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>> Mayor Reed: Get our meeting called to order. Rules and Open Government Committee for February 25th. Any changes to our agenda order for today? No, okay.

>> You have a note still on item 10.1.

>> Mayor Reed: We do have a request to defer item 10.1 workload assessment, further regulation of bail bond establishments, I have at least one person, two people to speak to that so we'll take that up when we get to it. Decide to defer or not. Get their testimony. First item then is to review the March 3rd council meeting agenda. Anything on page 1? I will be gone, I'll be in wash that day, Vice Mayor Chirco will be here to chair the meeting. Anything on page 2 or 3? Page 4 or 5? Page 6 or 7?

>> Just to note that under item 3.37, the performance audit for Team San José, we will have a cross-reference on that item on the amended agenda.

>> Mayor Reed: That's the annual performance audit?

>> That's right.

>> Mayor Reed: I have some requests for additions, excused absence for Vice Mayor Chirco due to illness and my travel to Washington next week.

>> Lee Price: And Mr. Mayor, we noted your trip to Washington, D.C. as another fund but you may be using your mayor's fund for that trip?

>> Mayor Reed: I can't be sure but I know there is someone who knows.

>> Lee Price: We will get the right one on the agenda.

>> Mayor Reed: I think that is what the councilmember travel fund is for. Anything else in the way of additions?

>> Councilmember Pyle: Move to approve.

>> Mayor Reed: Motion is to approve. All in favor? Opposed? That is with the additions as amended. Okay, that's approved. March 10th council agenda. Anything on page 1? Page 2 or 3? Page 4 or 5? 6 or 7? 8 or 9? Or 10 or 11?

>> I'd just like to note that item 9.1 was an early distribution item that went out this morning.

>> Mayor Reed: Okay, I did see that e-mail. I have some requests for additions. Councilmember Herrera's travel to Boston with the San José Silicon Valley chamber of commerce trip. Councilmember Kalra's travel to the national league of cities conference, travel for the City Clerk to Riverside, and Brea, two different training sessions. Any other additions? Are you training or being trained?

>> Lee Price: I am training.

>> Mayor Reed: That's what I thought.

>> Councilmember Constant: Move to approve that.

>> Mayor Reed: Got a second?

>> Councilmember Pyle: Second.

>> Mayor Reed: Okay, we do. Motion to approve with the additions. All in favor, opposed, none opposed, that's approved. Redevelopment agency agenda March 3rd.

>> Mr. Mayor, members of the committee, Gary Miskimon with the agency. The agency has no items. We recommend cancellation of the afternoon session of the agency. If there are any items those would appear on the city's agenda.

>> Mayor Reed: Okay, just need a motion to cancel.

>> Councilmember Pyle: So moved.

>> Mayor Reed: Motion to cancel, all in favor, say aye. Opposed, that's approved. March 10th redevelopment agency agenda. Anything on page 1? Page 2 or 3? Or 4?

>> Councilmember Constant: Motion to approve.

>> Councilmember Pyle: Second.

>> Mayor Reed: Motion is to approve. I have no requests for additions. All in favor, opposed, that's approved. Item 8 is the public record. Anything in the public record -- I'm sorry -- I got ahead of myself there. Looking at the wrong list.

>> I'll be very brief.

>> Mayor Reed: Legislative update.

>> Betsy Shotwell: Betsy Shotwell, director of intergovernmental relations. I'm very pleased that the governor did pass the budget, for a duration of 17 months, ending July 1, 2010. There are a number of measures that were outlined in the administrator's priority report. On the 36 budget trailer bills that are in print, we'll get an info memo out with the details of the budget. The budget also included a special election May 19th with a number of ballot measures on it related to the budget including borrowing from the lottery

funds and a number of other things. We'll have that laid out for you in the memo and I'm happy to answer any questions.

>> Councilmember Pyle: Betsy, the sales tax issue, does that have to go to the vote of the people?

>> Betsy Shotwell: The measures included going to the ballot May 19th are the spending cap one. More money for education, prop 98. Borrowing of the lottery, earnings, which I mentioned. Shifting money away from the prop 10 first five commissions and shifting of money or taking of money from proposition 63 from the mental health services act, old prop 63. So the sales tax item is not on the ballot.

>> Councilmember Pyle: I think it's because with the 2/3 which they obviously had with the passing of the budget.

>> Betsy Shotwell: Exactly.

>> Councilmember Pyle: And it's going directly to the General Fund, I think in that circumstance it can just receive the 2/3 and it's done.

>> Betsy Shotwell: They got the 2/3.

>> Councilmember Pyle: But then I heard people, local governments --

>> City Attorney Doyle: I think it's local governments, the state can increase or decrease the sales tax.

>> Councilmember Pyle: Thank you for that clarification.

>> Mayor Reed: Betsy, has anybody done an analysis yet, with all the measures on the ballot and they get approved, whether or not this budget is adequate to deal with the problems or is this another budget that's only good for about two weeks?

>> Betsy Shotwell: I may be getting ahead of myself but I'm summing that the leg analyst will be having a budget analysis, 36 of these measures some of them are just going into print right now, today, yesterday and one tomorrow. So I think a lot will depend on the April 15th revenues that come in, you know, traditionally the governor calls a May revise in the middle of May to adjust those numbers dependent on what income tax returns look like. So there will be some pieces out there that we'll need to deal with in the next two months, if it could last to July 1 of 2010.

>> Mayor Reed: And the actions that were taken on the reductions side, forgetting the revenue side but on the reduction side, are those mid year actions that are going to deal with this year's short fall or are they all pushed out into next year, as well?

>> Betsy Shotwell: I'd have to look into that. As I look at the list of reductions I'm assuming it starts Friday but we can include that in the information time frame.

>> Mayor Reed: I'm just trying to get a feel for whether or not this is a real budget or another one of the illusory budgets that just buy us a little bit of time. Probably April 15th when we see the revised revenue numbers we'll have a better feel for it, right?

>> Betsy Shotwell: Absolutely.

>> Councilmember Constant: I think there was pretty much consensus that some of the projects on revenue were a bit on the rosy side so it should be interesting.

>> Mayor Reed: We can hope it gets us through this fiscal year, and not have to start over again with next fiscal year, already. Although originally we were trying to fix 18 months at a time. Okay, we'll wait for the update until you get some real info. Nothing on federal. I'm going to Washington again next week for a series of meetings with administrative people and delegation think-tanks and others to work on the stimulus package and our clean tech legislative agenda. Anything else we have an opportunity on, I'll be there Monday through Thursday, back Thursday evening. That takes us to meeting schedules. Councilmember Pyle.

>> Councilmember Pyle: In reference to your trip, do we have anything as yet regarding the national incentive package and what it will mean to San José?

>> Mayor Reed: I think we have a lot of the information. I don't think we have specific numbers yet. There was a regional meeting on Monday that Paul Krutko went with the Office of Economic Development, state office, trying to organize the economic development part of it and there's the transportation part, there's a lot of different pieces. I know that Kim Welsh has been leading a managers group to try to figure out where we are. Some of it is formula driven. Some of it is discretionary. And some of it is competitive. So it's too early to know at this point what we have.

>> Councilmember Pyle: I'm a little frustrated because I'd like to see some of this in writing. Anything that we could be sent would be very, very gratefully received.

>> Betsy Shotwell: I understand the team is putting together an info memo with what information we have for the time being. But there are a lot of numbers up in the air that we aren't clear on but we are putting together as much information as we can this week.

