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REPORT TO CITY COUNCIL

SUMMARY OF LEGAL ISSUES RELATED TO PROPOSED AMENDMENTS TO THE
CHARTER RELATING TO ACCESS TO GOVERNMENT

INTRODUCTION

This report summarizes some of the legal issues identified in the proposed amendments to Charter sections 215, 216, and 216.1.¹ As a whole, there is nothing illegal in the proposed language. However, the proposal imposes requirements on the City that exceed those of state open government laws. Failure to properly comply with the requirements could expose the City to litigation and result in the disclosure of information the Council has determined should be kept confidential. The decision to place the proposed Charter amendments on the ballot is a policy and financial decision for the Council. This report provides an analysis of the proposal and identifies issues that might subject the City to litigation.

DISCUSSION

The primary purpose of the proposed amendments is to require that the City exceed the requirements of well-established open government laws (*i.e.*, the Ralph M. Brown Act and the California Public Records Act). These laws sometimes require public agencies to keep information confidential, and other times allow agencies the discretion to be more open. For example, the California Public Records Act lists types of documents and information that are exempt from disclosure, such as preliminary drafts, personnel and medical records, taxpayer information, records pertaining to pending litigation, test questions, library circulation records, and home addresses and telephone numbers.² A public agency may decline to make such records available by asserting an exemption. However, public agencies have discretion to provide greater access to records than prescribed by the minimum standards in the California Public Records Act. Cal. Gov't Code § 6253(e).

¹ This Office provided a preliminary analysis of the amendments and identified issues for the Committee on Economic Development and Intergovernmental Relations. *See*, City Att'y Report 14-1 (Jan. 14, 2014). The proponents updated the proposed revisions on 1/20/14 which resolved some of those issues. This report addresses the proposed amendments in the 2/3/14 memorandum from Councilmember Alvarez.

² There are many other laws that limit access to certain information, such as driver's license records, juvenile criminal records, settlement negotiations, names of victims of certain crimes, etc.

The proposed amendments address circumstances when the City is not required by state or federal laws to limit access to meetings and writings, but has the discretion to do so. The amendments would require the City to review its ordinances, regulations, and policies that limit access beyond what is required by state or federal law. In those instances, if the City does not wish to disclose records, the Council would be required to make factual findings, supported by substantial evidence, demonstrating: (1) the interest protected by the limitation; (2) the need for the limitation to protect that interest; and (3) the likelihood that the limitation will be effective in protecting the interest. A City ordinance, regulation, or policy would not be effective and the limitation cannot be asserted, unless this three-part test is met. Ordinances, regulations, and policies would be reviewed within two years of adoption of the amendments, and every three years thereafter.

As discussed below, the City's failure to properly comply with these Charter-mandated requirements could subject to the City to litigation by parties seeking disclosure. Likewise, the process could lead to litigation filed by parties wanting to keep information confidential. The litigation costs are difficult to estimate, but include the cost of defending the City, and possible payment of attorney's fees and costs to a prevailing party. The City would be exposed to litigation during the initial two-year review and every three years thereafter when it reconsiders the ordinances, regulations, and policies.

ANALYSIS

CHARTER SECTIONS 215 AND 216

The current proposal is to repeal sections 215 and 216 because the California Public Records Act already provides a comprehensive procedure for access to public records. There do not appear to be any legal issues with the repeal of Charter sections 215 and 216.

CHARTER SECTION 216.1

The following is a summary of the legal issues identified in the proposed amendments to section 216.1.

Amendments to section 216.1(b)(1):

1. The reference to meetings of "City bodies" should be clarified as to its meaning. The Brown Act uses the well-defined term "legislative bodies."
2. The reference that specifies "the writings of City officials, employees and agencies" 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" leaves out other writings the City may have that relate to City business, such as writings received from members of the public.
3. The California Public Records Act has defined the terms "public record" and "writings." The Charter language that attempts to define what records can be inspected by the public may conflict with the Public Records Act and cause uncertainty about what records must be made available for inspection.

4. The extent of the public's right to inspect contractor's records that are not in the possession of the City is being reviewed by the California courts. Allowing access to records as provided "by contract" is a "constructive possession" issue that might require contractors to provide records at the request of the public, even if the City does not need the records. This could result in litigation by both the contractor seeking to protect its records and a member of the public seeking disclosure. Contractors may take the risk of litigation into consideration when deciding whether to do business with the City or they may increase their bids.
5. The provisions relating to access to meetings and writings does not clearly state that there may be exceptions to access based on state or federal laws, or privacy rights. However, this risk is mitigated by keeping the existing subsections (b)(3), (4), and (5), dealing with constitutional or statutory exceptions to the right of access to public records or meetings.

