

# MEMORANDUM

City Manager's Office



**DATE:** February 4, 2019

**TO:** Mayor and City Council

**THROUGH:** Julie Edmonds-Mares, City Manager

**FROM:** Jennifer Yamaguma, Public Information Officer

**SUBJECT:** Citywide Public Records Act (PRA) Training

A handwritten signature in blue ink, appearing to read "J. Edm".

Recognizing that there are a number of new staff members within the City and with no known date of the last time there was offered, if ever, a training on the California Public Records Act (PRA), a Citywide training was provided in coordination with the City Manager's Office and Christine Wood of Best, Best & Krieger (BBK) on January 23. Two sessions were held - one in the morning and one in the afternoon. The session was also recorded and archived for easy retrieval for those that were unable to attend and also for those that would like to go back to the video to review specific pertinent information. A copy of the Powerpoint presentation is attached to this memorandum for review.

The session was all encompassing and included reference to sunshine laws, including The Brown Act (Government Code § 54950 et seq), the Public Records Act (Government Code §6250 et seq) and the City's Open Governance Ordinance (Milpitas Municipal Code Chapter 310).

Provided below is a general overview of what the training session included:

1. Overview of PRA
  - a. Access to information concerning the conduct of the people's business is a fundamental and necessary right of every person in this state.
  - b. Public writings shall be open to public scrutiny
  - c. Members of the public may inspect or obtain a copy of identifiable public records
2. PRA Lifecycle
  - a. In general, within 10 days the City must respond with:
    - i. Production letter – provides the record(s) and identifies any applicable exemptions
    - ii. Determination letter – tells the requester the date on which they will get the record(s)
    - iii. Extension letter – tells the requester that a determination letter will come within 14 days of the date of the letter
3. PRA Exemptions
  - a. Exemptions from PRA are extremely specific and must be carefully considered.
  - b. Some common exemptions include:
    - i. Personnel, medical records
    - ii. Investigative records
    - iii. Pending litigation
    - iv. Voter information
    - v. Attorney client privileged documents



# MEMORANDUM

City Manager's Office

## 4. PRA Pitfalls

- a. Failing to adhere to statutory timelines
- b. Not properly interpreting the scope of the request
- c. Not identifying all custodians of records
- d. Improperly accessing fees for records

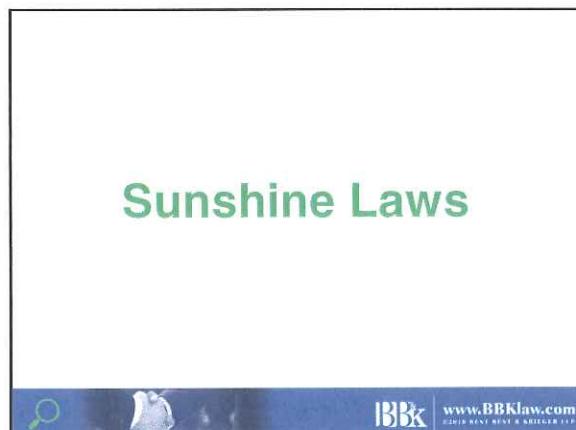
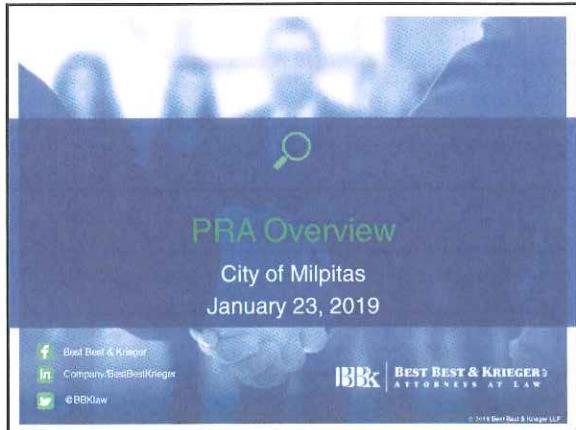
It was reiterated that the PRA defines a writing as "*any handwriting, typewriting, printing, photographing, photocopying, transmitting by electronic mail or facsimile, and every other means or recording upon any tangible thing, any form of communication or representation, including letters, words, pictures, sounds, or symbols, or combination thereof, and any record thereby created regardless of the manner in which the record has been stored.*" This means, all emails, text messages, voicemails, correspondence, reports, photos taken on cell phones, postings on social media, etc. could fall within the PRA and could be subject to disclosure. This is true regardless of if the device in which the record was created or saved was done so on a Milpitas-issued device/account or personal device/account.

