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September 14, 2020

VIA EMAIL

Ms. Heather Baker
Assistant City Attorney
Office of the City Attorney
9770 Culver Boulevard
Culver City, CA 90212-0507

Re: August 18, 2020 Public Records Act Request

Dear Ms. Baker:

Thank you for the September 10, 2019 supplemental-response letter (Supplement) that replies to my August 27, 2019 letter. It appears that we are narrowing the issues. The responsive records consist of "calendar entries" and nine e-mails. Further, the City of Culver City (City) does not contest that:

- the information publicly revealed by Council Member Thomas Small constitutes a significant part of the communications allegedly protected by the attorney-client privilege;
- the relevant "calendar entries" and nine e-mails are "reasonably segregable";
- the City has no fact to support a scenario where disclosure would interfere with the City's decision-making process.

However, the Supplement is suspiciously evasive as to:

- whether individuals and/or entities other than only the City Attorney, the City Manager and Council Member Small are identified in the "calendar entries" or participated in the e-mail communications.

1. The City Has a Heavy Burden to Justify Withholding Records

In *Rogers v. Superior Court of Los Angeles County* (1993) 19 Cal.App. 4th 469, the court squarely placed the burden to justify withholding records upon the City, by stating, in part:

> The Act contains a number of exemptions from disclosure. Because of the strong public policy in favor of disclosure of public records, such records must be disclosed unless they come within one or more of the categories of documents exempt from compelled disclosure. (§ 6254.) These exemptions are construed narrowly, and the burden is on the public agency to show that the records should not be disclosed. … Section 6255 "provides a means by which an agency may withhold a public record which would not be exempt under any of the specific exemptions delineated in section 6254." [citation] … Section 6255 states: "The agency shall justify withholding any record by demonstrating that the record in question is exempt under express provisions of this chapter or that on the facts of the particular case the public interest served by not making the record public clearly outweighs the public interest served by disclosure of the record."

(Emphasis added.) The City cannot overcome its heavy burden. This case is extremely unusual due to Council Member Small's public revelations.

2. The City Made No Showing of Potential Interference with Its Decision-Making Process

The Supplement cites *Times Mirror Company v. The Superior Court of Sacramento County* (1991) 53 Cal.3d 1325. That case, if applicable, supports disclosure.

First, the Public Records Act (PRA) request in that case differs greatly from that here. There, the court referenced "the massive weight of the Time's request," i.e., "the newspaper seeks almost five years of the Governor's calendars and schedules, covering undoubtedly thousands of meetings, conferences and engagements of every conceivable nature." Here, the City acknowledges that the

PRA request, rather than engaging in a fishing expedition, seeks only specific "calendar entries" and nine e-mails.

Second, the City makes no attempt to demonstrate why producing the responsive records would interfere with its decision-making process. The court emphasizes, "The key question in every case is 'whether the disclosure of materials would expose an agency's decision-making process in such a way as to discourage candid discussion within the agency and thereby undermine the agency's ability to perform its functions.'"

Further, the circumstances here are unique. Others are unlikely to make public disclosures similar to those made by Council Member Small. He voluntarily, publicly revealed that he had "extensive discussions" with the City Attorney and City Manager, possibly involving "we" and "outside counsel," with regard to his anticipated conflicts of interest.

Lastly, the City has made no attempt to show a scenario wherein anyone would be discouraged from communicating with the City Attorney or the City Manager. There, the balancing test was also supported by "the potential threat to the Governor's physical security."

Third, the court cautioned that even the Governor's records were not totally protected from disclosure.

> Lest there be any misunderstanding, however, we caution that our holding does not render inviolate the Governor's calendars and schedules or other records of the Governor's office. There may be cases where the public interest in certain specific information contained in one or more of the Governor's calendars is more compelling, the specific request more focused, and the extent of the requested disclosure more limited; then, the court might properly conclude that the public interest in nondisclosure does *not* clearly outweigh the public interest in disclosure, whatever the incidental impact on the deliberative process.

(Italic emphasis in original; underline emphasis added.)

The City has not stated any fact which tends to support any "public interest in nondisclosure."

