POLICY FOR RECORDS REQUEST FROM NEWS MEDIA

Presenter:

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Memorandum

PRIVILEGED AND CONFIDENTIAL

February 15, 1997

To: University Counsel

From: Michael M. York
Associate Counsel

Re: Policy for Records Requests From News Media

You have asked for a review of our procedures for responding to records requests from the news media and for some recommendations about how those procedures might be changed. For the sake of brevity, let me simply observe that our current system is much the same as those in place at other public institutions that are subject to open records laws. That is to say each record request is analyzed with the view that it should be denied if at all possible and the central inquiry is one of determining precisely which statutory exception best justifies the denial.

Let me start by offering a radical, but I believe a much simpler and more rational approach: Let us presume that records requests should be granted *unless* a statutory exemption applies. I believe such an approach has more integrity than does our current system because, after all, the Legislature plainly adopted the records law to grant a right of inspection to the public and press. Additionally, I believe a presumption of openness

will make our records review a far less burdensome and time-consuming task, and it should lead to fewer inconsistent results.

At the same time, there will be occasions when we absolutely resist disclosure, and those circumstances – such as personnel records, privileged material and other such confidential documents – will require that we are prepared to defend our decisions vigorously in court.

Even in those circumstances, we should be prepared for what I believe to be an eternal truth about the news media. Virtually any secret document, regardless of how sensitive or privileged, will likely become public if a reporter tries hard enough to get it. The scarcity of exceptions proves the rule: the Coca-Cola formula; the hidden codes for Nintendo games; the real lyrics to "Louie, Louie."

As I suggest in more detail at the end of this memo, we also should abandon our stiff procedure of issuing denials of records requests in tersely worded, see-you-in-court letters. Let us try a more conciliatory approach of meeting and countering with the requester to see if we can reach some common ground. From experience in other settings, I know many first requests are overly broad and burdensome because the requester was unfamiliar with the types of records and the manner in which they are kept. Often, the requester will agree to a significant narrowing of the request.

As for the most common exceptions supporting denials, I have these observations and suggestions.

Litigation

This exception is certainly the most overused. I suggest we overhaul the way we view records relating to ongoing or threatened litigation. The real question we should ask is what protection do we desire and does withholding records achieve the result. In most instances, I believe such an inquiry would lead to release.

In my view, there are only two essential issues for the reviewer to consider: First, would release of the documents give our adversaries any tactical advantage in the litigation. Second, is the requested record subject to any potential privilege such that its release could be deemed a wavier by us of that privilege. If the answer to both questions is no, then I believe the presumption should be in favor of its release.

Personal Privacy

Another overused exception. We should remember that our position in litigation is enhanced when courts see that we have not asserted blanket, all-encompassing classifications to deny requests. If we wish to avoid court-ordered disclosure of private information, we should attempt to make an objective determination of what truly constitutes an "unwarranted invasion" as contemplated by the statute.

Personnel Matters

In most instances, this area is unique. With respect to other exceptions, the release my be discretionary even if the record falls within the exception. Releasing personnel information, however, may be expressly prohibited by other statutes. In any event, it is probably wise to

review requests for personnel information with a view toward releasing only those records that are presumptively open, such as salary, position, assignments, dates of employment, etc.

Negotiation

Whenever possible, I believe negotiation can prevent needless and expensive litigation. Just as is the case in litigation discovery, records requesters initially have little or no sophisticated knowledge of the records they want or the manner in which the records are kept. This lack of knowledge understandably leads to overly broad and burdensome requests.

Perhaps the most useful aspect of routinely attempting a negotiated settlement to potential records request disputes is an early attempt to influence the direction of eventual press reports about the documents themselves. Often, we will want to underscore the importance of certain passages in documents, passages that may limit the negative impact of other so-called "newsworthy" passages in the document. In other instances, we may wish to direct the requesters' attention to other, non-requested documents that we believe are more favorable to our position. And in all settings, these negotiation sessions will give us an opportunity to place the requested documents in what we believe to be the proper factual and historical context.

Conclusion

In summary, we should consider overhauling our current system in favor of one that is based on presumptive openness of records that do not fall squarely within a statutory exception. Concurrently, we can just as vigorously assert those exceptions to deny access to records that should be withheld.

Such a change would create a system with more integrity, and should enhance our position and credibility in court when we do have to defend a denial.