CATHERINE M. BRADLEY
DEPUTY CITY ATTORNEY

OFFICE OF
THE CITY ATTORNEY
CITY OF SAN DIEGO

Michael J. Aguirre
CITY ATTORNEY

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

MEMORANDUM OF LAW

DATE: February 8, 2005

TO: Honorable Mayor, Councilmembers, and City Manager

FROM: City Attorney

SUBJECT: Disclosure of Official's Calendars under the California Public Records Act

INTRODUCTION

On January 13, 2005, the Union-Tribune submitted written requests under the California Public Records Act [CPRA] for the 2004 appointment calendars of the Mayor, Councilmembers, and the City Manager. Under California statutory and case law, certain entries in public officials' calendars are protected from disclosure for various reasons, including the deliberative process privilege, security concerns, personnel matters, and privacy. However, on November 2, 2004, the electorate passed State Proposition 59 (Public Records, Open Meetings) and City of San Diego Proposition D (Access to Government Information). The passage of these propositions has raised the question of whether the exemptions that permit withholding of officials' calendars still exist under California law. This memorandum provides an analysis of those propositions, the relevant case law, and guidance on how to respond to the pending record request for the 2004 calendars.

QUESTIONS PRESENTED

1. Do State Proposition 59 and City Proposition D change existing statutes or case law?

2. What are the legal requirements for providing the 2004 calendars of public officials?

SHORT ANSWERS

1. No. Both propositions contain language stating that the propositions do not repeal or nullify any constitutional or statutory exception to the right of access to public records that is in effect on the effective date of the propositions.

2. Under existing California case law, the wholesale production of an official's calendar is not required. However, in light of the passage of the above propositions, a court could find that disclosure of the 2004 calendars, with appropriate redactions discussed herein, is in the public's interest.

ANALYSIS

The letters from the Union-Tribune request that the Mayor, Councilmembers, and City Manager provide: "appointment calendars, daily schedules or other records sufficient to show all the [officials'] meetings and other activities," in their official capacities, in 2004. The letters also assert that if a determination is made that any or all of the information is exempt, that the determination be reconsidered in view of State Proposition 59. The letter claims that Proposition 59 may modify or overturn authorities on which the City has relied on in the past. The letter further requests that officials exercise their discretion to disclose records that might otherwise be exempt, and that records containing both exempt and non-exempt content be provided with exempt material redacted from the record.[1]

A. Times Mirror Case

Public officials' calendars have historically been entitled to certain exemptions from disclosure on the basis of the decision in *Times Mirror Co. v. Superior Court*, 53 Cal. 3d 1325 (1991). In the *Times Mirror* case, the California Supreme Court reviewed a request by the Los Angeles Times for the appointment schedules, notebooks, and calendars maintained by former Governor Deukmejian. The Court recognized that the Governor's calendar could reveal certain items of information that were best left undisclosed. "Disclosing the identity of persons with whom the Governor has met and consulted is the functional equivalent of revealing the substance or direction of the Governor's judgment and mental processes. . . . The intrusion into the deliberative process is patent." *Id*. at 1343.

The Court also noted that revealing certain information might have a chilling effect. "If the law required disclosure of a private meeting between the Governor and a politically unpopular or controversial group, that meeting might never occur." *Id*. at 1344. The Court determined that certain content in the calendar could reflect the governor's "deliberative process." "While the raw material in the Governor's appointment calendars and schedules is factual, its essence is deliberative. Accordingly, we are persuaded that the public interest in withholding disclosure of the Governor's appointment calendars and schedules is considerable." *Id*. at 1344. Finally, the Court stated: "To disclose *every* private meeting or association of the Governor and expect the decisionmaking process to function effectively, is to deny human nature and contrary to common sense and experience." *Id*. at 1345. (emphasis in original).

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[1] *See, e.g.,* Letter dated January 13, 2005, from the Union-Tribune to Mayor Dick Murphy. (Attachment 1).

The *Times Mirror* court also took into consideration the security concerns that would be present with the release of the requested materials. It noted that such information, even if contained in outdated calendars, could enable the reader to know in advance when and where the Governor will be, who would be with him, and when he will be alone, and that a person could use such information to "discern activity patterns" and "identify areas of particular vulnerability." *Id*. at 1345. "An individual intent on doing harm to the Governor might be able to reconstruct the Governor's daily habits and patterns using outdated schedules." *Id*. at 1347.

Ultimately, the *Times Mirror* court determined that the need to protect the deliberative process and the Governor's personal security interest outweighed the public interest in disclosure. Under Government Code section 6255, often referred to as the "catchall" exemption, records need not be disclosed when the public interest in nondisclosure clearly outweighs the public interest served by disclosure. On the basis of this catchall provision, the California Supreme Court upheld the trial court's decision denying the disclosure of the calendars and appointment schedules.

The *Times Mirror* court did not, however, create a blanket exemption for the Governor's calendars, or for the calendars of any public officials. The facts of *Times Mirror* involved a fairly broad request for all calendars and appointment schedules created over a five year period. The Court indicated that in some circumstances a more focused request might lead to a different result:

> Our holding does not render inviolate the Governor's calendars and schedules or other records of the Governor's office. There may be cases where the public interest in certain specific information contained in one or more of the Governor's calendars is more compelling, the specific request more focused, and the extent of the requested disclosure more limited; then the court might properly conclude that the public interest in nondisclosure does *not* clearly outweigh the public interest in disclosure, whatever the incidental impact on the deliberative process.

Id. at 1345-46.

