

ATTACHMENT D

MEMORANDUM

To: Mayor Reed, Rules and Open Government Committee
From: Bert Robinson, San Jose Sunshine Reform Task Force
Re: Balancing Test—Application to City Records

Introduction

As you know, I believe that a balancing test is unnecessary to protect any legitimate interests of the City in nondisclosure of sensitive information. Its absence from Sunshine Ordinances adopted by other cities in the Bay Area, to say nothing of the federal Freedom of Information Act, demonstrate that it simply is not required.

However, you asked for a list of proposed exceptions to the balancing test, should the City decide not to eliminate it. I am providing the attached list in response.

In order to respond to your request, I asked staff for a list of all types of records maintained by the City. Tom Norris provided the City's "Records Retention Schedule." It is a 95-page, single spaced table, listing hundreds of categories of records. Mercury News attorney James Chadwick and I have reviewed it carefully. The one fact that is immediately apparent from examining the Schedule is that the vast majority of the records maintained by the City are either indisputably subject to public disclosure, or covered by a specific exemption in the Public Records Act or the proposed Sunshine Ordinance (in particular, the proposed balancing provision, with its four categories of information subject to exemption—see section 5.1.2.070).

Therefore, it clearly will be much more efficient to identify the relatively small number of records that arguably **should** be subject to a balancing test than to try to list the myriad records that clearly should **not** be. In the discussion below, I have made a special effort to list those "balancing test" records, while also including a general discussion of records for which the test is not needed.

However, my review also indicates that virtually all of the categories identified below as potentially appropriate for balancing could be addressed simply by adding a couple new exemption provisions to the existing balancing test in the proposed Sunshine Ordinance. In particular, an exemption providing balancing for proprietary business information that does not rise to the level of a trade secret, but the disclosure of which could potentially harm the submitting party or deter businesses from providing necessary information, would address many of the potential concerns. Exemptions providing balancing for information that would permit unauthorized access to City financial accounts, computer systems, or facilities and for security/disaster recovery plans would address most of the remaining concerns.

Below, I am suggesting a new approach to the deliberative process issue. I continue to consider it critical that the city abandon its use of the deliberative process exemption, as Milpitas and San Francisco have done, because the exemption undermines the very foundation of open government laws: The deliberative processes of government are precisely what citizens have a

right and a need – indeed, a responsibility – to witness. If there is a vigorous debate among city staffers about the best approach to a controversial issue, that debate needs to be brought into the open so the residents of San Jose can participate in it—not cloaked by a dubious privilege.

I am sensitive to concerns expressed by Rules Committee members about their desire to protect communication within their own offices. However, as the City Attorney has explained—and as confirmed by a recent decision in the City’s litigation with Bay 101—the “mental process” privilege afforded to legislators, such as members of the City Council, already protects the discussions and deliberations taking place within your offices. Sutter’s Place Inc. v. Superior Court, 161 Cal. App. 4th 1370 (2008). The mental process privilege can be distinguished from the broader deliberative process privilege. Taking this protection and the existing exemptions provided by the Public Records Act and the proposed Sunshine Ordinance into account, there are very few records that may merit a balancing test. Those few exceptions are identified below.

Categories of Records

1. City Attorney’s records (1-22): There are specific exemptions that thoroughly protect the City’s interests in records of the City Attorney’s Office. If there are records that aren’t covered by those specific exemptions, they ought to be public, and the balancing test is not appropriate. The City Attorney’s Office has not to date asserted a need for a balancing test with respect to its records. I am informed that the balancing test is not typically invoked by public agencies or applied by the courts to the records of public agency attorneys.
2. City Auditor’s Records (23-30): Anything that may need to be withheld is protected by a specific exemption and so no balancing test is required, with the following exceptions where the balancing test could be employed: Special studies (27), and business license audits (29).
3. City Clerk’s Records (800-823): Nothing in the city clerk’s office should be covered by the balancing test. With only a few exceptions, the records of the City Clerk’s Office are all required to be provided to the public. The few exceptions are covered by express exemptions (for example, Government Code section 6253.5).
4. City Council Records (861-871): Between the “mental process” privilege for legislative representatives (i.e., City Council members) and specific exemptions (for example, the exemption for personal information regarding citizens), there is no need to apply the balancing test to City Council Records, most of which are indisputably subject to public disclosure.
5. City Manager’s Records (528-682): Certain categories of records of the City Manager are clearly subject to public disclosure, specifically Budget Office records (540-579) and Communications records (661-668). No balancing test is necessary or should be applied to these records. The same is true with respect to most of the other records maintained by the City Manager. The exceptions where the balancing test may be appropriate are: Records of interactions with council members (538) and the project files of senior staff (560), and records relating to emergency services.
6. While City staff has asserted a need for a balancing test with respect to personnel records (552-556), the existing provisions of the Public Records Act (Government Code section 6254(c)) already contain a balancing test that protects private information in personnel records.

The provisions of the Public Records Act and the proposed Sunshine Ordinance are more than adequate to protect all legitimate concerns.

7. Citywide General Files (146-573): Most of these categories of records are clearly subject to public disclosure or are covered by specific exemptions. For example, personal information mailing and contact lists (567) would be specifically exempted under the proposed Sunshine Ordinance. Drafts (569) are addressed by the Public Records Act and the Sunshine Ordinance. The only records for which a balancing test may be appropriate are: Routine meeting records (153), general correspondence and communications (154), convenience copies to the extent that the records in such files are copies of records otherwise subject to the balancing test (568), procurement and purchasing records to the extent they contain sensitive financial or business information not otherwise exempt from disclosure (170), department checking accounts to the extent they contain account numbers or other information that could be used to identify or access financial accounts at outside institutions (174, 175), and possibly emergency preparedness records (161).

