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>> Mayor Reed: We'll go ahead and get started, we expect Councilmember Constant any time now. The Rules and Open Government government for April 15th, 2009. Any changes to the agenda order we need to consider? No, then the first thing is agenda for April 21st. Anything on page 1? Page 2 or 3?

>> We'll pick it up, thank you.

>> Councilmember Pyle: Thanks.

>> Lee Price: And Councilmember Constant, we'll add you on item 1.4 at the request of your staff.

>> Mayor Reed: Anything else on page 2 or 3? Item 2.7 is agreement for public artwork at that time airport. Want to make sure that we have available for the public some, what does it look like? I've seen the rendering, it should be posted with the staff report.

>> Yes, Mayor, we are working with Kim Walesh on how we can do that. Pretty cool.

>> Mayor Reed: It ought to be part of the staff report. So people have an interest in it they can just click at it and take a look at a PDF file. Anything else on 2 or 3? Page 4 or 5? Page 6 or 7? Page 8 or 9?

>> Councilmember Constant: I just had a question on 5.2. Do you know if there's going to be a staff memo on that?

>> Mayor Reed: That's the library Internet access and computer use policy?

>> Councilmember Constant: Yes.

>> Yes, mayor and councilmembers there will be a staff report, very brief and it should be out by the end of the day or tomorrow morning. You should see it shortly.

>> Mayor Reed: Anything else on 8 or 9?

>> Mr. Mayor, you talked about wanting to defer the homework centers.

>> Mayor Reed: Councilmember Chirco may not be here on the 21st, she has done a lot of work on this. I think that can go to the 28th, with no problem. And then 5.4, the PRNS pricing and revenue policy. Can we push that to the afternoon or do we have to have it with the evening? We've got quite a few other things in the evening.

>> We're fine with the afternoon.

>> Councilmember Constant: The only comment is I know there were at least a couple of neighborhood organizations in our district that had expressed wanting to speak to it. I don't know if that's something else that other neighborhood groups were planning, because of the evening nature. That would be my only concern. I don't particularly have a problem moving it but what do we want to do with people who want to speak? So much of this relates to neighborhoods.

>> Mayor Reed: They can speak in the afternoon but you're saying they may not be able to get there.

>> Councilmember Constant: Yeah.

>> Mayor Reed: I think they would be better off coming into the afternoon, rather than having to sit through the rest of an evening council meeting, perhaps.

>> Yes, Mr. Mayor, we're going to have a couple of pretty big items in the evening. I don't know if we can do special noticing or work with the councilmember's office to let people know it's going to be in the afternoon or some other approach to try to mitigate.

>> Councilmember Constant: As long as we get the word out, we'll make sure in our office, but just let neighborhoods know.

>> Mayor Reed: Rather than Do this in the amended agenda, we decide to move this in the afternoon. Otherwise council offices will get it out to their people because they won't notice it until later in the week.

>> Lee Price: We can take that down as soon as possible but communications certainly would help.

>> Mayor Reed: Anything else on 8 or 9? 10 or 11? 12 or 13? Or 14? Which is the last page. I have a couple requests for additions. I have a memo that I've requested to add on AB 560 net energy metering because there's legislation moving to get that on the agenda. And a request from Councilmember Chu for travel to L.A. and Sacramento. I think those are the requests for additions, at least those are the ones I have in writing. Councilmember Constant.

>> Councilmember Constant: Mr. Mayor, I have one that I was good to request for the 28th. But when my office contacted your office, we found that the 28th is full. So I don't actually have paperwork. The week of the 28th is national victims' rights week and we were hoping to do a proclamation. If possible I would like to add it to the 21st, at least we have it recognized before it's a short -- we have room in the evening. I think we're at the max on the daytime.

>> Mayor Reed: Actually, they could go either place. I think, because we have six but two are the evening, so that leaves room for one in the afternoon.

>> Councilmember Constant: Yeah, it would be a very quick ceremonial but I think it's important that we do it. So if we could add that, my preference would be -- well, given that the evening is packed maybe we should do it in the afternoon. And we'll just -- if there's a problem we'll let you know but on orders of the day we'll move it but I think the afternoon is fine.

>> What was the name of it again?

>> Councilmember Constant: National victims' rights week.

>> Thank you.

>> Mayor Reed: We'll need to get the paperwork on that proclamation, commendation, whatever it is, to get it done quickly.

>> Councilmember Constant: We'll do it right away. Unless you want to squeeze it on the 28th. The 28th is full that's why we were trying to move it forward.

>> Mayor Reed: I think the afternoon of the 21st will be fine.

>> Is that one that LEED Lee made reference to?

>> Councilmember Chirco: You said you were going to put something on that Pete's office had contacted --

>> Councilmember Constant: That was a little different. A school in my district is being recognized on item 1.5. 1.4, yes.

>> Councilmember Chirco: Oh, okay.

>> Mayor Reed: Okay. So that's a third addition to the 21st, afternoon. Any other adds?

>> Councilmember Chirco: Move approval.

>> Mayor Reed: Motion to approve the agenda as amended. All in favor? [ayes]

>> Mayor Reed: Opposed, none opposed, that's approved. April 28th draft agenda. Anything on page 1? Page 2 or 3? Page 4 or 5? Or page 6? We have two requests for additions, ceremonials, El Dio de Los Ninos, book day, and excused absence for Councilmember Chirco. Any other requests for an agenda? Anything that we can put on here, that would otherwise make this a lengthy agenda? We have the downtown entertainment zone status report that got moved. Anything else we would consider moving off the 21st?

>> Player, if you like we would just do a request of departments and if people can defer things we could just add a note or let you know ahead of time that an item could be deferred to the 28th. Would that work?

>> Mayor Reed: We are going to have quite a bit going on, on the 21st, it would be good. We'll have a nice short meeting the 28th, and yesterday, but we're paying the price ton 21st. All in favor, opposed, that's approved. Redevelopment agency agenda for April 21st. Page 1? Page 2 or 3? Or 4? I have no written requests for adds. Are there any?

>> No, Mr. Mayor, there are none.

>> Mayor Reed: All in favor, opposed, none opposed, that's approved. Do we have a draft agenda for if 28th?

>> Mr. Mayor, members of the committee, the agency has no items at this time for the April 28th date. If that remains the condition, we would recommend cancelling that agenda at next week's Rules and Open Government Committee.

>> Mayor Reed: Okay. You could also take a look at the stuff on the 21st, that might -- we might get out of the way and move it to the 28th, so let's not cancel it just yet. Okay. That takes us to the upcoming study session with the water district. That's item 5.1. 9:30 start at the water district headquarters, until noon.

>> Councilmember Chirco: Move approval.

>> Mayor Reed: Motion is to approve the agenda. All in favor. [ayes] opposed? None opposed, that's approved.

>> Mayor Reed: Legislative update, item 6.1 from State. We have a recommending to support AB 68 and 87. Regarding single use carryout bags.

>> Betsy Shotwell: Yes, mayor if you'd like a brief presentation from John Stufflebean.

>> Mayor Reed: I think it would be helpful because niece are kind of moving targets with what the state has done before and what's happening now.

>> John Stufflebean: A brief presentation is that there --

>> Mayor Reed: Could you move that microphone up a little bit. Squeeze the handle.

>> John Stufflebean: John Stufflebean environmental services. There are a number of bills regarding plastic bags and theories two we are recommending the city support. Both of them essentially accomplish

some of the main things we're trying to accomplish with some of the efforts we're doing here and that is achieving a bag fee. Of course the state quite would be better than the city, it would actually then release us from if need to do something in the city. We're recommending support of these two bills. We have the plastic bag expert here if you have additional questions.

>> Mayor Reed: My question was, what impact does the litigation over whether or not environmental review should be done before we do anything with single use bags, I know Huntington or Manhattan beach had to go back and start environmental review. How does that fit into these bills if at all? Does the state have to do environmental review before they move ahead?