3. Redacted Records Should Be Produced Even When An Attorney-Client Communication Privilege Has Been Asserted

The City cites *Los Angeles County Bd. of Supervisors v. Superior Court* (2016) 2 Cal.5th 282. At the least, the court supports and encourages production of a redacted copy of the requested records. The court states, in part:

> As with any of the PRA's statutory exemptions, "[t]he fact that parts of a requested document fall within the terms of an exemption does not justify withholding the entire document." [citation] What the PRA appears to offer is a ready solution for records blending exempt and nonexempt information: "Any reasonably segregable portion of a record shall be available for inspection by any person requesting the record after deletion of the portions that are exempted by law." (§ 6253, subd. (a).) While this provision does not dictate which parts of a public record are privileged, it requires public agencies to use the equivalent of a surgical scalpel to separate those portions of a record subject to disclosure from privileged portions. At the same time, the statute places an express limit on this surgical approach — public agencies are not required to attempt selective disclosure of records that are not "reasonably segregable." (*Ibid.*) To the extent this standard is ambiguous, the PRA must be construed in "'whichever way will further the people's right of access.'" (*Ardon v. City of Los Angeles* (2016) 62 Cal.4th 1176, 1190 [199 Cal.Rptr.3d 743, 366 P.3d 996]; see also Cal. Const., art. I, § 3, subd. (b)(2).)

(Emphasis added.)

Even though I specifically suggested production of redacted records, the Supplement does not claim that any of the located records are not "reasonably segregable." To the contrary, the Supplement states, in part: "Here, there are responsive calendar entries, but each reflects the date and time of a conversation with the City Attorney. One of those entries reflects the subject matter of the discussion." (Emphasis added.) A "date" and "time" is not a communication

between a client and an attorney. The City could easily redact "the subject matter of the discussion" from one of the "calendar entries."

Further, the City admits, "[T]he only documents we were able to locate that are responsive to this request are nine e-mails that are attorney-client communications and reflect attorney-work product. Each of these e-mails reflects communications seeking or providing legal advice from the City Attorney."[1]

The City may easily redact the e-mails to show the identities of all senders, all recipients and all those copied, along with the time and date. The City does not contend that it cannot "reasonably segregate[e]" any of the e-mails.

Further, as to the issue of attorney-client-privilege, the court states, in part:

> What we hold is that the attorney-client privilege does not categorically shield everything in a billing invoice from PRA disclosure. But invoices for work in pending and active legal matters are so closely related to attorney-client communications that they implicate the heartland of the privilege. The privilege therefore protects the confidentiality of invoices for work in pending and active legal matters. … In a letter dated July 26, 2013, the County agreed to produce copies of the requested invoices related to three such lawsuits

[1] The Supplemental does not affirmatively state that the e-mails constitute "confidential communication." (EvC § 954.) The e-mails may not qualify as "confidential communications" if a copy was distributed to "we" and/or "outside counsel." The City does not affirmatively state that: (1) none of the e-mails was communicated to a non-client; or (2) all were distributed only to the City Manager and Council Member Small. The Supplement vaguely and ambiguously states, "There are no calendar entries that reflect communications outside the attorney-client relationship." In contrast, the Supplement has no similar statement with respect to the nine e-mails. It suspiciously states, in part, "With regard to your point about the attorney-client privilege and communications with non-clients, we are aware that the attorney-client privilege only extends to communications between the City Attorney and her clients, as explained above."

> that were no longer pending, with attorney-client privileged and work product information redacted. … Instead, the contents of an invoice are privileged only if they either communicate information for the purpose of legal consultation or risk exposing information that was communicated for such a purpose. This latter category includes any invoice that reflects work in active and ongoing litigation.

(Emphasis added.) Here, Council Member Small's issues were resolved by the time of his April 9, 2020 interview.

Producing "calendar entries" and e-mails that identify at least each sender, each recipient and each person copied, along with the time and date of sending would comply with both the spirit and letter of the law.

4. Small Has Waived Any Claim of Attorney-Client Privilege

The Supplement states, in part: "[T]he City Manager is the client of the City Attorney, as is the Council Member…." (Supplement, p. 3.) The Supplement further references those attorney-client relationships by stating, "[W]e are well aware that the attorney-client privilege only extends to communications between the City Attorney and her clients, as explained above." (Id., p. 5.)

