




COUNCILMEMBER DAVID ALVAREZ

**City of San Diego
Eighth District**

MEMORANDUM

DATE: February 20, 2014

TO: Honorable City Councilmembers

FROM: Councilmember David Alvarez 

SUBJECT: Open and Transparent Government City Charter Reforms Revisions for February 25, 2014 City Council Meeting

At the February 10, 2014 City Council meeting, consideration of the proposed open government ballot measure was continued to allow more time for the City Attorney, Californians Aware and my office to discuss issues raised in the City Attorney's February 10, 2014 memorandum released just before the Council meeting.

Over the course of the last week my office, Californians Aware and the City Attorney's Office have discussed the issues identified by the City Attorney in their February 10th memo and they have been addressed in the attached revisions, which includes a strikeout/underline version, clean version and explanation of changes. I appreciate the hard work and input by both the City Attorney and Californians Aware to produce these revisions on a short timeline. The attached revisions should be used for the purposes of discussion at the February 25, 2014 City Council meeting.

I feel strongly that implementing open government reform is critical at this point in our City's history. As such, amending our City Charter to make San Diego a leader in open government will send a clear message to the public that the City Council and Mayor are committed to making the City as open and transparent as possible. I look forward to a full discussion on this proposal at the full City Council to place these Charter amendments before the voters on the June 2014 ballot.

CC: Honorable Mayor Todd Gloria
Honorable City Attorney Jan Goldsmith
Elizabeth Maland, City Clerk
Andrea Tevlin, Independent Budget Analyst

Revised 'Strikeout/Underline' Version of City Charter Sections 215, 216 and 216.1

February 19, 2014

NOTE: Revised language indicated in blue font

Section 215: — Publicity of Records

All books, records and accounts of every office and Department of the City shall be open to inspection by any citizen at all reasonable times and under reasonable regulations established by the Council, except such records and documents the disclosure of which would tend to defeat the lawful purpose which they are intended to accomplish.

Section 216: — Copies of Records

Copies or extracts, duly certified, from said books and records open for inspection, shall be given by the officer having the same in custody to any person demanding the same who shall be charged for such copies or extracts, and for certification, the charge to be fixed by the Council.

Section 216.1: Access to Government Information

(a) The people have the right to instruct their representatives, petition government for redress of grievances, and assemble freely to consult for the common good.

(b) (1) The people have the right of access to information concerning the conduct of the people's business, and therefore, the meetings of public City bodies and the writings of public City officials, employees and agencies shall be open to public scrutiny, as well as the writings of contractors in the possession of the City, or to which it has the right of access by contract or by applicable statute or regulation.

(2) A statute, ~~court rule~~, ordinance, regulation or other State or City authority, including those in effect on the effective date of this Section, shall be broadly construed if it furthers the people's right of access, and narrowly construed if it limits the right of access. No limitation of access not mandated by state or federal law shall have greater scope or duration than required by demonstrable need. (3) ~~A statute, court rule~~ An ordinance, regulation, policy or other City authority adopted after the effective date of this Section that limits the right of access beyond state or federal law requirements shall not be adopted effective until justified with findings of fact, supported by substantial evidence, demonstrating the interest protected by the limitation, and the need for protecting the limitation to protect that interest, and the likelihood that the limitation will be effective in protecting the interest. **The justification shall be made by the City Council if it supports a standard policy irrespective of the particulars to which access is sought, or by a City officer if in response to a particular request.**

(4) Limitations on the right of access to meetings and writings not required by state or federal law existing in City ordinances, regulations, policies or other authorities **identified by the City or members of the public** in effect on the effective date of this Section shall, two years from that date and every third

year thereafter, be neither asserted or relied on until justified by the City Council with findings of fact, supported by substantial evidence, demonstrating the interest protected by the limitation, the need for the limitation to protect that interest, and the likelihood that the limitation will be effective in protecting the interest. **Limitations on access not required by state or federal law existing in City ordinances, regulations, policies or other authorities that are discovered and identified as such only after a justification review prescribed in this subdivision has concluded shall remain in force until the next scheduled review date or until the Council chooses to make findings, whichever occurs sooner. The justification shall be made by the City Council if it supports a standard policy irrespective of the particulars to which access is sought, or by a City officer if in response to a particular request.**

(5) For purposes of this subdivision:

(a) a policy is a position, whether or not codified, asserted with virtually total invariability, that resolves against access the discretion provided in State law to grant or deny access to a meeting of a public body or the writing of a City official, employee, contractor or agency.

(b) evidence is “substantial” when drawn from verifiable experience rather than speculation or conjecture.

(c) standard policy means a determination that access to a type of meeting or information will not be provided irrespective of the circumstances.

