



# Memorandum

TO: RULES AND OPEN  
GOVERNMENT COMMITTEE

FROM: TOM MANHEIM  
Communications Director

SUBJECT: REPLACEMENT MEMO FOR  
BALANCING TEST

DATE: July 16, 2009

Approved

Date

7/20/09

The attached documents replace the "Balancing Test" memorandum and attachment previously distributed and dated June 18, 2009.

These replacement documents make three clarifications:

1. The language in the memorandum describing the "deliberative process privilege" (second bullet) is replaced to eliminate any ambiguity regarding the intent of this section.
2. The language in the memorandum regarding disclosure of calendars (third bullet) was revised to clarify that current Council policy adopted on August 21, 2007, will not change.
3. The language in the attachment describing the "Mental Process Privilege" (6.1.2.075 -- Mental Process Principle) is simplified to make it easier to understand.

TOM MANHEIM  
Communications Director

Attachments



# Memorandum

TO: RULES AND OPEN  
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SUBJECT: BALANCING TEST

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## RECOMMENDATION

Adopt the revised narrow construction of the Balancing Test following the Rules and Open Government Committee's discussion on April 15, 2009.

## BACKGROUND

The Balancing Test is a general exemption in the California Public Records Act (CPRA) that allows the City to withhold records only when "the public interest served by nondisclosure clearly outweighs the public interest served by disclosure." In addition, under the CPRA, preliminary 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." In previous meetings, the Rules and Open Government Committee (ROGC) considered a proposal from the Sunshine Reform Task Force to eliminate the "Balancing Test" and replace it with four specific exemptions, as well as a proposal to alter the approach to Drafts and Memoranda.

The Rules and Open Government Committee directed staff to review the Summary of the California Public Records Act prepared by the California Attorney General's Office and draft language narrowly construing the Balancing Test. Staff was also directed to consider whether certain records could be identified that would always be disclosed—essentially a list of records to which the Balancing Test would never be applied.

After additional discussion on April 15, 2009, staff was directed to make certain revisions to the language proposed and return to the Committee.

## ANALYSIS

The Rules and Open Government Committee suggested several changes to the language presented on April 15, 2009:

- Add a reference to the "mental process principle" established by case law.

- Clarify that Section 6.1.2.070(B), describing the "deliberative process privilege" is not intended to alter interpretations of the Balancing Test that have been established by existing case law.
- Clarify that Section 6.1.2.070(C) does not alter the current City policy regarding disclosure of calendars adopted by the Council on August 21, 2007.
- Ensure that if the reason a record is being withheld on the basis of the balancing test expires, the requestor is notified that the record will be subject to disclosure at a later time.

In addition, staff recommends some changes to Section 6.1.2.070(C) (see Attachment), which was intended to identify categories of documents that would not be withheld on the basis of the balancing test unless specifically approved by a vote of the Rules and Open Government Committee. Because it is not likely that some of these records would ever be withheld on the basis of the balancing test, staff recommends two separate categories of records. In the attached revised language, the section lists records that would not be withheld on the basis of the balancing test. A new Section 6.1.2.070(D) lists records that would not be withheld on the basis of the balancing test unless specifically approved by a vote of the Committee.

#### CONCLUSION

Staff recommends that the Committee adopt the revised narrow construction of the Balancing Test attached to this memo.



TOM MANHEIM  
Communications Director

Attachment

## Section 6

### Public Records

#### 6.1 Public Information That Must Be Disclosed

##### 6.1.2 Other Public Information

...

##### 6.1.2.070 Balancing Test

- A. In order to withhold a record under Government Code Section 6255, the City must demonstrate that the public's interest in nondisclosure clearly outweighs the public's interest in disclosure. The City's interest in nondisclosure is of little consequence in performing this balancing test; it is the public's interest, not the City's interest that is weighed.
- B. Consistent with case law and Government Code Section 6255, the City may withhold a record that is protected by the "deliberative process privilege." The deliberative process privilege is intended to afford a measure of privacy to decision makers. This doctrine permits decision makers to receive recommendatory information from and engage in general discussions with their advisors without the fear of publicity. As a general rule, the deliberative process privilege does not protect facts from disclosure but rather protects the process by which policy decisions are made. Records which reflect a final decision and the reasoning which supports that decision are not covered by the deliberative process privilege. If a record contains both factual and deliberative materials, the deliberative materials may be redacted and the remainder of the record must be disclosed, unless the factual material is inextricably intertwined with the deliberative material. The balancing test is applied in each instance to determine whether the public interest in maintaining the deliberative process privilege outweighs the public interest in disclosure of the particular information in question.
- C. The following records will not be withheld on the basis of the balancing test:
1. Accounting Records, including accounts payable and receivable, general ledger, banking, and reconciliation, but excluding sales tax and resident utilities billing records
  2. City Budgets, Proposed and Adopted
  3. Public Meeting Records, including agenda, minutes, synopses, reports, audio-visual recordings, and most supporting documents, but excluding closed session records and internal City staff meetings

4. Calendars after the fact, excluding:
  - a. Personal appointments
  - b. Information protected by the attorney-client privilege
  - c. Information about attorney work product
  - d. Information about City staff recruitment
  - e. Information about a personnel issue
  - f. Information about corporate recruiting and retention
  - g. Information about criminal investigations and security
  - h. Information about whistle-blowers
  - i. Information about those who may fear retaliation
  - j. Information that is otherwise prohibited from disclosure
5. Staff Reports and Memoranda, excluding those related to closed session or covered by attorney-client privilege
6. Summary Statistical Reports
7. Employee Compensation
8. City Master Plans
9. Labor-Management Agreements
10. Audit Reports and Responses
11. Officials and Employees Disclosure Records
12. Lobbyist Registration Records
13. Election Results
14. City Logos, Seals, and Other Branding Records
15. Licenses Issued by the City, excluding information the disclosure of which would violate personal privacy rights
16. Policies
17. Records Retention and Destruction Records
18. Published Information

- D. The following records will not be withheld on the basis of the balancing test unless specifically approved by a vote of the Rules and Open Government Committee:
1. Geographic and Environmental Data and Records including geographic information systems data, environmental impact reports, and environmental monitoring and testing results
  2. Development Records and Permits, excluding plans of existing structures
  3. Contracts, Leases, and Other Legal Agreements, excluding information the disclosure of which would violate personal privacy or intellectual property rights
  4. Procurement Records after procurement activity has been concluded, excluding individual evaluator ratings and comments and any information the disclosure of which would violate intellectual property rights
  5. Real Property Records
  6. Facility, Site, and Equipment Safety Inspection Reports, excluding security-related information
  7. Property Inventories excluding inventories of firearms and security equipment
  8. Closed Litigation Records, excluding information the disclosure of which would violate personal privacy, intellectual property rights or a protective order issued by a Court.
- E. 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. In addition, if the justification for withholding the information will expire at some point, the City Attorney must notify the requestor, in writing, that the record will be subject to disclosure at a later time.

#### **6.1.2.075 Mental Process Principle**

Under case law, the mental process that a legislator uses to reach a conclusion, including any motivation for that decision, is not subject to disclosure. The courts have held that the mental process used by a legislator in deciding how to vote is beyond the reach of the judiciary. Instead, it is the majority's vote itself that is relevant in evaluating the resulting action. The City need not apply the balancing test when deciding to withhold a record based on the "mental process principle."