

# MEMORANDUM

**TO:** Mayor A C Wharton, Jr.  
Mayor of the City of Memphis

**FROM:** Mike Carpenter  
Executive Director, Plough Foundation

**RE:** Review of Public Records and Transparency in City Government

**DATE:** April 30, 2015

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Mayor Wharton:

In your letter dated March 26, 2015, you requested that I “conduct a comprehensive review of the existing process in order to insure that we are not just meeting the letter of the law, but that we have a process that fulfills the full intent of my executive order.”<sup>1</sup> You specifically requested that I review the processes and polices of other governmental entities, consider the appropriate point of entry and hub for records requests, find ways to balance laws regarding privacy and employees’ records with the public’s right to know, evaluate the effectiveness of the online public records system, assess the process for keeping the public informed of the status of their records’ requests, and recommend whether or not additional information should be posted to the City of Memphis website such as reports, studies and maps.<sup>2</sup> Finally, you concluded your letter by stating that it was your desire to “create a culture based on the understanding that the City of Memphis belongs to the public and to achieve the open government we desire and the public deserves.”

I have completed my review and believe that I have fully addressed the directives in your original charge. It is in fact my belief that the intent of the Executive Order has not been met and at times the law may have been inadvertently violated. The deficiencies identified through numerous interviews of internal and external parties stem from inefficient processes, a lack of understanding of the State of Tennessee’s Public Records Act by both employees and members of the public and a growing distrust between the public records staff at various levels of City government and the local media. On the latter point, a healthy tension between government and the media is expected and beneficial. However, when that “push and pull” becomes an authentic tug of war, citizens and the processes suffer.

In fairness to the Public Records staff, who work tirelessly to meet the requests which have increased dramatically in this election year, the majority of requests are met timely as demonstrated by the graph

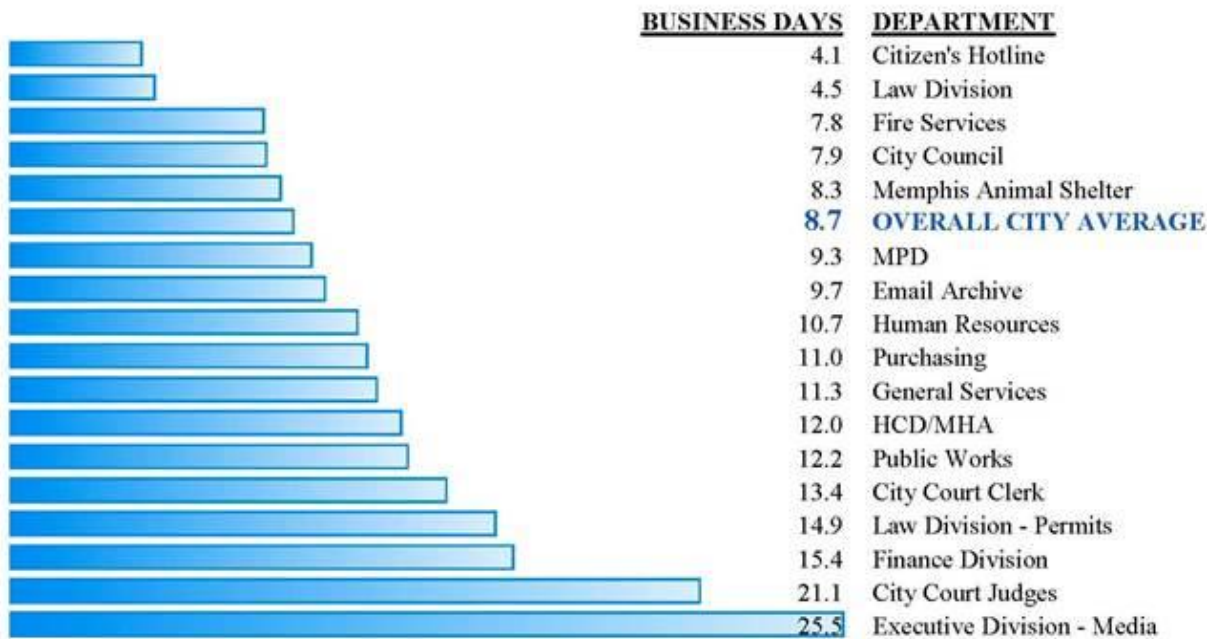
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<sup>1</sup> Executive Order 01-2009, An Order Establishing Standards of Performance for A Transparent and Open Memphis City Government, November 9, 2009.

<sup>2</sup> Letter from Mayor Wharton to Mike Carpenter, March 26, 2015.

below. However, there is much room for improvement and greater alignment with your personal belief in open and transparent government.

**PUBLIC RECORDS REQUESTS**  
**AVERAGE BUSINESS DAYS OPEN**  
 10/1/2014 TO 3/26/2015



SOURCE: Memphis City Attorney's Office

The recommendations contained in this memo strive to take into fair account the positions of both media and City staff under the umbrella of "What is really in the public's best interest?" These recommendations are relatively general in that the specific steps to implement them need to be determined by staff charged with day-to-day operations. What is clear is that any change you choose to adopt must be emphasized from "the top" and take on an importance commensurate with that of other major City initiatives. There must an insistence that all employees comply, proper incentives for complying and consequences for failure to comply.

