



**COUNCILMEMBER DAVID ALVAREZ
COUNCILMEMBER MARTI EMERALD**
City of San Diego
MEMORANDUM

DATE: March 18, 2014

TO: Elizabeth Maland, City Clerk

FROM: Councilmember David Alvarez
Councilmember Marti Emerald

SUBJECT: Open and Transparent Government City Charter Reforms Proposed
November 2014 Ballot Measure

Ensuring that San Diegans have broad and open access to government documents and information is critical to protecting the democratic process. We believe we have an opportunity to make important reforms to the City Charter that help protect the people's right of access to government by placing the attached changes to City Charter sections 215, 216, and 216.1 on the November 2014 ballot for voter consideration. With this submittal we would request that this proposal be docketed at the appropriate Economic Development and Intergovernmental Relations Committee meeting for consideration as a ballot measure for the November 2014 election.

We have attached a strike-out/underline version of the proposed changes.

CC: Honorable City Councilmembers
Honorable Mayor Faulconer
Jan Goldsmith, City Attorney
Andrea Tevlin, Independent Budget Analyst

**PROPOSED REVISIONS TO SECTIONS 215, 216 AND 216.1 OF THE SAN DIEGO
CITY CHARTER**

CLEAN VERSION

Section 215: Documentation of City Business

All documents, communications, and other writings, including emails and text messages, recorded in whatever medium, created or received in the course of conducting any City business by its appointed or elected officers, employees, departments, bodies or agents, are the property of the City. In addition, all such records shall be retained in or accurately and inalterably copied to the City's official records when created or received, and they shall be presumed open to the public unless such access is prohibited by state or federal law or by an ordinance of the City Council that is consistent with such law. These and other City records shall be retained for a minimum of two years.

Section 216: Documentation of Service Performance

All documents, communications, and other writings, including emails and text messages, recorded in whatever medium, created or received in the course of providing any services for the City or its residents by contractors, consultants, grantees, or any other entities and pertaining in any way to such services, shall be designated in the governing agreement therewith as the joint property of the City and the service provider, regardless of whether such records are in the possession, custody, or control of the City or the service provider. In addition, all such records shall be presumed open to the public unless such access is prohibited by state or federal law or by an ordinance of the City Council that is consistent with such law. These and other City records shall be retained for a minimum of two years.

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.

(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.

STRIKEOUT/UNDERLINE VERSION

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 215: Documentation of City Business

All documents, communications, and other writings, including emails and text messages, recorded in whatever medium, created or received in the course of conducting any City business by its appointed or elected officers, employees, departments, bodies or agents, are the property of the City. In addition, all such records shall be retained in or accurately and inalterably copied to the City's official records when created or received, and they shall be presumed open to the public unless such access is prohibited by state or federal law or by an ordinance of the City Council that is consistent with such law. These and other City records shall be retained for a minimum of two years.

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: Documentation of Service Performance

All documents, communications, and other writings, including emails and text messages, recorded in whatever medium, created or received in the course of providing any services for the City or its residents by contractors, consultants, grantees, or any other entities and pertaining in any way to such services, shall be designated in the governing agreement therewith as the joint property of the City and the service provider, regardless of whether such records are in the possession, custody, or control of the City or the service provider. In addition, all such records shall be presumed open to the public unless such access is prohibited by state or federal law or by an ordinance of the City Council that is consistent with such law. These and other City records shall be retained for a minimum of two years.

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.

(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.

OPEN GOVERNMENT CITY CHARTER AMENDMENTS BALLOT PROPOSAL

| <u>PROBLEM</u> | <u>SOLUTION</u> |
|--|---|
|  The public's right of access to government information is not protected and can be changed based on who is in office. |  Place an Open Government City Charter Amendment on the ballot and let the voters decide. |
|  When the public is denied access to government information and not told why, there is an increased risk of litigation. |  Amendments establish a clear process with well-defined terms that requires denials of access to be based upon findings of fact with evidence stating why. |
|  E-mail Deletion Policy: On February 27, 2014, an Administrative Regulation was introduced stating that city emails shall be deleted after one year, in contradiction to state law, with no public review or discussion. |  Charter Section 215 "Public Records Preservation Amendment": Adds new language that requires all public records, including emails, to be retained for 2 years as required by state law. |
|  Balboa Park Celebration Inc., Public Records: City contractors, such as the Balboa Park Celebration Inc., claimed that documents showing how they spent taxpayer money was not subject to the California Public Records Act. |  Charter Section 216 "Balboa Park Centennial Oversight Failure Amendment": Adds new language to ensure that public records of entities doing business with the City, such as contractors and consultants, are open to the public. |
|  No Guaranteed Access to Government Information: Public does not trust government to protect their right of access to government information. |  Charter Section 216.1 (b) (1) "Access to Government Information Amendment": Revises language to better define and ensure the people's right of access to government information. |
|  No Regular Review of City Policies that Deny Access to Public Records: New regulations and policies that limit public access can be enacted without any facts or evidence showing how that access would harm the city if the information were made public. The public is not included on a regular basis to review and comment on city policies and regulations that limit access to government information. |  Charter Section 216.1 (b) (3) & 216.1 (b) (4) Amendments: Revises language in 216.1 (b) (3) to require that any new ordinances, policies or regulations that limit public access, beyond state or federal law requirements, are legally justified based on facts and evidence before they can take effect. Revises language in 216.1 (b) (4) to establish an initial 2-year time period for the first public and City Council policy review, and a review every 3 years thereafter to identify existing policies that restrict public access beyond state and federal law. |
|  City Data is Difficult to Access and Use in a Meaningful Way: Public cannot easily access some important City information online. |  Charter Section 216.1 (c) "Commitment to Open Data Amendment": Affirm the City's commitment to providing information online in machine readable open standards and formats. |