For the same reasons discussed above, Human Resources records (148-152) are adequately addressed by specific exemptions in the Public Records Act and the Sunshine Ordinance. Exemptions for personal information in the Sunshine Ordinance and for personnel, medical, and similar files in the Public Records Act are also sufficient to address concerns over any private that may be contained in incident reporting and investigation records (573).

8. Economic Development Records (701-719): Proprietary business information submitted by private businesses and included in records covered by categories 701-712 (and perhaps 716) may be appropriate for the application of a balancing test, to the extent that it does not constitute trade secrets (which are already exempt under Government Code section 6254(k)). However, as I mention above, a more transparent and consistent approach would be to craft a specific exemption to cover these records.

9. Finance Records (291-330): Existing exemptions for information required from taxpayers in connection with the collection of local taxes (Government Code section 6254(i)), utility customer records (Government Code section 6254.16), and similar provisions will take care of nearly all concerns. Possible exceptions to which balancing might be applied would be: Unsuccessful bids and proposals (382); banking records (295-296) to the extent they contain account numbers or other information that could be used to identify or access financial accounts at outside institutions; and loan documentation (309) that contains proprietary information of private individuals or businesses.

10. Fire Records (751-783): Records of employee exposures to toxic substances may contain sensitive information, but such information is already governed by the provisions of the Public Records Act and the proposed Sunshine Ordinance addressing personnel, medical, and similar files. The same is true with respect to candidate recruitment files (754 and 755) and paramedic records (765), accident investigation reports (781) and vehicle accident records (782). It may be appropriate to apply a balancing test to fire investigations by the bureau of fire prevention (772).

11. General Services Records (901-909, 331-365): The express exemption in the proposed Sunshine Ordinance, together with existing exemptions in the Public Records Act, are sufficient to address concerns regarding the vast majority of records in this category. For example, one past situation that has been mentioned by City staff is the City's pet license database. That case was decided under the general balancing test in the Public Records Act, and personal

information in that database would still be exempt under the proposed Sunshine Ordinance. DMV records are also the subject of an express exemption under the Public Records Act. There does not appear to be any need for a balancing test with respect to these categories of records.

12. Housing Records (188-203): To the extent that housing records include sensitive personal information, that information would be subject to balancing and exemption under the personal information provision of the proposed Sunshine Ordinance. Proprietary information submitted by business that may appear in some of these categories (209-211) may be appropriate for balancing.

13. Human Resources (461-526): Certain categories of Human Resources records clearly raise privacy concerns: EAP files (469), personnel benefit files (471), personnel files (486 and 487), employee medical files (494), drug test records (505-6), and worker's comp records (523-526). However, all of these categories of records are the subject of express exemptions under the Public Records Act and the Sunshine Ordinance. No balancing test is required to address them.

14. Independent Police Auditor (177-186): To the extent that the IPA's powers are truly investigatory, any information that relates to investigations of complaints regarding identified peace officers is already exempt from disclosure under California law. To the extent they contain personal information provided with an expectation of confidence, there is an express provision in the proposed Sunshine Ordinance to address that. There is no need for a balancing test here.

15. Information Technology (683-693): To the extent that any of these records constitute actual software, they are exempt from disclosure under the Public Records Act. Categories that may be appropriate for balancing are: Usage and monitoring records (683), disaster preparation and recovery plans (685), and hardware and software documentation (687).

16. Library Records (1070-1120): Library registration and circulation records are exempt from disclosure under the Public Records Act. None of the other records in this category require the application of a balancing test.

16. Mayor's Office Records (850-860): As discussed above in connection with City Council records, the "mental process" privilege for legislative representatives and specific exemptions under the Public Records Act and the proposed Sunshine Ordinance (for example, the exemption for personal information regarding citizens), are adequate to protect information in the Mayor's records. There is no need to apply the balancing test.

17. Parks, Recreation & Neighborhood Services (910- 1044): Specific existing exemptions in the Public Records Act and the Sunshine Ordinance would protect most of the categories of potentially sensitive information, such as may be contained in accident records (925), incident reports (926), complaints (927), taxes (928), background checks for potential employees (987), etc. There do not appear to be any categories of records as to which a balancing test is required.

18. Planning, Building and Code Enforcement (580-660): Most of the records in this category are not sensitive. City staff has said that investigative files (589-592) are generally open. However, a balancing test may be appropriate to address unusual circumstances in which sensitive information is contained in files pertaining to particular investigations or

enforcement proceedings. No other code enforcement or planning files should be subject to the balancing test.

19. Police Records (31-106, 341-345, 694-695, 107-145, 696): Police records are already the subject of pervasive statutory exemptions (Government Code sections 6254(f) and 6254(k), Penal Code section 827 et seq., Government Code section 1040, etc.). They are also the subject of specific provisions of the proposed Sunshine Ordinance. There is no need for a balancing test.

20. Public Works Records (601-634): Worker's compensation records (602, 603) and the like are already covered by express exemptions in the Public Records Act. None of the other records in this category requires the application of a balancing test.

21. Retirement Records (1051-1062): Existing specific provisions in the Public Records Act and the proposed Sunshine ordinance are sufficient to protect sensitive information in these records. No balancing test is required.

22. Transportation Records (247-290): With the possible exception of personal or proprietary information in grant applications, nothing in the transportation records should be subject to the balancing test.