## RECOMMENDATIONS

### 1. Leadership & Oversight

#### **A. Relocate Public Records responsibility from Law Division to Executive Division**

Relocation of the public records responsibility would involve a shift in which division takes the lead, as well as a physical relocation.<sup>3</sup> Exactly where the staff would reside would be a decision of the Chief Administrative Officer (CAO) and may require shuffling of various offices. The ideal

<sup>3</sup> Deputy City Attorney Regina Newman indicated in an interview on April 2, 2015 favorability toward this realignment.

location would be on the 7<sup>th</sup> Floor of City Hall. The reassigning of the responsibility would underscore the imperative to have the process driven by the Mayor and CAO. It would address the fatigue and frustration expressed by staff of the Law Division, which was evident from my interviews, and allow the City’s attorneys to focus on contracts, lawsuits and policies and avoid potential conflicts arising out of public records litigation. It would better align the process for public records with the role of the Public Information Officer who receives both requests and complaints from the media in spite of the process that exists. To avoid the creation of new staff positions, some of the existing staff in the Law Division would need to be shifted to the Executive Division, including one full-time attorney to give final review to certain documents containing confidential information that must be redacted before they can be released. The chart below details the staffing levels necessary to meet current demand for Public Records Requests (PRR). Each of the staff below contributes a minimum of 5 hours of overtime per week to the PRR duties. Deputy City Attorney Regina Newman estimates 80% of her time is currently spent reviewing public records requests as a result of a backlog of so-called mega-requests.<sup>4</sup> None of this workload measurement includes the time of the Public Information Officer and Records Custodians in each division. The need for these positions could be potentially lessened through some of the proposed measures to be discussed later in the memo regarding process.

Public Records Team in Law Division:	
Maya Siggers - full-time Asst. City Attorney	80+%
Mary Ann Roaten - full-time Paralegal	60%
Christy Turner – contract staff	100%
James Perry – full-time Senior Law Clerk.	50%
Regina Newman – Deputy City Attorney	80%
Rosalind Pryor – full-time Paralegal	40%

SOURCE: Memphis City Attorney’s Office,  
date?

**B. Appoint a Public Records Ombudsman to oversee the process and resolve disputes**

To adequately insure the seriousness of purpose in making government open and transparent, a single individual needs to bear day-to-day responsibility for the success of the process and the compliance of the individuals charged with carrying out the process. The primary recommendation for this position would be the creation of a new position of Public Records Ombudsman. Bearing in mind current budget challenges and potential barriers associated with election year politics, a secondary approach would be adding the responsibility to the duties of a senior level individual and modestly increasing compensation to account for the extra duties. The Ombudsman would answer directly to the CAO and the Mayor. It is preferred that the individual would not possess a *Juris Doctorate*, but be well-educated and trained in the provisions of the state’s Public Records Act. This would keep the focus on the spirit of the law and the executive order, rather than the temptation to utilize the letter of the law to delay or decline to fill PRRs. The Ombudsman would be skilled in negotiation, conflict resolution and would serve as the point of contact for citizen and media complaints regarding access to public records. S/he would determine when requests are denied and assist in revising workflow to

<sup>4</sup> Email received from Deputy City Attorney Regina Newman dated April 10, 2015.

expedite high-priority requests. The Ombudsman would chair an oversight committee to be discussed subsequent to this recommendation and schedule public records training opportunities for employees, media and the public.

**C. *Appointment of Public Records Oversight Committee (PROC)***

As referenced, the Ombudsman would convene and chair this committee. The committee would be comprised of the Chief Information Officer, City Attorney, a Records Custodian from a City Division, a member of the City Council, a representative of print media, a representative of broadcast media and two private citizens. Each member would be appointed by the Mayor with the exception of the City Council representative who would be appointed by the Chair of the City Council. The Oversight Committee would meet at the call of the Ombudsman, but not less than once per quarter. The specific role of the Oversight Committee would be to discuss the efficacy of the existing processes, raise concerns and discuss potential solutions and seek to resolve conflicts that might otherwise lead to litigation. The PROC would review any proposed fees for records and approve or reject those fees so long as any approval of fees does not violate the allowable fees described in the Public Records Act. The PROC would only have authority to make recommendations, but their recommendations should receive the highest consideration of the Mayor and CAO.

**D. *Reassignment of All Records Custodians***

The State Public Records Act in Title 10-7-503 (B) references the role of a Records Custodian. In City government, each division and in some cases departments within divisions have a Records Custodian. In general, state law envisions the custodian to be the keeper and provider of the public record(s). Over time, to ensure timely response, appropriate tracking and compliance with confidentiality provisions of the law, the City Records Custodians' roles have evolved to typically supporting the City Attorney's office in meeting the PRRs. Later in this memo an enhanced role for the custodians will be suggested. For the purpose of this recommendation, all current custodians should be relieved of their public records duties and those duties reassigned to new staff within each department or division. The value to this recommendation is a fresh start with individuals who have a renewed sense of purpose. They would be newly trained to prevent adoption of incorrect methods or bad habits that have formed as part of the culture of the division or department in which they work. Because the work is in addition to normal job functions, serious in nature and has potential legal ramifications, it is recommended that each custodian receive a modest merit-based bonus for performing the extra duties. As an example, there are 37 unique Records Custodians and each could be paid a merit-based bonus of \$1,000 to \$1,500 annually for fulfilling the role and performing well in it.

