MEMORANDUM OF LAW

DATE: October 21, 1992

TO: Monica Higgins, Fire Marshal

FROM: City Attorney

SUBJECT: Public Records Act Request from the Environmental Health Coalition

In a memorandum dated October 5, 1992, and received by our office on October 7th, the Environmental Health Coalition ("EHC") requested information related to violations of the Fire Code determined by inspections conducted under the Combustible, Explosive and Dangerous Materials ("CEDMAT") Inspection Program. The paramount issue is whether the information requested by EHC is protected under the California Public Records Act ("CPRA") which parallels the federal Freedom of Information Act ("FOIA"). Our office has concluded that the requested information may not be protected under the CPRA except as noted. The following is an analysis of whether the requested information is protected under the CPRA and related issues.

I. CEDMAT (San Diego Municipal Code sections 55.0779.2001 to 55.0779.2005).

San Diego Municipal Code ("SDMC") section 55.0779.2005 provides,

> (a) Records of inspection, inventories, information and action plans developed in connection with the CEDMAT Inspection Program are for the exclusive use of the Fire Chief and his designees. Such records shall be further subject to all statutory protection and exemption against public disclosure otherwise allowed by law. The City Council finds and hereby declares that this information, were it accessible to the general public, may potentially be used to sabotage, destroy or otherwise damage industrial facilities. The Council further declares, pursuant to Government Code section 6255, that the public interest served by not making such information public clearly outweighs the public interest served by the disclosure. The City Council further finds and declares that a guarantee of confidentiality is essential for information

collected under the CEDMAT Inspection Program, because without such guarantee the Chief would be unable as a practical matter to collect fully complete and accurate information regarding combustible, explosive or other dangerous materials due to legitimate business concerns regarding the security and safety of business facilities and the protection of trade secrets and other competitive information.

(b) If a request or other action is made seeking the release of information collected under the CEDMAT Inspection Program, the Fire Chief or his designee shall, to the extent practicable, notify the owner, operator or manager of any occupancy which supplied such information. Information collected under CEDMAT Inspection Program shall not be released to the public except pursuant to a court order determining that, notwithstanding the provisions of this section, such release is legally required (emphasis added).

This Code section specifies what information is protected by CEDMAT and the reasons for those protections. Subsection (b) provides that information collected in accordance with a CEDMAT inspection will not be released except pursuant to a court order. However, subsection (b) will not apply if it is determined that the Fire Department has the authority to inspect businesses absent the CEDMAT Inspection Program, pursuant to authority found in the Uniform Fire Code ("UFC"). In the UFC, which has been adopted with modifications by the San Diego Fire Code, section 2.107 authorizes inspections to enforce the provisions of the UFC. Thus, if information was collected pursuant to UFC Section 2.107, then the provisions contained in SDMC Section 55.0779.2005(b) do not apply.

Also, CEDMAT protects "records of inspection, inventories, information and action plans ...." There is no mention of information regarding Fire Code violations. Consequently, it's possible to argue that Fire Code violations information was not contemplated by CEDMAT.

II. California Public Records Act (Gov't Code Section 6250 et seq.)

A. EHC requested, "all business records and files relating to hazardous materials violation of the Fire Code." This request is too broad, ambiguous and fails to comply with Government Code section 6256 which provides, in part, that "any person may receive a copy of any identifiable public record or copy thereof." A request for all business records and files

related to Fire Code violations is not a request for an "identifiable public record" or records.

B. Government Code section 6254 provides specificity as to that information which is exempt from disclosure. Subsection (f) states, in part,

> Records of complaints to, or investigations conducted by, or records of intelligence information or security procedures of, the office of the Attorney General and the Department of Justice, and any state or local police agency, or any ... investigatory or security files compiled by any other state or local police agency, or any ... investigatory or security files compiled by any other state or local agency for correctional, law enforcement, or licensing purposes (emphasis added) ....

