed in detail later in this report.

The City's Wireless Communication Services policy, AR 90.25, was issued in 2017, but only applies to City employees who receive a stipend to reimburse a portion of their monthly service fee or use city-funded devices. The policy states that text messages and instant messages "should" be transferred to the City if they are City records. However, the only reference to the PRA is the sentence, "Employees are also responsible for complying with the California Public Records Act for business-related usage of their Mobile Devices."

When determining if material held in a private account relates to public business, the *San Jose* case noted that the analysis typically involves consideration of several factors, including:

1. the content itself;
2. the context in, or purpose for which, it was written;
3. the audience to whom it was directed; and
4. whether the writing was prepared by an employee acting or purporting to act within the scope of his or her employment.

As an example of how one local jurisdiction has addressed PRA requests in light of this recent California Supreme Court case, the County of San Diego enacted a policy effective October 1, 2018, which states:

In light of the *San Jose* decision, unless a request specifically excludes private devices and accounts from the scope of the search, those who are asked to search for records must also determine whether they have responsive “public records” residing on their personal devices and accounts.

As such, the County policy requires routine searches of personal devices and accounts for every PRA request that does not specifically exclude them from the scope. The City’s policy and training materials are not clear regarding City employees’ obligations.

Improperly Altering, Removing, or Destroying Public Records is a Crime

Although we do not allege that any City employee committed a criminal act, given the severe potential consequences for violations related to public records, it is critical that City staff are aware of their legal duties and obligations under the State law and City policy. While there is no criminal penalty for violating the PRA, individual City employees may face prosecution under certain circumstances for violations related to public records.

According to an October 9, 2019 memorandum from the City Attorney’s Office regarding Online Collaboration Tools³, “Remedies against employees who fail to comply with records retention and [PRA] requirements can be severe.” The State law cited in the City Attorney’s Office memorandum lists specific acts which could expose City officials to criminal prosecution, and a sentence of up to four years in prison, for hiding or destroying public records. Although the specific provisions of the statute were not included in the public memorandum, California Government Code section 6200 reads as follows:

³ Source: <https://docs.sandiego.gov/memooflaw/MS-2019-24.pdf>

Every officer having the custody of any record, map, or book, or of any paper or proceeding of any court, filed or deposited in any public office, or placed in his or her hands for any purpose, is punishable by imprisonment pursuant to subdivision (h) of Section 1170 of the Penal Code for two, three, or four years if, as to the whole or any part of the record, map, book, paper, or proceeding, the officer willfully does or permits any other person to do any of the following:

- (a) Steal, remove, or secrete.
- (b) Destroy, mutilate, or deface.
- (c) Alter or falsify.

Although the State law does not define an “officer,” the next section begins, “Every person not an officer,” who is guilty of the same acts described in Government Code section 6200 above, could face punishment as a misdemeanor.

Recommendation 1

We recommend that the Assistant Chief Operating Officer coordinate citywide training regarding the obligation to search for and produce responses to requests for public records on personal devices and accounts, and other aspects of the PRA. (Priority 3)

The City’s Prior Administrative Regulation (AR) was Outdated and Incomplete

Until relatively recently, the City’s AR 95.20 regarding the PRA⁴ had been in effect since July of 2004. A new AR became effective on May 31, 2019. However, we note that the prior policy pre-dated the November 2004 State Constitutional amendment declaring that “The people have the right of access to information concerning the

⁴ The full title of the prior policy was, “Public Records Act Requests and Civil Subpoenas; Procedures for Furnishing Documents and Recovering Costs.” A revised version of the AR is numbered 95.21, and is titled, “Responding to California Public Records Act Requests.”

conduct of the people's business..." (Cal. Const. Art I §3(b)(1)). The policy also predated the language that was added to the State Constitution requiring that laws and other authorities "shall be broadly construed if it furthers the people's right of access, and narrowly construed if it limits the right of access" (Cal. Const. Art I §3(b)(2)). Moreover, the City's prior policy related to PRA compliance pre-dates, by nearly a decade, the June 2014 amendment to the State Constitution that added "each local agency is hereby required to comply with the California Public Records Act" (Cal. Const. Art I §3(b)(7)).

Because the City's policy was not updated, it did not include the nearly 15 years of State Court opinions. Specifically, the policy did not include updates to the PRA made in 2008, 2009, 2013, 2014, 2015, 2016, 2017, and 2018. Since these changes in the PRA, and interpretations of the City's requirements by the Courts, were not included in updates to the policy until very recently, City staff would not have had the information necessary to comply with the law, other than through separate guidance provided outside of the AR.

The prior 16-page policy addressed both PRA requests and civil subpoenas. It included substantial information related to civil subpoenas, but also provided a summary of most of the legal requirements set forth by the PRA as of July 2004. However, we noted that the policy did not address the 1998 addition to the law that prohibits "limitations on access to a public record based upon the purpose for which the record is being requested, if the record is otherwise subject to disclosure" (Gov. Code, § 6257.5).

The City's New Administrative Regulation (AR) Contains Some Inaccuracies and is Incomplete

During the course of our investigation, the City released an update to the 2004 policy regarding PRA responses. The new AR became effective on May 31, 2019 and includes most of the important legal updates to the PRA requirements. However, we identified both minor and major discrepancies between the language in the updated City policy and the PRA language which may cause City staff to misunderstand and misapply the PRA requirements. We also identified a concern that City staff could be disciplined or terminated for violating a confidentiality agreement that was added as a requirement to the PRA policy for some City staff.

An example of a minor discrepancy between the PRA and the new AR, with implications discussed in detail later in this report, relates to the requirement that requesters be informed whether or not the City has any disclosable responsive public records. The AR, at section 5.4, states, "Within 10 calendar days of the City's receipt of the Request, PRA Program staff must respond to the requester on behalf of the City." The PRA does not require a mere response, but a confirmation as to whether or not the City has responsive records. This discrepancy may cause PRA Program staff to inadvertently violate this aspect of the PRA when responding to requesters. We note that earlier in the AR, section 5.2.2(a) requires City department staff to post a note in the internal system indicating whether or not the department has responsive records, but the AR does not require that the same information be conveyed to the requester.

Once the City determines that disclosable records exist, the PRA requires that the City notify the requester of the "estimated date and time when the records will be made available" (Gov. Code, § 6253(c)). The prior AR included the "date and time" requirement. The new AR only refers to the "estimated date" in section 5.2.2(b) requiring City departments to make an internal note in the PRA software. Later, section 5.4.1 correctly states that the "date and time" estimate are required to be communicated to requesters. The policy should be consistent from one section to the next since it is not clear how the date and time could be conveyed to the requester when the department is only required to identify the target date.

Providing requesters with an estimated date and time when the records will be made available does not appear to be the PRA Program's consistent practice based on our review of PRA requests. According to the Communications Department, their practice changed in June of 2018 to include estimated delivery dates. In general, our analysis showed that estimated due dates were infrequently provided and estimated times of delivery were not found in our sample of Calendar Year 2018 requests.

Another minor difference between the PRA and City policy related to the language regarding denials of requests. The PRA requires that when the release of records is denied, the City "shall set forth names and titles or positions of each person responsible for the denial" (Gov. Code, § 6253(d)). The new AR, at section 5.8.1, states that when records are "withheld or redacted" the City is required to provide the "name and title of the person making this determination." Thus, there is a

discrepancy between the PRA requirement to identify *each* person and the AR's requirement to only identify *the* person responsible for a denial of a PRA request.