>> Mayor Reed: Moving to meeting schedules. We've got a revision to budget calendar, last week we approved some travel for like three councilmembers to go to the national league of cities meeting on, that will take them out of town on March 17th date. As we talked about shifting the budget message so that people will be here when we deal with it. If we move the date -- the release date from March 6th to March 13th, and have the presentation of the message to be part of the March 17th council meeting, then we could schedule the review and approval by the council on March 24th. And still not affect the rest of the budget schedule cycle that we have. Now, that means that I believe everybody will be here for March 24th when we have to take action on it. We would have three councilmembers absent on the 17th when we're explaining it but we'll already have been published in writing. That's about the best we can do with people that are going to be out clearly on the 17th. And I think that works for everybody, as go as we can make it work.

>> Councilmember Constant: I just wanted to say, thank you for that, because I'm one of the three that will be gone, and I know all three of us are anxious to be involved in the process.

>> Mayor Reed: More we have, the better we are. So I want to get a motion to do that.

>> Councilmember Constant: So moved.

>> Mayor Reed: Motion is to shift those dates. All in favor, opposed, none opposed, that's approved. Public record. Anything from the public record the committee would like to pull to discuss? I have one request to speak on the public record. Mr. Wall.

>> On item M. I'm here to apologize for an error. I inappropriately thought there were two members of the Mercury News giving testimony on last week's rules. I was wrong. There was only one. And so I stand corrected, apologize, and there will be a formal writing to that effect. Thank you.

>> Mayor Reed: Thank you. Councilmember Constant.

>> Councilmember Constant: Thanks. I just wanted to note on item B, in case the person who submitted that is watching, we actually do have a trap neuter return program. I believe this person believes we don't but we do. I just wanted to let them know that. And then we have item C which is also related to animals. Just want to be clear, we don't regulate fines for abuse or cruelty, right? That's a court process.

>> Yeah, I think that's correct.

>> Councilmember Constant: That's what I thought. To let the person know, Ms. Or Mrs. Lee, that is a court issue, it's not something we have jurisdiction over, the council. That's it.

>> Mayor Reed: Anything else in public record?

>> City Attorney Doyle: We could take that to animal services and work with our offices as well.

>> Mayor Reed: Well, there's nothing to do.

>> Councilmember Constant: I don't think there is anything there.

>> City Attorney Doyle: Mr. Constant is right, a state violation, it's administered by the courts.

>> Mayor Reed: I don't think we need to send animal services on a mission to figure this one out.

>> Lee Price: You're just noting it then for the record.

>> Mayor Reed: Noting it for the record.

>> Lee Price: We'll pick that up.

>> Mayor Reed: Motion is to note and file.

>> Councilmember Constant: Second.

>> Mayor Reed: All in favor, opposed, none opposed, that's approved. Item 9, appointments to boards, commissions, and committees. We have a deferred compensation advisory committee appointment, recommendation to appoint Franco Vado to the deferred compensation advisory committee, as the representative nominated by the San José police officers association, Robert Sapien as the representative nominated by the San José firefighters, local 230, and Pascal Roubineau as the representative nominated for the trades union, for four year terms, request to agendize this item on the March 3, 2009 council meeting in order to have a quorum for the next deferred compensation advisory committee.

>> Motion to approve.

>> Second.

>> Mayor Reed: All in favor, that passes. I have two people who want to speak on item 10.1. Why don't we take their comments now. Jeff Stanley and Don Kilmer.

>> Good afternoon, thanks for hearing us. My name's Jeff Stanley, I own bad boy's bail bonds. We've had bad boy's bail bonds for about ten years here on first street. This is the first I've ever heard about the hours of operation and regulating the hours of operation. We've always been a 24-hour business. Most of our customers need our services after hours. And when somebody has somebody in custody, they're

going to want to get that person out, whether or not it being a husband, wife, boyfriend, girlfriend, whatever the fact. These people are afforded the right by the U.S. constitution and the state constitution so it's important that we get these individuals out. Not only for that, it cuts down on overcrowding. If we have overcrowding at the county jail it means people will be released early or out on OR. People released out on OR have greater than 50% failure to appear rate over that of bail bonds and that's a security issue within the county and the city. Also it's important that my employees have a place where they can conduct their business. I don't want them walking around the city with cash in their pocket when we bail somebody out. It doesn't make sense. I have male and female employees and it's not good that they're out walking around with that type of cash. And they know they're bailing somebody out and they have to meet somebody at that time jail, they're going to have to take the cash there not in my office where we have security cameras and we've had panic buttons. We've never had an issue in this county, we've never had a security issue. We make sure that our park lots, people aren't waiting around or hanging out there. They're well-lit. And it's important that we have a place where somebody gets out they can go right to, they can fill out their paperwork. We can explain the process to them to let them know when their court date, they are supposed to attend their court dates.

>> Mayor Reed: Your time is up. Don or Dan Kilmer. I can't quite read your handwriting.

>> You and my secretary. It's Don.

>> Mayor Reed: She's probably had more practice than I.

>> That's all right. I'm here actually with a little bit more practical contact. Excuse me I'm the attorney for bad boys. I've been in contact with a woman in the city attorney's office, Angelique Nedro. She sent me an e-mail, saying they weren't going to enforce the \$2500 fine against my client, that expires today, we're not aware that there's any problems and we're happy to address any problems. The only other thing I wanted to note is, I have a copy of this memorandum dated February 19th, 2009, and it does a pretty good job of laying out what the City's issues are with regard to bail bond operations between midnight and 6:00, but I don't think the memorandum addresses the civil rights of people who need their bail addressed during the hours of midnight and 6:00. Thanks.

>> Mayor Reed: City Attorney.

>> City Attorney Doyle: I actually don't have a problem extending that but I'd like to work with code enforcement. It's a code enforcement compliance order. We'll contact them immediately and see if we can continue that until this discussion takes place next week. If it's deferred I'm assuming the committee may want to entertain Councilmember Liccardo's request. The issue involving bail bonds and 24-hour operation there is a process. It's a CNP process. I know some people think that's an uphill battle, and I don't think it is. But that's I think Planning needs to address. I know finally there are county officials who are contacted me expressing concern that the fact that there may be restrictions on 24 hour operations because county officials believe there is a need to have these operations open in order to facilitate getting people out of jail. So we're willing to work with them on at least deferral of the enforcement of the compliance order. But let me -- I have to say I do need to work with code enforcement on that, and you know, we'll do what we can. And Angelique will be in touch with you.

>> Thanks very much.

>> Mayor Reed: I'm a little bit confused about the issue in front of us. Because we're looking at a workload assessment whether or not to do something to change regulation in the future. Sounds to me like these folks have been cited for a code compliance violation and what we might do would have -- are those connected?

>> City Attorney Doyle: Well, they are connected insofar as subject matter. They're different in terms of what's on the table. What's on the table here is a workload assessment as to whether or not there should be a change in how we approach these operations as to zoning changes versus going through the C.U.P. process. The zoning process says that's sufficient and we should leave that alone. But related to that, there has been specific instances as to the operations of two businesses and the impacts if they cannot get a C.U.P. and whether they can. And so looking at the existing process and whether or not it works in a way that allows people to operate on the 24-hour basis. So they're related from the subject matter process only, not in terms of what's the workload assessment as to whether we should change the process.

>> Mayor Reed: Okay. Whether or not somebody is currently in compliance with the terms of their permits, not a subject that's in front of this committee?

>> City Attorney Doyle: That's not in front of this committee at all. That's an administrative matter and we have had communications in the last week. We have been working with the attorney and our code

enforcement folks and that's why I need to get back to them. But really that's an administrative matter and not before the committee.

>> Mayor Reed: Is that a subject of the appeals hearing process?

>> City Attorney Doyle: The appeals hearing board would be the final arbiter of the decision.

>> Mayor Reed: I don't have any problem deferring it for a week but I want to make sure I understand it. Staff is saying we don't need to change our ordinance because we already have the ability to regulate 24 hour uses.

>> City Attorney Doyle: That's correct.