In general, the following 4-part test may assist in the determination of defining a public record:

- (1) a writing
- (2) with content relating to the conduct of the public's business
- (3) prepared or
- (4) owned, used, or retained by any state or local agency.

Lastly, we reviewed best practices when it comes to PRA's, most importantly to be consistent, thorough and to have meticulous record-keeping habits and supporting policies.

This citywide training was the first of a multi-phased PRA initiative, and staff within the City Manager's Office intend to continue efforts with the City Attorney's Office, City Clerk's Office and Information Services to define a centralized database for record keeping of PRA requests received citywide, as well as updating certain policies, including, the records retention schedules, email and social media policies, and incorporating a website portal for full transparency of requests and records that are disclosed. Staff intends to present to Council updated email and social media policies for consideration, as well as an online PRA portal by summer 2019. The updating of the records retention schedules will be a robust project requiring dedicated time and substantial staff resources. Therefore, in order to balance workload, it is anticipated that the undertaking of that portion of the project will be initiated during fall 2019.



## Sunshine Laws

- The Brown Act
  - Government Code § 54950 *et seq*
- The Public Records Act
  - Government Code §6250 *et seq*
- City's Open Governance Ordinance
  - Milpitas Municipal Code Chapter 310



## Overview of PRA



## Overview of PRA

- "access to information concerning the conduct of the people's business is a fundamental and necessary right of every person in this state"
- public writings shall be open to public scrutiny
- members of the public may inspect or obtain a copy of identifiable public records
  - "members of the public" and "public records" are broadly defined
- agencies must assist the member of the public in making a focused and effective request



## Overview of PRA

## PRA Lifecycle – after a request is received...

- within 10 days, the City must respond with
  - **Production letter** – provides the record(s) and identifies any applicable exemptions
  - **Determination letter** – tells the requester the date on which they will get the record(s)
  - **Extension letter** – tells the requester that a determination letter will come within 14 days of the date of the letter



## Overview of PRA

## PRA Lifecycle – after a request is received...

- Reasons that justify a 14-day extension
  - 1) the need to search for and collect the requested records from locations or organizations that are separate from the office processing the request
  - 2) the need to search for, collect, and review a large volume of records
  - 3) the need to consult with another agency having substantial interest in the determination of the request
  - 4) the need to compile data, to write programming language or a computer program, or to construct a computer report to extract data



## Overview of PRA

- Recent & Significant Case Law Interpreting the PRA
  - San Jose v. Superior Court* (2017) 2 Cal.5th 608 - records in personal devices or personal email accounts are public records because to rule otherwise would create an unintended cloak of secrecy around the public's business
  - Marken v. Santa Monica-Malibu USD* (2012) 202 Cal.App.4th 1250 - disciplinary records are public records if the allegation "is well-founded and substantial in nature"
  - LA County Board of Supervisors v. ACLU* (2016) 2 Cal. 5th 282 - attorney invoices for current litigation are privileged communications exempt from disclosure



## Overview of PRA

- The PRA is NOT...
  - a retention policy
  - a destruction policy
  - a privacy policy
  - a usage policy



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## Overview of PRA

- Disclosure has become a heavy burden
  - Includes personal devices and accounts (*San Jose*)
  - Introduces the threat of Civil Discovery (*City of Los Angeles*)
  - Accounts for unpredictable attorneys' fees (*Sukumar*)
  - Requires an Enterprise Systems Catalog (Gov. Code § 6270.5)



## Overview of PRA

## Common Exemptions



## Overview of PRA

- Public access to information must sometimes yield to personal privacy interests
  - 76 express exemptions, plus those incorporated by reference
- When records contain both exempt and disclosable information, an agency must redact the reasonably segregable portions of the record, unless the burden of redacting the record becomes too great. (Gov. Code § 6253(a).)