>> John Stufflebean: I don't believe the state does and of course in our procedure we are building that into the process in the city. I don't believe that would affect the state goals.

>> Mayor Reed: And then the other question I had was, I can't tell from reading the description whether or not the bills have contemplated treating the bags like we do plastic bottles and cans, with a fee and you bring it back, you get the credit for it like you do with the plastic bottle and whether or not that's been considered at that time state level.

>> As far as I know, it's not been considered at the state level. That's all I know at this point.

>> Mayor Reed: I think that's something we ought to at least evaluate. Because I have talked to, let's see, the Sims recycling folks, and they think that they could handle the bags on a fee, return-fee basis like they do the plastic bottles, the same people would do it like they do plastic bottles. I'm curious as to whether the state has looked at that as opposed to the structure they're proposing.

>> I'll add that the plastic bag industry would rather see that happen at that time state level than at a local level. There is the issue that is always there, and that is that plastic bags that would be recycled would have to be clean. So if consumers were to return them for credit they would have to wash them in advance. So there are just that -- those kinds of limitations on it.

>> Mayor Reed: There are those issues, they have the same issue with the cans. If you put something in the cans, they weigh more. There is cheating potential. But somehow they manage to do them. Policy issues, somebody ought to analyze that. Maybe they've already done it I don't know. But this bill alternative, I think it would be important for us to know the answer. Anything else on this Nancy? If you turn your microphone there.

>> Councilmember Pyle: It's become obvious to me, just from the sort of output, that the input that we got from our community that a certain amount of education needs to accompany all this. I know it's unusual for this bill but one of this size which affects the entire state and the success of which is so critical, I think there has to be some kind of outreach. The state doesn't have a whole lot of extra money so I'm not sure how that would be done the most expeditiously. Posters in stores, something that could be done fairly reasonably I hope would be a consideration. Has there been any talk about that with the bill? Or any dialogue?

>> You mean talk about that with the bill to include the fee or on this recycle?

>> Councilmember Pyle: On the education component of it. People are more willing to help with the recycle and to pay the 25 cents if they forgot to do the reusable bag if they understand why we're doing this. We can't assume everybody knows. Even getting high school or elementary kids getting involved, putting up drawings, I can understand how it could be done reasonably. But it has to be done. The success is far greater if everyone understands why we're doing it. We assume because we're in the biz that everybody knows about it but they don't. People just feel it is one more thing they have to pay. I hope that --

>> We are in the process of presenting to different community groups all the time. We're on that part of it too, because you're right. Once they understand the process they say okay, it makes sense.

>> Mayor Reed: It is a way to save money. Right now PW and Safeway will give you a credit on your bill. You'll be saving money over having to buy a bag. Pete and then Judy.

>> Councilmember Constant: A lot of input I've got received from both the businesses and the individuals is the cost that would continue to impact consumers at a time when they're being impacted on various levels all the same time. I think now is the wrong time for us to be contemplating this. People are having a hard-enough time making their bills the way it is. There is some issues I don't see addressed in this particular analysis, like whether there's going to be a maximum charge, which I think concerns a lot of people. There's no -- I heard a lot from nonprofits, like the Salvation Army, goodwill and others, that feel that their customers would be disproportionately affected by a fee like this. And I just think this is the wrong time. So I just urge us not to take action on this, not to support this. Because the cost to consumers and businesses have been increasing incrementally at so many different levels, at a time

when it's difficult without all these extra fees and burdens. And since today is tax day Kim can't help but emphasize the issue that we have to be very careful when we are essentially placing a tax on consumerism and I just don't think it's a good idea at this time.

>> Mayor Reed: Judy.

>> Councilmember Chirco: I can't disagree with Pete Constant on some issues. But on the other one, I have to say I do disagree. This is an avoidable expense. But what I'd like to know is, I'd like to make a motion to support it with the addition of the concerns that were voiced here. One is, the return the bag. The other is the educational component. I know a ramp-up, something San José had talked about was using the first year to -- so people could buy -- using the funds to give to low-income people, the reusable bags. So I think especially on a statewide level, it fits into our green vision so well, that if we address those other elements, it does address some of Councilmember Constant's concern about expense. Because it is an avoidable expense. So I would like to make a motion of support including the concerns that were voiced here. I'll see where it goes. As you said, this is one of many at the state level and I think San José's voice needs to be heard. We've been doing a lot of work on this issue.

>> Councilmember Pyle: Second.

>> Mayor Reed: I have one request to speak, from the public on this. We'll do that now. Martha O'Connell.

>> Martha O'Connell representing homeowners organized to maintain equity speaking against both of these bills. We have already gone on record in February of pointing out to the mayor and the council that to place a 25 cent tax on a plastic shopping bag would have a disparate impact on those who could least afford it, those who are seniors and the poor. We are not talking about the green movement with these bills. It's clear to me, as a supporter of the green movement, that what's really behind this is raising money. I am distressed to see that both bills would prevent cities and counties that ban single use bags for being eligible for the funding. If you're really concerned about the earth and recycle and plastic bags, it's really simple. Ban the bags. That takes care of the whole thing and I think that's the more viable and equitable solution than place a disparate burden on the poor and the elderly.

>> Mayor Reed: Anything further?

>> Councilmember Constant: Just knowing that I don't support it at palm people like me having to shop for a family seven, the number of bags, it's almost impossible to determine ahead of time. And this can be a big impact, especially when there's no ceiling. And the implication for other areas, we're talking about every time you go to Macy's, every time you go to goodwill, every time you go to the grocery store, rite aid, the auto parts store, that is the area where you see bills of this type all opposed to an incredible amount. What strikes me is, when you have a fee that is probably ten or 15 times the the cost of the actual bag, that's excessive.

>> Mayor Reed: Nancy.

>> Councilmember Pyle: I'd just like to say that what we're really talking about at this point is changing habits. We're change habits. And I would agree, with the previous speaker, that, both of you, that we don't want to put an added burden on those least ability to afford it. So if we had worked with the retail people to come up with some bags that were -- would be available that would be part of their advertising campaign, I think that would help tremendously. But we have to change our habits. That's how we're going to improve this planet. We can't just say, well, you know, it's too hard. It's not too hard. It's like, to me, it's part of an educational process. And once people do realize the benefit, then they realize, wow, if you go into Costco, you don't get bags. You just don't. You go out with boxes, or whatever, that they put the groceries in. And very often, you don't even have the boxes. So we just need to change our habits, I think. And this is a good way to begin that process.

>> Mayor Reed: I have a question for the City Attorney. Under state law, this is proposed to be a fee, or is it proposed to be a tax, or do we know?

>> City Attorney Doyle: The bill as disclosed here contemplates a fee. I think that's consistent with what the legislature, at least the authors have intended. Whether or not -- this -- I'd have to look at that time bill and do an independent analysis.

>> Mayor Reed: It really goes to what they can use the money for.

>> City Attorney Doyle: Yes.

>> Mayor Reed: And there's no mention of whether or not they might use the money to bring down the cost of reusable bags. Which might be a legitimate use if it's a fee. That would be an interesting question, because that goes to the cost for somebody who is trying to not incur this cost. Right now, you can buy reusable bags for about 99 cents, I think. The store bags. And if there was a concerted effort to get those

in volume, you'd probably bring the price down dramatically more. And I think that's one of the things that the money ought to be used for this, but does bill speak to how it would be used?

>> The money would be used for public education, and there's a catch \$2 per transaction. That would apply for large purchases so they're trying to recognize that people use more than eight bags in a shopping session, oftentimes for large families. So that's something that's being considered as well as the exemptions for WIC and food stamps, I believe.

>> Mayor Reed: And what about using some of the funds to bring down the cost of reusable bags?