<b>PRRs by DEPARTMENT</b>	<b># of PRRS</b>	<b>% of PRRS</b>
Citizen's Hotline	1	0.2%
Law	136	21.1%
MPD	207	32.1%
Fire	41	6.4%
City Council	3	0.5%
City Clerk	8	1.2%
Gen. Services	5	0.8%
Public Works	43	6.7%
Human Resources	27	4.2%
Finance	47	7.3%
HCD/MHA	9	1.4%
Animal Shelter	104	16.1%
City Court Judges	1	0.2%
Exec. - Media	5	0.8%
Email Archive	7	1.1%
<b>OVERALL CITY AVG</b>	<b>645</b>	<b>100.0%</b>

SOURCE: Memphis City Attorney's Office

## 2. **Dissemination of Information**

### A. ***Tier information on the basis of confidentiality***

State law provides for hundreds of exemptions to the Public Records Act. Most of those exemptions are related to the confidential information of citizens such as social security numbers, health care information or home addresses of law enforcement officers to name a few. Other information exempted include submitted bids prior to award, negotiations of incentives during the business recruitment process and information directly tied to pending litigation. A common reason for delay in the filling of PRRs is the requirement to redact exempted information that is confidential in nature. Failure to redact the confidential information violates the law and exposes the City to potential litigation.<sup>5</sup> In an April 17, 2015 report by WREG News, it was revealed that Shelby County Jail employees failed to redact confidential information of suspects, including social security numbers. They attempted to redact the information by hand, but critical information was legible and in violation of the Public Records Act.<sup>6</sup>

Conversely, there are volumes of aggregate data available in various city departments that would not be subject to confidentiality requirements. Examples might include the number

<sup>5</sup> Tennessee Code Annotated 10-7-504 Confidential Records

<sup>6</sup> [www.WREG.com](http://www.WREG.com), 4/17/2015, *Mistakes May Have Put Suspects Identities At-Risk*

of traffic citations issued in any given month by the Police, the number of potholes filled by Public Works year to date or a list of city employees and their salaries, currently available on the City of Memphis website.

As a part of the current PRR process, several steps must be completed by the requestor and those fulfilling the request. That process will be addressed later. Each request is sent to the City Attorney and ultimately approved by the City Attorney for release (at least as written in the current policy). This process adds to the inordinate amount of time the City Attorney's employees must spend reviewing records to ensure that confidentiality is not breached. With some requests, a complete review by the City Attorney seems unnecessary and said requests could be filled by Records Custodians with approval by the Ombudsman and/or the Division Director of the division from which the information is to be accessed.

To make the process more efficient and responsive, all types of data requests should be sorted into one of three tiers:

- **Tier 1** – Does not require a review of a City Attorney to release. This information would include any data currently on the City website; data approved to be placed on the City website or other City operated public data portal; information previously reviewed and redacted by the City Attorney as a result of an earlier records request; or aggregate data maintained by divisions or departments that excludes by its nature confidential or identifying information. There are many other possible examples of information that could be included in this tier and could be delivered directly to the requestor without final review of the City Attorney.
- **Tier 2** – Always requires a review of the City Attorney. This information would include requests for emails, particularly those between public officials and extending over a lengthy period of time; personnel files that contain identifying or exempted information; or information that could be the subject of future litigation (City Attorney would need to demonstrate a strong likelihood that the information would become a part of a legal proceeding.) These are some Tier 2 examples.
- **Tier 3** – Not subject to open records law at the present time. Must be reviewed by the City Attorney. Examples of Tier 3 information could include facts specific to an on-going police investigation; documents pertaining to active litigation; records known to include information protected under HIPPA law; or documents containing proprietary information of a business entity seeking to move to Memphis or expand. At appropriate points, some Tier 3 documents could be moved to a lower Tier for access by the public or media.

The advantages to a tiered system include faster response times, empowerment of Records Custodians, reduction of workload by public records staff, elimination of ambiguity and expanded opportunities to train employees, the media and the public on the nuances of public records law.

## **B. *Rolling Release of Information***

A rolling release of information applies to large requests that require many hours of time by public records staff. For example, the City Attorney's staff has numerous media requests for emails of public officials. Those requests literally include thousands of emails that must be read, reviewed and (if necessary) redacted. The current model for filling these requests involves multiple steps and an ultimate release of all data at once.

In an interview with Shelby County open records officials, it was learned that the County public records staff recently filled an email request in under two months that included 30,000 emails. They achieved this feat through technology that may be superior to the City's, but equally important, by providing the information to the requestor in batches of 500 emails at a time.<sup>7</sup> This allowed the requestor to review the emails on a "rolling" basis rather than combing through thousands of documents at one time. Additionally, by adopting this model, the opportunity to reduce workload may be possible. A requestor may find what s/he is looking for in fewer documents than requested allowing staff to end the job without reviewing all documents. Moreover, responding in a rolling manner demonstrates customer service and a commitment to meeting the needs of the requestor and avoids the appearance of stalling or trying to "wait out" the requestor in hopes the request will go away.

## **C. *Compilation of requested data***

Without a doubt, state law explicitly states that Records Custodians must only produce existing records and are not required to create new records or compile records in a format that does not currently exist.<sup>8</sup> Giving the benefit of the doubt to the Legislature, it is assumed this provision is meant to decrease the workload of Records Custodians and prevent members of the public from demanding certain formatting that could be time-consuming or require technology beyond what is available in some government agencies.