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## Overview of PRA

- Common Exemptions
  - Personnel, Medical Records (§ 6254(c))
  - Investigative Records (§ 6254(f))
  - Pending Litigation (§ 6254(b))
  - Voter Information (§ 6254.4)
  - Tax Payer Information (§ 6254(i))
  - Law Enforcement Records (Penal Code §832.7)
  - 6254(k) exemptions – anything exempt anywhere else
    - Attorney Client Privilege & Work Product
    - Trade Secrets
    - Copyrighted material
  - Catch-all exemption (§ 6255)



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## Overview of PRA

### Pitfalls



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## Overview of the PRA - Pitfalls

- Failing to adhere to the statutory timelines
- Not properly interpreting the scope of a request
- Not identifying all possible custodians of records
- Improperly assessed fees for records



## Overview of the PRA – Pitfalls

#### *Failing to adhere to the statutory timelines*

- Scenario #1
  - You get a PRA request on Friday, December 21st, 2018, at 4:00pm—just before the City closes for the holiday. When is the first communication due to the requester?



## Overview of the PRA – Pitfalls

### ***Failing to adhere to the statutory timelines***

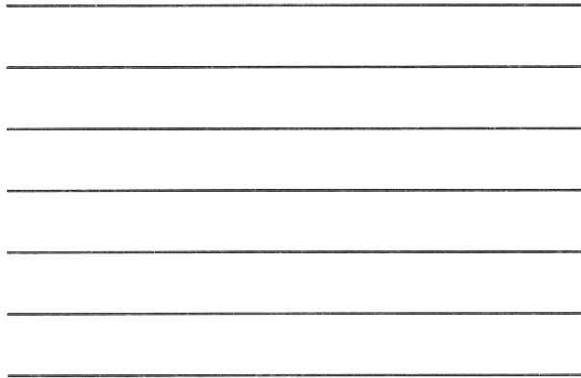
- Scenario #2
  - You get a PRA request sent to your email while you are on vacation. You return to work and see the request on the 9th day after the request is received. Can you take a 14-day extension?



## Overview of the PRA – Pitfalls

### *Not properly interpreting the scope of a request*

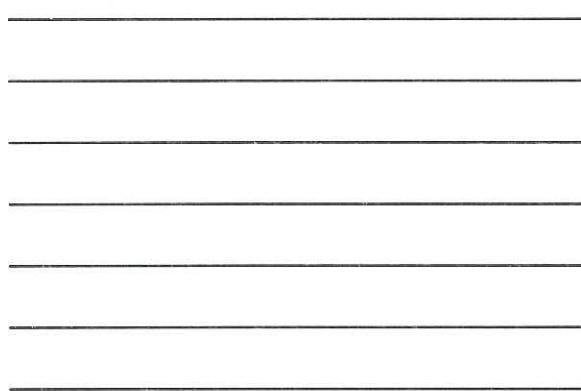
- Scenario #3
  - The request asks for any and all communication related to a recent City Council Resolution. What records do you collect?



## Overview of the PRA – Pitfalls

## *Not properly interpreting the scope of a request*

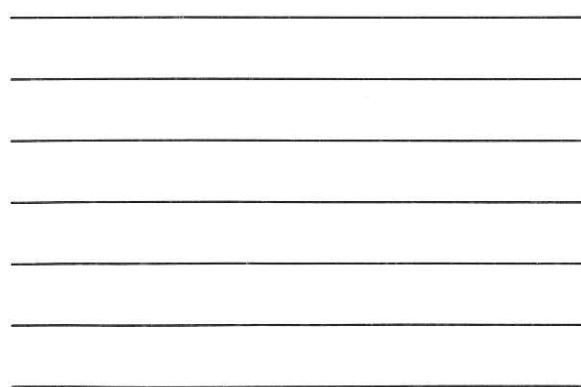
- Scenario #4
  - The request asks for any and all documents related to the settlement in the litigation between *Jones v. City of Milpitas*. What records do you collect?



