



## Memorandum

**TO:** HONORABLE MAYOR  
AND CITY COUNCIL

**FROM:** RICHARD DOYLE  
CITY ATTORNEY

**SUBJECT:** Deliberative Process Exemption  
to the Public Records Act

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### **BACKGROUND**

On January 11, 2006, an email was received by the City and the Agency from the Mercury News requesting: 1) "all records from August 1, 2005 to the present involving expenditures on the San Jose Grand Prix race, including both the July 2005 event and discussions regarding future races"; and 2) "all records reflecting (sic) the city has compiled reflecting the direct revenue and economic impact (sic) the 2005 Grand Prix race." On January 12, 2006, the Public Records request was supplemented by a request for "all records concerning distribution and use of the 2005 tickets the city received through its contract with Canary."

In response to this request, in compliance with the Public Records Policy and protocol adopted by the Council in January, 2004, the City Manager's Office distributed the request to the City Council and all City Departments that would have information related to the Grand Prix. On January 24, 2006, the reporter was provided access to the vast majority of the relevant documents. Thousands of documents were provided and he selected 243 pages to be copied. At that time he was notified that some documents had been withheld as privileged attorney-client communications and some had been withheld under the deliberative process privilege. In addition, to protect the privacy rights of our employees we had redacted names from documents that showed salaries, pursuant to Government Code §6255. The reporter was also notified at that time that due to the absence of some employees their files were not available for review that day, but would be provided shortly.

On January 27, 2006, the reporter sent an email requesting that we identify as specifically as possible the documents withheld on the basis of the deliberative process privilege and to provide redacted versions of the documents. On February 1, 2006, the reporter was provided with the 243 pages of documents he initially requested and on February 3, 2006, he was provided with redacted versions of the documents initially withheld due to the deliberative process privilege.

On April 11, 2006, the Executive Editor of the Mercury News sent a letter to the Mayor and City Council taking issue with the City's assertion of the deliberative process exemption. In response to this letter and Councilmember requests, the Rules

Committee added discussion of this matter to the April 25, 2006 City Council meeting. The Rules Committee asked the City Attorney to provide a memorandum explaining the deliberative process privilege exemption under the California Public Records Act.

## **ANALYSIS**

### A. The Redacted Documents.

Approximately 35 documents were provided to the reporter with redacted information. These documents fall into two general categories: 1) emails from staff to the City Manager, or one of his Deputies, containing information and suggestions as to how to structure the Agreement for the 2006 Race based on the experiences of the 2005 Race and the anticipated requests of the San Jose Grand Prix; and 2) various preliminary drafts of the Council memo which show the comments, suggestions and questions of various executive staff in formulating the Manger's recommendation to Council to approve the Grand Prix Agreement and take other actions.

### B. Status of the Law.

#### 1. California Public Records Act.

The California Public Records Act, which is modeled after the federal Freedom of Information Act, was enacted in 1968 for the explicit purpose of giving the public access to information held by public entities. The Legislature declared in enacting the law that "access to information concerning the conduct of the people's business is a fundamental and necessary right of every person in this state."

The Act provides that all public records must be disclosed unless they fall within one or more of the specified exemptions. The Act also has what is called a "catchall" exemption, which provides that an agency may withhold a public record if it can show the public interest served by not disclosing the record clearly outweighs the public interest served by disclosing the public record.

#### 2. The Deliberative Process Privilege.

The deliberative process privilege is designed to protect the flow of information to the decision maker, as well as the process of decision making itself. The purpose of the privilege is to ensure that the decision makers can be satisfied that all of the information, opinions, thoughts and hunches of their staffs and advisors are available to them to implement the work of governing. Since it is the process of decision making that is being protected, the particular information used in that process, no matter how significant or insignificant, is protected as well.

There have been four published legal decisions holding that the deliberative process privilege outweighed the public interests in disclosure under the balancing test of the "catchall" exception of California Public Records Act. There are no published cases that have held in favor of disclosure.

The privilege as an exemption to the Public Records Act was first addressed in *Times Mirror Co. v. Superior Court* by the California Supreme Court, which framed the issue as follows:

This case arises out of a dilemma inherent in the very nature of a free and open society. An informed and enlightened electorate is essential to a representative democracy. Yet even democratic governments require some degree of confidentiality to ensure, among other things, a candid exchange of ideas and opinions among responsible officials.

In that case, the *L.A. Times* was attempting to obtain access to Governor Deukmejian's appointment calendars. There is no specific exemption under the Public Records Act for such documentation. Looking to federal law, the Court found that there is a deliberative process privilege, similar to the executive privilege under federal law. The Supreme Court concluded that the deliberative process privilege was so important as to outweigh any public interest in disclosing Governor Deukmejian's appointment calendars, even such important interests as determining who is influencing the Governor's decisions.

The next case was *Rogers v. Superior Court* in which a newspaper columnist was seeking telephone records of Burbank City Council members. The City had provided records showing billing information, but redacting phone numbers. The columnist wanted the phone numbers in order to disclose who had access to the Council members. The Court of Appeals found that this case was indistinguishable from the *Times Mirror* case, and that the records were exempt from disclosure under the deliberative process privilege exemption to the Public Records Act.

In *Wilson v. Superior Court*, the *L.A. Times* sued the Governor to disclose applications of people seeking to be appointed to a vacant position on the Orange County Board of Supervisors. The Court of Appeals held that the applications were pre-decisional documents whose sole purpose was to aid the Governor in selecting an appointee, a process that depends upon the comparison of candidates qualifications, experience, political views and professional competency and frank discussion with candidates and advisors thereof.