>> At the state level I'd have to go back and check the details on that. But I don't remember that being part of that. I remember the public education piece.

>> Councilmember Constant: I think there's too much for us to take the council position on that whether I support it or not. The questions being asked are definitive questions. If amended with specific amendments that we feel are important. And otherwise defer to get more information in answer to these questions so that we can, at least, be really clear on what we're supporting as a city.

>> Mayor Reed: How long do we have on this bill? I noticed it was set for a committee on April 13th.

>> It was passed by the assembly natural resources committee this week. So it has gone forward to the appropriations committee.

>> Mayor Reed: Well, I would certainly like to see it amended or at least figure out whether or not a return fee, work like the bottles and help bring down the cost of the reusable bags. But that might be part of the amendment process. I don't know. Could we specify we might support it if those were added?

>> Sure.

>> Mayor Reed: Nancy.

>> Councilmember Pyle: And I would imagine, too, that plastic bags would be used for some items, like meat and produce, that kind of thing. Is that -- I mean we're not going to do away with them completely but we're trying to do away with them to the point they're not clogging our streams and waterways.

>> Exactly, exactly.

>> Councilmember Pyle: And our highways.

>> City Attorney Doyle: That information could be given Mr. Mayor on your questions by the time we get to council, we certainly can have a conversation with Roxann Miller and talk about amendments and get more information on uses of the money. There is a bag pollution fund, would this be something that they'd be amenable to?

>> Mayor Reed: All right, Judy.

>> Councilmember Chirco: I was wondering, I'd like to at to my motion, if amended.

>> Councilmember Pyle: That would be great.

>> Mayor Reed: Okay, anything else? Okay. I'm going to support it but I do think it needs to be amended. As we've outlined here. This should go at the 28th, not the 21st agenda. It is probably going to have a discussion at the council level at some length. So for the 28th agenda, all in favor. [ayes]

>> Mayor Reed: Opposed? One opposed, Councilmember Constant. I think that completes the state legislative report. Nothing on the federal side. Nothing on meeting schedules. Anything on the public records that the committee wants to pull for discussion? I'd just want to talk about item A which is the notice of preparation on the California high speed rail authority, just to pass on a little bit of state legislative thing is that former councilmember former supervisor and current assembly member Jim Beall, wants to form some sort of joint powers agreement or authority to deal with the Diridon station, similar to what has been done in San Francisco around their station and now has been apparently done around Anaheim, their station. I'm just reporting on this. I'm not sure exactly how we engage in that conversation but it is a means to have a coordinated effort to get funding for all the work we need to do around Diridon. Just pass that on. Figure out what it means sometime soon, I guess. Anything else from the public record? Councilmember Pyle.

>> Councilmember Pyle: Yes, I'd like to address public record F. Letter written by Mr. Wall, the 9th of April. I just want to thank Mr. Wall for being a good watch-person in reference to purchases that the city has made. I did want to ask a couple of questions about that from staff. And here we are, ready to go. Could you tell us a little bit about the bid process? I mean, I just want to know why we wind up buying rather large purchases from another city, rather than from our own.

>> Mark Giovannetti, finance --

>> Mayor Reed: Could you bring that a little bit higher?

>> How's that? Mark Giovannetti, finance purchases. We did a request for bid for hybrid vehicles. It's a low bid determination, low bid award. In this particular case any number of dealers we outreached to both in San José and the immediate area. And Sunnyvale Toyota submitted the low bid.

>> Councilmember Pyle: Did you have difficulty getting bids from dealerships in San José? I mean, let me put it a different way. Did all of the dealerships, and I believe there are only three, in San José respond to the bid?

>> There were no San José dealerships that responded to the bid.

>> Councilmember Pyle: And have we, as a city, done outreach to some of the auto dealerships to let them know this is an opportunity?

>> Yes. We went back and looked at that time log, the e-procurement notification log, and there were a number of San José dealerships that were notified. And they were mentioned as vendors through the system and we followed up with phone calls in the dealerships in the area. The reason was, we were getting trouble generating interest just because of the demand. This was let in November 2007. Just because of the demand for the vehicles, the only -- so Toyota was the Prius vehicle. One was in coalinga.

>> Councilmember Pyle: I'm disappointed that our local dealers couldn't be a little bit more accommodating.

>> Us, too.

>> Councilmember Pyle: Appreciate the diligence.

>> Councilmember Constant: Thanks, Nancy. I think we need to do follow-up as to why our dealerships didn't do bidding. When San José businesses aren't bidding, aren't becoming involved in our process, whether they're the request for information or request for proposals or any of the different things that we do, we should be proactively finding out why. Is it something in their own business that's preventing them from bidding, is it something in the process that's preventing them from bidding, is it something external that we have no control over? We should be looking to evolve and refine our processes so our businesses have the opportunity to bid for our business in all areas of the city.

>> And mayor and community members, just one more comment. In staff this morning we also talked about the economy has changed. So when we are reviewing bids that are up for -- or contracts that are up for renewal, we will take into consideration is there a possibility that we could get lower bids because the economy has changed and perhaps go out and rebid things that we may not have done so in the past. So --

>> Councilmember Pyle: Great. We need those sales tax dollars. Thank you.

>> Mayor Reed: The economy, especially the car dealer economy has changed dramatically since November of '07 because I know there was a waiting list for Prius during that time period, now they've got a few more extras. Mr. Wall, did you want to speak on this item?

>> Due in my haste, there was a slight typo in the telephone number. But also, more material to the effect I forgot to include that we should buy American. President Obama is investing heavily in General Motors, even though they are on the verge of alleged bankruptcy, for General Motors hybrids for the federal fleet. So due to my own negligence I should have included buy American, even though the topic of Prius or to it is being built in the United States, should cover that argument, with the exception that the Toyota places are not union facilities. And so that should also be taken into consideration in reference to the living wage issues. Thank you.

>> Mayor Reed: Anything else from the public record?

>> Councilmember Pyle: Mr. Mayor, if I could just follow up. I did want to say in response to that that I have been following up, checking in with various and sundry car dealerships and some of which was used car dealerships. And what I'm finding is that the used car and especially American used car sales are up. So I'm really pleased to hear about that. Not necessarily new cars, as much. But it's better than it has been. So we love it when those high ticket items begin to pick up speed. No pun intended there. Thank you.

>> Mayor Reed: Anything else from the public record?

>> Councilmember Chirco: Move to note and file.

>> Councilmember Constant: Second.

>> Mayor Reed: Motion is to note and file the public record. All in favor, opposed, none opposed, we have 10.1, auditor's monthly report of activities. Sharon.

>> Sharon Erickson: Good afternoon, Sharon Erickson. The Association of local government auditors announced the travel expenditures one in 2008, makes us very proud, we'll pick up that award at the

association's conference in San Francisco. Few other things. Our audits of workers compensation and the semi annual recommendation follow-up report are on the agenda of the Public Safety committee tomorrow. Item 4, the measures O, P and F audits are going forward to the city council on consent on the 28th. I'll give you a preview there. The city complied in all material aspects with measures O, P and F as approved by the voters. That was a follow-up to a recommendation we made as part of that management audit. About a year or year and a half ago. One other thing I'd like to point out number 11 we are formalizing that we will be conducting review of federal stimulus funds as they come through. My office is monitoring the guidelines, as they come through on OMB. And we will be monitoring these expenses as they are spent. And finally I would like to thank you for recruiting from my office, leaving a hole in my staffing as I try to get this done but I just wanted to say we are very produced Chris Constantin and think your selection was pretty darn special. So thanks again for that, and we are very proud. That's my report.

>> Mayor Reed: There is a good career path through the office of City Auditor. Chris constantin is on a good career path. And Edward Luna is on his way to San Diego.

>> Sharon Erickson: Yes, he is.