>> Mayor Reed: And then spent three pages explaining that. When we take it up next week, what we need to have is a workload assessment. Staff reached the conclusion, we don't need to do anything, but whatever is on their plate, 29 ordinances or something like that pend being with one person to work on it. And I think that should be part of the workload assessment so the council knows well if we want to send them out to do another mission, something is coming off the plate in order for them to do something new.

>> We will provide supplementary information.

>> Mayor Reed: All right. People want to defer it one week? I won't be here, you guys can handle it.

>> Councilmember Constant: Sure.

>> Mayor Reed: Motion is to defer it one week. All in favor, opposed, none opposed, take it up next week. That concludes item 10. Nothing under item 11, council committee workload agendas. Sunshine Reform Task Force recommendations, regarding balancing tests and drafts and memoranda. We said we wouldn't start before 2:30, it is almost 2:30.

>> Tom Manheim: If I could just jump in, I notice the chair of the subcommittee, who was planning to be here, isn't here yet. Perhaps we could take a two or three minute break, until the 2:30 time, and hopefully he'll be here then.

>> Mayor Reed: Okay, let's take a brief recess and make a couple of phone calls. [Recess]

>> Mayor Reed: Start again. Ready to take up the Sunshine Reform Task Force recommendations.

>> Tom Manheim: Thank you, Mr. Mayor. I'll just briefly introduce this and turn it over to Lisa who will go through the substance of what we're going to talk about. Just to remind you, when we did discuss this last time, the direction of the committee was that we look at San Francisco. And determine what impact had been the result of the lack of the balancing test in San Francisco. As our memo indicates, it was pretty inconclusive. We couldn't really find anything one way or the other. They've had 69 complaints filed under their law, but none of them address the balancing test because the balancing test is removed from the San Francisco ordinance. The other, I guess I'd describe it as an irony that we came up against, is that we, in trying to find out whether there have been any impact, there's an understanding on the part of all of the people who work in San Francisco that they're not allowed to point out any problems with their sunshine law, because they are required to promote their sunshine law.

>> Councilmember Constant: Little lack of sunshine?

>> Tom Manheim: So I'll just leave it at that. But we were frankly unable to get any additional information beyond the fact that there have been 69 complaints filed and none of them had to do with the balancing test. So with that I will turn this over to Lisa Herrick.

>> Lisa Herrick: Good afternoon. It may seem like the presentation is going a little bit backwards. We have covered a little bit of this ground but I will be brief and I think for the benefit of Councilmember Pyle who is new to this committee I think it might be useful as well. Hope it's useful. You can give me a grade at the end of the presentation and see what you thought. Well, I just realized that was not very helpful to say. In any event, we are talking about the balancing test. We're talking about deliberative process and we talked about that before. You'll recall that Bert Robinson when we talked about this in November mentioned also that we should think about all of this in the context of the draft memoranda exception as well. And that's why we are going to talk about that and we haven't specifically talked about that before. So I want to give you a sense of how this all fits together. As I have explained before, the California public records act permits records to be withheld and not produced really in two general instances. One is if there's a specific exemption that's divined under the California public records act and the second case would be where you can apply the general exemption, catch all exemption the balancing test. We are really focusing on the balancing test today. And that is defined in the public records act as allowing the city to withhold records in really very narrow circumstances. When the public's interest in not disclosing the record clearly outweighs the public's interest in disclosing the record. I've also mentioned before that the burden is on the city so demonstrate that the interest really is outweighed, the interest in

nondisclosure outweighs the interest in disclosure. Courts have derived the deliberative privilege from the California balancing test or the balancing test that is described in the California public records act and California attorney general's sterling's on the public records act describes as permitting public records, eligible discussions with their advisors without publicity.

>> Mayor Reed: Lisa could you pull the microphone up? It's not pick up very good.

>> Lisa Herrick: I'm good. The privilege doesn't, final document that describe facts are not exempt, under the deliberative process privilege. But it's typically sort of preliminary information, preliminary discussions. And that's really what we use when we're talking about the draft exemption when we're talking about deliberative process. So the task force's recommendation is to eliminate the deliberative process privilege entirely, and also, eliminate the balancing test and put in its place four exceptions. And those are bullet pointed here on this slide. Certain information provided to the city by a private individual with the reasonable expectation that the information will remain confidential. Identifying information about a city employee but only when he or she provides information in the course of an investigation but is not the subject of the investigation. Information about actual or potential threats to the security of public facilities or services or public access to those facilities and then any records prepared for use in connection with a closed session assuming that the topic of a closed session is properly -- the topic is properly the subject of closed session. So let's take a step back from the balancing test and talk a little bit about what the public records act provides for draft. The public records act permits drafts and notes to be withheld when they are not retained in the ordinary course of business and if the public interest in withholding the record clearly outweighs the public interest in disclosure. So the drafts exemption really uses a balancing test in that analysis as well. But the real point is, whether or not the documents are retained in the ordinary course of business. The task force's recommendation takes that analysis about whether or not the record would normally be retained in the ordinary course of business and instead just requires that once a document has been finalized and is released, if the draft records have been retained they're subject to disclosure. The task force's recommendation is clear that it would not require the city to alter any of its current retention schedules. Records retention schedules. So I want to then again outline how the city uses these exemptions, both the balancing test and the drafts exemption. We typically use balancing test to protect private information, negotiation and deliberative process and as I mentioned a couple of minutes ago when we are talking about deliberative process that's really where the draft exception comes in. When we are withholding drafts it is for the purpose of protecting the deliberative process. Since most private information would be protected by the task force's suggestions, we are not really talking about private exceptions here. What we're really talking about is these last two bullet points, negotiations and deliberative process. And the city uses the balancing test to protect the strategy of the city or the entities with whom the city's negotiating in negotiations about economic development which we've talked about and in labor negotiations as well. And in particular, in economic development matters, timing is everything. So while the city might invoke the balancing test at a certain point in time, once the deal has been completed, any of that information would reasonably, the balance would weigh in favor of disclosure after a certain point where the threat or fear of compromising the strategy has passed. And as I mentioned, the city uses the deliberative process privilege to protect draft documents. The courts have held that the deliberative process privilege is to prevent injury to the quality of decisions. And there are three policy purposes behind the deliberative process privilege that we went over last time. But I'll just repeat them quickly. First is to encourage frank, open discussions on matters of policy between subordinates and superiors, to protect against premature disclosure, proposed policies before they are finally adopted, and third, to protect against public confusion that might result from disclosure of reasons and rationales. As we said before, we do believe that the city needs the flexibility of the balancing test and we recommend that the city retain it and we also believe that the city should have the discretion to withhold draft documents when they reflect the deliberative process if appropriate. I know Bert Robinson has a presentation as well.

>> Bert Robinson: Should I proceed?

>> Mayor Reed: Please.

>> Bert Robinson: Since Councilmember Pyle was blessedly spared the earlier discussion, let me briefly critique the balancing test the deliberative process exemption and the drafts exemption and then I'll go into the alternatives. The critique of the balancing test fundamentally is that it's simply too broad and regardless of the City's best efforts is going to be executed in an arbitrary way. There's just no way around that. It removes the certainty that the public records act is in fact designed to create for citizens because it says that if you can construct the argument, anything can be withheld. Deliberative process,

which is, as Lisa has explained, is a notion that has been -- has come under the umbrella of the balancing test, through a court decision, our thinking on deliberative process is that in fact opening the deliberative processes of government to public view is exactly what open government laws are all about. And the notion that these are the things that we ought to be shielding is just backwards. On drafts, our thinking was that the construction of the law is really -- leads to a rather bizarre result. Preliminary drafts, notes or interagency memoranda that are not retained by the public agency in the ordinary course of business, it doesn't matter whether or not it's in the file that you asked to see. If you say to me, "Oh Bert, that shouldn't have been in the file, we didn't mean to save that," then you can withhold that. That's weird. It seems to me, you can say if it's in there, can you have it. If it's in the public file, you can have it. If it hasn't been retained because it's the sort of draft that shouldn't be retained then it won't be in there. It's a lot easier to have a concrete standard rather than a theoretical standard which is what the draft standard is now. Let me, since Councilmember Constant and Mayor Reed have heard that -- those lines from me before, let me move to the new material. Alternatives to the balancing test. My first slide is much like Lisa's, it's the baning test. At the last meeting at which we discussed the balancing test, the mayor asked us whether there might be alternatives, somewhere between a balancing test, and no balancing test. Somewhere between the yes and no. Always difficult thing to be confronted with.

