



THE CITY OF SAN DIEGO

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## OFFICE OF THE INDEPENDENT BUDGET ANALYST REPORT

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**Date Issued:** February 6, 2014

**IBA Report Number:** 14-07

**City Council Docket Date:** February 10, 2014

**Item Number:** TBD

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# Preliminary Cost Analysis of Open Governance Charter Amendment

## OVERVIEW

At the January 15<sup>th</sup> meeting of the Economic Development and Intergovernmental Relations Committee, our office was requested to prepare a preliminary fiscal analysis and cost estimate for the proposed Open Governance Charter Amendment. Since that meeting, Californians Aware has transmitted several updated drafts of the Amendment in response to conversations with the City Attorney. Our office has examined the most recent draft language received, which is attached to this report. It is important to note that the analysis and estimates in this report are preliminary and based on that draft language; should the language continue to be refined, an updated analysis may be necessary, and in the event that Council elects to move the measure to a Citywide ballot, our office will perform a full and complete fiscal analysis for placement in the Voter Guide, as is required the City's election laws.

The Open Governance Charter Amendment, if enacted, would declare a right of the people to have access to the writings and documents of City officials, employees, contractors, and agencies. The proposed amendment would additionally reduce limitations to access of those materials by requiring the Council, within two years of the measure's effective date, to determine the necessity of all existing policies and regulations that limit access. Should the City determine that such limitations are necessary, those limitations would be required to be narrow, and be adopted by the City Council upon a finding of fact, supported by substantial evidence, demonstrating the need for those limitations. Those findings would then have to be remade every three years in order for them to be asserted.

The measure also expresses general support of open data policies in the City, though its provisions do not specifically require the City to adopt an open data policy. In IBA report 13-50, our office preliminarily estimated that implementation of an open data program could cost between \$150,000 and \$1 million annually, depending on the scope of the program.

The measure carries three other potentially significant and unavoidable fiscal impacts to the City:

- 1) The incremental cost of adding an additional ballot item to the City's ballot;
- 2) Consultant costs and increased staff time associated with making findings of fact; and
- 3) Potentially increased costs related to defending the City from increased legal liability or potential litigation.

This report briefly examines each of these impacts.

## **FISCAL AND POLICY ANALYSIS**

### **Costs to Place Item on Ballot**

Placing items on Citywide ballots carries several costs. While the costs associated with opening and staffing polling places are not substantially impacted by the number of items on a ballot, the cost for materials, including ballots and voter guides, increases for each item placed on a ballot. As the City will already hold an election in June, the Council should consider the increased incremental cost associated with adding this item to either of the ballot, which the City Clerk estimates is approximately \$200,000.

### **Costs of Implementing Charter Amendment**

Adoption of the measure as it is currently written would restrict the ability of the City to limit access to confidential or private information contained in City documents when requests for that information are received. In order to assert any new limitations to that access, the Council would first be required to determine those limitations are necessary by making a finding of fact supported by substantial evidence (existing limitations would require the same findings to be made within two years of the measure's effective date). Those findings would then need to be readopted every three years. While the City is already committed to open and transparent governance and complying with existing laws such as the Public Records Act, it also recognizes the need for some limitations to that access that protect the privacy of employees, residents, and businesses, to ensure that proprietary information the City has access to is protected, and to ensure that open access does not interfere with public safety.

In a preliminary inventory, we have identified approximately 20 provisions in the San Diego Municipal Code that reference the need to protect the confidentiality of documents or meetings. There may be additional policies that limit access to information that are not codified by ordinance; examples of such policies include those generated by the City's Disclosure Practices Working Group, policies designed to protect taxpayer privacy and information, and policies that protect the confidentiality of reports generated by Ethics Commission investigations.

The measure would require Council to specifically approve these ordinances and policies within two years of the Amendment's effective date, and then calls on the City to reexamine and readopt these ordinances every three years thereafter.

The City Attorney has noted that the requirement to provide findings of fact supported by substantial evidence represents a high threshold, and that it is generally necessary to contract

with outside consultants to prepare an analysis that finds and demonstrates substantial evidence. Previous contracts of a similar nature have cost between \$10,000 and \$20,000; should the City desire to maintain its existing limitations, it could accordingly expect an initial cost, provided each of the twenty ordinances requires a separate consultant contract, of \$200,000 to \$400,000 within the first two years of the Amendment's effectiveness, and an additional \$200,000 to \$400,000 cost every three years thereafter, in addition to staff time necessary to prepare and present the findings to Council. We do note that the costs of making such findings of fact may be lower for those ordinances that reflect confidentiality protections that exist under Federal and State law.

### **Increased Risk of Litigation**

While many of the proposed Amendment's provisions already exist in some form in existing State or Federal law, should the Amendment be approved and adopted by voters, provisions that add additional requirements on the City will become legally mandated. Further, provisions which are largely duplicative of State law that are nevertheless worded differently may provide additional legal causes to those who engage in litigation against the City. While the City endeavors to comply with all its legal requirements, adding new and additional legal requirements increases the risk of litigation brought against the City.

If the City loses the litigation, the prevailing party is generally entitled to attorneys' fees and costs. In addition, because the City would face potential litigation on both sides of an issue (from those seeking access as well as those seeking to protect their own privacy rights) there may be more litigation, and it could be more protracted and thus more costly to the City in terms of both resources and potential exposure to attorneys fees and costs.

Given that the draft language of the measure is subject to additional revision and changes, it is difficult to accurately forecast the additional liability and litigation exposure that may result from its adoption. We accordingly do not include a dollar-figure cost for increased risk in this report, but note that Council should consider this increased risk as it deliberates on whether to place this item on a Citywide ballot.

## **CONCLUSION/RECOMMENDATION**

Should the City Council move forward with placing the Open Governance Charter Amendment on the June Ballot as it is currently drafted, the City should expect an immediate cost of approximately \$200,000 to actually place the item on the ballot. Should the measure then be approved by voters, our preliminary analysis suggests that the City should be prepared to expend as much as \$200,000 to \$400,000 within the first two years of the measure's adoption, and an additional \$200,000 to \$400,000 every three years thereafter, to make the findings of fact previously discussed, and should be prepared to dedicate sufficient staff time to prepare and present those findings to Council. We further note that the City may also face increased legal liability and additional litigation.

Should Council additionally wish to implement an open data program as supported in, but not required by, the measure, it could expect additional costs ranging from \$150,000 to \$1 million per year, depending on the scope of the program, as is discussed in IBA report 13-50.

These costs and risks should be weighed against the desire of the Council to further ensure the transparency and openness of City government.

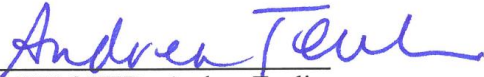
It is important to note that this analysis is only preliminary in nature and is based on draft language of the measure that continues to shift. Should the Council elect to place the item before the voters, our office will prepare an additional and full fiscal analysis as required by the City's election laws.



Charles E. Modica, Jr.  
Fiscal & Policy Analyst



Jeff Kavar  
Deputy Director



APPROVED: Andrea Tevlin  
Independent Budget Analyst

Attachment: 1. Draft Language