



Memorandum

TO: RULES AND OPEN
GOVERNMENT COMMITTEE

FROM: TOM MANHEIM
Communications Director

SUBJECT: BALANCING TEST &
DRAFTS AND MEMORANDA

DATE: January 29, 2009

Approved

Date

1-29-09

RECOMMENDATION

Retain the balancing test and continue to follow the requirement of the California Public Records Act on drafts and memoranda.

BACKGROUND

At the Rules and Open Government Committee meeting of November 19, 2008, the Committee considered a proposal from the Sunshine Reform Task Force to eliminate the "Balancing Test." The Balancing Test is an exemption in the California Public Records Act (CPRA) that allows the City to withhold disclosure of records only when "the public interest served by nondisclosure clearly outweighs the public interest served by disclosure." The Committee discussed the Task Force's recommendation and heard testimony about the Balancing Test. At the end of the meeting, the Committee asked for information about San Francisco's experience – "where have the fights been?"

Also at the November 19 meeting, the Chair of the Public Records Subcommittee of the Task Force noted that the issues related to the Task Force's proposal on Drafts and Memoranda were similar to the issues related to the Balancing Test and that the Committee should consider both proposals when it returned to discuss the Balancing Test. Under the CPRA, drafts and memoranda are exempt from disclosure if they are not retained by the City "in the ordinary course of business, if the public interest in withholding those records clearly outweighs the public interest in disclosure." Essentially, the City must apply the Balancing Test in every analysis under the Drafts and Memoranda exemption.

The Task Force proposals and staff recommendations for both the Balancing Test and Drafts and Memoranda are attached as Attachment A to this memo.

ANALYSIS

We contacted San Francisco about its Sunshine Ordinance. We learned that over a 20 month

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period, from January 2007 through August 2008, the San Francisco Sunshine Ordinance Task Force held 69 hearings on complaints about public records.

Not one complaint challenged the San Francisco's use of the Balancing Test. This may be because the San Francisco Sunshine Ordinance specifically states that the Balancing Test may not be invoked "as the basis for withholding any documents or information requested under [the San Francisco Sunshine Ordinance]." (San Francisco Sunshine Ordinance, Section 67.24(g).) In addition, it is difficult to obtain any information from San Francisco representatives that may be critical of the Sunshine Ordinance because of the following provision in the ordinance:

It is the policy of the City and County of San Francisco to ensure opportunities for informed civic participation embodied in this Ordinance to all local, state, regional and federal agencies and institutions with which it maintains continuing legal and political relationships. Officers, agents and other representatives of the City shall continually, consistently and assertively work to seek commitments to enact open meetings, public information and citizen comment policies by these agencies and institutions, including but not limited to the Presidio Trust, the San Francisco Unified School District, the San Francisco Community College District, the San Francisco Transportation Authority, the San Francisco Housing Authority, the Treasure Island Development Authority, the San Francisco Redevelopment Authority and the University of California.

Since San Francisco representatives must promote the Sunshine Ordinance, they have been unwilling to make any comments that are critical of it.

CONCLUSION

We cannot make any conclusions about San Francisco's experience. We do know that the San Francisco Sunshine Ordinance specifically states that the Balancing Test may not be invoked. We also know that representatives of San Francisco are required to promote the Sunshine Ordinance.

We continue to believe that the City must have the flexibility to rely on the Balancing Test when a specific exemption does not apply. Although the San Jose Sunshine Reform Task Force made a good faith effort in trying to capture certain categories of information that should be protected when it approved the exemptions presented in the Phase II Report and Recommendations, it is impossible to legislate every contingency.

Moreover, we also believe that the City should continue to protect the "deliberative process/legislative privilege" that has arisen from judicial interpretation of the Balancing Test. As we have explained, the deliberative process/legislative privilege is invoked to exempt disclosure of records revealing the deliberations of government officials or information relied upon by the officials in making decisions that they would not otherwise receive if the information were routinely disclosed. The key question in every deliberative process/legislative privilege case is whether disclosure of the materials would expose the government's decision-making policy. If the Balancing Test is eliminated or the exemption for Drafts and Memoranda is modified, the City could not prevent disclosure of documents reflecting the frank discussion of legal or policy matters.

