

**To: Members of the Public Records Subcommittee**  
**From: Bert Robinson, chair**  
**Date: Nov. 26, 2007**  
**Subject: Information that must be disclosed**

Here's a recounting of what we've done to date, what's still to be done, and some thoughts on how to proceed at our Dec. 3 meeting.

### ***Drafts***

We endorsed an approach that is essentially identical to that taken in the San Jose Mercury News/League of Women Voters/United Neighborhoods model ordinance: If it's in the files, it's public – an approach which avoids arguments over whether this is a draft retained in the ordinary course of business. I believe we would be ready for Lisa to draft something, using the model ordinance as a starting point.

### ***Litigation***

We favor the San Francisco/Milpitas language in three areas: pre-litigation claims, documents created prior to the litigation and correspondence between opposing parties. I believe we would be ready for Lisa to draft something, using the Milpitas ordinance as a starting point.

The one litigation-related issue on which we did not reach consensus was the language in the SF/Milpitas ordinances that makes public any advice or analysis given by the city attorney regarding the Sunshine Law. The concern was that this requirement might infringe upon the city council's attorney-client privilege. I asked James Chadwick to take a crack at drafting something which would protect the attorney-client relationship while still making the City Attorney's interpretations of the Sunshine Law public, to the extent possible. He offered the following language, which I have sent to Lisa, and which we can discuss on Monday.

"The City Attorney will make public any interpretation of Article I, section 3(b) of the California Constitution, the Public Records Act, the Brown Act, the Political Reform Act, and any San Jose open government or ethics ordinance, code, or rule. This provision does not require the disclosure of the actual advice given to any client, but does require disclosure of any such interpretation regardless of whether or not it is included in the advice given to a client."

### ***Personnel***

I think our consensus here was less definitive than in other areas, so Virginia and Bobbie, forgive me if I overstate.

I think we generally favor the San Francisco approach that enumerates a specific list of information about individual public employees that can be revealed. Of the information listed in the San Francisco ordinance – which generally covered salary and compensation, job description, and resume information – there were reservations expressed about two pieces of information that seemed more personal: Age and ethnicity.

The most contentious issue in this section appears to be the records of employee misconduct. While we generally agree that there is public interest in this sort of material, we have concerns about where to draw the line. We did not have an opportunity to establish a consensus, so I will offer some thoughts I had on what might work.

Bert's framework

- 1.) The records of any confirmed misconduct of a public employee at any level ought to be public, as long as it is a type of misconduct in which there is clear public interest. That leaves two questions: How do you define confirmed misconduct? (Is it only misconduct for which discipline is imposed, or is there some finding short of discipline that could be the trigger?) How do you define the type of misconduct that meets our threshold? (SF seeks to define the public interest by listing specific categories, such as misappropriation of public funds, but we found some aspects of the SF criteria hard to understand.)
- 2.) The records of any substantial allegation of misconduct ought to be public, even if they are not confirmed, when the subject of the allegation is a high-ranking employee. This would allow the public to scrutinize the quality of the investigation (was it a whitewash?) and avoid a situation in which the official resigns before a final determination is reached, thereby avoiding disclosure. That, too, leaves two questions: How do we define a substantial allegation of misconduct so that frivolous accusations are not included? How do we define the group of high-ranking employees for whom unconfirmed misconduct should still be public?
- 3.) Attorney-client privilege should not be a basis to resist disclosure of information about employee misconduct that would otherwise be disclosable. This proposal is based on the representation of the city attorney's representatives that misconduct investigations are occasionally performed by outside attorneys, and that attorney-client privilege could be relevant in those situations.

### ***Bids, contracts and proposals***

We endorsed the general approach to disclosing bid and contract information outlined in the San Francisco and Milpitas ordinances, with two exceptions to be noted. In general, those ordinances seek to disclose information regarding the city's bid and contract requirements and evaluations, bidders' submissions, and communication between the city and bidders. We believe this information should be disclosed 10 days prior to the award of a contract (a time period equivalent to the city's protest period). As we understand it from Monday's meeting, our consensus approach is almost entirely in keeping with current city practice.

There are two places where the subcommittee is inclined to deviate from the Milpitas/SF requirements. While we believe the names of individual evaluators for RFPs should be public, we do not favor disclosing individual scoring sheets or evaluators' notes. And while we believe draft contracts are disclosable if they have been retained, we do not favor a requirement that they be retained.

I believe we would be ready for Lisa to draft something on bids, contracts and proposals. Brian Doyle expressed a concern that the language be constructed in such a way that it meshes with the city's recent procurement reforms, which makes sense to subcommittee members. We did not feel wed to the specific language in the Milpitas/SF ordinances.