## Overview of the PRA – Pitfalls

### *Not properly interpreting the scope of a request*

- Scenario #5
  - Identify search terms for the following request...



**EXHIBIT A TO PUBLIC RECORDS ACT REQUEST**

**DIRECTED TO CITY OF MILPITAS**

**December 21, 2018**

The following public records relating to the development of the multi-use apartment building known as District 1 and located at 1315 McCandless Drive, Milpitas, California ("Project") are requested:

1. Any and all communications between the City of Milpitas ("Milpitas") and District 1 Associates, LLC, District 1 Owner, LLC, Lyon Communities Construction, LLC, or Lyon Living Construction, LLC (collectively "Owners") related to the Project;
2. Any and all communications between Milpitas and any of Owners' design consultants relating to the Project;
3. Any and all communications between Milpitas and any of Owners' agents relating to the Project;
4. Any and all of Milpitas' internal communications regarding the Project;
5. Any and all communications with any person that inspected the Project;
6. Any and all documents concerning any Project inspections;
7. Any and all communications between Milpitas and any person related to the Project.

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**Overview of the PRA – Pitfalls**

*Not identifying all possible custodians of records*

- Scenario #6
  - Who has responsive records?
    - what departments?
    - what staff in those departments?
    - former staff? where are those records?

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**EXHIBIT A TO PUBLIC RECORDS ACT REQUEST**

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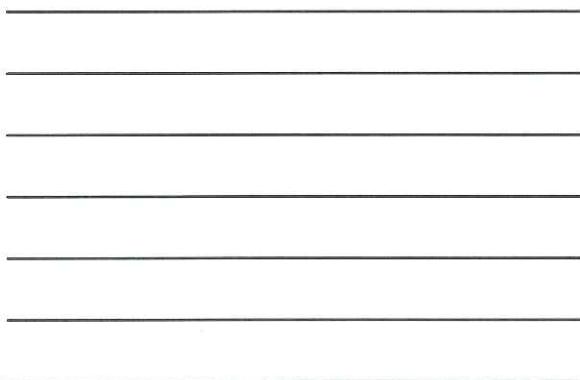
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2. Any and all communications between Milpitas and any of Owners' design consultants relating to the Project;
3. Any and all communications between Milpitas and any of Owners' agents relating to the Project;
4. Any and all of Milpitas' internal communications regarding the Project;
5. Any and all communications with any person that inspected the Project;
6. Any and all documents concerning any Project inspections;
7. Any and all communications between Milpitas and any person related to the Project.

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## Overview of the PRA – Pitfalls

### *Improperly assessed fees for records*

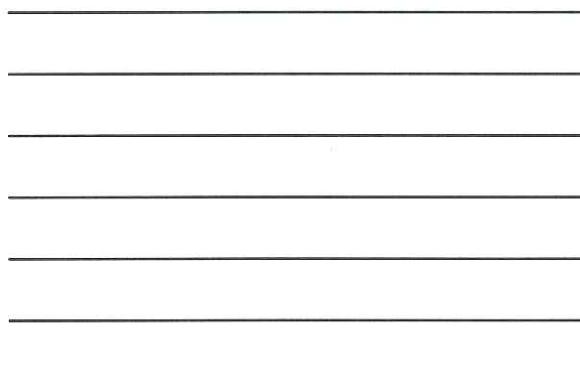
- Scenario #7
  - The request asks for copies of every City Council agenda for the past 15 years. They are online, but the requester wants paper copies. Can you charge for the cost of printing the agendas?