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If the Committee is concerned about the potential for abuse of the Balancing Test, it could consider the alternative proposal that was considered by the Task Force. The alternative proposal is a modification of the Balancing Test:

The City may justify withholding any public information by demonstrating that, under the facts of the particular case, clear and convincing evidence exists that the public interest served by not disclosing the information outweighs the public interest served by disclosure of the information. If the City determines that the public interest is served by not disclosing the information, the City Attorney must provide, in writing, a detailed justification. The person requesting the public information may appeal the City Attorney's determination to the Open Government Commission.

This alternative modifies the Balancing Test in two ways.

First, the City must demonstrate that clear and convincing evidence exists that the public interest served by not disclosing the information outweighs the public interest served by disclosure of the information. Although the California Public Records Act requires a finding that "the public interest served by nondisclosure clearly outweighs the public interest served by disclosure", the alternative language specifically imposes the burden of proof of "clear and convincing evidence."

Second, if the City determines that the public interest is served in not disclosing the information, the City Attorney must provide a detailed justification in writing. Although the California Public Records Act states that "a response to a written request for inspection or copies of public records that includes a determination that the request is denied, in whole or in part, shall be in writing", the alternative language specifically requires details to justify why the City is withholding a particular record.

While we believe that the City has applied the Balancing Test carefully, a modification of the Balancing Test should ensure that the City has the necessary flexibility but uses that flexibility appropriately.

In addition, staff is concerned that releasing drafts would stifle the deliberative – or decision-making – process. As explained above, revealing the deliberations of government officials or information relied upon by the officials in making decisions may impact frank discussion of legal or policy matters.

Staff, therefore, recommends that the Committee decide to retain the balancing test and continue to follow the requirement of the CPRA on drafts and memoranda.



TOM MANHEIM
Communications Director

ATTACHMENT A

TASK FORCE PROPOSALS AND STAFF RECOMMENDATIONS

This information was previously distributed to the Rules & Open Government Committee for the August 13, 2008 meeting.

Balancing Test (Section 6.1.2.070, page 13-14)

Background: The California Public Records Act provides a general exemption known as the balancing test. The balancing test allows public agencies to withhold records when, “on the facts of the particular case, the public interest served by nondisclosure clearly outweighs the public interest served by disclosure of the record.” (California Government Code Section 6255.) This provision contemplates a case-by-case balancing process.

Task Force has recommended that the balancing test be eliminated because of a perception that the City relies on it to withhold documents that should not be withheld. In place of the balancing test, the Task Force recommends that four specific exemptions be provided.

Task Force Recommendation:

- “A. Except as provided in this section, no record may be withheld on the basis that the public interest in withholding the information outweighs the public interest in disclosure, or that disclosure would reveal or interfere with the deliberative process of any City body, agency, department, official, or employee.

- B. Except as otherwise provided in this Open Government Ordinance or by state or federal law, the following specific categories of information may be withheld or redacted, if on the facts of the particular case the public interest served by not disclosing the record clearly outweighs the public interest served by disclosure of the record:
 - 1. Personal information provided to the City by a private individual, with the reasonable expectation that the information will remain confidential. “Personal information” means: name; passport, social security, driver’s license, or other government-issued identification number; physical description; home address; home telephone number; personal email address; financial, credit card, or debit card account number; or other information that would make the individual who submitted it readily identifiable.

 - 2. Identifying information regarding a City employee who: (a) provides information in the course of an investigation of the conduct of any City body, agency, department, official, or employee; and (b) is not a subject of the investigation. “Identifying information” means: names, unique job titles, or other information that would make the employee readily identifiable. Numerical or alphabetic designations will, to the extent possible, be substituted for names omitted from any record provided to the public.

