

# 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.

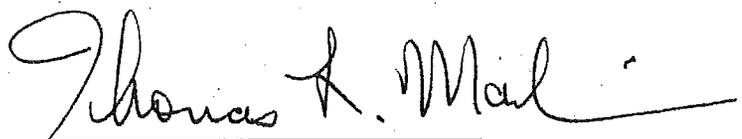
First, the City must demonstrate that clear and convincing evidence exists that the public interest served by not disclosing the information outweighs the public interest served by disclosure of the information. Although the California Public Records Act requires a finding that "the public interest served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

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#### **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 11<sup>th</sup>, 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.4<sup>th</sup> 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.