>> Mayor Reed: Maybe.

>> Bert Robinson: But we try to come up with some, anyway.

>> Mayor Reed: Yes, no, and maybe.

>> Bert Robinson: But it won't be arbitrary, right? So I started off by looking at what the balancing test actually is. As Lisa has said. The agency shall justify withholding any record by demonstrating that on the facts of the particular case the public interest served by not disclosing the record clearly outweighs disclosure of the record. I found myself thinking about our other open government law in California, the Brown Act. Approximate imagine the Brown Act with its own balancing test. It doesn't have one by the way. The public interest served by closing the public meeting, clearly outweighs the public interest served by closing the public meeting. Imagine closing meetings when necessary to protect the city council's deliberative process. You'd be closing all of them which might do the public --

>> Mayor Reed: Those were the good old days. Believe me.

>> Bert Robinson: A favor, believe me.

>> Mayor Reed: Go read Harry Farrell's stuff.

>> Bert Robinson: I apologize for the nature of the analogy I'm about to make. In this point of my consideration my 15-year-old son came up and said, "Dad, what you doing?" I say, "Think of this way, you know how we have a rule in this house and the rule is you cannot beat up your little brother. What if the rule were you can only beat up your little brother when it's in the public interest for to you do so." And he said, "Well, who would determine the public interest?" And I said, "You would." And he smiled and said, "Dad, you could trust me to do that." And then he said, and that's a real quote, "Who wrote that law?" With that in mind, with that comic relief, let's move on to some alternatives. In our last meeting, Vice Mayor Cortese was musing about a meeting. What we don't have in the Brown Act is not a balancing act. We have a series of things that ought not to be discussed in by the city council for a number of reasons. Negotiations of real property, pending litigation, performance dismissal of a public employee, labor negotiations. Vice Mayor Cortese mused and James and I did after the meeting and then tried to write up the notion that an approach could be to eliminate the balancing test, but add language to the task force's proposal that mirrors the exemptions in the Brown Act. Specific exemptions would cover negotiations of real property, pending litigation, pending dismissal of an employee, labor negotiations, just like the Brown Act. The thought being, this is what has been tested over time. Limiting the balancing test is I think fear of the unknown. What are we going to be forced to give over to the public that we may not have wanted to? And our suggestion here is that the Brown Act has been tested over time. And these exemptions have been modified over time. And now I think they tend to serve the city council's purposes and the purposes of most public bodies fairly well. That's our alternative approach number 1. Alternative approach number 2, I'm not wild about this one because I think it could be cumbersome but it is one way you could split the middle. You retain a balancing test but you commit a list of public records to which the balancing test will not apply. The difficulty of the balancing test as it's written now is in theory, you could try to apply it to anything. But a possibility you could consider would be to come up with a list of records, that the city will not attempt to use the balancing test to withhold. That adds back some certainty that the balancing test takes away. Our approach in number 2 would also include on the next slide a commitment by the city that it would not withhold records on the basis that the disclosure would reveal the deliberative

process. If we were -- if James and I were writing up an alternative approach number 2 for the city, that would be one of our listed things that you would not use the balancing test for. Again, and I've made the argument in more detail in previous meetings and I won't repeat it. Our feeling is that deliberative processes are exactly what the public ought to be able to say and that that is not at all what you ought to be using the balancing test for. And then there's an alternative approach number 3, sure to be Chuck's favorite. Retain the balancing test. But stipulate that it could only be invoked by the mayor. Put a higher hurdle in front of the balancing test. The reason we suggested it be the mayor, because we liked the mayor, although we do. But in a practical matter you would slow up the release of public records, if it took the Rules Committee to invoke the balancing test. You usually have a ten-day -- a window of no more than ten days and I don't think you would want to create some sort of a process that would be sure to stretch things out for a week longer every time the balancing test came into play. Those are the three alternatives that we came up with for your consideration. I'd like to make just one final point that is a little bit disconnected from the earlier thing but it's something that came up in the staff report, and it is one difficulty that I myself had and shared with Tom. And it is a question of experience of San Francisco. One of the natural things that you want to do, when you consider eliminating the balancing test, is of course look to a city that has eliminated the balancing test and say what were your experiences. The difficulty that Tom found out is you can't find out what happened to the balancing test in San Francisco now because they don't have one. The key question I think in San Francisco is what has San Francisco been forced to give over to the public record that was harmful, that was not desirable, because there's no balancing test? Can anybody point to something and say, "Here is a terrible thing they had to give to the San Francisco chronicle because the balancing test is gone." Now the difficulty as Tom knows is if you ask the city that question they can't answer it or their interpretation of the wording of the San Francisco sunshine law is, they're not allowed to say anything critical of the sunshine law. So they won't answer any specific question about how well or poorly they think it works. But what I would say is, I don't think there are any examples out there. I'm not aware of any. I think somebody would have brought them to our attention, given how long we have been discussing the balancing test if there was a real specific problem you could point to and say, "Here's why it is a problem not to have one." I don't think it is a problem not to have one. But, because I think I understand it's a big move and because there are at least conceptually, some alternatives you could offer, I'd like to offer these three alternatives for your consideration. Thanks.

>> Mayor Reed: Thank you. I appreciate the presentation, especially the alternatives. I spent some time studying this over the last few weeks, read a few cases, read everything that had been submitted and some suggestions. So my first question is, is there any reason why if the Mercury News comes and wants my notes and my staff notes from my work on this, that I shouldn't give it to them? And what impact does it have on me and my staff if I know that everything I write down is going to be in the newspaper or posted online or something?

>> Bert Robinson: Isn't that a question for you to answer? What impact does it have on you?

>> Mayor Reed: I'm not writing it down. I can't make notes. I can't keep them. I got to burn them or something. That's a deliberative process privilege issue that I think if we don't have a balancing test I have no basis upon which to say no, you can't see my notes, you can't see the memo from my staff, you can't see my staff's notes to me. I'd say okay, it's a public record, you got to have it. Isn't the balancing test the only thing that allows me to withhold my notes from public disclosure or is there some other protection or privilege that is in there that we haven't talked about?

>> City Attorney Doyle: I think you're right. I mean there may be isolated cases where depending on the topic it would fall within one of the other exemptions, personnel exemption, for example, but generally it would have to be the balancing test that you would have to invoke. Particularly if it's a policy, you're going over a discussion about the balancing test.

>> Mayor Reed: I made some nasty comments about some remarks that certain people had given me and I wouldn't want Bert to see what --

>> Bert Robinson: I wouldn't want to think you did that so I wouldn't want to see it.

>> Mayor Reed: I might have made some when I was doodling. So there is some value in the deliberative process privilege. And from my point of view, having my staff having to communicate with knee a way that can't be done in writing, because that is going to be a public record, I think that's harmful to what it is we're trying to do here. And so I think there's value in the deliberative process privilege, for starters. And I don't know all the other circumstances at which it might be valuable. But I'm not ready to say, okay, no deliberative process privilege. What I am interested in is some of your alternatives because they were sort of along the lines of what I was thinking. Looking at the criticism of the balancing test is, as

you said, it's too broad and will be arbitrarily applied. And the attorney general has a pamphlet that just got published in 2004 which talks about the various places the balancing act might be used. And what it's supposed to be used for and what it's not supposed to be used for. And there are some case interpreting it that are saying yes or no on the balancing test. And so what I'm interested in is, can we, without throwing the baby out with the bath water, limit the use of the balancing test, whether it's for drafts, documents, or deliberative process or whatever it is, to the circumstances in which it was intended?