One early case which interpreted this code section was Uribe v. Howie, 19 Cal.App.3d 194 (1971). This case involved the release of monthly pesticide spray reports which were required to be submitted (under the Agriculture Code) by licensed commercial operators to the county agricultural commissioner. The trial court held that these records were for law enforcement or licensing purposes under Gov't Code Section 6254(f), as well as other exemptions not relevant here. The appeals court reversed.

The court of appeals adopted the federal courts' definition of a similar provision of the FOIA which held that the exemption for records of "investigatory files" applies only when the prospect of enforcement proceedings is "concrete and definite" (emphasis added). Uribe, 19 Cal.App.3d at 212, citing Bristol-Myers Company v. F.T.C., 424 F.2d 935 (1970).

As to the licensing purposes exemption, the court held that since licensing was not the primary purpose of the reports, even though they were used for that on some occasions, the exemption did not apply. Uribe, 19 Cal.App.3d at 213.

The fact that it was the policy of the agricultural commissioner to keep the information confidential pursuant to a directive of the State Director of Agriculture was not decisive. The court stated that even though the reports are obtained under a pledge of confidentiality and even though confidentiality was the policy, there was no compulsion to maintain the subject reports in confidence.

Black Panther Party v. Kehoe, 42 Cal.App.3d 645 (1974), dealt with release of letters of complaint received from individuals by the Bureau of Collection and Investigative Services, charging unethical or abusive practices by licensed collection agencies. The bureau did not disclose the letters to the public, but had made a practice of disclosing them to the

businesses involved. The trial court found that the records fell under the exception in Gov't Code Section 6254(f).

The court of appeal reversed, directing the trial court to reconsider disclosure due to the practice of allowing disclosure to the licensees. The opinion reasoned that while the records may be protected from disclosure, once any disclosure is made (such as that to the licensees) the record loses its exempt status, and must be disclosed to the public. Black Panther Party, 42 Cal.App.3d at 655 (1974). It should be noted that the court found that these records were in themselves protected from disclosure (as "records of complaints"), and not protected simply as part of an investigatory file as in Uribe.

In American Civil Liberties Union Foundation v. Deukmejian, 32 Cal.3d 440 (1982), the California Supreme Court further expanded upon the notion that the federal FOIA illuminates (but does not control) the interpretation of the state act. In interpreting the "investigatory records" exemption, the court cited with approval the federal interpretation which allows exemption only if the production of such records would

> (A) interfere with enforcement proceedings, (B) deprive a person of a right to a fair trial or an impartial adjudication, (C) constitute an unwarranted invasion of personal privacy, (D) disclose the identity of a confidential source, and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential source, (E) disclose investigative techniques and procedures, or (F) endanger the life or physical safety of law enforcement personnel ...."

ACLU, 32 Cal.3d at 448, 449.

The trial court had decided that index cards which contained information collected by law enforcement agencies about individuals and any criminal associations they might have had should be disclosed except for personal information on the cards or information which might reveal the names of confidential sources. The California Supreme Court decided that this was too restrictive a reading of the exemption, but it would be too broad if read as "information reasonably related to criminal activity." ACLU, 32 Cal.3d at 449. The court found that information supplied in confidence is protected by the Act "even if the revelation of that information will not necessarily disclose the identity of the source." ACLU, 32 Cal.3d at 450. Further, the court cited with approval the Bristol-Myers based interpretation

in Uribe, which limits the exemption to cases in which the prospect of enforcement proceedings is concrete and definite, despite later U.S. Supreme Court decisions which may be interpreted differently as applied to the FOIA.

The courts have generally held that the overall intent of the act reflects a "general policy of disclosure of public records and information subject to narrowly drawn statutory exceptions." City of Santa Rosa v. Press Democrat, 187 Cal.App.3d 1315, 1318 (1986). The CPRA reflects the state legislature's balancing of the "narrower privacy interest of individuals with the public's fundamental right to know about the conduct of public business. (citations omitted.)" (Id.)

