



Staff Report

RESPONSE TO GRAND JURY RECOMMENDATIONS REGARDING ELECTRONIC COMMUNICATION POLICIES

Honorable Mayor and Council Members:

Summary

The San Mateo 2006/2007 Civil Grand Jury has filed a report which contains recommendations that, by state law, must be responded to by the City of Belmont. In its letter dated June 21, 2007 (Attachment A), the Grand Jury recommends that cities adopt email use and retention policies applicable to its Council Members and Planning Commissioners. The City's proposed response (Attachment B) indicates that the City of Belmont has already complied with all of the Grand Jury's recommendations.

Background and Discussion

The Civil Grand Jury is impaneled each year in each county in the state; their charge, under state law, is to review local government operations and make recommendations for improvements.

In its June 21, 2007 letter to all cities in San Mateo County, the Grand Jury recommended that the Council of every city or town in San Mateo County do the following:

1. Issue official email accounts to its council members.
2. Adopt email policies that require council members to use such email accounts for all city or town business.
3. Consider providing official email accounts to planning commissioners and applying the policies adopted in #2 above.
4. Develop and adopt appropriate record retention policies, including establishing appropriate document retention time periods.
5. Include updates on legal developments relating to the Brown Act and the Public Records Act during the ethics training for officials as required under AB 1234 (Ethics Training for Local Officials).

As the City's proposed response states, the City has implemented all five recommendations. The City's Electronic Communications Policy, which contains the Grand Jury's recommendations, was adopted in September 2002. Since 2006, the City issued official email accounts to all City Planning Commissioners, Finance Commissioners, and Parks and Recreation Commissioners.

The Electronic Communications Policy adopted in 2002 applies to members of those commissions.

For these reasons, the City believes that it has complied with all of the Grand Jury's recommendations. Staff therefore requests that the Council approve the draft response attached hereto.

General Plan/Vision Statement

No impact.

Fiscal Impact

No fiscal impact.

Public Contact

Posting of City Council Agenda.

Recommendation

Staff recommends that the Council approve the attached response to the Grand Jury, authorizing the City Manager to send the reply as written.

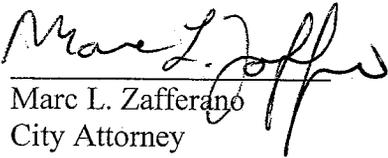
Alternatives

1. Take no action.
2. Refer back to staff for further information or modification of letter.

Attachments

- A. Letter from Grand Jury dated June 21, 2007.
- B. City's draft response.
- C. Resolution.

Respectfully submitted,


Marc L. Zafferano
City Attorney

Attachment A

Letter From Grand Jury Dated June 21, 2007



Superior Court of San Mateo County

Hall of Justice and Records
400 County Center
Redwood City, CA 94063-1655

cc: Council
Cmgn.
Valerie
Cathy

John C. Fitton
Court Executive Officer
Clerk & Jury Commissioner

(650) 599-1711
FAX (650) 363-4698

June 21, 1007

RECEIVED

JUN 22 2007

BELMONT CITY CLERK

City Council
City of Belmont
1070 Sixth Avenue
Belmont, CA 94002

Re: ELECTRONIC COMMUNICATION AMONG CITY OFFICIALS Report

Dear Councilmembers:

The 2006-2007 Grand Jury filed a report on June 21, 2007 which contains findings and recommendations pertaining to your agency. Your agency must submit comments, within 90 days, to the Hon. John L. Grandsaert.

As you are the public agency that has been commented upon by the Grand Jury, your comments are due no later than September 19, 2007 to:

Hon. John L. Grandsaert
Judge of the Superior Court
Hall of Justice
400 County Center, 2nd Floor
Redwood City, CA 94063-1655.

For all responses, the responding person or entity shall indicate one of the following:

1. The respondent agrees with the finding.
2. The respondent disagrees wholly or partially with the finding, in which case the response shall specify the portion of the finding that is disputed and shall include an explanation of the reasons therefor.

Additionally, as to each Grand Jury finding, the responding person or entity shall report one of the following actions:

1. The recommendation has been implemented, with a summary regarding the implemented action.

2. The recommendation has not yet been implemented, but will be implemented in the future, with a time frame for implementation.
3. The recommendation requires further analysis, with an explanation and the scope and parameters of an analysis or study, and a time frame for the matter to be prepared for discussion by the officer or director of the agency or department being investigated or reviewed, including the governing body of the public agency when applicable. This time frame shall not exceed six months from the date of publication of the Grand Jury report.
4. The recommendation will not be implemented because it is not warranted or reasonable, with an explanation therefor.

