

**CORRESPONDENCE REGARDING THE**  
**“BALANCING TEST”**  
**(Previously received and distributed)**

**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.

Memo From Ed Davis, 11/13/2008

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:<sup>1</sup>

- 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,

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<sup>1</sup> 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 Jose 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."