The law, however, does not forbid the creation of records or manipulation of data for the purpose of formatting. Therefore, with a customer service mindset, Records Custodians, City Attorneys and others involved in the gathering of public records should on a case-by-case basis attempt to reach agreement with requestors regarding formatting and summarizing data sets and other records as often as practicable.

City finance data (pensions, investments, refinancing, health plans, etc.) can be very complicated as can many policy and personnel issues. Simply turning over data without an understandable format or sufficient explanation leaves the data completely open to misinterpretation and the dissemination of misinformation. It is in the best interest of the

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<sup>7</sup> April 6 meeting with Shelby County CAO, Harvey Kennedy, Chief Administration Attorney, Marcy Ingram, and Public Records Attorney Megan Smith.

<sup>8</sup> Tennessee Code Annotated 10-7-503 (B) (4)

public and the City that information expected to be published or broadcast be understood and accurately reported.

### **3. Improving the process for obtaining public records**

#### ***A. Decentralize the request process, but maintain centralized tracking***

The online system

([www.memphistn.gov/Government/LawDivision/PublicRecordsRequest.aspx](http://www.memphistn.gov/Government/LawDivision/PublicRecordsRequest.aspx)) to allow requests for public records can be a convenient way for citizens to request records and allows requests to be tracked by both the requestor and the City. However, the current effort to drive most if not all requests through the online system is actually less efficient in filling requests.

As referenced, direct contact between requestors and Records Custodians in various divisions could speed up the process of filling requests. Custodians will need to be trained on the tiered system for information previously described, know what information is readily available in their areas and be willing to respond with a customer-friendly attitude. If the information is a Tier 2 or Tier 3 and requires City Attorney review, the custodian can make the request on behalf of the citizen through the online system or demonstrate to the citizen how to establish their own account. In any scenario, the Records Custodian should enter the information into the system for purposes of tracking and to show that the request is pending or filled.

#### ***B. Eliminate requirement for showing I.D.***

The current online system for requesting records requires requestors to upload a scanned copy of an approved I.D. Not every citizen has access to scanning capability and in this age of identity theft uploading one's I.D. is intimidating. The purpose of this requirement is to prevent filling requests for out-of-state requestors, which do not have a right to public records per state law. However, the barrier to legitimate Tennesseans is greater than the number of out-of-town requests that might actually be filled. An out-of-towner with some ingenuity is likely to be able to find a Tennessean to request the data anyway. The City should remove this impediment.

#### ***C. Educate requestors about available information on the City website and keep the information up-to-date***

Recently, a reporter requested a Request for Proposal that had been issued in the month of March. The request was made according to shared email at around 2 PM. After being passed from the Public Information Officer (PIO), to the City Attorney, to the Police, back to the City Attorney and the PIO, the reporter located the information on the home page of the



City's website.<sup>9</sup> ALL city employees need to be knowledgeable about what information exists on the city website. The Executive Order from 2009 should be reviewed to ensure that all information named in that order is in fact on the website and that it is current. Those responsible for posting current information should be held accountable for keeping it fresh. A special effort should be made to educate the media about available data on the website.

In the subsequent section on *Technology*, a data portal for public information will be addressed. Whether or not the City moves forward with a data portal, in the interim the City's website should become a primary source for public records as the 2009 Executive Order intended.

**D. *Don't charge for labor costs***

Historically, the City Council has been unwilling to support a resolution to establish fees for labor required to produce public records. More fundamentally, maintaining an open and transparent government comes with a cost and labor associated is just the price of doing business. Equally compelling is that taxpayers have essentially already paid for the labor through their property and sales taxes that fund the salaries of City government employees. The fact that some use the services of public records staff more frequently than others is basically no different than one taxpayer who uses Poplar Avenue daily and another who never uses that route. Both must pay for the maintenance of this important City thoroughfare. However, each citizen should receive an "invoice" detailing the expenses incurred for filling the request and the costs of those requests should be posted for the public to review. Open records and transparency is definitely a two way street and the costs will serve to encourage citizens to be more specific in their requests.