Amendments to section 216.1(b)(2).

6. The phrase "No limitation of access not mandated by state or federal law shall have greater scope or duration than required by demonstrable need" could invite litigation over the "scope or duration" and the "demonstrable need" any time the City limits access to a meeting or record. It also is unclear whether this phrase would affect the duration of time a record is kept under the City's record retention policies.

Amendments to section 216.1(b)(3).

7. Any new City ordinance, regulation or policy that limits access to meetings or writings will not be effective until justified with "findings of fact, supported by substantial evidence." This is a different standard than required by state law. For example, the California Public Records Act requires the City to justify withholding any record by demonstrating that "on the facts of the particular case the public interest served by not disclosing the record clearly outweighs the public interest served by disclosure of the record." Cal. Gov't. Code § 6255(a). The new standard could subject the City to litigation as to whether there was substantial evidence to support the Council's decision.

Amendments to section 216.1(b)(4).

8. Existing City ordinances that provide for confidentiality of certain records would need to be reviewed within two years, and every three years thereafter. The City has several ordinances that provide for confidentiality of records. (*See, e.g. Ethics Commission, Responsible Banking Ordinance, the Disclosure Practices Working Group, Fair and Open Competition in Construction Ordinance, and Civil Service requirements*).³ The City would not be able to rely on or assert the confidentiality provisions until justified by the Council with findings of fact, supported by substantial evidence. This process could expose the City to litigation as to whether the City properly met this obligation for each ordinance or policy that provides a

³ A preliminary list of ordinances that may be subject to review by the Council is attached for reference.

previously approved confidentiality exception. The failure to properly reconsider each item could also subject the City to challenge by those trying to protect the confidentiality of certain records.

Amendments to section 216.1(b)(5).

9. A City "policy" is described as "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." This could give rise to disagreement and litigation about whether a policy is "asserted with virtually total invariability."
10. The City routinely asserts privileges and exemptions based on well-established statutory and case law that balances privacy rights and other interests against the public's right of access. For example, the City regularly protects the applications of volunteers who were not appointed to boards and commissions. One reason is that volunteers may be less likely to apply if their failure to be appointed is made public. This "chilling effect" on volunteers is a well-recognized reason to limit access to the applications. If this limitation to access is "asserted with virtually total invariability," the City would need to justify the limitation within two years of the Charter amendments, and every three years thereafter. The City would need to identify other possible policies that are "asserted with virtually total invariability" that may not be in writing for regular review using the three-part test.
11. Additional research may be necessary to determine whether the City's closed sessions authorized under the Brown Act are a limitation that would be subject to review and challenge under the three-part test.

Amendments to add section 216.1(c).

12. This section is a policy statement regarding open data. There do not appear to be any legal issues.

CONCLUSION

The Brown Act and California Public Records Act provide comprehensive schemes to ensure that the public has access to meetings and public records. The City may impose upon itself additional legal requirements to ensure public access. However, doing so could repeatedly expose the City to litigation as to whether it met those additional requirements. This report identifies some legal issues, but additional issues will come to light as the language is applied in the context of specific requests for access to meetings or information.

If the proposed Charter amendment is adopted by the voters and the City experiences litigation or unanticipated costs, it could take more than a year to amend the Charter. In contrast, an ordinance or policy would provide the Council with flexibility to test the level of difficulty in complying with these new requirements and determine whether there are any unintended consequences. The decision to place the proposed amendments on the ballot or explore other alternatives is a policy and financial decision for the Council.

JAN I. GOLDSMITH, CITY ATTORNEY

By /s/ Catherine Bradley
Catherine Bradley
Deputy City Attorney

CMB:sc
RC-2014-4
Attachment
Doc. No. 710137_2

**PRELIMINARY LIST OF SDMC SECTIONS THAT REFERENCE
“CONFIDENTIAL” INFORMATION**

MEDIATION

§ 12.1104

All documents and results related to Mediations and Facilitations held pursuant to this Division shall be kept confidential in any subsequent administrative or judicial proceeding. The provisions of California Evidence Code Sections 1152 and 1152.5 and other laws pertaining to confidentiality and disclosure shall apply to Mediations and Facilitations held pursuant to this Division.

