

**To: the Sunshine Reform Task Force**

**From: the Public Records Subcommittee**

**Date: November 20, 2007**

**Re: Deliberative process privilege and the 6255 “balancing test” exemption**

**Summary:** The California Public Records Act includes a “balancing test” which gives governments the authority to withhold any record – regardless of whether it is exempt under the act – by arguing that the public interest is best served by non-disclosure. Two of the Sunshine Laws that we have used as models, San Francisco and Milpitas, have expressly eliminated the balancing test and the related “deliberative process privilege” as an allowed rationale for withholding records. The concern fueling their decision is that the balancing test is simply too broad, and too subject to abuse by officials who may want to keep records secret.

The Public Records Subcommittee is also concerned about the breadth of the balancing test and the possibilities for abuse. However, we are mindful of arguments offered by city staff and others that the balancing test is used to protect legitimate interests not otherwise shielded by the exemptions of the CPRA. We voted to recommend to the task force to eliminate use of the balancing test, but adopt a set of specific exemptions to replace the most critical interests that test has been used to protect. However, because we as a subcommittee were divided rather than unanimous, we would also like to outline an alternate approach to this issue for the consideration of the task force. This second approach envisions a more rigorous balancing test.

**Background:** The California Legislature added the clause that has become known as the balancing test to the CPRA. It is also known as Government Code section 6255 (a), and it reads as follows. The portion that institutes the balancing test is in italics:

- (a) The agency shall justify withholding any record by demonstrating that the record in question is exempt under express provisions of this chapter or that *on the facts of the particular case the public interest served by not disclosing the record clearly outweighs the public interest served by disclosure of the record.*

The clause is in essence a catch-all, included because of a belief that the specific exemptions in the act would not encompass every record that ought not be disclosed. Over time, this clause has been used to protect records that, for instance, might compromise the safety and security of local residents – and those uses have, in general, not been controversial. Controversy has ensued, however, from other uses, especially withholding deemed necessary to protect the “deliberative processes” of government officials. The “deliberative process exemption,” as it has become known, stems primarily from a 1991 Supreme Court decision regarding a media request for the appointment calendars of Gov. George Deukmejian. The court rejected the request, saying it was loathe to “expose the decision-making process in such a way as to discourage candid discussion.”

The contemplation of the balancing test is that public officials will carefully weigh the benefits of disclosure against the benefits of withholding on a case-by-case basis. It should be rare in practice that the public interest is best served by non-disclosure.

**The problem:** As suggested above, the fear about 6255 is that it can be invoked at any time, on any record, leading to suspicion that political interests in non-disclosure may at times overwhelm the public interest. Because only the agency has possession of an undisclosed record, it is not possible for the public to second-guess the agency's invocation of the balancing test, short of going to court. The balancing test also adds an air of unpredictability to public disclosure, since the judgment call involved may be seen differently by different individuals. One city attorney may come down on the side of non-disclosure where another would not.

**The approaches:** In order to form its recommendation, subcommittee members asked City Attorney Rick Doyle to describe the city's use of the balancing test. The subcommittee also asked officials in other cities with sunshine laws for input on life without a balancing test, posing the following question: "What interests in non-disclosure that the city would like to protect are difficult to protect without a balancing test?" From these inquiries, the subcommittee devised a list of specific exemptions that the task force should consider adding to a sunshine ordinance, if it chooses to reject the balancing test. The subcommittee also asked lawyers with expertise in open government law whether it would be possible to devise a balancing test that is more rigorous and, as a result, less subject to abuse. Their recommendations are incorporated in an alternate approach that the task force may also want to review.

So to summarize, our favored approach is adopt the Milpitas-SF language that commits the city not to use the balancing test or the deliberative process privilege as a justification to withhold records. In our discussions, we endorsed four specific exemptions that we believe would encompass the legitimate uses of the balancing test, and we offer them as an alternative. The legal language is part of your packet, but broadly they are:

- a.) **Personal information provided by private citizens.** This exemption encompasses situations where private individuals, through an interaction with the city, have provided personal information to the city with no expectation that the information would become public.
- b.) **Identities of public employees who provide information in internal investigations.** This is an issue that arose during the recent release of the investigation into Auditor Jerry Silva, where the names of employees who complained were redacted to protect the confidentiality of their interactions with the investigator.
- c.) **Security/safety.** This exemption allows the city to keep private information that might compromise public safety or security if released.
- d.) **Memos addressing closed meeting issues.** This exemption makes explicit what is implied in the Brown Act – that material dealing with a closed session issue (a memo outlining the Mayor's goals for union negotiations, for example) can be withheld.

Our alternate approach, which was favored by two members of our subcommittee, involves setting a higher legal standard for the balancing test – the “clear and convincing evidence” standard employed elsewhere in the law. This approach also requires the city attorney to prepare a detailed justification each time the balancing test is invoked, an effort to make certain that the reasoning is thoughtful rather than perfunctory. The legal language for this “enhanced balancing test” approach is also part of your packet.