

CALIFORNIANS

RULES COMMITTEE: 12-10-08

ITEM: 12e

November 19, 2008

Mayor Chuck Reed and Members
Rules and Open Government Committee
City of San Jose

RE: Government Code Section 6255

Dear Mayor Reed and Members,

It's my understanding that the Committee intends to consider at today's meeting whether or not to abrogate, in its proposed Open Government ordinance, the assertion of the balancing or "catchall" exemption in Government Code Section 6255.

I would encourage you to do so, for Section 6255 is far more useful as a barrier to legitimate public inquiry than to harmful disclosure of truly sensitive information. For a city or other agency to purport to offer the community "reform" of needless secrecy practices while retaining this wild card license ("We can't find a law that makes this information confidential, but we think it should be, so you'll have to sue us, and we bet you won't") would be nothing short of a fraud. Abrogating Section 6255 is not just another element of democratically responsive and accountable open government; it is its keystone.

Section 6255 may have been a prudent safety net when the California Public Records Act was adopted 40 years ago, with little more than a dozen specific exemptions from disclosure. But there are now more than 30 such express authorizations for withholding, plus countless secrecy statutes outside the CPRA which are recognized as exemptions (see Government Code Sections 6254 (k) and 6276-6276.48).

When actually challenged in court and on appeal, Section 6255 is more often than not found an inadequate basis for withholding information. The appellate courts have found the public interest in nondisclosure to be overriding in almost twice as many instances as not, typically because the information sought shed light on how important government programs and policies were operating.

But agencies that value Section 6255 well understand that legal challenges are vanishingly rare, and with good reason. The law allows them simply to recite that the public interest in nondisclosure trumps, without explaining why unless and until they are hailed into court. But even if they give a reason, they can be confident that litigation is the only real test of their rationale, and that all but the most determined and financially capable information seekers will simply walk away. Section 6255 has long since become a ready tactic for frustrating enforcement of the CPRA at will.

Accordingly, Section 6255 abrogation was a key element in my draft of the original sunshine ordinance in San Francisco the early 1990s. It has been in effect there almost 15 years, with no untoward releases of sensitive information resulting, as anyone on the supervising Sunshine Ordinance Task Force (or, for that matter, the City Attorney's Office) can tell you.

Your efforts to adopt more accommodating public information policy than strictly required by state law are unlikely to gain much respect from the public if you insist on retaining the Section 6255 exit from open government, and I urge you not to do so.

Cordially,



Terry Francke
General Counsel