We note that in the prior version of the AR, from 2004, the policy required that notifications of denials provide the "names and titles or positions of each person responsible for the denial." The evidence we reviewed⁵ and interviews with PRA Program staff indicate that they are not providing the names and titles of each person responsible for denied records. According to the Communications Department, the PRA Program began providing the names and titles of each person responsible for denials when the new AR became effective in May of 2019. We note that the requirement to provide this information was included in the 2004 version of the policy.

The PRA requires the City to assist requesters to make a "focused and effective request" (Gov. Code, § 6253.1(a)(1)-(3)). Given the City's complex organizational structure, idiosyncratic use of terminology, and diverse operations, there are likely many PRA requesters who would benefit from help from City staff. While the PRA describes three specific steps that must apparently be taken to assist requesters, the City's new AR does not accurately convey these requirements. As shown in **Table 1**, below, there are key differences between the PRA requirements and the paraphrased and circumscribed summary of these requirements included in the City's policy.

⁵ Some examples of requests where the names and titles of each person responsible for denials of records was not provided include requests: 18-151, 18-576, 18-1931, and 18-2573.

Table 1
Summary of Discrepancies Between the PRA Requiring City Staff to Assist Requesters and City Policy

PRA Requirement Gov. Code, § 6253.1(a)(1)-(3)	City Administrative Regulation 95.21
<p>(a) When a member of the public requests to inspect a public record or obtain a copy of a public record, the public agency, in order to assist the member of the public make a focused and effective request that reasonably describes an identifiable record or records, shall do all of the following, to the extent reasonable under the circumstances:</p> <p>Conclusion: The AR inaccurately limits the City's assistance obligation.</p>	<p>5.3.7(a) If a Department needs clarification of the Request in order to search for Public Records, PRA Program staff or PRA Liaison shall contact the requester to seek clarification.</p>
<p>(1) Assist the member of the public to identify records and information that are responsive to the request or to the purpose of the request, if stated.</p> <p>Conclusion: The AR is generally consistent with this PRA requirement.</p>	<p>5.3.7(b) The [PRA] requires an agency to assist the public in making a focused and effective Request that reasonably describes identifiable record(s).</p>
<p>(2) Describe the information technology and physical location in which the records exist.</p> <p>Conclusion: The AR inaccurately limits the City's assistance obligation.</p>	<p>5.3.6 Public Records Not Existing in Requested Form. When Public Records are not stored in the manner requested, the PRA Liaison must describe to the requestor the information technology and physical location in which the records exist, and provide suggestions for retrieving the Public Records.</p>
<p>(3) Provide suggestions for overcoming any practical basis for denying access to the records or information sought.</p> <p>Conclusion: The AR inaccurately cites the City's assistance obligation.</p>	<p>5.3.6 (see above regarding "provide suggestions for retrieving the Public Records.")</p>

The PRA focuses on City staff's duty to assist requesters by taking all three of the actions listed to the extent reasonable under the circumstances. All three steps were included in the 2004 version of the AR. In contrast, the City's new AR only applies this duty when a City department needs clarification in order to process a request. Our investigation determined that the apparent PRA requirement to assist all requesters has been interpreted by PRA Program staff to require only some of the three actions, and only "when applicable under the circumstances of each request."

Also listed in **Table 1**, above, is the requirement to describe the information technology and physical location of City records that could be responsive to a PRA request. The AR limits the City's duty to assist requesters in this regard to the narrow circumstance where there is a mismatch between the format in which the records are stored and the format described in the request. The apparent duty to assist requesters to provide a more focused data request under the PRA is not limited to requests where a particular format is requested. For example, Request 18-508, discussed in detail later in this report, expressed uncertainty regarding which data format should be requested:

if the data is in a proprietary format (not a format readable by typical consumer products, like Microsoft Access or Excel) ... but can be exported to a consumer-friendly format, I ask that the data be provided in a consumer-friendly format, preferably a format readable by Microsoft Excel or Access

In this case, it would appear that since the PRA language requires the City to assist the requester by describing the information technology used to process the records, City staff would be required to respond with the information that the data had already been exported to an Excel file. This information was not communicated to the requester.

The third action listed in **Table 1**, requiring City staff to advise requesters regarding "overcoming any practical basis for denying access to the records or information sought" was not accurately summarized in the new AR. The language in the AR is limited to circumstances where there is a difference between the formats in which City data is stored and requested. Even under that specific circumstance, City staff are only required to "provide suggestions for retrieving the Public Records." The language in the PRA is not limited to any particular circumstances. Moreover, the

PRA requires City staff to identify and communicate ways that requesters can avoid having their request denied, which is not included in the new City policy.

The California Supreme Court's conclusions regarding public records stored on personal devices and accounts are addressed in the new AR. However, the policy's requirement that public records stored on personal devices and accounts be produced in response to PRA requests only applies to City employees who receive a wireless stipend or use a City-provided device. The 2017 Memorandum of Law from the City Attorney's Office recommended that City policy be "expanded to clearly include those employees who do not receive a City stipend, but choose to use personal devices or accounts to engage in City business."

The new AR also does not include the four factors cited by the California Supreme Court that would help City staff to determine whether communications made on personal devices or accounts constituted public records. The four factors cited were: the content, purpose, audience, and whether the writing was within the scope of his or her employment.

In the *San Jose* case, the California Supreme Court provided the following illustration of the distinction between private and public communications made in the context of otherwise personal accounts and devices:

For example, depending on the context, an e-mail to a spouse complaining "my coworker is an idiot" would likely not be a public record. Conversely, an e-mail to a superior reporting the coworker's mismanagement of an agency project might well be.

Including the four factors cited by the California Supreme Court in the City's AR on PRA compliance would be useful for City employees who wish to comply with the law but need guidance on which communications constitute public records that would need to be produced (unless a specific exception can be articulated to justify withholding the information).

Finally, the new AR requires City staff who are designated by their department heads to serve as liaisons between their department and the PRA Program to sign a confidentiality agreement. The agreement was not attached to the AR, although a new "Statement of Compliance Regarding Search of Personal Accounts and Devices" was attached. We have attached the confidentiality agreement template we obtained from the Human Resources Department to this report (**Attachment B**).

We have identified some concerns regarding the scope of the form and the possibility that City employees may be disciplined for complying with the PRA. It is also not clear that the confidentiality agreement is necessary.

The form refers to the confidentiality of “management deliberative processes” and states (emphasis added), **“All employees must respect the highest level of privacy for our organization.”** These statements seem to conflict with City Charter section 216.1(b)(1), which states:

The people have the right of access to information concerning the conduct of the people’s business, and therefore, the meetings of public bodies and the writings of public officials and agencies shall be open to public scrutiny.

The first paragraph of the form warns that disclosing “confidential information” pursuant to a PRA request may lead to discipline or termination unless the PRA response has been “reviewed and approved by the City Attorney’s Office.” According to the Guide, “Unauthorized disclosure of [protected] records can subject local agencies and their officials to civil and in some cases criminal liability.” However, not all PRA responses are reviewed by the City Attorney’s Office. Therefore, the potential that the inadvertent disclosure of protected information could lead to termination and criminal prosecution may be a concern for City staff tasked with releasing potentially-confidential information as part of a PRA response. Clear legal guidance and training are essential to protect City employees.

