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REPORT TO COMMITTEE ON ECONOMIC DEVELOPMENT AND
INTERGOVERNMENTAL RELATIONS

PROPOSED AMENDMENTS TO CHARTER SECTIONS RELATING TO ACCESS TO
GOVERNMENT RECORDS

INTRODUCTION

Councilmember Alvarez has proposed amendments to Charter sections 215, 216, and 216.1 relating to access to government records. (*See*, Memorandum dated November 13, 2013 from Councilmember Alvarez to Sherri Lightner, Chair, Rules & Economic Development Committee). This report provides a preliminary analysis of the proposed changes and identifies issues for Committee consideration.

DISCUSSION

CHARTER SECTIONS 215 AND 216

1. Consider repealing sections 215 and 216 to avoid duplication and potential conflicts with the Public Records Act.

In our recent review of Charter sections that have potential legal issues, we determined that the provisions of Charter sections 215 and 216 are outdated and no longer necessary because the subject matter is now covered by the California Records Act.¹

Charter section 215 "Publicity of Records" and section 216 "Copies of Records," were adopted in 1931. Charter section 215 provides that City records will be open to public inspection unless there is disclosure of the records "would tend to defeat the lawful purpose which they are intended to accomplish." Charter section 216 allows the City to charge for copies of the records.

In 1968, the California Public Records Act was enacted and now provides that "public records are open to inspection at all times during the office hours of the state or local agency and every person has a right to inspect any public record, except as hereafter provided." Cal. Gov't Code § 6253(a). It also requires that local agencies "make the records promptly available to any

¹ One example of an outdated provision is in Charter section 215. That section states that records shall be open to inspection by any "citizen." Under the Public Records Act, any "person" may request to inspect public records, including "any natural person, corporation, partnership, limited liability company, firm, or association." Cal. Gov't Code § 6252(c).

person upon payment of fees covering direct costs of duplication, or a statutory fee if applicable.” Cal. Gov’t. Code § 6253(b).

The Public Records Act provides a general overall scheme for providing the public with access to government records. Cal. Gov’t Code §§ 6250 – 6276.48. The provisions apply to Charter cities like the City of San Diego. Cal. Gov’t Code § 6252(a). Legal issues can arise to the extent that Charter sections 215 and 216 duplicate or conflict with these requirements. The proposed amendment to section 216 to add the phrase “consistent with state law” helps cure any potential conflict with the charge for copies, but the City already must interpret the section consistent with state law.

2. Consider amending section 215 to conform to the Public Records Act.

The proposed amendments to section 215 have elements of the Public Records Act but are different enough to cause potential legal issues. The proposed changes are as follows:

Section 215: Publicity of Records

All books, records and accounts of every office and Department of the City, or information therefrom in whatsoever medium, 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~~ information the disclosure of which to the public is either prohibited by law, or is left to the discretion of the City by law, and which the City demonstrates in terms of specific facts and circumstances would tend to defeat the lawful purpose which they are intended to accomplish. No discretionary withholding shall persist beyond such demonstrable need.

The phrase “or information therefrom in whatsoever medium” is unclear. If the intent is to clarify that records include records that may exist in various formats, the Public Records Act has a clearer definition:

“Writing” means any handwriting, typewriting, printing, photostating, photographing, photocopying, transmitting by electronic mail or facsimile, and every other means of recording upon any tangible thing any form of communication or representation, including letters, words, pictures, sounds, or symbols, or combinations thereof, and any record thereby created, regardless of the manner in which the record has been stored. Cal. Gov’t Code § 6252(g).

The addition of language: “except such ~~records and documents~~ information the disclosure of which to the public is either prohibited by law, or is left to the discretion of the City by law, and which the City demonstrates in terms of specific facts and circumstances would tend to defeat the lawful purpose which they are intended to accomplish” is confusing and unclear. The Public Records Act already allows for non-disclosure of records when specifically exempted by the law and when there are well founded reasons for non-disclosure. Cal. Gov’t Code § 6255(a). However, use of the phrase “prohibited” by law is different than “exempt” by express provisions

of the law. This difference could lead to confusion and litigation about whether a document is subject to disclosure.

Section 215 also states that records of “every office and Department of the City” shall be open to inspection. This phrase conflicts with proposed amendments to section 216.1 which attempt to apply the requirements to “City bodies” and “City officials, employees, contractors and agencies.”