 - 3. Information regarding: (a) actual or potential threats to the security of public facilities, essential public services, or public access to public facilities or essential public services,

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and planned or actual responses to such threats, or (b) other information the disclosure of which would create a serious risk of death or injury, serious economic harm, or harm to public facilities or essential public services that cannot reasonably be prevented through means other than nondisclosure.

4. Records prepared for use in connection with a closed session of a body subject to the Brown Act, to the extent that they consist of information that may properly be discussed in closed session. Such records will be subject to disclosure to the same extent and pursuant to the same process as recordings or minutes of closed sessions.

C. If the City determines that the public interest is served by not disclosing the information, the City Attorney must provide, in writing, a detailed justification. The person requesting the public information may appeal the City Attorney's determination to the Open Government Commission."

Policy/Implementation Issues: The City Attorney's Office believes that the balancing test has been applied judiciously to protect only the most sensitive documents and the City must have the flexibility to rely on the balancing test when a specific exemption does not apply.

During the Task Force's discussion about the balancing test, several Task Force members identified examples of information that would not be protected by the four exemptions; to address these examples the Task Force did make some additional amendments to the language that had been approved by the Public Records Subcommittee. However, at least one Task Force member noted that the difficulty in crafting the language of the exemptions underscored why the balancing test should not be eliminated – it is impossible to legislate every contingency.

For example:

- 1) After the terrorist attacks of September 11, 2001, public agencies became concerned about requests for detailed information about public facilities. A request for blueprints of City Hall or the Water Treatment Facility, for example, could be protected by applying the balancing test because no specific exemption existed. In 2002, Governor Gray Davis signed a bill adding a specific exemption for "local government documents that assess the potential for terrorist attacks." The Governor's signing message stated, in part: "I believe that the balancing provision of Government Code section 6255 already protects these and other sensitive material in the hands of local as well as other government agencies. Given the tenor of these times, post-September 11th, it does not hurt to make it especially clear that such documents are protected." Without the balancing test, however, sensitive documents may not be protected from disclosure.

- 2) On May 19, 2008, California Attorney General Jerry Brown issued an opinion determining that the names of peace officers involved in a critical incident are generally subject to disclosure under the California Public Records Act unless the facts of the particular incident

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support an exemption in accordance with the CPRA's balancing test. Thus, the only protection under the CPRA for maintaining the confidentiality of a peace officer's identity when an officer is acting in an undercover capacity or facing retaliation is the balancing test.

Historically, the City has applied the balancing test to protect the right of privacy of third parties or the "deliberative process/legislative privilege." The deliberative process/legislative privilege is invoked to exempt disclosure of records revealing the deliberations of government officials or information relied upon by the officials in making decisions that they would not otherwise receive if the information were routinely disclosed. The key question in every deliberative process/legislative privilege case is whether disclosure of the materials would expose the government's decision-making policy. If the balancing test is eliminated, the City could not prevent disclosure of documents reflecting the frank discussion of legal or policy matters.

Furthermore, although the Task Force intended to protect third party information with the exemption listed above, staff is concerned that not all financial information of third parties would be protected – only account numbers would be exempt. In addition, staff is concerned that cell phone numbers of third parties should be protected – not just home telephone numbers. The City should be allowed to protect all the information in which third parties have a reasonable expectation of privacy.

Staff is also concerned that information about City employees who may be the subject of a confidential personnel investigation should be protected – at least until that information could otherwise be subject to disclosure under the California Public Records Act. The exemption approved by the Task Force could open the City to liability for invasion of privacy and defamation claims for disclosing protected information about employees for at least three reasons:

- 1) Disclosing unsubstantiated allegations, unsubstantiated information, and witness opinions about the accused employee may expose the City to liability for invasion of privacy and defamation.
- 2) If there is a pending criminal investigation relating to misconduct, the accused employee who participated in the investigation and provided statements may not have waived his/her Fifth Amendment and Fourteenth Amendment rights against self-incrimination, and the disclosure of such statements or information obtained as a result of the statements may affect his/her right to a fair trial should criminal charges be filed. This may be another area of exposure to liability.
- 3) The proposed language does not provide any exception for personnel records relating to misconduct by peace officers. Peace officer personnel records, including disciplinary actions, are confidential and may not be disclosed under the law. *Copley Press, Inc. v. Superior Court*, (2006) 39 Cal.4th 1272 (holding that Copley Press did not have a right under the California Public Records Act to records of the county civil service commission relating to a peace officer's administrative appeal of a disciplinary matter, which were protected by statutes safeguarding officer's right of privacy under the Penal Code.)

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During the discussion about the balancing test, the Task Force considered but did not accept an alternative proposal – modification of the balancing test. The Task Force reviewed the following language:

“The City may justify withholding any public information by demonstrating that, under the facts of the particular case, clear and convincing evidence exists that the public interest served by not disclosing the information outweighs the public interest served by disclosure of the information. If the City determines that the public interest is served by not disclosing the information, the City Attorney must provide, in writing, a detailed justification. The person requesting the public information may appeal the City Attorney’s determination to the Open Government Commission.”

Staff Recommendation: Retain the balancing test. The Rules Committee could consider modifying the balancing test consistent with the above language that the Task Force considered but did not approve.

Drafts and Memoranda (Section 6.1.2.020, page 9)

Background: The California Public Records Act exempts from disclosure “[p]reliminary drafts, notes or interagency or intra-agency memoranda that are not retained by the public agency in the ordinary course of business, if the public interest in withholding those records clearly outweighs the public interest in disclosure.”

Task Force Recommendation: “Once a proposal, initiative or other contemplated or suggested action is made public, or presented for action by any City body, agency or official, all related preliminary drafts, notes or memoranda, whether in printed or electronic form, will be subject to disclosure if they have been retained as of the time the request is made. This subsection does not require the retention of preliminary drafts, notes or memoranda that would not otherwise be retained in the ordinary course of business or pursuant to a policy, procedure or practice.”

Policy/Implementation Issues: The Task Force’s recommendation could result in the release of many draft documents that would not necessarily be produced now. Staff is concerned that releasing drafts could potentially restrict the creative process of the City’s Council and professional staff.

Brainstorming sessions require that participants be willing to offer every idea and to temporarily suspend judgment about the quality of those ideas; if the result of every brainstorming session were subject to disclosure, participants would be less candid and more guarded. Moreover, in the case of draft budget proposals that are rejected, releasing information about proposals that affect individual employees who might be the subject of a layoff or work groups or community-based organizations that might be defunded could be hurtful and demoralizing.

Staff Recommendation: Continue to follow the direction of the California Public Records Act on drafts.

To: Members of the Rules and Open Government Committee
From: Bert Robinson, Sunshine Reform Task Force
Re: The Balancing Test

Summary: The California Public Records Act includes a “balancing test” which allows governments to withhold any otherwise public record by arguing that the public interest is best served by non-disclosure. “Sunshine Law” reformers often cite the balancing test as the biggest flaw in the act, because it is so broad, and so open to abuse. The two primary Sunshine Laws that the Sunshine Reform Task Force used as models, San Francisco and Milpitas, expressly eliminated the balancing test and the related “deliberative process privilege” – apparently to no ill effect. The Task Force recommends that San Jose follow suit.

San Jose city officials suggested to us, as they will suggest to you, that the balancing test is used to protect many legitimate interests. In response, Task Force members talked to officials in San Jose about their experiences, and to their counterparts in San Francisco and Milpitas about life without the balancing test. We then crafted a series of specific exemptions to address the concerns we uncovered – concerns such as safety, security and personal privacy – making it easy to protect these important interests. Thus, our recommended approach is more conservative than the Milpitas or San Francisco laws.