Finally, the term “confidential information” is not defined on the form. The form lists two examples of confidential information, but adds the phrase “may include but is not limited to,” so it is not clear what could be considered confidential or “management deliberative processes.” We note that there is no reference to any City policy that would provide the authority for the agreement, such as the existing Conflict of Interest and Employee Conduct (AR 95.60), or the Information Security policy (AR 90.63). It does not appear that the recognized employee organizations that represent most City employees reviewed the confidentiality agreement before the policy was implemented. The confidentiality agreement was referenced in the AR as a requirement, but the form was not attached to the AR even though the “Statement of Compliance Regarding Search of Personal Accounts and Devices” form was attached to the draft policy that was reviewed by the labor organizations. It should be noted that while the language of the confidentiality form may be interpreted as directing employees not to comply with the PRA, this was not the

intent according to the Communications Department, who stated that the intent of the confidentiality form was to help ensure that employees do not disclose information that is exempt or protected from disclosure.

Recommendation 2

We recommend that the Assistant Chief Operating Officer, in consultation with the City Attorney's Office, revise Administrative Regulation 95.21, titled "Responding to California Public Records Act Requests" to: (Priority 1)

- a) clarify that the three actions the City is required to take to assist requesters, according to the PRA, includes the phrase "shall do all of the following, to the extent reasonable under the circumstances"**
- b) include the four factors City staff should consider regarding writings kept in personal accounts: the content, purpose, audience, and whether the writing was within the scope of his or her employment**
- c) clarify the requirement that PRA denials, in whole or in part, include the names and titles or positions of "each person" responsible for the denial**
- d) specifically address whether City employees who are asked to search for responsive records must determine whether they have responsive "public records" residing on their personal devices and accounts only when the request specifically includes references to private devices and accounts, or whether the requirement is presumed for all requests (whether or not the personal devices and accounts are specifically referenced in the request)**

Recommendation 3

We recommend that the Assistant Chief Operating Officer, in consultation with the City Attorney's Office, review the contents, legal implications, and necessity of the confidentiality agreement referenced in Administrative Regulation 95.21, titled "Responding to California Public Records Act Requests." (Priority 1)

The PRA Program Lacks Documented Procedures Which Are Especially Important to Ensure Continuity When There is Frequent Staff Turnover

The City's Public Records Act Program (PRA Program) has experienced significant staff turnover and other major changes recently. Currently, there are three Full-Time Equivalent staff people assigned to the PRA Program, including the Program Manager and two Program Coordinators. There have been three different PRA Program Managers during the two-year period between 2017 and 2018, and both current Program Coordinators began working for the PRA program in 2018. Last fiscal year, the responsibility for the PRA program moved from the Human Resources Department to the Communications Department. An Interim Director for the Communications Department was announced in July of 2019. We note that the number of PRA requests handled by the PRA program has increased⁶ recently, which may be related to the implementation of web-based software called NextRequest in December of 2015.

Documented procedures in addition to a revised AR would help ensure consistent processing of PRA requests and is a best practice. However, the PRA program does not have documented procedures. We note that when the Program Coordinator positions were created in 2016, one of the stated intents of the positions was to assist the Program Manager in "formulating new policies and procedures to ensure compliance with state law and City policies." To date, that task has not been completed.

Specifically, the PRA Program does not have a written procedure defining the information that is required to be provided to requesters in order for a request to be tagged as in compliance in the NextRequest system. Procedure steps related to the use of the PRA program's software should be documented to ensure consistent and accurate data. Similarly, the details regarding the information that is required to be provided to requesters within the statutory timeframes should be documented and be based on operationally-defined terms, such as what it means to be tagged as

⁶ In Calendar Year 2018, there were 4,823 PRA requests submitted through NextRequest. This equates to more than 1,600 requests per PRA Program staff person per year, or more than six per-person, per-day. The prior year, 3,812 requests were received, which equates to a roughly 25 percent increase in requests year-over-year.

in compliance. The procedures should include the information required to be provided to requesters in order to justify an extension of time for a response, but still be in compliance with the PRA.

Another undocumented procedure involves embargoing, or not publishing details of requests publicly, for three days. This practice apparently relates to news reporters who may not want a potential story to be published by a competitor preemptively. The delay also allows City staff to remove documents before they are released to the general public if they later determine that the release was in error.

Yet another practice that is not documented is that responsive documents are not always uploaded to the NextRequest system. The system's website states, "All previous requests and responsive documents are viewable here online." While responsive documents for most requests are posted publicly online, responsive documents for requests from the media are apparently provided to the requester in compliance with the PRA, but the documents themselves are not always posted online. While this practice technically complies with the PRA, which does not require responsive documents to be posted online, a written City policy should specifically address cases where deviation from the City's normal process of posting responsive documents publicly is warranted. Examples of responses where documents were not posted online include requests 18-508 (discussed in detail later in this report), 18-1009, and 18-2842.

As we detail later in this report, there may be instances when a City department fails to provide a timely or sufficient response to a PRA request. In those cases, it would be helpful if the PRA program had documented escalation procedures to follow. For instance, if a staff person does not notify the PRA requester within the statutory timeframe whether disclosable records exist, documented procedures could allow the PRA program staff to notify a higher level of City management about the potential PRA violation. Such a procedure could also prevent possible litigation.

The PRA Program also lacks documented policies and procedures regarding the format in which data will be provided to requesters. The PRA requires the City to provide data "in any electronic format in which it holds the information" (Gov. Code, § 6253.9(a)(1)). It also requires the data to be delivered in the format requested if that format "has been used by the agency to create copies for its own use or for provision to other agencies" (Gov. Code, § 6253.9(a)(2)).

These data format requirements are included in the new AR regarding PRA compliance. However, we learned through our investigation that email records are routinely provided in Adobe Portable Document Format (PDF) files even though the information is held as Microsoft Outlook message files and routinely forwarded in the original format. One of the key differences between the file formats is that the PDF documents do not contain all of the same information stored in the original message files. Email attachments and metadata would not be included in the PDF documents, but could be important to a requester. The PRA Program does not have documented procedures related to the format that the City will use to deliver email records. Documented procedures would help to justify the City's practice of converting the file format when email records are requested under the PRA.

Recommendation 4

We recommend that the Communications Department Director develop PRA Program policies and procedures to ensure that City staff processes PRA requests in a manner consistent with the Public Records Act and City policy. Specifically, the document should include, but not be limited to: (Priority 2)

- a) a definition of terms**
- b) procedure steps related to the use of the PRA Program's software**
- c) whether requests from the media or any other group will be handled differently from public requests**
- d) a policy regarding embargoing responses**
- e) whether all responsive documents will be posted online or not**
- f) details regarding the information that is required to be provided to requesters within the statutory timeframes**
- g) escalation procedures if City staff are not providing timely responses**
- h) the information required to be provided to requesters in order to justify an extension of time for a response**
- i) operational definitions of the compliance metric(s) used to evaluate the effectiveness of the PRA Program**
- j) a policy regarding the electronic format used to provide email messages**

The PRA Program's Voluntary Compliance Metric Appears to Overstate Compliance with the PRA and is not Documented in Procedures

According to the Fiscal Year 2019 Budget, the "Percentage of Public Record Act requests responded to within the statutory timeframe" was 99.5 percent for Fiscal Year 2018. However, our review of a sample of PRA requests from Calendar Year 2018 indicates that PRA compliance tags appear to be applied inconsistently and inaccurately, resulting in an overstatement of compliance with the PRA.