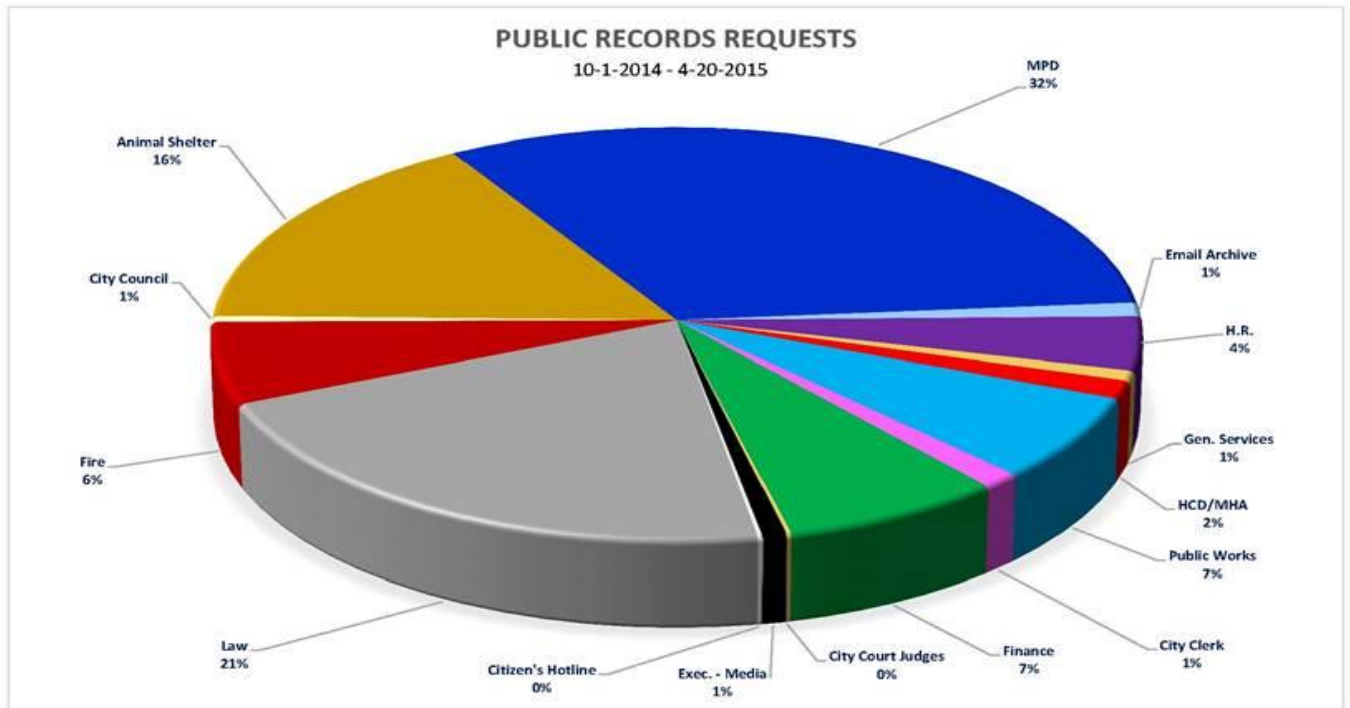
**4. Upgrade public records technology**

**A. *Continue with plans to replace email archiving platform with Microsoft Office 365, but explore emerging technology to facilitate redaction***

As shown in the graph provided by the City Attorney's office, requests for emails comprise only 1% of all PRRs. However, a single request for emails to or from a public official in a given period of time can produce thousands of emails and an estimate of three times that amount if needed in hard copy. With technology playing a larger role every day in the conduct of government business, it is logical to assume that these requests will increase.

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<sup>9</sup> April 9, 2015, Email string that included Jody Callahan, Commercial Appeal Reporter, Dewanna Smith, Public Information Officer, Sergeant Alyssa Macon-Moore and Mayor A C Wharton.



SOURCE: Memphis City Attorney's Office

Under the current process, an email request requires a search of the archive provided by CGS. The search function is relatively robust, but once the emails are identified the difficulty begins for public records staff. Each email must be reviewed for confidential information exempted by the public records law. If that information is discovered, then the information must be redacted before it can be provided to the requestor. Presently, the emails are converted to .PDF format, which averages about 30 conversions per hour using the current software. This can take many hours with some of the actual requests totaling 5,000 and 13,000 emails. Once converted to .PDF, they are reviewed by attorneys, paralegals, a senior clerk and sometimes clerical staff depending on the size of the request. Using Adobe Acrobat Pro, staff then utilizes the redaction tools in the software to redact confidential information – a long and tedious process.

After recent discussions with Deputy City Attorney Regina Newman and Chief Information Officer Brent Nair, it was believed by Information Services (IS) staff that the CGS platform could not only archive emails, but also allow for redaction in an email format (.Eml) avoiding the need for conversion and the use of Adobe Acrobat tools. A demonstration was held Monday, April 20<sup>th</sup> and included representatives from IS, the City Attorney's office, CAO

George Little, Deputy CAO Maura Sullivan and by phone technical support from CGS. In short, the demonstration failed to produce the needed results. As known, the search for emails proved successful, but the system would only allow the deletion of confidential words from the email, thus creating a new, edited email, not a redacted email as required by law. The system also only allowed a screen full of emails to be selected at one time for conversion to .PDF, rather than allowing all emails to be selected for conversion at once. Add to this failed demonstration the fact that the CGS archiving system remained down or unreliable as documented by the City Attorney's office from March 19, 2014 to March 5, 2015, thus delaying the completion of some large email requests.<sup>10</sup>

In the FY 16 budget IS has proposed utilizing Microsoft Office 365 city-wide for a variety of reasons related to greater functionality. An advantage is that Office 365 can archive the City's email and contains functionality that allows all searched emails to be converted to .PDF at one time. This is clearly a time-saver, but does not address the need to redact the documents in a .PDF format after conversion. To address this issue and further make the process more efficient, the City should explore options for software or platforms that allow redaction in an .Eml format. According to the IT staff at the Sunlight Foundation, they are unaware of any email archiving system that also includes a redaction function within the .Eml format. My own research found a company called **Intradyn** that is used widely for email archiving, but in February of 2015 announced the ability to redact within the .Eml format.<sup>11</sup> There also exists redaction software that may be compatible with Office 365's archiving and search platforms known as **RapidRedact**. Because of the expected increase in email requests, City IS should investigate these and other solutions for **this** budget cycle.

