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MEMORANDUM

TO: Honorable London N. Breed, Mayor
Honorable Members, Board of Supervisors
Naomi Kelly, City Administrator

CC: Angela Calvillo, Clerk of the Board of Supervisors
Members, Sunshine Ordinance Task Force

FROM: Jon Givner
Paul Zarefsky
Manu Pradhan
Brad Russi
Deputy City Attorneys

DATE: March 30, 2020

RE: Temporary Modifications to Public Records Laws During COVID-19 Local
Emergency

On February 25, 2020, the Mayor proclaimed a local state of emergency due to the COVID-19 pandemic; the Governor also issued a statewide declaration of emergency. Both the City and the State have issued stay-safe-at-home orders to help reduce the spread of COVID-19 during the emergency. The Mayor issued two supplementary orders, on March 13 and March 23, suspending select provisions of the Sunshine Ordinance during the emergency due to the impact the emergency has placed on the City's ability to respond to public records requests. Each order applies to all requests that were then pending and to all future requests until the order terminates. In this memorandum we summarize these temporary changes to assist City agencies as they respond to public records requests during the emergency.

Summary

The Mayor's orders made the following changes during the emergency:

- **Immediate Disclosure Requests:** City agencies are not required to respond within one business day to requests for "immediate disclosure" of public records. Agencies that receive "immediate disclosure requests" must respond within 10 calendar days (plus any applicable extensions), in the manner discussed below.
- **Deadlines for Agencies to Respond to Records Requests:** City agencies are not required to provide copies of records within 10 calendar days of a request or within a 14-day extension period. Instead, City departments must respond to requests by that deadline to inform the requester whether disclosable records exist and the reasons for that determination, and to provide the requester an estimated date when the agency will make the records available. This initial response may be relatively brief.
- **Duty to Provide Records:** Even though agencies are not legally required to provide records by a specific deadline, agencies still have a legal duty to provide records promptly if possible, unless there is a legal basis for withholding the records. But during

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the emergency, agencies may be unable to provide records as quickly as usual because the employees responsible for accessing and searching for records have been redeployed or are staying at home in compliance with the stay-safe-at-home order. Agencies are not required to order those employees to return to work to search for records, but agencies should make reasonable efforts to provide records to the extent feasible.

- **Withholding Records Based on Balancing Public Interests:** City agencies may withhold records or choose an appropriate date for producing them based on a determination that the public interest in nondisclosure of a particular record clearly outweighs the public interest in disclosure. In making this determination, agencies may take into account their significant staffing limitations and other pressing public needs responding to the emergency. But agencies must balance those factors against the fundamental public interest in government transparency, and cannot adopt a blanket policy of unnecessarily delaying or denying records requests. Rather, agencies must evaluate the public interests and burdens for each request.
- **Requests for Inspection of Public Records:** City agencies generally must allow members of the public to inspect public records during their office hours, if an office is open to the public. But agencies may delay inspections as long as necessary to accommodate insufficient agency staffing or to avoid public health risks.
- **Requests for Description of Public Records:** A City agency is not required to respond to a request for a statement describing the agency's records on a particular subject. The Sunshine Ordinance normally requires City agencies to respond to such requests within seven days by providing a statement with enough specificity to describe the existence, quantity, form, and nature of the records. This requirement has been temporarily suspended during the emergency.
- **Requests for Disclosure of Parties' Positions during Contract Negotiations:** City agencies are not required to make special disclosures of information during contract negotiations, as the Sunshine Ordinance normally requires.

On each of these issues, if agencies have questions they should consult in advance with the City Attorney's Office for further guidance regarding particular requests.

Analysis

1. Immediate Disclosure Requests

In her March 13 order, the Mayor suspended Sections 67.25(a) and (b) of the Sunshine Ordinance, which normally permit requests for "immediate disclosure" of public records and require City agencies to provide records (or invoke a 14-day extension) by the close of the next business day. The requirement to provide records in response to an immediate disclosure request is unique to the Sunshine Ordinance; there is no parallel provision in the California Public Records Act ("CPRA"). In light of the Mayor's order, departments are no longer obligated to reply to immediate disclosure requests by the next business day or provide records within that time frame.