The PRA Program's only performance metric is a yes-or-no tag that they enter in the NextRequest system indicating whether they complied with the 10-day and additional 14-day extended response times described in the PRA. Because this metric only tracks the initial response to the PRA request, it does not track full compliance with the PRA because it does not capture whether disclosable documents were promptly provided, and other requirements of the law.

The PRA does not require performance metrics, but they are a useful measure of the City's compliance (to the extent that the metric is applied accurately and consistently). The PRA requires only that the requester be notified whether the disclosable records *will be* disclosed, according to the Guide. In contrast, the timeframe for actually providing the requested records is a less precise standard of "promptly" (Gov. Code, § 6253(b)). Therefore, using this response metric which was intended to only track whether the initial response was timely provided to the requester may create the impression that City records are being provided to requesters in compliance with the PRA, but that is not how the performance metric has been defined by the PRA Program. As stated previously, definitions of key terms, such as "in compliance" should be documented in a policies and procedures to ensure accurate and consistent application of performance metrics.

Examples of incomplete responses that do not indicate whether disclosable records will be provided include requests 18-32, 18-2359, 18-2803, and 18-2848. Other examples of the inconsistent application of the in-compliance tag include:

- Request 18-4040 was tagged as not in compliance on the same day the request was received, which appears to have been an error since the records were ultimately provided within a week of the request.

Hotline Report of Public Records Act Responses

- Request 18-1253 was tagged as in compliance nine days after request was received, even though the requester was told that their request was not sufficiently “focused and specific;” no determination was communicated regarding whether City records would be disclosed.
- Request 18-2043 was inaccurately tagged as in compliance before the requester was notified whether disclosable records would be provided. After 26 days, the requester asked if the records existed. Documents were ultimately provided 27 days after the request.
- Request 18-3370 was tagged as in compliance nine days after the request was received. However, the requester was not notified whether disclosable records existed. In this case, the records were provided within the subsequent 14-day period, but it is not clear from the response which of the four “unusual circumstances” justified the extension since the reply appears to refer to elements of all four unusual circumstances listed (see Gov. Code, § 6253, (c)(1)-(4)).

The effect of this application of the in-compliance tags in the NextRequest system is to overstate compliance with the PRA. There is no indication that this misrepresentation is intentional on the part of PRA Program staff, but appears to be the result of high turnover and a lack of documented internal procedures.

Recommendation 5

We recommend that the Communications Department Director develop procedures to ensure that any performance metrics used related to PRA compliance are applied accurately and consistently, and are described in such a way as to communicate the correct interpretation of the measure’s meaning. (Priority 2)

The City Does Not Appear to Assist Some Requesters as Required

The PRA requires that the City take specific actions to “assist the member of the public [to] make a focused and effective request that reasonably describes an identifiable record” (Gov. Code, § 6253.1(a)). We found examples where City staff did not appear to meet this requirement. Our investigation identified a standard response template⁷ used in the NextRequest system that creates the impression that the PRA and City policy do not require that the City assist requesters.

For example, request 18-1253 stated that a company was performing an Environmental Site Assessment and requested “all files in your possession” pertaining to a specific address within City limits. The response from the PRA Program staff nine days after the request was entered was:

We have received your Public Records Act request.

The California Public Records Act only requires production of “identifiable” public records. California courts have held that a request for public records must be “focused and specific.” *Rogers v. Superior Court*, 10 Cal.App. 4th 1177, 1186 (1992). Your request is not sufficiently specific and fails to set forth identifiable categories of records that can be searched by the City. Please provide clarification with regard to the types of records that you are seeking, for example, building permits or building code violations so that we may assign the request to all the appropriate departments.

Please contact us so that we can assist you in making a focused and effective request for the records you are seeking so that we may be as efficient as possible in our response. We look forward to hearing from you.

This response raises several issues.

First, it was tagged as in compliance with the PRA after nine days even though no response was provided to the requester indicating whether disclosable records existed.

⁷ The “staff only” notes in request 18-1193 contains the statement from a PRA Program staff person, “I recommend using the ‘request does not reasonably describe identifiable records’ message template.”

Second, the statement that the PRA “only requires production of ‘identifiable’ public records” may imply that records sought must be precisely identified by the requester. In contrast, the PRA includes the phrase, “upon a request for a copy of records that reasonably describes an identifiable record or records, [the public agency] shall make the records promptly available” (Gov. Code, § 6253(b)).

Clearly, a public record cannot be provided to a requester until it is first identified; however, the PRA recognizes that a reasonable description of a record is the standard. In this case, the requester provided a specific address and asked for all files related to that address.

Third, the response to the requester cited a California Supreme Court case and noted, “California courts have held that a request for public records must be ‘focused and specific.’” The case cited involved a PRA request for all city-paid phone records for all City Councilmembers for a year. The Court stated:

The nonspecific and unfocused nature of the request, rather than its time period, was dispositive. A contrary holding would have permitted sequential annual requests. An individual should not be permitted to make a general, unfocused request for records to a public agency, which will then be compelled to deny it, thereby ensuring litigation. The request to the agency must itself be focused and specific.

Both the PRA and the City’s 2004 policy (in effect during our sample timeframe) require that PRA Program staff assist requesters to make a focused and specific request that reasonably identifies a public record. Additionally, PRA Program staff are required to “provide suggestions for overcoming any practical basis for denying access to the records or information sought” (Gov. Code, § 6253.1(a)(3)). We note that the 1992 *Rogers v. Superior Court* case cited by PRA Program staff pre-dates the 2001 amendment to the PRA titled “Agency to assist in inspection of public record” (Gov. Code, § 6253.1). Citing the case requiring a focused and specific request without mentioning the PRA and existing City policy’s requirement for PRA Program staff to assist requesters may leave requesters confused and frustrated (as discussed below).

Fourth, the response stated, “Your request is not sufficiently specific and fails to set forth identifiable categories of records that can be searched by the City.” The PRA Program staff provided examples of types of records, and asked that the requester

contact the PRA Program for assistance. However, internal records related to this PRA request indicate that staff from the City's Development Services Department identified a physical file three days later that was available for the requester to review in person. This indicates that the original request was sufficiently specific for staff from a relevant City department to identify a responsive record without additional clarification from the requester. Nevertheless, the PRA Program staff was required to assist the requester to identify potential records, describe their location, and give suggestions for overcoming denial of access (Gov. Code, § 6253.1(a)(1)-(3)).

Our review of a sample of Calendar Year 2018 PRA requests indicates that the same response, citing the California Supreme Court case of *Rogers v. Superior Court* appeared in several other requests. For example, request 18-2715 provided only the name of a business and a date range. In this case, PRA Program staff called the requester, but did not receive any response. Request 18-1475 cited the case, and referred to its use in an earlier request, 16-2859; it appears that the requester was frustrated by the responses from PRA Program staff and confused by the responses. For example, the requester in request 18-1475 responded with comments such as: "The request was extremely clear." "Re-read the request please. This is ridiculous." Similarly, requests 18-1193 and 18-1195 referred to the *Rogers v. Superior Court* case.