And I don't know if we can or not. Your approach to making sort of the Brown Act approach of listing all of the things that you can or cannot do under the balancing test might be one way. But I'm curious if we could draft the narrowing provisions, you had one alternative there that only used for certain things or will not be used for certain things, so that we don't have to have great fear of the unknown, maybe only a small fear of the unknown. By way of narrowing the possibility of its use, and I think I have to disagree, that it can be arbitrarily applied with the process that we have in place now, through the Rules and Open Government Committee, it's going to be done in a public way. I can see in the past where somebody in -- wherever in the city will just say, not going to give it to you, balancing test, end of discussion. But since we have a process to get that out as a public decision, I don't know that I like having the mayor make the decision. But a public decision or somebody who is publicly accountable in some way to the public, I think is an improvement on just letting whoever decides not to give it to you to invoke it. I had some other questions that came along. And that is, how the balancing test, and with regard to documents, one kind or another, how does that relate to civil discovery? And is there a way we can narrow it so if something is discoverable in litigation, but not releasable to the public under the balancing act test, is there a big difference there? I know in litigation ultimately it's about whatever the judge tells you to release.

>> City Attorney Doyle: The start is whether it would be reasonably calculated to lead to discoverable evidence. You may not get documents in the public records act request, so it really is, they're sort of separate and we have to treat them as separate.

>> Mayor Reed: But in discovery you have the possibility of --

>> City Attorney Doyle: Getting a protective order. Primary privacy.

>> Mayor Reed: What keeps councilmembers from getting deposed every week, about their deliberative process? Besides our smart lawyers who fight tooth and nail to make sure that doesn't happen?

>> City Attorney Doyle: There are areas where you cannot get into the mind processes of the councilmembers. There is a recent case involving our card room issues, the sixth district maintained that it is not the deliberative process but akin to that. In terms of you can't get into why did you vote this way, what were you thinking when you voted and enacted, took a legislative act? Because if you allowed that you would be in deposition every week with councilmembers, challenge this, challenge that. So it's a recognition essentially by the courts of a separation of powers, you have a legislative branch and they do their job and the courts don't come in and get into the minds of the legislator.

>> Mayor Reed: That is not really a balancing test issue?

>> City Attorney Doyle: Not a blanks test, more a separation of powers.

>> Mayor Reed: If we were to give up the balancing test, sounds like it wouldn't affect whatever rights --

>> City Attorney Doyle: This one goes back a couple hundred years.

>> Mayor Reed: Another question I had was, we're arguing about drafts of memoranda, until after it's -- whether or not they're kept in the public -- what if we keep a draft in the ordinary course?

>> Lisa Herrick: Then I think the public records act requires that we produce it, unless there's -- if it's ordinarily retained in course of business and you apply the balancing test and it comes out in the way that it favors disclosure, then we disclose it.

>> Mayor Reed: Now, wait wait wait, balancing test in there.

>> Lisa Herrick: The balancing test is part of the draft exemption as well.

>> Mayor Reed: But what if it's -- that funny language that Bert was making fun of, about if they're kept or not kept then what if we have it in the file, we didn't intend to have it in the file, why does that make any difference? Whether we intended to keep it or didn't intend to keep it, in the ordinary course of business or not in the ordinary course of business, let's say we fully intended to keep the draft of something and Bert or somebody wants to see it, is there a balancing test or do we give it over because we kept it?

>> Lisa Herrick: The way the exemption is written in the public records act, if it's been retained in the ordinary course of business, actually let me back up, no. I think if it's been retained in the ordinary course of business you would need to produce it. Only if it's not normally kept in the ordinary course of business, would you be required to turn it over.

>> Bert Robinson: It depends on which way it is. If it's a draft that's retained in the ordinary course of business, then you have to give it up.

>> Mayor Reed: There's no balancing.

>> Bert Robinson: If it's not retained in the ordinary course of business, first you have to say, I didn't mean to have it there. But then you have to weigh, the public interest of going it to you is outweighed from not giving it, and then you have to give it.

>> Mayor Reed: If I have a draft and my staff or I write all over it and we keep it, is that -- there's no balancing test, we just give it up?

>> Lisa Herrick: Then I think you could use the balancing test, because you then would be relying on deliberative process. But I also wanted to add that I think the draft exemption and the way we think about the deliberative process has the sense of timing in it as well. Drafts may be -- you may be preparing drafts in preparation of a final document, you get a public records request, it's on the verge of being finalized, you've got that, so maybe your ordinary course of business is not to retain drafts after something's been finalized, but it's there because you haven't finalized the document. That's thrown in there because you haven't finalized.

>> City Attorney Doyle: You would have notes on your documents, let's say it's a budget message and you go through ten drafts and you keep them all.

>> Mayor Reed: Which is highly likely.

>> City Attorney Doyle: And you keep them all and you have drafts written on those ten drafts, to the extent you won't be able to invoke the drafts kept in the ordinary course of business, you would have to apply the deliberative process to the balancing test generally.

>> Mayor Reed: The attorney general says, the exemption for notes drafts or memoranda has little or no effect because the balancing test in section 6255 in 1991 it's mentioned here because it's in the act.

>> Lisa Herrick: Right, and that is why I wanted to explain that we really only use, that drafts really come up basically when we're looking at deliberative process and we want to protect draft documents because of the deliberative process nature. And so in that case it's either a draft and we can use the exemption or if we can't because it's saved or retained in the ordinary course of business, then we've got to rely on the balancing test which does -- on deliberative process which comes out on balancing test. Because I read that same thing on the attorney general's materials and I thought that corresponded with the way we look at deliberative process and how we use the draft exemption at all which is only really to protect materials that have deliberative process.

>> Mayor Reed: I can't think of any other reason to protect drafts. If you do a balancing test there is really no reason to protect, unless it does somehow affect deliberative process. But maybe there is another reason somewhere.

>> City Attorney Doyle: There may be another example of why you have a draft, if you have a litigation rule on documents and you're required to keep and not destroy any documents as part of a litigation or pending litigation, you -- and somebody makes a public records act request and it's a document you wouldn't otherwise keep, you didn't vote through the deliberative process I think in response to the public records act request in which discovery would be different. There's all sorts of what-ifs and that's the reason for the deliberative process. Alternative 1 tries to capture the bulk of where we go when we exercise that balancing test. But I don't think it can. So that's why the legislature has this -- you have to establish that the public's interest in nondisclosure is outweighed or outways the public's right for disclosure. The courts ultimately has to make that decision and it's not something that we use arbitrarily.

>> Mayor Reed: Another category, I'm not sure how it fits in with documents subject to negotiations. Real estate negotiations is one of the Brown Act categories that has some protection because of our ability to go into closed session and talk real estate negotiations. When then Vice Mayor Cortese brought up the idea of using the Brown Act, saying we really didn't have to worry about the balancing test because we had the Brown Act areas, so in remits negotiations, what's protected under the Brown Act are the deliberations we have in closed session. Are the documents related to that not those documents that you carry into closed session but other documents related to real estate negotiations, are they also protected under the Brown Act?

>> City Attorney Doyle: Not under the Brown Act. Because those are -- let me give you an example. We go in and discuss real property negotiations. We come back from closed session and discuss price and terms. If we did a PowerPoint in the closed sessions sort of explaining what the terms were, I think that's separate.