>> Mayor Reed: Anything else? All in favor, opposed, that's approved, thank you. Nothing to add to council committee agendas. Except the transportation and environment committee work plan additions from environmental services, two requests for May 4th, talk about what we're going to have to do to achieve 15% water reduction and modifications for the Muni code. May 4th T & E committee agenda. Anybody here on that committee?

>> Councilmember Chirco: Yes.

>> Mayor Reed: Okay.

>> Councilmember Chirco: Can we make one motion for both of them?

>> Mayor Reed: Yes, we can.

>> Councilmember Chirco: Move to approve.

>> Councilmember Pyle: Second.

>> Mayor Reed: Motion is to approve the additions to the T & E committee work plan. All in favor, opposed, none opposed, that's approved. Under open government we have Sunshine Reform Task Force recommendations, balancing test and drafts and memorandum. This is a return back from a previous discussion. With a couple of things to try to work out. We did get some communication from Bert Robinson, I don't think he can be here today. I got a letter this morning or today in addition to the memo that got circulated with the packet. Anybody else see the letter that came in today?

>> Tom Manheim: Yes, we've seen it. Actually I believe it came in yesterday. It may have gotten circulated late. But yes, Bert is unable to make it. I think his memo makes his concerns fairly clear. I know that Lisa will be taking you briefly through our memo. We do have two people here, I think, who are interested in this item. A Virginia, I've blanked on your last name.

>> Mayor Reed: Holtz.

>> Tom Manheim: Thank you. Virginia is here from the task force and from the subcommittee. I think she's just here to listen. And I know when we get to the public comments, Mr. Chadwick I believe has some comes he wants to make on behalf of the Mercury News. Very briefly before I turn this over to Lisa I wanted to update you on the schedule. We have this item. We will be coming back next week on police statistical reports. The last significant decision before you then will be the police records item. We have been working to bring some consensus between the D.A.'s office and the task force representative, Mr. Robinson. And it's proving more challenge than expected. We are either very close to what I think they both can agree on or we may come forward with something that they may both have some concerns with. Once we have that, we have yet to get that out to the stakeholders. So I suspect it will probably be at least a month and a half before we can get back to you with that. So with that update on the schedule I'll turn this over to Lisa and let her walk you through today's item.

>> Lisa Herrick: Good afternoon. We're just going to take a few minutes to explain it, how we arrived at the proposed language, which is attachment B to the staff memo. We -- at that time last meeting where the balancing test was discussed we understood the committee's direction to be -- to really do two things. One is, consider or review the attorney general's language and come up with some narrow -- more narrow construction of the balancing test. And two, to consider whether a list of documents could be developed that would essentially identify records to which we would never apply the balancing test. Put another way, they would always be disclosed. And so we attempted to do that. And that's what section A and B of the proposed language here, which I think I just mentioned as attachment B, purports to do. Actually A and C. A and B are nearly verbatim from the A G's materials on the balancing test and

where it may have used the word public agency I substituted in city. So that's where sections A and B came from. Section D, we developed a list of documents, and section C happens to correspond with attachment C, if all of this is make sense as we're moving along through the materials. Section C was an attempt to identify records that we believe are routinely disclosed upon request. And we wanted to make the list as broad as possible. We wanted to identify as many documents that we believed really are routinely disclosed and rarely, if ever, is the balancing test asserted. But this exercise of course highlights the same concern that we expressed over and over again, which is, we could imagine some scenario in which some information might possibly be subject to or we might want to protect that information. We would use the balancing test. We wouldn't withhold the entire documents but some information might need to be redacted. And so to address that concern we thought it best to essentially require staff to make that case before the Rules and Open Government Committee in an open meeting, and only apply those tests if the committee agreed with that document. So that's the thinking for that language in section C. And finally section D is language that the task force proposed in its original proposal, part of its original proposal. This is much different than the tasks proposed, I don't mean to suggestion that it isn't. But there was an obligation on the City Attorney to provide in writing a detailed justification about why the balancing test was used. I think that the public records act imposes that obligation but it doesn't hurt to be even more explicit. So I included that in there. So staff's recommendation is to adopt this language, this proposed language on the balancing test and with this language in the blanks test we can recommend that the task force's language on draft and memoranda also be adopted.

>> Tom Manheim: Mr. Mayor, if I could just add one thing. I did note, Mr. Robinson's reference to certain items in this list we've given you, that we all clearly understand would never be withheld. And our dilemma in creating the list was whether to create two lists which would be a couple of very -- a very short list of things that would never be withheld, such as staff reports, memoranda -- I mean, pardon me, staff reports, agenda items, the things that are routinely publicized related to any of our public meetings, your calendars which are obviously posted online. We recognized there were some things on this list which literally would never be withheld. But for simplicity sake we felt it would be best to have one list that would be comprehensive. With that we'll welcome your questions and discussion.

>> Mayor Reed: Okay. I have a few questions. First is, just trying to keep this straight. Because you've got blanks test, deliberative privilege, drafts memoranda section. But if I get it right, it all falls under a specific section of the government code which is the public interest exemption. The way it's organized in the attorney general's opinion, is that right?

>> Lisa Herrick: I think mostly. The mental process privilege I think, mental process principle, rather, is actually something I think comes out of a recent decision out of the sixth appellate district, which doesn't only rely on 6255, I believe. And then in terms of drafts and memoranda, that comes out of 6254, section A. So there are two places where the public records act addresses drafts and memoranda, and section 6254 A and the deliberative process in 6255.

>> City Attorney Doyle: Mr. Mayor, the mental process principle really is derived from the separation of powers document which of course is not getting into the minds of legislators, deliberative process is truly a blanks test. It's weighing what's in the public interest. And the courts always balancing these things in everything they look at but I think they are different.

>> Mayor Reed: So then the way to categorize this, you have the mental process test that exists by itself. There is no blanks to the mental process privilege.

>> City Attorney Doyle: It applies to electeds, legislators.

>> Mayor Reed: That is not part of the blanks test. The way to best organize that is the balancing test, that's the way the staff has got it drafted here.

>> Lisa Herrick: Yes, because the balancing test then would take care of the balancing of -- in protecting information that should be protected, if the public interest in nondisclosure clearly outweighs the public interest in disclosure as well as be deliberative process, which is a blanks test.

>> Mayor Reed: Are there other areas in which we would use the balancing he test besides those two?

>> Lisa Herrick: No, we use these generally to protect draft memoranda as well. That's why the test on drafts would be an appropriate way to proceed if we've got some protection here in the blanks test. If we're still able to rely on the blanks test.

>> Mayor Reed: Do we need to mention somewhere in our ordinance the mental process principle, privilege or whatever it is we're trying to explain what it is we're doing? So the public can understand it, shouldn't that be --

>> City Attorney Doyle: We can, I mean --

>> Mayor Reed: Specifically called out? No one ever heard of it until you did a memo recently.

>> City Attorney Doyle: We have a court decision and we can certainly add that, I think, you know, at least from a sunshine transport standpoint, to include that as the principle in the written ordinance.

>> Mayor Reed: Yeah, I think that would be helpful. Because if somebody asks for that and you say no, and they go to our ordinance and say you're not following the ordinance, and you've got to explain yes, but there's this other case, I just -- I think it's better to have it all in there so people are not surprised when we assert that right that belongs to legislators. That takes you to my second point. The mental process privilege belongs to legislators. The balancing test, and deliberative process, refers to decision-makers. So even if I'm comfortable that no one's going to be trying to get inside my head, I don't necessarily want them trying to get inside the City Manager's head. So who are the decision makers?