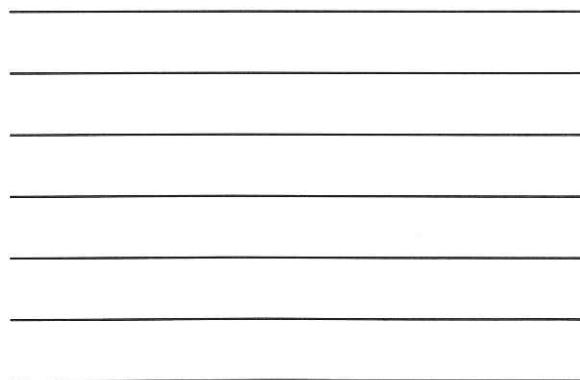
## Overview of the PRA – Pitfalls

### *Improperly assessed fees for records*

- Scenario #8
  - The request asks for copies of credit card statements. They are in paper form and need to be scanned so they can be redacted. Can you charge for the cost of scanning the statements?



## Intro to e-Records



**Overview of ESI...  
in the PRA context**

A writing is defined as "any handwriting, typewriting, printing, photostating, photographing, photocopying, **transmitting by electronic mail or facsimile**, and every other means of recording upon any tangible thing any form of communication or representation, including letters, words, pictures, sounds, or symbols, or combinations thereof, and any record thereby created, **regardless of the manner in which the record has been stored**".

(Gov. Code § 6252(g))

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**Intro to e-Records**

A local attorney and civic activist, sought communications from the Mayor, council members and staff concerning a local development project which had been developed with private and public money. His request under the Public Records Act explicitly sought "voicemails, emails and texts messages sent or received on private electronic devices" of these officials and employees.

(Source: *San Jose* (2017) 2 Cal.5th 608)

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**Intro to e-Records**

The City produced some documents, but took the position that "since the City does not prepare, own, use or retain [the language of the PRA] any record created by the Mayor, members of the City Council or their staff using any type of personal digital assistant, those records are not public records."

(Source: *San Jose* (2017) 2 Cal.5th 608)

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## Intro to e-Records

**California Supreme Court decision**

“Here, we hold that when a city employee uses a personal account to communicate about the conduct of public business, the writings may be subject to disclosure under the California Public Records Act (CPRA or Act).”

(Source: *San Jose* (2017) 2 Cal.5th 608, 614)


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## Intro to e-Records

**Public Record Defined → 4-part test**

(1) a writing

(2) with content relating to the conduct of the public's business

(3) prepared or

(4) owned, used, or retained by any state or local agency

(Source: *San Jose* (2017) 2 Cal.5th 608, 617)


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## Intro to e-Records

**Reasoning**

- a “writing” includes electronic communications (e-mails, texts, and voicemail messages) (at 617)
- the holding extends to employees and elected officials because only the people who serve in agencies can prepare, own, use, or retain any record (at 621)
- public records are retained by the agency even if the writing is in a personal account or device (at 623)
- whether a record substantively relates to the conduct of public's business won't always be clear (at 618)

(Source: *San Jose* (2017) 2 Cal.5th 608)


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## Intro to e-Records

### Factors to Identify Public Records

- the author of the communication
- the recipient of the communication
- the subject matter of the communication
- the content of the communication
- the communication was prepared by an employee within the scope of employment
  - definitely includes elected officials

(Source: *San Jose* (2017) 2 Cal.5th 608, 618)




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## Intro to e-Records

### Court-Cited Policies & Procedures

- prohibit use of personal electronic accounts for official business unless messages are copied or forwarded to an official account ([citing 44 USC. § 2911(a)])
- require that agencies ensure official email messages in employees' personal accounts are preserved in the agency's recordkeeping system ([citing 36 CFR § 1236.22(b)])
- encourage a policy that official emails be preserved in employees' personal accounts as well ([citing *Landmark Legal Foundation v. EPA* (2015) 82 F.Supp.3d 211, 225-226])

(Source: *San Jose* (2017) 2 Cal.5th 608, 628)




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## Intro to e-Records

### Best Practices




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## Best practices

- BE CONSISTENT!!!
- Recognize there are inherent risks in using your personal device.
- Use your District email account whenever conducting district business.
- Don't use text messages to conduct substantive District business.
- If you happen to receive a District-related email in your personal account, forward it to your District account and respond from there.
- Retain communications on your personal device in accordance with the District's document retention policy.