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2. Requests for Copies of Public Records**a. Deadlines for Producing Records**

In her March 23 order, the Mayor suspended any requirement in the Sunshine Ordinance for City agencies to provide copies of records within 10 calendar days of a request or within a 14-day extension period. Instead, as discussed below, City departments must comply with the requirement of the CPRA to respond to the request by the deadline to provide the requester with information about whether disclosable records exist, the reasons for that determination, and an estimated date when the agency will make the records available.

The CPRA requires a City agency to respond to a public records request within 10 days of receipt. The agency may invoke an extension of up to 14 additional days to respond if (1) the request will require the agency to search for, collect, and examine a voluminous amount of records, (2) the records are located offsite, (3) the agency needs to consult another interested department or agency, or (4) as to electronic information, the agency needs to compile data, write programming language or a computer program, or construct a computer report to extract data. (Cal. Gov't Code § 6253(c).)

When the City agency responds—whether at or before the 10-day deadline or the 14-day extension deadline—it must provide three pieces of information: (1) inform the requester whether the agency has disclosable records; (2) identify the legal basis for withholding records if the agency contends that all or some are exempt from disclosure; and (3) state the estimated date and time when the records will be made available. (Cal. Gov't Code § 6253(c).) The CPRA thus draws a distinction between responding to a public records request—communicating to the requester basic information about the agency's determination regarding the request—and actually producing the requested records.

Even if an agency does not produce records within the initial 10-day period or the 14-day extension, the agency must make the records “promptly available.” (Cal. Gov't Code § 6253(b).) The requirement to provide a “prompt” response is open to interpretation. The rule could mean that when the City agency is ready to produce the records, it must promptly transmit them to the requester (subject to the payment of any copying fees). Or it could mean that the agency may not be dilatory in its response. And whether an agency has been dilatory in producing records will necessarily depend on the nature and scope of the request, and all the surrounding circumstances. Under either interpretation, the CPRA allows the agency to produce records to a requester after the agency's initial determination and response, as noted above.

Section 67.21(b) of the Sunshine Ordinance, which the Mayor suspended in her March 23 order, arguably takes a different approach than the CPRA to these timing requirements. That section requires the City agency to “comply” with the request or justify withholding of any record within the 10-day deadline or 14-day extension period. It does not by its terms allow an agency to respond with an estimate of when the agency will produce records at some future date. The deadline for producing records under the Sunshine Ordinance is the 10-day deadline or the 14-day extension deadline, subject to very limited exceptions discussed in our office's Good Government Guide in circumstances when an agency may invoke the “rule of reason” in response to an overwhelmingly burdensome request.

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In her March 23 Order, the Mayor suspended Section 67.21(b). As a result, the deadline for producing records is now the CPRA deadline described above. So in summary, for all pending and future public records requests during the emergency, the City agency should review the request when it arrives, respond by the 10-day deadline (or, after having invoked an extension of time, by the subsequent 14-day deadline) with a statement of whether responsive records exist, the basis for the agency's determination, and a date when the agency estimates it will be able to produce the records. The response may be relatively brief. If the agency is not able to meet the estimated date for production of all disclosable records, it should, if reasonably feasible, provide the requester with records that are ready for production at that time, and provide a revised estimate of when the remainder of the records will be produced. Agencies should not unnecessarily delay producing records. Instead, they should produce records on a rolling basis before the due date when reasonably feasible, particularly if the requester has asked for rolling production.

b. Withholding Records Based on a Balancing Analysis

In her March 23 order, the Mayor also suspended the Sunshine Ordinance's prohibition on withholding or redacting a record based on an agency's determination that the public interest in nondisclosure clearly outweighs the public interest in disclosure. Under Sections 67.24(g) and (i) of the Sunshine Ordinance, City agencies normally may not rely on the exemption in Section 6255 of the CPRA, which states in relevant part: "The agency shall justify withholding any record by demonstrating ... that on the facts of the particular case the public interest served by not disclosing the record clearly outweighs the public interest served by disclosure of the record." (Cal. Gov't Code § 6255(a).) The Mayor's order suspended Sections 67.24(g) and (i), thus permitting City agencies to rely on Section 6255's general balancing exemption to withhold or redact records.

