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September 18, 2020

Via Email Only

Les Greenberg
plgreen@att.net

Re: Public Records Request – August 18, 2020

Dear Mr. Greenberg:

Thank you for your letter dated September 14, 2020. I agree that we are narrowing the issues. However, your most recent letter raises certain points that require a further response and clarification.

First, we disagree that Council Member Thomas Small waived the attorney-client privilege in any way and further disagree with your statement that the City is not contesting this point. The Supplemental Response did not address this issue because it was our conclusion that it was a non-issue. Under Evidence Code Rule 912(a), a privilege for confidential communications is waived by the holder's voluntary disclosure of a significant part of the communication. A disclosure of a significant part of the communication occurs when there is a disclosure sufficient to reveal the specific content of an alleged confidential communication. (*Southern Calif. Gas Co. v. California Pub. Utilities Comm'n* (1990) 50 Cal.3d 31, 46.) If a disclosure does not reveal the actual content or substance of the communications, there is no waiver. (*Mitchell v. Superior Court (Shell Oil Co.)* (1984) 37 Cal.3d 591, 602-603.) Similarly, there is no waiver when a client merely discloses a lawyer's conclusions without revealing the content of the communications. (*Southern Calif. Gas Co. v. California Pub. Utilities Comm'n, supra*, 50 Cal.3d at p. 49.) Here, Council Member Small did not reveal the content of any discussion with a member of the City Attorney's office. He did not reveal the questions asked, the issues discussed, or even the specific recommendations made. Therefore, there was no waiver of the attorney-client privilege, as you contend.

Second, your September 14th letter appears to be based on the assumption, or least the suspicion, that there were communications addressing Council Member Small's potential conflicts of interest related to Michael Hackman and/or Hackman Capital Partners that involved individuals who were outside the attorney-client relationship that exists between the City Attorney's Office, the City's elected officials, and the City's employees. This

assumption is mistaken. As you know, a Public Records Act (“PRA”) request does not require the City to provide substantive answers to factual questions, like an interrogatory, or to admit or deny certain facts, like a request for admission. Rather, as we explained in our prior correspondence, the PRA merely provides for the inspection or copying of existing, identifiable public records. (Gov. Code § 6253(b); *Fredericks v. Superior Court* (2015) 233 Cal.App.4th 209, 227.) However, although the City is not required to provide substantive answers in the context of a PRA response, we will do so in this instance in order to ensure that there is no confusion regarding the following point: neither City Attorney Carol Schwab nor City Manager John Nachbar had communications related to Council Member Small’s potential conflicts of interest with any individual other than a council member, member of the City Attorney’s Office, and member of the City Manager’s Office. In other words, Ms. Schwab’s and Mr. Nachbar’s communications regarding Council Member Small’s potential conflicts of interest took place within the established attorney-client relationship that we identified in our letter dated September 10, 2020.

Third, you requested redacted copies of the privileged calendar entries and e-mails that we deemed responsive to your PRA request. With regard to the calendar entries, we have determined that there is only one entry. We initially thought there was more than one entry, but there were actually multiple copies of the same meeting entry. The City contends that this entry is exempt from disclosure under the deliberative process privilege under Government Code Section 6255, as recognized in *Times Mirror Co. v. Superior Court* (1991) 53 Cal.3d 1325. The City further contends that the calendar entry reflects attorney-client communications and attorney work product. (See *Los Angeles County Board of Supervisors v. Superior Court* (2016) 2 Cal.5th 282, 297 [holding that attorney billing invoices in active legal matters are privileged because they can reveal investigative efforts and strategy].) However, without waiving these objections in the future, the City has elected to provide you with a copy of the calendar entry at issue. A copy of that calendar entry is provided with this letter.

With regard to the e-mails, the City’s position remains unchanged; these documents are confidential communications and are shielded from disclosure under the PRA. As a point of clarification, while our previous letter referred to nine e-mails, there were nine e-mail chains, each consisting of one to nine e-mails. One of these e-mails chains is a duplicate of another. Therefore, there are actually eight separate e-mail chains responsive to your PRA request. The e-mails in these chains are all confidential communications made in the course of the attorney-client relationship for purposes of legal consultation on the issue of potential conflicts of interest and were between members of the City Attorney’s Office (Ms. Schwab, Assistant City Attorney Heather Baker, and Senior Deputy City Attorney Lisa Vidra), members of the City Manager’s Office (Mr. Nachbar, Assistant City Manager Jesse Mays and Assistant to the City Manager Shelly Wolfberg), and Council Member Small. These e-mails all involve legal analysis, assessments, and advice from the City Attorney’s Office or requests for legal analysis, assessments, and advice by

Council Member Small and/or members of the City Manager's Office. No other individuals sent, received, or were copied on these e-mails.

