

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.”