Agencies can take a variety of factors into account in balancing the public interests to determine under this general balancing exemption whether a record may be withheld or redacted. For example, the public interest could favor nondisclosure because the City agency has a significant policy justification for withholding a record. More notably in the current crisis, the public interest could favor nondisclosure because the City agency has significant staffing limitations, lack of access to physical documents and limited access even to some electronic files, and other pressing public needs, particularly under severe emergency conditions. In that circumstance, there may be a public interest served by temporarily delaying disclosure so agency staff can focus on other critical needs. It is possible, though it should not occur frequently, that the public interest served by disclosure of records is so miniscule, and the burden on the agency in producing records is so great, that the burden alone warrants nondisclosure, at least in circumstances where a requester is unwilling to narrow an overly broad request.

But Section 6255 does not allow denials of public records requests *carte blanche*. The law strongly favors disclosure: to invoke the exemption in Section 6255, the public interest in nondisclosure must "clearly outweigh" the public interest in disclosure. While no precise formula defines when the "clearly outweigh" standard has been met, the standard serves as a reminder that the Section 6255 exemption may not be invoked casually or frivolously. City agencies must give serious consideration to the public interest in disclosure and government

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transparency. Given the uncertainties inherent in determining the application of the exemption, a City agency considering invoking the exemption should consult with the City Attorney's Office.

c. City Agency Practices

The dislocations that City agencies are facing under the emergency are twofold. First, many agencies must focus their attention and resources on time-critical and time-consuming tasks created by the emergency. And the nature of the emergency—presenting grave public health dangers for all San Franciscans—requires that agencies give top priority to these efforts, ahead of many other responsibilities, including complying with public records requests within normal timelines. Second, agencies' resources are strained because many employees are telecommuting to work, or not working for a variety of reasons. Hence, there are fewer agency resources to dedicate to public records requests; and in some cases records may be harder to locate and review than usual because the employee most familiar with particular records is not working or is physically separated from the records. And with many employees working remotely during the emergency, it may be challenging for agencies to make all appropriate redactions in electronic documents that are subject to partial disclosure.

These are precisely the considerations that led the Mayor in her March 23 Order to suspend several provisions of the Sunshine Ordinance pertaining to public records. In light of these realities, in some circumstances it may be necessary for City agencies to take more time than is customary to produce records, or in exceptional circumstances it may be appropriate for agencies to withhold records based on the general balancing test described above because of the extreme burden that would be presented by an overly broad request. It may even be necessary for an agency to delay the start of a search for records for a period of time. How long of a delay in producing records is reasonable—and hence lawful—cannot be reduced across all City agencies to the same number of days or weeks in every instance, though an agency particularly burdened by the emergency may establish a rule-of-thumb for the period of delay it may apply to public records requests. Where reasonably feasible, agencies should determine periods of delay case-by-case, considering all relevant facts and circumstances. If challenged in a legal proceeding, the agency must be able to demonstrate a causal nexus between the delay and the emergency. Ultimately a court would make a judgment whether the time taken to produce records was reasonable in light of all circumstances, including the emergency. If an agency needs to extend the date when it will produce records because of the emergency, or to withhold records based on a balancing analysis, it should consult beforehand with the City Attorney's Office.

3. Requests to Inspect Public Records

The Mayor's March 23 order also suspended the strict requirements in the Sunshine Ordinance allowing members of the public to inspect records in person. City agencies still must comply with the CPRA, which states that members of the public have a right to inspect public records during the office hours of the City agency. (Cal. Gov't Code § 6253(a).) But the right is subject to reasonable limitations, especially if the inspection would interfere with the operations of the public agency. (*Bruce v. Gregory* (1967) 65 Cal.2d 666.)