Further, proposed amendments to section 216.1 that refer to “findings of fact, supported by substantial evidence, demonstrating the interest protected by the limitation. . .” may conflict with similar, but different language in section 215 regarding “specific facts and circumstances” that “would tend to defeat the lawful purpose which they are intended to accomplish.” Even slight differences in language can give rise to litigation, compounded with requirements under the Public Records Act to justify non-disclosure of records.

CHARTER SECTION 216.1

Charter section 216.1 was approved by the voters in November, 2004, and is based on Proposition 59, a State constitutional amendment also approved by the voters at the same election. Because section 216.1 is similar to the State law, some clean-up of the language may be appropriate to tailor to the City, but such changes are not legally required. More importantly, the proposed amendments would add new requirements not found in state law.

1. Consider the potential fiscal impact of requiring City contractors to make records available to the public.

One of the proposed amendments to section 216.1 requires that “the writings” of City “contractors” be open to public scrutiny. The section does not define “writings” or “contractors” or make reference to provisions of the Public Records Act that might help provide guidance to the public and contractors.

It is not clear whether “contractors” includes all entities that contract with the City including consultants, suppliers, construction contractors, grant recipients. It is likely that potential contractors will consider this new requirement in determining whether to do business with the City, and if the cost of the additional requirements should be reflected in their bids. Further, some entities may have conflicting disclosure requirements under state or federal law or be bound by contractual confidentiality or trade secret requirements.

2. Consider the effect of automatic repeals and annual review of City ordinances, regulations, policies, or other authorities that limit access to meetings and writings.

The proposed amendments require the annual repeal of “City ordinances, regulations, policies or other authorities in effect on the effective date of this Section that limits the right of

access. . .”² A “policy” is described as “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.” These ordinances, regulations and policies will be repealed and “void” unless annually re-adopted 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 proposed amendments state:

(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. ~~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 shall be void unless adopted 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. Limitations on the right of access to meetings and writings existing in City ordinances, regulations, policies or other authorities in effect on the effective date of this Section shall, within one year of that date and every year thereafter, be repealed by the City Council and void unless re-adopted 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. For purposes of this subdivision, a policy is a position, whether or not codified, asserted with virtually total invariability,³ 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.

There are many City ordinances that provide for confidentiality of certain records to facilitate government operations (*See*, e.g. Ethics Commission, Responsible Banking Ordinance, the Disclosure Practices Working Group, Fair and Open Competition in Construction Ordinance, and Civil Service requirements). It appears that the City’s ordinances would be repealed each year and must be re-enacted with specific findings, otherwise the provisions would be void. This process could expose the City to litigation or require the disclosure of confidential information if such re-enactment is delayed for any reason.

² It is not clear whether this is meant to be the effective date of the Section (1/21/2005), or the effective date of the amendments.

³ The language that refers to policies that are “asserted with virtually total invariability” also could expose the City to litigation to determine which policies, if any, fall into this category.

3. Consider whether the deletion of certain privacy rights might be interpreted as limiting the rights of privacy.

The proposed amendments strike language relating to privacy rights:

~~(3) 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. the right to privacy or other rights granted in the California Constitution.~~

~~(4) 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) 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.~~

Deletion of the references to statutes, court rules, or other authorities that protect the right of privacy could be interpreted to limit the right of privacy to only as specified in the California Constitution. State and federal statutes and court rulings also specify certain privacy rights. It is unlikely that is the intent of the drafters to limit the right of privacy, but review of these deletions is recommended.

4. Consider whether the proposed Charter amendments are more appropriate for adoption in the Municipal Code or Council policies.

Charter amendments are expensive propositions to bring to the voters. Once adopted, it can take several months or years to amend, again with the expense of a ballot measure. If the proposed Charter amendment is adopted by the voters and the City experiences litigation or unanticipated costs, it could be difficult to quickly fix the problem. An ordinance or policy provides the Council with some flexibility to adjust the provisions if necessary.

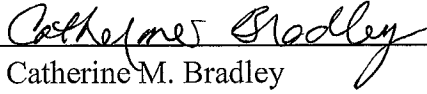
CONCLUSION

The proposed Charter amendment requires that the City regularly reviews its policies and practices and make findings justifying any limits on public access to government records and information. However, the Public Records Act already requires the City to “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’t Code § 6255. While regular review of policies limiting access is appropriate, the proposed annual repeal of existing ordinances, regulations and policies, could expose the City to unnecessary litigation.

This report identifies some significant legal issues with the proposed Charter amendments. This office is available to assist in reviewing alternative proposals or potential amendments to the Municipal Code or Council policies.

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