*California First Amendment Coalition v. Superior Court* had virtually identical facts as the *Wilson* case, and a different Appellate Court also found that the applications for a

temporary appointment to the Plumas County Board of Supervisors was protected from disclosure.

### 3. The Balancing Test.

The above cases make it clear that there exists a deliberative process privilege in California, and that privilege is held in high regard by the courts. However, the existence of the privilege does not mean that documents falling within the privilege are automatically exempt from disclosure under the Public Records Act. The "catch all" exemption requires that the privilege be balanced against the countervailing public interest in disclosure of the documents.

### 4. Proposition 59.

As mentioned in Ms. Goldberg's April 11, 2006 letter, the Mercury News has taken the position that the passage of Proposition 59, a Constitutional Amendment passed by the voters in November 2004, abolished the deliberative process exemption to the California Public Records Act. This position is based on one of the ballot arguments that stated that one of the purposes of the Proposition was to make the deliberative process public. The language of the amendment itself however, specifically provides that it does not repeal any statutory exception to the right of access to public records.

There has been no published decision interpreting Proposition 59. However, in January 2005, when the Mercury News sued the City to release certain emails between the City Manager and the Director of Employee Relations related to a personnel investigation, the Superior Court held that the deliberative process exemption survived Proposition 59. Specifically, the Court found:

Proposition 59 resulted in a constitutional amendment that requires statutes to be broadly construed if they further the people's right of access to information concerning the conduct of the people's business, and narrowly construed if it limits the right of access. ... It does not repeal or nullify, expressly or by implication, any statutory exception to the right of access to public records. ... As a result, the deliberative process privilege has not been eliminated.

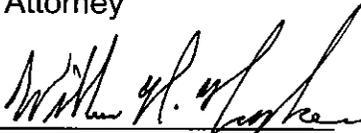
The Sixth District Court of Appeals refused the Mercury News request to review the decision. Therefore, until another court determines otherwise, the deliberative process privilege is still recognized as an important public interest to be balanced against other public interests under the "catch-all" exception to the California Public Records Act.

**CONCLUSION**

The Courts have determined that documents that reveal the deliberative process of executive or legislative decision makers may be withheld from public disclosure under the Public Records Act. The City's current Public Records Policy follows state law in this respect.

The Public Records Act does not require the City to exempt these records from disclosure and because the deliberative process privilege is held by the Council and executive staff, the Council is free to make the policy determination that the deliberative process privilege will not be used to exempt Public Records from disclosure. Careful consideration of the long term effect of this action on the operations and quality of decisions of City government is warranted.

RICHARD DOYLE  
City Attorney

By   
William H. Hughes  
Assistant City Attorney

c: Les White  
Attachment

April 20, 2006

Susan Goldberg  
Executive Editor  
The Mercury News  
750 Ridder Park Drive  
San Jose, California 95190

Re: Public Records Request San Jose Grand Prix  
Your Letter of April 11, 2006

Dear Susan:

We are in receipt of your letter dated April 11, 2006, to Mayor Gonzales and the City Council regarding a Public Records Act request made by the Mercury News in January. In response to that request, many thousands of pages of documents were gathered from Council offices, divisions and departments of the City and provided to your reporter for review, 243 pages of which we copied for him. An additional 35 documents were provided in redacted form. Many of those were duplicates of the same documents held and provided by different people. You take issue with the fact that the deliberative process privilege was cited in explaining the reason for the redactions.

Some, including the Mercury News, dispute the notion that the deliberative process exception still exists after the passage of Proposition 59. However, you may recall that in the recent case of the *San Jose Mercury News v. City of San Jose*, in which your newspaper sued the City to obtain certain emails related to a personnel investigation, the Court held that the deliberative process exception was not eliminated by the passage of Proposition 59. Specifically, the Court found:

"Proposition 59 resulted in a constitutional amendment that requires statutes to be broadly construed if they further the people's right of access to information concerning the conduct of the people's business, and narrowly construed if it limits the right of access. ... It does not repeal or nullify, expressly or by implication, any statutory exception to the right of access to public records. ... *As a result, the deliberative process privilege has not been eliminated.*" (emphasis added)

Susan Goldberg  
Your Letter of April 11, 2006  
April 20, 2006  
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The Sixth District Court of Appeals refused the Mercury News request to review the decision. Therefore, until another court determines otherwise, the deliberative process privilege is still an exemption to the California Public Records Act.

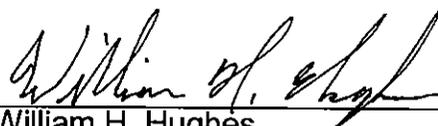
I understand that from the perspective of the press, access to all public records will often outweigh any reasons provided by a public entity not to disclose. The courts however have recognized the importance of allowing decision makers the freedom to "think out loud" without scrutiny in making decisions. As the California Supreme Court has stated, the issue is "whether the disclosure of materials would expose an agency's decision making process in such a way as to discourage candid discussion within the agency and thereby undermine the agency's ability to perform its functions." (*Wilson v. Superior Court*).

The Rules Committee has added an item to the April 25 Council agenda to consider direction to waive the privilege with respect to these particular documents and to refer the issue of what information should be protected under the deliberative process privilege with respect to public records to the Task Force to be established to review several "sunshine" proposals.

Until that policy decision has been made by the Council, it is up to the holder of the privilege, in this case the City Manager, to waive the privilege if he is comfortable that in doing so, he is not discouraging his staff from providing him with the information and advice that he needs to do his job. The City Manager will be reviewing this issue and you will be informed of the result of this review as soon as it is complete.

Very truly yours,

Richard Doyle,  
City Attorney

By:   
William H. Hughes  
Assistant City Attorney

c: Mayor and City Council  
Les White