In one area, however, we sharply disagree with city staff. The staff argues that the balancing test is necessary to protect the inner workings of San Jose city government – the “deliberative processes” that leads to policy formulation. It is our view that the public has a strong interest in those processes, and that secrecy can lead to mischief. Consider one example. Recently, the federal Environmental Protection Agency rejected California’s request that it be allowed to regulate greenhouse gas emissions from automobiles. The Agency’s head said California’s approach would actually harm the environment. Later, documents were leaked that revealed quite the opposite: In internal deliberations, agency scientists backed California’s proposals as a good approach. Ultimately, the public interest in understanding these deliberative processes was high.

Background: The California Legislature added the clause that has become known as the balancing test to the CPRA. It is also known as Government Code section 6255 (a), and it reads as follows. The portion that institutes the balancing test is in italics:

- (a) The agency shall justify withholding any record by demonstrating that the record in question is exempt under express provisions of this chapter or that *on the facts of the particular case the public interest served by not disclosing the record clearly outweighs the public interest served by disclosure of the record.*

The clause is in essence a catch-all, included because of a belief that the specific exemptions in the act would not encompass every record that ought not be disclosed. Over time, this clause has been used to protect records that, for instance, might compromise the safety and security of local residents – and those uses have, in general, not been controversial. Controversy has ensued from other uses, especially withholding

deemed necessary to protect the “deliberative processes” of government officials. The “deliberative process privilege,” as it has become known, stems primarily from a 1991 Supreme Court decision regarding a media request for the appointment calendars of Gov. George Deukmejian. The court rejected the request, saying it was loathe to “expose the decision-making process in such a way as to discourage candid discussion.”

The contemplation of the balancing test is that public officials will carefully weigh the benefits of disclosure against the benefits of withholding on a case-by-case basis. It should be rare in practice that the public interest is best served by non-disclosure.

The problem: As suggested above, the fear about 6255 is that it can be invoked at any time, on any record, leading to suspicion that political interests in non-disclosure may at times overwhelm the public interest. Because only the agency has possession of an undisclosed record, it is not possible for the public to second-guess the agency’s invocation of the balancing test, short of going to court. The balancing test also adds an air of unpredictability to public disclosure, since the judgment call involved may be seen differently by different individuals. One city attorney may come down on the side of non-disclosure where another would not.

The approaches: In order to form its recommendation, task force members asked City Attorney Rick Doyle to describe the city’s use of the balancing test. The members also asked officials in other cities with sunshine laws for input, posing the following question: “What interests in non-disclosure that the city would like to protect are difficult to protect without a balancing test?” From these inquiries, the subcommittee devised a list of specific exemptions to add to San Jose’s Sunshine Law.

To summarize, our approach is adopt the Milpitas-SF language that commits the city not to use the balancing test or the deliberative process privilege to withhold records. But we would couple that language with four specific exemptions that encompass legitimate interests. The legal language is part of your packet, but broadly they are:

- a.) **Personal information provided by private citizens.** This exemption encompasses situations where private individuals, through an interaction with the city, have provided personal information to the city with no expectation that the information would become public.
- b.) **Identities of public employees who provide information in internal investigations.** This is an issue that arose during the recent release of the investigation into Auditor Jerry Silva, where the names of employees who complained were redacted to protect the confidentiality of their interactions with the investigator.
- c.) **Security/safety.** This exemption allows the city to keep private information that might compromise public safety or security if released.
- d.) **Memos addressing closed meeting issues.** This exemption makes explicit what is implied in the Brown Act – that material dealing with a closed session issue (a memo outlining the Mayor’s goals for union negotiations, for example) can be withheld.

The Balancing Test.

The Task Force has recommended the elimination of the balancing test incorporated in the Public Records Act. In its place the Task Force has suggested a number of specific exceptions that would justify non-disclosure of records maintained by the City of San Jose ("City"). The purpose of the Task Force's proposal is twofold: (1) to protect information that truly needs protection; and, (2) to eliminate a discretionary loophole that government has too often exploited to keep information secret.