RESPONSIBLE BANKING ORDINANCE

§ 22.3904

The *Community Reinvestment Plan* shall include a summary of proposed programs and activities as provided in Section 22.3904(a), but is not required to include confidential financial information or information that qualifies as a trade secret under California Civil Code section 3426.1(d).

DISCLOSURE PRACTICES WORKING GROUP

§ 22.4104

All draft disclosure documents submitted to the Disclosure Practices Working Group will remain the property of the originating department. Draft disclosure documents shall be kept confidential and may not be transmitted to third parties without the express written permission of the originating department.

FAIR AND OPEN COMPETITION IN CONSTRUCTION ORDINANCE

§ 22.4403

To help ensure City compliance with the purposes of this Ordinance, the Mayor shall post on the City's website in a searchable format the text of all Construction Project contracts entered into by the City valued at more than \$25,000 in a given fiscal year. The Mayor shall redact any proprietary, trade secret, or otherwise legally privileged or confidential information from contracts prior to posting. For each contract, the Mayor shall note the number of total bidders who competed for the contract. For any sole source contract, the Mayor shall post a written justification for the sole source determination.

SUNSHINE ACT

§ 22.4501

This Division describes certain City records and information which will be posted online for access by the public. To the extent feasible, the records and information will be posted in a searchable and well-organized format on the City's website. Nothing in this Division should be construed to permit the disclosure of confidential or other information that is protected from disclosure under the California Constitution, any statute, court rule, or other authority.

§ 22.4502

Effective July 1, 2013, the Mayor shall post on the City's website in a searchable format the text of all contracts for consultants, goods, and services entered into by the City valued at more than \$25,000 in a given fiscal year. The Mayor, in consultation with the City Attorney, shall redact any proprietary, trade secret, or otherwise legally privileged or confidential information from contracts prior to posting and may require contractors to specifically identify such proprietary, trade secret, or otherwise legally privileged or confidential information.

§ 22.4505

By April 15 of each year, the Mayor shall post on the City's website the prior calendar year's employee compensation information as mandated and defined by the State Controller's Office. The information posted online should be organized in a manner that does not disclose any employee's personal identity or name. Information posted under this Section will be made available online for the preceding five years.

CIVIL SERVICE EXAMINATIONS

§ 23.0408

All applications and examination papers are the property of the Commission and shall be treated as confidential record.

CITY EMPLOYEES' RETIREMENT SYSTEM

§ 24.0909

Information submitted to the Board by any Member or Beneficiary is confidential. It must not be divulged by any Board or Retirement System staff member to any person other than the Member or Beneficiary to whom the information relates, his or her personal representative or the City of San Diego. The Board may use this information only for the purpose of administering the System. It is a misdemeanor for any Board or System staff member to divulge this information to any person not authorized by this section to receive it.

ETHICS COMMISSION

§ 26.0420

The Investigation and Enforcement Procedures of the *Commission*, set forth at Sections 26.0420 to 26.0456, are promulgated in order to ensure the fair, just, and timely resolution of complaints presented to the *Commission* that allege violations of *Governmental Ethics Laws* by: . . .

(c) Protecting the privacy rights of those accused of ethics violations by maintaining the confidentiality during the pendency of each proceeding; and

§ 26.0455

(c) Members of the public shall not be granted access to any document prepared by, or received by, the *Commission*, including investigatory files, related to a pending matter, until a *Probable Cause* determination has been made regarding the matter or until the matter is closed, at which time such documents shall be made available to the public in accordance with subsections (d) and (e).

(d) Following the *Commission's Probable Cause* determination, members of the public shall have access to the *Final Administrative Complaint*, but shall not be granted access to any other document prepared by, or received by, the *Commission*, including investigatory files related to a pending matter, except in accordance with subsection (e) below.

AUDIT COMMITTEE

§ 26.1710

(g) provide a mechanism for the City Auditor to discuss confidential audit-related matters with the Committee, provided such mechanism complies with the Brown Act;

BALLOTS FOR CANDIDATES

§ 27.0623

(a) The statement of qualifications may be withdrawn but not changed during the period for filing the nomination papers and until 5 p.m. of the next business day after the close of the nomination period or during other prescribed filing periods and until 5 p.m. of the next business day after the close of such period.

(b) Statements received by the City Clerk shall be kept confidential until the expiration of the filing period.