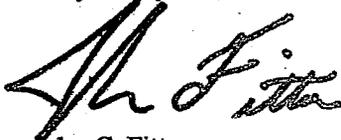
Please submit your responses as follows:

1. Responses to be placed on file with the Clerk of the Court by the Court Executive Office.
 - Prepare original on letterhead, address and mail to Judge Grandsaert.
2. Responses to be placed at the Grand Jury website.
 - Copy response and send by e-mail to: grandjury@sanmatencourt.org. (Insert agency name if it is not indicated at the top of your response.)
3. Responses to be placed with the clerk of your agency.
 - File a copy of the response directly with the clerk of your agency. Do not send this copy to the Court.

For up to 45 days after the end of the term, the foreperson and the foreperson's designees are available to clarify the recommendations of the report. To reach the foreperson, please call the Grand Jury Clerk at (650) 599-1711.

If you have any questions regarding these procedures, please do not hesitate to contact Thomas F. Casey III, County Counsel, at (650) 363-4756.

Very truly yours,



John C. Fitton
Court Executive Officer

JCF:mc
Enclosure

cc: Hon. John L. Grandsaert
Thomas F. Casey III

Information Copy: City Manager



RECEIVED

JUN 22 2007

BELMONT CITY CLERK

Electronic Communication Among City Officials: A Valuable Tool in Need of Careful Guidance

Issue

To what extent do the cities in San Mateo County facilitate, yet moderate, electronic communication among elected and appointed officials without violating the Brown Act or the Public Records Act?

Background

The Brown Act is California's open public meeting law. It was enacted in 1953 as necessary government reform to limit perceived and sometimes real "backroom" deal-making and to make local government decision-making more transparent to the public. The basic provision of the code is: "All meetings of the legislative body of a local agency shall be open and public, and all persons shall be permitted to attend any meeting of the legislative body of a local agency, except as otherwise provided in this chapter." Government Code Section 54953(a)

To an ever-increasing degree, city governments in San Mateo County have found the use of electronic communication (e-mail and attachment documents) to greatly facilitate the dissemination of information. It is much faster and cheaper to move and store large amounts of information electronically. With such ease, however, come pitfalls such as creating duplicate files subject to public disclosure under the Public Records Act and the ease with which an appearance of an illegal serial meeting can be created via email communication between officials.

Investigation

The 2006-2007 San Mateo County Civil Grand Jury (Grand Jury) conducted an investigation to determine the degree to which San Mateo County cities have:

- assigned specific email accounts to elected and appointed officials
- adopted policies for the use of those accounts
- adopted records retention policies to control document proliferation and establish accountability

The Grand Jury conducted selected interviews and requested information from all cities in San Mateo County and received varied responses, many of which indicated considerable effort to be proactive in these areas, particularly the Town of Woodside. It should be noted that the bulk of responses were via email with attachments.

Findings

Proposition 59 of 2004– the right of the people to open meetings and public records is now in the State Constitution, (Cal. Const. Article I Section 3(b)(1)) which reads:

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

The Public Records Act

“Public Records” include any writing containing information relating to the conduct of the public’s business prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics. The public can make requests to inspect or copy public records. Failure to comply with the Public Records Act can subject a public entity to litigation.

The Brown Act

The Brown Act requires legislative bodies or local agencies to conduct the public business in a public meeting, of which proper notice has been given. A meeting is a “...congregation of a majority of the members of a legislative body at the same time and place to hear, discuss or deliberate on any matter within its jurisdiction”.

Serial meetings are covered by the Brown Act if the purpose is to develop a concurrence as to action to be taken. A majority of members may not “develop a concurrence as to action” on business through serial meetings, intermediaries, communication, or other subterfuge.

Failure to comply with the Brown Act may subject a public entity to litigation and its members to criminal prosecution.

Most cities and towns were found to have created official email accounts for elected officials but few had done so for appointed officials such as Planning Commissioners.

Several cities and towns had developed record retention policies and one, the Town of Woodside, had developed an email policy for council members.

Most cities and towns have written policies for the use of official email accounts.

Most cities and towns do not have up-to-date policies that address the retention and storage of electronic documents.

Conclusions

All California cities face a complicated set of issues when attempting to balance the benefits of electronic communication and storage against the pitfalls of Brown Act constraints and Public Records Act obligations.

In the case of Brown Act violations, officials who engage in prohibited serial meetings face the possibility of criminal prosecution or other damaging consequences. The point at which a serial meeting becomes illegal, however, is not clear and as case law evolves ongoing legal guidance should be sought.

The California Public Records Act mandates citizen access to records including all communications related to public business "regardless of physical form or characteristics, including any writing, picture, sound, or symbol, whether paper, magnetic or other media". Government Code Section 6252(e)

The Public Records Act, while praiseworthy in its goals, can constitute a significant burden on staff time (the cost of which is not recoverable), document duplication cost (partially recoverable), and legal costs (not recoverable) to determine which information is public record and whether any Public Record Act exemptions apply. Additionally, litigation discovery trends specifically address the production of electronic documents, including the specific formats in which such document must be produced. This burden is, or should be, a strong motivation for enacting record retention policies that address redundancy issues and establish legally required document retention time periods.