This view has basically led the courts to presume disclosure, unless the records in question are shown to come squarely under the rubric of the enumerated exceptions. For example, in South Coast Newspapers, Inc. v. City of Oceanside, 160 Cal.App.3d 261 (1984), the court of appeals remanded the case to the trial court for an in camera inspection of a report which was prepared by the police department regarding an investigation of a school principal for failure to report suspected child abuse. The trial court had held that the report was protected from disclosure under the exemption in Gov't Code Section 6254(f) as a "record of complaint to or investigation conducted by a state or local police agency". Further, the trial court had held that no in camera inspection was necessary because the exemption was absolute.

The court of appeal found that the ACLU requirements had not been met, and so an in camera inspection and disclosure of at least parts of the report should take place. In other words, the presumption was for disclosure, unless those specific criteria enumerated in ACLU could be met, and here the court was not sure that they were. See also, Williams v. Superior Court, 3 Cal.App.4th 1292 (1992) (also holding that the ACLU criteria must be considered when determining disclosure of particular law enforcement investigatory records).

Thus the burden is generally very heavy to show that records should be exempted from disclosure. The CPRA favors public access to public records. One possible argument which could be made is that records kept by the Fire Department in the course of an investigation of a particular business should be exempted from disclosure as they are investigatory files with a concrete possibility of criminal prosecution. However, even if this argument were to succeed, there would be no basis for exemption for documents relating to other businesses that will not be subject to prosecution for any violations.

I have been unable to find any cases which interpret the

language regarding correctional purposes. However in some cases the courts have simply used the phrase "correctional law enforcement purposes" in discussing the code. It may be argued logically that these terms are meant to apply to traditional correctional purposes (such as for jails and the like), and not correctional in the sense of correcting code violations. As no cases have covered this, however, an argument could be made that correctional should be interpreted to mean correcting of code violations, and so the information comes under the exemption.

Therefore, an argument may be made for the protection of the requested information, but based on case law, it is unclear what the courts will decide.

C. Government Code section 6255 states,

> 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 making the record public clearly outweighs the public interest served by disclosure of the record (emphasis added).

A conclusionary statement is made in SDMC Section 55.0779.2005 that, "the public interest served by not making such information public clearly outweighs the public interest served by disclosure." Merely because an ordinance contains a statement that the public interest right to know is clearly outweighed by the public interest served by not disclosing the information does not make it so. The legislative findings in the Municipal Code which created the CEDMAT program would not, on their own, definitively cause the reports at issue to remain confidential. The burden is a heavy one, and statements without any support (such as legislative findings, or concerns about business refusing to cooperate if information is not kept confidential) are not considered sufficient to meet the burden. See, e.g., Uribe. In addition, the Department may argue that information gathered pursuant to CEDMAT is protected so that "complete and accurate information" is collected from businesses and greater compliance to the UFC is achieved as a result of protections provided to the business in CEDMAT. However, an argument could be made by EHC that greater compliance would be achieved to the UFC when businesses know that violation of the UFC could be disclosed to the public. Thus, a showing would have to be made which would demonstrate that the burden of releasing the information (i.e., the interest in confidentiality) is higher than the interest in disclosure, which is considered very high.

Conclusion

The Department should require from EHC that greater

specificity is needed regarding the requested information. The authority for that request is found in Government Code section 6256. Once the Department understands exactly what is being requested, then perhaps some of the information can be provided which may be sufficient for EHC and not cause the Department problems with the CEDMAT Inspection Program and affected businesses. If the information requested by EHC is still objectionable to the Department and assuming that the requested information is directly related to UFC violation, an in camera inspection of the disputed reports can be structured either informally or formally. Such an inspection would then preserve the exemption of 6254(f) in those cases that are designed for criminal enforcement and permit disclosure of those cases which are more compliance directed. The outcome of the court's ruling on 6254(f) of the Gov't Code is uncertain. In addition, the burden contained in section 6255 of the Government Code must be substantiated by departmental evidence and not merely by the legislative findings of section 55.0779.2005. Thus, Government Code section 6254(f) and 6255, although asserted as exemptions to disclosure, will not guarantee that the requested information will be protected.

Don't hesitate to call me if you have any further questions regarding this issue.

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By
Elmer L. Heap, Jr.
Deputy City Attorney

TB:ELH:MJR:smm:518(x043.2)
cc George George, Acting Fire Chief
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