ETHICS ORDINANCE

§ 27.3503

Confidential information means information to which any of the following apply:

(a) At the time of the use or disclosure of the information, the disclosure is prohibited by a statute, regulation, or rule which applies to the City; or

(b) the information is not general public knowledge and will have, or could reasonably be expected to have, a material financial effect on any source of income, investment, or interest in the real property of a City Official; or

(c) the information pertains to pending contract, labor, or real property negotiations and disclosing the information could reasonably be expected to compromise the bargaining position of the City; or

(d) the information pertains to pending or anticipated litigation and disclosing the information could reasonably be expected to compromise the ability of the City to successfully defend, prevail in, or resolve the litigation.

BURGLARY, ROBBERY AND EMERGENCY ALARM SYSTEMS

§ 33.3721

(a) The information furnished and secured pursuant to this Division shall be confidential in character and shall not be subject to public inspection and shall be kept so that the contents thereof shall not be known or disclosed except to *persons* charged with the administration of this Division.

(b) An *alarm user* shall have the right to information regarding the administration of that user's permit.

(c) Information discussed in Section 33.3721(a), may be disclosed when required by State or Federal law or lawful court order.

TRANSIENT OCCUPANCY TAX

§ 35.0114

(h) All returns and payments submitted by each Operator shall be treated as confidential by the City Treasurer and shall not be released except upon order of a court of competent jurisdiction or to an officer or agent of the United States, the State of California, the County of San Diego, or the City of San Diego for official use only.

DISCLOSURE OF HAZARDOUS MATERIALS

§ 42.0912

(a) If a user believes that a request for information made by either the disclosure form or pursuant to subdivision (c) and (d) of Section 42.0908 involves the release of a trade secret, the user shall stamp, mark or designate the information as a trade secret and shall submit the information requested to the Health Officer.

...

(e) Information certified by appropriate officials of the United States, as necessarily kept secret for national defense purposes, shall be accorded the full protection against disclosure as specified by such official or in accordance with the laws of the United States.

...

(k) The Council finds and declares, pursuant to the Government Code Section 6255, that the public interest served by not making information regarding trade secrets, proprietary information, and sensitive hazardous materials public clearly outweighs the public interest served by disclosure of such information to members of the general public, except as provided by this section.

EXCAVATIONS IN THE PUBLIC-RIGHT-OF-WAY

§ 62.1204

(b) To the extent permissible by law, including but not limited to the California Public Records Act, the City shall not disclose to third parties proprietary, trade secret, or otherwise confidential information that is provided to the City by a public utility beyond what is necessary to facilitate coordination among excavators and to avoid unnecessary excavation of the *public right-of-way*. Any information provided to the City that a *public utility* deems proprietary, trade secret, or confidential must be clearly marked and identified as such. The *public utility* must also provide a specific and detailed legal basis establishing why the information is exempt from public disclosure. If the *public utility* fails to properly mark or identify proprietary, trade secret, or confidential information or provide the specific legal basis for non-disclosure, the City may release such information to the public.

(c) *Public utilities* shall indemnify, defend, protect and hold harmless the City, including its departments, officers, agents and employees, from and against, any and all actions, claims, costs, damages, demands, expenses, fines, injuries, judgments, liabilities, losses, penalties, or suits arising from the City's nondisclosure of information deemed by a *public utility* as proprietary, trade secret, or confidential.

INDUSTRIAL WASTEWATER

§ 64.0502

(i) Confidentiality Claims: Any information submitted to the City Manager pursuant to Section 64.0502, or obtained during Industrial Wastewater Control Program inspection activities may be claimed as confidential by the Industrial User. Any such claim must be asserted at the time of submission in the manner prescribed on the application form or instructions, or, in the case of other submissions, by stamping the words "confidential business information" on each page

containing such information, or, in the case of inspections, by submitting a written confidentiality claim at the time of the inspection identifying the inspection areas and type of information for which the claim is asserted. If no claim is made at the time of submission or inspection, the City Manager may make the information available to the public without further notice. When requested and demonstrated by the Industrial User that such information should be held confidential, the portions of a report which might disclose trade secrets or secret processes shall not be made available for inspection by the public, but shall be made available immediately upon request to governmental agencies for uses related to the Clean Water Act, and in enforcement proceedings involving the person furnishing the report. Wastewater constituents and characteristics and other "effluent data" as defined by 40 C.F.R. 2.302 will not be recognized as confidential information and will be available to the public without restriction.