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## Intro to e-Records

### Identifying Public Records




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### Identifying public records

- Factors
  - the author of the communication
  - the recipient of the communication
  - the subject matter of the communication
  - the content of the communication
  - whether the communication was prepared by a District employee doing his/her job




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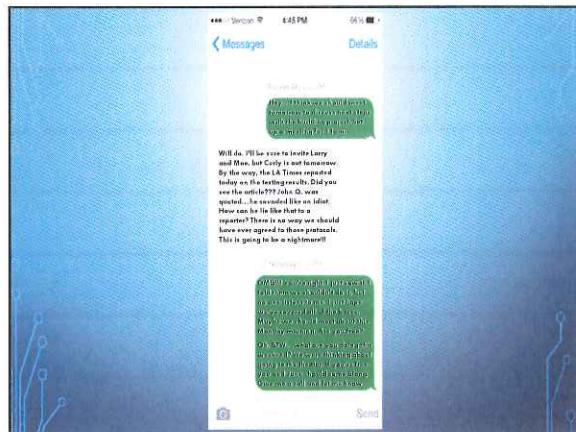
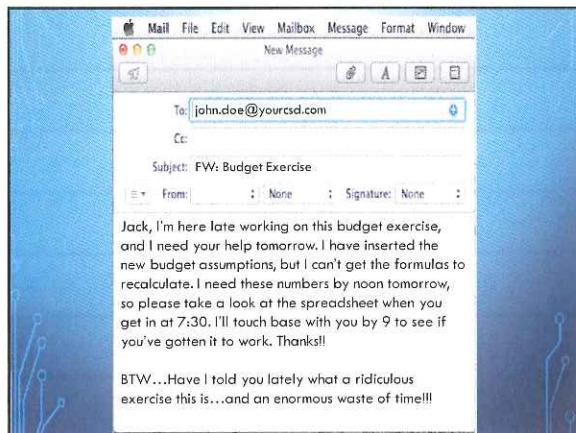
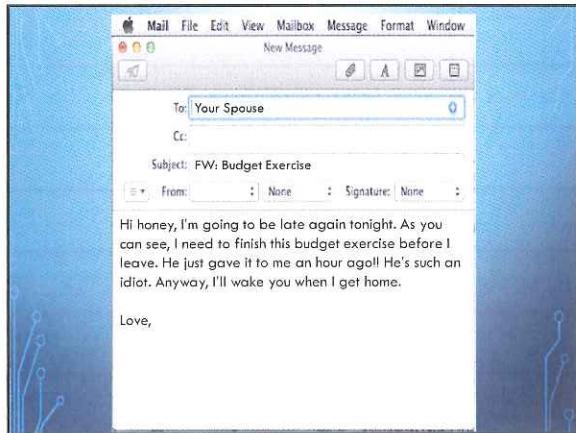
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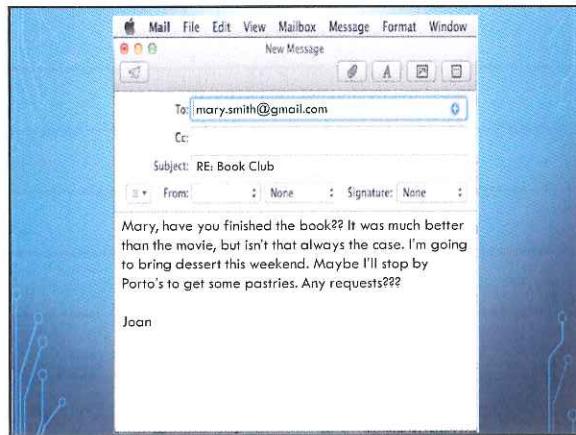
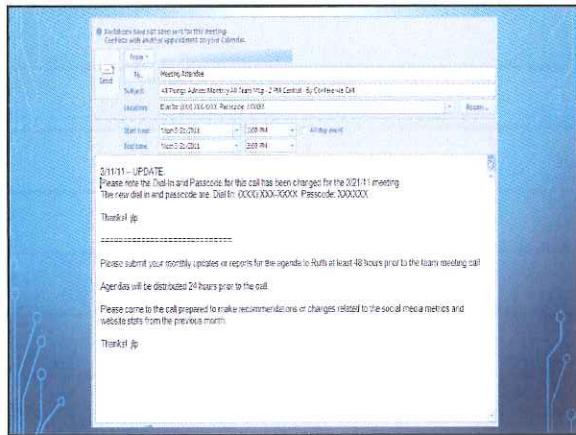
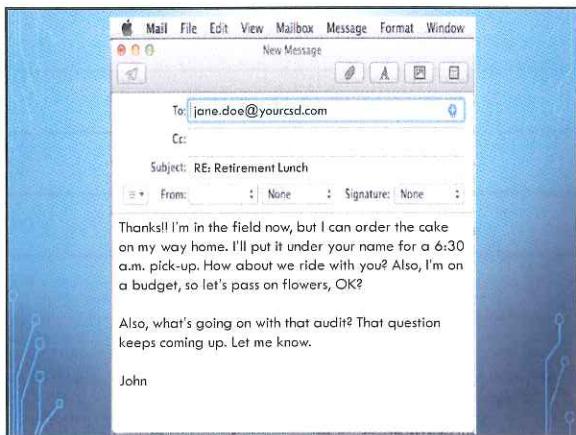


