MARY JO LANZAFAME
ASSISTANT CITY ATTORNEY

BRANT C. WILL
DEPUTY CITY ATTORNEY

OFFICE OF

THE CITY ATTORNEY

CITY OF SAN DIEGO

Jan I. Goldsmith
CITY ATTORNEY

CIVIL ADVISORY DIVISION
1200 THIRD AVENUE, SUITE 1620
SAN DIEGO, CALIFORNIA 92101-4178
TELEPHONE (619) 236-6220
FAX (619) 236-7215

MEMORANDUM OF LAW

DATE: March 28, 2012

TO: Jan I. Goldsmith, City Attorney

FROM: Brant C. Will, Deputy City Attorney

SUBJECT: Disclosure of Vote Allocation for Convention Center Facilities District Election Under California Public Records Act

INTRODUCTION

The City has received a public records request seeking certain information related to the allocation of votes for the upcoming election of the Convention Center Facilities District (CCFD). Specifically, a reporter has requested copies of records showing the number of votes allocated to Host Hotels & Resorts (Host). The vote allocation was calculated using confidential taxpayer information. This memorandum discusses whether such information can be disclosed under the California Public Records Act.

QUESTION PRESENTED

Absent a court order, is the number of votes allocated to Host subject to disclosure pursuant to the California Public Record Act (PRA)?

SHORT ANSWER

Absent a court order, the number of votes allocated to Host is exempt from disclosure under the PRA because the vote allocation is based on confidential taxpayer and proprietary corporate information.

BACKGROUND

The CCFD was formed by the City Council on January 24, 2012, pursuant to the San Diego Convention Center Facilities District Procedural Ordinance (Ordinance). SDMC § 61.2701 et. seq. The Ordinance sets forth specific procedures for the formation of a convention center facilities district with, among other powers, the power to levy a special tax on

all Hotels in the City of San Diego (City). Pursuant to the Ordinance, "Hotel" has the same meaning as set forth in the City's Transient Occupancy Tax (TOT) ordinance (TOT Ordinance). *See* SDMC § 35.0102. The Ordinance incorporates many provisions of the Mello-Roos Community Facilities Act of 1982 (Cal. Gov't. Code § 53311 et. seq.) (Mello-Roos Act) including some of the provisions regarding the conduct of elections. However, the election procedures under the Ordinance differ from those in the Mello-Roos Act in several important respects.

The Ordinance establishes that the "qualified electors" for an election are *Landowners,*[1] as defined in the Ordinance, and that votes "shall be allocated to each *Landowner* on the basis of one vote for each dollar of special tax that would have been the obligation of that parcel . . . if the proposed special tax had been in place for the 12-month period ending at the end of the month which is three months prior to the month in which the resolution calling the . . . election is adopted by the City Council." SDMC § 61.2710(c). This vote allocation is adjusted for circumstances where a particular Hotel operated at less than normal capacity during the 12-month period. *Id.* The determination on vote allocations is made by the City Council. *Id.*

The data used to determine the vote allocation for each Hotel is derived from the TOT records of a particular Hotel, as provided to the City Treasurer, as well as information provided by a Hotel in the event such Hotel was not operating at normal capacity during the 12-month period. The Ordinance also requires the City Clerk to protect the confidentiality of the ballots because "the number of votes assigned to each *Hotel* may be considered to contain proprietary commercial information." SDMC § 61.2710(e).

ANALYSIS

The PRA requires state and local agencies to make their public records available for public inspection and copying unless a particular record is exempt from disclosure. Cal. Gov't. Code §§ 6253, 6254. The PRA contains many specific exemptions where particular types of records are categorically exempt from disclosure. *See* Cal. Gov't. Code § 6254 et. seq. Two particular exemptions which are applicable here are for taxpayer information and proprietary corporate information.

I. EXEMPTION FOR TAXPAYER INFORMATION

Pursuant to the PRA, "[i]nformation required from any taxpayer in connection with the collection of local taxes that is received in confidence and the disclosure of the information to other persons would result in unfair competitive disadvantage to the person supplying the information" is exempt from disclosure. Cal. Gov't. Code § 6254(i). In addition to the express exemption in the PRA for taxpayer information, courts have interpreted statutory provisions prohibiting the disclosure of taxpayer information contained in reports or returns as rendering

---

[1] According to the Ordinance *"Landowner"* means the owner of real property upon which a *Hotel* is located, except that if the fee owner of the real property is a government entity, *Landowner* means the lessee of the government entity." SDMC § 62.2706.

such information privileged. In *Webb v. Standard Oil Co. of Cal.*, the California Supreme Court observed that the purpose of "statutory provisions prohibiting disclosure is to facilitate tax enforcement by encouraging a taxpayer to make full and truthful declarations in his return, without fear that his statements will be revealed or used against him for other purposes." *Webb v. Standard Oil Co. of Cal.*, 49 Cal. 2d 509, 513 (1957). The Court went on to note that, "the effect of the statutory prohibition is to render the returns privileged." *Id.* The Court in *Webb* was specifically addressing corporate income tax returns but the Court has also extended this privilege to information related to sales tax returns. *See Sav-On Drugs, Inc. v. Superior Court*, 15 Cal. 3d 1, 6 (1975). In both *Webb* and *Sav-On Drugs* the Court concluded that taxpayer information enjoyed an implied privilege against forced disclosure in civil discovery proceedings. While information that is privileged from disclosure in civil proceedings is exempted from disclosure under the PRA in a separate provision (Cal. Gov't. Code § 6254(k), the legislative intent in general appears to be designed to protect confidential taxpayer information from public scrutiny.