>> Mayor Reed: So if our staff is argue among the staff as to whether the offer should be \$10 a square foot or \$15 a square foot that might not show up in a Brown Act closed session meeting of the council. But I don't think I want to have anybody after the fact come in and say, I want to see all your staff work on that because I can, next time I negotiate with you I'll know how to negotiate better. I think there's value in keeping that confidential. Is it only the balancing act that would keep that confidential?

>> City Attorney Doyle: If you're negotiating with a third party and their lawyers are sending you letters and back and forth, that we would use the balancing test to -- if we felt we shouldn't disclose it. And I think it may be a question of timing again. And the example we've had in the past is at one point in time we don't disclose it. At the end of the day, we may very well, because the public's interest in knowing everything or knowing what's in those documents outweighs the right to keep it or the interests in keeping it confidential. But that's something that you don't know, has to be case-by-case.

>> Mayor Reed: One case I read recently was the Santa Clara County case over the GIS maps and things which was pretty complicated for various reasons. But the court did go through a balancing act or balancing test analysis in there. If something comes to this committee on appeal, what would we expect to be done in terms of the proof, one way or the other, on the balancing test, under the process that we have got laid out for us -- to appeal these things to the Rules and Open Government committee? Is it just the City Attorney comes in and says, I think on balance, you ought to do this, or are we going to have some ability to try to weigh whatever the interest might be, like a Court of Appeals does?

>> City Attorney Doyle: If I can use a real-world experience, the preliminary documents for the soccer FMC proposal from -- and the -- that issue came before both the committee and the council. And as I remember, you saying, Mr. Mayor, the attorney can make the legal arguments as to why this should be protected, but you wanted the facts as to how would this jeopardize a potential economic development deal? Would this jeopardize those negotiations? I think once it was weighed it was determined that it was too early to release something. But a no later the information was released. It really is fact-intensive. Will it jeopardize the city's economic development goals or accomplish any other kind of need for, whether it's a real property negotiation or whatever the context of the discussion. But it is dependent on the facts under the circumstances.

>> Mayor Reed: Okay, well, the Santa Clara County mapping case was one that the Mercury News won.

>> Bert Robinson: It actually wasn't the Mercury News. Although we'd love to take credit for it. I believe it was Cfac. California first amend coalition.

>> Mayor Reed: But the other one -- that was us that lost that one.

>> Mayor Reed: On that issue, noise complaints and the identities of people who filed the complaints, is that too broad and arbitrarily applied, or was that really some other factor like privacy?

>> Bert Robinson: James may have to help me with this. But my understanding of -- the concern that the court had there is that you had private individuals who had given over information to the city with no expectation that that information was going to become public. And that there wasn't a strong public interest in the release of that information. The task force actually considered that issue in making up some of the exemptions that we suggested.

>> Mayor Reed: Okay.

>> Bert Robinson: Information given over to the city by private individual, with no expectation that they were to become private, identity to --

>> City Attorney Doyle: We have that end of the table covered.

>> Mayor Reed: Hobby everybody stays healthy. I notice Lisa gave you extra space. Okay, Councilmember Constant or Councilmember Pyle, did you have other questions? I kind of monopolized the time.

>> Councilmember Pyle: Well, in many regards, you could almost substitute the word "balancing" with "sensitivity." And it would seem that those issues that are most being scrutinized and most delicate would be those that have a sensitivity towards privacy or endangerment. For example, the homestead act doesn't disclose a nature of that material, you certainly wouldn't divulge war plans, you wouldn't let the other side know what you're about to do, and you certainly wouldn't do it in regard to anyone's health, safety or any of those matters, or just privacy. So I'm just sitting here thinking, what did I miss? I'm trying to understand what it is that you're really after. And it's not been clear to me, at all.

>> Bert Robinson: Councilmember Pyle, you are absolutely correct, that there are certain records that, because of their nature, that are in the possession of government, that because of their nature, ought not to be made public. And there's a long list of specific exemptions both in the California public records act

and in the sunshine law, proposal from the Sunshine Reform Task Force, that contain very specific exemptions. We're not trying eliminate every exemption and make every single record public, by proposing that you should remove or change the balancing test. The concern about the balancing test is that the balancing test basically says, if you can construct an argument, and you can withhold anything --

>> Councilmember Pyle: But what information is it that you don't get now that you want? That's not clear to me.

>> Bert Robinson: At the risk of stepping on something, I know that James Chadwick in the presentation that he's going to make to the committee today does have a list of records that he can offer, that the city has used the balancing test in past years to withhold. So if that's what you're looking for, I could --

>> Councilmember Pyle: Well, otherwise, why are we having this conversation? In other words, you want something. It's not clear to me what that something is. What information is it that you've been denied?

>> Bert Robinson: Councilmember Pyle, this isn't about my desire for a specific record that I've been denied. The proposal on the balancing test is something that came out of the work of the sunshine task force. One of the things we did was to look at sunshine laws in other cities. San Francisco, Milpitas, which are two cities that we took as our model, have eliminated the balancing test. They don't use the balancing test anymore. They declare in their sunshine laws that we will not invoke the balancing test as a reason to invoke the rule. The reason they did that was because of a specific acknowledgment that they were withholding records willy-nilly, but over a concern that the balancing test is overbroad, and doesn't provide citizens any certainty that they can get a particular record when they ask for it.

>> Councilmember Pyle: So do they have inclusions that protect privacy and sensitive issues?

>> Bert Robinson: There are provisions that protect privacy and sensitive issues.

>> Councilmember Pyle: In other words, when they take the balancing act away, what helps to protect those sensitive items?

>> Bert Robinson: The specific exemptions in the act and in the sunshine law.

>> Councilmember Pyle: Okay.

>> Bert Robinson: The specific -- it's not a broad exemption anymore. You're specific.

>> Councilmember Pyle: Okay.

>> Bert Robinson: If you're concerned about protecting a specific kind of record, then you say this specific kind of record ought not to be public.

>> Councilmember Pyle: I've got it, thank you.

>> Bert Robinson: Sorry I'm being a little obtuse there.

>> Councilmember Constant: Well, first in regards to the notes in deliberative process, the area that I have a little discomfort with is sometimes, notes on one draft have something to do with something completely different, just because of the nature of how some of us are more scatter-brained than others, and notes to staff members and comments about different things, I really think it's important that, when we're dealing with our direct staff primarily, that we're able to write, however it is that we get our message across, to get the information, that there's no filters, particularly going upstream that we get this information. So that's the area that I have the most difficulty with the comfort level. On the other areas, with the balancing test, the difference between the balancing test as it exists and the alternative approach number 1 which you provided, alternative approach number 1, I can see the value in some of this. My question, I guess, would be to Lisa, is -- or Rick, how do you feel that alternative 1, where are the negative impacts when you compare that to the balancing test? We've heard pretty clearly Bert's perspective on that. But I'd like to see, kind of see the City Attorney's perspective.

>> City Attorney Doyle: Well, I'll take the first crack and ask Lisa to join in. First off, the first level of Brown Act that we're not bringing in here is security.

>> Bert Robinson: That wasn't a deliberative omission.

>> City Attorney Doyle: I just wanted to make sure it was added. The other thing is, one of the concerns we usually have, this is the noise complaints, the airport noise complaints, it's really protecting third party concerns. And I know that's something the Sunshine Reform Task Force proposed initially, is the privacy rights of third parties. People may file complaints or grievances or provide information. We don't want to turn over necessarily private information that we have on people, because there's some reasonable expectation of privacy that they have. Whether it's a Social Security number or a phone number or an address, it really depends on the circumstance. My gut feeling is that's 90% of what we would use it for now. There are areas you're not going to get everything and that's why you have a balancing test. This

covers most of it but I think there will be cases where it's hard to come up with specific examples because they come up when they come up.