In keeping with the above provisions of the *Times Mirror* case, our Office responded to the Union-Tribune by asking for a more focused request. Although the request seeks a narrower scope of documents than was sought in the *Times Mirror* case (one year instead of five), the request is still quite broad. However, the Union-Tribune declined to narrow the request, noting that Governor Schwarzenegger and Attorney General Lockyer recently provided portions of their 2004 calendars. Nonetheless, based on the law contained in *Times Mirror*, there exists a legal basis for public officials to decline to turn over entire calendars in response to a CPRA request.

B. Propositions 59 and D

On November 2, 2004, the voters of California and San Diego passed Propositions 59 and D, respectively.[2] Both of these propositions reaffirmed that the people have a right of access to information concerning the conduct of the people's business. These propositions require that any authority limiting the right of access to public records shall be narrowly construed. The passage of these propositions has raised concerns regarding their impact on the longstanding exemptions to the CPRA, such as those identified in *Times Mirror*.

Although the legal effect of the propositions on the CPRA has not been reviewed by the courts, we do have the benefit of some guidance from a California Attorney General Opinion released subsequent to the November 2004 election. In Opinion number 04-401 (December 22, 2004), the Attorney General reviewed its analysis of the exemptions available under the CPRA in light of the provisions of Proposition 59. The Attorney General noted that the requirement that exemptions to the CPRA be "narrowly construed" has already been established by prior case law." *Id*. at p. 16, citing *City of Hemet v. Superior Court*, 37 Cal. App. 4th 1411, 1425 (1995). Moreover, the Attorney General found compelling the language in Proposition 59 that states: "this subdivision 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 subdivision." Based on these facts, the Attorney General found nothing in Proposition 59 that eliminated the exemptions that exist in the CPRA.

Because Proposition D contains essentially similar language, the analysis by the Attorney General also would apply to the effect of that proposition on existing case and statutory exemptions. Although opinions of the Attorney General do not have the same weight as a court decision, they are persuasive, (*See*, *e.g. Napa Valley Educators' Assn. v. Napa Valley Unified School District,* 194 Cal. App. 3d 243, 251 (1987)), and it is likely a court could conclude that existing exemptions to the CPRA survive the passage of Propositions 59 and D.

C. Governor Schwarzenegger's Calendars

On November 3, 2004, one day after the passage of Proposition 59, the California First Amendment Coalition [CFAC] submitted a CPRA request to the Governor requesting a copy of his appointment calendars and daily schedules for 2004.[3] That request sought the same documentation that was asked of Governor Deukmejian more than a decade earlier, and essentially the same documents currently being sought by the Union-Tribune.

In response, Governor Schwarzenegger turned over the bulk of his calendar, but he also

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[2] *See,* Proposition 59 and D attached as Attachment 2 and 3, respectively.

[3] A copy of the request by the CFAC, the Governor's responses, and his calendar entries can be accessed at http://www.cfac.org/Attachments/governor_calendars.htm.

exercised his rights to certain exemptions contained in the CPRA, particularly sections 6254(c) [personnel, medical, or similar files, the disclosure of which would constitute an unwarranted invasion of personal privacy]; 6254(k) [records, the disclosure of which is exempted or prohibited pursuant to federal or state law, including, but not limited to, provisions of the California Evidence Code relating to privilege], and 6255 [public interest in nondisclosure outweighs public interest in disclosure]. On the basis of these exemptions, the Governor redacted information from his calendars that related to security (travel information and itineraries); personal information (private addresses, telephone numbers, and personal information concerning the Governor's staff or members of the public); and personnel matters (interviews with applicants for an office or appointment).

Although portions of his calendar were provided, the Governor declined the CFAC's request to "explain publicly that he is disclosing the asked-for records because of a change in the law created by Prop 59." Instead, the Governor responded that the decision to provide the records "should not be considered a reflection of his view of the legal effect of Proposition 59" because the legal effect is still under consideration. Accordingly, the Governor's decision to provide the records does not clarify the legal effect of Proposition 59 on the existing case law and statutory exemptions. Nonetheless, the Governor's response provides an example that may be useful in responding to the Union-Tribune's request for calendar entries reflecting official duties.

CONCLUSION

The *Times Mirror* court held that the "wholesale production" of five years of the Governor's calendars and schedules, "covering thousands of meetings, conference and engagements of every conceivable nature" has no identifiable public interest. *Id.* at 1345. A request for an entire year of calendar entries and hundreds of meetings is similarly overbroad. Because Propositions 59 and D arguably did not change existing case law, it is possible that a court could find that the Union-Tribune's request for the wholesale production of the officials' 2004 calendars is not required under the CPRA, and that a more focused request must be made.

On the other hand, a court might conclude that State Proposition 59 and City Proposition D require that the exemptions under *Times Mirror* case be more narrowly construed than before. In that regard, it would be appropriate to provide the 2004 calendars with the narrow exemptions described in section C above. When items are not disclosed on the basis of the California Government Code section 6255 "catchall" exemption: "The agency shall justify withholding any record by demonstrating that the record in question is exempt under express provisions of this chapter or that on the facts of the particular case the public interest served by not disclosing the record clearly outweighs the public interest served by disclosure of the record." Cal. Gov. Code § 6255(a). Accordingly, a decision to redact information from an official's calendar or appointment schedules must have a legitimate basis for the withholding of such information.

It also should be noted that you are not required to assert all exemptions from disclosure. In other words, you may provide information from your calendars or appointment schedules that may be subject to the deliberative process exemption or that may impact your personal security. However, we recommend that any personnel matters, and any private information of third parties, such as home phone numbers or addresses, be redacted. We are available to discuss individual entries or circumstances in more detail, if necessary.

MICHAEL J. AGUIRRE, City Attorney

By
Catherine M. Bradley
Deputy City Attorney

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Attachments
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