#### **B. Launch a dedicated public records data portal**

At the end of 2009 and in the early months of 2010, the Wharton Administration via Executive Order 01-2009 caused an unprecedented amount of information to be loaded on to the City's website. That data included "commonly used city forms and documents," employee salaries and benefits, all executed contracts, listing of all city contractors, listing of all city properties, bonded indebtedness of the City, value and details of the pension fund and the City Charter. Much of this information is still online and current. Other information is not online or is out of date. Other than the list of open RFPs and bids, which are on the City's homepage, most of the referenced information is difficult to find, unintuitive about where it is located and requires multiple click-throughs and a keen eye to locate. In a recent appointment with a member of the print media who covers City Hall, I learned that he calls the Director of Human Resources, Quentin Robinson, when he wants to know a salary of an employee. The reporter was unaware of the information being posted online.

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<sup>10</sup> On April 20, City Information Services, City Attorney's Office, CGS Technical Support and the Chief Administrative Officer participated in a demonstration of the archiving, search and redaction capabilities of the CGS platform currently used for public records requests.

<sup>11</sup> [www.prweb.com](http://www.prweb.com), Intradyn Introduces New Redaction Technology to Balance Full Disclosure with Security, February 9, 2015

The ideal scenario to reduce time of public records staff and make government more transparent would be the creation of a Public Records Data Portal. This specific data portal would be separate from the City website, but certainly linked to the City website. All public information contained on the City website and referenced in the 2009 Executive Order would be transferred to the data portal and organized in an intuitive and easily discoverable format. Each City division at the urging of the Mayor, CAO and proposed Ombudsman would compile bulk information that could be helpful to the public or that should be known by the public to include in the data portal. All of this information would be devoid of confidential or exempted material and classified as Tier 1. Finally, any public records requests filled by staff would be posted in the data portal post-delivery to the requestor. The theory behind posting requested information is that others are likely to want the same information or a portion of that information at various points in time and by posting, staff would not have to reproduce the information.

Examples of Cities with data portals include Nashville at [www.data.Nashville.gov](http://www.data.Nashville.gov), Austin, TX at [www.data.austintexas.gov](http://www.data.austintexas.gov) and Oakland, CA at [www.data.oaklandnet.com](http://www.data.oaklandnet.com). All three sites have advantages and disadvantages. Each provides enormous amounts of easily searchable information relevant to media and the public.

In discussions with Doug McGowen in the Office of Performance and Innovation and City Chief Information Officer, Brent Nair, it was learned that the City is working to launch a dashboard of Key Performance Indicators that are based on current data and allows citizens to “drill down” to better understand the trends. A data portal for public records could go hand in hand with the City’s forthcoming dashboard.

**C. *Apply for Support from the Bloomberg Philanthropies and Sunlight Foundation initiative What Works Cities***

Coincidentally, on April 20, 2015 Bloomberg Philanthropies and Sunlight Foundation announced an initiative called *What Works Cities*. The initiative is targeted at medium-sized cities (under 1 million) that want to ensure that data works for its citizens, according to the release. Cities who obtain the help will be connected with technical assistance, expertise and learning opportunities to drive better decision-making. More information on the initiative can be found at [www.whatworkscities.org](http://www.whatworkscities.org). The dashboard, potential data portal and the upcoming use of police body cams (to be discussed subsequently) make Memphis a prime candidate for the kind of support the City needs to be truly transparent and data-driven in its decision-making.

#### **D. Adopt the Sunlight Foundation's Open Data Policy Guidelines**

As stated in a recent press release, The Sunlight Foundation is “a national nonprofit, nonpartisan organization that uses the tools of civic tech, policy analysis and original reporting to promote more transparency and accountability in our government and our politics.” Sunlight has published a list of 31 guidelines to inform government policy-making around open data. The guidelines are too numerous to list in this report, but can be viewed or downloaded at <http://sunlightfoundation.com/opendataguidelines>. Some of the guidelines include recommendations made in this report such as Proactively Releasing Government Information Online, Creating a Public, Comprehensive List of All Information Holdings, Appropriately Safeguarding Information and Providing Comprehensive and Appropriate Formats for Varied Uses.

### **5. Memphis Police Department**

#### **A. *Make all police incident reports available within 48 hours regardless of whether there is an ongoing investigation***

Public records as it relates to the Memphis Police Department (MPD) is in a separate category for this report because law enforcement agencies enjoy a more liberal interpretation of exemptions under state law as it relates to public records. It should be noted that most of those exemptions are not listed in the Tennessee Public Records Act. Instead, law enforcement exemptions for the most part have come from case law and criminal rules of procedure. The most common referenced exemption is Rule 16 (a) (2) of the Rules of Criminal Procedure. The rule was designed to protect certain notes, witness statements and internal memos that might give the prosecution or defense an unfair advantage at trial.<sup>12</sup> The rule is often cited as a legal reason for denying a public records request. A recent case involving the highly-publicized rape trial of Vanderbilt University football players has led to a lawsuit by *The Tennessean* and a statewide media coalition over the release of third party information provided to the police and prosecutor.<sup>13</sup> This information is being withheld from the media under claims it is covered by Rule 16 (a) (2). In Chancery Court, the court ruled for the plaintiffs, but the Appeals Court overturned Chancery in a split decision. The case is now at the State Supreme Court and expected to be decided this summer. The outcome could solidify or dramatically change how law enforcement handles information it deems investigative.

The point of mentioning a complex issue like Rule 16 (a) (2) is that it should have no bearing on whether or not the public can receive a basic police incident report. Interviews conducted in preparation for drafting the recommendations in this report revealed that there is inconsistency in how long it takes to get an incident report and that sometimes

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<sup>12</sup> “Keys to Open Government: A Guide to Tennessee’s Open Records and Open Meetings Laws,” by Frank Gibson and Deborah Fisher, Tennessee Coalition for Open Government, 2015.