>> City Attorney Doyle: Well, I think decision makers are people, I would say, just off the top of my head, department level, department heads, folks, the redevelopment director, City Manager, her senior staff, I think it would include the city council. I mean, it would not be uncommon to assert both a deliberative process privilege as well as a mental process principle. I mean that would clearly be something where there is overlap. It does cover those because you are decision makers as well. Perhaps your top staff, it would depend on the issue but let's say it's a high level budget discussion, involving your budget director. That's a work in progress that is very deliberative, in terms of coming up with your budget message, I would think that your budget director might be included in that as well. It really does get to a level of who is involved, able to make the final decisions.

>> Mayor Reed: One of the arguments that Bert Robinson made in one of his letters is the mental process privilege adequately protects what we're trying to do here and that we don't need the deliberative process privilege. But I think the deliberative process privilege is clearly broader than the mental process just in the scope of the people that it covers if nothing else.

>> City Attorney Doyle: And let me say this, that I think that frequently it may result in not -- in just a redaction of certain information, that not all information would be turned over but we would be redacting just portions of it. And so it really depends upon the facts and circumstances of the case.

>> Mayor Reed: On the substance, I can't always agree with Bert Robinson, I know I should, but I don't always. His attachment D in the staff circulated records he says down at the bottom of page 1, the delivery process of governments are precisely what citizens have a right and a need, indeed a responsibility, to witness, if there is a vigorous debate among staff.

Not cloaked by a dubious privilege. And while I certainly understand the public interest in weighing into these debates, I think that's the wrong time for the public interest to be asserted. That when the City Manager is having the Planning Department, and the office of economic development, try to develop a position for the City Manager to make a recommendation to the city council, that's precisely when the special interest groups and lobbyists want to get engaged. That's the time when I don't want the special interest groups and the lobbyists to get engaged. It's hard enough when it comes to the council to sort out the public interest from those. And so I think having people coming in and make public records act requests on everything from inside the budget so they can pit one department against the other for their political interests is just not something that we ought to encourage. And I think the public has a great public interest in having rational decision-making and allowing the professional staff to get their professional opinion and do their work, and then it's the public debate and when the public gets engaged at council level, that we have to make the decisions concerning all of that. I haven't had the chance to talk about this with the City Manager but I just can't believe if there's a vigorous debate going on among her department heads that she wants that to be a political debate about which department to support. I just don't see that as good government.

>> Tom Manheim: I can speak for the City Manager and says she concurs. She strongly wanted to attend but she is in another meeting.

>> City Attorney Doyle: Mr. Mayor, we didn't invent the deliberative process privilege. This is established in federal law, recognized by the courts at all levels. And you know reasonable people can differ on the statement. But one thing this presupposes is you're going to have vigorous debate if everything is open to the world. I would challenge that. I would say you're unlikely to have vigorous debate among city staffers and giving that to the City Manager if they knew everything was going to be out for exposure. So there's a reason why they have this balancing test.

>> Mayor Reed: I'm not concerned about the Mercury News or somebody writing a story about it. That's not my concern. My concern is that then it becomes, you know, a public fight, a political issue before the manager's been able to finish the work. And let me give you an example of one scenario, is on land use

changes. If it's an employment lands conversion, which we've had a few of those, it's highly likely that one of the departments is not going to agree with the other departments. But ultimately, the City Manager has to make her professional recommendation of what to do. But if the -- varying departments have different points of view, then that becomes part of the public record, then City Manager's recommendation gets undercut when she comes to the council. And also, it sets off the lobbyists and the special interest groups who may want to use that to their advantage not necessarily the public's advantage. I don't necessarily agree with Bert that we can get rid of the deliberative process privilege. We can tailor it in a way that makes it clear it's not going to be abused, that it's going to be used for the purpose for which it's intended. And I don't know if the staff work has gotten us there or not but moving us in the direction that I think we need to go. Which makes it all very clear now, I'm sure. Anybody else want to weigh in? Make it more difficult? Or clarify it?

>> Councilmember Constant: Well, I have a couple of things. I would feel sorry for anyone who would want to get in our heads because it's a scary place, trust me. [Laughter]

>> Councilmember Constant: The one area that you haven't covered yet, mayor, is the list of records that should be balancing test applied or the records, the list that should not be applied. So clearly, we have from staff, a list where we are saying we would not apply it to this list of items. Others would be subject to it, maybe, maybe not, we'd have to look at it and ask. Bert's memo, the one that's in attachment D, recommends exactly the opposite. Let's make the list where these are the only ones where the blanks test applies. If I'm understanding what I'm reading. My concern is, whenever we try and make a comprehensive list, we -- I think we'll fail. Because there's so many things to consider in an organization this size, and things that don't exist yet, and to put them into an ordinance where you have a list of five items or ten items, that something new comes up, we have to keep adding. I feel more comfortable the way staff proposed just for fact that it's clear these, we're not going to have a conversation, we're just going to give them up, they're available and others, we'll decide whether the balancing test applies, or it just should be added to the list and just give it out. I just -- I worry about that. I just want to hear from staff's perspective, if there's something in the contrast of those two viewpoints that I don't see, or do you agree, or disagree?

>> Tom Manheim: Lisa may weigh in as well. I mean, I think, I want to clarify one thing about the list that we have proposed. Which it is a list that we believe would almost never, ever -- we would apply the balancing test. But -- and what we are proposing is that, for the -- for any requests regarding those records, if, for some reason, we did have a concern, that concern would be brought to this committee for a decision. So it would not be a staff decision. But to the larger question of, defining a list of items to which we would not apply the balancing test, versus trying to define a list to which we would, it's the approach, it's the approach of applying them, defining the list that we would apply to the concern test. Because as we have learned, as we've gotten into this, there -- it is just impossible to anticipate every possible example. And as I have learned from my able colleague here, when you talk about applying the blanks test, the issue is the specifics of -- it's not the type of record. It's the specifics of what's in that particular document and the specifics of the -- what that document is about, that really dictate whether or not you're going to apply the balancing test.

>> Lisa Herrick: I think that's exactly right. We've also talked about timing, sometimes it's an issue of timing, something might be withheld on the balancing test but at a particular point in time, a couple of weeks or months, that sensitivity is gone and the record will be reduced. That's the difficulty really, talking about category of records versus the content of information that's in any particular record, whatever the category is.

>> Councilmember Constant: When you have one of those records that could evolve, it's not releasable now because the balancing test, and maybe in the future, do we follow up with someone and say, okay, now it's available, do we keep that request and just fulfill it when it's able to be fulfilled or do we wait for another request, how do we handle those now?

>> Lisa Herrick: That's a good question. I think it depends on a case-by-case basis. I think where we told someone that some information would be available and releasable, after certain people -- after it was released to the public and a decision had been made, and so there, we've said we're not going to produce it to you now, but you know, in late May or early June it's going to be available. So there, we've gone and done that. I think it's -- it's reasonable for us, I think, the public records manager and me, perhaps, to try and articulate that in some our education and it's something that we could work into the policy if it's not clear. It's something that bears review and we should look at that and make sure we

educate the organization about that. So that rather than a straight no, we say, not now, but you know, when.

>> Councilmember Constant: Okay. And I might have some other questions after we hear from Mr. Chadwick, or anyone else who may be commenting.

>> Mayor Reed: Okay, anything from the committee, I will ask Mr. Chadwick to speak at some point.

>> Councilmember Chirco: I can't think of any questions that haven't been asked or clarified to date. I know we certainly spent a great deal of time on this issue.

>> Mayor Reed: Okay, Mr. Chadwick -- I'm our, Nancy.

>> Councilmember Pyle: Thank you. As an overall overarching principle, the balancing test would be a certain amount of protection, would be one where the city owes a certain amount of protection?

>> Lisa Herrick: It is, employees, people we're trying to do business with, and there's the degree of deliberative process, the process itself.

>> Councilmember Pyle: And we have to protect them from any harm that would come to them as a result of this become public knowledge.