>> Tom Manheim: If I could, I have an example and it's actually one we talked about last time. I think it's sort of at the heart of this discussion, is the issue of whether we're going to allow any space for those things that come up that we haven't anticipated. The fire chief, the only mechanism that the fire chief has for communicating with all of his staff, because they're distributed throughout the city, they work 24-hour shifts, there are three shifts that, you know, that rotate through the fire department, fire stations, the only mechanism that the fire chief has for communicating with them is via a web streaming process. We bring them into the studio and he does what we call the chief's chat. And the fire line folks can call up, ask questions, and so it is the way the chief conducts his staff meetings. We recently got a public records request for a copy of the file that is created when the chief holds those meetings. In the particular case, it was from the fire union, it was over issues that they had, and we were happy to provide it to the fire union, but we were very clear when we provided it to the fire union that we were not waiving the privilege. Because this is -- it is a perfect example. Up until it came up, in November I believe it was, we would not have thought of it, it was nothing that came in approach 1 here. Certainly at the heart of the staff's concern, this feels like one that is difficult to compromise. I do understand why allowing the city to have the discretion to look at something and make a decision, makes the public-d causes some concern on the public's part because they don't know what we're choosing not to withhold. But not having that discretion puts us in a position for, whether it's the chief's chat or the next thing that might come up that we haven't anticipated and that's not covered under a specific exemption, it puts us at risk of having that out there.

>> Mayor Reed: I think James Chadwick is going to give us some examples among other things. Why don't we hear from James now or whatever else you plan on talking about.

>> James Chadwick: Thank you Mayor. I think to Bert's point and to Councilmember Pyle's question, it's difficult to articulate all the circumstances in which the balancing test has been historically invoked to deny access to records. I can only tell you that having done this for close to 20 years now, it's a rare denial of a request for public records that does not invoke the balancing test. It's invoked with respect to virtually every category of records that I've ever requested from any public agency including the City of San José. To give you some examples of situations in which the City of San José has invoked the balancing test to deny request for records, a draft traffic impact analysis regarding proposed revisions to residential and commercial development rules for North San José, and that was denied even though portion of that very same draft had been quoted in a report submitted to the city council. A list of the panelists would interviewed candidates for the aviation director for the City of San José. E-mails exchanged between city employees and organizers of the San José grand prix regarding the cost of the grand prix. Records of telephone calls and telephone messages received my members of the San José city council. Records of complaint of misconduct by city officials submitted through the fraud and abuse hot line, even though we expressionly said we don't want any information either the person who made the complaint or about whom the complaint was made. We were denied all those categories of records on the basis of the balancing test.

>> Mayor Reed: Let me ask you about those. Sorry, we're not going to give it to you, balancing test, end of discussion or did you bet some analysis of what people were actually thinking of in the balancing?

>> James Chadwick: In some cases the balancing wasn't given to me or there was a brief oral explanation or a one or two page letter.

>> Bert Robinson: I would say over time the analysis has gotten more specific.

>> Mayor Reed: Specifically on -- in termination of, here is highway we weigh the balance.

>> Mayor Reed: What about the grand prix one, because I was here for that.

>> I don't remember.

>> Mayor Reed: The grand prix records were released, I just don't remember the process by which we got to releasing them.

>> City Attorney Doyle: That one goes back and it might have been an ultimate just waiver, just turn over the documents. It certainly wasn't a court test. It was one where ultimately it was determined not to invoke it.

>> Mayor Reed: I think that was made by Del Borgsdorf.

>> James Chadwick: That was a decision made by then executive editor, Susan Goldberg.

>> City Attorney Doyle: In order to encourage people to participate as panelists, and get people to participate, I don't know if the names were turned over after the recommendations were made but at the time that was the logic that the City Manager used.

>> Mayor Reed: Sorry James to interrupt you.

>> James Chadwick: To get to what I believe is the core evil of the balancing test, the core problem of the balancing test is it can be literally invoked with respect to any category, there is no boundaries on it at all. And when it's invoked as Rick Doyle said, when it's invoked there's no way to get around it, to resolve it, except to essentially go to court. And so really what it means is that most people, you know, most people are not like the Mercury News is and even the Mercury News isn't the way it used to be. Even going through multiple stage appeal, that ends up in the Rules Committee, when they get a denial they're done and they're not going to fight it and they're not going to appeal it through any administrative process, they're certainly not going to litigate it. That unbridled incentive to deny access to records, I'll just make a couple of other points, and then I'll sit down unless there are questions. It's important to understand that the balancing test is not a sort of ubiquitous solution that everybody adopts and agrees that's the right solution. The federal freedom of information act which is the the subject of more requests than any state act by far has no balancing test. It does in limited circumstance recognize deliberative process. It has no ad hoc balancing test. It relies on nine specific exemptions and just like the public records act, if there are express statutes that makes this confidential, it exempts that. There is no balancing test. County of Contra Costa, Milpitas, San Francisco, the mayor of Milpitas has testified it has not been a problem for the City of Milpitas. It is not the kind of dramatic step that people imagine it might be. I understand the concern about your internal communicates with your staff you know and even with third parties. And I think that the economic negotiations, you know, if you're negotiations with Lew Wolff over locating a stadium within San José, once the negotiations have reached the point where a presentation is going to be made, some action is going to be taken, the whole record should become public. You could have perverse results meaning the proposal that is presented is not the best proposal and a better proposal was considered down the line and didn't get adopted for reasons that didn't have to do with the merit. But I think you could narrowly tailor an exemption for economic negotiation that isn't in the current language but could easily be done. With respect to your communications back and forth with your staff, all I can tell you is this: There's nothing in this, what's being proposed by the task force that requires you to keep anything you don't currently keep. Do you currently keep every single version of everything you do? I certainly don't. You know, just a process of creating a draft nowadays generally overrides you know prior drafts when I do it electronically. I don't keep everything, I don't think most people keep everything. But at most, what it requires you to do is think a little bit. Have a process, that says I'm not going to keep this stuff. I'll keep my final draft and I'll keep this communication. You just have to have some deliberation about it. The consequences for you are inconvenience. The consequences for the public are, things like not being able to see the version of a report provided to the city about the merits of a particular proposal, that got buried, got radically altered, before being provided to the city council, or before being released to the public, in a way that had nothing to do with the merits of the proposal, and had everything to do with responding to political pressure. And if you think that doesn't happen, I can -- I'd be happy to provide you with documented examples of that very thing going on. In both nationally and locally. So those are my -- those are the concerns I want to make sure you have in mind. Thank you.

>> Mayor Reed: Well, all this talk about San Francisco has got me curious. We are occasionally in competition with San Francisco for funding right now at the MTC for example with the stimulus package and state funding. So if I send somebody to San Francisco, and ask to see the internal e-mails between Mayor Newsom and his staff for getting the best out of MTC, how do they protect that if there's no balancing test?

>> City Attorney Doyle: I don't know.

>> Mayor Reed: Let's try it. [Laughter]

>> City Attorney Doyle: You could send that request today, if you want.

>> Mayor Reed: Starting to warm to the idea. Back to the discovery question. One of the things I've noticed is the prelitigation discovery, because it's I guess easier than doing litigation discovery, I don't know. Maybe it's quicker. Maybe it's easier, I don't know. How would the balancing test affect that kind of work, if there's no basis to hold things back, based on the balancing test? Then it would have to be subject to a specific exemption, privacy or one of the things that people have -- whatever our list is. Or you got to give it up, just because it's a lawyer and they're in litigation doesn't mean they don't have public records act rights to ask for things.

>> Right, that's correct.

>> Mayor Reed: You don't ask why you want this.

>> City Attorney Doyle: You don't ask why you can't. Yeah. And so whether it's the Mercury News or a private litigant or just John or Jane Q. public, you know, you treat them all the same.

>> Mayor Reed: James, did you have something to add to that?