Responding to a Public Records Request usually includes the production of email sent or received relating to the requested subject matter. Consequently, council members or their legal representatives must review their email files to sort out personal communication versus public communication. If the Council member uses his or her personal email account for city matters, such searching is more time consuming and potentially intrusive. While the issuance of official email addresses for City Council members is a rapidly increasing practice, policies for using such accounts are not as common.

Planning commissioners are subject to the Brown Act, and their deliberations could be a problem if care is not taken.

The financial downside to cities faced with burdensome requests and aggressive litigation is substantial and merits focused, proactive attention. Most San Mateo County cities are, generally speaking, moving in the right direction by adopting separate email accounts for elected officials and by developing and adopting electronic records retention policies. Interpretation of the Brown Act is subject to change due to evolving case law, making it difficult to recommend a one-size-fits-all solution for all cities. Each city should monitor legal developments concerning the Brown Act.

Advances in communication using electronic media such as email have made communication among elected officials convenient and efficient. Certain forms of such communication, however, can be considered a prohibited serial meeting (as opposed to an allowable serial meeting) and thus violate the Brown Act. It is important for elected officials to understand the potential pitfalls as well as the benefits of email communication.

Recommendations

The Grand Jury recommends that the Council of every City or Town in San Mateo County:

- 1) Issue official email accounts to its council members.
- 2) Adopt email policies that require council members to use such email accounts for all city or town business.
- 3) Consider providing official email accounts to planning commissioners and applying the policies adopted in #2 above.
- 4) Develop and adopt appropriate record retention policies, including establishing appropriate document retention time periods.
- 5) Include updates on legal developments relating to the Brown Act and the Public Records Act during the ethics training for officials as required under AB 1234 (Ethics Training for Local Officials).

Attachment B
City's Draft Response

September 19, 2007

Hon. John L. Grandsaert
Judge of the Superior Court
Hall of Justice
400 County Center; 2nd Floor
Redwood City, CA 94063-1655

Re: ELECTRONIC COMMUNICATION AMONG CITY OFFICIALS Report

Dear Judge Grandsaert:

The City Council of the City of Belmont is in receipt of your letter dated June 21, 2007 regarding the Grand Jury's June 21, 2007 Electronic Communication Among City Officials Report. The City hereby responds, as requested, to the Grand Jury's Report.

Response to Findings:

1. **Proposition 59 of 2004** - the right of the people to open meetings and public records is now in the State Constitution, (Cal. Const. Article I Section 3(b)(1)) which reads:
"The people have the right of access to information concerning the conduct of the peoples' business; therefore, the meetings of public bodies and the writings of public officials and agencies shall be open to public scrutiny".

The respondent agrees with the finding, which accurately quotes the source cited.

2. **The Public Records Act**
"Public Records" include any writing containing information relating to the conduct of the public's business prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics. The public can make requests to inspect or copy public records. Failure to comply with the Public Records Act can subject a public entity to litigation.

The respondent agrees with the finding, which accurately quotes the source cited.

3. **The Brown Act**
The Brown Act requires legislative bodies or local agencies to conduct the public business in a public meeting, of which proper notice has been given. A meeting is a "... congregation of a majority of the members of a legislative body at the same time and place to hear, discuss or deliberate on any matter within its jurisdiction".

The respondent agrees with the finding, which accurately quotes the source cited.

4. Serial meetings are covered by the Brown Act if the purpose is to develop a concurrence as to action to be taken. A majority of members may not "develop a concurrence as to

action” on business through serial meetings, intermediaries, communication, or other subterfuge.

The respondent agrees with the finding, which accurately quotes the source cited.

5. Failure to comply with the Brown Act may subject a public entity to litigation and its members to criminal prosecution.

The respondent agrees with the finding.

6. Most cities and towns were found to have created official email accounts for elected officials but few had done so for appointed officials such as Planning Commissioners.

Respondent cannot agree or disagree with the statement to the extent that it addresses the situation in “most cities and towns” as respondent does not have information about cities other than the City of Belmont.

7. Several cities and towns had developed record retention policies and one, the Town of Woodside, had developed an email policy for council members.

Respondent cannot agree or disagree with the statement to the extent that it addresses the situation of “Several cities and towns” or to the extent that it addresses the situation in “the Town of Woodside” as respondent does not have information about cities other than the City of Belmont.

8. Most cities and towns have written policies for the use of official email accounts.

Respondent cannot agree or disagree with the statement to the extent that it addresses the situation of “Most cities and towns” as respondent does not have information about cities other than the City of Belmont.