<sup>13</sup> *The Tennessean*, “Judge Rules Some Vanderbilt Rape Case Records are Open,” by Tony Gonzalez.

reports are not available because the matter is under investigation. An incident report is the basic information filed by the responding officer. These reports include the date and time of the incident, the subjects involved, the type of criminal activity alleged, the location, demographics of the parties involved, charges filed by police and a brief narrative by the officers on scene. Incident reports provide minimal detail, avoid information that could impact an ongoing investigation and should be readily available once filed by the officer. Ideally, these reports should be put online to improve accessibility by the media and the public.

**B. *Internal Affairs (IA) investigations should be made fully public to instill public trust***

In a publication of the International Association of Chiefs of Police entitled *Best Practices Guide, Internal Affairs: A Strategy for Smaller Departments*, the author states:

“I prefer to make files (except medical information) available to the public.” “...I never had anyone but the press request reports and I never suffered negative repercussions from permitting it.”

While MPD is not a “smaller department,” it’s not among the largest in the country and the principle of openness and transparency is still salient. Unless, ultimately charged with an administrative or criminal violation, a cloud hangs over IA investigations when details are not made public. It breeds distrust and doubt regarding whether or not a cover up or conspiracy exists. While it may benefit the accused officer in the short term to be shielded from media scrutiny, the officer and the department suffer irreparable damage to their reputations over the long term. Additionally, officers are essentially public officials and a higher level of scrutiny and diminished level of privacy comes with the job.

**C. *Involve the Tennessee Bureau of Investigation (TBI) in investigations only as a last resort***

Clearly, The Tennessee Bureau of Investigation has resources and expertise that can benefit investigations, especially officer involved incidents where a perceived conflict could be present. However, the state Public Records Act explicitly exempts all TBI investigative files from public disclosure meaning once the TBI assumes responsibility for the investigation the media and the public can never fully know the details of a case.<sup>14</sup>

To keep the record open, MPD should look to Internal Affairs, other law enforcement agencies with jurisdiction or consider a special prosecutor appointed by the District Attorney General to investigate. Even if the investigative details are withheld for a period of time, they would still be ultimately available to the public, media and effected parties.

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<sup>14</sup> Tennessee Code Annotated 10-7-504 (2) (A)

**D. Utilize a steering committee including media and citizens to develop a coherent policy of the release of Body Cam footage**

This committee could be the same oversight committee (PROC) as referenced in the beginning of the report or a separate committee. Specific recommendations for body cam footage have been temporarily avoided in this report until MPD establishes other critical policies involving the use of this technology. MPD is working with a consultant and awaiting responses to an RFP to provide the body cams. However, some of the following questions must be answered: When should the camera be turned on? Should it be officer-activated or automatically activated based on some specific event? Should it ever be turned off? Should victims and witnesses be video recorded, audio recorded only or not recorded, instead only interviewed by the officer? What should the officer do with the footage at the end of a shift? Where should footage be stored? How much should be kept? How long should it be maintained? These are just some of the questions that must be answered before public access can be addressed.<sup>15</sup> Public access should be addressed in tandem with the policies developed regarding these issues. MPD, of course, should look at the different policies of similar departments, but in the interest of balancing individual privacy with the public's right to know the American Civil Liberty Union issued a highly-relevant white paper entitled *Police Body-Mounted Cameras: With Right Policies in Place, a Win For All*.

**E. As much as legally possible, all recommendations in this report must apply to Memphis Police Department**

There is an obvious separation or disconnect between MPD and the rest of City government. A different website, separate policies and the appearance of a police director with more autonomy than other directors gives one this appearance. Some of this separation may be justified, but in regard to public records, MPD should go beyond what the law requires and set a standard of transparency for the rest of City government. In this day of Ferguson, Baltimore, Tulsa and many, many other incidents of alleged police misconduct, MPD must hold itself to the highest standards of transparency to demonstrate the honesty and integrity with which the vast majority of officers operate. Therefore, it is critical that MPD be subjected to the same recommendations outlined throughout this report as permitted by law.

**6. Training**

**A. Partner with local media representatives to develop comprehensive, customer-focused training for City employees, reporters and private citizens**

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<sup>15</sup> "Police Body-Mounted Cameras: With Right Policies in Place, a Win for All," by Jay Stanley, ACLU Senior Policy Advisor, October 2013.

While trainings have been conducted and are conducted by various entities across the state, these trainings typically focus on what the Tennessee Public Records Act explicitly allows and prohibits. Many in City government and the media understand these basics. In a customer service context, employees fail to realize what they *can* do and media fails to realize what the employees can't or shouldn't do.

A joint curriculum developed locally by City and media representatives would address the law, the City's process, what exemptions must be adhered to, what employees can do but don't have to do, what information is available online and how to make specific, narrow requests to speed the process of receiving the data. While the City and the media will have legitimate disagreements on some issues like Rule 16 (a) (2), those can be pointed out, not dwelled upon and the areas where agreement exists maintained as the focus. The curriculum should be delivered multiple times a year, by both City officials and media representatives and to a "mixed" audience of reporters, City employees and citizens, so each can gain a greater understanding of the issues faced by all sides. This training, if successful, would be a statewide model.