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Sections 67.21(a) and (b) of the Sunshine Ordinance, which the Mayor's order suspended, arguably establish a more rigid right of inspection than in the CPRA. The Sunshine Ordinance arguably prohibits a City agency from requiring an appointment for the inspection. (Admin. Code § 67.21(a).) And the ordinance arguably imposes on agencies the same 10-day deadline for "compl[iance]" with an inspection request as for compliance with a request for copies of records, discussed above. (Admin. Code § 67.21(b).)

In her March 23 Order, the Mayor suspended both Sections 67.21(a) and (b). This leaves in place the right of inspection under the CPRA, which provides City agencies the flexibility to delay inspections as long as necessary to avoid public health risks. Inspection of public records may present special health risks during the emergency. Inspection may be impossible because an agency's office is closed to the public during the emergency or because members of the public cannot leave their homes to visit the agency's office. But even after the stay-safe-at-home order ends, if members of the public are able to come to an agency's office during the emergency, in-person inspection still may be infeasible. In that situation, space limitations at the site of the inspection, or the presence of an employee there to safeguard the records (as sometimes is necessary), could make inspection unsafe and render it difficult or impossible to adhere to social distancing rules. Further, there are public health risks associated with members of the public touching records or table surfaces or other furniture at the inspection site. Based on these concerns, City agencies have sound reasons—particularly during the stay-safe-at-home orders but possibly also after those orders end—to disallow inspections altogether until the public health issues are resolved. But agencies that delay or disallow in-person inspection for these reasons should be prepared to defend their decisions based on a good faith, reasonable belief in the public health risks that would have been present had the inspection occurred.

4. Requests for Description of Records

The Mayor's March 23 order also suspended Section 67.21(c) of the Sunshine Ordinance, which normally requires a City agency to respond to a request for a statement describing the agency's records on a particular subject or question, with enough specificity to enable the requester to identify records to make a public records request. The statement must describe the existence, quantity, form, and nature of the records, and must be made within seven days following receipt of the request. The Mayor's March 23 Order suspended this requirement, which renders it inoperative. There is no parallel provision of the CPRA, so the requirement no longer applies during the emergency. But City agencies still must generally assist a requester in making a focused and effective request that reasonably describes an identifiable record or records. (Gov't Code § 6253.1.)

5. Requests for Disclosure of Parties' Positions During Certain Contract Negotiations

The Mayor's March 23 order also suspended requirements in the Sunshine Ordinance to disclose certain information during contract negotiations. Section 67.24(e)(3) of the Sunshine Ordinance normally requires disclosure of documents related to the positions of the parties and exchanged between the parties during negotiations of three types of contracts: (1) personal, professional, or other contractual services not subject to a competitive process ("sole source"), or where such a process has arrived at a stage where there is only one qualified or responsive bidder; (2) leases or permits having total anticipated revenue or expense to the City of \$500,000

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or more or having a term of 10 years or more; and (3) franchise agreements. If there are no such records, or the records that have been exchanged do not provide a meaningful representation of the parties' respective positions, the Sunshine Ordinance normally requires the City Attorney's Office or a City representative familiar with the negotiations, upon request, to prepare written summaries of the parties' positions within five working days after the final day of negotiation for any given week. The Mayor's March 23 Order suspended these requirements, which renders them inoperative.

There is no parallel provision in the CPRA requiring the City to create summaries of parties' respective positions during contract negotiations. If a City agency receives a public records request for documents exchanged between the parties in negotiations regarding the types of contracts identified in Section 67.24(e)(3), the agency should determine its response based on consideration of exemptions under state law, including the balancing analysis in California Government Code Section 6255, discussed above. If an agency receives such a public records request, the agency should consult the City Attorney's Office for further guidance.

Conclusion

As mentioned above, the suspensions discussed in this memorandum are temporary measures during the period of the COVID-19 emergency. When the emergency ends, or when the Mayor earlier suspends the orders imposing these suspensions, the usual requirements of the Sunshine Ordinance will apply.