

Oct. 27, 2008

To: Members of the Rules Committee

From: Bert Robinson, Chair, Public Records Subcommittee, Sunshine Reform Task Force

At the last meeting, the Rules Committee made clear its discomfort with the proposals of the Sunshine Reform Task Force on police records. Committee members and city staffers were particularly concerned with the potential burden that disclosure could place upon the department, and the possibilities of inadvertent disclosure.

The work plan offered by the staff responds to those concerns. However, I fear it goes much too far toward the status quo – rejecting the work of the task force and discounting the concerns of numerous members of the public that the police department ought to disclose more information. The Rules Committee is right to consider the concerns, for example, of an arrestee who might be wrongly accused. But it should also give weight to the large number of individuals who might benefit from greater disclosure: the interested homebuyer who hears that the police made arrests at a prospective neighbors' house and wants to know more; the victim's advocate who hopes to track how police respond to domestic violence arrests; the immigrants' rights groups seeking more information on force incidents; the newspaper reporters striving to fulfill their watchdog function on controversial issues like arrests for public drunkenness. At present, in its effort to respond to law enforcement concerns, the Rules Committee risks ignoring the other interests at stake.

In hopes of steering a different course, I would like to offer some ideas that respond to the concerns I heard from the Rules Committee, while still acknowledging the deep public interest in this issue. Those concerns were:

Too many records are affected – An alternative would be to call out only Police Report Form 2's and 3's and Force Response Reports, discarding the "all reports" language. I hope the police department will be open to working with this proposal to make certain these new definitions to make certain the reports have been appropriately defined.

Innocent people may have their privacy invaded – A remedy would be to make original reports public only when a criminal complaint is filed. At that point, the investigation is usually complete and the case is headed into the court process, which is already public.

Disclosure will place a burden on the Police Department – In addition to reducing the number of records affected, this alternative proposal minimizes the burden of redaction by allowing the department to withhold entire reports that raise concerns, rather than simply redacting sensitive information. Moreover, I am suggesting a trial period during which only a set number of reports are released

I also want to say that I support the department's effort, as referenced in the staff's memo, to define the characteristics of a report "synopsis" that can be released to the public for each incident or arrest. I discussed this issue with the police chief after the last committee meeting, and am hopeful though not confident of reaching agreement. But while welcome, this effort in my mind merely complies with the spirit of existing state law – a law whose vague wording has led in the past to disclosures more minimal than I believe the legislature ever intended. I believe going beyond the law, as the following proposals envision, will lead to a better-informed public that can place more trust in a police department acting as if it has nothing to hide.

Here are the specifics of my alternative proposals, along with some italicized annotations that should aid understanding of them.

- Specify that Police Report Form 2's and 3's are releasable at the time a criminal complaint is filed. Adhere to the department's current redaction regime for these reports, but allow the four exemptions currently in the task force recommendation (to protect safety, privacy, the course of the investigation, and confidential techniques) to be used to withhold the entire Form 2 or Form 3, when necessary. *(As I understand it from the department, these forms are typically attached to complaints now, except when there is concern that disclosure will interfere with an ongoing investigation. In that case, this proposal simply codifies and adds consistency to current practice.)*

- Create a "reverse balancing test" allowing reports to be released in circumstances other than those described in the ordinance when it is determined that the public interest in disclosure outweighs the various interests in withholding a document from disclosure. Give the Rules Committee explicit authority to weigh this balance and authorize release. *(This language would allow the committee to consider questions like, Should the police reports in the case of the DA's investigator suspected of drunk-driving be released? The department declined requests from the Mercury News to release those reports, but the Attorney General ultimately attached them to the criminal complaint.)*
- Specify that reports produced by agencies other than the SJPd are not affected by the ordinance.
- Specify that Force Response reports -- which are multiple-choice documents categorizing force incidents and contain no narrative information -- are public record. *(These reports are the basis for the department's annual force reports; releasing the primary documents would significantly enhance the department's transparency on a controversial issue without disclosing any sensitive information. I urge the committee to look at a copy of one of these reports before deciding on this proposal.)*
- Include the Task Force's current approach on statistical records. This would make the reports quarterly rather than annual, add some additional information to the public report that is already tracked by the department, and include **pedestrian stops** as well as vehicle stops among the issues tracked. *(This proposal, which was not much discussed at the previous meeting, is the single most important proposal we made in the eyes of some community groups. I would ask the Rules Committee to give it serious consideration.)*
- In order to eliminate the possibility that the police department will be inundated with requests for reports, establish a six-month trial period in which the department will release no more than a set number of reports, with that number to be determined in consultation between the department and the rules committee. Evaluate the impact of the ordinance on the department at the end of the six-month trial.

To be clear, I should note that the above proposals are a collection of ideas I gathered over the last two weeks from groups with a strong commitment to opening up police records, and do not represent a new proposal from the Sunshine Reform Task Force. Personally, I continue to think that the Task Force's original proposal – which is already significantly more conservative than the approach to police records taken in some other states – is superior. But I would hate to see the enormous amount of effort invested in this issue end with something little better than the status quo, so I offer these proposals for your consideration.