

MEMORANDUM

DATE: December 12, 2007

TO: San Jose Sunshine Reform Task Force

FROM: James Chadwick, on Behalf of the San Jose Mercury News

RE: **Access to Information Regarding Misconduct by Public Employees**

I. INTRODUCTION AND EXECUTIVE SUMMARY

The San Jose Mercury News has asked me to provide you with a description of existing California law regarding access to information about misconduct by public employees. This memo provides an outline of current law.

In summary, under the California Public Records Act—and taking into account the privacy and public access provisions of the California constitution—disclosure of information regarding the actual or alleged misconduct of ordinary public employees is required if discipline is imposed or if the charges against a public employee are at least well-founded. Access to information regarding upper-level public officials (which includes appointed officials, not just those who are elected) is required if the accusations against him or her are not so unreliable that the accusations could not be anything but false. In either case, if disclosure is required, the information that must be provided includes the charges or complaints against the employee, any discipline imposed, and the information upon which the charges or discipline are based. Disclosure is required even if the information is contained in an employee's personnel file, and does not turn on the nature or severity of the misconduct.

The Mercury News believes that public access to information about the manner in which public employees discharge their official duties is critical. "Public disclosure is a critical weapon in the fight against government corruption. Whether there is real impropriety or merely the appearance of an impropriety, the public has a right to know the particulars." *Kunec v. Brea Redevelopment Agency*, 55 Cal. App. 4th 511, 515 (1997). The Mercury News therefore urges the Task Force to adopt provisions that clearly and strongly confirm the City's duty to keep the public informed regarding official misconduct, and the City's efforts to address it.

II. EXISTING CALIFORNIA LAW REQUIRES THE DISCLOSURE OF CONFIRMED OR SUBSTANTIAL CHARGES OF OFFICIAL MISCONDUCT

A. Applicable Provisions of the California Public Records Act

As you know, the California Public Records Act (“CPRA”) includes a broad mandate of disclosure of all public records, subject to certain exemptions. Gov’t Code § 6253. The government has the burden of justifying nondisclosure by showing that the information at issue falls within one of the specific exceptions in the CPRA, or that the public interest in nondisclosure clearly outweighs the public interest in disclosure. Gov’t Code § 6255; *Rogers v. Superior Court*, 19 Cal. App. 4th 469, 476 (1993); *Johnson v. Winter*, 127 Cal. App. 3d 435, 438 (1982). The exemptions to disclosure in the CPRA must be narrowly construed. Cal. Const., Art. I, sec. 3(b); *Rogers*, 19 Cal. App. 4th at 476; *San Gabriel Tribune v. Superior Court*, 143 Cal. App. 3d 762, 772-73 (1983).

Two exemptions are potentially applicable to records regarding misconduct by public employees. First, Government Code section 6254(c) exempts “personnel, medical, or similar files, the disclosure of which would constitute an unwarranted invasion of personal privacy.” Second, Government Code section 6255 provides that the government may withhold any record if it demonstrates 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.”

Both of these exemptions have been invoked in cases involving requests for information about public employees. However, with respect to records regarding employee misconduct, the analysis under section 6254(c) and under section 6255 is “essentially the same.” *BRV, Inc. v. Superior Court of Siskiyou County*, 143 Cal. App. 4th 742, 755 (2006). Furthermore, the same analysis is used to address constitutional privacy issues. *Braun v. City of Taft*, 154 Cal. App. 3d 332, 347 (1984).

B. Standards for Disclosure of Records Regarding Public Employee Misconduct

The determination of whether disclosure of information regarding actual or alleged misconduct by public officials and employees is required presents two questions: (1) whether disclosure would compromise a substantial privacy interest; and (2) whether the potential harm to any privacy interest outweighs the public interest in disclosure. *BRV, Inc.*, 143 Cal. App. 4th at 755.

Public employees have a privacy interest in their personnel files, to the extent that such files contain “sensitive” and “personal” information. *BRV, Inc.*, 143 Cal. App. 4th at 756. However, the exemption for personnel and similar files is not intended to protect official business transactions and relationships. *Braun*, 154 Cal. App. 3d at 343-344. Thus, for example, information relating to the demotion of a public employee from a position to which he had recently been appointed is not “personal” information that is exempt from disclosure, even if it is embarrassing. *Id.*, at 344.

The courts have recognized two main interests in disclosure of information relating to official misconduct by public employees. “Without doubt, the public has a significant interest in the professional competence and conduct of a [public employee]. It also has a significant interest in knowing how the [government] conducts its business, and in particular, how the [government] responds to allegations of misconduct” *BRV, Inc.*, 143 Cal. App. 4th at 757.