>> City Attorney Doyle: I think in recent years we've exercised it rarely, as opposed to something like a fairly high profile personnel investigation where we have released, and this is why I mentioned redacted versions in order to protect witnesses and sort of third parties.

>> Councilmember Pyle: Where something is out, there is an assumption that the person is guilty when they may be indeed in it. I can totally understand it.

>> Mayor Reed: One question before Mr. Chadwick speaks, and that is, I think it was proposition 59. Was open government proposition on the ballot a few years ago. Did that or did that not affect the deliberative process privilege which was judicially created or whatever?

>> City Attorney Doyle: Well, we might get a different interpretation from Mr. Chadwick on this. But the court decision we've seen and we've been involved in two of them, one involved the release of a personnel report, and superior court here in Santa Clara County specifically found that the deliberative process privilege is not abrogated by prop 59.

Similarly in the case involving the mental process principle, the sixth district court of appeal made a pronouncement, and if there are any other cases that come to mind?

>> Lisa Herrick: Those are the two that would come to mind I would say.

>> Mayor Reed: What about other impression?

>> Lisa Herrick: The argument in favor proposition 59 in the sixth district Court of Appeals, argued that that would be the result but the argument was not dispositive, the law was put into effect.

>> Mayor Reed: As usual we don't know what the proposition means until the court tells us, no matter what they say. But we do have some decisions on it. So as of today, deliberative process privilege is still approved by the courts.

>> City Attorney Doyle: Which is why I think we're discussing it.

>> Mayor Reed: Okay, Mr. Chadwick, you have some comments for us?

>> James Chadwick: Thank you, Mayor Reed. I guess my comments probably fall into the category of a sort of definitive example an exercise in futility. But I'll belabor you with them, anyway. Just to start off with, just to try to correct a couple of what I think are misconceptions --

>> Mayor Reed: You can sit if you want to, you've got your notes or whatever --

>> No, that's fine, thank you. :00 timing's not the issue, Mr. Mayor. The deliberative process privilege ensures that information about that debate, about what's the best policy among department heads, never becomes public. It doesn't just not become public at the time it is going on, it never becomes public. And so the fact that somebody who had a good idea that was squelched and that in fact never made it to the city council some that's never going to become public. You're not even going to know about that. The staff proposal doesn't narrowly construe the deliberative process privilege. It adopts a fairly broad interpretation of the deliberative process privilege and it actually codifies it in a way that is immutable. That's not the way that the deliberative process privilege is applied and interpreted by the courts, as staff has recognized it's a judicial doctrine. It's not codified anywhere in California state law. And it's applied on a case-by-case basis. Essentially in drafting it into city law, it's essentially going to encourage city employees to invoke it at every possible occasion. I also wanted to correct Councilmember Constant's comment about the Mercury News proposal. That is not -- I mean, first let me express a little dismay. We asked for a list of records so that we could try to respond to the city council's direction, to the committee's direction to identify a list of categories of records that would not be subject to the balancing test. And we were told to refer to the City's document retention schedule. So we did

that. And it's a very -- it's a 100-page list. It took quite a bit of time to go through that and to develop the memorandum that's attached to the papers, which identifies category by category which documents should be subject to balancing and which documents should not be subject to balancing. So it is a direct response to your suggestion that we try in good faith to identify records that should not be subject to the balancing test. It does not simply say, oh, no, just tell us what should be. It's not that. So I want to correct that misunderstanding of what we attempted to do. Having done that, having gone through that effort and presented it to you, staff's memo simply dismissed that as saying, well, the city's document retention schedule really isn't very helpful. I would have liked to have known that before I spent a weekend going through it, and trying to identify records that should and should not be subject to the balancing test. I actually think that it is useful, and that if you look at it categorically you'll see that there's a lot of records that really have no business being subject to an ad hoc balancing it's that allows any employee that happens to be handled a particular public records act request to say well, sorry, not this time, sorry, not this one. Embracing the task force recommendations with respect to memoranda is meaningful, because you can say we're going to withhold it. It doesn't matter if it's a draft or memoranda that would be subject to disclosure, under the balancing test we're going to withhold it. Really any public records act reform that you might consider adopting although I don't really think any significant public records act reform has been adopted yet so far or at least recommended by the committee is going to be undone by retaining the balancing test. It simply allows any specific exemption to be overcome by a determination that on a particular case, it's better not to release this information. So I guess -- [No audio] the idea was to craft a narrowly construed balancing test. And to identify categories of records which would not be subject to balancing. And I just want to point out that [No audio] In the California public records act, because it embraces a broad definition of deliberative process that is not waned in the California public records act. And they have identified exactly no records that would not be subject to balancing. Any record could be withheld based on a balancing test. So I think really at this point, we just have to recognize that any pretense, any fiction that there is some reform taking place here has to be abandoned. This is not about opening things to access, this is about presenting additional barriers to access.

>> Mayor Reed: I got a couple of questions for you.

>> James Chadwick: Yes, sir.

>> Mayor Reed: What is your definition of the balancing test, the narrow one as opposed to the broader one?

>> James Chadwick: Well, I'm not sure I would attempt to identify a narrow balancing test but let me give you an example. In an earlier report to this committee, staff proposed that you adopt a somewhat different test. Keep a test but say the baning could only be invoked if there was clear and convincing evidence. [No audio] backed off even from that. That would be narrower than what is currently being proposed.

>> Mayor Reed: Well, I remember getting some examples along the way of what some people thought were inappropriate uses of the deliberative process or the balancing test or whatever it is, and what I'm trying to do is to narrow it down to where it's supposed -- [No audio] produce some narrowing language. Now, the language is based on the attorney general's opinion. So are you saying that the attorney general has an expansive view of what is appropriate? Or --

>> James Chadwick: Correct.

>> Mayor Reed: Oh, okay.

>> James Chadwick: He has a government lawyer's perspective of what is appropriate. Okay?

>> Mayor Reed: He is the attorney general.

>> James Chadwick: He says this is from our perspective what the deliberative process is. It is not an advocacy piece but it is from the perspective of somebody who defends state agencies from public records act requests. This is not a strict narrowing.

>> Mayor Reed: Any other questions for Mr. Chadwick?

>> Councilmember Constant: Yes, do I. [No audio] either I'm reading something wrong or -- [No audio] It would clearly be much more efficient to identify the relatively small amount of records that would be subject to a balancing test. That's what I was referring to in his recommendations, that we would create the list that should be balancing test applied versus the list our staff maids that we should release without applying the balancing test. Am I misunderstanding something?

>> James Chadwick: Yes. That was his position and I embrace that position. It would be better, simpler, faster, cheaper, more effective, to list from our perspective, to list the records that are subject to balancing

than to try to identify all the ones that are not. None the less, this list goes on to identify, all the records we could ascertain, all the records from the schedule and say [No audio]

>> Councilmember Constant: Were to go in that direction, how would you propose we deal with things when we don't know what the requests are going to be, and if they're not on that list of the balancing test do we just then say, well, I guess we just have to give up the public's interest in not disclose it because we made this list of ten items? How would we effectively then protect the greater public interest, if we're limited to a list of eight, ten, 12, 15, whatever that number may end up being?

>> James Chadwick: As previous communication to the Rules Committee suggests, I believe that every legitimate concern that may necessitate the withholding of records or the redaction of information, can be addressed through specific exemption. I want to point out, again, as I think I've said before, the federal freedom of information act has no balancing test, none. And yet, somehow, the federal government manages to continue to operate. Why? Because there are specific exemptions to address the concerns that need to be addressed. We proposed in the original task force recommendations, the task force identified additional exemptions that could be included, over and above those specific exemptions in the public records act to address most of the concerns that the task force identified, and that were raised by all of the parties who came and testify before the task force. In this memo, attachment D, we've identified I think a couple more that based on everything we saw in the city's records retention schedule could be included, and if you took those additional specific exemptions in total, they would address all the concerns that you're going to have. Now, I know there's -- the caveat has always been, there's something we can't anticipate, there's something we don't know. There's something that's going to come up that nobody's thought about. You know, I don't accept the premise, but if that's the case, somehow the government has always found a way not to disclose that information. You know, you just say no, and fight over it.