According to the PRA Program's response to a draft version of this report, the "request does not reasonably describe identifiable records" message template has not been used as frequently in the last year and is "being removed as we work more closely with requesters to assist them and clarify requests."

The City Appears to Have Not Fully Complied with the PRA Regarding Request 18-508

PRA request 18-508 was entered on February 7, 2018, and asked for water customer billing information from the Public Utilities Department (PUD) for Calendar Year 2017 and 2018 to date. The request noted that the data was in use daily and could be provided immediately. At the time, there was a public controversy regarding the accuracy of water bills.

According to the requester, a request for the data was initially made via an email on January 17, 2018, which we confirmed. A request by email made 21 days prior to the

request's entry into the NextRequest system meant that the City was possibly not in compliance with the PRA at the time the request was entered into the system. According to the Guide, PRA requests are not required to be submitted in any particular format to be valid. Therefore, PRA requests may be made by email, not only through NextRequest. If the City did not reply within the statutory timeframe that records existed or would be provided, there could have been non-compliance with the PRA's timeliness requirement. However, we identified more substantive and easily verifiable examples of potential PRA non-compliance related to this request.

The detailed request preemptively responded to potential objections to providing the records. First, the requester noted that the City may respond that the request was "voluminous" because it involved 1.4 million records, but they argued that the request was actually for a single electronic record consisting of over a million pieces of data. Next, the requester pointed to a potential objection to releasing the records under California Government Code § 6254.16, which exempts some utility customer data from disclosure, and noted that they would have no objection to redactions of customer information. The requester provided several examples to argue that releasing the information was in the public interest and the request is not overly broad.

The PRA Program Manager acknowledged receipt of the request on the same day it was entered, then made a note to the PRA Program staff that the acknowledgement did not serve as the required 10-day response (to confirm whether disclosable records existed). Two days after the request, the PRA Program Manager contacted PUD staff and asked for a response within nine days to confirm that responsive records exist, an estimated date of production, the format of the data, and details regarding any redacted data. These actions appear to satisfy the most important aspects of the PRA (with the minor exception of the time that records will be produced).

After nine days, PUD staff sent an internal note in NextRequest that staff from the Department of Information Technology and "multiple divisions within PUD are involved in researching detailed records to fulfill this complex request." PUD extended the due date by two weeks until March 2, 2018. The requester was notified that the City hoped to have a response within two weeks. Although no specific date was provided, one could be inferred. However, the PRA Program did not definitively state whether any disclosable records would be provided. The

Hotline Report of Public Records Act Responses

request was tagged as being in compliance with the PRA. This was not accurate since the requester had not been notified whether records existed.

On March 1, 2018, 22 days after the request, and the day before the extended deadline that was communicated to the requester, PUD staff made the following note in the internal, staff-only section of the NextRequest system:

Hello - Staff from multiple divisions within PUD... are involved in researching detailed records to fulfill a total of five (5) complex media requests. For most of these media requests, we are also working with DoIT for email search assistance. As of today, we do not have any responsive records to provide. However, we plan to begin providing "rolling responses" as we search for and possibly find responsive records.

In the meantime, it would be helpful if all of these requests were on the same schedule. We anticipate completing our responses within four (4) weeks from today, so please extend the due date to 3.29.18. Thank you.

This note raises at least four issues.

First, the note mentions that there are five "media requests," which are all being addressed together. The PRA specifically "does not allow limitations on access to a public record based upon the purpose for which the record is being requested, if the record is otherwise subject to disclosure" (Gov. Code, § 6257.5). Requests from the media, for which the purpose is presumably to write a public story based on the records provided, are not permitted to be treated differently from requests made for other purposes if the end result is to limit access.

Second, the note indicates that five requests are being batched together because it would be "helpful if all of these requests were on the same schedule." The PRA states that a government agency "shall make the records promptly available." (Gov. Code, § 6253(b)). The PRA also states, "Nothing in this chapter shall be construed to permit an agency to delay or obstruct the inspection or copying of public records" (Gov. Code, § 6253(d)). Imposing a delay of four weeks based on the convenience of City staff is not one of the four "unusual circumstances" that expressly allow an extension of time to notify requesters whether documents will be provided (Gov. Code, § 6253(c)). The Guide adds, "a local agency may not extend the time on the basis that it has other pressing business or that the employee most knowledgeable about the records sought is on vacation or is otherwise unavailable."

PRA Program staff asked PUD staff if responsive records could be confirmed to exist. Eleven days after posting the note, and 33 days after the initial request was entered into NextRequest, on March 12, 2018, the PUD staff person responded in the internal system, "No, it has not been confirmed." A subsequent note a few minutes later added, "PUD is discussing Government Code Section 6254.16 (utility customer information), redactions, and other topics" with the City Attorney's Office and Communications Department.

Third, the internal note stated, "For most of these media requests, we are also working with DoIT for email search assistance." Our review of all of the PRA request data indicates that when the request mentions email records, the response time nearly doubles from 16 days to 30 days on average for all requests in the system. There is no provision in the PRA that allows one request to be delayed because a request from a similar class of requesters made a more time-consuming email request. The PRA states, "Nothing in this chapter shall be construed to permit an agency to delay or obstruct the inspection or copying of public records" (Gov. Code, § 6253(d)).

Fourth, the statement, "As of today, we do not have any responsive records to provide," is contradicted by the evidence we obtained. Again, the request was for water billing records which are necessary for the operation of the water utility and are kept in the normal course of business. This point was made in the original request, which also noted that there would be no objection to redactions of customer data. As of March 1, 2018, when the note was entered, the Microsoft Excel files that were eventually provided on May 8, 2018 showed file creation dates of January 12, 2018 and February 8, 2018. Therefore, the records existed at the time the note was entered, in Excel format, but the requester was not informed of their existence within either of the deadlines required by the PRA. The evidence shows that the PRA Program did not notify the requester whether or not disclosable, or partially disclosable, records existed within the required statutory timeframe.

As the Guide states, "Local agencies may choose to disclose public records even though they are exempt, although they cannot be required to do so" (citing Gov. Code, § 6254.5). The request noted that the County discloses "customer data and information about water charges," which we confirmed. The PRA request also noted that customer billing information may be disclosed, "Upon determination by the local agency that the public interest in disclosure of the information clearly outweighs the public interest in nondisclosure" (Gov. Code, § 6254.16(f)). The

requester argued that there was public interest that justified public the disclosure of the records. Ultimately, redacted records were provided, which indicates that the records were disclosable. The evidence shows that the data could be exported as soon as the day after the request was made, but the records were not released until more than 90 days had transpired from the date the request was entered into the system (111 days after the original request by email).

On April 10, 2018, the requester was asked if redacted records that did not include water customer data would be acceptable. The requester replied that those redactions would receive no objections, as indicated in the original request. The requester noted that 63 days had elapsed and asked when the records would be made available. After receiving no reply in over two weeks, the requester noted that no response to phone calls had been received as of April 27, 2018. Three days later, the PRA Program Manager replied that they would provide an estimated date of production.