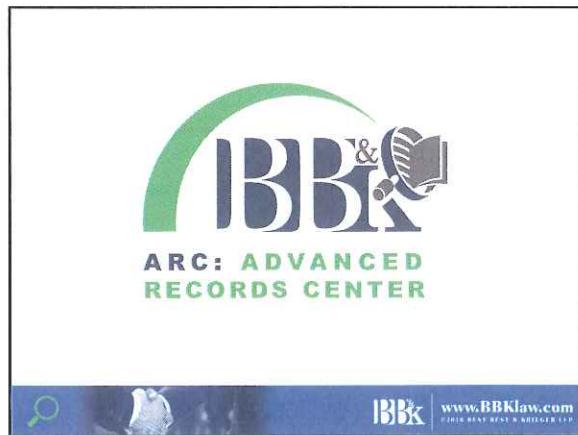
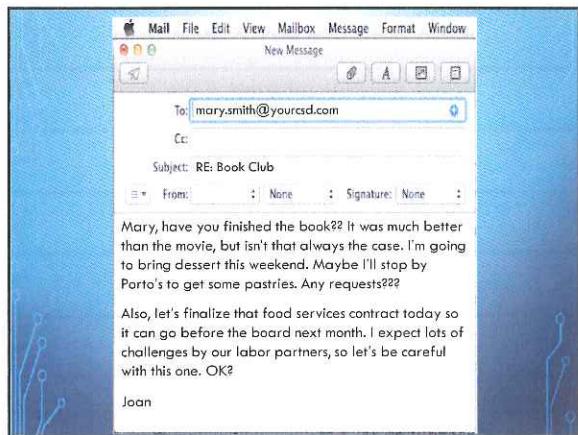
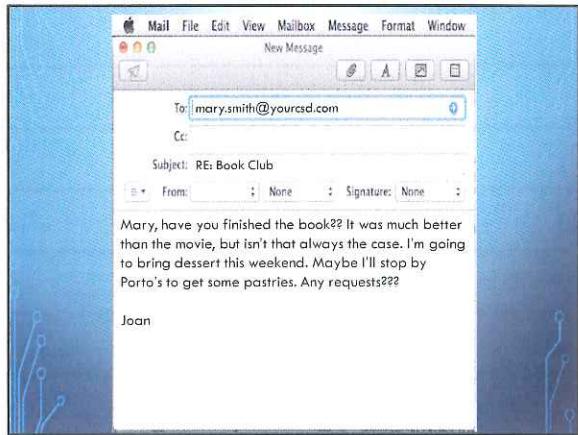
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# Advanced Records Center

# BB&K Resources