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MEMORANDUM

TO: Honorable London N. Breed, Mayor
Honorable Members, Board of Supervisors
Carmen Chu, City Administrator

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

FROM: Paul Zarefsky
Jon Givner
Deputy City Attorneys

DATE: November 16, 2021

RE: Deadlines for Responding to Public Records Requests Following the Termination of the Mayor's March 2020 Emergency Orders

Effective November 15, 2021, the Mayor has terminated her emergency orders suspending certain provisions of the Sunshine Ordinance (Admin. Code Chapter 67; hereafter, the "Ordinance") regarding public records requests. As a result, the City is now reverting to the normally applicable rules for responding to public records requests, governed by the Ordinance and the California Public Records Act (Cal. Govt. Code Sections 6250 et seq.; hereafter, the "Act"). This memorandum briefly summarizes the impact of the Mayor's termination of her orders, and more generally serves as a reminder of the rules governing the timing of responses to requests. For more information about compliance with the Ordinance and the Act, City departments should contact the City Attorney's Office and review the City Attorney's Good Government Guide, which includes a thorough discussion of State and local public records laws.

Termination of the Mayor's Emergency Orders

On February 25, 2020, the Mayor proclaimed a local state of emergency due to the COVID-19 pandemic. The Mayor issued two supplementary orders, on March 13 and March 23, 2020, suspending certain provisions of the Ordinance regarding public records requests during the emergency due to the impact the emergency placed on the City's ability to respond to such requests. On March 30, 2020, the City Attorney's Office issued a public memorandum summarizing the Mayor's orders and describing the legal standards that applied while the orders remained in place. That memorandum is available on the City Attorney's website at <https://www.sfcityattorney.org/wp-content/uploads/2020/03/Public-Records-Memo-3-30-20.pdf>.

On November 2, 2021, the Mayor announced the termination of several emergency orders, including the orders suspending certain public records provisions in the Ordinance. The termination was effective 11:59 p.m. on Sunday, November 14. Termination of the Mayor's orders means departments are now required to comply with the public records provisions of the Ordinance as they did before the COVID-19 pandemic. Because the Mayor's orders are no longer in effect,

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this memorandum does not discuss those orders in detail, but the termination of the orders has these significant impacts:

- **Deadlines to Respond to Standard Records Requests:** As discussed below, departments must provide copies of records within 10 calendar days of a request or within a 14-day extension period. Under the Mayor's orders, departments could respond to requests with an initial response stating whether disclosable records exist and providing an estimated date when the department would make the records available.
- **Immediate Disclosure Requests:** Also, departments must respond within one business day to requests for "immediate disclosure" of public records, subject to the qualifications discussed below. The Mayor's orders had suspended this immediate disclosure requirement.
- **Requests for Description of Public Records:** Also discussed below, departments must respond within seven days to requests for a statement describing the agency's records on a particular subject. The Mayor's orders had suspended that requirement.
- **General Balancing:** Departments may no longer rely on the general balancing test in Government Code Section 6255 to withhold records. The Mayor's orders had authorized departments to rely on Section 6255 to withhold records based on a determination that the public interest in nondisclosure clearly outweighs the public interest in disclosure.
- **Disclosure of Certain Information Regarding Contract Negotiations:** Departments must make certain disclosures of information during contract negotiations. The Mayor's orders had also suspended that requirement.

Deadlines for Responding to Public Records Requests

There are two types of public records requests – standard requests, and immediate disclosure requests – with different response deadlines. There is also a third type of request – for description of records – that is not technically a public records request but bears some similarities to such a request. In this section of the memorandum, we summarize the timing deadlines applicable to each of these types of requests. In addition, we discuss general principles regarding the timing of responses – calculating time, disclosing records on a rolling basis, and applying the "rule of reason" to unreasonably burdensome requests.

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A. Standard Requests**1. Initial Deadline for Response**

Departments must respond within 10 calendar days to a standard public records request to inspect or copy records. Cal. Govt. Code § 6253(c); Admin. Code § 67.21(b). Because the Ordinance calls for compliance with the request in that time period, we interpret the Ordinance as imposing an initial deadline of 10 days to permit the inspection (or deny or restrict it if there is a legal basis for doing so) and to require disclosure of copies of responsive records, if any (unless such records are exempt from disclosure).

2. Extension of Deadline

A department does not have an open-ended right to extend the time for responding to a public records request. But in four circumstances, specified below, departments may have up to 14 additional calendar days to respond. To invoke such an extension, the department must inform the requester in writing of the extension within the initial 10-day deadline, setting forth the reasons for the extension and the date on which a response will be made. Cal. Govt. Code § 6253(c). It will often be appropriate to state the maximum period for the extension because a precise date for completing the response may be elusive; but, even if so, it is advisable for the department to make a good faith effort to respond earlier than that deadline. The department need not obtain the requester's consent to invoke an extension of time for one of the four specified reasons.