Four days later, on May 1, 2018, the files that were ultimately provided were uploaded to the internal system with the following message from PUD staff:

the 3 files (maintained in the normal course of business) we offered as an alternative to the specific records requested (entire CCS database) have been uploaded. All columns from the original files containing customer/service location data have been excluded (redacted). These files cover CY2017 and Jan/Feb 2018. The specific record requested (copy of CCS database) which contains extensive customer and service location information including customer banking information and identification information, is not provided pursuant to government code 6245.16

After receiving three Microsoft Excel files on May 8, 2018, the requester complained that PUD did not include data that it had provided in the past. The effect, according to the requester, was to "create fake records" that frustrated the requester in order to "hide information" from the requester and water ratepayers.

On May 24, 2018, approximately 3.5 months after the request was entered into the system, a second version of the Microsoft Excel files were provided to the requester that included zip code and a unique identifier that could be used to group account information in a logical way.

NextRequest Appears to Have Violated the City's Product Endorsement Policy

The City's AR 95.65 regarding Product Endorsement has been effective since July 1, 1977. The policy requires written approval from the Mayor's Office before vendors publish "advertisements referring to the City of San Diego as a user of a product or service." According to the policy, the City is required to ensure:

- a. the facts in the advertisement are accurate,
- b. there are no references to individual City employees, and,
- c. there is no indication of the City's endorsement of the product or service.

During the course of our investigation, we found a web page on the NextRequest domain that was dedicated to the City of San Diego's use of the software. It contained the following quote, "This new public records portal created by NextRequest will give ordinary people access to wide swathes of information." The source of the quote was identified as Mayor Kevin Faulconer. Other information on the web page included the following:

EFFICIENCY & TRANSPARENCY

As the eighth largest city in the United States, San Diego is leading the way in building out its technological and data infrastructure to make government services and information more accessible to citizens. "This new public records portal created by NextRequest will give ordinary people access to wide swathes of information that would have been more difficult to acquire without this technology. This is a major step forward in our work to make city government more efficient and effective," said Mayor Faulconer.

IMMEDIATE SAVINGS

San Diego has taken full advantage of NextRequest's customizable routing feature. In the first three months of the portal being online, routing alerts were triggered over 190 times, automatically directing people to information as varied as documents on Sea World, building permits, and property tax information. Enabling requesters to immediately discover and download documents of interest prevents duplicate requests and saves many hours of staff time.

INFORMING OPEN DATA

San Diego also sees NextRequest as a critical part of its open data program. "By watching trends in our public records act requests, we will be able to more effectively target datasets for release to the City's Open Data Portal, increasing efficiency for our government employees and transparency to our residents," said Maksim Pecherskiy, the City of San Diego's Chief Data Officer.

The contract document with NextRequest includes the following:

You agree that we may publicly disclose your use of the Service, provided that we comply with Council Policy 000-41, namely that we receive prior written approval of the City Manager who will insure that:

- a. the facts in the advertisement are accurate
- b. there are no references to City employees, and
- c. there is no indication of the City's endorsement of the product or service, except as approved by City Council and in accordance with a signed agreement between the City and provider of products or services.

The two references to City employees and the endorsement of the service appear to have violated the City's policy and the terms of the contract. According to the interim Executive Director of the City's Corporate Partnerships and Development Program, there does not appear to be City Council approval for the endorsement by either the Mayor or the Chief Data Officer. During the course of our investigation, after we made City management aware of the endorsement, the web page was removed.

Recommendation 6

We recommend that the Assistant Chief Operating Officer, in consultation with the City Attorney's Office, and the Purchasing and Contracting Department, consider corrective action regarding the vendor's apparent violation of the City's Product Endorsement Policy. (Priority 2)

Conclusion

Our investigation identified several examples of potential non-compliance with the PRA, some of which are minor technical issues, while others appear to be more significant. The minor potential deviations we found include: not consistently providing the estimated date and time when records would be made available to requesters; and not providing the names and titles of each person responsible for the denial, partial denial, or redactions of records. Also, while not required by the PRA, the PRA Program does not accurately and consistently apply its own metric for compliance regarding initial responses to requesters.

Some of the more significant potential deviations from the PRA include: not consistently assisting requesters to identify potential records, describing the location of records, and giving suggestions for overcoming any practical basis for the denial of access to records; potentially impermissibly treating requests from the media differently from public requests; and not providing records promptly based on the City's desire in some instances to process a number of separate PRA requests together.

We identified structural conditions that may have caused the potential non-compliance to occur. For example, the PRA Program does not have documented policies and procedures that guide their activities and provide consistent treatment for PRA requesters. Documented procedures are especially useful when positions have frequent turnover. We pointed out that there have been three different PRA Program Managers in a recent two-year period.

Another, more direct factor that contributed to the potential non-compliance of City policy related to the PRA is the City's policy itself. We determined that the 2004 policy that pertained to the PRA during our investigation was outdated and incomplete. Specifically, the policy pre-dated two State Constitutional amendments and at least eight different updates and amendments to the PRA. Importantly, the policy did not address public records that may exist on personal devices and accounts of City employees. The San Diego County policy states, "unless a request specifically excludes private devices and accounts from the scope of the search," employees are required to conduct searches and certify the results of their searches. This is not the City's current policy or practice. We also pointed out inaccuracies related to the City's new PRA policy. Most notably, the new policy does not accurately convey City staff's duties to assist PRA requesters.

Finally, we identified an apparent violation of the City's Product Endorsement policy. The vendor had a web page devoted to the City of San Diego's use of the NextRequest system that included an apparent endorsement by the Mayor and the City's Chief Data Officer. It does not appear that the endorsements were authorized by the City Council, as required by both the City's policy and the terms of the contract. After we made City management aware of the endorsement, the web page was removed.

Recommendations and Management's Responses

(See Attachment C for Definitions of Fraud Hotline Recommendation Priorities)

Recommendation 1

We recommend that the Assistant Chief Operating Officer coordinate citywide training regarding the obligation to search for and produce responses to requests for public records on personal devices and accounts, and other aspects of the PRA. (Priority 3)

Management Response: Agree. The ACOO's office will work with the Communications Department to develop a citywide training addressing PRA responsibilities in general as well as specific obligations related to public records located on personal devices and accounts.

Target Implementation Date: June 2020

Recommendation 2

We recommend that the Assistant Chief Operating Officer, in consultation with the City Attorney's Office, revise Administrative Regulation 95.21, titled "Responding to California Public Records Act Requests" to: (Priority 1)

- a) clarify that the three actions the City is required to take to assist requesters, according to the PRA, includes the phrase "shall do all of the following, to the extent reasonable under the circumstances"**
- b) include the four factors City staff should consider regarding writings kept in personal accounts: the content, purpose, audience, and whether the writing was within the scope of his or her employment**
- c) clarify the requirement that PRA denials, in whole or in part, include the names and titles or positions of "each person" responsible for the denial**
- d) specifically address whether City employees who are asked to search for responsive records must determine whether they have responsive "public records" residing on their personal devices and accounts only when the request specifically includes references to private devices and accounts, or whether the requirement is presumed for all requests (whether or not the personal devices and accounts are specifically referenced in the request)**

Management Response: Agree. The ACOO's Office and Communications Department will coordinate with the City Attorney's Office to revise Administrative Regulation 95.21 to clarify the issues raised above.

Target Implementation Date: December 2020

Recommendation 3

We recommend that the Assistant Chief Operating Officer, in consultation with the City Attorney's Office, review the contents, legal implications, and necessity of the confidentiality agreement referenced in Administrative Regulation 95.21, titled "Responding to California Public Records Act Requests." (Priority 1)

Management Response: Agree. We are currently reviewing the confidentiality agreement and will coordinate with the City Attorney's office to make appropriate clarifications and revisions as required.

