

[RECEIVED 11/13/2009 FROM Ed Davis]

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,

---

<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.