The types of circumstances permitting the extension are limited to the need for the department to do one or more of the following:

- Search for and collect the requested records from facilities separate from the office processing the request.
- Search for, collect, and appropriately examine a voluminous amount of separate and distinct records included in a single request.
- Consult with another department or agency that has a substantial interest in the response to the request.
- As to electronic information, compile data, write programming language or a computer program, or construct a computer report to extract data.

Cal. Govt. Code § 6253(c); Admin. Code § 67.25(b). Other circumstances, such as the absence from work of an employee with responsive records, do not justify invoking an extension of time, but may nonetheless pose practical problems in timely responding to a request. In such cases, the department should consult with the City Attorney's Office as soon as the department recognizes the problem.

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Although departments have 10 days to respond to a standard request, and may be able to invoke an extension of up to 14 days, in either instance they should respond as soon as practicable within those limits, taking into consideration an appropriate balance of the resources needed to respond to the request and the department's need to fulfill its other responsibilities. Admin. Code §§ 67.21(a), (b).

B. Immediate Disclosure Requests**1. Requirements for an Immediate Disclosure Request**

The Ordinance requires a faster response for an "immediate disclosure request" ("IDR"). This faster process applies only to certain written requests. Admin. Code § 67.25(a). There are two requirements for a public records request to be a valid IDR.

First, the words "Immediate Disclosure Request" must appear across the top of the request and on the envelope, subject line, or cover sheet transmitting the request. Admin. Code § 67.25(a). These rules for designation of an IDR are more than a formality; they are designed to alert departments, which may be inundated with incoming mail and email, that an expedited time frame for processing the records request applies. A request that does not comply with these rules is not an IDR. But if a department perceives that the requester intended but failed to make an IDR, it may in its discretion choose to treat the request as if it were an IDR. In such cases, it may be advisable for the department to consult with the City Attorney's Office.

Second, the purpose of the IDR, as the Ordinance states, is to expedite the City's response to a "simple, routine, or otherwise readily answerable request." Admin. Code § 67.25(a). The Ordinance does not bestow on requesters the right to transform any or every public records request into an IDR simply by so designating it. Indeed, the Ordinance specifies that for more extensive or demanding requests, the maximum deadlines under the Act and the Ordinance for responding to a public records request apply. Admin. Code § 67.25(a). Thus, even if a requester properly formalizes the request by use of the "Immediate Disclosure Request" designation, a request that is not simple, routine, or otherwise readily answerable is not in fact an IDR. Rather, it is a standard request, subject to the deadlines summarized above.

2. Initial Deadline for Response

Immediate disclosure requests must be satisfied no later than the close of business the next business day. Admin. Code § 67.25(a). The department should respond to the requester within that time period by fax or email, if the requester has provided that contact information. If the requester has provided a postal address only, mailing the response within the time period satisfies the deadline.

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3. Extension of Deadline

The extension rules governing IDRs parallel the extension rules governing standard public records requests. Departments may invoke an extension of no more than 14 calendar days to respond to IDRs. Admin. Code § 67.25(b). While the Ordinance mentions a 10-day extension period, that provision incorporates an expired provision of the Act, that was framed in terms of 10 “business days,” which is typically equivalent to 14 calendar days. Further, when the voters amended the Ordinance and created the IDR process, the provision of the Act then in effect used 14 calendar days as the maximum time frame for extensions, and that provision remains in effect. Cal. Govt. Code § 6253(c). Therefore, we read the Ordinance to allow an extension of up to 14 calendar days to respond to an IDR.

If a department invokes the 14-day extension, it must notify the requester by the close of business on the business day following the request. Admin. Code § 67.25(b). A department may invoke the extension on one of the following grounds: (1) the voluminous nature of the records requested, (2) location of the records in a remote storage facility, and (3) the need to consult with another interested department. Admin. Code § 67.25(b). As previously discussed, the Act also permits an extension for responding to a standard public records request to compile electronic data, write programming language or a computer program, or construct a computer report to extract data. Cal. Govt. Code § 6253(c)(4). That provision was enacted after the voters amended the Sunshine Ordinance and created the IDR process. But, in creating that process, the Ordinance evinces an intent to follow state law regarding extensions of time to respond to records requests. Accordingly, we read the Ordinance to import into the IDR process this fourth ground for an extension of time.

As previously discussed, some requests designated as IDRs are, technically, standard public records requests because they are not “simple, routine, or otherwise readily answerable.” But, as noted above, the Ordinance provides for an extension on certain grounds of up to 14 days to respond to an IDR, a period that would likely accommodate many such requests that are not “simple, routine, or otherwise readily answerable.” Given this extension provision, departments should attempt in good faith to adhere to the extension limitation of 14 days. But sometimes that simply may not be feasible, because of the nature of the request. In such an instance, the department may adhere to the time deadlines governing standard requests – an initial 10-day period for response, plus a possible extension of up to 14 additional days.

C. Description Requests**1. Nature of a Description Request**

As noted earlier, the Ordinance allows a member of the public to obtain a description of the existence, quantity, form, and nature of a department's records on a subject. Admin. Code

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§ 67.21(c). Such a request is technically not a public records request, though it may easily be confused with one, especially when the description request accompanies or is stated within the body of a public records request.

