

To: The Sunshine Reform Task Force
From: Public Records Subcommittee, Bert Robinson, chair
Re: Litigation and Personnel recommendations
Date: 2/11/08

The proposals before you for the meeting of Feb. 21 have to do with personnel and litigation records. The California Public Records Act contains fairly broadly-written exemptions that pertain to each of these categories. In practice, those exemptions have given rise to a problem: What records regarding personnel and litigation are OK to release?

The cities of San Francisco and Milpitas dealt with this problem by adopting lists of personnel and litigation records that can be released in their sunshine ordinances, and the subcommittee is proposing taking a similar approach in San Jose. Our recommendation follows.

Background

The Public Records Act includes, in section 6254, the following language:

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:

(b) Records pertaining to pending litigation to which the public agency is a party, or to claims made pursuant to Division 3.6 (commencing with Section 810), until the pending litigation or claim has been finally adjudicated or otherwise settled.

(c) Personnel, medical, or similar files, the disclosure of which would constitute an unwarranted invasion of personal privacy.

The intention of these exemptions is worthy. Disclosure of information regarding pending litigation could, conceivably, weaken the city's legal position. And privacy protections are a critical part of California law, which must be weighed against the public interest.

But over the years, many questions have arisen regarding how broadly these clauses regarding litigation and personnel are to be applied, and what records can be released. The best-known of these was recently settled by the state Supreme Court, when it decided that neither 6254c nor the balancing test protected public employee salaries from release.

San Francisco and Milpitas have taken an approach in their sunshine ordinances that seeks to minimize the uncertainty. Each city has adopted a specific list of records that is not considered to be covered by the exemptions above. In essence, the cities are saying: Here is the sort of litigation information that will not damage the city's position. And

here is the sort of personnel information that will not erode personal privacy – or, to the extent that it will, the release of this information is warranted by the public interest.

The two cities take an identical approach on the litigation, which we are largely emulating. San Francisco has a more extensive approach to personnel records, which we will discuss along with our recommendations.

Recommendation

In the case of litigation records, we are making three suggestions. We propose clear disclosure of pre-litigation claims, which are precursors to a lawsuit filed by a potential plaintiff against the city. We propose requiring disclosure of communications between parties in litigation – following the logic that the city does not risk its legal position by disclosing a document that has already been provided to the adverse party. And we propose requiring disclosure of any document that was not initially subject to attorney-client privilege, even if it later becomes involved in litigation. Our understanding is that the city has no objections to these proposals, and that such documents are generally released now.

We have one additional proposal in the area of attorney work product that the city attorney's office does have concerns about. San Francisco and Milpitas adopted language that requires the city attorney to disclose any advice given to a public official regarding Sunshine or Political ethics laws. The logic of this is that the public ought to have a chance to see whether city officials are acting to uphold these laws, in letter and spirit, or to undermine them. The subcommittee was concerned, however, that the specific language in these other ordinances is so broad that it could undermine attorney-client privilege. So we adopted a scaled-back proposal that requires the release of any interpretation of these laws made by the city attorney, but not the release of actual advice given to a client. We will leave it to the city attorney to explain why this is still a concern for them. We believe we went well more than halfway to meet their concerns.

In the case of personnel records, we propose specifying the release of two classes of information: salary and benefits, which the Supreme Court already endorsed, and an employee's qualifications and job experience. San Francisco requires this same material to be released. San Francisco also requires the release of an employee's age, gender and ethnicity, but the subcommittee was concerned that this information strays too far into the private realm.