Evidence Code, Section 953, states, in part: "As used in this article, 'holder of the privilege' means: (a) The client…."

I have previously explained, during his media interview, Council Member Small disclosed a significant part of his alleged attorney-client communications. Thus, he waived any protection. (EvC § 912 ["(T)he right of any person to claim a privilege provided by Section 954 (lawyer-client privilege) … is waived with respect to a communication protected by the privilege if any holder of the privilege, without coercion, has disclosed a significant part of the communication…." (Emphasis added.)]).

The Supplement does not contest the scope and extent of Council Member Small's April 9, 2020 public disclosures of "extensive discussions with City Attorney [Carol Schwab] and City Manager [John Nachbar]" on specific conflict-

of-interest issues, the involvement of "we" and "outside counsel," and/or whether Council Member Small "disclosed a significant part of the communication."

Thus, Council Member Small waived any purported attorney-client privilege.

5. Council Member Small May Have Never Intended Confidential Communications

The Supplement does not contest that Evidence Code, Section 954, applies only to "confidential communication."

Small may have never intended that his communications with the City Attorney be confidential. If those allegedly privileged communications occurred at or about April 9, 2020—when Council Member Small was interviewed by the *Culver City Cross Roads*—one could reasonably conclude that confidentially was not his concern.

6. The City Attorney's Potential Waiver of Work Product Protection

The Supplement states, in part: "[T]he holder of the work product privilege regarding those records is the City Attorney; and she has not waived any of the privileged that apply to the work product of her Office." Elsewhere, the Supplement states, in part: "[W]e were able to locate … nine e-mails that are attorney-client communications and reflect attorney work product."

The City Attorney may have waived any work product contained in those e-mails by directing them to the "we" and/or "outside counsel," who were described by Council Member Small, or permitting Council Member Small to reveal the content. The Supplement is evasive as to who received her e-mails. (See, footnote 1, above.)

The work-product doctrine is codified in Code of Civil Procedure section 2018. Writings containing an attorney's impressions, conclusions, opinions, or legal research are absolutely protected. (Code Civ. Proc., § 2018, subd. (c).) '"The sole exception to the literal wording of the statute which the cases have recognized is under the waiver doctrine[,] which has been held applicable to the work product

rule as well as the attorney-client privilege.'" (*Wells Fargo Bank v. Superior Court* (2000) 22 Cal.4th 201, 214, quoting from *BP Alaska Exploration, Inc. v. Superior Court* (1988) 199 Cal.App.3d 1240, 1254.)

Waiver of work product protection, though not expressly defined by statute, is generally found under the same set of circumstances as waiver of the attorney-client privilege — by failing to assert the protection, by tendering certain issues, and by conduct inconsistent with claiming the protection. (See *BP Alaska, supra,* at p. 1261.) Waiver also occurs by an attorney's "voluntary disclosure or consent to disclosure of the writing to a person other than the client who has no interest in maintaining the confidentiality of the contents of the writing." (*BP Alaska, supra,* at p. 1261.)

The nine e-mails may have been sufficiently distributed to waive any work-product protection.

7. Specific Further Clarifications/Responses

Request No. 2: The Request did not seek "Nachbar's calendar." The City admits, "Here, there are responsive calendar entries, but each reflects the date and time of a conversation with the City Attorney. One of those entries reflects the subject matter of the discussion." Further, the City claims, "Entries of the nature you request would also reflect attorney-client communications and the attorney's work product." (Emphasis added.) However, revealing only the existence of an alleged communication or a meeting does not reveal the content of any communication and, therefore, is not subject to any privilege.

Request No. 3: The Supplement does not exclude the possibility that "we" or the "outside council" sought an advisory opinion from the City Attorney, and the City Attorney provided one. That would, most likely, not constitute an attorney-client communication. (See, footnote 1, above.)

Request No. 4: The City does not affirmatively state that: (1) none of the e-mails was communicated to a non-client; or (2) all were distributed only to the City Manager and Council Member Small. (See, footnote 1, above.) The City sets forth no fact suggesting a scenario that negatively impacts its decision-making process.

# # #

Compliance with applicable law requires, at the least, production of redacted "calendar entries" and e-mails.

Please communicate with me if you desire further information, and how you wish to proceed.

Very truly yours,

Les Greenberg

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