Weighing these interests, the published decisions of the California courts of appeal have held that records relating to charges of mismanagement or misconduct by public officials and employees must be made public. *A.F.S.C.M.E. v. Regents of the University of California*, 80 Cal. App. 3d 913, 918 (1978) (“*AFSCME*”) (granting request to compel university to release portions of audit report); *Bakersfield City School Dist. v. Superior Court*, 118 Cal. App. 4th 1041, 1045-46 (2004) (“*Bakersfield*”) (disciplinary records of school district employee required to be made public); *BRV, Inc.*, 143 Cal. App. 4th at 757-759 (requiring disclosure of report of investigation into claims of misconduct by public employee who served as school district superintendent and school principal). In doing so, the courts have established clear guidance for when disclosure is required.

First, when charges or complaints are made regarding ordinary public employees, the CPRA requires disclosure of substantial and well-founded complaints:

[W]here complaints of a public employee's wrongdoing and resulting disciplinary investigation reveal allegations of a substantial nature, as distinct from baseless or trivial, and there is reasonable cause to believe the complaint is well founded, public employee privacy must give way to the public's right to know.

Bakersfield, 118 Cal. App. 4th at 1046. Neither disciplinary action nor a finding that allegations are true is a “prerequisite to release” of personnel records. *Id.* at 1046-1047. Disclosure is required if there are “sufficient indicia of reliability that the complaint was well founded.” *Id.* at 1047. In other words, it is the reasonableness of the complaints or charges—not a final determination of their factual accuracy—that gives rise to the public interest and the requirement of disclosure. If the charges are well founded, both the charges and the resulting investigation must be disclosed.

However, if a public employee exercises sufficient authority to be deemed a “public official” under First Amendment principles, disclosure is required if the accusations against him or her are not “so unreliable that the accusations could not be anything but false.” *BRV, Inc.*, 143 Cal. App. 4th at 759. Because there is a reduced expectation of privacy in matters relating to public employment, “[t]he constitutional protections of free speech, press, and, in this state, access to public agency records to observe the conduct of public business are not forfeited by the risk of injury to official reputation.” *Id.* at 758-759.

The United States Supreme Court has established a test for determining whether a person will be deemed to be a “public official” for the purposes of the First Amendment. “It is clear . . . that the ‘public official’ designation applies at the very least to those among the hierarchy of government employees who have, or appear to the public to have, substantial responsibility for or control over the conduct of governmental affairs.” *Rosenblatt v. Baer*, 383 U.S. 75, 85 (1966). “This designation applies where the individual’s ‘position in government has such apparent importance that the public has an independent interest in the qualifications and performance of the person who holds it, beyond the general public interest in the qualifications and performance of all governmental employees” *Ghafur v. Bernstein*, 131 Cal. App. 4th 1230, 1237 (2005), quoting *Rosenblatt*, 383 U.S. at 86.

No definitive list of the categories of public employees who will be deemed “public officials” under this standard can be provided. However, under California law the following types of public employees have been held to be public officials: a child welfare worker (*Kahn v. Bower*, 232 Cal. App. 3d 1599, 1613 (1991)); a police officer (*Gomes v. Fried*, 136 Cal. App. 3d 924 , 934 (1982)); a city attorney and lawyer for a city redevelopment agency (*Weingarten v. Block*, 102 Cal. App. 3d 129 , 139 (1980)); and a superintendent of a charter school system (*Ghafur v. Bernstein*, 131 Cal. App. 4th at 1238-1239). Public employees who have been held not to be public figures include: a public school teacher (*Franklin v. Benevolent Etc. Order of Elks*, 97 Cal. App. 3d 915 , 924-925 (1979)); and a deputy public defender (*James v. San Jose Mercury News, Inc.*, 17 Cal. App. 4th 1, 10-11 (1993)).

C. Information that Must Be Provided If Disclosure Is Required

The *AFSCME* case involved a request for access to an internal audit investigation conducted by the University of California, after an employee reported “alleged financial irregularities” by two of her supervisors. The employee and her union, AFSCME, requested a copy of the audit report and the supporting documentation. The University refused to release the records, relying on Government Code sections 6254(c) and 6255.

The trial court ruled that the Union and the employee could have access to the “voluminous documentary evidence attached as exhibits to the audit report,” but not to the audit report itself. *AFSCME*, 80 Cal. App. 3d at 916-917. On appeal, the Court of Appeal modified the trial court’s order to require disclosure of portions of the audit report.

