

Robin Roemer

**Appeal to Denial of Public Record Request (Submission #: 386079) – Memorandum by Councilmember Lan Diep on Charcot Avenue Extension**

Dear Members of the Rules and Open Government Committee,

I hereby would like to appeal the City's decision to withhold a memorandum by Councilmember Lan Diep on the Charcot Avenue Extension.

**Background**

On June 27, 2020, a request was made for

*“the memo by Councilmember Lan Diep on the Charcot Extension that was circulated among council offices prior to the meeting on June 9<sup>th</sup>, 2020. As well as information to with which offices it was shared with.”*

On June 29, 2020, the City responded:

*“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.”*

On the same day, I appealed that decision to the City's Open Government Manager:

*“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.”*

The appeal was denied on July 7, 2020:

*“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.”*

## Reasons for Appeal

While the City originally denied access to records based on California Government Code § 6254(a), the City, when challenged, denied the request based on Government Code Section § 6255.

If § 6255 is underlying reason to deny access that should have been stated in the original response.

Regardless, neither exemption applies here, as is shown below and the memo should be disclosed in its entirety.

If it is not disclosed in its entirety, the City needs to comply with Government Code §6253 (a) to disclose any parts of the memo that are not exempt.

### § 6254(a) “Preliminary draft not retained in the ordinary course of business” exemption does not apply to the memo

The request is not for drafts of the memo nor for emails or text messages that provided input to the memo but only the final version that was shared with other Councilmembers. Retained drafts are subject to disclosure.

*“The courts have observed that preliminary materials that are not customarily discarded or that have not in fact been discarded pursuant to policy or custom must be disclosed.”<sup>1</sup>*

The City of San José Ethics & Public Records Ordinance and Resolutions<sup>2</sup> additionally states

#### *4.3.2.9 Drafts and Memoranda*

*Once a proposal, initiative or other contemplated or suggested action is made public, or presented for action by any City body, agency or official, all related preliminary drafts, notes or memoranda, whether in printed or electronic form, shall be subject to disclosure if they have been retained as of the time the request is made and no other exemption applies.*

### § 6255 “Decision making process” exemption does not apply to the memo

#### ***I. Releasing the memo does not impede frank discussions with staff and advisors***

While some records are understood to be protected by the deliberative process privilege under Government Code Section 6255, not all input to a decision-making process can be covered under this exemption.

The City of San José Ethics & Public Records Ordinance and Resolutions states:

#### *4.3.3.1.B Deliberative Process Privilege.*

*Consistent with case law and Government Code Section 6255, the City may withhold a record that is protected by the "deliberative process privilege." The deliberative process privilege is intended to afford a measure of privacy to decision makers. This doctrine permits decision makers to **receive recommendatory information from and engage in general discussions with their advisors** without the fear of publicity. [emphasis added]*

The memo was not an internal District 4 document and releasing it would not impede Councilmember Diep’s ability to have candid discussions with his staff.

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<sup>1</sup> “The People’s Business A GUIDE TO THE CALIFORNIA PUBLIC RECORDS ACT”, League of California Cities, p. 34.

<sup>2</sup> <https://www.sanjoseca.gov/home/showdocument?id=33306>

Councilmembers might receive advice from other Councilmembers - or members of the public for that matter - but those records do not all fall under the deliberative process privilege.

## **2. Memo was not part of the deliberative process but reflected an already made decision**

*“The ... courts have uniformly drawn a distinction between predecisional communications, which are privileged [citations]; and communications made after the decision and designed to explain it, which are not.”* 194 - NLRB v. Sears, Roebuck & Co. (1975) 421 U.S. 132, 151–152.”<sup>3</sup>

The City of San José Ethics & Public Records Ordinance and Resolutions further states in 4.3.3.1.B

*“As a general rule, the deliberative process privilege does not protect facts from disclosure but rather protects the process by which policy decisions are made. City Records which reflect a final decision and the reasoning which supports that decision are not covered by the deliberative process privilege.”*

In a meeting with me on June 4, 2020, Councilmember Diep stated that he has made up his mind on the project and which alternative to support and that he would write a memo to explain his decision. The memo was therefore not part of the deliberative process but written after his decision was made and should not fall under the deliberative process privilege.

The City has shown no evidence that the memo was part of a deliberative process or that disclosing the memo would unduly impede the Councilmember’s decision making.

## **§ 6255 “Balancing test”: Interest in disclosure outweighs interest in withholding the memo**

The City of San José Ethics & Public Records Ordinance and Resolutions states

### *“4.3.3.1 Balancing Test*

*The balancing test is used to determine whether the public interest is better served by releasing or withholding documents. Narrowly Construe the Balancing Test. It is the intention of the City to narrowly construe the balancing test if it limits the public's right of access. In order to withhold a record under Government Code Section 6255, the City shall demonstrate that the public's interest in nondisclosure clearly outweighs the public's interest in disclosure. **The City's interest in nondisclosure is of little consequence in performing this balancing test; it is the public's interest, not the City's interest that is weighed.” [emphasis added].***

Councilmember Diep may have an interest in not disclosing his memorandum, yet that does not constitute a “public” interest.

There is an obvious public interest in Councilmembers being transparent about the facts and arguments they weigh in their decision.

Furthermore, the City of San José Ethics & Public Records Ordinance and Resolutions requires any Councilmember to publicly disclose all material facts related to an item on the City Council agenda. (Section 5.3.1)

### *5.2.8 Material Fact*

*“Material Fact” means a fact that is relevant for a member of the City Council to make an informed and knowledgeable decision and which would likely influence the decision of a member of the City Council on an item of business on the City Council agenda. [...]*”

Although the quoted Section 5 refers mainly to information received from outside sources, the existence of the Section itself clearly shows that there is significant public interest in City

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<sup>3</sup> “The People’s Business A GUIDE TO THE CALIFORNIA PUBLIC RECORDS ACT”, League of California Cities, p. 32.

Councilmembers disclosing facts material to their decision making. It seems fair to assume that Councilmember Diep's memo was a material fact in the decision of the other Councilmembers who received the memo and should therefore be disclosed to the public.

So even if Councilmember Diep were able to claim an interest that would outweighs the public interest, it seems unlikely that the Councilmembers who received the memo could claim an interest in non-disclosure of a communication they received and they would therefore be required to disclose the memo.

### **§6253 Failure to disclose factual material in the memo**

Pursuant to Government Code §6253, subd. (a), any non-exempt (public) part of a record must be made available after any exempt information has been redacted (removed or obliterated).

The City of San José Ethics & Public Records Ordinance and Resolutions further states in 4.3.3.1

*“If a record contains both factual and deliberative materials, the deliberative materials may be redacted and the remainder of the record must be disclosed, unless the factual material is inextricably intertwined, with the deliberative material. The balancing test shall be applied in each instance to determine whether the public interest in maintaining the deliberative process privilege outweighs the public interest in disclosure of the particular information in question.”*

And in 4.3.1.7.A

*Information that is exempt from disclosure shall be redacted or otherwise segregated so that the nonexempt portion of requested Public Information may be made available.*

It should be noted, that as Councilmember Diep's position and opinion is on the record already, there seems to be no good reason to exclude the deliberative materials.

Thank you.