You requested that we provide redacted copies of the e-mails that would show the senders' and recipients' identities and the date of time of each e-mail. Under the circumstances, even providing redacted emails with this information would violate the attorney-client privilege. As the Supreme Court observed in *Costco Wholesale Corp. v. Superior Court* (2009) 47 Cal.4th 725, "when the communication is a confidential one between attorney and client, the entire communication, including its recitation or summary of factual material, is privileged." (*Id.* at p. 736.) Furthermore, by including the names of each sender and recipient *and* the date of each e-mail, it would be possible to surmise the subject matter, if not the content, of the privileged communications. For example, if an e-mail exchange took place in advance of a City Council meeting, a person could connect actions or statements, or the lack thereof, at the meeting with the privileged communication. For this reason, the Supreme Court's analysis in *Los Angeles County Board of Supervisors v. Superior Court* is particularly applicable. In that case, the Court considered whether attorney billing invoices were exempt from disclosure. The Court concluded that invoices in active cases were exempt because the purely factual information regarding the amount of aggregate fees could reveal significant information about a lawyer's advice or strategy. "Midlitigation swings in spending, for example, could reveal an impending filing or outsized concern about a recent event." (*Los Angeles County Bd. of Supervisors v. Superior Court*, *supra*, 2 Cal.5th at p. 297.) This would come close enough to the "heartland" of the attorney-client relationship to "threaten the confidentiality of information directly relevant to the attorney's distinctive professional role." (*Id.*) Likewise, revealing information in this situation about who was discussing potential conflict of interest issues, the number of e-mails that were exchanged, when those discussions were taking place, and the amount of material that was subject to redaction could reveal strategic advice or reflect an "outsized concern about a recent event." (*Id.*) Under these authorities, the City's invocation of the attorney-client privilege as to the e-mails was proper.

The PRA does not require that a city create or produce a "privilege log" or any other type of document or list that identifies the specific records being withheld. (Govt. Code § 6252(e); *Haynie v. Superior Court* (2001) 26 Cal.4th 1061, 1075.) In *Haynie*, the Supreme Court acknowledged that a public agency may demonstrate that a record falls within a claimed statutory exemption and comply with Government Code section 6255 by providing a citation or citations to the specific statutory exemption relied upon and that in doing so a public agency will necessarily provide enough information to the requestor to adequately reveal the general nature of the documents withheld. (*Ibid.*) As set forth in the City's prior responses to your PRA request, the City met this requirement by identifying the exemptions that applied. *Haynie* states, "[W]hat section 6255 does not require, however, is for the agency to go further and describe each of the documents falling within the statutory exemption." (*Ibid.*) Providing the redacted e-mails with only the

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names of the senders and recipients would be akin to providing a privilege log. In any event, we have provided you with the names of all senders and recipients of the responsive e-mails and the purpose and general subject matter of the emails. Under *Haynie*, no further information is required to raise a statutory exemption under the PRA.

Your request presents a unique situation because it expressly seeks records pertaining to discussions involving the City Attorney. Such a request strikes at the “the heartland of the attorney-client privilege.” (*Los Angeles County Bd. of Supervisors v. Superior Court*, supra, 2 Cal.5th at p. 297.) In this letter, we have provided you more information than is typically provided in a PRA request and the information we have provided is more than is required under the PRA to invoke the exemption for confidential attorney-client communications and attorney work product. As demonstrated above, the City is properly invoking the attorney-client privilege and attorney work product doctrine with the regard to the responsive e-mails.

If you have further questions, please feel free to contact me.

Sincerely,



Heather Baker
Assistant City Attorney

cc: City Clerk

Subject: Conflicts Issues
Location: John's Office

Start: Tue 9/24/2019 3:00 PM
End: Tue 9/24/2019 4:00 PM

Recurrence: (none)

Meeting Status: Meeting organizer

Organizer: Baker, Heather
Required Attendees: Baker, Heather; Small, Thomas; Nachbar, John; Schwab, Carol
Optional Attendees: Vidra, Lisa