The City's TOT Ordinance requires Hotel operators to submit to the City on a monthly basis collected TOT with a return form approved by the City Treasurer. SDMC § 35.0114. Pursuant to the TOT ordinance, "[a]ll 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." SDMC § 35.0114(h). Because the TOT Ordinance requires taxpayers to provide information to the City Treasurer and, further, requires the City Treasurer to maintain the confidentiality of the information submitted, the information submitted is exempt from disclosure under the PRA.

However, the information sought in the request is not specifically the tax information provided by Host to the City for TOT purposes. Rather, the request seeks the number of votes allocated to Host for the CCFD election. As noted above, this allocation is determined based upon information Host is required to provide to the City Treasurer in the TOT return forms. Assuming Host's Hotels were operating at normal capacity for the 12-month period described above, if the number of votes allocated to Host were disclosed, Host's total room revenue for the 12-month period could be calculated to the dollar. In effect, the vote allocation is the aggregation of 12 months of TOT returns. In addition to the exemption for taxpayer information, the information sought is also exempt under the PRA exemption for "corporate proprietary information." Cal. Gov't Code § 6254.15.

II.   EXEMPTION FOR CORPORATE PROPRIETARY INFORMATION

The PRA states that "[n]othing in this chapter shall be construed to require the disclosure of records that are . . . corporate financial records [or] corporate proprietary information . . ." Cal. Gov't. Code § 6254.15. To the knowledge of the City Attorney's office, this provision has not been interpreted by any court of law. However, in other contexts, California statutes have imposed misdemeanor penalties on public officials who "disclose or make known in any manner information as to the amount of income or any particulars (*including the business affairs of a corporation*)." Cal. Rev. & Tax. Code § 19542 (italics added); *see also* Cal. Rev. & Tax. Code

§ 7056(a). As noted above, courts have interpreted such prohibitions from disclosure as creating a privilege from compelled production. *See Schnabel v. Superior Court*, 5 Cal. 4th 704 (1993).

The Ordinance requires the City Clerk to "protect the confidentiality of the ballots" because "the number of votes assigned to each *Hotel* may be considered to contain proprietary commercial information." SDMC § 61.2710(e). There is no penalty specified in the Ordinance for unauthorized disclosure. The information contained in the ballots as to vote allocation is, in effect, taxpayer information adjusted for the particular circumstances of a Hotel, in the event that such Hotel was operating at was "operated at less than normal capacity for any reason" during the 12-month period. SDMC § 61.2710. The City Council adjusted the vote allocations of 5 Hotel properties pursuant to this provision. This information was provided to the City by the Hotel with an expectation of privacy, as indicated in the Ordinance. Accordingly, the disclosure of the vote allocation would result in the disclosure of confidential and proprietary information, contrary to the PRA and the Municipal Code.

III.   CITY ATTORNEY DISCRETION WITH RESPECT TO DISCLOSURE

In separate discussions between the requestor and the City Attorney's office, the requestor has indicated that he believes the City Council's resolution calling for the election (Resolution No. R-307245) (Resolution) gives the City Attorney's office discretion with respect to the disclosure of the number of votes assigned to each ballot. This is a misreading of the Resolution.
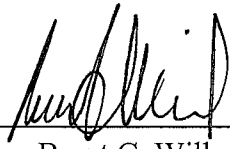
The Resolution sets forth the provisions the City Clerk is required to follow in the conduct of the election. Resolution § 6. Among the provisions is a subsection that restates the confidentiality of the ballots and refers to Municipal Code section 35.0114, the TOT Ordinance. Resolution § 6(l). The resolution goes on to state that "no persons, other than those among the staff and consultants of the City who require access for the purposes of conducting the election, may have access to the ballots at any time without the approval of the City Attorney, unless by order of a court of competent jurisdiction." *Id.*

The intent of this provision is to protect the confidentiality of the ballots and the taxpayer information. The specific language with respect to the City Attorney's office is to allow for the City Attorney to determine if the City is legally required to disclose the ballot information, within the context of the election, even absent a court order. To suggest that this allows the City Attorney the discretion to provide access to the ballots to anyone who requests access is a misreading of the Resolution and is contrary to the Municipal Code provisions discussed above, which codify the confidentiality of taxpayer information (SDMC §35.0114(h)) and proprietary commercial information (SDMC § 61.2710(e)). To the extent there is any ambiguity between the Municipal Code and a resolution, the resolution must be harmonized with the Municipal Code. *See, generally, San Francisco Int'l Yachting Ctr. Dev. Group v. City and County of San Diego*, 9 Cal. App. 4th 672 (1992). Accordingly, the City Attorney does not have the discretion to grant access to the ballots other than for purposes of conducting the election or if ordered to do so by a court of competent jurisdiction.

CONCLUSION

The information sought related to the specific vote allocation of Host, or any other Hotel owner, for the CCFD election is exempt from disclosure under the PRA. This information is derived from information Host is required to provide to the City Treasurer related to the collection of TOT and other information requested by the City regarding the operations of the Hotel properties. The City is required to keep this information confidential in both the Ordinance and the TOT ordinance and the PRA contains specific exemptions for both taxpayer information and corporate proprietary information. The City Attorney does not have discretion to provide access to the ballots other than for purposes of conducting the election or if ordered to do so by a court of competent jurisdiction.

JAN I. GOLDSMITH, City Attorney

By _____
Brant C. Will
Deputy City Attorney

BCW
ML-2012-4
Doc. No.:343988_4