>> James Chadwick: I just wanted to make sure it's clear, nothing in the balancing -- nothing in the task force recommendations with respect to the sunshine ordinance affect your discovery obligations and I think as Rick pointed out with respect to the mental process privilege, that is a common law problem that's routed in the separation of powers. There is nothing you could do in the sunshine ordinance that would affect that.

>> Mayor Reed: Anything else? I had a couple of suggestions, direction we'd go. Something along the lines of alternative 2, retain the balancing test, but commit the specific records for which the balancing test would not apply. Whether or not we would commit to specific records I don't know. But that's something for us to look at. We've already done some things that have been withheld on the balancing test, in the past, the calendaring of the public officials, we have the whole calendaring, some things we're not going to apply it to, but I'm interested in the description in the attorney general's pamphlet, describes the attention and how it's not to be used and what I'd like to do is that we follow the dictates of proposition 59, which interesting enough, did not eliminate the deliberative process privilege. But it does tell us that we ought to narrowly construe the balancing test. Somewhere I have the language that's in the constitution. And I think if we take the balancing test, and construe it in a way that will only be applied in accordance with the narrow version, as opposed to the broad, arbitrary, overbroad version that maybe has been used in the past, that would be a way to deal with it. Somewhere I've got the prop -- let's see, prop 59, California constitution, article 1, section 3, statute including those in effect, when the effective date would be narrowly construed if it limits the right of access. So balancing test limits the right of access. It has to be narrowly construed under the constitution. Can't we just narrowly construe it and put that in our ordinance so people can see we're narrowly construing it and our staff and anybody who might be dealing with the release understands it's narrowly construed? So we don't have the -- we have less potential for arbitrary and broad application, without giving it up and having to worry about what we've given up that we don't even know about. And then, I think that would be a good way to do it. I don't know exactly how the staff would go about that, but that's why we have staff and lawyers to --

>> Bert Robinson: Are you speaking about having a narrow list of documents to be applied?

>> Mayor Reed: Yes, it will not be used for X, Y and Z, people know it's being narrowly construed. I think I would want to kick it to the staff to try to figure out how to draft it and then we might then have a discussion about whether or not we should not apply it at all to staff reports, public officials calendars, claims against the city, drafts, et cetera.

>> City Attorney Doyle: Just for the record, I think currently your calendars are all public. And I don't know of any case where we've treated a claim as not being a public record.

>> Councilmember Constant: Or a staff report.

>> City Attorney Doyle: But that gets us down to preliminary drafts, or that -- we'll come back with --

>> Mayor Reed: There's claims against the city, the claim, I understand, the staff analysis of what to do with the claim, may be covered under staff or attorney client privilege or something else related to claims. But clearly the claim itself is public as soon as it's filed, be treated as such, right? So I'd like to know what the committee thinks about that approach or if there's another one of these alternatives that appeals to you more.

>> Councilmember Pyle: That's my favorite alternative.

>> Councilmember Constant: Yeah, I think it's probably is most comfortable direction to go.

>> Councilmember Pyle: It's a start.

>> Mayor Reed: The other thing we might do to make it a little more clear, is, as I understand it, there's not three of these. It's really the public interest exception. If the public interest in nondisclosure outweighs the public interest in disclosure, that's how you end up getting to the drafts and memoranda and the deliberative process and everything that the courts have created. And I don't know if there's a way to describe it so that everybody understands, it's really the same concept. That balancing the public's interest in nondisclosure versus disclosure. Because the attorney-general goes in the pamphlet, takes a pretty good shot at explaining this is really the same thing looked at from different directions. And deliberative process privilege, something -- some court decided to call it but it was really an application of

the balancing test. At least that's the way I remember from always saying, look at my notes that I don't want to get requested, make sure I got that right.

>> City Attorney Doyle: Going to get a public records act request.

>> Mayor Reed: Staff, is that enough direction to probably make headway on this?

>> Lisa Herrick: Yes, that is.

>> Mayor Reed: Any further direction on this, Bert or James?

>> James Chadwick: So could we submit a list of records, categories of records that might be exempt from balancing?

>> Mayor Reed: Sure. And that would be the next part of the discussion, where have we tailored, have we tailored it narrowly enough and that would be part of the discussion, I think.

>> Tom Manheim: Just checking, alternative 2 isn't the list?

>> Bert Robinson: No, that was just examples.

>> Mayor Reed: But I would look to the Brown Act list. There's actually about 20 different reasons, different organizations that can go into closed session. And if we were coming at this from the other way that's where I would start making a list of things that don't get subject to disclosure, because there's reasons for each of those. But there's more than three or four Brown Act things. We think of three or four but it's a much longer list. Go ahead.

>> Councilmember Constant: And couldn't you have kind of a compound approach, where there's one list that's always exempt, one list that's always protected, and everything else falls in between? You know, for those unknowns, for the way this is worded, alternative 2?

>> Bert Robinson: I think you essentially have that, you have that anyway, I mean there are a list of exemptions, records that are exempt.

>> Councilmember Constant: But we don't have a list of always allowed.

>> Bert Robinson: I think that's what we're talking about, making a list of always allowed, right? If I'm following the mayor's thinking here.

>> Councilmember Constant: I think almost a hybrid between alternative 1 and alternative 2 that captures the certainty. Because there's a whole lot of uncertainty out there but the certainties on both sides are fairly certain. So if there's a way to capture that. Or that may just make it more complicated.

>> Councilmember Pyle: Exactly.

>> Bert Robinson: Good luck, Lee.

>> Tom Manheim: Let us come back with something. We'll keep that in mind as we're looking at that.

>> Mayor Reed: City Manager.

>> City Manager Figone: My interpretation of that is, there may be a list of what you have not. You may evaluate the best language to use in order to narrowly construe which may or may not. Is it still open to present ideas and alternatives in terms of language?

>> Mayor Reed: Yes, I think so. I would start with, which I'm not thankfully, the attorney general's pamphlet about what we're trying to do and not trying to do. They do specify things that are not specific to this, it is the deliberative process not the facts that may be protected for example. And you have to take -- some cases you got to go back to the deliberative process and still give up the information. That's just a good starting place I think.

>> City Attorney Doyle: As I take it, it's the narrowly construing it, the scales are tipped in favor of disclosure. And I think it's something we need to work with in terms of categories, as has been discussed today, and we can try to come back with something.

>> Mayor Reed: Okay.

>> Councilmember Pyle: Then do you need a motion?

>> Mayor Reed: No, that's enough to direct the staff. And then the other category of places to look, one of the documents that we got from the task force, I got several over time, is the list of cases that made decisions of what was appropriate for the balancing act, was the appropriate kinds of thing. Of course they're all fact-specific, but that is a category of things that go into one list or the other, if we end up having to do lists. Anything else on this?

>> Tom Manheim: I think we're set. We'll take all of the things we've got combed through for cases because we have them in several different documents and go from there.

>> Mayor Reed: Mr. Wall wanted to speak on this item.

>> I would respectfully recommend that you reject in toto what you have heard here today as being legitimate. Baste line can corresponding like San Francisco and Milpitas are non sequitur. Because they do not make it right. The sunshine law is suspect and intent for profit. It assumes that the City Attorney is

not competent which I reject in its entirety. Our City Attorney and his staff is of the utmost honor and capacity to take care of the balancing act as it exists today. The deliberative process put forth by the Sunshine Reform Task Force is objectionable to the point of it's burdensome and oppressive and vague and ambiguous on its face. Of no utility. I would therefore say the Sunshine Reform Task Force has thus far reached it Zenith of utility. Thank you.

>> Mayor Reed: Anybody else want to speak on the item? If not, we'll move on to the rest of the agenda which I think is done. Any other public comment under open forum? Seeing none, we are adjourned. Thank you.