Addressing privacy concerns, it held that there was a public policy against disclosure of “trivial or groundless charges,” but that “where the charges are found true, or discipline is imposed, the strong public policy against disclosure vanishes; this is true even where the sanction is a private reproof.” *Id.* at 918. In addition, the Court of Appeal held that “where there is reasonable cause to believe the complaint to be well founded, the right of public access to related public records exists.” *Id.*

This standard was confirmed in another case seeking access to records regarding discipline of a public employee. In the *Bakersfield* case, a newspaper sought access to “disciplinary records” maintained by the Bakersfield City School District regarding a district employee. The trial court reviewed the records in camera, and found that the complaint against the employee was well-founded as to at least one alleged incident. *Bakersfield*, 118 Cal. App. 4th at 1043-44. The trial court ordered the records regarding that incident to be disclosed.

The school district petitioned the Court of Appeal. It claimed that the trial court erred because under the *AFSCME* standard a charge or complaint is “well founded” only if it has been found to be true or if the employee has been disciplined based on the complaint. *Id.* at 1044, 1046. The Court of Appeal rejected that contention. It held that under the *AFSCME* standard, “where there is reasonable cause to believe the complaint is well founded, public employee privacy must give way to the public’s right to know.” *Id.* at 1045-46.

In both cases, the courts held that “[i]n such cases a member of the public is entitled to **information about the complaint, the discipline, and the information upon which it was based.**” *Bakersfield*, 118 Cal. App. 4th at 1046, quoting *AFSCME*, 80 Cal. App. 3d at 918 (emphasis added). In the context of these decisions, this holding establishes that the following information must be disclosed: (1) any well-founded complaint and any complaint that has resulted in the imposition of discipline; (2) any discipline imposed; and (3) the information upon which the complaint or discipline was based.

D. Disclosure Does Not Turn on the Nature or Severity of the Misconduct

None of the published decisions interpreting the CPRA have held that the nature or severity of the misconduct involved is a factor in determining whether information regarding official misconduct by public employees must be disclosed.

The federal Freedom of Information Act (“FOIA”) includes an exemption very similar to the “personnel records” exemption in the CPRA, permitting the federal government to withhold “personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.” 5 U.S.C. § 552(b)(6). To the extent that decisions interpreting FOIA may be considered pertinent, they apply a balancing test, pursuant to which the public interest in disclosure is weighed against the privacy interests of the government employees regarding whom information is sought. *See, e.g., Dobronski v. FCC*, 17 F.3d 275, 278 (9th Cir. 1994); *Lissner v. United States Customs Service*, 241 F.3d 1220, 1223 (9th Cir. 2001). Under this balancing test, the nature or severity of the misconduct may play a role, but the courts have not expressly identified them as factors to be considered.

Moreover, alleged misconduct that could be considered relatively minor has been found sufficient to justify disclosure. For example, records of sick leave of an assistant bureau chief for the Federal Communications Commission were found to be subject to disclosure under the Freedom of Information Act. *Dobronski*, 17 F.3d 275. The court found that the public “has a

right to investigate whether government officials abuse their offices and the public fisc by improperly using sick leave to take unauthorized paid vacations.” *Id.*, at 278.

Therefore, disclosure does not appear to turn on the nature or severity of the misconduct. While there is surely some misconduct that is sufficiently trivial that public disclosure may not be warranted, it is unlikely that public disclosure of such misconduct will be sought.

III. CONCLUSION

There is certainly information regarding public employees contained in public records that has no bearing on employees’ performance of their public duties. Such information is generally kept confidential, and appropriately so. However, when public records relate to misconduct or mismanagement by public employees in the discharge of the official responsibilities—that is, their responsibilities to the public—then disclosure is appropriate and necessary in order to ensure that the government is conducting the public’s business efficiently, effectively and ethically. “Openness in government is essential to the functioning of a democracy. ‘Implicit in the democratic process is the notion that government should be accountable for its actions. In order to verify accountability, individuals must have access to government files. Such access permits checks against the arbitrary exercise of official power and secrecy in the political process.’” *International Federation of Professional And Technical Engineers, Local 21, AFL-CIO v. Superior Court*, 42 Cal.4th 319, 328-329 (2007), quoting *C.B.S., Inc. v. Block*, 42 Cal.3d 646, 651(1986). The Task Force should adopt provisions that clarify and confirm that information regarding official misconduct by public employees is vital to the public.