

AGENDA # \_\_\_\_\_

CITY OF MADISON, WISCONSIN

REPORT OF: City Attorney

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DATED: February 11, 2008

PRESENTED \_\_\_\_\_

REFERRED \_\_\_\_\_

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REPORTED BACK \_\_\_\_\_

ADOPTED \_\_\_\_\_ POF \_\_\_\_\_

ID NUMBER \_\_\_\_\_

Re: Legistar File No. 09158  
Repealing and recreating Section 3.70 of the Madison General Ordinances to modify portions of the City's policy regarding public records.

TO THE MAYOR AND COMMON COUNCIL:

The changes to the current Public Records Ordinance were developed by the Office of the City Attorney in order to offer the public and its records custodians with guidance on how to apply the complex state public records laws to the unique records created and maintained by the City of Madison. These revisions clarify application of the state laws to the potential records associated with new and emerging technologies. The City of Madison has been encouraged to undertake this initiative as the state laws have failed to keep up to date with the emerging technologies of our time.

**I. The State Public Records Law Is Incorporated By Reference**

The current ordinance duplicates the text of the state public records laws and contains a few provisions unique to the City of Madison. Since the City is, at a minimum, obligated to follow these states statutes, it seems to be in the City's best interests to adopt the statutes by reference and eliminate the need to redraft our ordinances every time there is a change to those statutes.

**II. These Revisions Specify the Means of Responding to Records Requests Submitted in Email Correspondence**

The question has often arisen as to whether public records requests may be made by email, text message or instant messaging. This revision clarifies the means by which requests may be made and the means by which those requests must be responded to. Current state law is ambiguous on this point.

**III. Treatment of Certain Data As Public Records**

This section addresses issues associated with emerging technologies. It sets forth our long-standing recognition that emails are often public records. The amendment explains why Voicemail, Instant Messaging (IM), Voice Over the Internet Protocol (VOIP) and other forms of perishable data do not constitute public records. It also recognizes the perishable data in rewritable recording systems (think bank surveillance tapes) is not subject to retention as a public record unless some action is taken to download or otherwise preserve that data. This is an important point as we have several systems in place, such as police squad car cameras and bus cameras which use computer/digital technology that is constantly recording data (pictures) and then overwriting that data as memory capacity is achieved. The amendments also hold that temporary computer logs and operating systems data is not going to be preserved as a public record. The amendments also establish rules for temporary retention of recordings that are made expressly for the limited purposes of preparing meeting minutes.

#### **IV. Format For Delivery of Records, Fees for Reproducing Records, Waivers of Fees, Reproduction of Emails**

The new provisions permit custodians to deliver records via the Internet or email. However, the ordinance would require that such records be delivered in a secure format. Where the security of any redactions cannot be guaranteed if the records are delivered in an electronic fashion, the ordinance requires that only paper copies of such records may be disclosed.

The revision also transfers the responsibility for determining records fees to the Director of Information Technology and the Comptroller. These individuals are responsible for creating a uniform fee schedule for reproduction of City records. Such costs are limited (by state statute) to the actual, necessary and direct costs of reproducing the records. Different departments have developed different fee structures for the reproduction of similar records. While there may be a factual basis for such differences (i.e., higher labor costs in one department over the other) it has become a source of confusion for records requestors. This section also specifies that custodians may charge for the mailing or shipping of records.

The revision establishes criteria for granting fee waivers. A department or division head must determine in writing that a fee waiver is in the public interest before such fees may be waived. This is an area where additional guidance would be of use to records custodians. Currently, individual custodians employ their own personal criteria in making these decisions. Additionally, the revision would establish a clear rule that all 501(c)3 non-profits are entitled to fee waivers.

Finally, these revisions establish access rules for email records. We have two email databases. Emails created prior to April 1, 2004 must be restored from monthly back-up tapes in order to be searched. That is an expensive and time consuming process. Emails generated after that time frame have been maintained in a searchable database and are much easier to retrieve. These revisions explain the differences in both costs and access to these different records databases.

#### **V. Revises Records Retention Schedule**

The City is obligated to have a records retention schedule for any records it wishes to maintain for any period of less than seven (7) years. The State Public Records Board must approve this retention schedule. Our current retention schedule is maintained by ordinance at sections 3.42(17) and (18), M.G.O. The schedule has become outdated but the revision of this schedule would result in the addition of hundreds if not thousands of records classifications. The Information Technology Department has been working with representatives of the State Public Records Board to identify records classes and appropriate storage periods for those records.

The amendments would preserve the status quo for records in existence prior to January 1, 2008. New records would be subject to a record retention schedule created by the Director of Information Services in consultation with the City Attorney. This new retention schedule would still need the approval of the State Public Records Board and would then be incorporated into a Mayoral Administrative Procedure memorandum (APM). An APM may not be necessary but would provide the public and city employees with ready access to these retention schedules.

The amendment also codifies considerations that custodians must take into account that may require retaining records for periods longer than set forth in the retention schedules. For example, records that are part of a lawsuit must be preserved until the litigation has been exhausted, even if the records could otherwise have been destroyed.

Finally, the amendments preserve the custodian's right to designate electronic copies of records as the official records. Custodians making use of this provision could expect to save on storage costs as the hard copies of such records could be destroyed and would not need to be sent to the state records center for storage.

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