

MEMORANDUM OF LAW

DATE: October 27, 1993

TO: Bruce Herring, Deputy City Manager

FROM: City Attorney

SUBJECT: Disparity Study Request for Proposals

BACKGROUND

Councilmember Stevens' office has requested that it be provided with copies of the five bid proposals submitted by firms on the short list seeking to conduct the City's proposed disparity study. The review and evaluation of the proposals is not scheduled until November 10, 1993. You have asked if the proposals may be released to Councilmember Stevens pursuant to the Public Records Act, Government Code sections 6250 et seq.

ANALYSIS

The subject of whether bid proposals are public records has been previously addressed by this office in an opinion written by Senior Chief Deputy City Attorney Stuart H. Swett. See attached Opinion 83-8. It is still valid law. As noted in Mr. Swett's opinion, the proposals are not yet subject to release under the California Public Records Act as they have not yet been the subject of public action. The court explained the essence of a public record in the case of *People v. Olson*, 232 Cal. App. 2d 480 (1965).

The mere fact that a writing is in the possession of a public officer or a public agency does not make it a public record. "A public record, strictly speaking, is one made by a public officer in pursuance of a duty, the immediate purpose of which is to disseminate information to the public, or to serve as a memorial of official transactions for public reference." . . . They have not attained the character and dignity of completed acts or documents of any kind until approved.

Id. at 486-487.

Significantly, in *People v. Garfield*, 40 Cal. 3d 192 (1985), a case involving a bid for municipal garbage collection service the court noted: "A bid is not in any sense a complete or binding contract when it is filed or even when it is opened for; sic for, generally speaking, a bid is not effectuated until it is accepted and merged in a formal contractual obligation." *Id.* at 197. A bid may be withdrawn at any time before acceptance.

Using the court's language as a guide, the information contained in the bid proposal requested by Councilmember Stevens will not become a public record until it is opened, then reviewed and evaluated by the City Manager's selection panel, and the selection approved by the City Council. Only at that juncture do the documents become records used in the regular course of the City's business and thereby subject to disclosure.

However, the fact that the bid proposals are not yet public records does not really answer your question concerning whether Councilmember Stevens may take receipt of the documents. Release to officials in the City, within certain parameters, may not constitute a waiver of any protections the proposals have at this time. Release to Councilmember Stevens may, therefore, not be strictly prohibited.

There is precedent in the City for allowing Councilmembers an opportunity to review proposals prior to making a decision on the award of a contract. The most recent example occurred during the selection process for the paramedic contract. We would suggest, however, that if the decision is made to provide copies of the proposals to Councilmember Stevens, copies be provided to each of the Councilmembers so that no questions of fairness or equity arise. It is essential that all Councilmembers making decisions have equal access to information.

Case law also indicates that disclosure to a Councilmember will not automatically render a previously nondisclosable document disclosable. In *Parrott v. Rogers*, 103 Cal. App. 3d 377 (1980), a case involving a request by Berkeley's "Citizen Assistant" for personnel documents otherwise exempt from disclosure, the court stated that "disclosure by one official or department to another is not a 'public disclosure.'" *Id.* at 383. The Parrott case should, however, be viewed with caution. The "Citizen Assistant" in Parrott was specifically empowered through the Berkeley city charter to ". . . inquire into any aspect of government, and any department, agency, officer or employee, by the production of public records or otherwise." *Id.* at 382. Councilmembers are not vested with such authority. In fact, the powers of Councilmembers are specifically circumscribed by the provisions of San Diego City Charter ("Charter") section 22.

Charter section 22 allows release of information to Councilmembers for purposes of inquiry, much like the charter provisions for the "Citizen's Assistant" in the Parrott case. Like the Parrott case, which indicated the charter gave "No grant of authority whatever to the citizen's assistant to engage in, or interfere with, any function of management or control reposed in the city manager by the charter." *Id.* at 382, the Charter section precludes use of the information by Councilmembers for any purpose other than information. Specifically, Charter section 22 provides in pertinent part:

(a) No member of the Council shall directly or indirectly by suggestion or otherwise attempt to influence or coerce the City Manager or other officer appointed or confirmed by the Council in the making of any appointment to, or removal from, any city office or employment, or the purchase of any supplies, or discuss directly or indirectly with any candidate for City Manager the matter of appointments to City Offices or employment, or attempt to exact any promises from such candidate relative to any such appointments.

(b) Except for the purpose of inquiry, the Council and its members shall deal with that part of the administrative service for which the City Manager is responsible solely through the City Manager or his designated representative and not through his subordinates.

Although inquiry is not further defined anywhere in the Charter, it appears that under Charter section 22, Councilmembers may receive information from departments for the purpose of educating themselves on issues which will ultimately appear before them for approval or disapproval and to refer issues of concern to the City Manager for resolution. Use of the information for other purposes may result in removal from office.

Finally, it should be noted that disclosure to a Councilmember may not render a document a public record, but disclosure to any other individual will make such a document subject to full public disclosure. As the court noted in *Coldwell v. Board of Public Works*, 187 Cal. 510 (1921),

communications that may be privileged become public through a waiver of the privilege when voluntarily placed in the hands of a third party. Id. at 522.

CONCLUSION

The five bid proposals are not public records. They are, however, disclosable to Councilmember Stevens who is not a member of the public but an official of the City. Under this Charter section, a Councilmember may use the information only to assist in making an informed and educated decision at the time Council approval of the City Manager's selection becomes necessary. The information may not be used to influence the selection process. Use of the information for purposes other than education may result in the information becoming a public record before an evaluation and decision is made, thereby diluting the efficacy of the sealed bid process.

If you have any further questions, please give me a call.

JOHN W. WITT, City Attorney

By

Sharon A. Marshall

Deputy City Attorney

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Attachment

ML-93-96