

MARY JO LANZAFAME  
ASSISTANT CITY ATTORNEY

PRESCILLA DUGARD  
CHIEF DEPUTY CITY ATTORNEY

CATHERINE M. BRADLEY  
DEPUTY CITY ATTORNEY

OFFICE OF  
**THE CITY ATTORNEY**  
CITY OF SAN DIEGO

**Jan I. Goldsmith**

CITY ATTORNEY

1200 THIRD AVENUE, SUITE 1620  
SAN DIEGO, CALIFORNIA 92101-4178  
TELEPHONE (619) 236-6220  
FAX (619) 236-7215

February 20, 2014

REPORT TO CITY COUNCIL

SUMMARY OF LEGAL ISSUES RELATED TO PROPOSED AMENDMENTS TO THE  
CHARTER RELATING TO ACCESS TO GOVERNMENT

**INTRODUCTION**

In a February 10, 2014 Report, this Office summarized some of the legal issues identified in the proposed amendments to Charter sections 215, 216, and 216.1. In response to these concerns, on February 12, 2014, the proponents provided revisions that changed the three-part test, provided a definition, and added new language. On February 17, 2014, the proponents provided comments regarding their revisions and on February 19, 2014, provided a final proposal for submittal to City Council. This Report summarizes new issues and unresolved legal issues for the Council's consideration before deciding whether to approve an amendment to the Charter. The decision to place the proposed Charter amendments on the ballot is a policy and financial decision for the Council.

**DISCUSSION**

The revised proposal addresses issues 5 and 9 provided to City Council in our February 10, 2014 Report. No other changes to the proposal address the balance of the issues identified in that Report. Of the following comments provided to the proponents on February 14, 2014, the final proposal makes changes to address item no. 1 only. The balance of the issues identified in the February 10, 2014 Report and items 2 – 5 below, remain for the Council's consideration in reviewing the proposal. We have provided an explanation of the status on the comments below in italics.

1. Having the Council make findings of fact, supported by substantial evidence, that there is an "absence of any overriding public interest in the information" is a potential problem. It is very difficult to show the "absence" of something.

*This language was revised to reflect the standard as stated previously.*

2. The term "standard policy" is not a term or phrase that the City uses, so it could be difficult to figure out what it means.

*We received clarification from the proponents regarding their intended application of this phrase. We understand that the provision is intended to require that the City Council adopt findings, supported by substantial evidence with respect to any matter for which the Council determines to apply an exception under the Brown Act for hearing a matter in closed session,*

*whether litigation, labor negotiations, personnel matters or real property negotiations. The proposal requires justification by staff in response to particular requests.*

3. The new (4)(b) requires justification in writing by the City of the reasons for not providing access. This is one area where the City could seek reimbursement from the State under the 2012 decision by the Commission on State Mandates. There is a pending State ballot measure that would do away with the reimbursements, but this would be a new fiscal issue for the Council to consider.

*We have not been advised of any proposed change in this language.*

4. The revision to the definition of substantial evidence is helpful, but seems excessive with the added requirement that an ordinance "shall not be effective until justified . . ." Ordinances are subject to referendum and adding another "effective" requirement adds additional complexity and the potential for litigation.

*We have not been advised of any proposed change in this language.*

5. The proposal requires the City to justify why it needs to go into closed session for matters that are specifically permitted under the Brown Act without the need for independent findings. If the City were challenged by someone claiming that the evidence was insufficient, it could jeopardize the City's ability to resolve litigation claims and labor issues.

*As indicated previously, the proponents intend the requirement for findings supported by substantial evidence to apply to any policy or decision to hear a matter in closed session, where currently permitted under the Brown Act.*

## CONCLUSION

The Brown Act and California Public Records Act provide comprehensive schemes to ensure that the public has access to meetings and public records. The City may impose upon itself additional legal requirements to ensure public access. However, doing so could repeatedly expose the City to litigation as to whether it met those additional requirements. The decision to place the proposed amendments on the ballot or explore other alternatives is a policy and financial decision for the Council.