~~(3)~~ (6) Nothing in this Section supersedes or modifies the right of privacy guaranteed by Section 1 of the California Constitution or affects the construction of any statute, court rule, or other authority to the extent that it protects that right to privacy, including any statutory procedures governing discovery or disclosure of information concerning the official performance or professional qualifications of a peace officer.

~~(4)~~ (7) Nothing in this Section supersedes or modifies any provision of this Charter or the California Constitution, including the guarantees that a person may not be deprived of life, liberty or property without due process of law, or denied equal protection of the laws.

~~(5)~~ (8) This Section does not repeal or nullify, expressly or by implication, any constitutional or statutory exception to the right of access to public records or meetings of public bodies that is in effect on the effective date of this Section, including, but not limited to, any statute protecting the confidentiality of law enforcement and prosecution records. **Nothing in this Section affects the City's rights or obligations under applicable laws governing retention of records.**

(c) The City of San Diego is committed to open, transparent, and accessible government; it is in the best interest of the City that its agencies and departments make their data available online using machine readable open standards and formats to make City operations more transparent, effective and accountable to the public. Open data policies will permit the public to assist in identifying efficient solutions for government, promote innovative strategies for social progress and create economic opportunities.

Revised 'Clean' Version of City Charter Section 216.1

February 19, 2014

NOTE: Revised language indicated in blue font

Section 216.1: Access to Government Information

(a) The people have the right to instruct their representatives, petition government for redress of grievances, and assemble freely to consult for the common good.

(b) (1) The people have the right of access to information concerning the conduct of the people's business, and therefore, the meetings of City bodies and the writings of City officials, employees and agencies shall be open to public scrutiny, as well as the writings of contractors in the possession of the City, or to which it has the right of access by contract or by applicable statute or regulation.

(2) A statute, ordinance, regulation or other State or City authority, including those in effect on the effective date of this Section, shall be broadly construed if it furthers the people's right of access, and narrowly construed if it limits the right of access. No limitation of access not mandated by state or federal law shall have greater scope or duration than required by demonstrable need. (3) An ordinance, regulation, policy or other City authority adopted after the effective date of this Section that limits the right of access beyond state or federal law requirements shall not be effective until justified with findings of fact, supported by substantial evidence, demonstrating the interest protected by the limitation, the need for the limitation to protect that interest, and the likelihood that the limitation will be effective in protecting the interest. **The justification shall be made by the City Council if it supports a standard policy irrespective of the particulars to which access is sought, or by a City officer if in response to a particular request.**

(4) Limitations on the right of access to meetings and writings not required by state or federal law existing in City ordinances, regulations, policies or other authorities **identified by the City or members of the public** in effect on the effective date of this Section shall, two years from that date and every third year thereafter, be neither asserted or relied on until justified by the City Council with findings of fact, supported by substantial evidence, demonstrating the interest protected by the limitation, the need for the limitation to protect that interest, and the likelihood that the limitation will be effective in protecting the interest. **Limitations on access not required by state or federal law existing in City ordinances, regulations, policies or other authorities that are discovered and identified as such only after a justification review prescribed in this subdivision has concluded shall remain in force until the next scheduled review date or until the Council chooses to make findings, whichever occurs sooner. The justification shall be made by the City Council if it supports a standard policy irrespective of the particulars to which access is sought, or by a City officer if in response to a particular request.**

(5) For purposes of this subdivision:

(a) a policy is a position, whether or not codified, asserted with virtually total invariability, that resolves against access the discretion provided in State law to grant or deny access to a meeting of a public body or the writing of a City official, employee, contractor or agency.

(b) evidence is “substantial” when drawn from verifiable experience rather than speculation or conjecture.

(c) standard policy means a determination that access to a type of meeting or information will not be provided irrespective of the circumstances.

(6) Nothing in this Section supersedes or modifies the right of privacy guaranteed by Section 1 of the California Constitution or affects the construction of any statute, court rule, or other authority to the extent that it protects that right to privacy, including any statutory procedures governing discovery or disclosure of information concerning the official performance or professional qualifications of a peace officer.

(7) Nothing in this Section supersedes or modifies any provision of this Charter or the California Constitution, including the guarantees that a person may not be deprived of life, liberty or property without due process of law, or denied equal protection of the laws.

(8) This Section does not repeal or nullify, expressly or by implication, any constitutional or statutory exception to the right of access to public records or meetings of public bodies that is in effect on the effective date of this Section, including, but not limited to, any statute protecting the confidentiality of law enforcement and prosecution records. **Nothing in this Section affects the City's rights or obligations under applicable laws governing retention of records.**

(c) The City of San Diego is committed to open, transparent, and accessible government; it is in the best interest of the City that its agencies and departments make their data available online using machine readable open standards and formats to make City operations more transparent, effective and accountable to the public. Open data policies will permit the public to assist in identifying efficient solutions for government, promote innovative strategies for social progress and create economic opportunities.

