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January 10, 2008

Linda Dittes
AFSCME District Council 57
1150 North First Street, Suite 101
San Jose, CA 95112-4923

Re: *City of San Jose and AFSCME Local 101
(Public Disclosure of Employee Disciplinary Records)*

Dear Linda:

This letter will summarize our recent discussions regarding the City of San Jose Sunshine Reform Task Force's consideration of City rules automatically compelling disclosure of certain records regarding employee misconduct.

I understand that the City currently uses a balancing test to determine when records of employee misconduct are to be released or not released. If so, this approach is consistent with the personnel record exception contained in the California Public Records Act (CPRA) at Government Code Section 6254(c), which exempts from disclosure under the CPRA, "Personnel, medical, or similar files, the disclosure of which would constitute an unwarranted invasion of personal privacy." The balancing test, of course, is the public's interest in knowing about the employee misconduct versus the employee's legitimate interest in maintaining the privacy of the information. This same kind of balancing test is applied to determine whether release of personnel-file information constitutes an unlawful infringement of the employee's constitutionally protected right of privacy.

Continued application of this balancing test to public requests for employee disciplinary records is the best approach for the City, AFSCME, and AFSCME's members. The balancing test permits each such request to be addressed on a case-by-case basis, with a focus on the particular circumstances surrounding each request. The case-by-case approach minimizes the risk that a record of misconduct, or alleged misconduct, will be disclosed in circumstances giving rise to an invasion-of-privacy claim by the affected employee.

If the Task Force is adamant that some bright-line rules must be adopted regarding disclosure of employee misconduct records, I would recommend that the San Francisco Ordinance be used as the model. That Ordinance calls for routine disclosure of: "The record of any confirmed misconduct of a public employee involving personal dishonesty, misappropriation of public funds, resources or benefits, unlawful discrimination against another on the basis of status, abuse of authority, or violence, and of any discipline imposed for such misconduct."

As written, this Ordinance limits the risk of an unwarranted disclosure of employee personnel records, *i.e.*, a disclosure that could result in an invasion-of-privacy claim against the City, in two important respects.

First, the list of the types of misconduct covered by the rule limit the scope of the rule to misconduct that is substantial, and not trivial. The public's interest in access to cases of trivial misconduct is not nearly as great as it is in substantial cases; thus the rule prevents automatic disclosure in cases where the weight on the public-interest side of the balancing test is slight.

Second, the rule limits automatic disclosure to cases of confirmed misconduct; *i.e.*, misconduct allegations the City has acted upon to discipline an employee where either the employee has not appealed the discipline, and the time for any such appeal has expired, or the employee has exhausted the available appeals with the discipline confirmed at the end of the process. By limiting automatic disclosure to confirmed misconduct, the rule limits the risk that a record based on an unfounded complaint will be released in violation of the employee's protected right of privacy. Absent the requirement that the misconduct be confirmed, the rule would necessarily compel the City to develop a standard as to how substantial the evidence must be in support of the alleged misconduct before disclosure is routinely required. That, in turn, would necessitate development of a hard-and-fast rule distinguishing "public officials" (such as the high school superintendent in *BRV, Inc. v. Superior Court* (2006) 143 Cal.App.4th 742) from public employees of lesser stature for whom the proof of alleged misconduct must be greater before disclosure is contemplated under the law. Drawing lines as to the quantum of proof necessary before records of misconduct allegations are disclosed is something that requires a case-by-case approach, and is not amenable to a blanket rule.

The limitation on automatic disclosure to those records of confirmed misconduct serves a second important purpose: it permits the City, AFSCME, and AFSCME's members the flexibility to settle disputes over misconduct allegations the parties have enjoyed historically. When an AFSCME member vehemently denies the City's allegations of misconduct, yet the parties wish to avoid full-blow litigation over the disputed allegations, compromise settlements may on occasion be reached. An important element of those compromise settlements can be the City's willingness to treat the disputed, unconfirmed allegations as confidential. If the parties were unable to negotiate such a term into their settlement agreements, disputed cases of employee misconduct would settle far less frequently, and the City (and AFSCME) would face far greater litigation costs in cases with uncertain outcomes. By limiting the automatic disclosure of misconduct records to those of *confirmed* misconduct, the San Francisco Ordinance

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does not preclude settlements that include a term treating as confidential disputed, unconfirmed allegations of misconduct.

Very truly yours,



Andrew H. Baker

AHB/ea