JAN I. GOLDSMITH, CITY ATTORNEY

By /s/ Prescilla Dugard  
Prescilla Dugard  
Chief Deputy City Attorney

February 19, 2014

This is the current version of the proposed City Charter amendments from which Californians Aware will be doing our presentation at the February 25, 2014, City Council meeting.

The changes to the February 10, 2014 version are shown in blue and highlighted in yellow in the strikeout/underline version; they are shown in blue in the smooth version. The changes were made to address concerns raised by the City Attorney on February 10, 2014.

**Californians Aware February 19, 2014  
Strikeout/Underline**

~~Section 215: Publicity of Records~~

~~All books, records and accounts of every office and Department of the City shall be open to inspection by any citizen at all reasonable times and under reasonable regulations established by the Council, except such records and documents the disclosure of which would tend to defeat the lawful purpose which they are intended to accomplish.~~

~~Section 216: Copies of Records~~

~~Copies or extracts, duly certified, from said books and records open for inspection, shall be given by the officer having the same in custody to any person demanding the same who shall be charged for such copies or extracts, and for certification, the charge to be fixed by the Council.~~

Section 216.1: Access to Government Information

(a) The people have the right to instruct their representatives, petition government for redress of grievances, and assemble freely to consult for the common good.

(b) (1) The people have the right of access to information concerning the conduct of the people's business, and therefore, the meetings of public City bodies and the writings of public City officials, employees and

agencies shall be open to public scrutiny, as well as the writings of contractors in the possession of the City, or to which it has the right of access by contract or by applicable statute or regulation.

(2) A statute, court rule, ordinance, regulation or other State or City authority, including those in effect on the effective date of this Section, shall be broadly construed if it furthers the people's right of access, and narrowly construed if it limits the right of access. No limitation of access not mandated by state or federal law shall have greater scope or duration than required by demonstrable need. (3) A statute, court rule An ordinance, regulation, policy or other City authority adopted after the effective date of this Section that limits the right of access beyond state or federal law requirements shall not be adopted effective until justified with findings of fact, supported by substantial evidence, demonstrating the interest protected by the limitation, and the need for protecting the limitation to protect that interest, and the likelihood that the limitation will be effective in protecting the interest. The justification shall be made by the City Council if it supports a standard policy irrespective of the particulars to which access is sought, or by a City officer if in response to a particular request.

(4) Limitations on the right of access to meetings and writings not required by state or federal law existing in City ordinances, regulations, policies or other authorities identified by the City or members of the public in effect on the effective date of this Section shall, two years from that date and every third year thereafter, be neither asserted or relied on until justified by the City Council with findings of fact, supported by substantial evidence, demonstrating the interest protected by the limitation, the need for the limitation to protect that interest, and the likelihood that the limitation will be effective in protecting the interest. Limitations on access not required by state or federal law existing in City ordinances, regulations, policies or other authorities that are discovered and identified as such only after a justification review prescribed in this subdivision has concluded shall remain in force until the next scheduled review date or until the Council chooses to make findings, whichever occurs sooner. The justification shall be made by the City Council if it supports a standard policy irrespective of the particulars to which access is sought, or by a City officer if in response to a particular request.

(5) For purposes of this subdivision:

a policy is a position, whether or not codified, asserted with virtually total invariability, that resolves against access the discretion provided in State law to grant or deny access to a meeting of a public body or the writing of a City official, employee, contractor or agency.

evidence is "substantial" when drawn from verifiable experience rather than speculation or conjecture.

standard policy means a determination that access to a type of meeting or information will not be provided irrespective of the circumstances.

~~(3)-(6)~~ Nothing in this Section supersedes or modifies the right of privacy guaranteed by Section 1 of the California Constitution or affects the construction of any statute, court rule, or other authority to the extent that it protects that right to privacy, including any statutory procedures governing discovery or disclosure of information concerning the official performance or professional qualifications of a peace officer.

~~(4)(7)~~ Nothing in this Section supersedes or modifies any provision of this Charter or the California Constitution, including the guarantees that a person may not be deprived of life, liberty or property without due process of law, or denied equal protection of the laws.

