



# Memorandum

**TO:** RULES AND OPEN  
GOVERNMENT COMMITTEE

**FROM:** Lee Wilcox

**SUBJECT: PUBLIC RECORDS APPEAL -  
ROBIN ROEMER**

**DATE:** August 19, 2020

Approved

Date

8/20/2020

## **RECOMMENDATION**

Deny the appeal from Robin Roemer regarding the City's response to his Public Records Act request.

## **BACKGROUND**

On Saturday, June 27, 2020, Robin Roemer requested a memorandum from Councilmember Lan Diep on the Charcot Avenue Extension project through the City's online Public Records Act request form.

On Monday, June 29, 2020 the City notified Mr. Roemer of its decision to withhold the requested document pursuant to California Government Code § 6254(a). The requested document was never finalized and is therefore a preliminary draft not subject to disclosure. Later that day, Mr. Roemer appealed the City's decision to withhold the record because the City did not demonstrate that the public interest in withholding clearly outweighed the public interest in disclosure and because the memorandum was shared with other Councilmembers.

On Tuesday, July 7, 2020, the City further explained that the draft memorandum is protected by the deliberative process privilege and public interest exemption under Government Code § 6255 and asked Mr. Roemer if he would like to proceed with a formal appeal to the Rules and Open Government Committee. On Wednesday, August 5, 2020, Mr. Roemer notified the City's Open Government Manager that he would like to proceed with a formal appeal.

This correspondence is included in Attachment A.

## **ANALYSIS**

Mr. Roemer is contesting the City’s response to his Public Records Act request. The requested document is a preliminary draft that was never finalized or presented to City Council or the public. Councilmember Diep used the draft memorandum to organize his thoughts and thought processes and receive feedback from staff or other Council Offices.

The Public Records Act exempts from disclosure “preliminary drafts, notes, or interagency or intra-agency memoranda that are not retained by the public agency in the ordinary course of business, if the public interest in withholding those records clearly outweighs the public interest in disclosure” under California Government Code § 6254(a). Furthermore, the draft memorandum is protected by the deliberative process privilege and public interest exemption under California Government Code § 6255. Its disclosure would have a chilling effect on the Councilmember’s ability to have frank discussions of legal or policy matters and could expose the Councilmember’s decision-making process in such a way as to discourage candid discussion and thereby undermine his ability to effectively make decisions.

## **CONCLUSION**

Mr. Roemer’s request for a draft memorandum from Councilmember Lan Diep on the Charcot Avenue Extension project is exempt from disclosure on the basis of the preliminary drafts exemption, deliberative process privilege, and public interest exemption. Staff recommends that the Rules and Open Government Committee deny the appeal from Mr. Roemer.

## **COORDINATION**

This memorandum was coordinated with the City Attorney’s Office and Councilmember Diep’s Office.

/s/

LEE WILCOX

City Manager’s Office Chief of Staff

Director of the Office of Administration, Policy and Intergovernmental Relations

For questions please contact Amanda Orozco, Open Government Manager, at [publicrecordsrequest@sanjoseca.gov](mailto:publicrecordsrequest@sanjoseca.gov).

Attachment A: Correspondence with Robin Roemer

**From:** [Robin Roemer](#)  
**To:** [PublicRecordsRequest](#)  
**Subject:** Re: \*NEW SUBMISSION\* Request Public Records  
**Date:** Wednesday, August 5, 2020 8:08:54 PM

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[External Email]

Hi Amanda,

I would like to move forward with an appeal for this record request to the Rules Committee. Could you let me know how the process works? I'll probably would like to submit a written brief in support of my appeal. By when would you need that by?

Thank you!

Robin

On Wednesday, July 8, 2020, 10:21:21 AM PDT, Robin Roemer [REDACTED] wrote:

Thanks! I'll think about and will be in touch probably in a week or two.

Thanks,

Robin

On Wednesday, July 8, 2020, 10:17:42 AM PDT, PublicRecordsRequest <[publicrecordsrequest@sanjoseca.gov](mailto:publicrecordsrequest@sanjoseca.gov)> wrote:

Hi Robin,

There is no deadline. Just let me know if you want to move forward with an appeal to Rules and I can help with getting it scheduled.

Best,

Amanda Orozco

Open Government Manager

City of San José | City Manager's Office

200 East Santa Clara Street San José, CA 95113

408.535.8120

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**From:** Robin Roemer [REDACTED]  
**Sent:** Wednesday, July 8, 2020 10:01 AM  
**To:** PublicRecordsRequest <PublicRecordsRequest@sanjoseca.gov>  
**Subject:** Re: \*NEW SUBMISSION\* Request Public Records

[External Email]

Hi Amanda,

thank you for getting back to me. Is there a deadline for filing an appeal to the Rules Committee?

Thank you!

Robin

On Tuesday, July 7, 2020, 4:42:00 PM PDT, PublicRecordsRequest  
<[publicrecordsrequest@sanjoseca.gov](mailto:publicrecordsrequest@sanjoseca.gov)> wrote:

Hi Robin,

The Public Records Act exempts from disclosure “preliminary drafts, notes, or interagency or intra-agency memoranda that are not retained by the public agency in the ordinary course of business, if the public interest in withholding those records clearly outweighs the public interest in disclosure.” This preliminary draft memo is protected by the deliberative process privilege under Government Code Section 6255 because its disclosure would have a chilling effect on the Councilmember’s ability to have frank discussions of legal or policy matters and could expose the Councilmember’s decision-making process in such a way as to discourage candid discussion and thereby undermine his ability to effectively make decisions.

Please let me know if you would like to proceed with a formal appeal to the Rules and Open Government Committee. This appeal will be scheduled some time in August as City Council is on recess through the month of July.