Target Implementation Date: December 2020

Recommendation 4

We recommend that the Communications Department Director develop PRA Program policies and procedures to ensure that City staff processes PRA requests in a manner consistent with the Public Records Act and City policy. Specifically, the document should include, but not be limited to: (Priority 2)

- a) a definition of terms**
- b) procedure steps related to the use of the PRA Program's software**
- c) whether requests from the media or any other group will be handled differently from public requests**
- d) a policy regarding embargoing responses**
- e) whether all responsive documents will be posted online or not**
- f) details regarding the information that is required to be provided to requesters within the statutory timeframes**
- g) escalation procedures if City staff are not providing timely responses**
- h) the information required to be provided to requesters in order to justify an extension of time for a response**
- i) operational definitions of the compliance metric(s) used to evaluate the effectiveness of the PRA Program**
- j) a policy regarding the electronic format used to provide email messages**

Management Response: Agree. We are currently reviewing the PRA Program's policies and procedures for responding to PRA requests and plan to update them in accordance with the Public Records Act and City policy.

Target Implementation Date: June 2020

Recommendation 5

We recommend that the Communications Department Director develop procedures to ensure that any performance metrics used related to PRA compliance are applied accurately and consistently, and are described in such a way as to communicate the correct interpretation of the measure's meaning. (Priority 2)

Management Response: Agree. We will review current performance metrics and revise as needed with clear procedures on how the metric is applied.

Target Implementation Date: June 2020

Recommendation 6

We recommend that the Assistant Chief Operating Officer, in consultation with the City Attorney's Office, and the Purchasing and Contracting Department, consider corrective action regarding the vendor's apparent violation of the City's Product Endorsement Policy. (Priority 2)

Management Response: The vendor took immediate action to correct its website once it was brought to their attention that they were not in compliance with the City's Product Endorsement Policy. The ACOO will work with the City Attorney and Purchasing and Contracting Department to determine if any further corrective action is required.

Target Implementation Date: June 2020

Hotline Report of Public Records Act Responses

This investigation was conducted by Fraud Investigator Andy Horita under the authority of California Government Code Section 53087.6 which states:

(e) (2) Any investigative audit conducted pursuant to this subdivision shall be kept confidential, except to issue any report of an investigation that has been substantiated, or to release any findings resulting from a completed investigation that are deemed necessary to serve the interests of the public. In any event, the identity of the individual or individuals reporting the improper government activity, and the subject employee or employees shall be kept confidential.

(3) Notwithstanding paragraph (2), the auditor or controller may provide a copy of a substantiated audit report that includes the identities of the subject employee or employees and other pertinent information concerning the investigation to the appropriate appointing authority for disciplinary purposes. The substantiated audit report, any subsequent investigatory materials or information, and the disposition of any resulting disciplinary proceedings are subject to the confidentiality provisions of applicable local, state, and federal statutes, rules, and regulations.

Thank you for taking action on this issue.

Respectfully submitted,

A handwritten signature in black ink that reads "Kyle Elser". The signature is written in a cursive, flowing style.

Kyle Elser
Interim City Auditor

Attachment A – Citywide Email Communication

From: Employee Notification
Sent: Friday, March 24, 2017 2:01 PM
To: All City Employees <AllCityEmployees@sandiego.gov>
Subject: Notice to all City Officers and Employees

NOTICE TO ALL CITY OFFICERS AND EMPLOYEES WHO USE PERSONAL ELECTRONIC DEVICES AND ACCOUNTS TO COMMUNICATE ABOUT CITY BUSINESS

To All City Officers and Employees:

On March 2, 2017, the California Supreme Court (Supreme Court) issued an opinion in [City of San Jose v. Superior Court \(Smith\)\(Case No. S218066\)](#), concluding:

- When a government officer or employee in California uses a personal account or device to conduct public business, the writings on that personal account or device are within the definition of public records and may be subject to disclosure under the California Public Records Act (CPRA).
- Officers' or employees' communications about official agency business may be subject to the CPRA regardless of the type of account -- City-owned or controlled or personal -- used to prepare or transmit the communication.
- The writing, including emails and text messages, must relate in some substantive way to the conduct of the City's business to be subject to disclosure under the CPRA.
- This opinion applies to all personal electronic devices, including personal cell phones, tablets, and computers, and personal electronic accounts, including e-mail accounts.

To ensure compliance with this new decision which is binding on the City, any City officer or employee required to respond to a request for records under the CPRA must search City accounts and their own personal files, accounts, and devices for responsive records. Employees with questions about whether a personal record is responsive should discuss the matter with their Department CPRA coordinator and Department Directors.

Employees are reminded to comply with all current Administrative Regulations, including, but not limited to: [85.10 - Records Management, Retention and Disposition](#); [90.25 - Wireless Communications Services](#); [90.66 - Mobile Device Security](#); and [95.20 - Public Records Act Requests and Civil Subpoenas, Procedures for Furnishing Documents and Recovering Costs](#).

The Human Resources Department will be developing further training and guidance on this new Supreme Court opinion.

Thank you.
Human Resources Department

Supervisors: Please post this message for any employees who do not have access to City e-mail.

Note: This is a broadcast e-mail, please do not reply

Attachment B – Confidentiality Agreement Template

City of San Diego

[INSERT DEPARTMENT]

CONFIDENTIALITY NON-DISCLOSURE AGREEMENT

[INSERT DEPARTMENT] employees handle a variety of confidential material each day. This material may include but is not limited to (1) personal data concerning other City employees, and (2) management deliberative processes. All employees must respect the highest level of privacy for our organization. It is impermissible to disclose, discuss, or provide any confidential information obtained in the course of your employment at the City unless disclosure is a normal requirement of your position and has been authorized by your supervisor. In the absence of a valid subpoena or request under the Public Records Act, reviewed and approved by the City Attorney's Office, disclosing confidential information may be cause for dismissal or other appropriate disciplinary action.

POLICY ON SECURITY AND CONFIDENTIALITY OF EMPLOYMENT INFORMATION

As a Staff member of the City of San Diego with access to City employee personal information and other confidential information, you must not:

- Make unauthorized use of any information in files maintained, stored, or processed by the City.
- Seek personal benefit from any confidential information that has come to you by virtue of your position at the City of San Diego, or permit others to benefit from this information.
- Divulge the contents of any record or report to any person except in the conduct of your work assignment and in accordance with this policy and other City policies.
- Knowingly include or cause to be included in any record a false, inaccurate, or misleading entry.

You must comply with the City's Policy on Confidentiality of Information. If you become aware of any violation of this policy or the procedures, you must immediately inform your supervisor, Deputy Director, or the Director. Any violation of this policy may be cause for dismissal or other appropriate disciplinary action.

I UNDERSTAND THAT THIS POLICY PERTAINS TO ME AND AGREE TO ADHERE TO THIS AGREEMENT

Print Name: _____

Signature: _____

Date: _____

Attachment C – Definition of Fraud Hotline Recommendation Priorities

DEFINITIONS OF PRIORITY 1, 2, AND 3

FRAUD HOTLINE RECOMMENDATIONS

The Office of the City Auditor maintains a priority classification scheme for Fraud Hotline recommendations based on the importance of each recommendation to the City, as described in the table below. While the City Auditor is responsible for providing a priority classification for recommendations, it is the City Administration's responsibility to establish a target date to implement each recommendation taking into considerations its priority. The City Auditor requests that target dates be included in the Administration's official response to the findings and recommendations.

