



December 23, 2004

Ann Ravel
County Counsel
Santa Clara County
Fax (408) 292-7240

Dear Ann;

Pursuant to Supervisor Gage's suggestion, I am contacting you regarding the County's policy of sharing preliminary environmental documents with project applicants while refusing to show the same documents to others. I want to raise the legal issue of this practice as a likely violation of the Public Records Act, while noting that a separate policy argument exists for ending the practice as something that harms the attempt to do a neutral evaluation of proposed projects.

I had a brief discussion of this issue with Lizanne Reynolds from your office. She said the County relies on Public Records Act section 6254(a), which exempts preliminary documents from disclosure, "provided that the public interest in withholding those records clearly outweighs the public interest in disclosure." A key issue here is that the County has waived this exemption by showing the documents to project applicants. Disclosure of these documents is not accidental, inadvertent, or even negligent, but rather an intentional, deliberate act as part of a disclosure policy for environmental planning that has been stated repeatedly by County staff.

Lizanne said she was not aware of any case on point discussing the Public Records Act issue we raise - that the County has waived this exemption and cannot reassert it. I would make the following additional points to support the argument that documents disclosed to project applicants (and relevant communications related to the disclosures) must be disclosed to others who requests those documents:

- **Section 6254(a) requires a balancing of interests whereby prior disclosure of the document favors subsequent disclosure of the same document.** Only where the public interest in withholding documents "clearly outweighs" the interest in disclosure, is withholding justified. The often-alleged value that withholding promotes frank internal communication is weakened by the disclosure to a project applicant, who apparently can publicize the document whenever she wishes. By contrast, the public interest in disclosure is vastly strengthened in this circumstance, given that one member of the public has the preliminary document, and that member usually has a financial or political interest in the content of later versions. The fact that County policy allows the applicant an opportunity to argue for changes in the document, and that the prior version is ultimately destroyed without any public access to know what happened even afterwards, vastly strengthens the need for disclosure.
- **The lack of case law emphasizes the general rule that waived exemptions cannot be reasserted.** Lizanne Reynolds stated she was unaware of case law testing the issue of whether section 6254(a) could be reasserted after being waived. I would go further and state that I am unaware of any Public Records Act exemption, or any evidentiary privilege of any kind, that can be reasserted after the intentional disclosure of a document known to be theoretically covered by the privilege to someone who is known to be a third party. If County Counsel has any even remotely relevant case law to support this

argument which it is now making with respect to section 6254(a), I would be very interested in reviewing the cases.

- **The recent passage of Proposition 59 further supports disclosure.** The proposition states “[a] statute, court rule, or other authority, including those in effect on the effective date of this subdivision, shall be broadly construed if it furthers the people’s right of access, and narrowly construed if it limits the right of access.” Even if the County can point to case law supporting its position prior to November 2, such case law has now been brought into doubt with respect to its application here. Prop. 59 further supports the argument that section 6254(a)’s balancing test requires disclosure in this circumstance.

The above reasons indicate to us that County’s position under the Public Records Act is untenable.¹ While the policy arguments favoring disclosure provide additional support for the legal arguments above, these policy arguments also provide “stand-alone” reasons for changing the policy, and we hope that County Counsel will make a clear distinction between legal and policy recommendations to the Board of Supervisors. And while the waiver argument mentioned above provides a very “clean” legal argument, the County could choose to change its policies merely based on section 6254(a)’s explicit support of disclosure that is further emphasized by passage of Prop. 59.

Please contact me if you have any questions.

Sincerely,

<signed>

Brian A. Schmidt
Legislative Advocate, Santa Clara County

cc: Michael Lopez
Lizanne Reynolds

¹ We note there may also be concerns regarding this policy under the California Environmental Quality Act.