Thank you.

Best,

Amanda Orozco

Open Government Manager

City of San José | City Manager’s Office

200 East Santa Clara Street San José, CA 95113

408.535.8120

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**From:** PublicRecordsRequest

**Sent:** Monday, July 6, 2020 3:16 PM

**To:** Robin Roemer [REDACTED]

**Cc:** PublicRecordsRequest <[PublicRecordsRequest@sanjoseca.gov](mailto:PublicRecordsRequest@sanjoseca.gov)>

**Subject:** RE: \*NEW SUBMISSION\* Request Public Records

Hi Robin,

The City is in receipt of your Public Records Act appeal. I'm following up with the appropriate offices and will provide an update by no later than July 17. Thank you for your patience.

Best,

Amanda Orozco

Open Government Manager

City of San José | City Manager's Office

200 East Santa Clara Street San José, CA 95113

408.535.8120

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**From:** Robin Roemer [REDACTED]  
**Sent:** Monday, June 29, 2020 9:12 PM  
**To:** PublicRecordsRequest <[PublicRecordsRequest@sanjoseca.gov](mailto:PublicRecordsRequest@sanjoseca.gov)>  
**Cc:** PublicRecordsRequest <[PublicRecordsRequest@sanjoseca.gov](mailto:PublicRecordsRequest@sanjoseca.gov)>  
**Subject:** Re: \*NEW SUBMISSION\* Request Public Records

[External Email]

Hi,

I would like to appeal the decision based on the fact that records can only be withheld pursuant to California Government Code § 6254(a) only "if the public interest in withholding those records clearly outweighs the public interest in disclosure." The City has not demonstrated that this applies in this case.

That the memo was shared with other Councilmembers also speaks to the fact that it was not a preliminary draft.

While the appeal is pending I kindly request you to release any non-exempt portions of the record.

Thank you,

Robin

On Monday, June 29, 2020, 4:01:35 PM PDT, PublicRecordsRequest <[publicrecordsrequest@sanjoseca.gov](mailto:publicrecordsrequest@sanjoseca.gov)> wrote:

Hello,

The City of San Jose is in receipt of your Public Records Act request copied below.

The City is withholding the requested document pursuant to California Government Code § 6254(a). The document you requested was never finalized and is therefore a preliminary draft not subject to disclosure. Council District 4 and Open Government Manager, Amanda Orozco, participated in the decision to withhold records.

Your request is now complete. Any person who believes that he or she has been inappropriately denied access to City of San José public records, may appeal to the City Council Rules and Open Government Committee. For more information on the appeals process, see [www.sanjoseca.gov/your-government/departments-offices/office-of-the-city-manager/official-city-records/appeals](http://www.sanjoseca.gov/your-government/departments-offices/office-of-the-city-manager/official-city-records/appeals).

Please contact me if you have any questions pertaining to your Public Records Act request at [PublicRecordsRequest@sanjoseca.gov](mailto:PublicRecordsRequest@sanjoseca.gov).

Thank you.

Best,

Amanda Orozco

Open Government Manager

City of San José | City Manager's Office

200 East Santa Clara Street San José, CA 95113

408.535.8120

**From:** City of San Jose [<mailto:webrequests@sanjoseca.gov>]

**Sent:** Saturday, June 27, 2020 3:35 PM

**To:** PublicRecordsRequest <[PublicRecordsRequest@sanjoseca.gov](mailto:PublicRecordsRequest@sanjoseca.gov)>

**Subject:** \*NEW SUBMISSION\* Request Public Records

#### **Request Public Records**

**Submission #:** 386079

**IP Address:** 73.70.29.168

**Submission Date:** 06/27/2020 3:34

**Survey Time:** 5 minutes, 17 seconds

You have a new online form submission.

Note: all answers displaying "\*\*\*\*\*" are marked as sensitive and must be viewed after your login.

**About the Right to Access Records:** The public's right to access information concerning the conduct of the people's business is a fundamental and necessary right. A record shall not be withheld from disclosure unless it is clearly exempt under applicable laws, or unless the public interest served by not making the record public clearly outweighs the public interest served by disclosure of the record.

An email address is required so that we may respond to your request.

Email

[REDACTED]



**Full Name**

Robin Roemer

**Company/Organization/Agency**

**Address**

[Redacted]

[Redacted]

**Phone**

[Redacted]

**Fax**

**Records Requested**

Other:

**Records Requested**

I would like to kindly request the memo by Councilmember Lan Diep on the Charcot Extension that was circulated among council offices prior to the meeting on June 9th, 2020. As well as information to with which offices it was shared with. I ask for a determination on this request within 5 days of your receipt of it, and an even prompter reply if you can make that determination without having to review the record[s] in question. If you determine that any or all of the information qualifies for an exemption from disclosure, I ask you to note whether, as is normally the case under the Act, the exemption is discretionary, and if so whether it is necessary in this case to exercise your discretion to withhold the information. If you determine that some but not all of the information is exempt from disclosure and that you intend to withhold it, I ask that you redact it for the time being and make the rest available as requested. In any event, please provide a signed notification citing the legal authorities on which you rely if you determine that any or all of the information is exempt and will not be disclosed. If I can provide any clarification that will help expedite your attention to my request, please contact me at phone or email. I ask that you notify me of any duplication costs exceeding \$50 before you duplicate the records so that I may decide which records I want copied. Thank you for your time and attention to this matter. Sincerely,

**Requests must be focused and reasonably describe the record(s) being sought. Try to be as clear as possible when requesting records and put date limits on your request. Offer any search clues you can and if you are informed that the records you are requesting do not exist, discuss alternatives with the City staff to whom you are making the request.**

**Preferred Method of Delivery**

Email

Thank you,  
City of San Jose



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