Priority Class¹	Description
1	Fraud or serious violations are being committed. Significant fiscal and/or equivalent non-fiscal losses are occurring. Costly and/or detrimental operational inefficiencies are taking place. A significant internal control weakness has been identified.
2	The potential for incurring significant fiscal and/or equivalent non-fiscal losses exists. The potential for costly and/or detrimental operational inefficiencies exists. The potential for strengthening or improving internal controls exists.
3	Operation or administrative process will be improved.

¹ The City Auditor is responsible for assigning Fraud Hotline recommendation priority class numbers. A recommendation which clearly fits the description for more than one priority class shall be assigned the higher priority.

Attachment D – City Attorney Memorandum and City Auditor’s Comments

The City Attorney’s Office provided the following response to our recommendations to management. While we agree with the majority of the memorandum, it incorrectly implies that we recommended that the City’s policy be revised to be a “verbatim recitation of the provisions of the PRA.” Our report notes that the City’s 15-year-old policy, in effect during our review, was revised in May of 2019, but the new policy did not include some key elements of the PRA, inaccurately paraphrased other requirements, and was inconsistent from one section to the next. We pointed out that some of the information from the 2004 policy was removed during the update even though those aspects of the law did not change. While we agree that the policy should be “user friendly,” any guidance provided to City staff should accurately and completely reflect the PRA’s key requirements. Although a good policy is necessary to advise City staff of the PRA’s requirements, the results of our investigation show that such a policy alone is not sufficient to ensure compliance.

The City Attorney’s memorandum correctly states that our review occurred while the prior policy was in effect. As such, no connection should be made between the new policy and the apparent deviations from the PRA’s requirements we found. We agree with the memorandum’s conclusion that there is no evidence to suggest that the new policy was responsible for the issues we identified because such a connection is logically impossible. However, our report does not assert any causal relationship between the prior policy and the apparent deviations. Our report reviewed the prior policy, the new policy, and the PRA requirements and made suggestions for improvement to the new policy to make it more complete and accurate. Improving the policy should help to reduce the risk of unintentional violations of the PRA.

**Office of
The City Attorney
City of San Diego**

**MEMORANDUM
MS 59**

(619) 236-6220

DATE: December 13, 2019
TO: Kyle Elser, Interim City Auditor
FROM: City Attorney
SUBJECT: Hotline Report of Public Records Act Responses

On December 13, 2019, the City Auditor released a fraud hotline report (Report) relating to the City of San Diego's (City) responses to California Public Records Act (PRA) requests. This response is intended to provide legal context to the final report.

Each year, the City receives thousands of PRA requests. Based on our research, since the City began using NextRequest in December 2015, the City has received over 17,400 PRA requests. The volume of requests has increased by an average of 25% each year; thus far, the City has received almost 5,700 PRA requests in 2019 alone.¹ The number of lawsuits filed against the City for violations of the PRA has also increased. This, in turn, has resulted in increased City liability. We believe that with better practices and training, and an increased allocation of resources, this rising trend of liability can be stemmed. In the absence of change and institution of better practices, the City's liability will likely continue to increase.

For these reasons, our Office strongly agrees with the recommendations in the Report with respect to coordinated citywide training on employee obligations under the PRA and development of consistent policies and procedures (see Recommendation Nos. 1 and 4). As the Report indicates, staff turnover and training challenges have led to inconsistent application of PRA procedures and exemptions, and the phrasing of responses, which can increase the City's exposure. Part of the problem may be that staffing resources have simply not been able to keep pace with the sheer volume of requests that the City has experienced in recent years.

¹ We have conferred with other cities regarding their PRA practices. Of the 10 largest cities in California that we spoke with, the City of San Diego is on track to receive the highest number of PRA requests this year. By way of comparison, the City has received more than double the number of PRA requests received by the City of Los Angeles.

Kyle Elser, Interim City Auditor
December 13, 2019
Page 2

We applaud the increase in access and transparency that the NextRequest system has afforded to members of the public. At the same time, City departments could benefit from improved coordination when posting responses in the NextRequest system to avoid confusion, inconsistency, and incomplete responses to requestors. Therefore, in addition to the Interim Auditor's recommendations, we would advise that the City develop a more centralized process for responding to PRA requests. This might take the form of an inter-departmental team that handles all communications with the public regarding PRA requests on behalf of the City, including both mayoral and independent departments.

Centralizing this function would allow for more efficient and complete records collection and production by coordinating search parameters and efforts across affected departments. It would also enable our Office to more effectively and efficiently advise on consistent phrasing in 10-day and 14-day responses, the application of exemptions, and coordination with outside counsel on particularly voluminous or complex requests, as needed and appropriate. We acknowledge that this may require a greater budgetary commitment from the Mayor and City Council, but believe the investment would be offset by improved access and a corresponding reduction in liability.²

In addition, the City may wish to revisit its current practice of retaining all emails beyond that period of time required by applicable records retention laws and policies. This practice has resulted in increases in the costs of storage and associated search tools, and it has made it more difficult to quickly and efficiently search for specific documents due to the massive volume of non-responsive emails that one must sort through when responding to requests.³

Finally, with respect to Recommendation No. 2 (revisions to Administrative Regulation 95.21), we agree in part and disagree in part with the Interim Auditor's Report. We agree that the new Administrative Regulation (A.R. 95.21) is an improvement over the prior A.R. 95.20. However, we do not agree that A.R. 95.21 should be a verbatim recitation of the provisions of the PRA codified in California Government Code section 6250, et. seq. Rather, we believe that administrative regulations should provide user-friendly instructions that any City employee can

² We note that the City appears to have ceased regularly charging for copies of documents since it transitioned to the NextRequest system. Other government agencies, such as the state and federal courts, charge for electronic copies through a user portal that accepts credit cards. This could be an additional source of income to fund PRA administration.

³ Emails that rise to the level of records should be transferred to an appropriate format in accordance with the City's Master Record Retention Schedule (see Administrative Regulation No. 85.10), and any emails relevant to litigation should be preserved under a litigation hold or preservation request. Beyond those imperatives, the City has no obligation to preserve all emails indefinitely. We are not aware of any other local agency that retains emails in this manner.


Hotline Report of Public Records Act Responses

Kyle Elser, Interim City Auditor
December 13, 2019
Page 3

understand and utilize. Further, because the sample of requests reviewed in the Report occurred while the prior A.R. 95.20 was still in place, there is no evidence to suggest that the new A.R. is responsible for the issues identified. That said, we support any efforts to further clarify the PRA rules for City employees and stand ready to assist in that effort.

MARA W. ELLIOTT, CITY ATTORNEY

By



Sanna R. Singer
Assistant City Attorney

SRS:ccm
MS-2019-27
Doc No. 2235466
cc: Honorable Mayor and City Council
Audit Committee
Aimee Faucett, Chief of Staff
Kris Michell, Chief Operating Officer
Ron Villa, Assistant Chief Operating Officer
Andrea Tevlin, Independent Budget Analyst