CALIFORNIANS AWARE
THE CENTER FOR PUBLIC FORUM RIGHTS

July 1, 2010

Glenn Sabine
City Attorney
City of Encinitas
505 S. Vulcan Avenue
Encinitas, CA, CA 92024-3633

Reference Code: 137
California Public Records Act (Government Code Section 6250 et seq.)
Request for Reconsideration

Dear Mr. Sabine,

This letter is to give you the opportunity to reconsider your response dated June 21 to my public records records request for access to
* all draft(s) of the City's street maintenance report produced by the City's current streets consultant and delivered to the city; and
* all correspondence with the streets consultant since the submission of its draft report, including but not limited to the City's requested edits and changes to the draft report.

I believe that upon such reconsideration you will agree that your reliance on *Times Mirror Co. v. Superior Court, 53 Cal.3d 1325, 283 Cal. Rptr. 893 (1991)* is misplaced as a basis for withholding these documents, for two reasons.

First, the court in *Times Mirror Co.* applied the common law deliberative process privilege as a basis for finding an overriding public interest in nondisclosure of materials that were *not* drafts. Had they been drafts, the court could not have ignored the limitations of the draft exemption in Government Code Section 6254, subd. (a) in favor of a more encompassing exemption drawn from federal court jurisprudence under the Freedom of Information Act (FOIA). As the court remarked in *Williams v. Superior Court of San Bernardino County*, 5 Cal. 4th 337, when the California Legislature takes a "different approach" from Congress in creating exemptions from disclosure, that distinct policy cannot be ignored.

> The Legislature's careful efforts to provide access to selected information from law enforcement investigatory records was largely a waste of time if . . . the records themselves are subject to disclosure when none of the FOIA criteria apply. *A court should not lightly adopt an interpretation of statutory language that renders the language useless in many of the cases it was intended to govern.*

Id. at 353 (emphasis added). In your assertion of the deliberative process privilege under Section 6255 to bypass the limitations of the Section 6254 (a) exemption for drafts as such, you would be precisely inviting the court to "adopt an interpretation of statutory language (Section 6255) that renders the language (of another provision—Section 6254 (a)) useless in . . . cases it was intended to govern."

In my original request letter I pointed out why the draft exemption would not justify nondisclosure of the drafts of the street maintenance report. First, the exemption applies only to documents not retained in the ordinary course of business. These

drafts have been retained for the better part of a year, and in any case under the applicable records retention statute—Government Code Section 34090 *et seq.*—can be disposed of only after two years' retention.

Second, the sole case interpreting the draft exemption cites with approval a California Supreme Court case antedating the California Public Records Act that holds that the public has a right to see the documentation of a public works project even though not (or not yet) "approved" or in final form. If *Times Mirror Co.* could be applied to justify withholding of any draft that would not be exempt as such under Section 6254 (a), that limited exemption would obviously be rendered useless.

The second problem with the applicability of *Times Mirror Co.* is that it antedates Proposition 59 of 2004, which

- elevated public access to the writings of public officials and agencies to a constitutional right as fundamental as, for example, speech or assembly;
- grandfathered in limits to such access found in then existing statutes and constitutional provisions—but not then existing judicial authority;
- required any such limitations to be given a narrow construction; and
- was adopted by more than 83 percent of the vote based on a ballot argument that asserted the need "to understand the deliberative process." The City Attorney of San Diego, noting this event, has concluded that the privilege after Proposition 59 "is of dubious authority." Opinion No. 2005-01.

In any event, moreover, the value of secrecy to protect candor—and the value of secret and candid discussion to the public interest—was assumed by the *Times Mirror Co.* court to be self-evident, whereas recent more thoughtful criticism argues to the contrary. See *Too Big a Canon in the President's Arsenal: Another Look at United States v. Nixon* by Eric Lane, Frederick A.O. Schwarz, Jr., and Emily Berman, George Mason Law Review, volume 17, no. 3, Spring 2010. As for what is protected at the staff-consultant level, one could as logically argue that a better term might be the *manipulative* process privilege, with staff massaging awkward facts or conclusions presented by the consultant into some form more consistent with staff policy objectives. That may seem to be an invidious interpretation of what happens, but it is no more unsupported by evidence than is the conventional consensus that secrecy "improves the quality of agency policy decisions."

> If the waging of the Vietnam War, Watergate, and the IRAN-Contra affair is any indication, the protection from discovery of the deliberative process has the actual effect of producing poorly guided, flawed, and even illegal decisions.

An Imperfect Shield: How Private Parties Can Attack And Defeat The Executive Privilege For Deliberative Process In Government Procurement Litigation, 28 Pub Const L. J. 127, 143.

Courts can afford to insist on the confidentiality of their own deliberative process, because the public nonetheless learns not only their decisions but the facts considered (or ignored), the assumptions made (or disregarded) and the authorities relied on (or rejected) showing how they got there. The suggestion you quote from *Times Mirror Co.* that government officials "should be judged by what they decided, not for matters they considered before making up their minds" is a standard no one—least of all judges—would accept from the courts themselves, in terms of either records or court proceedings. And in the government sector, the deliberative process privilege operates in the public records domain in a manner that, if applied to the Brown Act, would mean closed sessions for deliberation followed by open sessions for the announcement of decisions.

We appreciate your courteous offer to make the final report presented for adoption available to us later in the year, but we are not going to be satisfied with that product. We believe the public is entitled to see all phases of its development including original and intermediate drafts and communications between staff and consultants concerning those drafts. We believe the public has a right to demand to know not just what decisions were ultimately made, but how the options and recommendations to adopt them were developed. This is what transparency means, and why that term, not "deliberative process," is the universal byword among democracies signifying integrity, accountability and worthiness for public trust.

We would expect that members of the City Council would likewise be interested in having access to the records we seek, if only better to judge the wisdom and necessity of what they are being asked to make their own.

Thank you for your prompt attention to this request for reconsideration. Please contact me if you need further clarification.

Sincerely,

Terry Francke
General Counsel
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cc: Mayor Dan Dalager
Deputy Mayor Maggie Houlihan
Council Member Teresa Barth
Council Member James Bond
Council Member Jerome Stocks