9. Most cities and towns do not have up-to-date policies that address the retention and storage of electronic documents.

Respondent cannot agree or disagree with the statement to the extent that it addresses the situation of “Most cities and towns” as respondent does not have information about cities other than the City of Belmont.

Response to Recommendations:

1. Issue official email accounts to its council members.

The recommendation has been implemented.

Since approximately 2002, the City of Belmont has issued official email accounts to all City Council members.

2. Adopt email policies that require council members to use such email accounts for all city or town business.

The recommendation has been implemented.

In September 2002, The City of Belmont adopted an Electronic Communications Policy. Paragraph III. General Procedures, subsection B. states as follows:

- B. No Use of Personal Email.** Users shall not utilize their home or business email accounts or addresses for any communication pertaining to City business. Users should communicate with the public and staff solely via their designated City email addresses. User shall not commingle email pertaining to City business with their home or business email.
3. Consider providing official email accounts to planning commissioners and applying the policies adopted in #2 above.

The recommendation has been implemented.

Since approximately 2006, The City of Belmont has issued official email accounts to all City Planning Commission members, Finance Commission members and Parks and Recreation Commission members. Electronic Communications Policy Paragraph III. General Procedures, subsection B, set forth above, applies equally to members of the City's commissions.

4. Develop and adopt appropriate record retention policies, including establishing appropriate document retention time periods.

The recommendation has been implemented.

In September 2002, The City of Belmont adopted an Electronic Communications Policy. Paragraph V. Specific Procedures, subsections A. and B. state as follows:

- A. Retention of Email.** Electronic mail may be covered by public records laws and users of email should be aware of retention issues. Email is not intended for permanent storage on the PC. Users should not hold email messages in their system for more than 60 days. After 60 days, messages are to be deleted by the user from their "Inbox" as well as their "Deleted Items" folder. All email messages are held for 30 days on tape backup by the Information Services Division but City backups of the email system are not sufficient for the various record retention requirements (see your department's copy of the City's records retention schedule). In the event information in an email message relates to a current project/policy-making decision, or otherwise needs to be retained, the message should be printed and placed in the proper hard-copy file or transferred electronically to the administrative record of an online project file.

- B. **Public Records Act.** City records, whether paper or electronic, are governed by the public disclosure requirements of the Public Records Act. Disclosure may be required regardless of who sends or receives a communication or document. In the event that the City receives a request for disclosure of City records that includes email, the person responsible for the requested records must use his or her best efforts to preserve all City email covered by the request until it is determined whether the email must be disclosed. The City Clerk and/or City Attorney must be contacted concerning any request for disclosure of any City records applicable to email or other electronic records of any user subject to this policy.
5. Include updates on legal developments relating to the Brown Act and the Public Records Act during the ethics training for officials as required under AB 1234 (Ethics Training for Local Officials).

The recommendation has been implemented.

At AB 1234 training, updates on legal developments relating to the Brown Act and the Public Records Act are on the agenda and are discussed.

The City of Belmont thanks the Grand Jury for its time and interest in this matter.

Very truly yours,

JACK CRIST,
Belmont City Manager

Attachment C

Resolution

RESOLUTION NO. _____

**RESOLUTION OF THE CITY COUNCIL OF THE CITY OF BELMONT
RESPONDING TO GRAND JURY RECOMMENDATIONS REGARDING
ELECTRONIC COMMUNICATIONS POLICY**

WHEREAS, the San Mateo County 2006-2007 Civil Grand Jury has released its final reports;
and,

WHEREAS, the City of Belmont is required to respond to recommendations contained in that
final report dealing with adoption of electronic communications policies;

WHEREAS, the City of Belmont has prepared appropriate responses and wishes to transmit
them, as required by state law, to the Presiding Judge of the Civil Grand Jury.

NOW, THEREFORE, BE IT RESOLVED that the City Council of the City of Belmont
resolves as follows:

Section 1. The responses to recommendations of the San Mateo County 2006-2007 Civil Grand
Jury relating to electronic communications policies pertaining to the City of Belmont, attached
hereto and made a part hereof, are hereby accepted.

Section 2. The City Manager is hereby authorized and directed to transmit said responses to the
Presiding Judge of the San Mateo County 2006-2007 Civil Grand Jury, in accordance with state
law.

* * * * *

I hereby certify that the foregoing Resolution was duly and regularly passed and adopted by the
City Council of the City of Belmont at a regular meeting thereof held on September 11, 2007 by
the following vote:

AYES, COUNCILMEMBERS: _____

NOES, COUNCILMEMBERS: _____

ABSTAIN, COUNCILMEMBERS: _____

ABSENT, COUNCILMEMBERS: _____

CLERK of the City of Belmont

APPROVED:

MAYOR of the City of Belmont