>> Councilmember Constant: Okay. I don't know if I'd agree that the federal government works well, but other than that, I understand your points.

>> Mayor Reed: Tom.

>> Tom Manheim: Yes, I did just want to comment on Mr. Chadwick's proposal or suggestion that the original language that was in the staff report, we actually haven't amended, that would be fine with language, that was language that the task force rejected so we never considered, I think in one of our first rounds we suggested that as an alternative. But we've really been trying to follow the direction of the Rules Committee and what we're hearing from the chair of the public records subcommittee of the task force, in terms of trying to craft something that was different from this language which had been rejected.

>> Lisa Herrick: And I don't want to focus on too specifically what the federal government does or does not do but one of the specific exemption is the deliberative process privilege, we've talked about that before, the deliberative process privilege in the freedom of information act.

>> Mayor Reed: But they don't --

>> City Attorney Doyle: They have a deliberative process privilege and it either applies or it doesn't. The courts will ultimately have to determine whether or not it's appropriate. But the California public records act, it provides more sunshine than the federal government does. But again, that's -- I don't know if we have to debate that. We're under California law and what the City of San José is choosing to do is to see, this is our floor, and do we want to go beyond what's, in terms of disclosure, of what state law requires. I mean, that's been the whole two years of discussion. And that's why we're here.

>> Mayor Reed: I just know the hire up in government you get the less sunshine there is. All the rules they make in the state they don't apply to the state typically. Brown Act would be one of the public records acts as well. Judy.

>> Councilmember Chirco: I'm going to dare to make a motion here. I would say first that reasonable minds disagree. I would make the motion to move the staff recommendation. I think this is an issue where we have to balance between the attorney general, the District Attorney, the Sunshine Reform Task Force, the community, it's a tight rope. And I think that we need to move this motion.

>> Mayor Reed: And there's a second. Okay. Some discussion on the motion. I had a couple of other things. Attachment C, the staff recommendation, city records that are routinely disclosed upon request. We had one of these calendars, after the fact excluding personal appointments and information. We have either a policy or an ordinance on how we do calendar disclosures. And there are other things that don't necessarily get disclosed. And we're not changing that, with this --

>> City Attorney Doyle: No. Then that disclosure is -- applies to electeds, your chief of staff, City Manager, executive director, myself, and it doesn't include department heads and others.

>> Mayor Reed: Right.

>> City Attorney Doyle: This would only apply to them. We could make that clear that it would not change the current policy vis-a-vis those covered by.

>> Mayor Reed: We have a policy and I don't want to have to get into that whole policy, whether or not we're change it. We have a policy and we don't need take it up under this.

>> Tom Manheim: I think we need to make sure they're consistent so there isn't a conflict. The policy has been well debated and seems to be working well so we'll make this consistent with that.

>> Mayor Reed: And then the other thing I would request for the maker of the motion is that we include somewhere, not necessarily under the balancing test but somewhere in here the reference to the mental process privilege so that it's -- people don't think we're make it up if we ever have to assert it.

>> Councilmember Chirco: That would be part of the motion.

>> Mayor Reed: That would be part of the motion, okay.

>> Councilmember Constant: Can I ask a question?

>> Mayor Reed: Yes.

>> Councilmember Constant: Just so everyone can be clear, because I know we've had a lot of discussions about this. But not everybody has. And some people who are watching are trying to get caught up on this. Can we have a very brief analysis of what this change is from what we're doing right now? So the action that we're recommending, how is that different from today's process in real summary form?

>> Lisa Herrick: I think that the description from the attorney general's materials is more explicit than what the public records act provides now, that the statement in particular that the mayor calmed out in our last discussion is the city's nondisclosure is not the city's interest that is weighed, I think that's more explicit. The deliberative process language from the attorney general's materials, is -- is different than what the public records act currently provides, although this analysis is something that we use anyway, when making an analysis of the deliberative process privilege. And then this attachment C would make these sorts of records -- we can only assert the balancing test on these categories of records if we came to the Rules and Open Government Committee and you agreed as to that application of the balancing test. So I think that would be the difference.

>> Councilmember Constant: Okay, thanks.

>> Mayor Reed: Then of course we do have the whole appeal process.

>> Lisa Herrick: That's right. And I actually -- that came to my mind when Mr. Chadwick was speaking as well. I think that's something, that appeal process is something that you've made clear, months ago, and in fact I just saw a change in the police department's procedures that requires that, in a response to a public records request, that there be some notice to the requestor that if there are any concerns, the requestor can come and talk to the Rules and Open Government committee. So I know that the police department itself is actually making it part of its protocol, and when they don't produce what's requested.

>> Mayor Reed: And Dan Pulcrano wanted to speak to the motion.

>> Dan Pulcrano: Thank you, Mr. Mayor. This is one of the most difficult aspects of the sunshine law. I've studied it many times and find it hard to get my head partnered it requires an individual at that time city to make a judgment call which could, in fact, be a political judgment. And you know, my concern is one, that it could expose the city or individuals within the city to risk by forcing them to make this test, they have to say this is in the public's interest. Well, who is the public? What if there are -- what if there's a divided public in the case? Let's say that there are a minority group and the business community are on different sides of an issue. Which public would have to be protected by the balancing test? Is it any part of the public? What if another part of the public feels that it's very important to release the information? So the subjective nature of it and for those of us who make requests from time to time, you know, becomes more and more unclear, you know, whether -- whether the information request is going to be approved or not, or if it's going to go through the subjective layer. So you know, I just read the staff's recommendations, and while I'm not as adamant about the idea that it can't be codified, I would say that if it is codified it has to be in a way that is extremely understandable on all sides, and that everybody's is on the same side of the fence on this and can understand it and read it, every member of the public, media and staff needs to know what the rules are. By putting in something that's vague and subjective I think it's going to create a lot of confusion, and that's my biggest concern about this. You know, what is the public interest? If there was a clear and objective public interest, we wouldn't have to have elections. We would just know. We wouldn't need a city council to make judgments. You would just tell staff, okay, just do whatever's in the public interest here. So that's my big concern, and I also have a secondary concern, which is, you know, we wanted to do something that was really state-of-the-art that went beyond that put

a stake in the ground that said San José is a public entity that is doing more or less than Milpitas or Gilroy is doing, that would say we're a second tier sunshine city. I would prefer us to go to the maximum level. If there is going to be a balancing test, it's got to be defined, and go forwards and rather than throw in something that's vague and be fought about for years. Thank you.

>> Mayor Reed: Thank you, I have one more question on the motion, first page of the memorandum, you say, in the backgrounds section, talking about the task force proposal for drafts and memoranda. And staff somewhere in here set that if we approved the staff's recommendation, then the committee's recommendation on drafts and memoranda would be workable. So if the motion passes, what does it do to the section on drafts and memoranda?

>> Tom Manheim: I believe it subjects the drafts and memoranda, on the balancing test, could be applied, this new, more narrowly construed balancing test could be applied to drafts and memoranda.

>> Lisa Herrick: I would only add, I think that as we've discussed before, we use the drafts exemption really to protect deliberative process documents. And so to the extent that there's an acknowledgment that deliberative process can be asserted, then that would be asserted and that to the extent that drafts and memoranda, any preliminary drafts needed to be protected under this deliberative process privilege they would be protected. If they didn't and they existed after the time that the final document is made public then they would be produced.

>> Mayor Reed: Okay, well one of the things that I'd like to see is, if the motion passes, is this put in, whatever we've done here, put in one place so I could just see it before it goes to the council. Because this is somewhat confusing. We need to see it in a final form I think at some point. See if I understand what we've done.