2. Deadline for Response

Departments must respond to description requests within seven days. The Ordinance does not authorize time extensions for responding to such requests. Admin. Code § 67.21(c).

D. General Principles Regarding Timing of Responses**1. Calculating Time****a. Date of Receipt of Request**

If a department receives a public records request after regular business hours (for example, an email request received after 5:00 p.m. on a weekday), or on a weekend or holiday, the next business day is considered the date of receipt. Cal. Civ. Code § 10.

b. Deadline for Response

As previously discussed, the deadline for responding to a standard public records request is 10 days after the request, and the deadline for responding to an IDR is close of business the next business day following the IDR. For this purpose, the date of receipt is not included when counting the days to the deadline. For example, if the date of receipt is Monday, May 1, the first day counted to determine the deadline would be Tuesday, May 2 – when the response to an IDR would be due – and the tenth day counted would be Thursday, May 11 – when the response to a standard public records request would be due.

As the above example indicates, weekends and holidays after the date of receipt of a standard public records request are counted when determining the deadline for response. However, if the deadline actually falls on a weekend or holiday, the next business day is considered the deadline. Cal. Civ. Code § 11. Thus, for example, if the tenth day to respond to a standard public records request is Saturday or Sunday, the following Monday is considered the deadline – unless that Monday is a holiday, in which case Tuesday would be the deadline.

c. Deadline for Response Following an Extension

The above rules for determining when a response is due apply to the deadline for a response when an extension of time has been invoked. For example, if the 10-day deadline for responding to a standard public records request falls on a Friday, Saturday, or day preceding a holiday, the time for the extension starts to run on the next day, be it a Saturday, Sunday, or other holiday. But if the response deadline with an extension of time falls on a weekend or holiday, the department may consider the next business day as the deadline.

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2. Duty to Produce Records Incrementally

Departments must produce records as soon as reasonably possible on an incremental or “rolling” basis, when so requested. Therefore, even when a department has additional time to respond and is collecting a large quantity of records, if requested, it must produce records as it locates and reviews them – providing the review is in all respects complete – rather than waiting until it has located and reviewed all potentially responsive records. Admin. Code § 67.25(d). In some cases, because of the relationship between two records or sets of records, review of the first will not necessarily be complete until the department has completed review of the second. If the department must redact a responsive record, review of the record is not complete until the department has made the redaction.

3. The Rule of Reason

City departments must balance the duty to respond to public records requests with their obligation to maintain a high level of service generally to the public. In rare circumstances, responding to a single public records request may be so burdensome and time-consuming that the demands placed on the department to respond within the required time frame would unreasonably impinge on the department's ability to perform its other duties. The same is true for a series of requests from the same requester that cumulatively impose extreme burdens on a department. In these unusual instances, the department may invoke a “rule of reason” (a common law doctrine that has been applied in public records cases) under which it will limit the amount of time per day or week it will devote to responding. If circumstances may warrant invoking this rule, the responding department should consult with the City Attorney's Office before doing so.

In general, the timing of a department's response to a request to inspect records or to receive copies of records must be reasonable in light of all the circumstances, including: the volume of records to be inspected or copied; whether the records are readily available; the need, if any, to review the records to make appropriate redactions; and the complexity of the review and redaction process. In particular instances, other considerations might be relevant: for example, the need, if any, to assign staff to oversee the requester's inspection of records to protect the integrity of the records, and whether the department is actively using responsive records such that their production at a given time would disrupt the department's operations by depriving it of access to the records.

Without unreasonably delaying the time for a requested inspection of records to occur or be completed, or the time for producing copies of records, a department may consider such factors as those discussed above in determining the timing and logistics of an inspection, or the time for producing or completing the production of responsive records. In compelling circumstances, the rule of reason, rather than specific deadlines, may govern the pace of the department's response,

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to enable it to balance its duties under the public records laws with its obligation to maintain a high level of service to the general public.

Departments must not place unnecessary roadblocks in the way of requesters, however. Before invoking the rule of reason to govern the timing of a response, department personnel should endeavor to work cooperatively with the requester to determine if the request or requests can be narrowed to minimize barriers to a prompt response, or to at least prioritize records the requester would like to receive first.

Because open government laws place great importance on responding promptly to public records requests, a department should neither lightly nor routinely invoke the rule of reason as a basis for elongating the time for fully responding. Indeed, as noted above, we advise City personnel against invoking the rule of reason unless they have first consulted with the City Attorney's Office about their particular circumstances.

Conclusion

In this memorandum, we have summarized the basic rules and principles regarding the timing of responses to public records requests. As with any general legal guidance, it will sometimes be important for us to supplement this guidance with specific advice arising in the context of specific public records requests. We encourage departments to consult with the City Attorney's Office when the facts and circumstances surrounding a public records request necessitate a more fact-specific application of these rules and principles.