Other municipalities—San Francisco, Contra Costa and Milpitas, for example—have eliminated the balancing test and have not encountered any problems stemming from its absence. Indeed, Robert Livengood, then the Vice Mayor and now the Mayor of Milpitas told the Task Force that the balancing test was a “*blank check*” that was not consistent with that city’s transparency objectives.

The City frequently asserts the balancing test. For example, it was used to reject Public Records Act requests for:¹

- A draft traffic impact analysis on proposed revisions to residential and commercial development rules for North San Jose, even though portions of the draft analysis were quoted in a report submitted to the Council.
- A list of panelists who participated in interviewing candidates for Aviation Director.
- Records of telephone calls and telephone messages received by members of the City Council.
- E-mails exchanged between City employees and organizers of the 2006 San Jose Grand Prix event.

Staff opposes elimination of the balancing test. It has offered several doomsday scenarios to support its position. Although Staff might wish it otherwise, each of these scenarios demonstrates how well-crafted the Task Force's proposal is, as each is accounted for:

- Staff argues that information about public facilities could put public safety in jeopardy. (See Staff Comments, page 16). However, Section 5.1.2.070 (B)(3) specifically exempts information that would put persons or property at risk.
- Staff argues that, without the balancing test, the identity of undercover police officers would have to be disclosed. (See Staff Comments, page 16.) Again, 5.1.2.070(B)(3) specifically protects information related to “essential public services.” Moreover, Section 5.1.1.020 prevents access to law enforcement information that would impede the successful completion of an investigation of jeopardize the safety of any person.
- Staff argues that, without the balancing test, unsubstantiated allegations, information or opinion about an “accused employee” would become available to the public or that employee’s right to a fair trial might be jeopardized. (See Staff Comments, page 17.) Section 5.1.2.040 governs what personnel information may be released to the public,

¹ These examples were provided to the Task Force on February 6, 2008 by the *San Jose Mercury News*.

including the type of information pertaining to the “misconduct of City Officials.” Unsubstantiated allegations are not subject to disclosure.

- Staff argues that, without the balancing test, “[p]eace officer personnel records, including disciplinary actions” would have to be disclosed in violation of state law. (See Staff Comments, page 17.) Section 5.1.2.070(B) specifically exempts from the Open Government ordinance’s mandate protections afforded by “state and federal law.” Thus, if police personnel records are protected by state law, that law is not trumped by the Sunshine ordinance.
- Finally, Staff argues that the deliberative process privilege would be eliminated. (See Staff Comments, pages 16-17). This is true. And, this is a good thing.

The deliberative process “privilege” has been grafted on the Public Records Act by judicial interpretation of the balancing test. The Legislature itself never considered it to be a privilege important enough to codify. Thus, the deliberative process “privilege” has been the subject of a great deal of criticism because it has been extended beyond the need to protect the legislative or executive thought process. For example, the calendars of public officials have been shielded from public scrutiny via assertion of deliberative process. Yet, there appears to be unanimous agreement at the Council level that public access to calendars performs a valuable function; indeed, that access is currently being provided.

Staff has not offered a single example of how the objective decision-making process would be jeopardized

Every example Staff cited in support of the need of a balancing test is without merit. Far from providing a catch-all to protect legitimately sensitive information, the balancing test has historically been used to thwart access to information of importance to the public.



RECEIVED
San Jose City Clerk

2008 NOV 18 P 2:31

November 17, 2008

Lee Price, City Clerk
City of San Jose,
San José City Hall
200 East Santa Clara Street San Jose, CA 95113

BY FAX and MAIL

Dear Ms. Price:

This letter is for Mayor Chuck Reed and the Rules and Open Government Committee, for the Nov. 19 Meeting.

On behalf of the California First Amendment Coalition, I am submitting this letter to the Rules Committee of the San Jose City Council, which I understand will soon consider the question whether to retain, in San Jose's proposed Sunshine Law, a provision allowing the withholding of records on the basis of a "balancing test" that is the same as, or similar to, Section 6255 of the California Public Records Act.