Californians Aware Proposed City Charter Amendments -
Status and Explanation of Revisions Made to Original Proposal
February 19, 2014

NOTE: Revised language indicated in blue font

City Charter Section 215.

Status: Resolved. The City Attorney's January 14 report recommended repealing this Section, rather than adopt Californians Aware proposed amendments. Californians Aware agrees and made the revisions on January 20.

The City Attorney's February 10 report states that there do not appear to be any legal issues with the repeal of this Section.

Section 215: — ~~Publicity of Records All books, records and accounts of every office and Department of the City shall be open to inspection by any citizen at all reasonable times and under reasonable regulations established by the Council, except such records and documents the disclosure of which would tend to defeat the lawful purpose which they are intended to accomplish.~~

City Charter Section 216.

Status: Resolved. The City Attorney's January 14 report recommended repealing this Section, rather than adopt Californians Aware proposed amendments. Both Council President Pro Tem Lightner and Councilmember Kersey expressed concerns about how the proposed amendment may impact the City's current fee structure for public records. Californians Aware agrees with the City Attorney, and repealed the language. This also eliminates the concerns raised by Council President Pro Tem Lightner and Councilmember Kersey because the language Californians Aware originally proposed regarding the fee structure has been eliminated.

The City Attorney's February 10 report states that there do not appear to be any legal issues with the repeal of this Section.

Section 216: — ~~Copies of Records Copies or extracts, duly certified, from said books and records open for inspection, shall be given by the officer having the same in custody to any person demanding the same who shall be charged for such copies or extracts, and for certification, the charge to be fixed by the Council.~~

Charter Section 216.1

216.1(a) Status: Resolved. There are no changes proposed to the current Charter language. The

language for 216.1 (a) remains the same as current charter language.

(a) The people have the right to instruct their representatives, petition government for redress of grievances, and assemble freely to consult for the common good.

216.1 (b) Subdivision (1) Status: Language has been revised. The language was revised on January 20 to address the City Attorneys concerns raised in their January 14 report regarding contractor records. The City Attorney and Council President Pro Tem Lightner had concerns about the potential fiscal impact of requiring City contractors to make records available to the public.

Californians Aware has revised the language and clarified that the presumption of public access is limited to only contractor records already in the City's actual possession—already presumed under the CPRA—or in its constructive possession because the City has by contract reserved the right to review or obtain copies of such records, or has been given that right by statute or regulation.

There should be no net cost to either the City or the contractor, since under the CPRA the City is authorized to charge its duplication costs back to the requester, and that would include any costs incurred in obtaining copies from the contractor.

The amended language also addresses the City Attorney's doubts as to which contractors' records are covered. As with the existing CPRA definition, they include any contractor records or communications already in the City's possession, and the constructive possession principle applies only to other records to which the City has the right of access. Such a contractual right of scrutiny probably applies only to major contracts for goods or services, where more extensive City supervision or monitoring is involved, and not to the hundreds or thousands of purchase arrangements for consumable supplies or routine one-time service contracts.

The City Attorney's concern that contractor confidentiality requirements reflecting state or federal law, or specific contractual provisions, might create conflicts is already addressed in the CPRA, whose exemption for information protected by privilege or other confidentiality laws would, like all other mandatory CPRA disclosure restrictions, operate to limit any public access rights under the Charter. Moreover, the City cannot bind itself by contract not to disclose information that is made public by the CPRA.

As referenced in the City Attorney's February 10 report, Californians Aware is also prepared to clarify the definition of "City bodies", include language regarding writings received from members of the public, and eliminate any conflict with the Public Records Act's definition of terms, or have the City Attorney provide the language.

(b) (1) The people have the right of access to information concerning the conduct of the people's business, and therefore, the meetings of ~~publie~~ City bodies and the writings of ~~publie~~ City officials, employees and agencies shall be open to public scrutiny, as well as the writings of contractors in the possession of the City, or to which it has the right of access by contract or by applicable statute or regulation.

216.1 (b) Subdivision (2). Status. Language has been revised. Californians Aware revised the language on January 20 to address the concerns raised in the City Attorney's January 14 report. The City Attorney expressed misgivings as to the risk that an annual review and findings-based justification of City rules and policies that limit public access beyond the degree mandated by state law might miss some such provision and thereby expose the City to litigation.