~~(5)-(8)~~ This Section does not repeal or nullify, expressly or by implication, any constitutional or statutory exception to the right of access to public records or meetings of public bodies that is in effect on the effective date of this Section, including, but not limited to, any statute protecting the confidentiality of law enforcement and prosecution records. Nothing in this Section affects the City's rights or obligations under applicable laws governing retention of records.

The City of San Diego is committed to open, transparent, and accessible government; it is in the best interest of the City that its agencies and departments make their data available online using machine readable open standards and formats to make City operations more transparent, effective and accountable to the public. Open data policies will permit the public to assist in identifying efficient solutions for government, promote innovative strategies for social progress and create economic opportunities.

## Section 216.1: Access to Government Information

(a) The people have the right to instruct their representatives, petition government for redress of grievances, and assemble freely to consult for the common good.

(b) (1) The people have the right of access to information concerning the conduct of the people's business, and therefore, the meetings of City bodies and the writings of City officials, employees and agencies shall be open to public scrutiny, as well as the writings of contractors in the possession of the City, or to which it has the right of access by contract or by applicable statute or regulation.

(2) A statute, ordinance, regulation or other State or City authority, including those in effect on the effective date of this Section, shall be broadly construed if it furthers the people's right of access, and narrowly construed if it limits the right of access. No limitation of access not mandated by state or federal law shall have greater scope or duration than required by demonstrable need. (3) An ordinance, regulation, policy or other City authority adopted after the effective date of this Section that limits the right of access beyond state or federal law requirements shall not be effective until justified with findings of fact, supported by substantial evidence, demonstrating the interest protected by the limitation, the need for the limitation to protect that interest, and the likelihood that the limitation will be effective in protecting the interest. **The justification shall be made by the City Council if it supports a standard policy irrespective of the particulars to which access is sought, or by a City officer if in response to a particular request.**

(4) Limitations on the right of access to meetings and writings not required by state or federal law existing in City ordinances, regulations, policies or other authorities **identified by the City or members of the public** in effect on the effective date of this Section shall, two years from that date and every third year thereafter, be neither asserted or relied on until justified by the City Council with findings of fact, supported by substantial evidence, demonstrating the interest protected by the limitation, the need for the limitation to protect that interest, and the likelihood that the limitation will be effective in protecting the interest. **Limitations on access not required by state or federal law existing in City ordinances, regulations, policies or other authorities that**

are discovered and identified as such only after a justification review prescribed in this subdivision has concluded shall remain in force until the next scheduled review date or until the Council chooses to make findings, whichever occurs sooner. The justification shall be made by the City Council if it supports a standard policy irrespective of the particulars to which access is sought, or by a City officer if in response to a particular request.

(5) For purposes of this subdivision:

a policy is a position, whether or not codified, asserted with virtually total invariability, that resolves against access the discretion provided in State law to grant or deny access to a meeting of a public body or the writing of a City official, employee, contractor or agency.

evidence is “substantial” when drawn from verifiable experience rather than speculation or conjecture.

standard policy means a determination that access to a type of meeting or information will not be provided irrespective of the circumstances.

(6) Nothing in this Section supersedes or modifies the right of privacy guaranteed by Section 1 of the California Constitution or affects the construction of any statute, court rule, or other authority to the extent that it protects that right to privacy, including any statutory procedures governing discovery or disclosure of information concerning the official performance or professional qualifications of a peace officer.

(7) Nothing in this Section supersedes or modifies any provision of this Charter or the California Constitution, including the guarantees that a person may not be deprived of life, liberty or property without due process of law, or denied equal protection of the laws.

(8) This Section does not repeal or nullify, expressly or by implication, any constitutional or statutory exception to the right of access to public records or meetings of public bodies that is in effect on the effective date of this Section, including, but not limited to, any statute protecting the confidentiality of law enforcement and prosecution records. **Nothing in this Section affects the City's rights or obligations under applicable laws governing retention of records.**

(c) The City of San Diego is committed to open, transparent, and accessible government; it is in the best interest of the City that its agencies

and departments make their data available online using machine readable open standards and formats to make City operations more transparent, effective and accountable to the public. Open data policies will permit the public to assist in identifying efficient solutions for government, promote innovative strategies for social progress and create economic opportunities.