The Coalition strongly recommends that such a provision NOT be included in your Sunshine Act

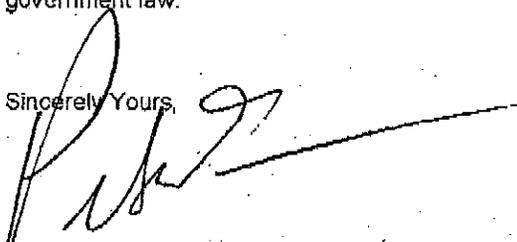
How San Jose addresses this seminal issue will be seen, correctly, as a test of whether the San Jose City Council is serious about government transparency, or is merely going through the motions of adopting a reform law that does not create real reform. Other cities and counties that have adopted Sunshine Laws, including San Francisco, Contra Costa and Milpitas, have excluded balancing-test exemption authority from their ordinances. Their experience is that the sky has not fallen. They are able to function more efficiently AND more openly.

Public policy supports exclusion of a balancing test because of the many abuses that have resulted and can result from local governments' invocation of this test. When agencies don't want to release a document, but have no valid reason for doing so--they resort to the balancing test, confident that few requesters have the incentive or resources to challenge such decisions in court. Misuse of the balancing test has allowed some jurisdictions to treat the Public Records Act as merely optional.

Finally, retaining the balancing test effectively means that any other reforms regarding access to public records are meaningless, because City staff can still invoke a "catch-all" exemption to essentially re-incorporate any justifications for denying access that have been eliminated or narrowed, and thereby prevent open government.

We respectfully urge you to make the right decision and remove the balancing test from San Jose's new open-government law.

Sincerely Yours,



Peter Scheer

To: Members of the Rules Committee
From: Bert Robinson, Public Records Subcommittee, Sunshine Reform Task Force
Re: The “Drafts” exemption

As the Rules committee continues to move through the public records recommendations of the Sunshine Reform Task Force, I thought it would be helpful to provide some additional background on one proposal scheduled for the Nov. 12 meeting: Narrowing the drafts exemption currently contained in the California Public Records Act.

To understand our proposal, it's best to start with the law itself. It reads as follows.

Sec. 6254. Except as provided in Sections 6254.7 and 6254.13, nothing in this chapter shall be construed to require disclosure of records that are any of the following:

(a) Preliminary drafts, notes, or interagency or intra-agency memoranda that are not retained by the public agency in the ordinary course of business, provided that the public interest in withholding those records clearly outweighs the public interest in disclosure.

The drafts exemption, therefore, shields documents that were part of the policy formulation process, but requires the public agency to use a balancing test. Any time the documents are clearly of public concern, they should be released.

Much of the time this exemption is easily applied. A draft document that has a formal role in a city process, like a “Draft Environmental Impact Report,” is released, while a council aide’s handwritten draft of an ordinance is not. However, that leaves a vast middle ground.

The task force’s concern focused on the phrase “not retained . . . in the ordinary course of business.” In theory and sometimes in practice, that phrase allows a public agency to withhold a record found in a public file simply by saying, “Oh, that shouldn’t have been in there. We meant to throw that away.” And that is sometimes said about documents that would provide crucial insight into the policy-making process: Think, for example, of the material on the federal level that showed scientists at the Environmental Protection Agency wanted to allow California to regulate greenhouse gases, but were overruled by their superiors. In such cases, there is great public interest in the process of policy formulation.

Our proposal is simple: if a preliminary draft, note or memorandum has been retained, it should be released. Period. This eliminates any debate about whether it theoretically should have been retained, and simply sticks to the facts.

We included two caveats to deal with unintended consequences.

First, to protect ongoing negotiations or decision-making processes, we say that the preliminary drafts are not available until the document is in final form.

Second, we make clear that our proposal does not require the retention of any documents. It simply says, “If they have been retained, they’re public.”