>> Councilmember Constant: Did you get one more request to speak?

>> Councilmember Chirco: Does had a need to be in the motion?

>> Mayor Reed: No.

>> City Attorney Doyle: We're bringing it back to Rules, that's the understanding.

>> Mayor Reed: We're bringing it back to Rules. Did somebody else want to speak? Mr. Wall.

>> Once again, I would like to assert my concerns, that the test of the balancing act, and the deliberative process, is being driven by special interest, corporate entities, for their own profits. Both the metro and the Mercury News are present and accounted for today, are members of this task force who sell advertising as part of their newspaper operation, to which access to police records and confidential information pertaining to the office of the City Attorney is predicated on selling their newspapers. This is a material conflict of interest that taints the entire work of the Sunshine Reform Task Force. And therefore, the entire work should be excluded on that background, that base. In reference to the office of the City Attorney, it is probably the best law firm arguably in the state. They have a wide variety of diverse opinions, who are not squelched or quashed, and if anything, encouraged to the highest levels to express their opinions. So any notion that there is skulduggery or navish behavior is to be thrown out on that level alone. So in my opinion the balancing test should stay what it is and the corporate entities should be recognized what they are, not as individuals but heartless soulless corporate entities out for a profit and not for the public good, otherwise they wouldn't sell advertising and their newspapers would be for free. Thank you.

>> Mayor Reed: Anybody else wants to speak on this item? Virginia. Just bring that microphone down just a little bit.

>> Tom Manheim: Just squeeze the handle underneath.

>> Virginia Holtz: There's much I'd like to say. But I don't think we have time here to just go through it again and rehash what's been going on over the many months that the Rules Committee has been meeting. But I am upset by this -- what has been mentioned by the last speaker. The people who have been speaking for the task force, Mr. Chadwick and Mr. Pulcrano, have been working with us, cooperating with us, in every of the committee -- and all the committee meetings of subcommittee of the Rules, records, public records. And that in no way would I believe that what has just been said is true. It is absolutely untrue. And that comment has just upset me greatly. I am disappointed that there hasn't been - - we haven't been able to come to some agreement with the staff, and with your desire for putting together a product that, in my mind, is going to be workable, or is going to be successful and reflect anything that the sunshine task force actually recommended. And I am just really disappointed that that wasn't able to happen. And I hope that when it comes to the council, I would expect that the recommendations of the sunshine task force move forward at the same time that this body's

recommendations move forward so that the council has -- the full council has a chance to compare the two documents. Thank you.

>> Mayor Reed: Anyone else want to speak? I have a couple of questions. One is, I'm very interested in the concept that what we're doing in paragraph B under the balancing test is not, in fact, narrowing the balancing test. That's what we intended to do, and I think we've done that. And any authority that anybody's got that they'd like to share with us, I'd like to see it. Any time anybody wants to send it, and -- I had one other note, find it here in a minute. Pete, did you have something else?

>> Councilmember Constant: While you're looking I just wanted to clarify the motion. Is the motion to summarize our discussion, bring it back for final approval like you mentioned? Or is the motion to take a position and send it forward? I just want to be sure.

>> Councilmember Chirco: The council can do whatever it wants. But the motion was to move the staff's recommendation on this document.

>> Mayor Reed: And then bring it back to us before it goes to the council.

>> Councilmember Chirco: Yes, uh-huh.

>> Councilmember Constant: Okay.

>> Mayor Reed: Anything else? Whatever I've got, it will come back to me. All in favor, opposed, none opposed, that's approved. Is that it on this item?

>> Tom Manheim: That is.

>> Mayor Reed: Open forum, I think is the only thing left on our agenda. I had one more question. I remember. Before we're done on this item. When we first started talking about the deliberative process and the balancing test and those things, there were examples of it being abused or over used or too broadly used and then we had some commentary about our use of it. We've been at this for a year and we've not had a single person bring one of those issues to the Rules committee for discussion. So I'm curious, does that mean we're not turning down requests or people don't know they can come to the Rules Committee or do we have examples where we're using the balancing test or the deliberative process privilege or whatever?

>> City Attorney Doyle: Yes, we do have examples where we have used it. The ones that come to mind are litigation-related public records act requests. The one, the San Pedro square, lobbyist investigation that's pending. There have been at least four public records act requests.

>> Lisa Herrick: At least. I think seven.

>> City Attorney Doyle: And it has been exercised in that, so there have been circumstances, but it's rare. And I think those really go to council deliberations.

>> Lisa Herrick: Yes, and they're very limited and we've provided redacted version. And protected what we think should be taken under the balancing test or deliberative process.

>> Mayor Reed: I know we'd gotten reports six months ago about we're talking about how long it takes to process them, and there weren't huge numbers of requests. I'd lost track of how many we are denying.

>> 4% or something like that and they're typically not because of the balancing test, they're for specific exemptions that are in the public records act.

>> Mayor Reed: Okay. Mr. Chadwick.

>> James Chadwick: If I can respond to your question. Nobody out there knows that they can appeal to the Rules Committee. That's the first point. Second point is: I don't know why they would bother. I mean, you're asking the agency that is essentially responsible for denying your request to reconsider the denial of your request. I know you treasure a sense of your independence. But from out there, there is no faith in that independence. And you know, based on history, no reason to suspect that there's going to be a great deal of independent judgment exercised. You know, we've been in the -- we've had the -- I probably more than most people have had the history of going to the city council and asking the city council to reconsider decisions with respect to disclosure of public records, or information pertaining to closed session. And I think I've succeeded on that once. It's just not done. I think there is -- I think that the public perception is and will continue to be that the Rules Committee will defer to the staff.

>> Mayor Reed: Okay, anybody else on that one?

>> Mr. Mayor, I just wanted to indicate that just recently, we put up an open government Website for the city. And on that Website, there's clear definition of what the appeals process is. And somebody must be getting it because I got my first appeal this week. And I was able to get the person the records so it didn't have to come here.

>> City Attorney Doyle: And I would just note for the record that I disagree with Mr. Chadwick's conclusion, because I think we've had instances where, and the one case that comes to mind is the

soccer MOU, from sometime ago, but that that went not just to the Rules Committee, to the council and it wasn't a question of was it going to be released. It was when it was going to be released, but it was released. And I think the rules committee played a very important role in leading that decision.

>> Mayor Reed: Okay. Now, to open forum. Anybody wish to -- Mr. Wall.

>> Before I start I need a ruling from the bench as to the jurisdiction subject party of my testimony. This is in regards to the foreclosure mitigation study on Monday. May I give testimony on --

>> Mayor Reed: Yes.

>> Okay. My concern was, first of all, and it's no function of the council's but who created the staff. I'll make inquiries, who chose the people to give testimony as to the people who were there. But what bothered me in particular, was the number of Realtors that were there. In reference to councilmembers, who are trained attorneys, and one, or more, councilmembers who have extensive real estate knowledge, that no commentary or questions were put forth to these individuals, as to how many loans they assisted in letting, to people that had no way to buy a home. These people, especially the lady from the national association of Hispanic Realtors, not to single her out, but she did mention several statistics from different groups stating that Hispanic folks an Afro American folks were victimized. But yet they came to Hispanic Realtors because they spoke Spanish. And so, at no point did they say, well, we helped them or falsified their applications, for lending institutions, that necessitated or ended up in their homes being foreclosed. At no point did any Realtors act or make volitional statements to the fact that they would refund their fees from people that got their homes foreclosed on. They took their money, arguably, they know the people could never pay. And yet, they want more taxpayer money to be funneled into --

>> Mayor Reed: Sorry, your time is up.

>> The rest will be on the public record. Thank you very much.

>> Mayor Reed: Thank you. Anyone else under open forum? No, we are adjourned.