In response, the first review is re-set from one to two years after the effective date of the Charter amendment, and the periodic reviews thereafter have been extended from an annual to a triennial period, allowing more time for a careful effort to locate and examine the relevant ordinances, regulations and policies. New subdivisions (3), (4) and (5) were added for ease of reading.

Also, the City Attorney and Councilmember Kersey expressed concerns about Californians Aware proposed language that included an automatic repeal of existing policies, ordinances or regulations that limited public access and were not re-adopted with findings of fact. The automatic repeal language has been eliminated.

Language has been added to address the City Attorney's recent concerns including definitions for the words "standard policy" and "substantial" as it relates to evidence.

Language has been added to address concerns that the City, during the course of the initial two-year or subsequent review period, could fail to identify an existing policy or regulation. If that were to occur, the policy would remain in force until the next scheduled review. The City Council, however, would have the authority to address the oversight at any time before the next scheduled review period.

(2) A statute, ~~court rule~~, ordinance, regulation or other State or City authority, including those in effect on the effective date of this Section, shall be broadly construed if it furthers the people's right of access, and narrowly construed if it limits the right of access. No limitation of access not mandated by state or federal law shall have greater scope or duration than required by demonstrable need.

*(3) ~~A statute, court rule~~ An ordinance, regulation, policy or other City authority adopted after the effective date of this Section that limits the right of access beyond state or federal law requirements shall not be adopted-effective until justified with findings of fact, supported by substantial evidence, demonstrating the interest protected by the limitation, the need for the limitation to protect that interest, and the likelihood that the limitation will be effective in protecting the interest. **The justification shall be made by the City Council if it supports a standard policy irrespective of the particulars to which access is sought, or by a City officer if in response to a particular request.***

*(4) Limitations on the right of access to meetings and writings not required by state or federal law existing in City ordinances, regulations, policies or other authorities **identified by the City or members of the public** in effect on the effective date of this Section shall, two years from that date and every third year thereafter, be neither asserted or relied on until justified by the City Council with findings of fact, supported by substantial evidence, demonstrating the interest protected by the limitation, the need for the limitation to protect that interest, and the likelihood that the limitation will be effective in protecting the interest. **Limitations on access not required by state or federal law existing in City***

ordinances, regulations, policies or other authorities that are discovered and identified as such only after a justification review prescribed in this subdivision has concluded shall remain in force until the next scheduled review date or until the Council chooses to make findings, whichever occurs sooner. The justification shall be made by the City Council if it supports a standard policy irrespective of the particulars to which access is sought, or by a City officer if in response to a particular request.

(5) For purposes of this subdivision:

(a) a policy is a position, whether or not codified, asserted with virtually total invariability, that resolves against access the discretion provided in State law to grant or deny access to a meeting of a public body or the writing of a City official, employee, contractor or agency.

(b) evidence is “substantial” when drawn from verifiable experience rather than speculation or conjecture.

(c) standard policy means a determination that access to a type of meeting or information will not be provided irrespective of the circumstances.

216.1 (b) Subdivisions (3), (4) and (5) Status: Resolved.

The City Attorney raised concerns about the deletion of these subdivisions. Californians Aware concurs and the language remains the same, except to renumber existing subdivisions (3) (4) and (5) as subdivisions (6), (7) and (8).

To address City Attorney concerns about records retention, language has been added stating that this Section does not affect the City’s rights or obligations.

(6) Nothing in this Section supersedes or modifies the right of privacy guaranteed by Section 1 of the California Constitution or affects the construction of any statute, court rule, or other authority to the extent that it protects that right to privacy, including any statutory procedures governing discovery or disclosure of information concerning the official performance or professional qualifications of a peace officer.

(7) Nothing in this Section supersedes or modifies any provision of this Charter or the California Constitution, including the guarantees that a person may not be deprived of life, liberty or property without due process of law, or denied equal protection of the laws.

(8) This Section does not repeal or nullify, expressly or by implication, any constitutional or statutory exception to the right of access to public records or meetings of public bodies that is in effect on the effective date of this Section, including, but not limited to, any statute protecting the confidentiality of law enforcement and prosecution records. Nothing in this Section affects the City's rights or obligations under applicable laws governing retention of records.

Charter Section 216.1 (c)

Status: Resolved. Californians Aware added Open Data language on January 20. The only change to that version was adding the words “machine readable” before the words “open standards”.

The City Attorney's February 10 report states that there do not appear to be any legal issues with this language.

(c) The City of San Diego is committed to open, transparent, and accessible government; it is in the best interest of the City that its agencies and departments make their data available online using machine readable open standards and formats to make City operations more transparent, effective and accountable to the public. Open data policies will permit the public to assist in identifying efficient solutions for government, promote innovative strategies for social progress and create economic opportunities.