## 7. Legal

### ***A. Draft and issue a new executive order reflecting the updates to Public Records policy***

Upon deciding which recommendations to implement, a new, revised Executive Order should be issued. This order should receive more attention than the last and be provided via email or mail to every City employee. The order should outline consequences for failure to abide by the order and serve the public in a customer-focused manner in regard to public records.

### ***B. Ask the City Council to pass an ordinance adopting these recommendations***

While the Mayor can order most of the recommendations via executive order, there should be a united front to ensure swift and effective implementation. Regardless of election year politics, each Councilmember and the Mayor should acknowledge the public's right to know and take the strongest steps possible to enforce these policies.

## **Conclusion**

I want to recognize and thank all of those from City government, local media and state and national non-profits who agreed to be interviewed. All participants were direct and clear in their opinions on this matter and won't agree with all of the recommendations contained in this memo. However, I think it is safe to say that each involved has a genuine desire to "get it right" and understands that this issue is complex and filled with potential areas of disagreement.



Mayor, it has been my pleasure to serve my community at your request and hope that at a minimum the revelations of and suggestions from this report spark a sense of obligation among all parties to see that our City government is demonstrably transparent and accessible to those it serves.

## A Listing of Those Interviewed for this Report

Herman Morris	City Attorney	City of Memphis
Regina Morrison Newman	Deputy City Attorney	City of Memphis
Maya Siggers	Senior Attorney	City of Memphis
George Little	Chief Administrative Officer	City of Memphis
Maura Sullivan	Deputy Chief Administrative Officer	City of Memphis
Toney Armstrong	Director of Police Services	City of Memphis
Zayid Saleem	Senior Attorney	Memphis Police Department
Louis Brownlee	Officer	Memphis Police Department
Dewanna Smith	Public Information Officer	City of Memphis
Brent Nair	Chief Information Officer	City of Memphis
Doug McGowen	Office of Performance and Innovation	City of Memphis
Harvey Kennedy	Chief Administrative Officer	Shelby County Government
Marcy Ingram	Chief Administration Attorney	Shelby County Government
Megan Smith	Senior Attorney	Shelby County Government
Louis Graham	Editor & Chief	<i>Commercial Appeal</i>
Bruce Van Wyngarden	Editor	<i>Memphis Flyer</i>
Bianca Phillips	Reporter	<i>Memphis Flyer</i>
Toby Sells	Reporter	<i>Memphis Flyer</i>
James Overstreet	Managing Editor	<i>Memphis Daily News</i>
Bill Dries	Senior Reporter	<i>Memphis Daily News</i>
Tracy Rogers	Vice President & General Manager	WMC-TV
Ron Walter	President & General Manager	WREG-TV
Bruce Moore	News Director	WREG-TV
Deborah Fisher	Executive Director	Tennessee Coalition for Open Government
Lucian Pera	Attorney	Adams & Reese & Counsel to the <i>Commercial Appeal</i>
Emily Shaw	National Policy Manager	The Sunlight Foundation
Lavita Tuff	Senior Policy Analyst	The Sunlight Foundation
Joe Saino	Private citizen and regular requestor of Public records	

*In addition to these personal interviews, research for this memo included the following: A review of online policies of numerous cities, review of website and data portals, best practice reports and documents from The Sunlight Foundation, Tennessee Coalition for Open Government, American Civil Liberties Union, International Association of Chiefs of Police, substantial numbers of email correspondence and data from the City Attorney's Office. A demonstration of the City's email archiving capabilities was arranged and participated in by City IS, City attorney's office, the CAO's office and representatives from the vendor. Finally, other media outlets in the city were asked to participate, but were unable.*

## **Summary of Recommendations**

### **1. Leadership & Oversight**

- A. *Relocate Open Records responsibility from Law Division to Executive Division*
- B. *Appoint an Open Records Ombudsman to oversee the process and resolve disputes*
- C. *Appointment of Open Records Oversight Committee*
- D. *Reassignment of All Records Custodians*

### **2. Dissemination of Information**

- A. *Tier information on the basis of confidentiality*
- B. *Rolling Release of Information*
- C. *Compilation of requested data*

### **3. Improving the process for obtaining public records**

- A. *Decentralize the request process, but maintain centralized tracking*
- B. *Eliminate requirement for showing I.D.*
- C. *Educate requestors about available information on the City website and keep the information up to date*
- D. *Don't charge for labor costs*

### **4. Upgrade public records technology**

- A. *Continue with plans to replace email archiving platform with Office 365, but explore emerging technology to facilitate redaction*
- B. *Launch a dedicated public records data portal*
- C. *Apply for Support from the Bloomberg Philanthropies and Sunlight Foundation initiative What Works Cities*
- D. *Adopt the Sunlight Foundation's Open Data Policy Guidelines*

### **5. Memphis Police Department**

- A. *Make all police incident reports available within 48 hours regardless of whether there is an ongoing investigation*
- B. *Internal Affairs investigations should be made fully public to instill public trust*
- C. *Involve the Tennessee Bureau of Investigation (TBI) in investigations only as a last resort*
- D. *Utilize a steering committee including media and citizens to develop a coherent policy of the release of Body Cam footage*
- E. *As much as legally possible, all recommendations in this report must apply to Memphis Police Department*

### **6. Training**

- A. *Partner with local media representatives to develop comprehensive, customer-focused training for City employees, reporters and private citizens*

### **7. Legal**

- A. *Draft and issue a new executive order reflecting the updates to Open Records policy*
- B. *Ask the City Council to pass an ordinance adopting these recommendations*